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Recent Cases of Interest to Fiduciaries

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In re Jill Petrie St. Clair Trust Reformation, 311 Kan. 541, 464 P.3d 326, 2020 Kan. LEXIS 41, 2020 WL 3023373

The Supreme Court of Kansas reformed the terms of an irrevocable trust to conform to the settlor's intent when intent proved by clear and convincing evidence.

Facts:
In 2003, Jill Petrie St. Clair executed a trust agreement establishing her husband, William Paxson St. Claire, as a life beneficiary of the trust income. Upon William's death, the trust income would then be distributed to Jill's and William's children and grandchildren, and the principal eventually would be distributed to the grandchildren. In 2002, before Jill created her trust, William established his own trust with an identical distribution scheme but naming Jill as a lifetime beneficiary of the trust's income. Both Jill and William funded their trusts in identical amounts when Jill executed her trust agreement.

One of the purposes of William's trust was to make sure the assets in his trust were not included in his or Jill's taxable estates. M. Wayne Davidson, the attorney who prepared the trusts for Jill and William, proposed to Jill that she create her own trust to obtain gift tax benefits and to similarly assure that the assets in her trust were not included in William's taxable estate. Jill's trust agreement provided that "no part of this Trust shall be included in the Grantor's gross estate for death tax purposes." At the time Jill executed the trust agreement, she believed it contained the necessary provisions for the trust assets to be excluded from her and William's taxable estates, and for the transfers to the trust to be considered completed gifts.

Because of a drafting error, Davidson failed to include two provisions in Jill's trust to avoid the two trusts being considered reciprocal, resulting in the assets of Jill's trusts being included in William's estate and vice versa. Davidson omitted William's ability to withdraw $5,000 or 5 percent of the trust assets. In addition, Davidson failed to give William a lifetime special power of appointment.

Because of the common distribution scheme, the trusts could be considered reciprocal. This was contrary to Jill's intent.

Jill and the trustee petitioned the district court for an order reforming Jill's trust, citing concerns that the trust as originally drafted would trigger the

reciprocal trust doctrine and cause the assets in Jill's trust to be included in William's taxable estate upon his death. Jill and the trustee requested that the trust include the two provisions noted above.

The district court ordered that the trust be reformed to add the two new provisions to conform the trust with the grantor's intent. To satisfy certain requirements under federal and Kansas law, Jill and the trustee appealed, and the Supreme Court of Kansas granted their motion to transfer the appeal from the Court of Appeals to the Supreme Court of Kansas.

Law:
"The 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." K.S.A. 58a-415.

In *In re Harris Testamentary Trust*, 275 Kan. at 957, the court approved the reformation of a testamentary trust under K.S.A. 58a-415 to shield the trust corpus from being included in the taxable estate of the settlor's son, the trustee, when the facts showed (1) the settlor intended to exclude the trust assets from his own and his heirs' estates, (2) the trust terms as drafted contained a mistake, and (3) the party seeking the reformation demonstrated a need under existing tax law for the proposed reforms.

Holding:
The Supreme Court of Kansas stated that Jill and the trustee demonstrated by clear and convincing evidence that Jill's intent in executing and funding the trust, and the terms of the trust itself, were both affected by a mistake of fact or law, making it necessary to reform the trust in order to conform to her true intent. The Supreme Court of Kansas added that absent reformation, the reciprocal trust doctrine would likely apply, which would destroy the economic symmetry of the two trusts.

The Supreme Court of Kansas held that reformation was necessary for the trust to be consistent with Jill's original intent and to correct the scrivener's error in excluding the two trust provisions. Accordingly, the district court did not err in reforming Jill's trust.

De Prins v. Michaeles, 154 N.E.3d 921, 486 Mass. 41, 2020 Mass. LEXIS 650, 2020 WL 6141080

The Massachusetts Supreme Judicial Court held that the assets of a self-settled spendthrift trust that allows distributions to the settlor during his lifetime, can be reached by the settlor's creditors after the settlor's death.

Facts:
In 2000, Donald Belanger and his wife moved from Massachusetts to Arizona. In 2005, a dispute arose with their neighbors, Armand and Simonne De Prins, over shared water rights, which gave rise to litigation. In 2008, Belanger created an irrevocable trust that named himself as the sole beneficiary during his lifetime, Michael Michaeles as the sole trustee, and Belanger's daughter as the beneficiary after Belanger's death. In addition, the trust contained a spendthrift clause and provided that Belanger could not alter, amend, revoke or terminate the trust. Belanger conveyed substantially all of his assets to Michaeles as trustee of the trust.

Shortly thereafter, Belanger shot and killed the De Prinses. Belanger then shot and killed himself. Michaeles became personal representative of Belanger's estate, which was probated in Arizona.

In 2010, the De Prinses' son, Harry, brought a wrongful-death action against the personal representative of Belanger's estate. That action was removed from Arizona state court to the U.S. District Court for the District of Arizona.

After learning about the trust, Harry brought a separate action in the U.S. District Court for the District of Arizona to reach and apply assets of the trust toward any judgment he may receive in the wrongful-death action. In 2015, Harry settled the wrongful-death action for $750,000. As part of the settlement, the parties stipulated that the wrongful-death judgment would be against the trust exclusively, through the reach-and-apply action, and the reach-and-apply action would be transferred to the U.S. District Court for the District of Massachusetts.

The District Court judge concluded that Harry satisfied the three elements required for a reach-and-apply action under Massachusetts common law. Moreover, the District Court concluded that a settlor may not use a self-settled spendthrift trust to protect his assets from creditors. The trustee appealed.

On appeal, because Massachusetts law did not clearly answer the question at hand, the First Circuit certified to the Supreme Judicial Court of Massachusetts the following question: “On the undisputed facts of this record, does a self-settled spendthrift irrevocable trust that is governed by Massachusetts law and allowed unlimited distributions to the settlor during his lifetime protect assets in the irrevocable trust from a reach and apply action by the settlor’s creditors after the settlor’s death?”

Law:
“The established policy of this Commonwealth long has been that a settlor cannot place property in trust for his own benefit and keep it beyond the reach of creditors.” *Ware v. Gulda*, 331 Mass. 68, 70, 117 N.E.2d 137 (1954), quoting *Merchants Nat’l Bank of New Bedford v. Morrissey*, 329 Mass. 601, 605, 109 N.E.2d 821 (1953). The prohibition against using a self-settled trust to protect one’s assets against creditors applies both to current and future creditors. *Forbes v. Snow*, 245 Mass. 85, 89, 140 N.E. 418 (1923).

Holding:
The Massachusetts Supreme Judicial Court answered the certified question in favor of Harry by stating, “The well-established legal maxim that one must be just before being generous compels us to conclude that it does not.” See *Foster v. Hurley*, 444 Mass. 157, 172, 826 N.E.2d 719 (2005) (Greaney, J., dissenting in part); *Hill v. Treasurer & Receiver Gen., 229 Mass*. 474, 477, 118 N.E. 891 (1918); *Chase v. Redding*, 79 Mass. 418, 13 Gray 418, 420 (1859).

The Massachusetts Supreme Judicial Court recognized that the answer to the certified question hinged on whether the common law or the Massachusetts Uniform Trust Code applied. After reviewing the MUTC, the Massachusetts Supreme Judicial Court determined that the MUTC is supplemented by the common law of trusts and principles of equity. Furthermore, the Massachusetts Supreme Judicial Court determined that because the MUTC did not directly address the present case, the common law applied.

The Massachusetts Supreme Judicial Court concluded that the facts here lean toward the creditor because the judgment at issue accrued before Belanger’s death, and it is well-established in Massachusetts that a settlor may not use a self-settled trust to protect his assets from creditors.

In addition, the Massachusetts Supreme Judicial Court explained that it would be unequal for a self-settled trust not to protect a settlor’s assets from

creditors while the settlor is alive but to have it protect the settlor's beneficiaries from the settlor's creditors after the settlor's death. Accordingly, the Massachusetts Supreme Judicial Court held that a self-settled trust does not become protected from the settlor's creditors upon the settlor's death.

The trustee argued that because Belanger did not receive assets during his lifetime, he was not able to "have his cake and eat it too." However, the Massachusetts Supreme Judicial Court responded by explaining that the important point is what is within the trustee's power, not what the trustee actually does. *Tilcon Capaldi*, Inc., 249 F.3d at 60.

Finally, the Massachusetts Supreme Judicial Court concluded that the equities simply do not allow Belanger to murder Harry's parents and then leave Harry with no recovery in a subsequent wrongful-death action, despite Belanger possessing substantial assets.

The Supreme Court of Massachusetts answered the certified question by holding that a self-settled spendthrift irrevocable trust that is governed by Massachusetts law and that allowed unlimited distributions to the settlor during his lifetime does not protect assets in the irrevocable trust from a reach-and-apply action by the settlor's creditors after the settlor's death.

Wilburn v. Mangano, 851 S. E.2d 474 (Va. 2020)

The Virginia Supreme Court found that the term "fair market value" on a specific date in a codicil, without more, failed to provide sufficient certainty as to the purchase price to warrant specific performance of an option contract for sale.

Facts:
On March 19, 2002, Jeanne Mangano executed a will wherein she left her residence to her three daughters, Ann, Mary and Carol, and granted her son, Anthony, an option to purchase the property from his sisters. Under the terms of the will, Anthony could exercise the option within one year from the probate of Jeanne's will at a price equal to the property's real estate tax assessment in the year of her death. On Oct. 12, 2005, Jeanne executed a codicil that revised the purchase price "to an amount equal to the fair market value at the time of Jeanne's death." Jeanne died Nov. 16, 2005.

Shortly thereafter, Anthony sent a letter to his sisters "to serve as legal notice of his intent to exercise the option to purchase" under the terms of the will or the codicil, whichever was found to be valid. Anthony also filed suit to set aside the codicil, which a jury determined to be valid.

The sisters then filed suit to compel Anthony to purchase the property in accordance with his exercise of the option. The sisters alleged they had obtained two appraisals of the fair market value of the property as of Jeanne's death — one valuing the property at $311,000, and the other at $270,000. They requested that Anthony be compelled to specifically perform.

Anthony filed a demurrer. He contended that there was no enforceable contract because "an amount equal to the fair market value at the time of Jeanne's death" is not a sufficiently specific term to establish mutual assent as to the purchase price of the property. The trial court sustained Anthony's demurrer, and entered an order dismissing the case with prejudice. The trial court held that there was no enforceable contract because "the will, codicil, and notice of acceptance did not determine the purchase price and did not provide a method of determining the purchase price."

The sisters appealed.

Law:
Price is a material term of a contract and it must be specified in the agreement itself, or the agreement must provide a mode for ascertaining it

with certainty before a court will compel specific performance. *Moorman v. Blackstock, Inc.*, 276 Va. 64, 75 (2008).

The term “fair market value” generally means the price a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction.

Holding:
The Virginia Supreme Court held “fair market value” on a specific date, without more specificity, is not a sufficiently certain price term to allow a court to compel specific performance of a contract regarding the purchase of real estate and upheld the trial court’s decision.

In considering specifically whether “fair market value” in these circumstances is sufficiently specific to set the purchase price, the court relied on the fact that “[t]here is no single fixed approach to determine fair market value, as applied by appraisers or Virginia courts.” Rather, Virginia courts recognize a variety of approaches, including without limitation, the cost approach, the income approach, the sales approach and the comparable sales approach. Given the multitude of valuation approaches, the court found that without additional specification, the term “fair market value” on a specific date failed to provide a mode for ascertaining the price with sufficient certainty to allow the court to compel specific performance on the option.

Neal v. Neal, 2020 Tex. App. LEXIS 4514, 2020 WL 3263433

A Texas appeals court upheld a final judgment construing a trust when the trust was later challenged.

Facts:
Brucilla Neal created a revocable trust in 1991. Under the terms of the trust, upon Brucilla's death, the trust assets would go in certain percentages to her daughter, Karen, to her son, George, and to her nephew, Homer. The trust also provided that under no circumstances would George receive any assets from the trust if he had a relationship with Pamela Faulkner.

In 2007, Brucilla amended her trust to provide that instead of Karen and George receiving the trust assets outright, the assets would be placed in separate trusts for their benefit. In addition, the amendment provided that Karen and George, at each of their deaths, could each devise by will how to distribute any remaining trust assets to their descendants; otherwise, the assets would go to their respective descendants.

In 2008, Brucilla amended her trust again to provide that if George predeceased her or had a relationship with Pamela Faulkner, his share of the trust assets would go to Karen during her lifetime and then to Karen's descendants. In addition, the 2008 amendment provided that at George's death, the remaining assets of George's trust would go to Karen or Karen's descendants. Thus, pursuant to the 2008 amendment, George no longer had the ability to devise by will his share of the trust assets to his descendants and his descendants no longer held remainder interests in the trust.

Brucilla died in January 2009; Karen died later that year. Homer served as trustee of George's trust. A dispute arose between George and Homer regarding distributions. Homer filed a declaratory judgment action to determine his obligations as trustee. George counterclaimed seeking to invalidate the 2008 amendment. The trial court joined Karen's children, George Whisler and Melanie Pugh.

The parties mediated the conflict and later entered into a settlement agreement, and the trial court entered a final judgment in 2012. The trial court judgment, consistent with the settlement agreement, modified Brucilla's trust to remove all provisions regarding Pamela Faulkner. However, the judgment retained the language stating that upon George's death, the assets are

distributed to Karen or to her living descendants. The final judgment also stated that, given Karen's death, "George Whisler and Melanie Pugh are the only children of Karen S. Pugh, and are the only remainder beneficiaries of the George's Trust."

George died in 2017. His widow and estate administrator sought to obtain funds from his trust. The trustee informed the estate administrator that he intended to distribute the assets to Karen's descendants. Afterward, the estate administrator filed a declaratory judgment. The trial court entered a judgment confirming George Whisler and Melanie Pugh as the only remainder beneficiaries of the trust. The estate administrator appealed.

Law:
The court interprets an agreed judgment like a contract between the parties, seeking to harmonize and give effect to all its provisions so none are rendered meaningless. See Mann v. Propst, No. 05-19-00432-CV, 2020 Tex. App. LEXIS 2581, 2020 WL 1472212, at *6 (Tex. App.—Dallas Mar. 26, 2020, no pet.) (mem. op.).

Holding:
On appeal, George's estate argued that the agreed judgment made George Whisler's and Melanie Pugh's remainder interests contingent on George either predeceasing Brucilla or having a relationship with Pamela Faulkner, and because neither occurred, George Whisler's and Melanie Pugh's interests were divested. The Court of Appeals disagreed with George's estate. The Court of Appeals found that George's estate ignored the 2012 settlement agreement, which clearly stated that George Whisler and Melanie Pugh are the only remainder beneficiaries of George's trust. Accordingly, the Court of Appeals confirmed the judgment of the trial court.

Ron v. Ron, 2020 WL 6494223 (5th Cir. 2020)

The 5th U.S. Circuit Court of Appeals affirmed the U.S. District Court, Southern District of Texas, decision that a trust protector has no fiduciary duty to the settlor.

Facts:
A wife created a trust with her children as beneficiaries and naming her husband as trustee and a friend as the trust protector. The trust agreement provided that the trust protector's purpose is "to direct the trustee in certain matters concerning the trust, and to assist, if needed, in achieving [the wife's] objectives expressed by other provisions of [the wife's] estate plan hereunder." The trust agreement also permitted the trust protector to add, among others, the husband, as a beneficiary of the trust. The trust agreement stated that the trust protector's authority was conferred "in a fiduciary capacity."

Husband and wife later separated. The wife filed suit against the trustee and the trust protector alleging that: (1) the husband made inappropriate transfers of community property to the trust both before and after the couple's divorce, and (2) the trust protector wrongfully added the husband as a trust beneficiary. The trustee and the trust protector filed motions to dismiss, which were granted by the U.S. District Court, Southern District of Texas.

The wife appealed.

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

Holding:
The 5th U.S. Circuit Court of Appeals agreed that the trust protector owed no duty to the wife, as the settlor.

First, no formal fiduciary relationship existed between the wife and the trust protector. Under the Texas statute governing trust protectors, the trust protector's fiduciary duties were owed to the trustee, and not the settlor.

Furthermore, the trust agreement stated that the wife had no interest or incidence of ownership in the trust. Accordingly, the wife could not compel the trust protector to take an action and the trust protector owed the wife no duties under the trust agreement.

Second, no informal relationship existed between the wife and the trust protector where the only evidence of a "special relationship" between the two was the wife's appointment of him as trust protector.

For a more in depth analysis please see "Recent Cases of Interest to Fiduciaries: September 2020."

Platt v. Griffith, 853 S.E.2d 63 (Va. 2021)

The Virginia Supreme Court held that the personal representative of an estate is the only party entitled to bring suit on behalf of the estate for personal claims that would belong to the decedent during the decedent's lifetime.

Facts:
In 2008, Dr. Lloyd Griffith executed a will leaving his residuary estate, including 704-acre Albany Farm, in a lifetime trust for the benefit of his second wife, Mary Cate. If Mary Cate predeceased Dr. Griffith, Albany Farm would pass to Dr. Griffith's son, Charles, apart from two 10-acre parcels, one for each of Dr. Griffith's two daughters, Mary and Lindsay.

In 2010, Dr. Griffith executed a new will, revoking and replacing all prior wills. The 2010 will left a 20-acre parcel of Albany Farm to each of Mary and Lindsay. Dr. Griffith left the remainder of his property, including the remaining 664 acres of Albany Farm, to Charles and Mary Cate.

In 2016, Dr. Griffith executed a deed of gift giving the entire 704-acres of Albany Farm to Charles and Mary Cate. Mary Cate received a life estate and the remainder went to Charles. The 2016 deed was silent as to the two 20-acre parcels Dr. Griffith's 2010 will left to Mary and Lindsay.

Dr. Griffith died six months following the 2016 deed of gift. He was survived by Mary Cate, Charles, Mary and Lindsay. Initially, Dr. Griffith's 2008 will was probated. However, Charles, in his capacity as personal representative of the estate, later filed a suit requesting to probate the 2010 will. Mary and Lindsay unsuccessfully challenged the validity of the 2010 will, and they did not appeal the trial court decision.

In 2018, the daughters sued Mary Cate and Charles individually, alleging that they conspired to convert $13 million of Dr. Griffith's assets and used their confidential relationship with Dr. Griffith to unduly influence him into signing the 2014 chattel deed and the 2016 deed of gift. Accordingly, the daughters sought a declaration that both were void.

Mary Cate and Charles individually moved to dismiss the daughters' complaint for lack of standing.

The circuit court dismissed the complaint with prejudice, noting that the transfers at issue occurred during Dr. Griffith's lifetime. Accordingly, the circuit court concluded that only Dr. Griffith's personal representative could bring the

claims. The court specifically held that the daughters did not have "any right, title or interest" to the property at issue, as the 2016 deed of gift extinguished the prior testamentary gifts of the two 20-acre parcels on Albany Farm.

Mary and Lindsay appealed, arguing that they are “vested beneficiaries” of two 20-acre parcels of Albany Farms, and thus have standing to pursue the rescission of the 2016 *inter vivos* deed of gift.

Law:
To establish standing, a litigant must "show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest." *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n., Inc.*, 273 Va. 107, 120, 639 S.E.2d 257 (Va. 2007). Under Virginia law, the proper party to litigate on behalf of the estate is the personal representative, not a beneficiary of the estate, even when the personal representative is also a possible beneficiary. *Reineck v. Lemen*, 292 Va. 710, 722, 792 S.E.2d 269 (Va. 2016); *see also* Va. Code § 1-234.

A specific bequest is revoked if the testator disposes of the property prior to death. See *May v. Sherrard,* 115 Va. 617, 623, 79 S.E. 1026 (1913); *King v. Sheffey*, 35 Va. (8 Leigh) 614, 619 (1837). This is called “ademption by extinction.”

Holding:
The Virginia Supreme Court held that the daughters lacked standing to seek the rescission of the *inter vivos* 2016 deed of gift. As potential beneficiaries under the 2010 will, the daughters’ claims only indirectly benefit them. Rather, the entity that “directly benefits” is Dr. Griffith’s estate. Moreover, the rescission claim would have belonged to Dr. Griffith during his lifetime, and consequently, such claim is inherently on behalf of the estate. Accordingly, the proper party to litigate claims related to the 2016 gift is the personal representative of Dr. Griffith’s estate, not the daughters.

The daughters argued that it was unreasonable to expect Charles, as personal representative, to pursue these claims on behalf of the estate. The misconduct directly benefits Charles and he is the perpetrator. The Virginia Supreme Court dismissed such concerns where the daughters had failed to file a petition to remove and replace Charles as personal representative of the estate.

The Virginia Supreme Court affirmed the circuit court's decision and held that Charles, as personal representative, was the only one who had standing to seek rescission of the 2016 deed of gift.

In a footnote, the court also noted that the daughters were not "vested beneficiaries" of the two 20-acre parcels of Albany Farms under the 2010 will. The two parcels were conveyed by the 2016 deed of gift. As a result they were not part of Dr. Griffith's estate, and the daughters' interests never vested.

In re Matter of the Ruff Management Trust, 2020 WL 7065829 (Tex. Ct. App. Dec. 3, 2020)

A Texas Court of Appeals held that a trial court's order modifying the trustee removal provisions of a trust agreement was not subject to review on appeal because the modification was consistent with the material purposes of the trust and caused no harm to the interested parties.

Facts:
Suzann Ruff and her son Mike created the Ruff management trust in 2007, with Suzann as the primary beneficiary and her five children as remainder beneficiaries. Following the resignation of Mike and then Frost Bank as trustees, Suzann's three children Tracy, Mark and Kelly (the "three children") became co-trustees, in accordance with the terms of the trust. In 2019, Suzann filed a motion to modify the trust, which the trial court denied, and subsequently filed another motion to modify or terminate the trust, or alternatively, to appoint a new trustee. Specifically, the motion requested modification to eliminate the requirement that Suzann act jointly with Mike to appoint a successor trustee and instead allow her to appoint a trustee on her own. The three children opposed the second motion. After hearing evidence and the parties' positions, the judge signed an order modifying the trust. The three children appealed, arguing that the trial court's trust modification was an abuse of discretion and reversible error because: (i) the evidence was legally insufficient to support the modification and the modification was contrary to the trust's purpose, and (ii) the order was signed without affording them a jury trial.

Law:
On petition of a trustee or beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part if: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; (3) modification of administrative, non-dispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration; (4) the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or (5)(a) continuance of the trust is not necessary to

achieve any material purpose of the trust, or (b) the order is not consistent with a material purpose of the trust.

Holding:
On appeal, the Court of Appeals held that the modification caused no harm to the appellants, and therefore, a determination of the sufficiency of the evidence was irrelevant. A trust modification is within the trial court's discretion. More specifically, because of conflict between Suzann and Mike, including arbitration wherein Mike was found to have committed fraud with respect to the trust, the trial court's order recognized Suzann's right to seek court approval to replace or remove a trustee. The order did not remove the three children as trustees, and therefore the three children did not suffer any actual harm as a result of the modification.

The Court of Appeals further held that the modification was not inconsistent with the trust's purpose. The trust agreement directs the trustees to make distributions of income and principal to the settlor (Suzann) for health, support, maintenance, education and best interests. The modification does not appoint Suzann as trustee, or affect how the trustees make distributions. It simply changed the third party involved in the decision to remove and replace a trustee.

Lastly, the Court of Appeals held that the three children were not deprived of their right to a jury trial because they failed to timely object to proceeding before the trial court. Although the three children filed two jury demands before the hearing, the three children failed to object on the record when the trial court proceeded without a jury or otherwise affirmatively indicate that they intended to stand on their perfected jury trial right, and continued to participate in the modification hearing. Thus, the issue was not preserved for review by the Court of Appeals.

Hodges v. Johnson, 2020 WL 5648573 (May 13, 2020)

The Supreme Court of New Hampshire held that trustees were not entitled to reimbursement or indemnification for fees incurred in defending improper decantings where the trustees were found to have been in serious breach of fiduciary duties.

Facts:
David Hodges created two irrevocable trusts to hold stock in a family business, with William Saturley and Alan Johnson (the "former co-trustees") as trustees. The trusts ultimately created separate trusts for the benefit of the Hodges children and stepchildren. Hodges hired attorney McDonald in 2009 to assist with estate planning, and stated he wanted to revoke the provisions benefiting his stepchildren. McDonald advised that the trusts could be decanted to new trusts, of which the stepchildren would not be beneficiaries. Over a few years, McDonald decanted the trusts three times.

First, in 2010, Johnson resigned as trustee in favor of McDonald. McDonald decanted both trusts, removing the stepchildren as beneficiaries. Johnson was reappointed as trustee and McDonald resigned. Second, in 2012, McDonald was appointed as trustee and decanted the trusts to exclude Hodges' biological son, David Jr. Again, to accomplish this, Johnson resigned as trustee in favor of McDonald. McDonald decanted both trusts, Johnson was reappointed as trustee, and McDonald resigned. Lastly, in 2013, McDonald was appointed as trustee and decanted the trusts to exclude Hodges' wife, Joanne. After decanting, McDonald resigned as trustee and Johnson was reappointed as trustee.

In 2014, David Jr. and the stepchildren filed a petition to invalidate the decantings and to remove Johnson and Saturley as trustees. The Circuit Court ruled in favor of the beneficiaries. Johnson, Saturley and McDonald appealed. On appeal, the Supreme Court of New Hampshire affirmed the trial court's order declaring the decantings void *ab initio* and removing Saturley and Johnson as trustees. After the case was returned to the trial court, the trial court appointed Judith Bomster and J. Daniel Marr as successor co-trustees of the trusts.

The former co-trustees filed a motion for fees and costs they personally incurred while defending the decantings. The successor co-trustees objected and filed a motion asking the court to order the former co-trustees to repay the trusts for fees and costs incurred on behalf of the former co-trustees to

defend the decantings. The trial court denied the former co-trustees' motion, granted the successor co-trustees' motion and ordered the former co-trustees to reimburse the trusts. The former co-trustees appealed.

Law:
A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses that were properly incurred in the administration of the trust. R.S.A. § 564-B:7-709(a)(1). The official comments to the Uniform Trust Code provide that "reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust."

In administering, investing and managing the trust and distributing the trust property, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee. R.S.A. § 564-B:8-805.

Holding:
The Supreme Court of New Hampshire affirmed the trial court's order, holding that (1) fees and costs incurred by the former co-trustees to defend improper decantings were not "properly incurred" in connection with their duties to administer the trusts; (2) the former co-trustees were not entitled to statutory indemnification for "reasonable" costs incurred in defending the decantings; and (3) the court could require the former co-trustees to personally reimburse the trusts for attorney's fees and costs incurred in defending the former co-trustees' improper decantings.

The trial court ruled that the former co-trustees were not entitled to reimbursement because the fees and costs incurred to defend the decantings were not "properly incurred" as part of their duties to administer the trusts. The former co-trustees were found to have committed a serious breach of trust. In affirming the trial court's findings, the Supreme Court noted that the former co-trustees had no fiduciary duty to defend their misconduct. The conflict between the interests of the beneficiaries was created by the decanting; thus, the former co-trustees were not entitled to reimbursement for expenses related thereto. The former co-trustees failed to obtain independent legal advice or petition a court for instruction as to the proposed decantings, and instead proceeded based solely on the advice of the settlor's counsel.

The Supreme Court agreed with the trial court that the circumstances of the decantings should have caused the former co-trustees to have reasonable doubt as to whether the decantings were proper, and that the trial court did not err in suggesting that the former co-trustees could have filed a petition for instruction or obtained an independent legal opinion, instead of relying on McDonald's advice. Accordingly, the trial court did not err in ruling that the former co-trustees were not entitled to reimbursement for the fees and costs personally incurred to defend the decantings.

The Supreme Court further agreed with the trial court with respect to the former co-trustees' request for indemnification for reasonable costs. The trial court ruled that the former co-trustees were not entitled to indemnification because of their "serious and egregious breaches," and the Supreme Court found such ruling to be supported by the evidence and not contrary to law. The trial court ruled that the former co-trustees breached their duty of impartiality, and as such breach could reasonably be deemed "serious," the Supreme Court found no error in the trial court's determination on indemnification.

Lastly, the Supreme Court affirmed the trial court's award of attorney's fees to the successor co-trustees, noting that the trial court determined that, because of the former co-trustees' serious breach, improper reliance on the settlor's counsel (McDonald), failure to seek independent legal advice or court guidance concerning their duties, and pursuit of the decantings that increased the likelihood of litigation, it would be unfair and unjust to charge the trusts with the costs of litigation in defense of a breach of fiduciary duty.

Turk v. Morris, Manning & Martin, LLP, Case 1:20-mi-99999-UNA (N.D. Ga. 2020)

Class action plaintiffs alleged that law firm and other defendants promoted and advised on prepackaged conservation easements that did not qualify for the charitable deduction from federal income tax.

Facts:
William Turk and other plaintiffs sued law firm Morris, Manning & Martin, LLP, and other defendants in the Northern District of Georgia alleging that the defendants induced Turk and the other plaintiffs to participate in a conservation easement deduction strategy called the Syndicated Conservation Easement Strategy (SCE strategy).

Turk alleged that the SCE strategy used a complex web of partnerships to convey real estate interests to a charity after fraudulently inflating the value of the donated interests. Turk further alleged that the defendants sold the scheme to him and other clients to obtain the corresponding tax deduction.

In particular, Turk alleged that the defendants sold "prepackaged" appraisals that vastly overstated the fair market value of the interest being donated to charity, which in turn overstated the charitable deduction the donor (such as himself) could receive. Turk alleged that the defendants knew or should have known that the transactions did not meet the requirements to qualify for a conservation easement deduction. Turk also alleged that promotional materials sent to prospective clients indicated a donor could receive $2 in tax savings for every $1 invested.

Turk also alleged that, without informing him or the other plaintiffs, the defendants entered into improper agreements with each other that eliminated their independence and furthered the defendants' best interests over the interests of the plaintiffs, who were their clients.

Turk alleged breaches of fiduciary duty, racketeering, fraud, negligent misrepresentation and other claims, and requested ordinary and punitive damages as well as disgorgement of fees.

Law:
Taxpayers can claim a charitable deduction for granting conservation easements on real estate. However, the easement must meet several strict requirements under the Internal Revenue Code and Treasury Regulations. The IRS has listed syndicated conservation easement transactions as

potentially abusive in that they may exploit the deduction by obtaining appraisals that inflate the value of the property and accordingly the tax deduction to the donor.

Holding:
The District Court has not yet ruled on the defendants' motion to dismiss.

Burgess v. Johnson, 835 Fed. Appx. 330, 2020 WL 6479178 (Nov. 4, 2020)

The 10th U.S. Circuit Court of Appeals held that a trustee's power under the trust agreement to submit a claim against the trust or the trustee to arbitration did not allow the trustee to compel arbitration of a beneficiary's claim for breach of trust.

Facts:
Howard Johnson served as sole trustee of a trust created under Oklahoma law. In May 2019, the beneficiaries of the trust sued Johnson in federal court alleging he breached his fiduciary duties by wrongfully taking trust assets.

Johnson moved to compel arbitration of the beneficiaries' claim. He cited a provision of the trust agreement that authorized him "[t]o compromise, contest, submit to arbitration or settle all claims by or against, and all obligations of, the Trust estate or the Trustees" (the arbitration provision). Johnson further pointed out that the trust agreement allowed him to exercise this authority "in [his] sole discretion."

The District Court for the Northern District of Oklahoma denied Johnson's motion to compel arbitration. Johnson appealed to the 10th U.S. Circuit Court of Appeals.

Rule:
A court will apply contract law principles to analyze an agreement to arbitrate claims. In construing the terms of a contract, the document's plain language governs its interpretation.

Holding:
The 10th Circuit affirmed the District Court's denial of Johnson's motion to compel arbitration. The court found that the arbitration provision simply granted the trustee a range of options to resolve disputes, which also included the power to compromise and settle claims. The trust agreement did not empower Johnson to *compel others* to arbitrate claims.

In reviewing the arbitration provision, the court noted that the provision applied to beneficiaries' claims as well as claims involving third parties who had no interest in the trust. The arbitration provision clearly did not (and could not) allow the trustee to compel a third party to submit to arbitration. Therefore, the court found it unlikely the grantor had intended the arbitration provision to require the beneficiaries to arbitrate claims against the trustee.

Bergal v. Bergal, 153 N.E.3d 243 (Ind. Ct. App. Sept. 17 2020)

The dead man's statute may apply to prevent a party whose interest is adverse to the estate from testifying about matters against the estate in certain trust cases where the trust at issue is so central to the overall estate plan that it is akin to the estate itself.

Facts:
The decedent, Dr. Milton Bergal, created an estate plan consisting of a will and trust. His son and wife were the two primary beneficiaries of the trust. The will that was created at the same time as the trust was a "pour over will which said that if [the decedent] owned anything in his name it would pour over into the trust so that everything would be in the trust at the time of his death."

The decedent became ill with dementia and Alzheimer's disease and later died. While he was ill, his wife moved assets out of the trust and named herself the primary beneficiary of those assets. This change effectively resulted in disinheriting the son. After the decedent's death, his son filed a complaint seeking return of the moved assets to the trust.

A trial jury unanimously found in favor of the son. Each of the assets was ordered to be restored to the trust. Before the trial began, the son had filed a motion in limine seeking to prohibit the wife from testifying about statements made by the decedent pursuant to the dead man's statute. Ind. Code ch. 34-45-2. The trial court granted the motion, holding that the wife "may not testify about what Dr. Bergal said or testify about actions that constitute an assertion by Dr. Bergal." (p. 249).

On appeal, the wife argued that this order was erroneous primarily because the dead man's statute does not apply to cases involving trusts because trusts are distinct from estates. Secondarily, the wife argued that the dead man's statute does not apply because there was no executor or administrator who was a party to the litigation.

Law:
The dead man's statute, Indiana Code § 34-45-2-4, may apply in certain trust cases where "the trust at issue is so central to the overall estate plan that it is akin to the estate itself." (p. 256).

The general purpose of the dead man's statute is to protect a decedent's estate from spurious claims. It is a rule of fairness and mutuality requiring that, when the lips of one party to a transaction are closed by death, the lips of the surviving party are closed by law. Rather than excluding evidence, the statute prevents a particular class of witnesses from testifying about claims against the estate. The statute does not render the surviving party incompetent for all purposes; instead, its application is limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party. (p. 254).

“Even if an administrator or executor is not a party to the action, the Dead Man’s Statute applies where one of the parties is acting in the capacity of an administrator or executor.” (p. 254, FN 10).

Holding:
In a trust dispute, the trial court correctly found that the dead man’s statute (Indiana Code § 34-45-2-4) prevented testimony from a party adverse to the estate about her deceased husband’s statements because the trust at issue was “so central to the overall estate plan that it was akin to the estate itself.” (p. 256). In this case, the will created at the same time as the trust was a pour-over will, which said that if the decedent owned anything in his name it would pour over into the trust so everything would be in the trust at the time of his death; therefore, the trust was the primary piece of the overall estate plan.

Secondarily, the appellate court noted that the dead man’s statute applies where one of the parties is acting in the capacity of an administrator or executor. In this case, the appellate court held that one of the parties to the litigation was the trustee of the trust at issue so he was acting in the capacity of an administrator or executor.

In Re Passarelli Family Trust, J-46-2020 (Supreme Court of Pennsylvania December 22, 2020); see also *In Re Passarelli Family Trust*, 231 A.3d 969 (Superior Court of Pennsylvania April 16, 2020)

A settlor alleging fraudulent inducement in the creation of an irrevocable trust must prove the elements of common law fraud by clear and convincing evidence.

Facts:
A husband and wife established an irrevocable trust after 20 years of marriage to keep their marital assets in the family and ensure they are passed on to their minor children. The trust included multiple real estate properties held by two real estate property companies. The husband owned 100 percent of the real estate companies. Unbeknownst to the wife, the real estate companies' assets included two properties in Florida. When presented with the trust inventory of assets, which included the real estate companies, the wife did not question its contents. She was not presented with a listing of the specific holdings of the real estate companies, e.g., the Florida properties.

Four months after creation of the trust, the wife discovered that the husband was having an affair and his paramour was living in one of the Florida properties. The wife filed for divorce and then filed an emergency petition for special relief to prevent dissipation of the marital assets, including assets in the trust — a "Petition for Citation to Terminate Irrevocable Trust" in the ophans' court. The wife argued that the trust was void *ab initio* based on a theory of fraudulent inducement at the time the trust was created. She argued that the husband fraudulently induced her to create the trust by not disclosing the Florida properties and she would not have agreed to a trust that included properties where his paramour resided. Her fraud claim was specifically based on her husband's failure "to disclose all of the marital assets."

The Supreme Court Pennsylvania adopted the elements of common law fraud as the standard for determining fraud in the inducement of an irrevocable trust.

Law:
A settlor seeking to void an irrevocable trust based on a theory of fraudulent inducement pursuant to 20 Pa.C.S. § 7736 bears the burden of proving the common law elements of fraud by clear and convincing evidence. This aligns

with the Uniform Law Comment to 20 Pa.C.S. § 7736 the authority cited therein and general principles of Pennsylvania law.

At common law, "fraud is practiced when deception of another to his damage is brought about by a misrepresentation of fact or by silence when good faith required expression*." In re Thome's Estate*, 25 A.2d 811, 816 (Pa. 1942).

"Pennsylvania trust law does not require that trust property be identified or described in any particular manner or to any particular level of detail. Indeed, '[a] declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer.' 20 Pa.C.S. § 7731 Editor's Note, Uniform Law Comment. The law requires only that the property be identifiable." (p. 22).

Holding:
A settlor of an irrevocable trust seeking to void the trust based on fraudulent inducement in the creation of the trust must prove the elements of common law fraud by clear and convincing evidence, including a material misrepresentation.

Here, the wife failed to prove fraudulent inducement because the husband's failure to disclose the existence of the Florida properties was not a material misrepresentation. The wife's intent at the time of the creation of the trust was to keep their marital assets in the family and ensure they were passed on to their children and the husband's failure to disclose specific properties in Florida did not prevent this end. (p. 24).

Furthermore, the schedule of assets disclosed to the wife satisfied the requirements for trust creation in Pennsylvania. (p. 25). Thus, "Husband's failure to identify the Florida Properties does not serve as a basis for voiding an otherwise valid, irrevocable trust agreement."

Ramirez v. Rodriguez, 2020 WL 806653 (Tex. Feb. 19, 2020)

Trustees established a prima facie case for the removal of a co-trustee by providing clear and specific evidence of the co-trustee's hostile and unauthorized actions that impeded the proper performance of the trust.

Facts:
In 1977, the Ramirez mineral trust was created and funded with a family's oil, gas and mineral interests. The provisions of the trust agreement appointed four co-trustees to control, manage, develop, operate and lease the interests held by the trust and required that any action on behalf of the trust required the joinder of at least three of the four co-trustees. As of January 2019, the four acting co-trustees were Santiago Ramirez, Sonia Garza Rodriguez, Victor M. Ramirez and Javier Ramirez Jr.

On Feb. 7, 2019, Santiago and Ancient Sunlight, Ltd. (a beneficiary of the trust of which Santiago was the general partner), filed a lawsuit against Sonia in the District Court of Zapata County, alleging the trust's employment of Sonia's spouse as an independent contractor constituted breach of fiduciary duty and breach of trust.

On April 26, 2019, Sonia, Victor and Javier (collectively, the responding trustees), filed a petition to remove Santiago as a co-trustee of the trust pursuant to Section 113.082(a)(4) of the Texas Trust Code, alleging Santiago had created hostility and friction that impeded the operations of the trust since approximately 2007. The complaint alleged that Santiago (i) acted without the authority of the trust by unilaterally communicating with third parties, including government officials, fiduciary professionals and an opposing party in ongoing litigation; (ii) threatened and harassed the responding trustees; (iii) disclosed confidential trust information to third parties; and (iv) engaged in destructive behavior to the detriment of the trust, among many other hostile activities.

Santiago moved to dismiss the lawsuit under Section 27.003(a) of the Texas Civil Practice and Remedies Code, arguing that the cause of action was based on, related to or in response to the exercise of Santiago's right of free speech and right to petition. The responding trustees filed a response and supplemental response asserting that Santiago failed to establish the cause of action was based on, related to or in response to the exercise of Santiago's right of free speech and right to petition and attaching evidence to establish a prima facie case for Santiago's removal.

The trial court held a hearing on the motion to dismiss, but did not rule on the motion. On the 30th day following the hearing, the motion was denied by operation of law. Santiago appealed the denial to the San Antonio Court of Appeals, arguing his motion to dismiss should have been granted.

Law:
Texas law authorizes a court to remove a trustee upon the petition of an interested party if the court finds cause for removal. Tex. Prop. Code § 113.082(a)(4). Although hostility or ill will between the trustee and beneficiaries alone is insufficient to establish cause for removal, a court may remove a trustee if such hostility or ill will affects the trustee's performance or impedes the proper performance of the trust. *Bergman v*. *Bergman-Davidson-Webster Charitable Tr.*, No. 07-02-04600-CV, 2004 WL 24968 at *1 (Tex. App.— Amarillo Jan. 2, 2004, no pet.) (mem. op.); *Akin v*. *Dahl*, 661 S. W.2d 911, 913–14 (Tex. 1983).

Under Section 27.003(a) of the Texas Civil Practice and Remedies Code, a party may move for dismissal if a "legal action is based on, relates to, or is in response to [such] party's exercise of the right of free speech [or] right to petition." To establish grounds for dismissal, the moving party must show by a preponderance of the evidence that the "'legal action is based on, relates to, or is in response to [the movant]'s exercise of the right of free speech'" or right to petition. *Dall*. *Morning News*, *Inc*. *v*. *Hall*, 579 S.W.3d 370, 376 (Tex. 2019) (quoting Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a)). If the moving party meets this burden, the claimant must establish a prima facie case for each essential element of the cause of action by clear and specific evidence to overcome the motion to dismiss. *Id*. Review of an order granting or denying dismissal on this ground is *de novo*. *Id*. at 377. However, the pleadings and evidence must be considered "in the light most favorable to the nonmovant." *Robert B. James, DDS, Inc*. *v*. *Elkins*, 553 S. W.3d 596, 603 (Tex. App.—San Antonio 2018, pet. denied). A court may award costs and reasonable attorney's fees to the responding party if it determines a motion to dismiss filed pursuant to this provision is frivolous or intended solely to delay the proceedings. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(b).

Holding:
The San Antonio Court of Appeals affirmed the trial court's denial of the motion to dismiss and remanded the issue of an award of costs and fees to the trial court.

Without determining whether Santiago proved by the preponderance of the evidence that the action at issue was based on, related to or in response to his exercise of the right of free speech or right to petition, the Court of Appeals concluded that the responding trustees established a prima facie case for the removal claim by clear and specific evidence. In coming to this conclusion, the Court of Appeals relied on communications provided by the responding trustees that illustrated Santiago's general hostility and unauthorized acts with respect to the trust, including challenging professional fees, baselessly accusing other trustees of impropriety, disclosing confidential trust information to third parties and negotiating with a third party on the basis that the trust would be dissolved due to internal conflicts. The responding trustees also produced statements from a trust beneficiary that accused Santiago of acting without authority, sabotaging the trust, and acting destructively at the expense of the beneficiaries. Accordingly, the Court of Appeals upheld the denial of Santiago's motion to dismiss.

The Court of Appeals remanded the issue of the award costs and fees to the trial court because the trial court had not yet considered whether Santiago's motion to dismiss was frivolous or intended solely to delay the proceedings.

Ferguson v. Ferguson, 473 P.3d 363 (Idaho Sept. 24, 2020)

As a matter of first impression, the Idaho Supreme Court held that no-contest provisions in trust agreements are generally enforceable in Idaho, but such enforceability is subject to various common law limitations. Additionally, a broad grant of discretion under the terms of a trust agreement will not excuse trustees from applicable fiduciary duties, including the duty to administer the trust in good faith and the duty to keep beneficiaries reasonably informed with relevant information.

Facts:
Roger Ferguson and Sybil Ferguson (collectively, the grantors, and each, a grantor) created the Ferguson family revocable trust (the original trust), under which they excluded their son, Michael Ferguson, as a beneficiary. Under the terms of the trust agreement, the original trust would become irrevocable upon the death of the first grantor and the assets would be divided into subtrusts: the deceased grantor's property and a one-half share of the community property would be distributed to the Roger Ferguson family trust and the Roger Ferguson nonexempt marital trust, while the surviving grantor's separate property and one-half share of the community property would be distributed to a trust called the survivor's trust. The trust agreement granted the surviving grantor the right to continue to serve as trustee of the subtrusts and designated three of the grantors' children (not including Michael) and the grantors' accountant as successor co-trustees of the trust (collectively, the successor trustees) upon the death of the surviving grantor.

Roger died in 2012, triggering the distributions to the subtrusts, and Sybil exercised her right to serve as trustee of the subtrusts. Under the trust agreement, Sybil, as trustee of the survivor's trust, had broad discretion to distribute trust principal to herself. The following year, Sybil executed a will under which she exercised a power of appointment granted to her under the trust agreement and named Michael and various grandchildren as beneficiaries of the survivor's trust.

The trust agreement also contained a "no-contest" provision providing that any beneficiary who "files suit on a creditor's claim filed by the beneficiary in a probate [sic] of the estate of either Grantor ... after rejection or lack of action by the applicable fiduciary," would be deemed to have predeceased the surviving grantor and, accordingly, forfeit any interest in the trust.

Sybil died in 2015, and her will was admitted to probate in Arizona. Three of her children (not including Michael) were appointed as co-personal representatives of her estate. On July 27, 2016, Michael filed a petition for accounting and performance of trustee duties requesting financial information regarding the original trust and subtrusts dating back to Roger's death. The successor trustees asserted nine affirmative defenses to Michael's petition and continued to withhold all information predating Sybil's death.

On March 16, 2017, while Michael's initial petition was pending before an Idaho magistrate court, Michael submitted a claim against Sybil's estate, asserting that Michael was a creditor of the estate because Sybil, as trustee of the survivor's trust, breached fiduciary duties owed to Michael. The co-representatives denied his claim, and Michael subsequently filed a petition for allowance of claim and for stay in the Arizona probate court, claiming the petition was necessary to preserve his claim while he litigated the Idaho matter. The parties agreed to stay the Arizona probate proceeding pending resolution of Michael's Idaho petition.

Following the stay, Michael filed a motion for partial summary judgment on five of the successor trustees' defenses. The successor trustees filed a supplemental affirmative defense and counterclaim for declaratory judgment, asserting that Michael's Arizona petition breached the no-contest provision of the trust agreement, disqualifying Michael as a beneficiary of the trust. Michael responded with a motion to compel discovery, requesting financial documents related to the original trust. The successor trustees then filed a cross-motion for summary judgment, requesting judgment on their affirmative defense based on the no-contest provision or, in the alternative, in favor of other asserted affirmative defenses.

The magistrate court held a hearing on the cross-motions and issued a memorandum decision denying the successor trustees' motion for summary judgment to enforce the no-contest petition, but granting summary judgment on five other affirmative defenses. The magistrate court concluded that Michael did not become a beneficiary of the survivor's trust until after Sybil's death, was not entitled to any records that preceded her death, and lacked standing to seek an accounting or other information regarding the original trust or the subtrusts. In light of these rulings, the court also denied Michael's motion to compel discovery.

After a hearing on intermediate appeal, the Madison County District Court held that the magistrate court erred in finding that Michael was not a

beneficiary until after Sybil's death and instead concluded that Michael became a beneficiary of the survivor's trust when Sybil exercised the power of appointment in her will. Additionally, the District Court held that (i) the magistrate court erred in refusing to apply the no-contest provision, (ii) Sybil did not owe a fiduciary duty to Michael because she had broad discretion over the assets of the survivor's trust, and (iii) Michael did not have probable cause to bring the Arizona petition against her estate and had violated the no-contest provision. Michael appealed.

Law:
A trustee has a duty to administer the trust in good faith and in accordance with the terms of the trust agreement and applicable law. *Restatement (Third) of Trusts* § 76 (2007). While courts will not interfere with a trustee's reasonable exercise of discretionary power based on a proper interpretation of a trust's terms, they will not permit abuse of discretion by a trustee. *Restatement (Third) of Trusts* § 50 cmt. b. Even under the broadest grant of discretion, trustees have a general duty to be reasonably informed, act with impartiality among the beneficiaries and interests, and "to provide the beneficiaries with information concerning the trust and its administration." *Id*.

Under Idaho law, a trustee has a duty to keep beneficiaries reasonably informed of the trust and its administration, I.C. § 15-7-303, and, upon a reasonable request, must provide a "beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration." I.C. § 15-7-303(b). Further, Idaho recognizes a duty of loyalty that requires a trustee "to administer the trust in the interest of the beneficiaries alone, and to exclude from consideration his own advantages and the welfare of third persons." *Taylor v*. *Maile*, 142 Idaho 253, 260 (2005). (quoting *Edwards v*. *Edwards*, 122 Idaho 963, 969 (Ct. App. 1992)) (internal quotation marks omitted). The term beneficiary includes any person who has a present or future interest in the trust, whether vested or contingent. I.C. § 15-1-201(3).

The enforceability of no-contest provisions in trust agreements was an issue of first impression in Idaho, but Idaho previously codified limitations on the enforceability of no-contest provisions in wills. See I.C. § 15-3-905. In the context of trusts as will substitutes, no-contest provisions "serve the same purpose as do such clauses in wills, and the same test applies to determine the validity of those clauses in the two comparable situations." *Restatement (Third) of Property (Wills and Donative Transfers)* § 8.5 cmt. c. However, the majority of jurisdictions recognize various common law limitations to no-

contest clauses. For example, actions "intended solely to procure time to ascertain the facts upon which the decision to institute a proceeding must rest should not be construed to constitute the institution of an action to contest." *Id*.

Holding:
Sybil owed Michael a fiduciary duty under the trust agreement and Idaho trust law because Michael's interest in the survivor's trust arose 18 months prior to Sybil's death when she exercised the power of appointment and no grant of discretion will exempt a trustee from fiduciary duties imposed by Idaho law.

Under Idaho law, Michael, as a beneficiary of the survivor's trust, was entitled to receive any relevant financial information relating to the original trust and subtrusts, including information that predates his interest in the survivor's trust. There is no temporal restriction on the information a trustee has a duty to furnish to a beneficiary, so long as such information is relevant to the beneficiary's interests, the assets of the trust or particulars of administration.

No-contest provisions in trust instruments are enforceable in Idaho, unless probable cause existed for instituting the proceeding such that it would contravene public policy to enforce the provision or enforcement of the provision would otherwise interfere with the enforcement or proper administration of the trust.

The no-contest provision in the present case was not enforceable with respect to Michael because it interferes with the proper administration of the survivor's trust and Michael's rights as a beneficiary. Under Idaho law, the successor trustees have a duty to keep Michael reasonably informed of the trust and its administration. Here, the successor trustees refused to produce relevant information that Michael reasonably requested pursuant to his right as a beneficiary and attempted to prevent Michael from accessing such information through enforcement of the no-contest provision. Further, Michael's minimal actions to preserve his rights against Sybil's estate while waiting to receive information through the Idaho litigation should not be construed to constitute a challenge.

Finally, since the district court did not reach the issue of Michael's motion to compel discovery because it enforced the no-contest provision, the Supreme Court remanded the matter for reconsideration.

Trowbridge v. Estate of Trowbridge, 150 N.E.3d 220 (Indiana June 11, 2020)

Under Indiana law, when offering a copy of a missing will for probate, the proponent's failure to produce the decedent's original will is not determinative of the proponent's ability to rebut the presumption that the decedent destroyed the original will with the intent to revoke it.

Facts:
Everett Thomas Trowbridge (the decedent) and Christal Trowbridge married in 2003 and divorced in 2012.

Everett Trowbridge subsequently died on June 6, 2018. On July 13, 2018, the decedent's brother, Michael Trowbridge, filed a petition for issuance of letters of administration asserting that the decedent died intestate. The probate court granted Michael's petition on July 16, 2018, and appointed him personal representative of the decedent's estate.

On Nov. 13, 2018, Christal filed a petition for probate of will and appointment of co-personal representative with the probate court, asserting that the decedent died testate pursuant to a will dated April 30, 2012 (approximately two months after their divorce). Under the will submitted by Christal, the decedent appointed Christal and Michael as co-personal representatives and left Christal residential real estate, a retirement account, 25 percent of an additional retirement account, and all of his personal property. Michael objected to the probate of the will.

The probate court held a hearing in January 2019, during which Christal, Michael and the attorney for the estate, Michael Maschmeyer, testified to the facts and circumstances surrounding the execution of the decedent's original will and its status as of his date of death. After the hearing, the probate court entered an order denying probate of the will on the basis that a presumption of revocation applied where a will that was in the possession of a testator is missing at the time of the testator's death. Christal appealed the decision, and the Court of Appeals of Indiana reversed and remanded, finding that the estate had not been entitled to the presumption that the original will was destroyed with the intent to revoke without predicate factual findings.

The probate court held a second hearing in October 2019, during which Christal, Michael and Maschmeyer testified to additional facts and circumstances regarding the status of the will. The evidence established that

the will offered by Christal was a copy of the decedent's original will, which at one time had been kept in a safe in the decedent's home, but was not found when Michael searched the decedent's safe and home after his death. The probate court concluded that because Christal failed to prove by a preponderance that the will she offered for probate was the original will, she had not overcome the presumption of revocation, and it entered an order denying probate of the will. Christal again appealed the decision of the probate court.

Law:
When a copy of a will is offered for probate in place of the original, a contesting party has the burden of establishing that the original will was revoked. *Estate of Fowler v*. *Perry*, 681 N.E.2d 739, 741 (Ind. Ct. App. 1997). However, "where a testator retains possession or control of a will and the will is not found at the testator's death, a presumption arises that the will was destroyed with the intent to revoke it." *Id*. Such presumption shifts the burden to the proponent of the will to prove by a preponderance of the evidence that the testator did not destroy the original will with the intent to revoke. *Id*. Evidence that can rebut the presumption of revocation includes: (1) evidence of the testator's intent when he allegedly revoked the will, (2) evidence relating to the ability of the testator to obtain access to the will during the alleged period of revocation, (3) evidence relating to the competency of the testator during the alleged period of revocation, and (4) evidence relating to the ability of interested parties to obtain access to the will before its disappearance. *Trowbridge*, 150 N.E.3d at 226 (citing *In re Estate of Borom*, 562 N.E.2d 772, 776 (Ind. Ct. App. 1990).

Holding:
The Court of Appeals affirmed the probate court's holding that the estate was entitled to the presumption of revocation based on the findings that the original will had been in the decedent's possession, that Christal had offered a copy of the will for probate, and that the original will could not be found after the decedent's death.

However, the Court of Appeals also held that the probate court erred in denying Christal's petition solely because she was unable to offer the decedent's original will for probate. Rather, the Court of Appeals concluded that the probate court should have engaged in the burden-shifting analysis set forth in *Estate of Fowler* to determine whether the testimony and exhibits offered by Christal could rebut by a preponderance of the evidence the presumption that the decedent's will was destroyed with the intent to revoke.

In coming to this conclusion, the Court of Appeals noted several facts in the record that could rebut the presumption of revocation, including: (i) the decedent did not execute his will until after his divorce; (ii) the decedent continued to list Christal as the beneficiary of his accounts as recently as 2018; (iii) the decedent never informed Christal that he had revoked his will; (iv) Michael had access to the decedent's home and safe immediately following his death; and (v) Michael stood to gain more under intestacy laws if the will were barred from probate. Accordingly, the Court of Appeals reversed the probate court's decision on this issue and remanded the case for further proceedings.

Parris v. Ballantine, Supreme Court of Alabama, September 25, 2020 (not yet released for publication)

The Alabama Supreme Court held that a beneficiary's adopted son, who was adopted as an adult, was not a "lineal descendant" of the child of the trustors entitled to take under the terms of trust, and therefore was not a beneficiary of the trust. The court concluded that, in 1971, Alabama law did not authorize the adoption of adults, and therefore, the trustors neither intended to include adopted children, nor did they have constructive knowledge of an adopted adult being included in the plain meaning of the phrase "lineal descendants" as used in their trust agreement.

Facts:
In 1971, a married couple (the trustors) created a trust for their children and children's descendants. The trustee was to make distributions of income and principal "to or among the issue of the primary descendant[s] and such issue's lineal descendants." In 2002, per court order, the 1971 trust was divided into three separate trusts, one for each of the trustors' three children. One of the three trusts was created for the trustors' daughter, Sarah Schutt Harrison and her four children. In a 2010 court order, the Jefferson County Probate Court subdivided the Harrison trust into four separate trusts, one for each of Sarah Schutt Harrison's four children (the sibling trusts), including one for Aimee Harrison Parris. The provisions of the sibling trusts were to be consistent with the 1971 trust. If there were no lineal descendants remaining as beneficiaries of a sibling trust, such sibling trust would be divided among the remaining sibling trusts.

Prior to her death in February 2017, Aimee Harrison Parris adopted her husband's adult biological son, Samuel, in 2016. Aimee did not have any other adopted or biological children.

In March 2017, the trustee of Aimee's trust filed a petition for final settlement of Aimee's trust before the probate court. In response, Aimee's three siblings filed an answer and cross-claims against the trustees and Samuel before the probate court seeking a determination that Samuel was not a lineal descendant entitled to take under the terms of the 1971 trust because he was adopted as an adult. Accordingly, the siblings argued, the remaining assets of Aimee's trust should be divided and distributed among the other three sibling trusts. The 1971 trust defined "lineal descendants" as "those hereafter born, either before or after trustor's death, as well as those now in existence. A child en ventre sa mere shall be deemed to be living."

Samuel argued that under the 2010 court order, adopted children were meant to be included as beneficiaries of the sibling trusts because, when entering the 2010 court order, the Supreme Court of Alabama made it clear that "lineal descendant" included adopted children. Additionally, Samuel argued that the guardian *ad litem* appointed in the 2010 proceeding represented "all unborn, unconceived, and unascertainable income and remainder beneficiaries," which should be construed to include children adopted in the future, such as himself. In 2019, the probate court ruled in favor of the three siblings, holding that the 1971 trust was not ambiguous and that adopted children were not included in the 1971 trust's meaning of "lineal descendants" and, therefore, Samuel was not a beneficiary of Aimee's trust. Samuel appealed the probate court decision.

Law:
The Supreme Court of Alabama applied a *de novo* standard of review, holding that the construction and interpretation of an unambiguous document is a question of law for the court to decide.

Additionally, the court determined that the 1931 statute, relied upon by Samuel, addressed adopted *children*, not individuals adopted as adults.

Holding:
The Supreme Court of Alabama affirmed the probate court's holding because Samuel's adoption was not contemplatable at the time the 1971 trust was executed, thus excluding him from the meaning of "lineal descendants" as used in the 1971 trust. Thus, Samuel was not a beneficiary of Aimee's trust. The majority opinion was sure to include that the holding was specific to the unique facts of this case, which involved adult adoptions, and should not be read to apply to adoptions of minors.

Dissent:
The dissenting Justice first contended that the full faith and credit clause of the U.S. Constitution should require the Alabama courts to give full faith and credit to the adoption decree executed by Aimee, which created the parent-child relationship between Aimee and Samuel. Next, the dissenting Justice argued that the phrase "hereafter born" was meant only to reference a time frame for descendants to be born, and was not specifically intended to exclude other means of becoming a descendant than by birth (such as by adoption). The fact that Samuel was born in 1993, after the 1971 trust was established, and later became a legal child of Aimee, was conclusive to the

dissenting Justice, and should have made him a lineal descendant of Aimee and a beneficiary of Aimee's trust.

Pena v. Dey, 39 Cal. App. 5th 546, 548, 252 Cal. Rptr. 3d 265, 266 (2d. Dist 2019)

The California Third District Court of Appeal held that the settlor's handwritten interlineations did not satisfy trust's amendment provisions, which required amendments to be signed by the settlor, and therefore the interlineations did not effectively amend the trust.

Facts:
In 2004, James Robert Anderson executed the James Robert Anderson revocable trust and designated himself as the settlor and trustee. The trust provided that "any amendment, revocation, or termination of this trust shall be made by written instrument signed by the settlor.... An exercise of the power of amendment substantially affecting the duties, rights, and liabilities of the trustee shall be effective only if agreed to by the trustee in writing." Anderson later executed a first amendment in compliance with the trust's requirements.

In February 2014, Anderson consulted an attorney to amend his estate planning documents. The attorney, unfamiliar with Anderson's prior documents, asked for copies of the trust and the first amendment, and asked for a writing of Anderson's requested changes. Anderson made interlineations on the face of the copies of his existing estate planning documents and sent the markup to his attorney. Accompanying the copies was a note that read, "Hi, [attorney], Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." The interlineations changed the beneficiaries listed in the first amendment, adding Grey Dey as a beneficiary. Anderson's attorney required further clarification as to Anderson's intent based on the interlineations, and called Anderson to get more information. Anderson was unavailable to answer his attorney's questions, and ended up passing away before connecting with his attorney to clarify the requested changes. As a result, the interlineations were never formally inserted into Anderson's estate plan by a signed writing.

Margaret Pena, the successor trustee of the trust, petitioned the trial court for instructions as to the validity of the interlineations. She thereafter moved for summary judgment, asserting the interlineations did not amount to a valid amendment to the trust as a matter of law. The trial court granted the motion and entered judgment in Pena's favor. Dey appealed.

Law:
Under the California Probate Code, a revocable trust "may be revoked in whole or in part by any of the following methods:

> (1) By compliance with any method of revocation provided in the trust instrument.
>
> (2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation.

If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked" by other means pursuant to the California probate code.

Holding:
In this case, the trust instrument provided that any amendment to the trust "shall be made by written instrument signed by the settlor and delivered to the trustee." The California Third District Court of Appeal found that the interlineations constituted a written instrument separate from the trust agreement, and since he was both settlor and trustee, it was indisputable that Anderson delivered the interlineations to himself when he made them. However, Anderson did not sign the interlineations, and as a result, the court found that the interlineations did not effectively amend the trust instrument.

The court rejected Dey's argument that Anderson validly adopted his 2008 signature on the first amendment to the trust when he made the interlineations to that document in 2014. Dey cited cases supporting the proposition that handwritten interlineations made to a holographic (handwritten) will or codicil after that instrument was signed, when made with testamentary intent, become part of that will or codicil and adopt the original date and signature. The Court declined to apply the handwritten changes to a non-holographic document. The court reasoned that in the context of a holographic will, subsequently added handwritten interlineations become part of that signed holographic will and they become a single testamentary document. In contrast, handwritten interlineations on a non-holographic trust document are a separate writing. The trust instrument in this case required such an amendment to be signed by the settlor, which the court determined would be useless if handwritten changes could be made without an accompanying signature.

The court further rejected Dey's argument that the note attached to the trust documents constituted Anderson's signature. The court reasoned that the note was a separate writing that simply identified the enclosed documents and that if the changes and note were sufficient to qualify as a signed writing, there would have been no need for Anderson to send them to his attorney to put into a formal amendment that he would later sign. Because Anderson died prior to signing the new amendment, however, these changes were never incorporated into his trust.

Cundall v. Mitchell-Clyde, 51 Cal. App. 5th 571, 265 Cal. Rptr. 3d 254 (2020)

California Appellate Court held that, to eliminate the availability of the statutory method of trust revocation provided in section 15401 of the California probate code, a trust agreement must provide an alternative method of revocation and provide an express statement that such alternative method of revocation is the exclusive method available.

Facts:
Martin, Cundall and Diaz were all neighbors in West Hollywood. After meeting in 2007, Cundall began remodeling Martin's house. The quoted price of the remodel was $81,000, but it ended up costing $219,000.

Later, Diaz, an attorney, drafted a trust for Martin, which Martin eventually executed (the February trust). The February trust stated the following:

> "During the Grantor's lifetime, the Grantor may revoke at any time, and/or the Grantor may amend, this Agreement by delivering to the Trustee and the Successor Trustee an appropriate written revocation or amendment, signed by the Grantor and his attorney, Frances L. Diaz. The powers of amendment may be exercised by a duly appointed and acting attorney-in-fact for the Grantor for the purpose of withdrawing and/or distributing assets from the Trust."

Shortly after executing the February trust, Martin began suspecting Diaz and Cundall of stealing from him, so he retained new counsel, Kanin. Kanin believed Martin was lucid and rational, and began preparing a new estate plan for Martin (the May trust), as well as a revocation of the February trust. The May trust named Mitchell-Clyde and Ronald Preissman, two friends of Martin's, as beneficiaries. Preissman was also named the successor trustee. The revocation stated, in full, that "[t]he undersigned, John W. Martin, as Grantor and Trustee, hereby revokes the John W. Martin Living Trust Dated February 11, 2009," and was signed by Martin. Both the May trust and the revocation were signed May 12, 2009.

Upon learning of Martin's new estate plan, Diaz raised concerns with Kanin and Preissman, as well as Martin's doctor, that Martin was not lucid. The relationship among Martin, Cundall and Diaz continued to deteriorate. Martin died in January 2010.

In September 2010, Cundall filed a petition in the Superior Court of L.A. County for a determination that the February trust had not been revoked and that the trust assets therefore belonged to him. Clyde and Preissman filed an objection, as well as a separate petition, seeking a determination that the February trust was revoked and the May trust was valid and enforceable. In 2018, the trial court issued a final decision that Martin did have the capacity to execute the May trust, and that there was no basis to conclude that the February trust could only be revoked upon Diaz's consent. Thus, the February trust was properly revoked according to the trial court.

On appeal before the Court of Appeal, Second District, of California, Cundall argued first that Diaz had been appointed as a "trust protector" and therefore her consent was required to revoke the February trust, and thus the statutory method of revocation did not apply to the February trust. In the alternative, Cundall argued that the February trust required an "exclusive" method of revocation.

Law:
The appellate court first cited section 15401 of California's probate code, which provides two methods of trust revocation:

1. A trust may be revoked by compliance with any method of revocation provided in the trust instrument.

2. A trust may be revoked by a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation (the statutory method of revocation).

Section 15401(a)(2) of the California probate code provides one exception to the alternative means of statutory revocation: "If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph."

Holding:
The Court of Appeals rejected Cundall's argument that the alternative revocation method in section 15401 does not apply to trusts that establish a "trust protector" because section 15401 is limited to the "method" of revoking a trust rather than the authority to revoke. The Court of Appeals rejected this argument, finding that a trust document must contain explicit statements that

limit the trust's revocation methods, and otherwise, the statutory revocation method is available, regardless of the presence of a "trust protector." The Court of Appeals reasoned that granting an individual the authority to approve revocation is not relevant to the "method" of revocation as contemplated by section 15401.

The Court of Appeals further reasoned that, if anything, Diaz may have had the authority to revoke, in addition to Martin's authority, but Martin's revocation was not conditional upon Diaz's consent, and nothing in the legislative history of section 15401 shows an intent to limit a settlor's right to revoke his or her trust. The Court of Appeals found that retaining authority in a settlor to revoke a trust absent explicit surrender of that authority is consistent with the modern statutory scheme, as the current rule protects "the clear intention of the settlor who attempts to revoke a revocable trust by the statutory method." Finally, the appellate court determined that section 15401 would simply require that the trust explicitly state that a trust protector's consent was required as a part of the *method* of revoking a trust. Again, the Court of Appeals did not equate the granting of authority to Diaz to consent to revocation as an explicit statement that Diaz's consent was a required component of the method of revocation.

The Court of Appeals went on to find that the February trust may have laid out a particular method of revocation but it did not include any language to state that it was the "exclusive" method of revocation, thus allowing the statutory method of revocation to be available. Therefore, the statutory method of revocation followed by Martin and Kanin was available and adequately revoked the February trust. Accordingly, the trial court's holding that the February trust was revoked was affirmed.