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Probate & Estate Track

Unlocking Excellence In Trust & Estate Practice: Ethics, Case Updates, and Practice Pointers for Probate, Trust & Estate Practitioners

Monday, July 8, 2024 - Wednesday, July 10, 2024
8:15 AM - 12:30 PM (each day)

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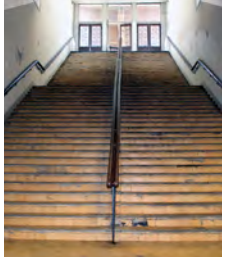
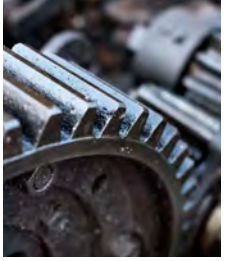
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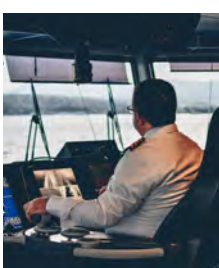
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CLE by the Sea

Probate Law Track

July 8-10, 2024

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State Bar of Arizona

2024 CLE BY THE SEA- Probate Track

Agenda

Day One- Monday, July 8, 2024

8:15 a.m. – 9:15 a.m.	**Changes for Court Appointed Counsel and Supported Decision Making: Changes to the Law: Possibilities and Pitfalls** Elizabeth Rollings Friman, *Fleming & Curti PLC*
9:15 a.m. – 10:15 a.m.	**Revocable and Irrevocable Trusts: Drafting for flexibility when you want it and when you don't.** Debra J. Polly Esq, *Fennemore Craig, P.C.*
10:15 a.m. – 10:30 p.m.	**Break**
10:30 a.m. – 11:45 a.m.	**Ethics Representing Multiple Family Members** Andrea Burnett O'Neill, *Becker & House, PLLC*
11:45 a.m. – 12:30 p.m.	**Panel Discussion: The Intersection of Divorce and Estate Planning** Andrea Burnett O'Neill, *Becker & House, PLLC* Robert Fleming, *Fleming & Curti PLC* Elizabeth Rollings Friman, *Fleming & Curti PLC* Debra J. Polly Esq, *Fennemore Craig, P.C.*

Day Two- Tuesday, July 9, 2024

8:15 a.m. – 9:30 a.m.	**Tax Planning for Surviving Spouses: Tips and Best Practices** Nora L. Jones, *Tiffany & Bosco PA* Lauren Talkington, *Snell & Wilmer LLP*
9:30 a.m. – 10:15 a.m.	**Directed Trusts: The good and the bad. Everything you need to know.** Jim Lee, *Fennemore Craig, P.C.*
10:15 a.m. – 10:30 a.m.	**Break**

10:30 a.m. – 11:30 a.m.	**Fiduciary Fees: What is reasonable? A review of the laws in Arizona and standards for practitioners and their clients to keep in mind.** Lauren Talkington, *Snell & Wilmer LLP*
11:30 a.m. – 12:30 p.m.	**Breakout: Fiduciary Fees** Robert Fleming, *Fleming & Curti PLC* Elizabeth Rollings Friman, *Fleming & Curti PLC* Jim Lee, *Fennemore Craig, P.C.* Lauren Talkington, *Snell & Wilmer LLP*

Day Three- Wednesday, July 10, 2024

8:15 a.m. – 9:15 a.m.	**Case Updates** Robert Fleming, *Fleming & Curti PLC*
9:15 a.m. – 10:30 a.m.	**Non-Judicial Settlement Agreements: Forms and Best Practices** Daren J. Layton, *Jennings Haug Keleher McLeod Waterfall LLP*
10:30 a.m. – 10:45 a.m.	**Break**
10:45 a.m. – 11:45 a.m.	**Consents and Waivers in Estate and Trust Administration Cases: A review of standard forms and lessons learned.** Nora L. Jones, *Tiffany & Bosco PA*
11:45 a.m. – 12:30 p.m.	**Checklists and Practice Management Tips for a Busy T&E Practice** Robert Fleming, *Fleming & Curti PLC* Elizabeth Rollings Friman, *Fleming & Curti PLC* Nora L. Jones, *Tiffany & Bosco PA* Daren J. Layton, *Jennings Haug Keleher McLeod Waterfall LLP*

2024 CLE by the Sea: Estate, Trust & Probate Track
July 8-10, 2024

Faculty Biographies

ROBERT B. FLEMING is a Fellow of both the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys. He has been certified as a Specialist in Estate and Trust Law by the State Bar of Arizona's Board of Legal Specialization, and he is also a Certified Elder Law Attorney by the National Elder Law Foundation. Robert has a long history of involvement in local, state and national organizations. He is most proud of his instrumental involvement in the Special Needs Alliance, the premier national organization for lawyers dealing with special needs trusts and planning. Robert has two adult children, two young grandchildren and a wife of over fifty years. He is devoted to all of them. He is also very fond of Rosalind Franklin (his office companion corgi), and his homebound cat Muninn. He just likes people, their pets and their stories.

ELIZABETH N. FRIMAN- Elizabeth Noble Rollings Friman is a principal and licensed fiduciary at Fleming & Curti, PLC. She is a Fellow of the American College of Trust and Estate Counsel. Elizabeth enjoys estate planning and helping families navigate trust and probate administrations. She is passionate about the fiduciary work that she performs as a trustee, personal representative, guardian, and conservator. Elizabeth works with CPAs, financial professionals, case managers, and medical providers to tailor solutions to complex family challenges. Elizabeth is often called upon to serve as a neutral party so that families can avoid protracted legal conflict. Elizabeth relies on the expertise of her team at Fleming & Curti, and as the Firm approaches its third decade, she is proud of the culture of care and consideration that the Firm embodies. Finding workable solutions to sensitive and complex family challenges is something that Elizabeth and the Fleming & Curti team do well. A third generation Tucsonan, Elizabeth attended Green Fields Country Day School and earned her law degree from the University of Arizona College of Law. Before starting her legal career, she earned her bachelor's degree from Connecticut College. Elizabeth was first exposed to the practice of law during her years of work as a legal assistant in the capital markets group of Davis Polk & Wardwell, LLP. Elizabeth volunteers her time to a diverse array of community and professional organizations. She is currently serving on the board of TMC Hospital and is the acting chair of the Finance Committee for the Primavera Foundation. She also serves as a board member of the Special Needs Alliance and the Jewish Philanthropies of Southern Arizona. Elizabeth received the Tucson Hispanic Chamber of Commerce "40 Under 40 Award" at the age of 32. Outside of work, Elizabeth treasures her time with husband (and law school classmate) Doug and their goldendoodle, Duncan. She enjoys gardening, spicy food, cold drinks, and paddle boarding along the shores of Lake Tahoe.

NORA L. JONES is a skilled trial attorney specializing in probate and trust litigation, elder law, guardianships and conservatorships, and estate and trust administration. A recognized leader in the elder law community, Nora blends compassion and strength to resolve matters with her clients' best interests at heart. Nora recognizes that issues in this area of law

sometimes require outside the box strategies and multi-faceted solutions and employs a holistic approach to her cases to achieve client goals. Nora is board-certified as a specialist in estates and trusts by the State Bar of Arizona, a distinguished honor held by less than 1% of Arizona attorneys, reserved for lawyers having substantial experience, the respect of their peers, and demonstrated special knowledge, skills and proficiency in this area of law. Nora is frequently recognized as a Top Lawyer by Phoenix Magazine and a Rising Star by Super Lawyers and has been repeatedly honored for her vision, influence, and leadership in Elder Law by Arizona Business Leaders. In addition, Nora has an AV Preeminent Rating, the highest possible rating in both legal ability and ethical standards, by Martindale-Hubbell and has a Perfect 10 rating with AVVO. Nora and her team are also renowned as a top law firm for Trust and Estate Litigation by U.S. News & World Report. Nora further serves as an acting Judge Pro Tempore with the Superior Court of Maricopa County for the Probate Court division, on the Estate and Trust Advisory Commission for the State Bar of Arizona's Board of Legal Specialization, and on the Board of Directors for the Arizona Chapter of the National Academy of Elder Law Attorneys. An Arizona native, Nora graduated summa cum laude from Barrett, the Honors College at Arizona State University, with a degree in Political Science and a Certificate in Civic Education. She received her Juris Doctor from the James E. Rogers College of Law at the University of Arizona and is admitted to practice throughout the State of Arizona, in the U.S. District Court for the State of Arizona, and the United States Supreme Court.

DAREN J. LAYTON is an attorney with the law firm Jennings Haug Keleher McLeod Waterfall LLP in Tucson, Arizona where he assists clients in creating and implementing personalized estate plans, navigating income, gift and estate tax issues, business succession matters, and charitable planning. In addition to lifetime planning, Daren assists clients with probate and trust administration matters. Daren is also a certified public accountant (CPA). Daren earned a B.S. in Accountancy (2007) and a M.S. in Taxation (2008) from Arizona State University, and a Juris Doctor (2012) from the University of Arizona. Daren is also a certified public accountant.

TERRY J. LEE T. JAMES ("JIM") LEE is a *Trust and Estate Specialist*, certified by the Board of Legal Specialization of the State Bar of Arizona, and a Director and Shareholder (Partner) of Fennemore Craig, P.C. He leads the firm's Family Office & Private Client attorneys, a specialized group of advisors providing multidisciplinary resources and bespoke solutions for sensitive and pressing family concerns, values-based wealth transfer, and business succession. His areas of practice include estate planning, business design and structuring, and commercial transactions, including tax planning, corporate, partnership, LLC, real estate, and international matters. He also advises trustees and executors on their fiduciary responsibilities and provides tax advice in the administration and distribution of trusts and probate estates. James is an author and a frequent lecturer on estate planning, tax, and probate issues. He is a member of the American Bar Association (ABA), the State Bar of Arizona, and the Utah State Bar. He is also a peer-elected member of the American College of Trust and Estate Counsel (ACTEC), and previously served as Chair of the Arizona Bar's *Probate and Trust Executive Council*, Chair of its *Estate and Trust Advisory Commission*, and is a member of the ABA's *national committee* on Estate and Gift Taxes (Taxation Section). Jim is listed in *Chambers HNW Advisors* (Band 1), *Southwest Super Lawyers*, and in *Best Lawyers in*

America (Tax and Trusts & Estates). He was named by Best Lawyers (Arizona) as *Lawyer of the Year* for Trusts & Estates in 2017, 2021, 2024, and for *Tax Law* in 2023. He is the 2023 recipient of the Eleanor ter Horst Distinguished Service Award, State Bar of Arizona, and serves on various boards or committees of local charitable organizations. Jim received a bachelors degree in business management from Brigham Young University, with distinction as the top business school graduate in the area of entrepreneurship. He also earned a business composite minor (Accounting and Economics), and a minor in Spanish. He graduated *with honors* in 1996 from the J. Reuben Clark Law School at BYU, and served on the Editorial Board of the BYU *Law Review*.

ANDREA B. O'NEILL is the managing partner at Becker & House, PLLC, and practices primarily in the area of trust and estate litigation. Andrea represents both fiduciaries and beneficiaries in every type of trust and estate controversy, with a particular focus on financial exploitation of vulnerable adults, undue influence, and other will contests. Additionally, Andrea's practice involves complex trust and estate administration where litigation is anticipated or ongoing. Andrea serves on the board of the Estate Planning, Probate, and Trust Section of the Maricopa County Bar Association. Andrea is a co-author of Arizona Probate and Trust Administration and Litigation with Forms (Matthew Bender ed., 2023). Additionally, she regularly speaks on issues related to professional responsibility and is a guest lecturer at Arizona State University Sandra Day O'Connor College of Law. Andrea attended Wake Forest University in North Carolina where she received her B.A. magna cum laude in 2014. She proceeded to attend Arizona State University's Sandra Day O'Connor College of Law where she received her J.D. cum laude in 2017.

DEBRA J. POLLY is a director in Fennemore's Trusts & Estates practice group who works out of the firm's Phoenix office. Her practice focuses on probate; estate & trust administration; estate planning; retirement benefits planning and administration; estate tax, gift tax, and generation-skipping transfer tax planning, strategy and compliance; and family settlement agreements and negotiation. Deb is also an Arizona Certified Public Accountant. Originally from Sioux City, Iowa, Deb began her professional career working for KPMG, one of the "Big Four" accounting firms. She gravitated to work involving consulting for estate planning strategies, however, to fully assist her clients, it was evident that she needed to become an attorney – and this led her to law school and a rewarding career in the legal profession. In her work involving estate planning and administration, Deb takes great pride in creating customized solutions – never a "one size fits all" approach – on behalf of her esteemed clients. Outside of the office, Deb's life is an enjoyable blur as the mother of three teenagers, including a daughter on a travel ice hockey team.

LAUREN R. TALKINGTON is an attorney with Snell & Wilmer. Her practice is concentrated in private client services, specifically estate planning, probate, as well as estate and trust litigation. She has extensive experience in preparing estate planning documents to fit clients' needs, including wills, revocable or irrevocable trusts, as well as incapacity planning documents such as financial and health care powers of attorney. Lauren also provides advice regarding income, gift, and estate tax issues with experience in preparing taxable estate tax returns and gift tax returns. She has widespread knowledge of fiduciary service matters, including matters of complex estate and trust administration. Lauren is a Certified Estate and

Trust Law Specialist through the State Bar of Arizona. She received her Bachelors from Northern Arizona University (Business Economics and International Affairs) and her JD from the University of Arizona.

2024 CLE by the Sea: Estate, Trust & Probate Track - Monday

July 8, 2024

8:15 AM - 12:30 PM

Coronado Island Marriott Resort & Spa
Coronado, CA

Changes for Court Appointed Counsel and Supported Decision Making: Changes to the Law: Possibilities and Pitfalls

State Bar of Arizona – CLE by the Sea
Estate Planning, Trust and Probate Seminar

July 8, 2024

Elizabeth Noble Rollings Friman
Fleming & Curti, PLC
Friman@flemingandcurti.com
www.Elder-Law.com

Court Appointed Counsel

The right to counsel is a constitutional right and the importance of this representation is sometimes taken for granted by families, the court and other parties. In many cases the alleged incapacitated person (i.e. the client) lacks the resources to pay for private counsel. Without the role of the court appointed attorney, the case could not proceed. Court appointed attorneys are under pressure to discuss difficult issues with clients, who may be incapacitated and then represent the client in a court proceeding, which may be highly contentious.

While other parties to an action make take the court appointed counsel's work for granted, rarely does the alleged incapacitated person. The court appointed attorney's job includes advocacy, negotiation and review. Often the person who is the subject of the action has diminished capacity and may not understand the proceedings, or how his or her civil rights may change as a result of the action. In cases where counsel is appointed by the Court, the alleged incapacitated person does not have a choice about what attorney to work with and more often than not, the person is grateful for the representation.

Training for court appointed counsel is sparse and much of the training happens on the job. The State Bar of Arizona offers a CLE for court appointed counsel as an "on demand" course titled: Probate Court Appointed Counsel and Guardians Ad Litem. In Pima County (it may be different in other counties!), once an attorney completes the CLE and provides the presiding probate Judge with a cover letter, resume and proof that the CLE has been completed, then the probate Clerk will be notified by the Judge and the attorney will be added to the court appointed list.

SB 1291 made significant changes to Title 14, governing matters related to protected persons and new law will went into effect on October 30, 2023. The new rules have serious implications for court appointed counsel and merit careful review. As a result of these new rules, some attorneys who have served as court appointed counsel for many years have decided not to continue in this capacity because the new rules are onerous and impose real consequences for attorneys.

A.R.S. § 14-5111: Duties of appointed attorney

The new rule outlining the duties of the court appointed attorney allows the Court to find the attorney may be held in contempt if the attorney fails to fulfill all of the duties outlined in the rule.

Among other requirements of court appointed counsel, there is now a requirement that "no later than" seven calendar days before the initial hearing on a guardianship/conservatorship petition, the court appointed counsel must:

1. Interview his/her client (the proposed ward/protected person)
2. Explain the following
    a. There is a right to a trial by jury;
    b. The client may hire a different attorney at the person's own expense;
    c. The client has a right to appear in court with any person that he or she wishes;
3. Review the court process, timelines and expected future proceedings;
4. Provide the client with a copy of the supreme court promulgated order to a guardian, order to conservator or order to guardian and conservator that the court will enter if the relief requested in the petition is granted.

At the initial hearing on the petition for appointment, the attorney must then avow to the Court that he/she has fulfilled the requirements prescribed in A.R.S. § 14-5111, or provide an explanation as to why the attorney has been unable to comply with the requirements prescribed in this section.

A.R.S. § 14-1306: Jury Trial and Rule 29

Jury trials in probate court?! A.R.S. § 14-1306 provides that a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury. A.R.S. § 14-1306 states that the court in its discretion may call a jury to decide any issue of fact (in which case the verdict is advisory only), however it is hard to see what circumstances the Court would feel this would be necessary. This new rule opens the door to lots of questions for court appointed counsel who may represent a client who requests a jury trial. The rule also creates additional burdens on the court appointed attorney to explain to the client that there is a right to a trial by jury. If the alleged incapacitated person decides that he or she would like a jury to rule on a question of fact, then Rule 29 is invoked and there must be a written demand for a jury trial. The demand must be provided to the Court no later than 30 days after the initial hearing on the petition.

Many guardianship and conservatorship cases involved families in conflict, and sometimes evidentiary hearings may be requested. An evidentiary hearing is an opportunity to present material evidence which directly relates to a particular issue of fact. These hearings are common and take relatively little time when compared to a jury trial. The additional administrative work involved for the Court, as well as the additional costs incurred in cases where a jury trial may be requested are significant. It is imperative that court appointed counsel be prepared to counsel the client about the additional administrative challenges and burdens that can result if there is a jury trial.

Court appointed counsel may find the alleged incapacitated person does not understand what a jury trial is or appreciate the burdens that a jury trial may entail, both from a time and resource perspective.

If the court appointed attorney makes a written demand for a jury trial as a result of instruction from the alleged incapacitated person and medical evidence suggests that this person is incapacitated, what (if any) opportunities are there for the Court and related parties to avoid a jury trial? If the court appointed attorney feels that he or she lacks the expertise to competently represent the client in a jury trial, under Ethical Rule 1.1, does that circumstance require the court appointed attorney to seek the Court's approval to withdraw?

A.R.S. § 14-5401: Protective proceedings; fingerprinting

In conservatorship cases court appointed counsel now have to prepare (and file) a declaration on behalf of the alleged incapacitated person if he or she does not want to appear before the court in person or virtually. The requirements of A.R.S. § 14-5401(D) creates even more work for court appointed counsel because if the client does not want to participate in the hearing, counsel needs to prepare a pleading, and have the client sign this to document the decision not to appear. According to the new rule, the declaration that is filed is necessary to prove the person's inability or unwillingness to attend. The court is then required to weigh the evidence, request additional evidence if necessary and document all evidence in the court record. Ethically speaking, if there is clear and convincing evidence that the client is incapacitated, then how can that person understand a declaration and then sign it? In some cases, an incapacitated person may be physically unable to sign a document. In this situation, is the best practice for the court appointed attorney to file a declaration with the court to document the circumstances, and then attend the hearing virtually with his/her client? If the client is not able to engage or understand the hearing but the client attends the hearing (virtually or in person) then it appears that the court appointed counsel will have satisfied his or her duties under this new rule.

Representing a Client with Diminished Capacity

Representing a client with diminished capacity can be difficult. Ethical Rule 1.14 of the Model Rules of Professional Conduct applies to the representation of any adult client with diminished capacity, regardless of whether the client's capacity is diminished as a result of a developmental disability, a stroke, dementia or other cause. Any attorney who is serving as court appointed counsel will benefit from reviewing the ethical rules that relate to the representation of a client with diminishes capacity. Arizona adopted the ABA Model Rules of Professional Conduct (MRPC) in September of 1984.[1] MRPC Rule 1.14 addresses representation of a client with diminished capacity.

[1] See A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct.

MRPC 1.14: Client with Diminished Capacity

> A. When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> B. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> C. Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Capacity can be measured along a spectrum and for this reason, the assessment of a client's capacity needs to be made on a case by case basis. The commentary to ethical rule 1.14 reflects an understanding of this and suggest that that a lawyer working with a client who has diminished capacity "may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long term goals and commitments" when defining the scope of representation and performing legal work on the client's behalf.

Representation of a client with diminished capacity calls for a collaborative and assistive approach by the attorney, rather than one that is formulaic. A client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting his or her own well-being. When it comes to guardianship and conservatorship cases, court appointed counsel are on the front lines and responsible for maintaining a normal client-lawyer relationship with the client, while also complying with the rules. Explaining the right to a jury trial or discussing the client's decision about whether to attend the hearing in a conservatorship case, are just some of the conversations that court appointed counsel are expected to have with clients, regardless of the client's capacity.

Supported Decision-Making A.R.S. § 14-5721 and 14-5722

The verdict is out on supported decision-making agreements. While some believe that these agreements will provide autonomy and will help adults who need assistance with medical and financial decision-making avoid the need for a guardianship or conservatorship, others believe

that these agreements will muddy the waters and create conflict and the potential for confusion. A.R.S. § 14-5721 includes a new definition section related to supported decision-making agreements and added A.R.S. § 14-5722, which outlines the concept of these agreements.

An adult (who may or may not have an existing power of attorney) may voluntarily enter into a supported decision-making agreement to appoint a "supporter" to assist with decision-making. The term of the "agreement" is until is it terminated in writing by either party, the adult becomes incapacitated, or a guardian is appointed. The rule is specific that the supporter does not have the authority to bind the adult to legal agreements. The supported decision-making agreement itself can be found within A.R.S. § 14-5722.

In theory, the supporter(s) is supposed to provide assistance with decision-making by helping the adult in need of assistance better understand the options and implications of decisions (e.g. signing a pre-hospital medical care directive, hiring caregiving support, buying a pre-paid funeral plan, taking certain medications, etc.). The supporter might help collect information necessary to help the adult better understand the decision to be made and the consequences of a decision and review the information collected with the adult. There are civil penalties (what are those?) or criminal prosecution if the supporter intimidates or deceives the adult in procuring the supported decision-making agreement. If the supporter collects compensation this is a violation of the rule. Who is going to patrol this? Conflicts of interest are likely to about with supportive decision-making agreements.

Supplemental Materials

1. A.R.S. § 14-5111: Duties of appointed attorney; contempt
2. A.R.S. § 14-1306: Jury trial
3. Rule 29 Demand for Jury Trial
4. A.R.S. § 14-5401: Protective proceedings; fingerprinting
5. ER 1.14: Client with Diminished Capacity
6. Form Letter to Client
7. Attestation of Court Appointed Counsel
8. Declaration of Inability or Willingness to Appear
9. Notice of Hearing
10. Letters of Guardian and Conservator
11. Order Appointing Guardian and Conservator
12. A.R.S. § 14-5721: Definitions
13. A.R.S. § 14-5722: Supported decision-making agreements; scope; rights and obligations; intimidation; deception; petition; termination; form

2024 CLE By The Sea

1. A.R.S. § 14-5111: Duties of appointed attorney; contempt

2. A.R.S. § 14-1306: Jury trial

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11. Order Appointing Guardian and Conservator

12. A.R.S. § 14-5721: Definitions

13. A.R.S. § 14-5722: Supported decision-making agreements; scope; rights and obligations; intimidation; deception; petition; termination; form

14-5111. Duties of appointed attorney; contempt

A. No later than seven calendar days before the initial hearing on a petition for the appointment of a permanent guardian or permanent conservator, the attorney for the alleged incapacitated person or the person allegedly in need of protection shall fulfill the following minimal duties:

1. Interview the alleged incapacitated person or person allegedly in need of protection.

2. Inform the alleged incapacitated person or person allegedly in need of protection of all the following:

(a) The right to a trial by jury pursuant to section 14-1306.

(b) The right to select an attorney of the person's choosing. If the attorney is appointed by the court, the attorney shall explain to the alleged incapacitated person or person allegedly in need of protection that the person may hire a different attorney at the person's own expense.

(c) The right of the alleged incapacitated person or person allegedly in need of protection to appear in court and have any person the alleged incapacitated person or person allegedly in need of protection wishes to be present with the alleged incapacitated person or person allegedly in need of protection.

(d) A review of the court process, timelines and expected future proceedings.

3. Provide the incapacitated person or person allegedly in need of protection with a copy of the supreme court promulgated order to a guardian, order to conservator or order to guardian and conservator that the court will enter if the relief requested in the petition is granted.

B. At the initial hearing on the petition for appointment, the attorney for the alleged incapacitated person or the person allegedly in need of protection shall attest to the court that the attorney has fulfilled the requirements prescribed in this section or shall provide an explanation as to why the attorney has been unable to comply with the requirements prescribed in this section.

C. The court may find an attorney who fails to fulfill the duties prescribed in this section in contempt of court.

14-1306. Jury trial

A. If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

B. If there is no right to trial by jury under subsection A of this section or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

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Arizona Rules of Probate Procedure
Effective: January 1, 2020

Arizona Revised Statutes Annotated
Arizona Rules of Probate Procedure (Refs & Annos)
Part IV. Contested Proceedings

Effective: January 1, 2020

17B A.R.S. Rules Probate Proc., Rule 29

Rule 29. Demand for Jury Trial

Currentness

(a) Demand. On any issue triable of right by a jury, a party may obtain a jury trial by filing a written demand at any time after the proceeding is commenced, but no later than 30 days after the initial hearing on the petition. The demand may not be combined with any other motion or pleading.

(b) Specifying Issues. In its demand, a party must specify the issues for which it requests a jury. The party is deemed to have waived a jury trial on all issues not specified in the demand. If a party has demanded a jury trial on only some issues, any other party, within 10 court days after the demand is served or within a shorter time ordered by the court, may file a demand for jury trial on any other issues triable of right by a jury.

(c) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly filed. A proper demand may be withdrawn only if all parties consent.

(d) If a Demand Is Made. If a jury trial is properly demanded on an issue, the issue must be tried by jury unless

(1) all parties file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court finds that the issue is not triable by jury as a matter of right.

(e) If No Demand Is Made. The court must try all issues on which a jury trial is not properly demanded.

(f) Advisory Jury; Jury Trial by Consent. Even if an issue is not triable of right by a jury, the court may order the issue tried by a jury. The jury's decision on the issue will be advisory only, unless the parties agree that the jury's decision will be binding.

Credits

Added Aug. 29, 2019, effective Jan. 1, 2020.

17B A. R. S. Rules Probate Proc., Rule 29, AZ ST PROB Rule 29
State Court Rules are current with amendments received through November 15, 2023. The Code of Judicial Administration is current with amendments received through November 1, 2023.

END OF DOCUMENT

14-5401. Protective proceedings; fingerprinting

A. On petition and after notice and a hearing pursuant to this article, the court may appoint a conservator or make another protective order for cause as follows:

1. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection that cannot otherwise be provided or has or may have affairs that may be jeopardized or prevented by minority or that funds are needed for the minor's support and education and that protection is necessary or desirable to obtain or provide funds.

2. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court specifically finds by clear and convincing evidence on the record both of the following:

(a) The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.

(b) The person has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

B. On petition and after notice and a hearing pursuant to this article, the court may continue a conservatorship or other protective order entered pursuant to subsection A, paragraph 1 of this section beyond the minor's eighteenth birthday if the court determines that the order is appropriate pursuant to subsection A, paragraph 2 of this section. The petition shall comply with the requirements of section 14-5404, subsection B and must be filed after the minor's seventeenth birthday and before termination of the conservatorship by court order.

C. The court may require each person who seeks appointment as a conservator to furnish a full set of fingerprints to enable the court to conduct a criminal background investigation. The court shall submit the person's completed fingerprint card to the department of public safety. The person shall bear the cost of obtaining the person's criminal history record information. The cost shall not exceed the actual cost of obtaining the person's criminal history record information. Criminal history records checks shall be conducted pursuant to section 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation. This subsection does not apply to a fiduciary who is licensed pursuant to section 14-5651 or an employee of a financial institution.

D. Unless the alleged basis for the appointment of a conservator or entry of a protective order is that the person allegedly in need of protection is confined, detained by a foreign power or missing, the court shall not appoint a conservator or enter a protective order for a person under subsection A, paragraph 2 of this section unless the person allegedly in need of protection has appeared before the court either in person or by virtual means. If that person is unable or unwilling to appear in person or by virtual means, evidence of the person's inability or unwillingness to attend shall be presented to the court. If the person does not wish to attend in person or by virtual means, a declaration signed by that person shall be filed with the court to prove the person's inability or unwillingness to attend. The court shall weigh the evidence, request additional evidence if necessary and document all evidence in the court record.

ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor,

whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See ER 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interest. For example, raising the question of diminished capacity could, in some circumstances, lead to

proceedings for involuntary commitment. Information relating to the representation is protected by ER 1.6. Therefore, unless authorized to do so the lawyer may not disclose such information. The lawyer may disclose information otherwise protected by ER 1.6 to the extent such disclosure may be required by law. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

DATE

NAME
ADDRESS
ADDRESS

RE: [MATTER NAME]
Pima County Superior Court Case No. GC [####-####]
Petition for Appointment of Guardian/Conservator

Dear [NAME]:

As we discussed, a Petition has been filed to appoint a guardian and/or conservator for you. The Petitioner, the person that filed the Petition, is [PETITIONER]. The Petition asks for [PROPOSED GUARDIAN] to be appointed as your guardian and for [PROPOSED CONSERVATOR] to be appointed as your conservator. I have been appointed by the Court to represent you in this matter.

The Petition has been set to be considered at a hearing on [HEARING DATE].

Because the Petition requests the appointment of a Conservator or other protective Order, the Court requires that you appear (either in person or by phone) at the hearing, or you can sign the attached document stating that you are unwilling or unable to appear.

Part of the requirements as your court-appointed attorney is to let you know about some specific rights you have when this type of action is requested. You have the following rights:

a The right to a trial by jury pursuant to A.R.S. § 14-1306. A.R.S. § 14-1306 states as follows: "(A) If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury. (B) If there is no right to trial by jury under subsection A of this section or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only." Be advised that if the Petition is granted, the fees and expenses related to the proceeding, including any additional expenses associated with a jury trial, will be paid from your funds/estate. If a jury trial is not requested and/or required, then the hearing will take place in front of a judge without a jury.

b The right to select an attorney of your choosing. I have been appointed by the Court to represent you, but you may hire a different attorney at your own expense. I am providing you with a copy of my *Notice of Basis of Compensation* for my rates. My fees/costs may be paid from your estate/funds. If it is not possible for you to pay my fees/costs, the Court will provide me with compensation for my fees/costs. If the Petition is denied, the Court may order the Petitioner to pay my fees/costs and other expenses related to the proceeding.

c The right to appear in Court (which is sometimes allowed by phone) and have any person you wish to be present with you.

I also am required to explain the court process:

- The Court has appointed/will appoint a medical examiner to evaluate your capacity and an investigator to interview you and others as appropriate. The medical examiner and investigator will submit written reports to the Court about their findings/observations.

- At the hearing, the Petitioner will be given an opportunity to offer evidence/testimony. I can question the Petitioner's witnesses through a process called cross-examination. You will also be given the opportunity to offer evidence/testimony and you can testify yourself.

- If you oppose any of the relief requested in the Petition, you must file with the Court a written response at least 7 calendar days before the hearing date or you or your attorney must attend the hearing. I can assist with preparing the written response/objection if one is necessary. If you do not file a timely response or attend the hearing, then the Court may grant the relief requested in the Petition unless otherwise prohibited by law and without further proceedings.

- If the Court grants the Petition and appoints a guardian and/or conservator for you, the Court will issue Orders similar to the enclosed copies of the *Order of Appointment of Permanent Guardian and Conservator of an Adult* and the *Order to Guardian and Conservator and Acknowledgement and Information to Interested Persons*.

If you have any questions or would like to discuss the Petition, please do not hesitate to contact me at 520-623-3526.

Sincerely,

ATTORNEY
Attorney at Law

ENCL:
Notice of Basis of Compensation
Order to Guardian and Conservator and Acknowledgement and Information to Interested Persons
Order of Appointment of a Permanent Guardian and Conservator of an Adult

ACKNOWLEDGMENT OF RECEIPT OF THIS LETTER:

_____
Client Signature

Name of Person Filing Document:
Address:
City, State, Zip Code:
Telephone Number:
Attorney Bar Number (if applicable):
Licensed Fiduciary Number (if applicable):
Representing [ ] Self or [ ] Attorney for:

THE SUPERIOR COURT OF ARIZONA, COUNTY OF PIMA

In the Matter of the Guardianship/ Conservatorship of: [NAME] DOB: [DATE OF BIRTH] An Adult Alleged to be Incapacitated.	NO. [CASE NUMBER] ATTESTATION OF COURT APPOINTED COUNSEL [JUDGE]

Pursuant to A.R.S. § 14-5111(B), I, [NAME], Court Appointed Attorney, hereby attest that I have fulfilled the requirements prescribed in A.R.S. § 14-5111.

DATED: _____

_____
[NAME]
Court Appointed Attorney

Name of Person Filing Document:
Address:
City, State, Zip Code:
Telephone Number:
Attorney Bar Number (if applicable):
Licensed Fiduciary Number (if applicable):
Representing [ ] Self or [ ] Attorney for:

THE SUPERIOR COURT OF ARIZONA, COUNTY OF PIMA

In the Matter of the Guardianship/ Conservatorship of: [NAME] DOB: [DATE OF BIRTH] An Adult Alleged to be Incapacitated.	NO. [CASE NUMBER] DECLARATION OF INABILITY OR UNWILLINGNESS TO APPEAR [JUDGE]

I, [NAME], declare under penalty of perjury that I am unable or unwilling to appear in Court in person or by virtual means.

DATED: _____

_____

[NAME]

ATTORNEY WORK PRODUCT
FOR DISCUSSION PURPOSES ONLY

Shannon M. Derksen, Esq.
State Bar #034139 / PCC #67086
FLETCHER STRUSE
FICKBOHM & WAGNER PLC
6750 N. Oracle Road
Tucson, Arizona 85704
Telephone: (520) 575-5555
sderksen@tucsontrusts.com
Attorneys for Petitioner

SUPERIOR COURT OF ARIZONA, PIMA COUNTY

In the Matter of the Guardianship and Conservatorship of: {WARD} Date of Birth: {DOB} An Adult.	NO. _____ **NOTICE OF HEARING** Hon_____

NOTICE IS GIVEN that the Court will consider the Petition for Appointment of Permanent Guardian and Conservator of an Adult, on _____ **at** _____**a.m/p.m.**, Pima County Courthouse, located at 110 West Congress, Tucson, Arizona, in **Division** ___, the **Honorable** _____ presiding.

☐ This is a telephonic appearance hearing. The parties are directed to appear at the hearing by calling as follows: **520-222-1111 - Enter Code** _____

☐ This is an in-person appearance hearing (not telephonic).

ATTORNEY WORK PRODUCT
FOR DISCUSSION PURPOSES ONLY

Dated: _____.

FLETCHER STRUSE
FICKBOHM & WAGNER PLC

By:_____
Shannon M. Derksen, Esq.
Attorneys for Petitioners

YOU ARE RESPONSIBLE FOR PROTECTING YOUR INTERESTS.

This is a legal notice; your rights may be affected. **ESTE ES UN AVISO LEGAL. SUS DERECHOS PODRIAN SER AFECTADOS.**

You are not required to attend this hearing except as provided in A.R.S. § 14-5401(D). However, if you oppose any of the relief requested in the petition that accompanies this notice, you must file with the court a written response at least 7 calendar days before the hearing date or you or your attorney must attend the hearing. Any written response must comply with Rule 15(e) of the Arizona Rules of Probate Procedure. If you do not file a timely response or attend the hearing:

(1) the court may grant the relief requested in the petition unless otherwise prohibited by law and without further proceedings, and

(2) you will not receive additional notices of court proceedings relating to the petition unless you file a demand for notice pursuant to Title 14, Arizona Revised Statutes.

NOTICE OF RIGHT TO TRIAL BY JURY:

PURSUANT TO A.R.S. §14-5309 AND §14-5405 NOTICE IS HEREBY GIVEN THAT THE ALLEGED INCAPACITATED PERSON HAS THE RIGHT TO DEMAND A TRIAL BY JURY UNDER A.R.S. § 14-1306 A:

A.R.S. § 14-1306. Jury trial

A. If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

B. If there is no right to trial by jury under subsection A of this section or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

ATTORNEY WORK PRODUCT
FOR DISCUSSION PURPOSES ONLY

Shannon M. Derksen, Esq.
State Bar #034139 / PCC #67086
FLETCHER STRUSE
FICKBOHM & WAGNER PLC
6750 N. Oracle Road
Tucson, Arizona 85704
Telephone: (520) 575-5555
sderksen@tucsontrusts.com
Attorneys for Petitioner

SUPERIOR COURT OF ARIZONA, PIMA COUNTY

In the Matter of the Guardianship and Conservatorship of: {WARD} Date of Birth: {DOB} An Adult.	NO. GC_____ **LETTERS OF GUARDIAN AND CONSERVATOR OF AN ADULT** Hon._____

_____PETITIONER_____ is hereby appointed guardian of **_____WARD_____** and is granted the general powers of a guardian pursuant to Arizona Revised Statutes §14-5312, and 5312.01(A), subject to **no restrictions.**

_____PETITIONER_____ is hereby appointed Conservator of **_____WARD_____**'s estate, pursuant to court appointment, subject to **no restrictions.**

WITNESS: _____.

CLERK OF THE SUPERIOR COURT

_____
Deputy Clerk

ATTORNEY WORK PRODUCT
FOR DISCUSSION PURPOSES ONLY

Shannon M. Derksen, Esq.
State Bar #034139 / PCC #67086
FLETCHER STRUSE
FICKBOHM & WAGNER PLC
6750 N. Oracle Road
Tucson, Arizona 85704
Telephone: (520) 575-5555
sderksen@tucsontrusts.com
Attorneys for Petitioner

SUPERIOR COURT OF ARIZONA, PIMA COUNTY

In the Matter of the Guardianship and Conservatorship of: _____WARD_____ Date of Birth: {DOB} An Adult.	NO. GC _____ **ORDER APPOINTING GUARDIAN AND CONSERVATOR FOR AN ADULT** Hon._____

The Petition for Appointment of Permanent Guardian and Conservator for an Adult having been considered, the subject person who is also in need of protection being represented, and ☐ present in person/by virtual means or ☐ not present, presence having been found to be not in his best interests and waived by his counsel ,and the court specifically finding that the evidence of his inability or unwillingness to attend is sufficient, and that no substantial rights will be prejudiced by his absence:

THE COURT FINDS:

1. Petitioner is entitled to file the petition under A.R.S. §§14-5303(A) and 14-5404(A).

2. Venue in this county is proper.

3. Notice has been given and service has been made as required by law. Notice of the right to trial by jury has been provided as stated in the notice of hearing and has been read into the court record pursuant to A.R.S. §5405 C.

4. The written reports of the court-appointed investigator and medical examiner have been submitted to the court. The court-appointed attorney has complied with the provisions of A.R.S. §14-5111.

5. The _____WARD_____ is an incapacitated person and appointment of a guardian is necessary to provide for his demonstrated needs. This has been shown by clear and convincing evidence.

6. Appointment of a conservator is necessary because _____WARD_____ meets the conditions of A.R.S. §14-5401(2). This has been shown by clear and convincing evidence.

7. _____PETITIONER_____ is qualified to serve as guardian of _____WARD_____ and has priority for appointment under A.R.S. §14-5311.

8. _____PETITIONER_____ is qualified to serve as conservator of _____WARD_____'s estate and is entitled to appointment under A.R.S. §14-5410.

9. Bond is required in the amount of $_____ for the conservator.

IT IS THEREFORE ORDERED:

A. _____PETITIONER_____ is appointed permanent guardian and conservator of _____WARD_____.

B. The Clerk of Court shall issue Letters of Guardianship and Conservatorship as follows:

_____PETITIONER_____ is hereby appointed guardian of _____WARD_____ and is granted the general powers of a guardian pursuant to Arizona Revised Statutes §14-5312, and 5312.01(A), subject to no restrictions.

_____PETITIONER_____ is appointed Conservator of the subject person's estate, pursuant to court appointment, subject to no restrictions.

C. The guardian has the authority to withhold or withdraw life sustaining treatment, including artificial food and fluid.

D. The ward's privilege to obtain or retain a driver license ☐ is ☐ is not suspended, pursuant to A.R.S. §14-5304.01. The ward's right to vote ☐ is ☐ is not suspended, pursuant to A.R.S. §14-5304.02.

E. The guardian is vested with authority specifically intended to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as currently codified as 42 USC 1320d, with regulations implementing its effect at 45 CFR 160-164, as they now exist and as they may be amended. Accordingly, any health care provider or other entity required by that law to maintain medical records confidentially is expressly authorized to provide any and all such information, whether past, present or future, to the guardian without restriction or limitation except that the provision of information shall be for the scope of this protective proceeding only.

F. The court-appointed investigator and medical examiner previously appointed are discharged.

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G. The court-appointed attorney ☐ is discharged ☐ is not discharged, the court having found that the interests of the incapacitated person require continuing representation by counsel.

H. A non-appearance hearing is set for _____ to confirm the filing of bond.

I. The Conservator shall file an Inventory, Budget and Credit Report within ninety (90) days of appointment.

J. A non-appearance hearing is set for _____ to confirm the filing of the Inventory, budget and credit report.

K. The guardian shall report to the court annually on a date to be set by the court.

L. The conservator shall file an annual account. The account year end shall be _____. A non-appearance hearing is set for _____, to review the account and the guardian's annual report.

M. The conservator shall record his Letters of Guardian and Conservator in this county and any county in which the ward holds real estate and file recorded Letters with the Clerk of the Superior Court.

N. The guardian and conservator shall immediately notify the court of any change of address of the guardian, conservator, or the ward.

O. Pursuant to Ariz. R. Civ. Proc., Rule 54(c), no further matters remain pending: this is a final appealable order.

ATTORNEY WORK PRODUCT
FOR DISCUSSION PURPOSES ONLY

DATED: _____.

_____
Judge / Court Commissioner

WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL THE LETTERS OF APPOINTMENT HAVE BEEN ISSUED BY THE CLERK OF THE SUPERIOR COURT

14-5721. Definitions

In this article, unless the context otherwise requires:

1. "Adult" means an individual with a disability who is at least eighteen years of age.

2. "Disability" means a physical or mental impairment that substantially limits one or more major life activities, as defined in section 41-1492.

3. "Interested person" means any person who is interested in the affairs or welfare of an adult who has entered into a supported decision-making agreement.

4. "Intimidate" includes threatening to deprive an adult of food, nutrition, shelter or necessary medication or medical treatment.

5. "Supported decision-making" means a process of supporting and accommodating an adult to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, support and medical care the adult wants to receive, whom the adult wants to live with and where the adult wants to work, without impeding the adult's self-determination.

6. "Supported decision-making agreement" means an agreement between an adult and a supporter that is entered into pursuant to this article.

7. "Supporter" means a person who is at least eighteen years of age and who enters into a supported decision-making agreement with an adult.

14-5722. Supported decision-making agreements; scope; rights and obligations; intimidation; deception; petition; termination; form

A. An adult, without undue influence or coercion, may voluntarily enter into a supported decision-making agreement with a supporter under which the adult authorizes the supporter to do any or all of the following:

1. Provide supported decision-making, including assisting the adult in understanding the options, responsibilities and consequences of the adult's life decisions, without making those decisions on behalf of the adult.

2. Assist the adult in accessing, collecting and obtaining from any person information that is relevant to a given life decision, including medical, psychological, financial, education or treatment records.

3. Assist the adult in understanding the information described in paragraph 2 of this subsection.

4. Assist the adult in communicating the adult's decisions to appropriate persons.

B. A supporter is not a surrogate decision-maker for the adult and does not have the authority to sign legal documents on behalf of the adult or bind the adult to a legal agreement.

C. The supported decision-making agreement shall set forth the rights, roles, duties, limitations and obligations of both the adult and the supporter who are entering into the agreement.

D. If the supporter intimidates or deceives the adult in procuring the supported decision-making agreement or any authority provided in the supported decision-making agreement, the supporter may be subject to criminal prosecution and civil penalties as otherwise provided by law.

E. The supporter may not receive compensation as a result of the supporter's duties under a supported decision-making agreement. The supporter shall act without self-interest and shall avoid conflicts of interest.

F. A supported decision-making agreement must be signed by the adult and the supporter in the presence of two or more subscribing witnesses, who must be at least eighteen years of age, or a notary public, and the signature process is subject to the following requirements:

1. By witnessing the agreement, each witness or notary affirms that the witness or notary was present when the person dated and signed or marked the agreement, except as provided under paragraph 2 of this subsection, and that the person appeared to be of sound mind and free from duress at the time of execution of the agreement.

2. If a person is physically unable to sign or mark the agreement, the witness or notary shall verify on the document that the person directly indicated to the notary or witness that the agreement expressed the person's wishes and that the person intended to adopt the agreement at that time.

G. A supported decision-making agreement extends until:

1. Terminated in writing by either party or by the terms of the supported decision-making agreement.

2. At any time the adult becomes an incapacitated person as defined in section 14-5101.

3. On the appointment of a guardian pursuant to article 3 of this chapter.

H. The supported decision-making agreement shall be in substantially the following form:

Supported Decision-Making Agreement

This agreement is governed by the Arizona supported decision-making agreement statute section 14-5722, Arizona Revised Statutes. For the purposes of this agreement, "decision-maker" means an adult with a disability

who executes an agreement for the purpose of designating an individual to serve as the decision-maker's supporter when the decision-maker makes certain decisions that are listed in the agreement.

Purpose of Agreement

The purpose of the supported decision-making agreement is to support and accommodate a decision-maker to make informed decisions and choices about certain aspects of the adult's daily life.

Role of Supporter

To assist a decision-maker, a supporter may:

1. Assist the decision-maker with getting information to be able to understand available choices.

2. Assist the decision-maker in understanding choices so the decision-maker can make the best personal decisions.

3. Assist the decision-maker in communicating decisions to the right people and organizations.

Revocation or Termination of Agreement

A. The decision-maker or the supporter may revoke this agreement at any time.

B. This agreement terminates as a matter of law at any time the decision-maker becomes an incapacitated person as defined in section 14-5101, Arizona Revised Statutes.

C. This agreement terminates as a matter of law on the appointment of a guardian for any reason or purpose pursuant to title 14, chapter 5, article 3, Arizona Revised Statutes.

D. If either the decision-maker or supporter has questions about the agreement, the decision-maker or supporter should speak with a lawyer before signing this supported decision-making agreement.

Important Information for Supporters About

the Limits to this Agreement

A. You may not make a decision for or on behalf of the decision-maker.

B. Neither you nor any organization for whom you are employed or serve as a volunteer may receive any financial support, remuneration or compensation, either directly or indirectly, for or related to your services and role as a supporter to the decision-maker.

C. When you agree to provide support to an adult under this supported decision-making agreement, you have a duty to and you shall:

1. Act in good faith.

2. Act with loyalty to the decision-maker.

3. Act without self-interest.

4. Avoid conflicts of interest.

5. Stop serving as a supporter at any time that you question the capacity of the decision-maker to continue making decisions even with your support.

6. Stop serving as a supporter at any time that the supported decision-making agreement is revoked by the decision-maker or you, or the agreement ends as a matter of law.

7. Respect the decision-maker's relationships with friends and family members and not attempt to isolate or alienate the decision-maker from those friends and family members.

APPOINTMENT OF SUPPORTER

I _____, (name of adult, (the "decision-maker")), am of sound mind and enter into this agreement voluntarily.

My disabilities are: (describe briefly)

_____

I choose _____ to be my supporter.

Supporter's address:_____

Supporter's telephone number:_____

Supporter's email address:_____

SUPPORTER'S ROLE AND LIMITATIONS ON THAT ROLE

My supporter may help me with life decisions about each of the following which I have marked with an "X" (check those that apply):

Yes ___ No ___ Obtaining food, clothing and a place to live.

Yes ___ No ___ My physical health and health services.

Yes ___ No ___ My mental health and mental health services.

Yes ___ No ___ Managing my money or property.

Yes ___ No ___ Getting an education or other training.

Yes ___ No ___ Choosing and maintaining my services and supports.

Yes ___ No ___ Finding a job.

Yes ___ No ___ Other: _____ (specify)

Yes ___ No ___ My supporters may see my private health information under the Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191) if I first choose to provide a signed release.

Yes ___ No ___ My supporters may see my educational records under the Family Educational Rights and Privacy Act of 1974 (20 United States Code section 1232g) if I first choose to provide a signed release.

This agreement is effective when signed and will continue until _____ (date) or until my supporter or I end the agreement or the agreement ends by operation of law, including the appointment of a guardian for me.

DECISION-MAKER'S SIGNATURE

Signed this _____ (day) of _____ (month), _____ (year)

_____ _____

(signature of decision-maker) (printed name of decision-maker)

CONSENT OF SUPPORTER

I (name of supporter), _____ consent to act as a Supporter under this agreement.

_____ _____

(signature of supporter) (printed name of supporter)

This agreement must be signed in front of two

witnesses or a notary public

_____ _____

(witness 1 signature) (printed name of witness 1)

_____ _____

(witness 2 signature) (printed name of witness 2)

or

Notary Public

State of _____

County of _____

This document was acknowledged before me on _____(date) by

_____ _____

(name of decision-maker) (name of supporter)

_____ _____

(signature of notary) (printed name of notary)

(seal, if any, of notary)

My commission expires: _____

WARNING: PROTECTION FOR THE DECISION-MAKER WITH A DISABILITY

If a person who receives a copy of this supported decision-making agreement or who is aware of the existence of this agreement has cause to believe that the decision-maker is being abused, neglected or exploited by the supporter, the person shall report the alleged abuse, neglect or exploitation to the department of economic security's online reporting system by calling the adult protective services, adult abuse hotline or by calling the local police department.



Changes for Court Appointed Counsel and Supported Decision Making: Changes to the Law, Possibilities and Pitfalls

Elizabeth N. R. Friman, Fleming & Curti, PLC

Court Appointed Counsel

- Essential and sometimes taken for granted
- Rewarding and often burdensome
- Training
- New Rules
- New Case!
- Personal Experience

FLEMING & CURTI PLC

A.R.S. § 14-5111: Duties of appointed attorney

- Attorney can be found in contempt!
- Visit “No later than” 7 calendar days before hearing
- Details about the required discussion with the client
- Explain Court process and timelines, and provide copy of order
- Attorney must attest to the Court that he/she fulfilled these duties, or explain why not

FLEMING & CURTI PLC

A.R.S. § 14-1306: Jury Trial and Rule 29

- Jury trials in probate court? WHAT?!
- Court Appointed Attorney must provide notice of the right to trial by jury
- Even if the right to trial by jury is waived, the court may still call a jury to decide any issue of fact (verdict would be advisory).
- Additional burden on petitioner, must include reference on notice that there is a right to trial by jury.
- What about ER 1.1?

FLEMING & CURTI PLC

A.R.S. § 14-5401: Protective proceedings; fingerprinting

- Applies in conservatorship cases
- Alleged incapacitated person must appear before the court in person or virtually.
- If the person does not appear, then their inability or unwillingness must be presented to the court and, they must sign a declaration declaring their inability or unwillingness.
- If someone is incapacitated, how can he/she sign a declaration?

FLEMING & CURTI PLC

ER 1.14: Client with Diminished Capacity

- The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client
- Consider the client's diagnosis
- Representation that is collaborative and assistive vs. formulaic
- How do the new rules create ethical challenges for court appointed counsel?

FLEMING & CURTI PLC

Assistive Techniques for Counsel

- When working with a client who has diminished capacity, there are techniques to try and strengthen engagement with the client that can be helpful.
- Consider when and where you meet
- Sensory aids (hearing aids, quiet rooms, etc.)
- Practical Skills: be clear and go slow

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

- ABA/APA Commission and Handbooks
- Assessment Algorithm for Lawyers
- Capacity Worksheet for Lawyers

FLEMING & CURTI PLC

Where do we go from here?

- The role of court appointed counsel is essential
- Consider the practical experience as part of your own professional development
- Embrace the new rules and develop letters and form pleadings that make documentation easier

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A.R.S. § 14-5721 and 14-5722: Supported Decision Making

- Went into effect on January 1, 2024
- Added A.R.S. § 14-5721 and A.R.S. § 14-5722
- Form agreement provided
- Adult who is 18 years or older may enter into a supported decision-making agreement.
- Agreement can be revoked or terminated. Terminates on the appointment of a guardian or if decision-maker becomes an incapacitated person as defined in A.R.S. § 14-5101.

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A.R.S. § 14-5721 and 14-5722: Supported Decision Making

- How is an agreement different than a power of attorney?
- Agreement does not give supporters the authority to make decisions on behalf of the individual. It only allows them to assist in the decision-making process.
- Will supported decision-making agreements reduce the need for guardianships?
- Potential pitfalls: Undue influence, conflicts of interest, reliance by third-parties and potential for abuse

FLEMING & CURTI PLC

Questions

Elizabeth N. R. Friman

Fleming & Curti, PLC

Email: Friman@flemingandcurti.com

Phone: (520) 622-0400

FLEMING & CURTI PLC

DRAFTING FLEXIBILITY INTO REVOCABLE AND IRREVOCABLE TRUSTS

CLE BY THE SEA
July 8, 2024

Debra J. Polly
Fennemore.
dpolly@fennemorelaw.com
(602) 916-5309

In a world marked by constant change, the importance of drafting a resilient estate plan cannot be overstated. Life is unpredictable. Personal circumstances, family dynamics, financial conditions, and laws governing estates and trusts can change rapidly. A rigid estate plan might not be able to accommodate these changes, potentially leading to unintended consequences. A flexible estate plan, however, can adapt, ensuring that your clients' wishes are honored and their loved ones are protected no matter what the future holds.

I. Drafting Issues Specific to Revocable Trusts

A. Ensure that the trust agreement is amendable and revocable by the settlor(s).

1. Subject to any limitations set forth in the terms of the trust, a settlor may revoke or amend the trust unless the terms of a trust expressly provide that the trust is irrevocable. A.R.S. § 14-10602(A).

2. Notwithstanding Arizona law, a revocable, living trust should contain a statement that clearly indicates the settlor's intent.

SAMPLE LANGUAGE: "Settlor reserves the right to revoke or amend this Trust Agreement or any trust hereunder. This right is exercisable only by an acknowledged instrument in writing. After Settlor's death, neither this Trust Agreement nor any trust hereunder may be revoked or amended except as expressly provided elsewhere herein."

B. Provide for the possibility of a separation or divorce.

1. If a revocable trust is created or funded by more than one settlor, and it includes community property, either spouse can revoke the trust concerning their own share of the community property independently. However, any amendments to the trust require the joint action of both spouses. A.R.S. § 14-10602(B)(1).

2. If a revocable trust is created or funded by more than one settlor and includes property other than community property, each settlor can revoke or amend the trust concerning the portion of the trust property attributed to their contribution. A.R.S. § 14-10602(B)(2).

3. Notwithstanding Arizona law, a revocable living trust with more than one settlor should contain a statement that clearly indicates the settlors' intent.

SAMPLE LANGUAGE: "**Revocation and Amendment**. Right to Amend. While both Settlors are living, any of the terms of this Trust Agreement may be amended by written instrument signed by both Settlors and delivered to the Trustee. In addition, while both Settlors are living, either Settlor may, by written instrument signed by the Settlor and delivered to the Trustee and the other Settlor, amend any of the terms of this Trust Agreement insofar as they govern the administration and distribution of such Settlor's interest in the Trust Estate after his or her death. After the death of the Deceased Settlor and during the life of the Surviving Settlor, the Surviving Settlor shall have the right to amend the Survivor's Trust. Provided, however, no amendments shall substantially change the duties and responsibilities of the Trustee without its consent. Upon the death of the Surviving Settlor, this Trust Agreement shall be unamendable. Right to Revoke. While both Settlors are living, the Settlors may revoke this Trust Agreement, in whole or in part, by written instrument signed by both Settlors and delivered to the Trustee. Upon revocation, the Trustee shall deliver to the Settlors all of the Trust Estate or the revoked portion of the Trust Estate. After the death of the Deceased Settlor and during the life of the Surviving Settlor, the Surviving Settlor shall have the right to revoke the Survivor's Trust, in whole or in part, by written instrument signed by the Surviving Settlor and filed with the Trustee. Upon the death of the Surviving Settlor, this Trust Agreement shall be irrevocable."

C. Provide for the possibility of incapacity.

1. A settlor's powers to revoke, amend, or distribute trust property can be exercised by an agent under a power of attorney only if explicitly allowed by the trust's terms or, if not prohibited by the trust, expressly authorized by the power of attorney. If the agent lacks such authorization and the trust does not forbid a conservator from acting on behalf of the settlor, these powers can be exercised by the settlor's conservator with court approval. Similarly, if no agent is authorized and no conservator is appointed, the settlor's guardian may exercise these powers with court approval. A.R.S. § 14-10602(E).

2. Thus, in Arizona, an agent acting under a durable power of attorney can be granted the authority to amend an incapacitated person's estate plan, including a revocable living trust (if not prohibited by the terms of the trust). However, this is not uniformly the case across all states. Consequently, an alternative approach for consideration is the inclusion of a trust protector provision that would allow a trust protector to amend the settlor's revocable living trust in the event of the settlor's incapacity. The capability of a trust protector to modify an incapacitated settlor's estate plan is especially crucial in the current climate of estate tax uncertainty.

D. Draft for Flexibility in Gifts to Spouse

1. Disclaimer Trust. A disclaimer trust enhances the flexibility of an estate plan by allowing the surviving spouse to effectively manage and respond to changes in their personal circumstances, tax laws, and financial needs after the death of the trustor. With a typical disclaimer trust plan, all assets will fund the surviving spouse's revocable and amendable survivor's trust unless some or all of the deceased spouse's assets are disclaimed by the surviving spouse, in which case the disclaimed property trust is funded. The disclaimed property trust is essentially a bypass or credit shelter trust; however, the surviving spouse cannot be given a power of appointment over the remaining trust assets in order for the disclaimer to constitute a qualified disclaimer under Code § 2518.

a) A "wait and see" approach.

b) Useful for spouses with a combined estate at or less than twice the exclusion amount.

c) A simple, straightforward, and flexible alternative for certain clients.

d) If the surviving spouse does not disclaim assets in the full amount of the deceased spouse's exclusion amount, the filing of a Form 706, estate tax return, for the deceased spouse for portability purposes is highly recommended. Document the executor's decision not to file a Form 706 for portability with a letter or email to the executor and the client (if different).

e) The decision to disclaim must be made within 9 months of the death of the first spouse.

f) This approach may provide a full income tax basis adjustment upon the death of the surviving spouse with no estate tax cost.

g) Eliminates notice and reporting requirements to qualified beneficiaries of the bypass trust if no assets are disclaimed.

h) Deceased spouse's generation-skipping transfer tax exemption is forfeited to the extent that assets are not disclaimed.

i) If surviving spouse relies on portability rather than funding the disclaimed property trust, then Inflation adjustments to deceased spouse's exclusion amount are lost; appreciation in assets may eventually exceed deceased spouse's unused exclusion amount. Conversely, if assets are disclaimed and the disclaimed property trust is funded, then because the disclaimed property trust is not included in the surviving spouse's gross estate, all appreciation in the deceased spouse's assets (to the extent of the disclaimer) escape estate tax at the surviving spouse's death.

j) Allows the surviving spouse to completely restructure the estate plan after the death of the first spouse to die.

k) May not be viable for second marriage or other family situations.

2. QTIP-able Bypass Trust. A QTIP-able bypass trust, also known as a QTIP-eligible bypass trust, is a type of estate planning tool designed to provide flexibility in post-mortem tax planning. It combines features of a bypass trust (also known as a credit shelter trust) with the option to elect Qualified Terminable Interest Property (QTIP) treatment, thereby maximizing the use of the marital deduction and the estate tax exclusion.

a) The trust is structured to meet the QTIP trust requirements of Code § 2056(b)(7)(B). Thus, all income must be distributed to the surviving spouse in annual or more frequent installments and the surviving spouse is the only permissible beneficiary during their lifetime.

b) The trust provides income and potentially principal to the surviving spouse, but the remaining principal eventually passes to other beneficiaries (typically children) upon the surviving spouse's death.

c) A QTIP-able bypass trust works well if it is anticipated that the surviving spouse will need all of the income from the deceased spouse's assets.

d) The primary function of the bypass trust is to use the deceased spouse's estate tax exclusion. Assets in the bypass trust that are not subject to the QTIP election use the deceased spouse's estate tax exclusion, reducing the taxable estate of the surviving spouse. Assets placed in the bypass trust are not subject to estate tax upon the death of the surviving spouse.

e) The executor can elect to treat part or all of the assets in the bypass trust as QTIP property, qualifying for the marital deduction and deferring estate taxes until the death of the surviving spouse.

f) This flexibility allows the surviving spouse and executor to make tax-efficient decisions based on the estate's circumstances at the time of the first spouse's death.

3. Clayton QTIP (Qualified Terminable Interest Property) Trust. The Clayton QTIP trust offers additional flexibility in estate planning by allowing post-mortem decision-making regarding the allocation of the estate between different types of trusts. This flexibility can help optimize tax outcomes and address the financial needs of the surviving spouse and other beneficiaries more effectively.

a) The deceased spouse's assets initially pass to a trust established for the surviving spouse's lifetime benefit, designed to satisfy QTIP Trust rules, requiring all income to be paid to the surviving spouse for life. However, this trust also authorizes the decedent's personal representative to elect whether all or only a portion of the decedent's assets should pass to the QTIP Trust. Any portion not elected for the QTIP Trust is then directed to a

non-marital trust share, such as a conventional bypass trust, which may also be established for the survivor's lifetime benefit.

b) This allows the personal representative of the decedent's estate to decide whether to fund a bypass trust, utilizing the decedent's available exclusion amount.

c) On the other hand, if the personal representative concludes that the married couple's combined assets are unlikely to ever exceed their combined exclusion amount, they may choose to leave all of the decedent's assets in the QTIP Trust and elect portability.

d) Unlike the QTIP-able bypass trust option, the assets not subject to the QTIP election under a Clayton election could fund a bypass trust that provides only for discretionary income to the surviving spouse and that has other beneficiaries, such as the settlor's children.

e) There is a concern that if the surviving spouse or one of the remainder beneficiaries is acting as the executor, then a general power of appointment might be attributed to such person as a result of the potential to shift beneficial interests, causing adverse tax consequences.

f) Until this concern is addressed by the IRS or Congress, an independent third party should be named as the executor for the purpose of making the Clayton QTIP election.

E. Plan for Qualified Disclaimers. Aside from the disclaimed property trust discussed above with respect to the surviving spouse, a flexible estate plan should also anticipate disclaimers of some or all property by other beneficiaries.

1. Permissible Adjustments to the Original Plan. Disclaimers allow a wealthy beneficiary to make a transfer to other beneficiaries without gift tax consequences or, if so drafted, to allow the assets to pass to a charity, with possible resulting estate tax savings.

2. Elimination of a Trust. If the beneficiary who is entitled to receive all income for life disclaims this interest, the remainder interest in the trust is accelerated. This results in the trust being distributed to the remainder beneficiaries, as the trust provisions call for termination following the death of the life tenant.

3. Adjusting Shares. An equal division of assets among children is often desirable. However, in cases where one child is extremely wealthy, the typical disclaimer process, which would transfer the disclaiming child's share to their own children, might not be the preferred outcome. Including a provision in the document stating that if Child A disclaims, the assets will pass to Child A's siblings, allows the parent to defer to the wealthy child the decision on whether the

parents' plan should divide the estate equally or instead favor the children with fewer assets.

II. Trust Protector Provisions

A. Under Arizona law, a trust protector is anyone named in a trust instrument with powers similar to a power to (i) remove and appoint a trustee; (ii) modify or amend the trust instrument for any valid purpose or reason; (iii) modify or restrict the interests of any beneficiary of the trust; (iv) modify the terms of a power of appointment granted by the trust; or (v) change the applicable law governing the trust. A.R.S. § 14-10818(A).

B. Unless otherwise specified by the trust instrument, a trust protector is neither a trustee nor a fiduciary and is not liable as a trustee or fiduciary due to its actions or omissions when performing or failing to perform the duties of the trust protector under the trust instrument. Arizona law specifically restricts a trust protector from: (i) adding a new individual beneficiary or class of beneficiaries other than those provided for under the original trust instrument; or (ii) modifying the beneficial interest of a government unit in a special needs trust. A.R.S. § 14-10818(C), (D).

C. A trust protector has the powers given to it under the terms of the trust instrument. A.R.S. § 14-10818(B). The use of a trust protector is a way to enhance flexibility, particularly because the drafter can control the extent of the trust protector's powers according to the client's wishes. There may be a temptation to grant the trust protector broad powers to address potential future changes in circumstances, laws, or the needs of beneficiaries. However, this approach can be risky, if not reckless, and often the opposite strategy is more prudent. With a clear understanding of the trust's purposes, the settlor and the drafter should aim to reasonably anticipate which powers (i) would most effectively support the trust's objectives and (ii) are better entrusted to someone other than the trustee. Then, careful drafting will explicitly outline a trust protector's powers and duties.

D. Considerations for Choosing a Trust Protector

1. Impartial and Trustworthy. The trust protector must be impartial and have the settlor's and beneficiaries' best interests in mind. The trust protector should be trustworthy, ethical, and capable of making unbiased decisions.

2. Relevant Expertise. Depending on the trust's complexity, the trust protector might need legal, financial, or business expertise to handle specific issues that arise.

3. Availability and Willingness. The individual or entity should be willing to serve and have the time and availability to fulfill the duties of a trust protector.

4. Understanding of the Settlor's Intentions. The trust protector should have a clear understanding of the settlor's objectives, values, and wishes to ensure the trust is managed according to the settlor's intent.

5. Potential Conflicts of Interest. The chosen trust protector should have minimal risk of conflicts of interest that could affect its decision-making.

E. Choosing a Trust Protector

1. Family Members. A close family member might be chosen for their familiarity with the family dynamics and the settlor's intentions. However, they must be trustworthy and impartial to avoid conflicts of interest.

2. Trusted Friends. A long-time friend of the settlor, especially someone with a legal, financial, or business background, could serve as a trust protector. They should have a clear understanding of the settlor's goals and values.

3. Professional Advisors. Lawyers, accountants, or financial advisors who have a longstanding relationship with the settlor and an understanding of the trust's goals can be good candidates. Their professional expertise can be invaluable in making informed decisions.

4. Corporate Entities. Trust companies or professional fiduciary services can serve as trust protectors. They bring professional expertise and impartiality, but their services come with a fee.

5. Independent Third Parties. Individuals who are neither family members nor professional advisors but have relevant expertise and an impartial stance can be considered. This helps minimize potential conflicts of interest.

6. Combination. In some cases, a combination of the above can be used. For instance, a family member might serve alongside a professional advisor to balance personal knowledge and professional expertise.

F. Common Trust Protector Powers

1. Remove, add, and replace trustees.

2. Name successor trust protectors.

3. Amend the trust as to administrative provisions.

4. Modify the trust instrument to correct drafting errors.

5. Modify or amend the trust instrument to achieve favorable tax status or to respond to changes in the internal revenue code or state law, or the rulings and regulations under that code or law.

6. Amend the trust as to dispositive provisions, such as increasing, decreasing, modifying or restricting the interests of any beneficiary of the trust.

7. Amend the trust to modify the time at which a group trust is divided.

8. Add a power of appointment or modify the terms of a power of appointment granted by the trust.

9. Consent to the exercise of a power of appointment.

10. Change the situs and governing law of the trust.

11. Veto or direct trust distributions (especially useful in conjunction with a corporate trustee).

12. Veto or direct investment decisions.

13. Add or delete beneficiaries.

14. Determine whether an event of duress has occurred.

15. Resolve disputes between the trustee and beneficiaries.

16. Approve trustee accounts.

17. Terminate the trust.

G. Tailoring the Powers to Effectuate the Settlor's Intent.

The list above is simply a laundry list of common trust protector powers. The following explores examples of custom drafting of the trust protector powers to effectuate the settlor's intent.

1. The Trust Protector has the power to amend a trust to remove, add, and replace trustees; provided, however, that the Trust Protector is prohibited from adding, nominating, or appointing [the beneficiary of a trust as the sole trustee / a trustee who is related or subordinate to the beneficiary within the meaning of Code § 672(c), with the beneficiary being treated as the grantor for purposes of that Code section / the spouse of the beneficiary of a trust as the sole trustee].

2. The Trust Protector may, in its absolute discretion, modify a trust to allow a beneficiary to serve as a co-trustee or as the sole trustee of such beneficiary's trust [and to modify the distributive terms of such beneficiary's trust as necessary to prevent the inclusion of the assets of the trust in the beneficiary's gross estate for estate tax purposes].

3. The Trust Protector may modify or amend the powers of the Trustee; provided, however, that in no event may the Trust Protector modify or amend these powers in a manner that would have a result contrary to Settlor's intent as expressed in Section _____ of the Trust Agreement.

4. The Trust Protector may amend the administrative provisions of the trust as required by any corporate trustee as a condition to accepting appointment.

5. The Trust Protector has the power to amend a trust to modify the distribution provisions relating to any trust for the benefit of Settlor's issue to carry out Settlor's intent considering any change in circumstances.

6. The Trust Protector has the power to create, modify, or eliminate a beneficiary's income withdrawal right / principal withdrawal right.

7. The Trust Protector may, in its absolute discretion, amend a trust in order to qualify as either an electing small business trust or as a qualified subchapter S trust.

8. The Trust Protector may, in its absolute discretion, modify the distribution provisions of a trust based on the Trust Protector's subjective belief that the beneficiary is suffering from any form of substance abuse, is financially irresponsible, or is not a productive member of society.

9. The Trust Protector has the power to amend the trust in any manner as the Trust Protector deems advisable except that no distributee or beneficiary of the trust shall be a person other than a beneficiary as originally executed or a descendant of Settlor.

H. Additional Provisions to Consider for Trust Protectors

1. Include a succession plan for appointing successor trust protectors. Consider naming the person in a particular role instead of naming a specific individual to fill a vacancy.

2. If powers are listed without custom drafting, then list any limitations in the trust protector's powers (for example, a prohibition against adding a distributee or beneficiary that is not already named in the trust agreement or that is not a descendant of the settlor).

3. Clarify that the trust protector does not owe a fiduciary duty to the beneficiaries or to the trustee (or otherwise, if desired).

4. Clarify the extent of the trust protector's liability for their actions or omissions.

5. Include provisions for indemnifying the trust protector against legal claims arising from their duties, except in cases of gross negligence or willful misconduct.

6. Detail how the trust protector will be compensated (if applicable) and reimbursed for expenses.

7. Include a right to obtain trust information from the trustee.

8. If desired, specify the term length for the trust protector's service or the conditions under which the trust protector's role will automatically terminate.

9. Include a power to enforce the trust protector's actions.

10. Include a right for the trust protector to resign.

III. Powers of Appointment

Powers of appointment can significantly enhance the flexibility of an estate plan by allowing designated individuals to make decisions about the distribution of trust assets in response to changing circumstances.

A. Types of Powers of Appointment

1. General Power of Appointment. A general power of appointment is a power of disposition granted to an individual, known as the powerholder, allowing them to designate who will receive certain property or assets from an estate or trust. The power is "general" because it grants broad discretion to the holder to allocate the assets to virtually anyone, including themselves, their creditors, their estate, or the creditors of their estate. Although the general power of appointment provides maximum flexibility, the implications of a general power of appointment are:

a) Estate Tax Implications. Assets subject to a general power of appointment are included in the holder's estate for estate tax purposes. This can have significant tax implications, as the value of the appointed assets may be subject to estate taxes upon the holder's death.

b) Gift Tax Implications. The inter vivos exercise or release of a general power of appointment is a transfer of property that may be subject to gift tax under Code § 2514.

c) Income Tax Implications. The possession of a general power of appointment by a trust beneficiary, or its exercise by a powerholder creating a trust, can cause the trust to be classified as a "grantor trust" under Code §§ 671-679. This classification results in some or all of the trust's income being attributable to that beneficiary, powerholder, or another party.

d) Generation-Skipping Transfer Tax Implications. If the exercise of the general power of appointment results in a transfer directly to a skip person, the transfer may be subject to the GST tax. The person exercising the power is considered the transferor for GST tax purposes.

e) Creditor Access. Since the powerholder can appoint the assets to themself, creditors may have access to the assets subject to the power to satisfy any debts owed by the holder.

2. Limited (or "Special") Power of Appointment. In contrast to a general power of appointment, a limited power of appointment restricts the powerholder to distribute assets among a specified group of people or for certain purposes, which can provide targeted flexibility without some of the adverse tax consequences associated with a general power of appointment. Specifically, a limited power of appointment excludes the ability of the powerholder to appoint the assets to themself, their estate, their creditors, or the creditors of their estate.

3. Lifetime Power of Appointment. A lifetime power of appointment is also known as an inter vivos power of appointment. The powerholder can exercise the

power at any point during their lifetime, providing immediate flexibility to adapt to changing circumstances.

4. Testamentary Power of Appointment. A testamentary power of appointment is one of the most common ways to build flexibility into an irrevocable trust. It allows the settlor to maintain control of the distribution of the assets until the powerholder's death, but then provides the powerholder with the ability to direct the distribution of assets at the powerholder's death (subject to the terms of the power).

B. Reasons for Creating Powers of Appointment

1. Ensuring Compliance with the Settlor's Intentions. Powers of appointment allow the estate plan to be dynamic and adaptable, ensuring that the settlor's intentions are honored even as circumstances change. If the original purposes of the trust become impractical or impossible to fulfill, powers of appointment can redirect the assets in a manner consistent with the settlor's broader goals.

2. Adapting to Changes in Beneficiary Circumstances. Beneficiaries' needs can change due to marriage, divorce, birth of children, career success, or financial hardship. Powers of appointment enable a designated person to adjust the distribution of assets to better align with these evolving needs. Moreover, if a beneficiary becomes disabled or requires special care, the power of appointment can be used to allocate additional resources or set up special needs trusts.

3. Responding to Changes in Tax Law. If the primary objective of the estate plan was to mitigate estate tax liability, and subsequent changes in tax laws render estate tax inconsequential, the powerholder can exercise the power in a manner that optimizes income tax advantages. This could include making outright distributions or establishing trusts that grant a general power of appointment.

C. Considerations for Drafting Powers of Appointment

1. Broad General Power of Appointment

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute all remaining principal of the Beneficiary's Trust, and any accrued or undistributed income, to or for the benefit of such one or more individuals or organizations, including Beneficiary's estate, in such proportions and subject to such trusts, powers and conditions as Beneficiary may appoint by Beneficiary's valid Last Will, expressly referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

NOTE that a "takers in default" provision is needed in any instance where a beneficiary is given a power of appointment, in the event that the power of appointment is not exercised.

2. Narrow General Power of Appointment. In instances where a broad general power of appointment is sought primarily for tax considerations, yet the creator intends to control the ultimate disposition of the remaining assets or to restrict the power's application to specific individuals, such as descendants or

another defined group, a narrow general power may be employed. In PLR 8836023, the IRS determined that a power of appointment allowing for appointments to the creditors of the power holder's estate, in isolation, qualifies as a general power of appointment.

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute all remaining principal of the Beneficiary's Trust, and any accrued or undistributed income, to such members of the group consisting of the creditors of the child's estate as Beneficiary may appoint by Beneficiary's valid Last Will, expressly referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

3. Conditional General Power of Appointment. A modified form of the narrow general power of appointment is the "conditional" general power of appointment, wherein the narrow authority is conferred solely in cases where assets are poised to transfer to a "skip" individual. This provision has the potential to cause inclusion of the assets in the powerholder's gross estate in instances where the trust would otherwise be subject to generation-skipping transfer tax.

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute so much or all of the remaining principal of the Beneficiary's Trust that is not exempt from generation-skipping transfer taxes, and any accrued or undistributed income, to such members of the group consisting of the creditors of the child's estate as Beneficiary may appoint by Beneficiary's valid Last Will, expressly referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

4. Formula General Power of Appointment. A "formulaic" general power of appointment would grant a general power of appointment only if the estate tax rate applicable to such assets is anticipated to be lower than the otherwise applicable GST tax rate.

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute the smallest fractional share of trust property, if any, that would reduce to the minimum the aggregate estate, inheritance, succession, and generation-skipping transfer taxes payable upon the Beneficiary's death, assuming no deductions are allowed with respect to such property for federal estate tax purposes, to such members of the group consisting of the creditors of the Beneficiary's estate as Beneficiary may appoint by Beneficiary's valid Last Will, expressly referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

5. Broadest Limited Power of Appointment. The broadest limited power of appointment is a power of disposition that allows the power holder to designate who will receive certain trust assets or property, but with the necessary restrictions that prevent it from being a general power of appointment. The power of disposition must exclude the powerholder, their estate, their creditors, and the creditors of their estate. The broad limited power of appointment provides a balance between giving the powerholder significant control over asset

distribution and maintaining necessary restrictions to prevent adverse estate tax consequences.

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute all remaining principal of the Beneficiary's Trust, and any accrued or undistributed income, among any person(s) or organization(s) other than the Beneficiary, the Beneficiary's estate, the Beneficiary's creditors, and the creditors of the Beneficiary's estate as Beneficiary may appoint by Beneficiary's valid Last Will, expressly referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

6. Narrowing the Limited Power of Appointment. Narrowing a limited power of appointment involves placing specific restrictions and conditions on how and to whom the powerholder can allocate the trust assets. This ensures that the power is exercised in a controlled and predictable manner, aligned with the settlor's intentions and objectives. The following are some strategies to narrow a limited power of appointment:

a) Define Specific Classes of Appointees. Limit the powerholder's authority to appoint assets to certain groups of people or entities. For example:

(1) Family Members. Restrict the power to appoint assets only to the powerholder's descendants, settlor's descendants, or specified relatives. Here, thoughtful drafting may create a "power to disappoint" and keep potential beneficiaries in line. For example, if the class of family members is expanded beyond the powerholder's descendants, for example, to any charitable organization or to the settlor's descendants (which may include the powerholder's siblings, nieces, and nephews), it can eliminate any sort of expectancy by the powerholder's children, encouraging them to be productive members of society, and maintain family harmony by providing other options beyond a perceived favoritism of one or more of the powerholder's descendants. That is, if only one of the powerholder's children is misbehaving, then his or her share can be redirected while the other children receive only the proportionate share that would otherwise be anticipated.

(2) Spouses. Will the spouse of the powerholder, or the spouses of descendants, be permissible appointees?

(3) Charitable Organizations. Allow appointments only to certain named charities or types of charitable organizations.

(4) Designated Individuals. Rather than creating a class of individual potential appointees, specify a list of individuals who can be potential appointees.

b) Limit the Manner in Which the Power May be Exercised. For example:

(1) Exercisable Only by Will. Requiring that a power of appointment be exercised only by will may ensure deliberate and final decision making and alignment with the powerholder's overall estate plan. However, the exercise of the power will then subject the powerholder's will to probate, which process has its own advantages and disadvantages.

(2) Require Specific Reference to the Power of Appointment. Requiring that a power of appointment be exercised only by a specific reference to the power provides a clear indication of the powerholder's intent to exercise the power and reduces the possibility of disputes or legal challenges by parties who might question the enforceability of the exercise.

(3) Power Limited to Modification of Manner of Distribution. A settlor may insist on a specific class of appointees but be open to the idea of flexibility in the manner of distribution. For example, upon the powerholder's death, the remaining assets of the powerholder's trust are distributed to the powerholder's descendants. However, a power is provided that that allows the powerholder to alter the distribution terms of the descendant's trust (for example, from mandatory distribution of income to discretionary distribution of income or vice versa or to add a 5 or 5 power), to alter the ages at which the descendant's trust is distributed or allowed to be distributed outright or to eliminate the withdrawal right altogether, to change successor trustee provisions of the descendant's trust, etc.).

(4) Other Limitations. The possibilities are endless. By way of example, the power of appointment may include the powerholder's spouse as a permissible appointee, but mandate that any power of appointment exercised in favor of a spouse must be in trust for the spouse, with required distribution of remaining trust assets to the powerholder's descendants upon the death, remarriage, or cohabitation of such spouse. In addition, the power of appointment may further limit the terms of the trust that will potentially be created for the powerholder's spouse, such as limiting distributions that are made to such spouse to income only, or principal only for conventional health care purposes, and providing that the spouse may not serve as sole trustee of the trust.

c) Set Purpose-Based Conditions. Establish conditions that dictate the purposes for which the assets can be appointed. For example:

(1) Educational Expenses. Limit distributions to cover educational costs for beneficiaries. "Educational expenses" can be further defined to include or exclude, for example, K-12 private education for descendants (assuming that such expenditures do not constitute a trustee's or beneficiary's legal obligation to support such descendants), travel for educational purposes, or technical training.

(2) Medical Expenses: Allow the power to be exercised for covering medical or health-related expenses.

(3) Support and Maintenance: Specify that assets can only be appointed to provide for the support and maintenance of beneficiaries.

d) Impose Temporal Restrictions. Create time-based limitations on when the power can be exercised. For example:

(1) Age Milestones. Restrict the exercise of the power until the beneficiary reaches a certain age.

(2) Event-Based Conditions. Allow the power to be exercised only upon the occurrence of certain events, such as marriage, graduation, or the birth of a child.

e) Limit the Amount or Proportion of Assets. Specify limits on the amount or proportion of the trust assets that can be appointed. For example:

(1) Percentage Limits. Restrict the power to appoint no more than a certain percentage of the trust assets to any one beneficiary (for example, the spouse of the powerholder).

(2) Percentage Remaining for Powerholder's Descendants. If the settlor is not opposed to the idea of giving the Powerholder a broad power of disposition but wants to ensure that at least some assets are distributed to the Beneficiary's descendants, the limited power of appointment can be tailored to provide the powerholder with virtually unlimited disposition power over a percentage of the assets.

SAMPLE LANGUAGE: "Upon the death of Beneficiary, the Trustee shall distribute assets having a value of up to 50% of the remaining principal of the Beneficiary's Trust, and any accrued or undistributed income, to or among any person(s) or organization(s) other than the Beneficiary, the Beneficiary's estate, the Beneficiary's creditors, and the creditors of the Beneficiary's estate as Beneficiary may appoint by Beneficiary's valid Last Will, expressly

referring to and exercising this power of appointment, which shall be exercisable by Beneficiary alone and in all events."

(3) Monetary Caps. Set a maximum dollar amount that can be appointed to any individual beneficiary.

f) Require Approval or Consent. Include a requirement that the powerholder must obtain approval or consent from another party, such as a trustee, protector, or advisory committee, before exercising the power.

g) Include Discretionary Guidelines. Provide guidelines that outline the criteria or considerations the power holder should take into account when exercising the power, such as the financial needs, health, or lifestyle of the beneficiaries.

Drafting Flexibility into Revocable and Irrevocable Trusts

Debra J. Polly
Fennemore.
dpolly@fennemorelaw.com
(602) 916-5309

AZCLE® from the State Bar of Arizona

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Drafting Issues Specific to Revocable Trusts

- Ensure that the trust agreement is amendable and revocable by the settlor(s)
- Provide for the possibility of a separation or divorce
- Provide for the possibility of incapacity
- Draft for flexibility in gifts to spouse
- Plan for qualified disclaimers

Trust Protector Provisions

- Arizona law considerations
- Considerations for choosing a trust protector
- Choosing a trust protector
- Common trust protector powers
- Tailoring the powers to effectuate the settlor's intent
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Powers of Appointment

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Ethics: Representing Multiple Family Members

1. What's the (potential) problem?

   Whenever you have more than one client, there is always the potential for a conflict to arise.

   If a conflict arises, the attorney must usually withdraw, leaving you with fewer or no clients.

   Even if you still have a client, you may be disqualified.

2. Ethical Considerations

   "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." *ER 1.7, cmt. [1].* Accordingly, conflicts of interest may prohibit representation even in unrelated matters.

   a. Confidentiality

   Confidentiality in common representation – There is none.

   > A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

   ER 1.7, cmt. [28].

   b. Vetting Potential Conflicts of Interest

   > *ER 1.7 Conflict of Interest: Current Clients*
   >
   > *(a) Except as provided in paragraph (b), a lawyer shall **not** represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*

> *(1) the representation of one client will be **directly adverse** to another client; or*
>
> *(2) there is a **significant risk** that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities **to another client, a former client or a third person** or by a personal interest of the lawyer.*
>
> *(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client **if each affected client gives informed consent, confirmed in writing**, **and**:*
>
> *(1) the **lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client**;*
>
> *(2) the representation is not prohibited by law; and*
>
> *(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.*
>
> *(c) A lawyer may not represent a party in asserting a claim against another party represented by a firm if the same person or entity holds an ownership interest, directly or indirectly, of 10 percent or more, or has managerial authority comparable to that of a partner, in the lawyer's firm and the other firm.*

(Emphasis added).

In summary, you may not represent multiple clients if they are directly adverse *or,* even if they are not directly adverse, there is a significant risk your ability to represent one client will be materially limited by your responsibilities to another client, former client, third person, or personal interest.

Third persons are often implicated where a fiduciary relationship is involved. Whether the lawyer is acting as the fiduciary (i.e., trustee, personal representative, corporate director), or has derivative fiduciary duties as a result of their representation of a fiduciary. *ER 1.7, cmt. [9].*

> *This means there are ethical considerations even when representing multiple family members in separate matters.*

A lawyer *may* represent multiple clients even if there is a conflict if (i) all affected clients provide informed consent in writing and (ii) the lawyer reasonably believes they can provide competent and diligent representation to each affected client.

So what does this mean for me?

i. Clearly identify your client(s). You should have engagement letters with each current and former client defining your client and the scope of your representation. Knowing your client is essential to determining if there is a conflict of interest. *ER 1.7, cmt. [2].*

ii. Not every conflict is consentable - have conflicts check procedures in place *before* you communicate with prospective clients. "A conflict of interest may exist before representation is undertaken, in which event the representation must be declined… Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule." *ER 1.7, cmt. [3].*

What representations are nonconsentable?

- ER 1.7(b)(3) prohibits representation of opposing parties in the same litigation even if the clients are willing to consent.
- A lawyer cannot represent a client with a conflict of interest even if informed consent could be obtained if in the circumstances the lawyer cannot reasonably conclude that they can provide competent and diligent representation. *ER 1.7, cmt. [14].*

Comment 6 to ER 1.7, excerpted below, illustrates this issue well.

iii. Identifying Conflicts of Interest: Directly Adverse - Lawyer represents A in Litigation 1. Lawyer may not represent another client that is adverse to A even in a wholly unrelated matter.

Why not? Because of the lawyer's duty of loyalty to their client. *ER 1.7, cmt. [6]:*

> The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

iv. Identifying Conflicts of Interest: Material Limitation – A conflict may exist between clients whose interests initially appear aligned. This comes up frequently in probate, i.e. representing co-trustees or multiple beneficiaries. "A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there

are substantially different possibilities of settlement of the claims or liabilities in question." *ER 1.7, cmt. [21].*

A conflict of interest among non-adverse clients may limit the lawyer's ability to recommend or advocate for all possible positions because of the lawyer's duty of loyalty to each individual client.

"The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *ER 1.7, cmt. [8].*

c. Getting Informed Consent

"Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." *ER 1.7, cmt. [17].*

Best practice – For representation of multiple clients in a single matter, you should disclose at the time of engagement "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." *ER 1.7, cmt. [17].* ***See Appendix A, Form Multi-Client Disclosure.***

A written disclosure to the client should be *in addition to* a verbal discussion.

> The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

ER 1.7, cmt. [19].

Consent Confirmed in Writing – Means a writing signed by the client, or an oral consent that the lawyer promptly records and transmits to the client (email is ok). *ER 1.7, cmt. [19] and ER 1.0(n).* "The writing need not take any particular form: it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks." *ER 1.7, cmt. [19].*

d. What to do if a Conflict Arises (AKA Further Illustrations on Why You Should be Careful in Agreeing to Represent Multiple Clients in the First Place)

Conflict Between Co-Clients –

Disagreement over best course of action – The lawyer's next step here is to engage in further discussion. The discussion should include the available course of action, including one in which they cannot agree and the lawyer must withdraw.

> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that **if the common representation fails** because the potentially adverse interests cannot be reconciled, **the result can be additional cost, embarrassment and recrimination**. Ordinarily, the lawyer will be **forced to withdraw from representing all of the clients** if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, **representation of multiple clients is improper when it is unlikely that impartiality can be maintained**. Generally, if the relationship between the parties **has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good**. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

ER 1.7, cmt. [27]. (Emphasis added).

Differences in Liability – If it becomes clear during the course of representation that the co-client are each liable, and a conflict arises between them such that the best defense of one may be to the detriment of the other, the lawyer should withdraw.

One Client Wants to Keep a Secret from the Other - The lawyer must discuss with the client that there is no confidentiality between you and them to the exclusion of the co-client. If you can cite your signed multi-client disclosure form, you may be better off. If the lawyer cannot secure the client's cooperation, the lawyer should disengage from that representation. Disclosure to the co-client despite the first client's is necessary if it has any affect on that client's interests.

Withdrawal - If the lawyer determines that withdrawal is necessary, the lawyer must usually withdraw from representing both/all co-clients in the matter. The lawyer may continue to represent one or more if the others give informed consent *and* the continued representation of one would not be adverse to the other. If the representation of one would necessarily be adverse to the other, the lawyer should withdraw from representation of all co-clients in the matter.

A lawyer is not required to withdraw if (i) the lawyer obtains informed consent in writing from the affected clients, and (ii) the lawyer can reasonably comply with their duties to their former client *and* adequately represent the remaining client(s). *ER 1.7, cmt. [4].*

"The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn." *ER 1.7, cmt. [5].*

Conflict Between Same Client's Multiple Capacities – In probate, it is not uncommon for lawyers to represent the same person as fiduciary of multiple entities, i.e. personal representative of an estate and trustee of a trust. It is possible a conflict may arise between the multiple capacities. Conflicts can be resolved by the consent of the interested persons, or court approval.

In the *CVR 1997 Irrevocable Trust* case, Valerie served as Trustee of three trusts. The first trust, the "CVR trust" named Carl as a beneficiary. In her capacity as trustee of the two other trusts, Valerie was a plaintiff suing Carl for financial exploitation of a vulnerable adult, seeking forfeiture of Carl's inheritance from the trusts. The adult died, triggering the CVR trust to be funded. As trustee of the CVR trust, Valerie had a duty to distribute the CVR trust, while Valerie as trustee of the other two trusts had a duty to pursue Carl for financial exploitation to recover trust property. Valerie petitioned the court for instructions on whether she should distribute the CVR trust to Carl or withhold distributions pending the outcome of the exploitation suit. The court ruled that Valerie should distribute the CVR trust unless a provisional order or injunctive relief was granted in the exploitation action. After a motion for injunctive relief was denied, Valerie distributed the CVR trust property to Carl. Valerie petitioned for approval of her final accounting of the CVR trust, to which Carl objected. The Court held that seeking instructions from the court resolves any potential conflict of interest. *In re CVR 1997 Irrevocable Tr.*, 202 Ariz. 174, 42 P.3d 605 (App. 2002).

3. Disqualification

A lawyer should not represent clients of varying capacities in the same matter, i.e. fiduciary and individual capacities. Although derivative duties are outside the scope of these materials, probate lawyers should be aware that as fiduciary counsel they owe derivative duties. These derivative duties usually prohibit representation of more than one capacity in a matter.

In the *Shano* case, an attorney represented a decedent's girlfriend in seeking to admit a holographic will to probate. This holographic will named girlfriend as a partial beneficiary.

Decedent's children and wife, from whom he was separated, sought to admit a competing will which named them as the beneficiaries. The court appointed a third party to serve as Special Administrator of the estate pending determination of the validity of the wills. The third-party fiduciary hired counsel, then hired girlfriend's attorney as co-counsel. Decedent's children and wife sought to disqualify girlfriend's attorney from representing the Special Administrator. The Court disqualified the attorney who then appealed. The Court of Appeals found that an attorney of a Special Administrator owes derivative duties to the successors of the estate, which included decedent's wife who was entitled to statutory allowances. This duty conflicted with the attorney's duty of loyalty ("single allegiance") to his existing client (girlfriend) in seeking to admit the holographic will to probate. *Matter of Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993).

Another interesting example appears in the *Fogelman* case. In *Fogelman*, the personal representative of a decedent's estate was an attorney, and that attorney was represented by his law firm. The firm also represented some of the creditors of the estate. The Court of Appeals determined that, because attorneys owe their clients a duty of single allegiance, or undivided loyalty, the Personal Representative could not fulfill that duty to his creditor clients *and* fulfill his duty of fairness and impartiality to all successors of the estate, in part because the estate was insolvent and therefore the successors were at odds. *In re Estate of Fogelman*, 197 Ariz. 252 (Ariz. Ct. App. 2000).

Appendix A: Multi-Client Representation Disclosure Form

[*Insert Firm Letterhead]*

SENT VIA E-MAIL & DOCUSIGN

[*Client First Name and Last Name*]
[*Address*]
[*Email address (if applicable)]*

Re: Multi-Client Representation Disclosure Statement

Dear [*Client First Names*]:

You have asked this law firm to perform services for you relating to the litigation matter concerning the [*Trust Name/Estate Name*]. We are pleased to do so. However, it is in your interest, and our ethical obligation to each of you requires that you fully understand the considerations involved in "multi-client representation".

Persons can have differing, and sometimes conflicting, interests and objectives regarding cases in which they are involved. For example, they may have different views on the strategy to be employed in pursuing litigation, they may have different strategies in bringing the litigation to a close, or they may have different views on settlement positions. These are just a few general examples. Each situation is unique.

If you each had a separate lawyer, you would each have an "advocate" for your position and would receive totally independent advice. Information given to your own lawyer is confidential and cannot be obtained by anyone else without your consent.

That is not the case when one firm advises multiple clients. We cannot be an advocate for one of you against the other(s). Information that one of you gives us relating to the litigation or probate administration cannot be kept from the other(s). If you ask us to serve you in both capacities, our effort will be to assist in both developing a coordinated overall litigation plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of the overall well-being of everyone affected, and in the best interests of the litigation as well as the probate administration. If an irreconcilable conflict arises, we may be required to withdraw from representing all co-clients in this matter.

After considering these factors, each of you must decide whether you wish us to represent you in connection with this matter. If you do, please review the statement that follows, sign it as indicated, and return this letter to us.

If at any time any of you wish to have the advice of separate counsel, you are completely free to do so.

Please contact me if you have any questions concerning this letter.

Very truly yours,

[*Attorney Name*]

Appendix A: Multi-Client Representation Disclosure Form

We have reviewed the foregoing disclosure statement. We realize that there are areas where our interests and objectives may differ and there may be areas of potential or actual conflict of interest between us in connection with the [*Trust Name/Estate Name*]. We understand that each of us may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of us requests that [*Insert Firm Name]* represent us in connection with the litigation matter involving the [*Trust Name/Estate Name*], and each of us consents to that multi-client representation. Each of us also understands and agrees that communications and information [*Insert Firm Name*] receives from either one of us relating to these matters may be shared with the other(s).

DATED: _____ _____

[*Client Name*]

DATED: _____ _____

[*Client Name*]



Intersection of Divorce and Probate

Topic One – Ethics

- Estate planning attorney represents married couple, learns of dissolution of marriage
  - Completed?
  - Pending?
- One partner contacts to update estate plan
  - Notification to other former client?
  - Conflict?
- Now-divorced couple seeks joint representation

Topic Two – Pending Divorce

- Estate planning attorney consulted by client in midst of dissolution
  - Estate planning permissible?
  - Transfer of assets into new trust
    - Separate assets
    - By beneficiary deed/designation
  - Severance of right of survivorship
  - Retirement plan beneficiary designations

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Topic Three – Former Couple

- No prior representation, but separately two divorced spouses seek estate planning
  - Conflict?
  - Disclosure and sharing of information
- Can divorced couple seek joint representation, e.g.: for preparation and management of a SNT for their shared child with a disability?

Topic Four – Divorced Clients

- Do you check on possible prior divorces? Do you need to see divorce decrees?
  - Beneficiary agreements on retirement accounts
  - Life insurance maintenance
- What about prenuptial or postnuptial agreements that might affect current or even prior estate planning?

Topic Five – Beneficiary Designations

- Divorce effects disinheritance (see A.R.S. §14-2802), but
  - ERISA pre-empts as to employer plans
  - Legal separation is not a divorce for these purposes
  - Divorced spouse might have reaffirmed estate plan
- Divorce also treats former spouse as having died or disclaimed (A.R.S. §14-2804(C))
  - What effect on named step-children?
  - What does “affinity” mean in A.R.S. §14-2804(I)(5)

Topic Six – Creditor's Claims

- Notice to creditors to ex-spouses?
- Child support claim held by now-adult child for unpaid support during minority, perhaps?
- *Future* child support might be a claim against the estate (with the same priority as the family allowance under A.R.S. §14-2404). *See* A.R.S. §25-327(C)
- Divorcing couple can modify statutory terms re: termination of obligation at death

2024 CLE by the Sea: Estate, Trust & Probate Track - Tuesday

July 9, 2024

8:15 AM - 12:30 PM

Coronado Island Marriott Resort & Spa
Coronado, CA

Tax Planning and Surviving Spouses: Tips and Considerations

Presented by: Nora L. Jones & Lauren R.G. Talkington

AZCLE® from the State Bar of Arizona

CLE by the SEA 2024

Agenda:

1. QTIP and Disclaimer Trusts
2. Filing an Estate Tax Return (Form 706)
3. When to Elect Portability
4. Trust Protectors
5. Petitions to Modify Trust

QTIP and Disclaimer Trusts

QTIP Trusts

QTIP Trust = Qualified Terminable Interest Property Trust

Remember:

- Must meet the requirements of IRC § 2056(b)(7)

  and

- Election made on timely-filed estate tax return (Form 706)

Disclaimer Trusts

Must be a qualified disclaimer under IRC § 2518:

- In writing
- Writing received by transferor of property within 9 months of date of death*
- No benefits received by disclaimant
- Must pass without direction of disclaimant

Filing an Estate Tax Return (Form 706)

Practical Considerations for 706

- "Snapshot" of the assets owed by decedent at date of death
  - If there is community property, total value of community is reflected
- When to File?
  - Standard Filing Deadline – 9 months from DOD
  - Extended Filing Deadline – 15 months from DOD

In order to make certain elections (e.g., QTIP), must have timely filed Form 706

When to Elect Portability

History of Portability

- Tax Relief, Unemployment Reauthorization and Job Creation Act of 2010
- American Taxpayer Relief Act of 2012
- IRC § 2010(c)(5)(A)
- Allows surviving spouse to claim deceased spouse's unused estate tax exclusion (DSUEA)
- Spouse's death on or after Jan. 1, 2011
- Part 6 of Form 706

Reasons Not to File

- No Estate Tax Due
- Under exemption amount
- Too expensive

Practice Tip: still advise!

Late Portability Election

- Private Letter Examples:
  - PLR201414001
  - PLR201607019
  - PLR201827003
  - PLR202150013
  - PLR202202008
  - PLR20237002
- Result:
  - Rev. Proc. 2022-32
  - Extends portability election to, on, or before 5th anniversary of first spouse's death

But What About…

- Potential sunset of Tax Cuts and Jobs Act
- January 1, 2026
  - Revert to 2018 exemption levels (~$7 million per person)

Trust Protectors

Helpful Powers

- Power to adjust income and principal
- Power to exercise power of appointment
- Plans for the unexpected, such as changed circumstances and spouse's later incapacity

Petitions to Modify Trust

When Available

- Consent (A.R.S. § 14-10411)
- Unanticipated Circumstances (14-10412)
- Correct Mistakes (14-10414)
- Achieve Tax Objectives (14-10416)
- Among others

Court Considerations

- Often combination of statutes employed (A.R.S. §§ 14-10411, -10412, -10414, -10416)
- **Practice Tip: Focus on trust purposes or settlor's intent**
  - Material purpose (14-10411)
  - Further trust purposes (14-10412)
  - Settlor's intent (14-10415)
  - "Not contrary to the settlor's probable trust intention" (14-10416)



Nora L. Jones
nlj@tblaw.com
(602) 255-6014

Nora Jones is a skilled trial attorney specializing in probate and trust litigation, elder law, guardianships and conservatorships, and estate and trust administration.

Nora co-authored Arizona Probate and Trust Administration and Litigation with Forms (Matthew Bender ed., 2023), a comprehensive summary and analysis of probate, trust, and related issues in Arizona. Nora is board-certified as a specialist in estates and trusts by the State Bar of Arizona, a distinguished honor held by less than 1% of Arizona attorneys, reserved for lawyers having substantial experience, the respect of their peers, and demonstrated special knowledge, skills and proficiency in this area of law. Nora further serves as an acting Judge Pro Tempore with the Superior Court of Maricopa County for the Probate Court division, on the Estate and Trust Advisory Commission for the State Bar of Arizona's Board of Legal Specialization, and on the Board of Directors for the Arizona Chapter of the National Academy of Elder Law Attorneys.



Lauren R.G. Talkington
ltalkington@swlaw.com
(520) 882-1263

Lauren's practice is concentrated in private client services, specifically estate planning, probate, estate and trust litigation, and business succession planning.

She has extensive experience in preparing estate planning documents to fit clients' needs, including wills, revocable or irrevocable trusts, as well as incapacity planning documents such as financial and health care powers of attorney. Lauren also provides advice regarding income, gift, and estate tax issues and has extensive experience in preparing taxable estate tax returns, portability estate tax returns, estate and trust income tax returns, as well as gift tax returns.

Lauren has widespread knowledge of fiduciary service matters, including matters of complex estate and trust administration, as well as focused knowledge of generation-skipping and fiduciary tax principles. Lauren also represents fiduciaries – family/friends, licensed professionals or corporate – as well as heirs, beneficiaries or other interested parties in estate, trust, and probate litigation.

Lauren is a Certified Estate and Trust Law Specialist through the State Bar of Arizona.

AZCLE® from the State Bar of Arizona

CLE by the SEA 2024

Questions?

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Tax Planning for Surviving Spouses: Tips and Best Practices

Additional Resources:

How To Avoid Faulty Advice On IRS Form 706 And The Portability Election (forbes.com)

Directed Trusts and Arizona Law

Presented by Jim Lee

There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative" or "directed trustee", with regard to actions taken or directed by the nontrustee. Existing uniform trust and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray. (Prefatory Note to the Uniform Directed Trust Act.)

1. Why Directed Trusts?

(a) See "Directed Trusts from the Trust Company Perspective," by Bridget Swartz, used and attached with permission of the author.

(b) See generally, Jocelyn Margolin Borowsky, Shaheen I. Imami, and Laura G. Mandel, "It's Not My Fault…. They Made Me Do It: An Update on Directed Trusts," American College of Trust and Estate Counsel, 2023 Annual Meeting, March 4, 2023, used and attached with permission of the authors.

(c) Lower trustee fees.

(d) Enable beneficiaries or settlor to retain control over investments and/or distributions.

(e) Provide liability protection for trustees not charged with certain areas of decision-making.

2. Fiduciary Duties Generally: Uniform/Arizona Trust Code

(a) A.R.S. § 14-10801 (Duty to administer trust): "[T]he trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this chapter."

(b) A.R.S. § 14-10802 (Duty of loyalty): "A trustee shall administer the trust solely in the interests of the beneficiaries. . . ."

(c) A.R.S. § 14-10803 (Impartiality).

(d) A.R.S. § 14-10804 (Prudent administration): "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution."

(e) A.R.S. § 14-10809 (Control and protection of trust property).

3. Uniform Directed Trust Act ("UDTA")

(a) Concepts/roles: *trust director* and *directed trustee*.

(b) Provides rules regarding fiduciary status, mandatory minimum standard of conduct, exoneration, duty to monitor, duty to share information, etc.

(c) The common law and principles of equity supplement the act, except to the extent otherwise expressly modified by the act itself or the state adopting the act.

4. State Approaches: Overview of State Directed Trust Statutes | The American College of Trust and Estate Counsel (actec.org)

5. Arizona Delegation Statutes

"**14-10807 Delegation by trustee**

A. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:

1. ***Selecting*** an agent.

2. ***Establishing the scope and terms*** of the delegation, consistent with the purposes and terms of the trust.

3. Periodically reviewing the agent's actions in order to ***monitor*** the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an ***agent owes a duty*** to the trust to exercise reasonable care to comply with the terms of the delegation.

C. ***A trustee who complies with subsection A is not liable*** to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

D. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state."

(Emphasis added.)

"**14-10907 Delegation of investment and management functions; duties; limitations**

"A. A fiduciary may ***delegate investment and management functions*** that a prudent investor of comparable skills might delegate under the circumstances.

B. ***A fiduciary is not responsible*** for the investment decisions or actions of the investment agent to which the investment functions are delegated ***if the fiduciary exercises reasonable care, skill and caution in selecting the investment agent***, in ***establishing the scope and specific terms*** of the delegation and in ***reviewing periodically*** the investment agent's actions in order to ***monitor*** the investment agent's performance and compliance with the scope and specific terms of the delegation.

C. ***The investment agent must comply with the scope and terms of the delegation and exercise the delegated function with reasonable care, skill and caution and is liable to the trust if the agent fails to do so.*** An investment agent who represents that the agent has special investment skills must exercise those skills.

D. An investment agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this state is deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.

E. ***A cofiduciary may delegate investment and management functions to another cofiduciary*** if the delegating cofiduciary reasonably believes that the other cofiduciary has greater investment skills than the delegating cofiduciary with respect to those functions. The delegating cofiduciary is not responsible for the investment decisions or actions of the other cofiduciary to which the investment function are delegated if the delegating cofiduciary exercises reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the other cofiduciary's actions in order to monitor the cofiduciary's performance and compliance with the scope and specific terms of the delegation.

F. Investment in a mutual fund is not a delegation of investment function and neither the mutual fund nor its advisor is an investment agent."

(Emphasis added.)

6. Arizona Directed Trust Statute

"**14-10808 Powers to direct**

A. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

B. ***If the trust provides that the assets in the trust are subject to the direction of the settlor or a cotrustee, beneficiary or third party, the trustee has no duty to***

review the directions it is directed to make ***or to notify the beneficiaries*** regarding any investment action taken pursuant to the direction. ***The trustee is not responsible for the purchase, monitoring, retention or sale of assets that are subject to the direction*** of the settlor or a cotrustee, beneficiary or third party. ***The trustee is not subject to liability if the trustee acts pursuant to the direction, even if the actions constitute a breach of fiduciary duty, unless the trustee acts in bad faith or with reckless indifference.***

C. The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.

D. ***Unless the trust instrument provides otherwise, a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary*** who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. ***The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty***."

(Emphasis added.)

7. Trust Director – power to direct

(a) UDTA: Trust director is a fiduciary.

(i) Fiduciary duty and liability in exercise or nonexercise of power of direction.

(ii) Same duty as a trustee or co-trustee in like position and similar circumstances.

(iii) Terms of trust agreement may vary duty and liability but only to the extent that such could be varied with respect to a trustee in like position and similar circumstances.

(iv) Mandatory minimum standard of conduct: same as standard for nondirected trustees under state law. (No exculpation or exoneration if below this standard.)

(b) State law approaches as to a trust director.

(i) Main variations:

(1) Trust director is a fiduciary with the same duties as trustees (by adoption of the UDTA or some version of it) (e.g., FL, WA).

(2) Trust director is deemed to be a fiduciary and this status cannot be overridden by the trust agreement (e.g., TX).

(3) Trust director is a fiduciary *unless* terms of trust override (e.g., DE, IL, NV)

(ii) Texas: The mandatory minimum standard of conduct for a trust director in Texas is good faith and adherence to the terms of a trust.

(iii) Tennesee: trust director must act in accordance with terms and purposes of the trust and interest of the beneficiaries. To the extent this standard can be overridden by the trust agreement is not entirely clear. Compare Tenn. Code Ann. § 35-15-1202 (text of code) with Tenn. Code. Ann. § 35-15-1202, cmts (2013). Also, whether a trust director in Tennesee could be relieved of the duty to act in good faith could be open to debate.

(iv) Delaware and Nevada: Trust director is a fiduciary with the same duties as a trustee unless overridden by trust agreement, but in all events (regardless of trust terms) subject to a mandatory minimum standard of conduct (willful misconduct).

(v) Many states have imposed mandatory minimum standards of conduct on a trust director via application of common law and establishing a willful misconduct standard for directed trustees. A minority provide that a trust director is a fiduciary with liability for breach of trust. Arguably, adoption of a willful misconduct standard for a directed trustee should result in a similar minimum standard of conduct for a trust director-fiduciary.

(vi) Public Policy Query: In states where a trust director can serve as a nonfiduciary, who is the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the direction of a nonfiduciary trust director?

8. Directed Trustee

(a) UDTA: Directed trustee is a fiduciary.

(i) Must take reasonable action to comply with trust director's exercise of power.

(ii) Mandatory minimum standard of conduct: willful misconduct.

(iii) Must not comply with a trust director's exercise or nonexercise of a power of direction to the extent that complying with it would cause the directed trustee to engage in willful misconduct.

(b) State approaches regarding a directed trustee.

(i) Main variations:

(1) Whatever state law provides as to trustees.

(2) Willful misconduct standard (e.g., DE, IL, TX).

(3) No liability

(ii) Delaware: Mandatory minimum "willful misconduct" standard for any fiduciary (including the directed trustee). Trust agreement can override common law duties, but it cannot exculpate or indemnify a fiduciary for its own willful misconduct.

(iii) Texas: Requires that trustees act in good faith and in accordance with trust terms and that, absent a contrary provision in the trust instrument, a trustee is subject to all common law duties applicable to trustee.

(iv) Tennesee: Trust agreement may vary/eliminate trustee duties, and courts must strictly construe statutes in derogation of common law and give maximum effect to principle of freedom of disposition and enforceability of trust instruments.

(v) Nevada:

"NRS 163.5549 Limitations on liability of directed fiduciary [directed trustee].

1. A directed fiduciary is not liable, individually or as a fiduciary for any loss which results from:

(a) Complying with a direction of a directing trust adviser [trust director], whether the direction is to act or to not act; or

(b) Failing to take any action proposed by a directed fiduciary if the action:

(1) Required the approval, consent or authorization of a person who did not provide the approval, consent or authorization; or

(2) Was contingent upon a condition that was not met or satisfied.

2. A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.

3. The provisions of this section do not impose an obligation or liability on a custodian of a custodial account for providing any authorization."

(vi) <u>Comment regarding Nevada statute:</u> In general, a directed trustee is not liable as a fiduciary as to those acts with respect to which it is being directed. Notwithstanding

the "no liability" standard, a directed trustee may be subject to a minimum fiduciary duty to act in the interests of the trust purpose or beneficiaries with respect to the directed act. For example, Nevada has adopted a statute (N.R.S. § 163.004) that allows a trust agreement to expand, restrict, eliminate or otherwise vary a fiduciary's powers, duties, standard of care, etc. However, that statute does *not* expressly authorize the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or gross negligence. Nevertheless, in theory, if a directed trustee is considered a nonfiduciary with respect to a directed act, then ***it should be able to be indemnified*** under the terms of a trust agreement for complying with a directed act, including where its compliance was itself an act of willful misconduct or gross negligence.

(c) Excluded trustee concept — In some states this term is generally equivalent to a directed trustee. The Delaware concept of an excluded trustee is that of a nonfiduciary (see 12 Delaware Code Section 3313A).

9. Exoneration/Indemnification

(a) The directed trust statutes generally exonerate a trustee for loss for complying with the trust director's direction, but the term "loss" is yet to be defined by courts. The term "loss" could be understood to mean a financial loss. It is unknown whether the term "loss" would refer to a distribution of trust principal where a beneficiary objects to a trust distribution.

(b) UDTA: Does not exonerate a **directed trustee** or a **trust director** for its willful misconduct. (Also, as implied above, the UDTA does not exonerate a **directed trustee** when its compliance with the instruction from the trust director is itself and act of willful misconduct.)

(c) Delaware: The statute provides that the **directed trustee** is exonerated for loss resulting from compliance with the trust director's directions, except for the trustee's own willful misconduct. If a trust director is not a fiduciary, it appears that a trust agreement might permit indemnification for the **nonfiduciary trust director**'s acts of willful misconduct.

(d) Nevada: The exoneration of a **directed trustee** provided by the statute applies to (1) loss resulting from compliance with a direction to act or refrain from acting; and (2) loss resulting from the trustee failing to act when the direction was subject to a condition that was not met or did not occur. Similar to Delaware, Nevada may/might permit a trust agreement to indemnify a **nonfiduciary trust director**'s acts of willful misconduct.

10. Scope of Duty to Monitor

(a) UDTA: Unless the terms of a trust agreement provide otherwise, there is no duty of a directed trustee to monitor a trust director. A directed trustee does not assume the duty to monitor merely by taking an action that could be construed as monitoring a trust director. Similarly, except as otherwise provided by trust agreement, a trust director has no duty to

monitor a directed trustee. Neither a directed trustee nor a trust director assumes the duty to monitor the other merely by taking an action that could be construed as monitoring the other.

(b) State law examples:

(i) Some of the directed trust statutes explicitly waive the duty to do an investment review or provide advice in the context of an investment decision, but do not waive the duty to warn the beneficiary about the directed act.

(ii) Delaware: No duty to monitor or to provide advice to or consult the trust director (advisor).

(iii) NV approach: Waives what would otherwise be a trustee's duty to evaluate the merits of an investment made by a trust director or provide advice to the trust director with respect to an investment.

11. Duty to Share Information

(a) UDTA: Unless the terms of a trust agreement provide otherwise, neither a directed trustee nor a trust director has a duty to inform or give advice to a settlor, beneficiary, or to the trust director or directed trustee (as applicable) concerning an instance in which that trustee or director might have acted differently. Neither a directed trustee nor a trust director assumes the duty to share information (inform or give advice) merely by taking an action described in the previous sentence.

(b) Delaware: No duty to warn or apprise the beneficiary. Imposes a duty to keep co-fiduciaries informed upon request.

(c) Nevada: No apparent duty.

12. Scope of Trust Director's Investment Authority

(a) UDTA: No default statutory powers for trust directors. Per section 6, the existence and scope of a power of direction must be specified by trust agreement. Under section 6(b), a trust director is granted those further powers that are appropriate for the exercise of powers granted under the trust agreement.

(b) State law provisions: Many directed trust statutes are unclear as to the scope of a trust director's authority and what actions constitute an "investment." Because many directed trusts own interests in complex structures (e.g., entities with multiple layers), ambiguities can and often do arise in connection with the investment and management of those interests in directed trusts. For example, is the making of a business decision for an entity an investment decision at the trust level? Many directed trust statutes address valuation of nonpublicly traded

assets as part of a trust director's (or investment trustee's or advisor's) authority, but they often stop there.

13. Looking Forward: What do we want in a future Arizona directed trust statute?

(a) Trust director: fiduciary status, liability exposure, and exoneration

(i) Should an AZ statute provide that a trust director is a fiduciary as a matter of default, which can be overridden by the trust agreement, or should it be more consistent with the default nonfiduciary status of a trust protector?

(ii) Should there be some mandatory minimum standard of conduct, such as willful misconduct or gross negligence, or should the standard be the same as that for nondirected trustees under Arizona law.

(iii) If a trust director is a fiduciary, is exoneration or indemnification permitted under the trust agreement?

(iv) If a trust director is a nonfiduciary, can a trust agreement indemnify the trust director's acts of willful misconduct?

(b) Directed trustee: liability exposure , exoneration, and other duties

(i) Do we like the "no liability" provisions of the Nevada statute (see above), provided that there is no willful misconduct?

(ii) If we adopt a "no liability" model, could a trust agreement indemnify a nonfiduciary trust director's acts of willful misconduct.

(iii) Duty to monitor?

(iv) Duty to share information?

(c) Allocation of powers and responsibilities between a trust director and a directed trustee (particularly as to investment decisions):

(i) Should a trust director who is responsible for investment decisions be able to direct formation of new entities and the opening of accounts in the entities' names?

(ii) Should a trust director be empowered to direct the trustee to make loans and pledge trust assets, or to direct no-interest loans?

(1) What about loans to beneficiaries? Is that instead within the trustee's authority to make distributions?

(2) What about the financing and pledge of assets of entities, interests of which are held in trust?

(3) What if the investment trust director is an interested party in an entity or other trust investment?

(iii) Who enforces a loan if it was made by a trust director's instruction?

(iv) What if the loan is made by the corporate directed trustee's banking department? Should beneficiaries be able to waive the potential conflict of interest of that trustee?

(v) Who directs liquidation of entities?

(vi) Can a trust director tasked with investment decisions delegate its powers to their parties?

(vii) What are the respective responsibilities of an investment trust director and a directed trustee when litigation arises in connection with an investment or entity (e.g., shareholder litigation)?

(1) Is the directed trustee as the named party able to take direction from the investment trust director?

(2) Can the investment trust director be designated as the named party?

(d) Can the trust agreement override or vary the effect of *any* provision of a directed trust statute?

(e) Banking / trust company perspective on these issues? (See attachment.)

14. Drafting and Administration Considerations

Below is a nonexclusive list of things to think about, both in drafting a trust instrument, and administering a trust, with directed trust provisions:

- Make sure the directed trust provisions are "woven" into the overall trust instrument and not inherently, or even impliedly, inconsistent with other provisions regarding a trustee's powers and duties.
- Do not overreach in drafting where you know your directed trust provisions, particularly those dealing with exoneration and indemnification, go beyond what is allowed under the law of the jurisdiction. In fact, if your settlor wants maximum protection for the directed trustee or trust director, even consider abandoning the

use of specific terms or limits of liability (e.g., bad faith, reckless indifference, willful misconduct) and, instead, using something like "to the fullest extent allowed under the law of jurisdiction governing the trust administration."

- Consider addressing the reasons underlying the use of directed trust provisions in a "statement of intent" at the beginning of the trust instrument. This also puts the issue front-and-center for the settlor and may bolster a defense against a claim by a beneficiary that the settlor did not intend the harshness that might attend a particular circumstance.
- Consider limiting change of situs provisions to jurisdictions that afford the same or greater protections for directed trusts as the initial jurisdiction.
- Make sure the trust instrument clearly defines and delineates the authority and responsibility of the directed trustee and the trust director.
- Consider whether, in following the direction of the trust director, the information the directed trustee is required or allowed to receive is at odds with the directed trustee's overall duties to the beneficiaries under the trust instrument or applicable law. Similarly, consider whether allowing the directed trustee the ability to conduct any form of due diligence might create an implied obligation to do so (even if there are statements to the contrary) and potentially undermine liability protection.
- Ensure the directed trustee is not given any discretion in deciding whether to follow the direction of the trust director – the requirement to follow such direction must be absolute. However, you also must be aware of any limits to the protection afforded to a directed trustee under applicable law (e.g., willful misconduct).
- Do not confuse a "delegated" power with a "direction to act."
- Require that all directions from the trust director must be in writing and be: (a) clear and unambiguous; (b) complete on its face; (c) devoid of any suggestion that the directed trustee has discretion about how to take the directed action; and (d) devoid of any "catch-all" provision.
- Likewise, the directed trustee should ensure that all related communications with the trust director are in writing, as well as indicate that any request by the directed trustee for information does not constitute a waiver of any protection afforded under the trust instrument or applicable law and that such communications are only "administrative" steps necessary for the directed trustee to follow the direction.
- Differentiate between the potential liability for acting upon the direction of a trust director and potential liability for failing to follow or properly execute such direction. For example, the UDTA applies a willful misconduct standard for acting upon the direction of a trust director but requires that a directed trustee take "reasonable action to comply with a trust director's exercise or nonexercise of a power of direction."

- For states that have adopted a "willful misconduct" standard, how does your state define "willful misconduct?" In other words, will the standard differ in practice from state to state even if the language of those states' statutes is identical? For example, the UDTA does not define "willful misconduct," but Delaware's statute defines it as "intentional wrongdoing, not mere negligence, gross negligence or recklessness" and further defines "wrongdoing" as "malicious conduct or conduct designed to defraud or seek an unconscionable advantage." The Delaware standard therefore presents a high burden to any person seeking to hold a directed trustee liable for directed actions, but other states may lack a working definition of "willful misconduct."
- Does your directed trustee possess "special skills" that might make it more susceptible to a claim of willful misconduct?
- Some state legislatures have adopted a "no duty" standard for the directed acts of directed trustees (including Alaska, New Hampshire, Nevada, and South Dakota).
    - If your state has adopted a "no duty standard," are you confident that courts will reliably apply it?
    - Or do you fear that courts in your state will be too squeamish to find that a trustee has no duty as to some aspect of trust administration and that courts may instead apply some other standard (perhaps borrowing from equity or common law) to hold the directed trustee accountable?
    - Is it possible that a "no duty" standard could present greater uncertainty for directed trustees?

Attachment: Directed Trusts from the Trust Company Perspective
by Bridget Swartz

Why directed rather than delegated?

- Perceived cost savings in fees but is it ultimately less expensive?
- Are clients/beneficiaries best served without any oversight? Who's watching the hen house?

Why a trust company if desire directed arrangement?

- Does it make sense to have a trust company serve as directed trustee if what is directed is distribution authority?
- Fee structure arguably devalues trustee side/services-the role of the trustee becomes an afterthought.

Trust company may welcome having no responsibility with regards to what is directed but clarity regarding potential liability is paramount!

- What does Arizona's standard of "reckless indifference" mean?
- Some trust companies will only accept on condition that laws of certain jurisdictions apply where minimal to no liability on part of directed trustee exists!
- Does the nature of the investment matter, e.g. impact investing?

Consider the role of the investment advisor in a directed arrangement.

- Is the investment advisor prepared to act in a quasi-fiduciary role?
- Who has counseled the investment advisor?
- What is the succession plan for the investment advisor?

Tight and consistent drafting important!

- Track the statutory language; do not try to draft around it.
- Don't call it directed when it is delegated, i.e., the latter increases liability of trustee.
- If no opportunity to amend, does a bifurcation agreement afford the opportunity to create such an arrangement? With or without court approval?
- What is the so called "poison pill" if the directed arrangement fails or does not operate as contemplated or intended?

Attachment: It's Not My Fault…. They Made Me Do It: An Update on Directed Trusts

AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
2023 ANNUAL MEETING
March 4, 2023
New Orleans, LA

It's Not My Fault…. They Made Me Do It: An Update on Directed Trusts[1]

The Uniform Directed Trust Act is now five years old with 16 jurisdictions enacting it. This panel will discuss the latest lay of the land for directed trusts from the perspectives of trustee, planner, and litigator. The panel will review the risks of taking direction from third-party investment and distribution advisers and their practical experiences with this very popular planning technique.

Speakers and Content:

Jocelyn Margolin Borowsky
Duane Morris, LLP – Wilmington, DE

Shaheen I. Imami[2]
Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C. – Chattanooga, TN

Laura G. Mandel
The Northern Trust Company – Chicago, IL

[1] **Disclaimer**: This paper only scratches the surface of the covered topic because the intersection between drafting and litigation-risk is incredibly varied and complex and, therefore, it is for educational and informational purposes only. All analyses, exhibits, hypotheticals, language, or drafting concepts are presented for illustration and do not necessarily reflect specific strategies that may have been developed for particular clients. They are for illustrative and discussion purposes only. They certainly are not intended to serve as specific legal or tax advice, because the availability and effectiveness of any strategy is dependent upon your individual facts and circumstances. Results will vary and no guarantee or suggestion is made about how any specific solution, analysis, or strategy will perform in reality.

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I. Introduction

Directed trusts are wildly popular for at least two reasons: they typically result in lower trustee fees, and they enable the beneficiaries or the settlor to retain control over key aspects of trust administration – investment decisions and/or distribution decisions. Directed trusts can afford greater flexibility in trust management through the bifurcation of fiduciary duties among various parties, but also can result in a complicated intersection of roles, duties and undefined liability. An essential component of managing directed trusts is determining the roles and authority of the advisor/ trust director[3] and the directed trustee. Each party's status as a fiduciary or nonfiduciary is a foundational step in determining the scope of each role and who owes what duties to the beneficiaries. Closely related to a party's status as a fiduciary is whether a directed trust act imposes a mandatory minimum standard of conduct on advisors and directed trustees.

First, we will highlight key provisions in the Uniform Trust Code ("UTC"), the Uniform Directed Trust Act ("UDTA") and selected state directed trust laws. Then, we will point out what these provisions do not cover including gaps in coverage highlighted through litigated cases. We also included sample trust language for consideration when drafting directed trusts.

II. Uniform Laws and State Statute Comparisons

A. Fiduciary Status and Minimum Standard of Conduct

1. Uniform Trust Code and Restatement of Trusts Applicable Provisions

The UTC was the original uniform act that incorporated a directed trust concept.[4] Section 808 of the UTC is now "reserved,"[5] and has been replaced by the UDTA. Historically, Section 808(b) provided as follows:

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

The UTC was expanded to include paragraphs (c) and (d) to Section 808:

> (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
>
> (d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the

[3] The term "trust director" will be used to refer to advisors and trust directors except where statutes use the term advisor.
[4] Mary C. Downie, ACTEC State Laws Presentation, November 4, 2022, "Variations in Directed Trust Statutes".
[5] The UTC legislative note states that "*A state that has enacted the Uniform Directed Trust Act (UDTA) should repeal Section 808 and revise certain other provisions of the UTC as indicated in the legislative notes to the UDTA.*"

trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

Restatement (Third) of Trusts, Section 75 provides as follows:

> Except in cases covered by Section 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.

Restatement (Second) of Trusts Section 185 provides as follows:

> If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.

a. Fiduciary status. Former Section 808 of the UTC adopted a similar approach to the Restatement (Third) of Trusts. It contained a presumption that a powerholder was a fiduciary. In addition, the language was clear that any party with a power to direct was liable for losses resulting from a breach of fiduciary duty. The Prefatory Note to the UTC references former Section 808(d) in support of this point. In 2018, the UTC was amended to recognize the promulgation of the UDTA, and Section 808 was superseded.

b. Mandatory minimum standard of conduct. Neither the UTC nor the Restatement expressly addresses the standard of conduct for a trust director or a directed trustee. Given the limitations of the UTC and Restatements precluding a directed trustee from complying with a direction that would be in violation of the terms of a trust or would violate a fiduciary duty, the standard of conduct likely would be gross negligence or possibly negligence. While most of the default provisions of the UTC can be overridden by the terms of a trust there are certain mandatory rules relating to the duties and powers of a trustee and rights of a beneficiaries. UTC Section 105(b)(2) sets forth the mandatory rules that a trustee must act in good faith, in accordance with the purposes of the trust and in the interests of the beneficiaries. In the wake of the UDTA, UTC Section 105 (b)(2) was amended so that these mandatory rules are now expressly subject to certain sections in the UDTA (Sections 9, 11 and 12).[6] In addition, UTC Section 1008 (2000) and Restatement (Third) of Trusts Section 96 (2012), provide that an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference.

[6] Uniform Trust Code, Section 105 (b) (2).

2. Uniform Directed Trust Act Applicable Provisions[7]

The UDTA Section 8 focuses on the status of the trust director. UDTA Section 8 defines the scope of a trust director's duty and liability as follows:

> (a) Subject to subsection (b), with respect to a power of direction or further power under Section 6(b)(1):
>
> > (1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:
> >
> > > (A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or
> > >
> > > (B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and
> >
> > (2) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.
>
> (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].
>
> (c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

UDTA Section 9 addresses the status of the trustee. It provides:

> (a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.
>
> (b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct…

a. Fiduciary status. The foregoing provisions make it clear that a trust director is a fiduciary, as is a directed trustee.

b. Mandatory minimum standard of conduct. The UDTA expressly states that it imposes mandatory minimum fiduciary duties on trust directors and trustees alike for public policy reasons.[8] The drafting committee for the Uniform Directed Trust Act contemplated that Section 8 (Duty and Liability of a Trust Director), Section 9 (Duty and Liability of Directed Trustee), along

[7] 16 states have adopted the Uniform Directed Trust Act as of 2022.
[8] Uniform Directed Trust Act, Section 8.

with Section 10 (governing information sharing among directed trustees and trust directors), and Section 11 (eliminates certain duties to monitor, inform or give advice), would prescribe the mandatory minimum standard of conduct for a trust director and a directed trustee. The comments emphasize that the trust director duties are defaults and minimums, not ceilings. Based on Sections 8 and 9 and UDTA comments noted below, the minimum standard of conduct for a directed trustee is the "willful misconduct" standard (discussed further below), and the minimum standard of conduct for a trust director is whatever that standard is for non-directed trustees under applicable state law. The comments to UTC Section 1008 confirm that "a trustee must always comply with a certain minimum standard" even where the terms of a trust attempt to completely exculpate a trustee.[9]

The Prefatory Note to the UDTA observes the lack of uniformity among the states as to whether advisors are deemed fiduciaries and who is ultimately liable for breaches of fiduciary duties owed to the beneficiaries, noting:

> There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an 'administrative trustee' or 'directed trustee', with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

The Comments to UDTA Section 8 clarify that by making a trust director a fiduciary it followed many existing statutes but improved upon existing statutes which used the term "fiduciary" without specifying which fiduciary duties apply. Section 8(a) absorbs existing state trust fiduciary law that would apply to a trustee and applies it to a trust director.

The third paragraph of the Prefatory Note makes the following point on mandatory minimum fiduciary duties:

> Enabling Settlor Autonomy Consistent with Fiduciary Minimums. By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition. At the same time, the act imposes a mandatory minimum of fiduciary duty on both a directed trustee and a trust director in accordance with the traditional principle that a trust is a fiduciary relationship. See, e.g., Restatement (Third) of Trusts Section 96 cmt. c (2012) ('[F]or reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.)

The drafting committee noted that it was heavily influenced by the prominent Delaware directed trust statute which imposes a standard on a directed trustee to avoid "willful misconduct" and that this standard has proven to be workable in practice. It further noted that "a beneficiary's main recourse for misconduct by a director is an action against the director for breach of the director's fiduciary duty to the beneficiary." The drafting committee concluded that by preserving all of the usual duties of a trustee appointment in a trust director and a minimum standard of conduct in a trustee to avoid willful misconduct the Act provides more "aggregate fiduciary duties" being

[9] Uniform Trust Code Section 1008,cmt.

owned to a beneficiary. The Prefatory Note is clear that the drafting committee declined the suggestion that the Uniform Directed Trust Act should eliminate the fiduciary duty of a directed trustee completely.[10]

Another example discussed in the comments is the alignment between the fiduciary duties of trust directors and trustees is the inclusion of terms such as "sole/absolute/uncontrolled" in describing a trust director's discretion. The drafting committee was clear that these terms would have the same effect as if the extended power were given to a trustee noting: "A trust director could not act in bad faith or take actions that do not further the purposes of the trust".[11] Additionally, a trust agreement cannot exonerate a trust director or a directed trustee beyond the minimum standard of liability.

The comments to Section 8 note the following on exoneration clauses in trusts:

> A trust director is likewise subject to the same rules as a trustee with regard to an exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code Section 1008 (2000) and Restatement (Third) of Trusts Section 96 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference. Under subsection (a)(2) of this section, the same rules would apply to an exculpation or exoneration clause for a trust director. Thus, if the terms of a trust provide that a director can never be liable to a beneficiary, then the trust director would have the same liability as a trustee would have under a similar exculpatory clause.

3. State Law Provisions

States have different approaches on the fiduciary status of trust directors. There are at least three approaches to the issue: (1) the trust director is a fiduciary under the statute unless the terms of the trust override the default fiduciary status; (2) trust directors are deemed to be fiduciaries and this status cannot be overridden by the terms of the trust; or (3) trust directors are fiduciaries with the same duties as trustees due to enactment of UDTA or some version of it.

Many states have in effect imposed mandatory minimum standards of conduct on trust directors through the application of common law and establishing a willful misconduct standard for directed trustees. A minority of states continue to follow the former Section 808 of the Uniform Trust Code where the trust director is a fiduciary with liability for a breach of trust.[12]

a. Select state law approaches to fiduciary status. Delaware and Nevada are examples of states where an advisor is deemed to be a fiduciary, but a nonfiduciary status can be conferred on an advisor by the terms of a trust. Illinois appears to take this approach also.

Delaware Section 3313:[13]

> (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed

[10] Uniform Directed Trust Act, Prefatory Note, Fiduciary Duty in a Directed Trust.
[11] Uniform Directed Trust Act, Section 8, cmt.
[12] Alabama, District of Columbia, Maryland, Massachusetts, Mississippi, Oregon and Pennsylvania.
[13] 12 Del. C. Section 3313 (a) (1) (i)

> investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.

Nevada Section 163.5551:[14]

> If one or more trust advisers are given authority, by the terms of an instrument, to direct, consent to or disapprove a fiduciary's investment decisions, the investment trust advisers shall be considered fiduciaries when exercising that authority unless the instrument provides otherwise.

The Illinois Trust Code provides, in pertinent part:[15]

> A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee.

In Illinois the above section does not fall within the mandatory sections of the Illinois Trust Code which cannot be overridden by the terms of a trust. In theory, a directing party could be deemed a nonfiduciary under the terms of a trust in Illinois.[16]

The Texas directed trust statute, excerpted below, is an example of a statute where the fiduciary status of trust directors cannot be superseded by the terms of a trust.

Texas requires an advisor to serve in a fiduciary capacity regardless of the terms of the trust with limited exceptions relating to removal and appointment of other fiduciaries and powers which are conferred to create a grantor trust for income tax purposes.

Texas Section 114.003 (e):[17]

> (e) If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
>
> > (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
> >
> > (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision (1).

[14] 760 ILCS Section3/808 (e).
[15] 760 ILCS Section3/808 (h)
[16] 760 ILCS Section3/105
[17] Texas Prop. Code Section 114.0031 (e).

> (e-1) Subsection (e) does not prohibit the exercise of a power in a nonfiduciary capacity as required by the Internal Revenue Code for a grantor or other person to be treated as the owner of any portion of the trust for federal income tax purposes.

The ability to override the fiduciary status of an advisor under Tennessee's statute is less clear. Under Section 35-15-1202 (a) an advisor is deemed to be a fiduciary, with the imposition of mandatory minimum fiduciary duties consistent with common law duties.[18] Comments to Section 35-15-1202, however, state that the trustor may exclude a trust advisor from being a fiduciary at all, with or without a duty of good faith, provided only that a trust advisor cannot be exculpated from reckless indifference to the purposes of the trust or the interests of the beneficiaries.[19]

Section 35-15-1202 (a):

> A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust advisor or trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

The Florida and Washington directed trust statutes, excerpted below, are examples of states that have adopted the UDTA mandatory minimum fiduciary duties.

Florida:[20]

> (1) Subject to subsection (2), with respect to a power of direction or further power under s. 736.1406(3)(a), relating to additional power granted to a trust director in furtherance of an express power of direction:
>
> > (a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:
> >
> > 1. If the power is held individually, as a sole trustee in a like position and under similar circumstances; or
> >
> > 2. If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.
> >
> > (b) The terms of the trust may vary the trust director's duty or liability to the same extent the terms of the trust may vary the duty or liability of a trustee in a like position and under similar circumstances.
>
> (2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a

[18] Tenn. Code Ann. Section 35-15-105 (b).
[19] Tenn. Code Ann. Section 35-15-1202, cmts (2013).
[20] Fla. Stat. Section 736.1406

profession, to the extent the trust director acts in that capacity the trust director has no duty or liability under this part.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Washington:[21]

(1) Subject to subsection (2) of this section, with respect to a power of direction or further power under RCW 11.98B.050(2)(a):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(i) If the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(ii) If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(b) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this chapter to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this chapter.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

b. Mandatory minimum standard of conduct. The states that have adopted the UDTA have incorporated the same minimum fiduciary standard of conduct with respect to the trust director as would apply to a trustee. In other words, if, under state law, a trustee would breach the minimum standard of conduct by acting with gross negligence, under the state UDTA, the trust director would be subject to the same minimum standard of conduct. The willful misconduct standard (discussed below) would be applicable to the directed trustee.

All of the other state statutes cited above which provide that a trust director is a fiduciary also impose some form of a mandatory minimum standard of conduct through affirmation of certain common law fiduciary duties such as the duty to act in good faith, adhere to the terms of the trust and a duty to act in the interests of the beneficiaries. Furthermore, adoption by a state of a willful misconduct standard for a directed trustee arguably should result a similar minimum standard of conduct for a trust director acting in a fiduciary capacity.

[21] RCW 11.98B.070

For example, Illinois subjects the directed trustee (called an "excluded trustee") to a willful misconduct standard.

ILCS Section 3/808(f):

> Except as otherwise provided in this Section or the trust instrument, an excluded fiduciary is not liable, either individually or as a fiduciary, for any action, inaction, consent, or failure to consent by a directing party, including, but not limited to, any of the following:
>
> > (1) if a trust instrument provides that an excluded fiduciary is to follow the direction of a directing party, and such excluded fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following any such direction, including but not limited to compliance regarding the valuation of assets for which there is no readily available market value.

In addition, Illinois holds trust directors to the same standard of conduct as trustees and under Section 105(b)(2) of the Illinois Trust Code, the terms of a trust cannot override the duty of a trustee to act in good faith.

Texas also has adopted a willful misconduct standard for directed trustees.

Section 114.0031(f):[22]

> A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.

The Texas Trust Code requires that trustees act in good faith and in accordance with trust terms and that absent a contrary provision in the trust instrument a trustee is subject to all common law duties applicable to trustees. The mandatory minimum standard of conduct for a trust director in Texas is good faith and adherence to the terms of a trust.

Section 113.051:

> The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.[23]

While Tennessee provides that the terms of a trust can vary or eliminate the duties of a trustee and statutes in derogation of common law shall be strictly construed and that courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust

[22] Texas Prop. Code Section 114.0031 (f).
[23] Texas Prop. Code Section113.051.

instruments, it excludes from these provisions the mandatory duties for trustees to act in accordance with the terms of the trust and in the interests of the beneficiaries.

Section 35-15-105 includes among its mandatory provisions: "The duty of a trustee to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries…"[24]

At a minimum, trust directors in Tennessee must act in accordance with the terms of a trust and in the interests of the beneficiaries. Whether trust directors in Tennessee could be relieved of the duty to act in good faith could be open to debate.

Delaware provides a mandatory minimum "wilful misconduct" standard for both the directed trustee and any other fiduciary.[25] Pursuant to Section 3303(a), a trust agreement can override common law duties, but it cannot exculpate or indemnify a fiduciary for its own willful misconduct.[26]

Nevada adopts a "no liability" standard for the directed trustee and appears to provide that a directed trustee is not liable as a fiduciary as to those acts with respect to which it is being directed.[27] Notwithstanding the "no liability" standard, a directed trustee may be subject to a minimum fiduciary duty to act in the interests of the trust purpose or beneficiaries with respect to the directed act.[28] Nevada has adopted a statute (NRS Section 163.004) that allows a trust agreement to expand, restrict, eliminate or otherwise vary a fiduciary's powers, duties, standard of care, etc. Notwithstanding, NRS Section 163.004 does not "[a]uthorize the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or gross negligence." In theory, if a directed trustee is considered a non-fiduciary with respect to a directed act, then it should be able to be indemnified under the terms of a trust agreement for complying with a directed act, including where its compliance was itself an act of willful misconduct or gross negligence (but this is not recommended).

With respect to both Section 3303(a) under Delaware law and Section 163.044 under Nevada law, where a trust director is a fiduciary, those statutes would allow a trust agreement to vary its duties, but not beyond the willful misconduct standard (or the gross negligence standard, in Nevada). Where a trust director is not a fiduciary, it appears that a trust agreement might permit indemnification for the non-fiduciary trust director's acts of willful misconduct (but this is not recommended).

Comment: In states where a trust director can serve as a nonfiduciary the question then becomes who is the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the directing party's instructions and the trust director is not a fiduciary?

[24] Tenn. Code Ann. Section 35-15-105 (b) (2) (3).
[25] 12 Del. C. Section 3303(a), 3313
[26] 12 Del. C. Section 3303(a)
[27] NRS Section 163.5549(1) ("A directed fiduciary is not liable, individually or *as a fiduciary* for any loss…")
[28] None of the authors of these materials practices law in Nevada, and accordingly, this statement is the opinion of two Nevada practitioners consulted in preparation of these materials.

In *McLean Irrevocable Trust v. Patrick Davis, P.C., et. al.,*[29] the Missouri Court of Appeals addressed the issue of a trust protector's liability for failing to remove a trustee who purportedly was damaging the trust. There was no dispute that the trust agreement vested the trust protector with the authority to remove and replace a trustee, or that the defendant trust protector accepted his appointment as such.[30] Instead, the defendant trust protector argued that because neither Missouri law nor the trust agreement created any duty for a trust protector to "monitor or supervise" trustees, he could not be liable for not doing so. The Court, noting that the issue was one of first impression in Missouri, pointed to: (1) existing law regarding the voluntary assumption of duties and potential liability stemming from the same; and (2) the inference of specific duties that might reasonably follow from a fiduciary relationship.[31] Because the trust agreement was created for the purpose of investing "settlement proceeds in a prudent manner," the Court found it possible that a trust protector owed duties to the "trust itself" and "might include a duty to protect the trust itself from foreseeable injury."[32] The Court also found, by extension, that the power to remove and replace trustees (which was in held in a fiduciary capacity) meant that the "grantor expected the Trust Protector to exercise his power of trustee removal if the trustee at issue was acting against the purpose of the trust."[33] Ultimately, the Court found such inference a sufficient basis to allow the claim of fiduciary duty to go forward; however, the Court recognized the determination of the ultimate issues of breach and damage were not before it.[34]

4. Sample Language, Fiduciary Status of Investment Advisor [emphasis added][35]

Appointment of Investment Advisor. In reliance on the provisions of 12 *Del. C.* Section 3313, the Grantor hereby appoints _____ (the "Investment Advisor") as Investment Advisor. If at any time _____ is unwilling or unable to act, then the Investment Advisor of such trust shall be such individual or entity appointed by _____. By accepting an appointment to serve or act hereunder, such Investment Advisor (or any successor Investment Advisor) shall be deemed to have consented to submit to the jurisdiction of each court in which jurisdiction and venue are proper to review the administration of the Trust and to be made parties to any proceedings in each such court that place in issue the decisions or actions of the Investment Advisor. *The Investment Advisor shall exercise the Investment Advisor's functions in a fiduciary capacity and in a manner that the Investment Advisor reasonably believes to be in accordance with the purposes of this Trust Agreement. The Investment Advisor shall be deemed to have acted within the scope of its authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all persons interested unless the contrary be proven by affirmative clear and convincing evidence, and in the absence of such proof the Investment Advisor shall not be liable for loss arising from depreciation or reduction in value of any property authorized to be held or acquired*. Each successor Investment Advisor shall have all of the powers and discretions conferred in this Trust Agreement upon the original Investment Advisor.

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[29] *McLean Irrevocable Trust v. Patrick Davis, P.C., et. al.*, 283 S.W.3d 786 (Mo. App., 2009).
[30] *Id.* at 793.
[31] *Id.* at 794.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 795; *see also, McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482 (Mo. App., 2013) (affirming the trial court's dismissal of the trustees' claims against the trust protector because of the failure to establish damages).
[35].

B. Scope of Trust Director's Investment Authority

1. UDTA Applicable Provisions

The Uniform Directed Trust Act does not contain default statutory powers for trust directors. Instead under Section 6 the existence and scope of a power of direction must instead be specified by the terms of a trust.[36] Section 6(b) grants a trust director those further powers which are appropriate for the exercise of powers granted under the trust instrument.

Comments to Section 6 indicate that the drafting committee contemplated the terms of a trust would validate a trust director's power to engage in a broad array of powers and specifically mentions powers to: acquire, dispose of, exchange, or retain an investment; make or take loans; vote proxies for securities held in trust; adopt a particular valuation of trust property or determine the frequency or methodology of valuation; and manage a business held in the trust, among other powers.[37]

Two ACTEC Fellows, David Diamond and Todd Flubacher, in a published article commented on this point:

> The rubber meets the road when the trustee must determine whether the direction language covers the investment powers being exercised. The best solution is to provide a broad and inclusive description of investment activities, plus a specific cross-reference to all of the detailed investment powers granted to the trustee in the trust instrument.[38]

Likewise, the comments specifically mention that it would be expected for the terms of a trust to grant a trust director the power to prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust. In fact, the drafting committee observed that it would normally be "appropriate," for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction. From a drafting perspective, it may be advisable for the terms of the trust to confer on a trust director a power to participate or even direct litigation.

In *Schwartz v. Wellin, et. al.,*[39] the U.S. District Court in South Carolina dismissed a complaint filed by the plaintiff trust protector against the defendant children of the grantor (in their capacities as trustees, beneficiaries, and managers of an LLC owned by the trust) for breach of fiduciary duty, conversion, and restitution based on the allegation that the defendant children of the grantor "frustrated the intent and purposes of the trust." The defendant children of the grantor filed a motion to dismiss the plaintiff trust protector's complaint based on the "real party in interest" requirements. The Court, applying South Dakota law, looked at whether a trust protector can qualify as a real party in interest under the facts at hand.[40] The plaintiff trust protector argued that the trust agreement, which he purportedly amended in his capacity as trust protector, expressly authorized his complaint because such amendment granted a the trust protector "the power to

[36] Uniform Directed Trust Act, Section 6.
[37] Uniform Directed Trust Act,Section6 cmt.
[38] David A. Diamond and Todd A. Flubacher, *The Trustee's Role in Directed Trusts,* Trusts & Estates (2010).
[39] *Schwartz v. Wellin, et. al.*, 2:13–cv–3595–DCN, 2014 WL 1572767 (D. S.C., April 17, 2014).
[40] *Id.* at 6.

represent the Trust with respect to any litigation brought by or against the [t]rust if any [t]rustee is a party to such litigation" and "to prosecute or defend such litigation for the protection of trust assets."[41] Even so, the Court held that the real party in interest test is a matter for the courts to decide, "not one for private parties to decide."[42] The Court found that South Dakota law did not address a trust protector's authority to bring a lawsuit on a trust's behalf, there only were references to "trustees" and not trust protectors.[43] So, because the plaintiff trust protector did not demonstrate that he personally suffered an actual or threatened injury, he was not a real party in interest.[44] Notably, although it is unclear if the language in the referenced trust amendment would have change the Court's mind, the Court found that the plaintiff trust protector lacked the authority to amend the trust agreement to expand the trust protector's powers to include litigation against a trustee.[45]

2. State Law Provisions

Not all directed trust statutes are clear as to the scope of the trust director's authority and what actions constitute an "investment" and therefore can be directed by the trust director. Many directed trust statutes do address valuation of nonpublicly traded assets as part of the investment advisor's authority but stop there.

While at first it would seem obvious what actions would be subject to the investment trust director's direction, many directed trusts have complex structures (LLCs and partnerships with multiple layers) and hold operating businesses or alternative investments, making it difficult to determine the scope of a trust director's investment authority. Ambiguities can and often do arise in connection with the investment and management of complex assets in directed trusts.

Mennen v. Wilmington Trust Company is a case involving a directed trust with ambiguous directed powers. This case generated two major opinions -- one finding the individual trustee – Jeff Mennen ("Jeff") – liable for the trust's losses as a result of his bad faith and willful misconduct,[46] and one refusing to pierce a spendthrift trust to pay damages occasioned by Jeff's liability.[47] This is a summary of the final Master's Report on Jeff's liability.

In 1970, patriarch of the Mennen family, George Mennen, settled four inter vivos irrevocable trusts, one for each of his children, and funded each of them with stock in the Mennen Company. The Mennen Company made a personal hygiene product known as "Speed Stick." Almost two decades later, the Mennen Company was acquired by Colgate-Palmolive and the trusts, referred to as the "1970 trusts," became essentially liquid.

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[41] *Id.*
[42] *Id.* at 7.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 8.
[46] *Mennen v. Wilmington Trust Co. et al*, 2015 WL 1914599 (Master's Final Report, Del. Ch. Apr. 24, 2015), adopted by court, 2015 WL 4935373 (Del. Ch. Aug. 18, 2015), affirmed, 166 A.3d 102 (Del. 2017).
[47] *Mennen v. Wilmington Trust Co. et al*, C.A. No. 8432-ML Master's Report (Trustee Roberts's Motion for Summary Judgment) (Final Master's Report April 24, 2015), affirmed on remand, (Del. Ch. Feb. 27, 2017).

Each of the 1970 trusts benefited the child for whom it was settled, along with his or her living descendants. In each of these trusts, an individual trustee served as cotrustee with the corporate trustee, Wilmington Trust Company. The corporate trustee could only make investments upon receiving direction from the individual trustee. Until the Mennen Company stock was acquired by Colgate-Palmolive, very little investment activity occurred, but after the 1970 trusts became liquid, this all changed. At that time, the settlor's oldest son, Jeff, served as the individual trustee for the trust established for the settlor's youngest son, John Mennen ("John"). It was in this capacity as individual trustee of John's trust that Jeff directed several catastrophic investments in private companies which ultimately cost the trust nearly $100 million over a twenty-year period.

Some of Jeff's more notable investment failures included an investment in beeper technology ($10 million loss); an investment in wireless technology based on a bad patent ($40 million loss); and an investment in an on-site oil change company ($30 million loss). Jeff had a personal stake in each of those companies. From this conflicted position, Jeff directed that loans be made to them from John's trust, or that the trust's assets be used to secure loans to such companies by third party lenders or that trust funds be used to directly purchase an equity position in such companies. The court summed up Jeff's pattern of misconduct as "(i) markedly increasing the Trust's exposure at the same time the subject company's insolvency deepened, (ii) using the Trust's money to rescue himself from personal guarantees, (iii) risking substantial portions of the Trust's diversified portfolio to bail out a small number of companies unable to turn a profit or repay debts in the ordinary course, and (iv) allowing the companies to use new infusions of capital from the Trust to service the Trust's existing debt."[48]

Jeff claimed that he engaged in a due diligence review before directing the trust's investments, but was unable to produce any documentary evidence of due diligence for any of the failed investments. Further, in a few instances, the trust loans or purchases of company equity were used by the borrowing company to relieve Jeff from his own personal liability to the company.

Because the trust did not have the millions of dollars of cash needed to make loans to the start-up companies, the trust borrowed money from either the trustee or a third party lender, securing the loans that it owed with trust assets. Eventually, almost all of the remaining liquid assets in John's trust were liquidated to pay off the trust's obligations, following which, the corporate trustee petitioned the court to remove Jeff as trustee. The beneficiaries eventually filed claims against both trustees.

The corporate trustee vigorously disputed its liability for the trust's losses based on the fact that it was a directed trustee. The trust, being drafted in 1970, lacked the nuances of modern directed trusts. Article Second of John's trust set forth 18 trustee powers. Article Third limited four of those trustee powers, by providing that actions falling under those powers were to be exercised by the corporate trustee upon the direction of the individual trustee. The four "directed" powers were: [i] a power to sell and exchange; [ii] a power to invest funds; [iii] a power to participate in, among other things, a refunding, readjustment of stocks, bonds, or other securities or other obligations, enforcement of obligations or security, or reorganization of a company; and [iv] a power to vote

[48] *Id*. at *29.

on a variety of matters. While this provision was likely intended to encompass all investment decisions, the powers to lend funds, borrow or to secure loans with trust property were not expressly on the list of directed powers. Ultimately, the corporate trustee settled out of the case.

Jeff had his day in court. The Master in Chancery's introductory paragraphs sum up the court's reasoning behind its decision. Concluding that Jeff engaged in non-exculpated breaches of trust in the nature of disloyalty to the trust, the Master explained:

> Interestingly, the bulk of the transactions tainted by the trustee's bad faith were not – as one might expect – directly intended to confer an immediate pecuniary benefit on the trustee. Although a handful of investments directly relieved the trustee from personal guarantees or loans he made to these companies, or – on one notable occasion – were used as leverage to ensure a company paid the trustee's consulting fees, most of the transactions were motivated by something far more amorphous, but much more pervasive: pride. That is, because most of the trustee's personal fortune was out-of-reach in his own trust, the trustee turned to his brother's trust as a piggy bank he readily opened to fund a few private companies in which the trustee had invested his time and on which he had staked a claim that he was uniquely skilled at selecting and advising small fledgling companies that he could turn into the "next big thing." Certain that fortune and acclaim were around the bend, the trustee eschewed the interests of the beneficiaries in favor of subsidizing his self-aggrandized standing as a financier.[49]

The court's analysis turned on whether the trust agreement exonerated Jeff from liability.

One potential barrier to liability were three exculpatory clauses in the trust. Article Sixth provided that the trustees were exonerated from responsibility for loss to the trust fund so long as they acted in "good faith, notwithstanding that they may be an officer, director, shareholder, partner or otherwise financially interested in his [sic] individual capacity in any business, company or real property in which the Trust Estate has an interest."[50] Article Seventh provided an additional exoneration clause exculpating the trustees from liability so long as they "acted in good faith" including for "'any loss or depreciation in the value of the Trust Estate occurring by mistake in, or error of, judgment in the purchase or sale of any investment or the retention of any investment…so long as the same be made or done in good faith.'"[51] Trustees were further excused from liability for acts taken on the advice of counsel.[52]

The court recognized that a trustee would be absolved of liability for loss so long as he acted in good faith and did not engage in willful misconduct.[53] The "willful misconduct" standard is the minimum standard of conduct required by Section 3303 of Title 12 of the Delaware Code. It was enacted more than 30 years after John's trust was created. The beneficiaries argued for a more stringent minimum standard of conduct, being gross negligence, based on cases decided before

[49] *Mennen, supra.* at *1.
[50] *Mennen, supra.* at *3.
[51] *Id.*
[52] *Id.* at *4.
[53] Id. at *21.

Section 3303 was enacted. The court held that it would be bound by the legislature's instruction that Section 3303 applies to all trusts whenever created.[54]

Expounding on the difference between bad faith and willful misconduct, the court acknowledged that "it is not easy to delineate a precise distinction between the two, and one might credibly argue that willful misconduct is one subset of bad faith conduct."[55] The term "wilful misconduct" is defined under Delaware law as "intentional wrongdoing, not mere negligence, gross negligence or recklessness and 'wrongdoing' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[56] Good faith is defined as "honesty in fact and the observance of reasonable standards of fair dealing."[57] The court defined "bad faith" as the absence of "good faith."[58]

Jeff's argument was that good faith should be determined with reference to his state of mind. He said he never meant for the trust to lose money. The court rejected the purely subjective interpretation of "good faith" proffered by Jeff. Instead, the court read into the definition of "good faith" a part objective/part subjective interpretation. The objective part relates to the "observance of reasonable standards of fair dealing."[59] This is where Jeff's conduct failed to meet the good faith standard. The court found that some of Jeff's investment decisions were motivated by his personal interests – which is the very definition of bad faith, if not willful misconduct.[60] Additionally, a centerpiece of Jeff's argument that he acted in good faith was his insistence that he conducted extensive and continuous due diligence before making investments. But Jeff kept no records to support this position, and the court found his testimony to be self-serving.

The trust agreement waived liability for the trustee's conflict of interest – which meant that it was not a breach of duty for Jeff to direct the trust to enter into transactions with companies in which he had a financial interest. However, it would be a breach of trust for Jeff to direct such conflicted transactions in order to advance his own interests. There was evidence that in some instances, Jeff caused the trust to borrow funds and lend the funds to companies in order to relieve his personal loans. Where Jeff acted for his pecuniary self-interest, the court held that he acted with willful misconduct.[61] The court acknowledged that many of the investments did not result in direct pecuniary benefit to Jeff. Instead, Jeff's improvident investments stemmed from the need to prove himself – a motivation that the court found to constitute, at a minimum, bad faith.[62]

As to those investment losses that did not bear the hallmark of Jeff's pride or direct self-interest, the court dismissed the breach claims.[63]

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[54] Id. at *22.
[55] Id. at *23.
[56] Id. citing 12 Del. C. § 3301(g).
[57] Id., *citing* 12 Del. C. § 101(2)
[58] Id. at *23.
[59] Id. at *23.
[60] Id at *24.
[61] Id at 27, 28.
[62] Id.
[63] Id at 29.

The court held Jeff liable for overcharging the trust for his "expenses." Jeff relied on a letter he procured from an attorney explaining which trustee expenses could be reimbursed, coupled with the trust's exoneration for a trustee's reliance on advice of counsel. The attorney letter advised Jeff to keep records of his time and to fairly allocate his time, but Jeff disregarded the advice and did not keep records. The court rejected the advice of counsel defense.[64]

Jeff raised the defense of laches because all of the transactions occurred more than three years before the action was filed. The beneficiaries countered that the limitations period was tolled by Jeff's fraudulent concealment of problems. Rather than address this argument, the court found that the limitations period for John's children was tolled until they reached the age of majority, because, even if John was on notice of claims, the court found that he could not virtually represent his minor children. [65] The court held that John had a material conflict with his children that precluded his virtual representation of them because "(1) he placed nearly complete emphasis on the present income of the Trust, without any apparent regard for the capital growth or long-term stability of the Trust, and (2) he was beholden to Jeff to the point that John could not himself take action to remedy Jeff's bad faith conduct."[66] In the end, the court ordered Jeff to pay nearly $100 million in damages, less set off for the corporate trustee's settlement, plus interest.[67]

In practice, many questions arise as to an investment advisor's authority and the directed trustee's ability to rely upon trust directors' directions. A sampling of such questions are as follows:

- Can an investment trust director direct the trustee to make loans and pledge trust assets as collateral?
- Can investment trust directors direct no interest loans?
- Can an investment trust director direct that loans be made to beneficiaries or is that within a distribution trust director's authority if one is named, or is that within the trustee's authority to make distributions?
- Does a directed trustee have any responsibility to enforce repayment of loans where it has been directed to make the loan?
- What if the loan is being made by the corporate trustee's banking department and the bank is acting in two capacities: lender and trustee?
- Can the beneficiaries waive the potential conflict of interest of the trustee (see sample waiver language below)?
- Can the investment trust director direct formation of new entities and open accounts in the name of the entities? (See specific powers granted to investment advisor in sample language below).

[64] Id at 29.
[65] Id at 31.
[66] Id at 32.
[67] Id at 37.

- Can the trustee be directed to finance and pledge assets of entities held in trust (see specific powers granted to investment advisor sample language below?

- Can the investment trust director delegate its powers to third parties?

- Who directs liquidation of entities?

- What if the investment trust director is an interested party in an entity or other trust investment?

- What are the responsibilities of the investment trust director and directed trustee when litigation arises in connection with an investment or entity (e.g., shareholder litigation)? Is the directed trustee as the named party able to take direction from the investment trust director? Can the investment trust director be designated as the named party?

3. Selected State Statutes

For states which have adopted the UDTA (16 as of 2022), clear and robust provisions defining the scope of the trust director's authority and defining what actions constitute "investments" is important given that there are no statutory definitions under the UDTA.

Even in states where the statute includes provisions pertaining to a trust director's investment authority/powers (e.g., Nevada, Illinois), the term "investment" may not be defined or may include general references to "purchases, sales and retention" of assets.

Examples of different state statutes, namely, Delaware, Nevada, Illinois, Tennessee, Texas, are excerpted below.

Delaware has a comprehensive definition of the term "investment" in 12 Delaware Code Section 3313(d):

> For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes, provided, however, that the power to lend for investment purposes shall be considered an investment decision only with respect to loans other than those described in § 3325(19)b. and c. of this title), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

Nevada's directed trust statute provides:[68]

> (1) An instrument may provide for the appointment of a person to act as an investment trust adviser or a distribution trust adviser with regard to investment decisions or discretionary distributions.
>
> (2) An investment trust adviser may exercise the powers provided to the investment trust adviser in the instrument in the best interests of the trust. The powers exercised by an investment trust adviser are at the sole discretion of the investment trust adviser and are binding on all other persons. The powers granted to an investment trust adviser may include, without limitation, the power to:
>
> a. Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust.
>
> b. Vote proxies for securities held in trust.
>
> c. Select one or more investment advisers, managers or counselors, including the trustee, and delegate to such persons any of the powers of the investment trust adviser.
>
> d. Value non-publicly traded investments held in trust that are subject to the investment management authority of the investment trust adviser.

The Illinois directed trust statute defines the powers of an investment trust director:

> (b) An investment trust advisor may be designated in the trust instrument of a trust. The powers of an investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including, but not limited to, each beneficiary, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The trust instrument may use the title "investment trust advisor" or any similar name or description demonstrating the intent to provide for the office and function of an investment trust advisor. Unless the terms of the trust provide otherwise, the investment trust advisor has the authority to:
>
> (1) direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;
>
> (2) direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including, but not limited to, voting proxies for securities held in trust;
>
> (3) select and determine reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them

[68] Nevada Rev Stat Section 163.5557.

any of the powers of the investment trust advisor in accordance with Section 807; and

(4) determine the frequency and methodology for valuing any asset for which there is no readily available market value.

The Texas Directed Trust Act [69] defines investment, but does not expressly address voting powers, lending, creation of entities or delegation of an investment trust director's powers.

"Investment decision" means, with respect to any investment, the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of the investment or rights in the investment and, with respect to a nonpublicly traded investment, the valuation of the investment.

With respect to investment powers, Tennessee [70] grants advisors the authority to direct the "acquisition, disposition or retention of any trust investment" and among other powers grants investment advisors:

(1) The power to make loans out of trust property, including but not limited to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances;

(2) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust;

(3) The power to select one (1) or more investment advisors, managers or counselors, including but not limited to, a trustee and delegate to them any of its powers;

4. Sample Form Language, Definition of Investment [71]

In addition to defining the scope of a trust director's investment authority, certain other investment decisions may put the trustee in a conflicted position. Accordingly, the following provisions are samples of The Northern Trust Company of Delaware's form language defining the scope of investment authority and related exoneration and waiver of conflict provisions.

a. Scope of investment powers [emphasis added]:

Directed as to Investment Powers. Notwithstanding any other provision of this Trust Agreement, so long as an Investment Advisor is acting, the Trustee shall only have the duty to act with respect to all any matters relating to the management and investment of Trust assets only upon the written direction of the Investment Advisor. The Trustee shall exercise the powers granted to it under this Trust Agreement, by statute relating or by other applicable law, including (but not limited to) (i) to buying, selling, retaining, managing,

[69] Texas Prop. Code Section114.0031 (a) (2).
[70] Tenn. Code Ann. Section35-15-1201 (a)
[71].

leasing, exchanging, *borrowing, leveraging, lending, guaranteeing, mortgaging, pledging or, encumbering or otherwise disposing of or acquiring property held in any trust hereunder,* (ii) *participation in voting trusts, incorporations, reorganizations, consolidations, liquidations or, mergers or divisions,* (iii) *the acquisition, creation and/or retention of partnerships, (whether general, limited or otherwise), limited liability companies, corporations, statutory or business trusts or other business enterprises or entities (including the transfer of any portion of the Trust estate to any such enterprise or entity) and the management of such partnerships, limited liability companies, corporations, statutory or business trusts or other business enterprises or entities, (iv) voting and exercising all rights of an equity holder or , shareholder, partner, member or manager of any entity or enterprise owned (in whole or in part) or managed, directly or indirectly, by the trust , including without limitation, subscription, conversion, option and similar rights, and* (v) *opening accounts of the trust or an entity owned, in whole or in part, by the trust, only upon receiving the written direction of the Investment Advisor of such trust and the Trust.* The Trustee shall have no other duties to the trust, the beneficiaries of the trust or the Investment Adviser of the trust or the Investment Advisor relating to the exercise of such powers and the Trustee shall have no authority with respect to any action or inaction as to any asset held in any Trust under this Trust Agreement except as may be necessary from time to time to carry out the directions of the Investment Advisor.

Other Duties of the Investment Advisor. With regard to [Trust assets] [Special Assets] and liabilities over which the Investment Advisor has responsibility and in addition to the Investment Advisor's duties under this Trust Agreement, the Investment Advisor shall have the duty (i) to confirm to the Trustee, in writing, the value of [Trust assets] [Special Assets] and liabilities at least annually and upon request by the Trustee, (ii) to direct the Trustee with respect to any representation, warranty or covenant required to be made in order to maintain any [investment] [Special Asset] held in the Trust, (iii) to direct and instruct the Trustee on future actions, if any, to be taken with respect to such representations, warranties and covenants and (iv) to direct the Trustee to sign agreements and any other documentation required in connection with the management and investment of [Trust assets] [Special Assets].

Alternate version with specific directed powers identified. Each Trust created hereunder is intended to be a directed trust under Section 3313 of Title 12 of the Delaware Code. The Investment Adviser shall have the exclusive authority to make investment decisions for the Trust, and notwithstanding any other provision of this Agreement, the Trustees shall exercise all authority to make investment decisions only upon the written direction of the Investment Adviser. The Trustees shall follow each direction of the Investment Adviser which is authorized by this Agreement. The Trustee's investment powers set forth in Paragraphs B and K of this Article shall be made expressly subject to this Paragraph C. In particular, the Trustee shall exercise the powers hereinbefore granted to it in subparagraphs B(1), B(2), B(3), B(4), B(5), B(6), B(7), B(8), B(9), B(10), B(12), B(13), B(14), B(15), B(19), B(20), B(21), B(22), B(23) and B(24) of this Article, in subparagraphs K(1) and K(8) of this Article (to the extent involving investment decisions), and all other powers relating to the acquisition, disposition, retention, exchange, change in character, lending, borrowing, pledging, mortgaging, managing, voting, leasing, granting of options with respect to, insuring, abandoning, or in any other way relating to the management or investment of

the assets of the trust estate, with respect to each Trust hereunder, only upon the written direction of the Investment Adviser of such Trust...

a. Reliance on valuation provided by trust director

Under the terms of the Trust agreement, the Trustee shall be entitled to rely upon the valuation provided by the Investment Adviser for all purposes in administering the trust, without incurring any liability to any party, and shall be under no obligation to inquire or to make any independent verification of the information provided to the Trustee by the Investment Adviser.

b. Waiver of conflict for loans by corporate trustee to trust and entities in trust [72]

Disclosure of Loan Conflict of Interest. From time to time, one or more of the Trust, the Grantor, the Grantor's spouse, an individual, entity or institution acting as Trustee and/or one or more entities the interests in which are held directly or indirectly by the Trust, may have or wish to enter into a loan ("Loan") with the Corporate Trustee, or an Affiliate of the Corporate Trustee, in its corporate (rather than fiduciary) capacity (in such capacity, the "Lender"). Having the Corporate Trustee acting as both Trustee and Lender or having the Corporate Trustee act as Trustee and an Affiliate of the Corporate Trustee act as Lender poses a conflict of interest for the Corporate Trustee because as Trustee, the Corporate Trustee has a fiduciary duty to preserve the Trust property for the beneficiaries, while as Lender, the Corporate Trustee or an Affiliate of the Corporate Trustee will be a direct or indirect creditor of the Trust and in the position of seeking repayment on favorable terms of the Loan from the Trust and therefore from the Trust property. These competing interests as Lender and as Trustee shall be referred to as the "Loan Conflict of Interest."

Waiver of Loan Conflict of Interest. The Grantor hereby specifically waives, on behalf of [himself/herself] and all beneficiaries hereunder, the Corporate Trustee's Loan Conflict of Interest, and authorizes the Corporate Trustee as Trustee, [subject to the direction of the Investment Advisor/Empowered Trustee, if applicable], without notice to or consent by any beneficiary or court and without any disclosure otherwise required pursuant to 12 *Del. C.* Section 3312(c) or other applicable law, to take any action or omit to take any action in good faith related to the Loan, including but not limited to any participation as Trustee in any decision as to when and whether to enter into and repay the Loan or to deal with the collateral and any security interest in such collateral, as though the Loan Conflict of Interest did not exist. Notwithstanding any duty otherwise existing hereunder or at law or in equity, the Corporate Trustee (i) shall have no greater burden to justify its acts as a fiduciary by reason of conflict of interest than it would have in the absence of any conflict and (ii) shall not be liable for any action or omission taken by the Corporate Trustee as Trustee in good faith with respect to the Loan, or any action or omission taken by the Corporate Trustee or an Affiliate of the Corporate Trustee as the Lender pursuant to the Loan or any security interest related thereto while the Loan is outstanding, including but not limited to any

decision to pursue the Lender's rights as a creditor, generally, of the Trust or as a security interest holder in the event of any default.

C. Exoneration and Waiver of Duties

The flexibility inherent in a directed trust may persuade a hesitant settlor to create a trust, and in many cases, may make it more palatable to engage a professional trustee. But what's in it for the trustee? The trustee may be willing to reduce its fee provided that its risk of liability is commensurately reduced. One key measure of whether the risk of liability is reduced sufficiently, from a trustee's perspective, is the degree to which it is exonerated for following directions of the trust director. Related to the degree of exoneration, is the presence or absence of a duty of a trustee to monitor, supervise or be responsible for, the acts of the trust director. If a directed trustee must monitor the acts of the trust director to avoid liability, it may put a directed trustee into the position of uncertainty regarding the directed action.[73]

There are at least four different approaches to trustee exoneration.[74] At one end of the spectrum are statutes which completely exonerate a directed trustee from liability related to the directed act, or exonerate subject to an exception for willful misconduct, and at the other end of the spectrum are statutes (or uniform acts) which impose some degree of duty on the directed trustee to monitor the trust director. Each of the approaches will be reviewed below.

1. UTC/Restatement Applicable Provisions

The UTC and Restatement provide the least amount of protection from liability for the directed trustee.

UTC Section 808(b) provided as follows (emphasis added):

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is *manifestly contrary to the terms of the trust* or the trustee knows the attempted exercise would constitute a *serious breach of a fiduciary duty* that the person holding the power owes to the beneficiaries of the trust.

The Restatement (Third) of Trusts, Section 75 provides as follows (emphasis added):

> Except in cases covered by Section 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is *contrary to the terms of the trust* or power or the trustee knows or has reason to

[73] References herein to a "directed action" also include directions to refrain from acting.
[74] Mary C. Downie, ACTEC State Laws Committee presentation, November 4, 2022 "Variations in State Directed Trust Statutes."

believe that the attempted exercise *violates a fiduciary duty* that the power holder owes to the beneficiaries.

Restatement (Second) of Trusts Section 185 provides as follows (emphasis added):

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power *violates the terms of the trust* or is a *violation of a fiduciary duty* to which such person is subject in the exercise of the power.

a. Scope of exoneration. UTC Section 808 does not expressly state that a directed trustee is not liable for complying with the directed act. This is implied, subject to the requirement that the directed trustee determine if the directed act is a "serious breach" of the trust director's duties or is "manifestly contrary" to the terms of the trust instrument. The Restatement versions are similar to the UTC.

b. Scope of duty to monitor. Under UTC Section 808, Restatement (Third) of Trusts Section 75 and Restatement (Second) of Trusts Section 185 the directed trustee must determine whether the directed act is a breach of the trust director's duties. Because the directed trustee is responsible for its decision to comply with the directed act, the trustee has an implicit duty to monitor the trust director. The framing of the UTC/Restatement approach was seemingly perceived as un-workable by experts in the field. The drafting committee for the UDTA reported, in a comment to Section 9(b) of the UDTA, that "a review of every existing specialized state statute on directed trusts showed that no state that has legislated specifically on the issue of directed trustee fiduciary duties has chosen to follow [UTC Section] 808.

2. UDTA Applicable Provisions

The UDTA eliminates a directed trustee's liability except for its own willful misconduct and ostensibly the trust director's willful misconduct.

UDTA Section 9 provides in pertinent part (emphasis added) as follows:

> (a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.
>
> (b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in *willful misconduct*…

The UDTA comment to Section 9(a) provides the following explanation of the duty to reasonably comply with directions:

> The duty to take reasonable action under subsection (a) does not, however, impose a duty to ensure that the substance of the direction is reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule of subsection (b), a trustee is liable only for

its own breach of trust in executing a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to execute the purchase reasonably.

UDTA Section 11 waives the directed trustee's duty to monitor, inform and advise as follows:

> (a) Unless the terms of a trust provide otherwise:
>
> > (1) a trustee does not have a duty to:
> >
> > > (A) monitor a trust director; or
> > >
> > > (B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and
> >
> > (2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).
>
> (b) Unless the terms of a trust provide otherwise:
>
> > (1) a trust director does not have a duty to:
> >
> > > (A) monitor a trustee or another trust director; or
> > >
> > > (B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and
> >
> > (2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).

a. Scope of exoneration. The UDTA approach is to exonerate the directed trustee except where it does not reasonably comply with the direction or where its compliance would constitute willful misconduct. The prefatory note to the UDTA states that "[i]n complying with a trust director's exercise of a power of direction, a directed trustee is liable only for the trustee's own 'willful misconduct.'" However, leading practitioners have observed that the focus on carrying out the directed act potentially imposes associative liability on the directed trustee for the trust director's willful misconduct.[75] Additionally, there is an affirmative duty on the directed trustee (discussed below) to share pertinent trust information with the trust director, which may expose the trustee (or trust director to liability).

The UDTA incorporates a concept found in the Nevada (and similar) directed trust statutes that addresses what happens when a directed trustee fails to carry out a directed act. The Nevada directed trust statute (discussed below) provides for no liability where a trustee fails to comply

[75] Richard W. Nenno, *Directed Trusts: Making Them Work*, 45 Tax Mgmt. Est., Gifts & Tr. J. 247, ¶ E (Sept. 10, 2020), *citing* Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee Under the Uniform Directed Trust Act*, 44 ACTEC L.J. 207 (Spring 2019).

with a direction if it was subject to a condition that did not occur. The UDTA requires a directed trustee to take reasonable action to comply with the direction, and by implication exonerates the directed trustee from liability if it took reasonable action to comply with the direction but failed to carry out the directed act. The Nevada statute does not have a "reasonable action" provision. This provision, or lack thereof, could play out in different ways under the Nevada statute compared to the UDTA. For example, if a directed act is contingent upon a third-party providing consent or authorization, the Nevada statute does not appear to require the trustee to seek the consent or authorization. In contrast, the UDTA implies that the trustee should solicit compliance with the condition precedent to the directed act in order to take "reasonable action" to comply. Overall, the "reasonable action" requirement may inject uncertainty into the UDTA, from the directed trustee's vantage point.

b. Scope of duty to monitor. The UDTA waiver of duties is similar to the Delaware statute. Subsection (e) of the Delaware directed trust statute lists three separate but related duties that are waived: the duty to monitor the conduct of the adviser; the duty to provide advice to, or consult with, the adviser; and the duty to warn the beneficiary or others about the directed act. UDTA Section 11(a)(1)(B) waives the duty to monitor the adviser and the duty to inform or give advice to a settlor, beneficiary, trustee, or trust director about the directed act. Although UDTA Section 11 waives the duty to monitor the trust director, UDTA Section 9(b) implicitly requires the directed trustee to monitor the directions it receives from the trust director to confirm that compliance with the direction would not be an act of willful misconduct.

Subsection (a)(2) provides that if a directed trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not assume a continuing duty to provide advice to a settlor, beneficiary, trustee, or another trust director. The same rules apply for a trust director.[76]

However, the decision in *Rollins v. Branch Banking, Trust Co. of Va.*,[77] suggests that judges may resist the notion that a trustee can have zero responsibility with respect to a particular matter of trust administration. There, the plaintiff beneficiaries asserted that the defendant trustee consulted with the grantors concerning investment decisions, including the decision to over-concentrate the trust's portfolio, but failed to communicate those decisions or their justification with the beneficiaries. Beneficiaries claimed a resulting diminution in the value of the trusts of $25,000,000.00. Notably, the trust instrument vested the beneficiaries with the exclusive authority to make investment decisions and craft investment strategy.

The Court applied the "basic principle" that a court cannot hold a trustee liable for decisions that it did not and could not have made. That principle was codified in Virginia under what was then Va. Code Ann. § 26-5.2.[78] The then-existing and applicable Virginia statute prohibited a finding of liability against a trustee for failing to do what he had no ability to do. However, while the Court found no breach of a duty for the directed trustee's failure to question an investment director's

[76] Uniform Directed Trust Act, Section11 (b) (2).
[77] *Rollins v. Branch Banking, Trust Co. of Va*., 56 Va. Cir. 147 (Cir. Ct. Roanoke City 2001).
[78] Virginia has since adopted the Uniform Directed Trust Act's provision on the liability of directed trustees, providing that a directed trustee is ordinarily not liable for acting on a direction unless the trustee's action amounts to willful misconduct. Va. Code Ann. § 64.2-779.32.

concentration of the trust's portfolio, the Court did hold the directed trustee liable for failing to inform the trust's beneficiaries of the risks of the director's over-concentration.

c. Duty to share information. As noted above, one of the duties imposed by the UDTA is a duty to share information.[79] It runs in all directions. Accordingly, the directed trustee must share information with the trust director, the trust director must share information with the trustee and trust directors must share information with each other, all to the extent that the information is reasonably related to their powers or duties. This duty is an affirmative duty to provide information even in the absence of a request for information and is another potential avenue for liability. Section 10 contains safe harbors for trustees and trust directors who act in reasonable reliance on information provided by the other party.[80] The safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct.

3. Selected State Statutes

An example of the "no liability" approach can be found in Nevada Revised Statute (NRS) Section 163.5549.[81] It provides as follows:

> 1. A directed fiduciary is not liable, individually or as a fiduciary for any loss which results from:
>
> (a) Complying with a direction of a directing trust adviser, whether the direction is to act or to not act; or
>
> (b) Failing to take any action proposed by a directed fiduciary if the action:
>
> (1) Required the approval, consent or authorization of a person who did not provide the approval, consent or authorization; or
>
> (2) Was contingent upon a condition that was not met or satisfied.
>
> 2. A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.
>
> 3. The provisions of this section do not impose an obligation or liability on a custodian of a custodial account for providing any authorization.

a. Scope of exoneration. The exoneration provided by this statute applies to [1] loss resulting from compliance with a direction to act or refrain from acting; and [2] loss resulting from

[79] Uniform Directed Trust Act, Section 10.
[80] Uniform Directed Trust Act, Section 10 (c) and (d).
[81] Alaska, Idaho, Kentucky, New Hampshire, Ohio, South Dakota, Tennessee and Wyoming generally follow the no liability approach. Todd A. Flubacher, ACTEC State Surveys, "Overview of State Direct Trust Statutes" (Sept. 20, 2019)

the trustee failing to act when the direction was subject to a condition that was not met or did not occur.

b. Scope of duty to monitor. Subsection 2. of NRS Section 163.5549 appears to waive the trustee's duty to evaluate the merits of an investment made by a trust director or provide advice to the trust director with respect to an investment.

c. Duty to share information. Nevada does not appear to have a statute requiring the sharing of information among trustees and trust directors.

An example of the "no liability" except for the directed trustee's own willful misconduct approach can be found in 12 Delaware Code Section 3313, providing in pertinent part as follows:

> (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act…
>
> (e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:
>
> (1) Monitor the conduct of the adviser;
>
> (2) Provide advice to the adviser or consult with the adviser; or
>
> (3) Communicate with or warn or apprise any beneficiary or third-party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.
>
> Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

a. Scope of exoneration. Subsection (b) of 12 Delaware Code Section 3313 exonerates the directed trustee for loss resulting from compliance with the trust director's directions except for the trustee's own willful misconduct. Note that this is different from the UDTA standard of liability – which does not exonerate a trustee where its compliance with the direction is itself an act of willful misconduct.

b. Scope of duty to monitor. Subsection (e) of 12 Delaware Code Section 3313 waives the directed trustee's duty to monitor the trust director's conduct, waives the duty to provide advice or consult with the adviser and waives the duty to warn a beneficiary or third party about the direction.

c. Duty to share information. Delaware imposes a duty to keep co-fiduciaries informed, upon request, in 12 Delaware Code Section 3317.[82] The duty applies to aspects of trust administration that relate to the specific duty or function of the fiduciary or nonfiduciary requesting such information provided that it is reasonably necessary for such fiduciary or nonfiduciary requesting the information to perform its duty. This is subject to the same waiver of duty to monitor, advise and warn that applies in Section 3313 to directed trustees.[83] Section 3317 does not provide an express safe harbor from liability for a trustee who relies on information provided by a third party, but the trust agreement may provide such exoneration. Section 3586 provides that a "trustee who acted in good faith reliance on the terms of a written governing instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."[84]

4. Excluded trustee:

What is an "excluded trustee?" The term "excluded trustee" appears to be synonymous with "directed trustee" in several states, but under Delaware law, an excluded trustee is not equivalent to a "directed trustee."

The New Hampshire statute[85] provides:

> (c) A trustee is an excluded fiduciary to the extent that the terms of the trust vest a power or duty exclusively in a trust advisor, trust protector, cotrustee, or other person. (d) A trustee is an excluded fiduciary to the extent that: (1) under the terms of the trust, the trustee must follow the direction of a trust advisor, trust protector, cotrustee, or other person; and (2) the trustee acts in accordance with that direction.

The Nevada statute[86] provides:

> a fiduciary is a "directed fiduciary" with respect to any action that the fiduciary:
>
> (1) Has no power to take under the terms of the governing instrument;
>
> (2) Is mandated by the governing instrument and for which the fiduciary has no discretion to act otherwise; and
>
> (3) Is directed to take or prohibited from taking by a directing trust adviser.

[82] 12 Del. C. Section 3317
[83] Id.
[84] 12 Del. C Section 3586.
[85] New Hampshire Rev Stat Ann Section 564-B:7-711
[86] Nevada Rev Stat Section 163.5548.

The Alaska Statute[87] provides:

> (c) Notwithstanding the other provisions of this section, if the terms of a trust instrument provide for the appointment of more than one trustee but confer on one or more of the trustees, to the exclusion of other trustees, the power to direct or prevent specified actions of other trustees, the excluded trustees shall act in accordance with the exercise of the power. An excluded trustee under this subsection is not liable, individually or as a fiduciary, for a consequence that results from complying with the exercise of the power, regardless of the information available to the excluded trustee. An excluded trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. A trustee having the power is liable to the beneficiaries as a fiduciary with respect to the exercise of the power as if the excluded trustees were not in office and has the exclusive obligation to account to and to defend an action brought by the beneficiaries with respect to the exercise of the power. In this subsection, "power" means the power to direct or prevent specified actions by other trustees.

South Dakota and Idaho describe a fiduciary who is directed to take or refrain from taking an action as an "excluded fiduciary."[88] The Wyoming statute treats a trustee that is directed by an adviser as an excluded fiduciary, as well as a trustee where fiduciary duties of a trustee are performed by an adviser.[89]

Ohio recognizes an "administrative trustee" arrangement where the fiduciary is responsible for a limited set of ministerial acts.[90]

Delaware's excluded trustee statute[91] provides as follows:

> (a) If the terms of a governing instrument confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duty and liability of the excluded trustee is as follows:
>
> > (1) If the terms of the governing instrument confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes wilful misconduct on the part of the directed cotrustee;
> >
> > (2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by

[87] Alaska Stat. Section 13.36.072(c)
[88] Idaho Code Section 15-7-501(1)(b); Section 15-7-501(2); South Dakota Cod. Laws Ann Section 55-1B-2(1)
[89] Wyo. Stat Ann. Section 4-10-718(a)
[90] Ohio Rev Code Ann 5815.25(b)
[91] 12 Delaware Code Section 3313A

the cotrustee in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee; and

(3) The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

(b) The cotrustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

The difference between a directed trustee and an excluded cotrustee under Delaware law, is that a directed trustee takes direction from a trust director, whereas in an excluded cotrusteeship, one or more trustees exercise full authority and retain full responsibility for certain trust acts, and the excluded cotrustee is precluded from participating in such acts. The excluded cotrustee is, in effect, not a fiduciary with respect to the excluded actions.

a. Scope of liability. In all of the foregoing states, the "excluded" trustee or fiduciary is not liable for loss. In particular, the foregoing statutes provide in pertinent part:

- Alaska: "An excluded trustee under this subsection is not liable, individually or as a fiduciary, for a consequence that results from complying with the exercise of the power, regardless of the information available to the excluded trustee."[92]

- Delaware: "If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or

[92] Alaska Stat. 13.36.072(c)

other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee."[93]

Comment: The Delaware statute provides that an excluded cotrustee is not even a fiduciary with respect to the authority as to which it is excluded. To the extent that one trustee directs another trustee, the directed trustee would be considered a fiduciary and would be subject to the willful misconduct standard.

- Idaho: "An excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following: (a) Any loss that results from compliance with a direction of the trust advisor; (b) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization."[94]

- Ohio: "As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the administration of the trust."[95]

- South Dakota: "An excluded fiduciary is not liable, either individually or as a fiduciary, for any of the following: (1) Any loss that results from compliance with a direction of the trust advisor, including any loss from the trust advisor breaching fiduciary responsibilities or acting beyond the trust advisor's scope of authority; (2) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization; (3) Any loss that results from any action or inaction, except for gross negligence or willful misconduct, when an excluded fiduciary is required, pursuant to the trust agreement or any other reason, to assume the role of trust advisor or trust protector; (4) Any loss that results from relying upon any trust advisor for valuation of trust assets; or (5) Any loss that results from any tax filing made or tax position taken based on the recommendations or instructions received from a tax preparer or professional used by the excluded fiduciary at the direction of the grantor or of another trust fiduciary."[96]

- Wyoming: "Unless the trust instrument appointing, designating or providing for a method for appointing a trust protector or trust advisor or the court order appointing a trust protector states otherwise, the excluded fiduciary is not liable for any loss resulting from any action or inaction of the trust advisor or protector."[97]

b. Scope of duty to monitor. Each of the foregoing states waives some combination of the duty to monitor the trust director, perform an investment review, value trust assets, provide

[93] 12 Del. C. Section 3313A(a)(2)
[94] Idaho Code Section 15-7-501(2)
[95] Ohio Rev Code Ann Section 5808.08(B)
[96] South Dakota Codified Laws Ann Section 55-1B-2(1)
[97] Wyo. Stat Ann Section 4-10-717

advice to the trust director or warn a beneficiary or others about the trust director's exercise of its discretion.[98]

5. Recent Developments: Use of Special Purpose Entities as Trust Directors

An interesting recent development in directed trust law is the use of special purpose entities as trust directors in directed trusts. Both South Dakota and Tennessee have enacted new statutes related to special purpose entities that allows such entities to be designated as advisors and trust protectors within directed trusts. [99]

Both states' legislation is intended to provide liability protection for individuals serving as investment advisors, distribution advisors or trust protectors under directed trust structures. The difficulty in acquiring liability insurance coverage for individuals serving as cotrustees or investment and/or distribution advisers is cited as a reason for using the special purpose entity structure. Several South Dakota trust companies also claim that the special purpose entity structure within a directed trust maximizes trust situs for income tax, asset protection and trust law purposes.

The typical structure is an LLC as a "housing" structure with a Board of Managers overseeing Investment Committees, Distribution Committees and Trust Protectors. The special purpose entity must be created for the specific purpose of acting as the trust protector or trust advisor, *exclusive to all other purposes*.

Both states have some restrictions on the use of special purpose entities and have specified state regulatory filing requirements.[100] Special Purpose entities are not to provide fiduciary services outside the context of a specific directed trust structure and cannot engage in fiduciary business with the general public or with a family as part of a private trust company . Under the Tennessee statute, the special purpose entity can only be used where the trusts are held for family members.[101]

South Dakota:

> (1) The entity is established for the exclusive purpose of acting as a trust protector, investment trust advisor, or distribution trust advisor, as defined by Section 55-1B-1;
>
> (2) The entity is acting in such capacity under a trust instrument which names a South Dakota trust company, a South Dakota bank with trust powers, or a national bank with trust powers as trustee;

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[98] Alaska Stat. Section 13.36.072; 12 Del. C. Section 3313A(a)(3); Idaho Code Section 15-7-501(2)(b); Nevada Rev. Stat. Section 163.5549; Ohio Rev Code Ann Section 5815.25(B); SDCL Section 55-1B-2(1); Wyo Stat. Section 4-10-715

[99] Tenn. Code Ann. Section 35-15-1301(b); SDCLSection 51A-6A-66

[100] SDCL Section 51A-6A-66

[101] Tenn. Code Ann. Section 35-15-1301 (a) (5) (defines family members).

(3) The entity is not engaged in trust company business with the general public as a public trust company or with any family as a private trust company;

(4) The entity does not hold itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company;

(5) The entity files an annual report with the South Dakota secretary of state and provides a copy to the Division of Banking; and

(6) The entity agrees to be subject to examination by the Division of Banking at the discretion of the director.

The governing documents of any such excluded entity shall limit its authorized activities to the functions permitted to a trust protector, investment trust advisor, or distribution trust advisor pursuant to chapter 55-1B and limit the performance of those functions with respect to a specifically named trust or family of trusts.

An entity complying with this section shall notify the director of its existence, capacity to act, and the name of the trustee for the trust or family of trusts.

Tennessee[102]:

(a) "Special purpose entity" means an entity that meets the requirements provided under subsection (b).

(b) A special purpose entity shall not be subject to chapters 1 and 2 of title 45 regulating fiduciary activity if:

(1) The entity is established for the exclusive purpose of acting as a trust protector or trust advisor as defined by Section 35-15-1201, or any combination of such purposes;

(2) The entity is acting in such capacity solely under the terms of trusts in which the grantor or beneficiary is a family member, and under which a corporate trustee is serving as trustee;

(3) The entity is not engaged in trust company business as a private trust company under title 45, chapter 2, part 20, or with the general public as a public trust company;

(4) The entity does not hold itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company;

(5) The entity files an annual report with the secretary of state and provides a copy to the department;

[102] Tenn. Code Ann. Section 35-15-1301 (b).

> (6) The entity agrees to be subject to examination by the department at the discretion of the department solely for the purpose of determining whether the entity satisfies all requirements for qualification under this part;
>
> (7) The entity agrees to pay the department the actual expenses of the examination at the time of the examination described in subdivision (b)(6);
>
> (8) The entity does not use the word "trust" or "trustee" in the entity's name in any manner;
>
> (9) The governing documents of the entity, as such governing documents may be amended from time to time, limit the entity's authorized activities to the functions permitted to a trust protector or trust advisor, or any combination of such functions, and limit the performance of those functions with respect to trusts in which a grantor or beneficiary of such trust is a family member with respect to a designated ancestor specifically named in the entity's governing documents;
>
> (10) The entity does not act as a fiduciary other than as provided in this part . . .

6. Limits of Statutory Exoneration and Waiver of Duties for Directed Trustees.

a. Exoneration is narrow in scope. The directed trust statutes generally exonerate a trustee for loss for complying with the trust director's direction, but the term "loss" is yet to be defined by courts. The term "loss" could be understood to mean a financial loss. It is unknown whether the term "loss" would refer to a distribution of trust principal where a beneficiary objects to a trust distribution.

Some of the foregoing directed trust statutes explicitly waive the duty to do an investment review or provide advice in the context of an investment decision, but do not waive the duty to warn the beneficiary about the directed act.

None of the directed trust statutes reviewed herein expressly waives the common law duty to prevent or redress a known breach. If the trust director makes a bad investment decision, would the directed trustee breach its duty if it fails to redress a breach? UDTA Section 4 confirms that common law and equitable principles apply to directed trusts unless otherwise modified by the act of the other applicable laws of the state. It provides in pertinent part as follow:

> The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Presumably, the common law duty to prevent or redress a breach known to the directed trustee would apply to any trust governed by a state that has adopted the UDTA.

If not inconsistent with applicable state law, a trust agreement might expand the scope of the exoneration or waiver of duties. However, as noted above most, if not all state directed trust statutes have a mandatory minimum beyond which a directed trustee and trust director may not be exonerated.

b. Powers are not directed. If a trust agreement does not clearly delineate which trustee powers are directed by a trust adviser, and the state law governing the trust does not provide a default definition, the trustee might lose the statutory protection of being a directed trustee.

c. Act or omission is addressed by other common law duties. Where the trustee is directed as to investments, most directed trust statutes waive the duty on the trustee to evaluate the merits of the investment. However, the trustee remains subject to common law duties in most states, even where the state has a directed trust statute. As previously noted, UDTA Section 4 expressly incorporates other common law duties. Accordingly, if the directed trust statute does not waive a particular trustee duty, it may still apply to the directed trust. Where the trustee has full authority over trust investments, it is normally subject to the duty to act prudently and the duty to act in the sole interest of the beneficiaries.[103] If a trust director has full authority over trust investments, the duty to act prudently would apply to the trust director. A separate duty of disclosure exists to keep beneficiaries informed about significant changes in investments.[104] The trustee also must act impartially as to the beneficiaries, it must administer the trust in accordance with its terms, in the best interest of the beneficiaries, and generally to act in good faith. A trust director acting in a fiduciary capacity would be subject to the duty to avoid conflicts of interest. Such conflicts should be expressly waived in the trust agreement where the trust director serves as investment trust director and also serves on the board of directors or as an officer of a company, an interest in which is held in the trust.

d. Courts may find "willful misconduct" in bad facts cases. In the *Mennen* case, discussed above, the court found that a trust director who invested the trust assets in insolvent or nearly insolvent companies in order to prove that he could pick the next winner, acted out of pride, and that such misconduct amounted to "bad faith" and in some instances it also amounted to "willful misconduct."

7. Sample Exoneration Language for a Directed Trustee



Trustee Liability. Each person acting as Trustee shall be presumed to have acted within the scope of its authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all persons unless it be proven by clear and convincing evidence in the court then having primary jurisdiction over the trust that such person acted in a manner that constitutes willful misconduct. Except as otherwise provided in this Trust Agreement, the Trustee shall be personally liable only for its own willful misconduct. No Trustee shall be liable for making any delegation with reasonable care. The Trustee shall have no duty to offer to the trust any business opportunities that become available to it, in its individual or corporate capacity or in any other capacity. The Trustee shall not be liable for its reliance on (i) any apparently valid documents and certifications including, but not limited to, tax reports and other tax information provided to the Trustee by any entity in which the Trust holds an ownership interest; (ii) the opinions of counsel or any accountant or advisor to any trust; and (iii) any valuation of trust assets (including any supporting documentation for such valuation) provided by the Investment Advisor.

[103] UDTA cmt to Section 10, citing Restatement (Third) of Trusts Section Section 77-79, 90-92 (2007).
[104] Restatement (Third) of Trusts Section 82 cmt. d (2007)

The Trustee shall have no duty to determine whether the Investment Adviser has breached or might breach any of its duties, or to warn any beneficiary, or to seek redress, petition the court for instruction, with respect to any such breach.

Trustor acknowledges that the same person may act as an Investment Adviser of a trust held hereunder and also as a director, officer, manager or similar position of a company, an interest in which is held in such trust. In such event, Trustor waives any inherent conflict of interest, and intends that the standard of conduct and threshold for liability of an Investment Adviser and duty of loyalty owed by the Investment Adviser to the trust shall be applicable to such person only when acting in the capacity as Investment Adviser and not when acting in the capacity as director, officer, manager or similar position of such a company.

Trustee Indemnification. Each person acting as Trustee (or any officer, affiliate, director, employee, or agent of a Trustee, each an ("Indemnified Person")) shall be entitled to indemnification from the Trust, to the fullest extent permitted by law, from and against any and all losses, claims, taxes, fines, penalties, judgements, amounts paid in settlement, damages, reasonable expenses, and liabilities (including liabilities under state or federal securities or tax laws) of any kind and nature whatsoever (collectively, "Expenses"), to the extent that such Expenses arise out of or are imposed upon or asserted against such Indemnified Persons, whether in their fiduciary, corporate or individual capacity or otherwise, with respect to the 23 creation, operation, administration or termination of the Trust, the execution, delivery or performance of this Trust Agreement or the transactions contemplated hereby, except as a result of the willful misconduct of such Indemnified Person.

Payment of Trustee Expenses. Without limiting the right to indemnification provided in Section __ above, the Trustee's right to indemnification for its Expenses under Section ___ above need not await the resolution of any judicial or nonjudicial proceeding or any judicial determination that such Trustee is entitled to indemnification under this Trust Agreement. The Trustee shall have the right to have such Expenses advanced from the trust fund [as such Trustee incurs them][on an ongoing and periodic basis] without the approval of any court, party, person, or entity and regardless of whether the Trustee is adverse or nonadverse to an Advisor, the Grantor, any beneficiary or any other interested party of the Trust with respect to such action, proceeding or matter; provided, however, that, if a court of competent jurisdiction subsequently determines that the actions or failure to act of the Trustee constituted willful misconduct or such other standard of liability provided under this Trust Agreement, such Trustee shall repay to the trust fund the amount expended from the trust fund for such Expenses of the Trustee in connection with such action, proceeding or matter. Such Expenses may include, without limitation, professional fees and expenses of counsel, accountants, and expert witnesses. This provision shall survive the termination of each such Trustee's services under this Trust Agreement.

III. Looking at Directed Trust Concepts Where the Rubber Meets the Road

The discussion up to this point demonstrates and emphasizes the need for careful drafting not only of directed trust provisions, but the overall trust instrument, all while taking into account the laws of the applicable jurisdiction. In theory, this task may seem rather straightforward – we all draft carefully, right? Yet, if we are honest with ourselves, and our clients, we must acknowledge that:

(1) we cannot anticipate every situation that might arise during a trust administration; and (2) things do not always work in the way we intended them to work. The reasons underlying the failure of a trust instrument in application, whether in whole or in part, may be varied and many because not every fact-pattern is neat and tidy.

Moreover, because of the variations between state statutes on directed trusts, along with the enhanced mobility of a trust's principal place of administration under situs provisions, the level of protection afforded to a directed trustee (or a trust director) may not be quite as extensive as it appears at first blush. So, in the beginning, it probably is a good idea to think about the end – in particular, where things might go badly in litigation – and temper our expectations accordingly as we draft for the practical and efficient administration of the trust at hand.

A. Things that Make You Go Hmmm

Below is a non-exclusive list of things to think about, both in drafting and administering an instrument with directed trust provisions:

- Make sure the directed trust provisions are "woven" into the overall trust instrument and not inherently, or even impliedly, inconsistent with other provisions regarding a trustee's powers and duties.

- Do not overreach in drafting where you know your directed trust provisions, particularly those dealing with exoneration and indemnification, go beyond what is allowed under the law of the jurisdiction. In fact, if your settlor wants maximum protection for the directed trustee or trust director, even consider abandoning the use of specific terms or limits of liability (e.g., bad faith, reckless indifference, willful misconduct) and, instead, using something like "to the fullest extent allowed under the law of jurisdiction governing the trust administration."

- Consider addressing the reasons underlying the use of directed trust provisions in a "statement of intent" at the beginning of the trust instrument. This also puts the issue front-and-center for the settlor and may bolster a defense against a claim by a beneficiary that the settlor did not intend the harshness that might attend a particular circumstance.

- Consider limiting change of situs provisions to jurisdictions that afford the same or greater protections for directed trusts as the initial jurisdiction.

- Make sure the trust instrument clearly defines and delineates the authority and responsibility of the directed trustee and the trust director.

- Consider whether, in following the direction of the trust director, the information the directed trustee is required or allowed to receive is at odds with the directed trustee's overall duties to the beneficiaries under the trust instrument or applicable law. Similarly, consider whether allowing the directed trustee the ability to conduct any form of due diligence might create an implied obligation to do so (even if there are statements to the contrary) and potentially undermine liability protection.

- Ensure the directed trustee is not given any discretion in deciding whether to follow the direction of the trust director – the requirement to follow such direction must be absolute. However, you also must be aware of any limits to the protection afforded to a directed trustee under applicable law (e.g., willful misconduct).

- Do not confuse a "delegated" power with a "direction to act."

- Require that all directions from the trust director must be in writing and be: (a) clear and unambiguous; (b) complete on its face; (c) devoid of any suggestion that the directed trustee has discretion about how to take the directed action; and (d) devoid of any "catch-all" provision.

- Likewise, the directed trustee should ensure that all related communications with the trust director are in writing, as well as indicate that any request by the directed trustee for information does not constitute a waiver of any protection afforded under the trust instrument or applicable law and that such communications are only "administrative" steps necessary for the directed trustee to follow the direction.

- Differentiate between the potential liability for acting upon the direction of a trust director and potential liability for failing to follow or properly execute such direction. For example, the UDTA applies a willful misconduct standard for acting upon the direction of a trust director but requires that a directed trustee take "reasonable action to comply with a trust director's exercise or non-exercise of a power of direction."[105]

- For states that have adopted a "willful misconduct" standard, how does your state define "willful misconduct?" In other words, will the standard differ in practice from state to state even if the language of those states' statutes is identical? For example, the UDTA does not define "willful misconduct," but Delaware's statute defines it as "intentional wrongdoing, not mere negligence, gross negligence or recklessness" and further defines "wrongdoing" as "malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[106] The Delaware standard therefore presents a high burden to any person seeking to hold a directed trustee liable for directed actions, but other states may lack a working definition of "willful misconduct."[107]

- Does your directed trustee possess "special skills" that might make it more susceptible to a claim of willful misconduct?

- Some state legislatures have adopted a "no duty" standard for the directed acts of directed trustees (including Alaska, New Hampshire, Nevada, and South Dakota).

[105] Uniform Directed Trust Act, § 9.
[106] Del. C. 12 § 3301(g).
[107] Alternative interpretations of "willful misconduct" are discussed, *infra*.

- If your state has adopted a "no duty standard," are you confident that courts will reliably apply it?
- Or do you fear that courts in your state will be too squeamish to find that a trustee has no duty as to some aspect of trust administration and that courts may instead apply some other standard (perhaps borrowing from equity or common law) to hold the directed trustee accountable?
- Is it possible that a "no duty" standard could present greater uncertainty for directed trustees?

B. A Few More Words About "Willful Misconduct"

Throughout this paper, there are references to the "willful misconduct" standard of liability for a directed trustee under the UDTA and certain other state statutory schemes. However, except for Delaware, which appears to require an element of scienter in its statutory definition, the meaning of "willful misconduct" is not entirely clear in other jurisdictions because the term is not statutorily defined and the issue of directed trustee liability has been litigated very little (or, at least, written court decisions are few and far between).

Although it is safe to say that "willful misconduct" is a lower standard than "reckless indifference,"[108] it is difficult to define just how much lower. This is evident from cases in other contexts:

> While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is "willful" on the part of the responsible person. While it is difficult to define that degree of carelessness which the Legislature must have had in mind, it is my opinion that it must be held that willful misconduct is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable. Of course, willful misconduct may be inferred from the circumstances surrounding the accident.
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> *Walker v. Bacon*, 132 Cal. App. 625, 629–30, 23 P.2d 520, 522 (Cal. Ct. App. 1933).

[108] *Newcomer v. Natl. City Bank*, 19 N.E.3d 492, 504 (Ohio App. 2014) (holding that "bad faith, willful default, or reckless indifference constitute distinct and separate bases of liability"). Although "reckless indifference" is not a standard of liability found in the various directed trust statutes, it does typically demark the outer limit of trustee exoneration under the variations of the UTC. The court in *Newcomer* equated "reckless indifference" with "reckless conduct," which is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." 19 N.E.3d 505 (citations and quotations omitted).

* * *

> The TCA does not define "willful misconduct." Our Supreme Court has cautioned against simply importing definitions of the term applied in contexts not involving sovereign immunity and the TCA.
>
> "Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." *Fielder v. Stonack*, 141 N.J. 101, 124 (1995). Even within the context of the TCA, the concept may vary, depending on the nature of the public employee's activity.
>
> [W]ithin a statute like the Tort Claims Act, the precise definition might differ where the role of willful misconduct is to impose liability in numerous situations where it would otherwise not exist, for the reasons and purposes of imposing liability may differ in those situations and call for differences in the definition and application of willful misconduct." Id. at 125.
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> *Brightwell v. Off. of Licensing*, No. A-4262-17T1, 2020 WL 412903, at *3 (N.J. Super. Ct. App. Div. Jan. 27, 2020).

Certainly, some UDTA courts may choose to adopt Delaware's definition of "willful misconduct." However, others may not be willing to go so far as to require scienter and, instead, adopt a slightly softer interpretation. In this regard, the court's rather lengthy discussion in *Harvey v. Guaranty Trust Co. of N.Y.*[109], on the topic may prove enlightening, if not controlling:

> It remains in this connection to consider the effect, if any, of the so-called exculpatory provisions of article XVI of the indenture. Fairly construed, the exemption of the trustee in the first paragraph of that article from liability 'for anything whatever in respect to the premises or the trust hereby created, except its own fraud or willful misconduct' appears to apply only to those matters specifically referred to in the instrument itself. The indenture under consideration contained no provision requiring or permitting the trustee to satisfy it. On the contrary, it expressly dispensed with the necessity of a formal satisfaction. Nor was there any authority granted to authenticate duplicate bonds or coupons. Assuming, however, that the exemption clause is regarded as applicable to the situation here presented, I am of opinion that it cannot properly be given effect. The tendency of our courts appears to be in the direction of refusing to permit such an exculpatory provision to prevail where the misconduct of the trustee is so repugnant to the trust as to defeat its very purpose. The language quoted from the *Green Case, supra*, affords an excellent illustration. In a recent article in the Harvard Law Review, December, 1928, there appears the following apposite statement (page 244): 'It is therefore apparent that not every obligation of a corporate trustee is found expressed or implied in the covenants of the indenture, but that inherent in the relation there

[109] 236 N.Y.S. 37 (Sup. Ct. 1929), *aff'd* 242 N.Y.S. 905 (1930).

are duties which, even if they may admit of something less than full performance, rise beyond their disavowal and demand at least a reasonable measure of responsibility for their discharge. The requirement that the trustee must record or file the mortgage seems to be clearly such a duty. The duties assumed by a trustee have been declared to be not only those defined by the instrument but also those 'superimposed upon the trustee, created by the relation of the parties and the situation of the trust fund.' It is not the intention of the parties that the trustee shall be 'a mere dummy,' and concerning matters which go directly to the integrity of the security, the trustee must expect to be held to the exercise of the care and diligence which would naturally be expected of one acting in like circumstances to protect his own property. Such is the plain implication of the *Rhinelander Case*, 172 N. Y. 519, 65 N. E. 499. That case stands in striking contrast to the *Browning Case* (C. C. A.) 250 F. 321, where the court, relying directly upon the contract construction, declared that the responsibility of the trustee should be 'determined from the provisions of the mortgage which constitute the contract of the bondholders with the trustee * * *.''

Even if the view be taken that the exculpatory provision is not only applicable here but also effective, it seems to me that it is not going too far to characterize the trustee's action as 'willful misconduct' within the meaning of the indenture. It was certainly 'willful misconduct' in the sense of an unauthorized and wrongful act, deliberately and intentionally done, with knowledge that not all the original bonds and coupons had been surrendered, and with an appreciation of the possibility that they might be in the hands of innocent holders for value. The trustee appears to have been cognizant of the fact that it was doing something irregular, calculated to imperil the rights of possible bona fide holders of the missing originals and quite likely to result in its being held liable to the latter. This recognition by the trustee of the doubtful propriety of its conduct is indicated by its exaction of the indemnity agreement previously referred to. In connection with this phase of the case it is interesting to observe that in *Warren v. Pazolt*, 203 Mass. 328, at page 347, 89 N. E. 381, 388, the court said: 'Wilful default means intentionally making away with the trust property and a wilful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a wilful violation of duty.' The term 'willful' does not imply the existence of actual malice or evil design. Thus in *Boyce v. Greeley Square Hotel Co.*, 228 N. Y. 106, at page 111, 126 N. E. 647, 649, the Court of Appeals said, per Collin, J.: 'A willful injury means intentionally doing the act which is calculated or adapted to cause the injury, with design to inflict injury or *with disregard of the natural consequences of the act. The willful injury is in law malicious, although no malevolent purpose to cause it nor any notive of spite is imputed.* 'Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious' (*Wills v. Noyes*, 12 Pick. [Mass.]

324).' (Italics mine.) In *May v. New York Motion Picture Corporation*, 45 Cal. App. 396, 187 P. 785, the court declared that a 'willful' disobedience was an intentional disobedience and did not 'necessarily imply any evil intent on the part of the servant or malice toward his master. *In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness, or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent* (*Benkert v. Benkert*, 32 Cal. [467], 470; *Towle v. Mathews [Matheus]* 130 Cal. [574], 577 [62 P. 1064]; 40 Cyc. 944).' (Italics mine.) In *Roseville Trust Co. v. American Surety Co.*, 91 N. J. Law, 588, the court said at page 591, 103 A. 182, 183: 'By the term 'willfully' is meant purposely or designedly. The intent to injure and defraud, which is necessary to constitute a willful misapplication, does not necessarily involve any malice or ill-will, but merely that general intent to injure and defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal and fraudulent, and which, in its necessary and natural consequences must injure another. *Agnew v. United States*, 165 U. S. 36 [17 S. Ct. 235, 41 L. Ed. 624]; *Walsh v. United States* [C. C. A.] 174 F. 615; *Pearce v. United States* [C. C. A.] 192 F. 561.' In the recent case of *Thompson v. Hays* (C. C. A.) 11 F.(2d) 244, the court had before it for construction a clause exempting a trustee from liability for anything but 'his own willful default.' The court said at page 248: 'What is 'willful default,' as the term is used in the instrument of May 1, 1914? It means more than involuntary, inadvertent, negligent, mistaken, careless, or accidental default. It means an intentional designing failure to do or not to do something required—an affirmative wrong. *Van Siclen v. Bartol et al*. (C. C.) 95 F. 793; *In re Mallon's Estate*, 89 N. Y. S. 554, 43 Misc. Rep. 569; *Winslow Warren and others, trustees, v. Elizabeth B. Pazolt and others*, 89 N. E. 381, 203 Mass. 328. In *Van Siclen v. Bartol et al.*, supra, the Court refers to willful misfeasance as 'a conscious, deliberate breach of trust.' *In re Mallon's Estate*, 89 N. Y. S. 554, 43 Misc. Rep. 569, where a trustee had been relieved from liability except for willful default, the court said: 'The words 'willful default' imply more than negligence or carelessness. The word 'willful' means intentional, while the word 'default' means transgression.' * * * *It is doubtless true that a trustee may be guilty of such wanton or willful neglect of his duties, such reckless indifference to and disregard of the interests and rights of the beneficiary, that the law will hold him guilty of a 'willful default.' Henry L. Doherty & Co. v. Rice et al*. (C. C.) 186 F. 204; *Kessler & Co. et al. v. Ensley Co. et al*. (C. C.) 129 F. 397.' (Italics mine.)

Harvey v. Guar. Tr. Co. of N.Y., 134 Misc. 417, 425–27, 236 N.Y.S. 37, 50–53 (Sup. Ct. 1929), *aff'd* 242 N.Y.S. 905 (1930).

C. What Roles Do Common Law and Equity Play?

Both the UTC and the UDTA contain provisions preserving the role and application of common law and principles of equity to the extent not modified by the respective acts (and other state statutes).[110] Still, although the subject matter covered by the UTC and UDTA is extensive, neither fully occupies the space covered by the common law of trusts, let alone principles of equity.[111] So, as we struggle to determine the relative liability between a directed trustee and a trust director in a particular circumstance, particularly the interplay between UTC § 105(b)(2) and UDTA §§ 9, 11, and 12, we are well-served to remember and understand what the common law provides regarding a trustee's fiduciary duties and liabilities and the courts in which we may find ourselves always have the tools of equity available to provide a remedy we might not expect from a strict reading of the statutes presented.[112]

Perhaps the most important general aspects of the common law that might affect a court's determination and allocation of liability in a directed trust setting are: (1) the definition of a "trust;" and (2) the unifying characteristic of all fiduciary relationships:

> A trust. . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, as least one of whom is not the sole trustee.[113]
>
> * * *
>
> Despite the differences in the legal circumstances and responsibilities of various fiduciaries, one characteristic is common to all: a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship.[114]

Additionally, equitable doctrines may allow courts of equity, in the appropriate circumstances, to craft remedies that avoid the harsh application of liability protection or exoneration stated in the UDTA (or other states' directed trust statutes or under a particular trust instrument):

> Equitable doctrines are grounded in fairness and justice, and their application implies the occurrence of atypical circumstances. Courts of equity have the power, where necessary, to pierce rigid statutory rules to prevent injustice. They possess broad powers and should exercise them so as to do substantial justice. Equity is not a rigid concept, and its principles are not applied in a vacuum; rather, equity is determined on a case-by-case basis when justice and fairness so require. A court of equity has the power to prevent legal rules from

[110] Uniform Trust Code § 106; Uniform Directed Trust Act § 4.
[111] *See* Uniform Trust Code Prefatory Note; Uniform Directed Trust Act Prefatory Note. Notably, the Uniform Trust Code "was drafted in close coordination with the writing of" the Restatement (Third) of Trusts.
[112] Most, but not all, states provide that statutes in derogation of the common law are to be strictly construed.
[113] Restatement (Third) of Trusts § 2 (2003).
[114] Restatement (Third) of Trusts § 2 (2003), comment (b).

> working an injustice, and will depart therefrom whenever it is necessary to accomplish the ends of justice. Equitable doctrines are generally designed for relief from the harshness of strict legal rules.[115]

Perhaps, the most important principle of equity that might attend liability questions between a directed trustee and a trust director, and the ability of a beneficiary to recover for a breach of fiduciary duty, is that "equity will not suffer a wrong to be without a remedy:"

> It has been frequently stated that equity will not suffer a wrong, or, as sometimes stated, a right, to be without a remedy. This maxim includes the whole theory of equity jurisdiction and affords relief wherever a right exists and no adequate remedy at law is available. The function of equitable relief is to supplement the law where the law is insufficient to remedy a wrong. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. The remedy to be enforced must suit the facts of the particular case in question.[116]

If nothing else, the availability of equitable relief, particularly in light of common law provisions related to the purpose of trusts and fiduciary relationships, should cause directed trustees to be extremely fastidious in evaluating and following direction given by a trust director, even if such direction might seem routine. Moreover, if the directed trustee reasonably believes that the direction given could result, even if only in a very limited set of circumstances, to substantial harm to a beneficiary's interest, then the directed trustee would be wise to seek instruction from the court.[117]

D. General Rules of Statutory Interpretation and Construction

It also is important to remember that none of the various directed trust statutes is an island or otherwise sits in a vacuum, so it is dangerous to assume that nothing relevant exists outside of text of UDTA §§ 9, 11, and 12 (or your particular state's version of the same). As such, general rules of statutory interpretation and construction should be kept in mind when advising a directed trustee or trust director on the propriety of a proposed direction, including the following:[118]

- Statutes in derogation of the common law are strictly construed.[119]

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[115] 30A C.J.S. Equity § 98 (internal citations omitted).
[116] 30A C.J.S. Equity § 132 (internal citations omitted).
[117] Uniform Directed Trust Act § 9(d).
[118] These are only very general statements of certain rules and not specific to any particular jurisdiction. For a far more detailed discussion, *see* Reading Law: The Interpretation of Legal Texts, Scalia & Garner (2011).
[119] *But see,* Tenn. Code Ann. § 35-15-105(a): "The rule of statutory construction that states that statutes in derogation of the common law are to be strictly construed shall have no application to this section. Except as restricted by subsection (b), pursuant to this section, courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments."

- The primary purpose of statutory construction is to determine and carry out the intent of the legislature.

- Courts are to assume the legislature intends a statute to be applied as written and give effect to the statute's plain meaning, based on the statute's language and context.

- A statute will be interpreted based on the circumstances existing at the time of enactment.

- A statute is ambiguous if it is susceptible to more than one reasonable interpretation.

- Definition sections and interpretation clauses are to be followed carefully.

- Words used in a statute are to be given their ordinary, everyday meanings, unless defined or the context otherwise indicates that they are technical.

- A word used in the same statute should be interpreted consistently. If different words are used in different parts of the statute, the presumption is that each word has a different meaning.

- The meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context (*noscitur a sociis*).

- Where general words or phrases follow a number of specific words or phrases, the general words are construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned (*ejusdem generis*).

- Every word and every provision is to be given effect, if possible (*verba cum effectu sunt accipienda*).

- When one or more things of a class are expressly mentioned others of the same class are excluded (*expressio unius est exclusio alterius*).

- When possible, separate statutes must be read together and harmonized.

- Statutes enacted at different times, but pertaining to the same subject matter, must be read together as if they were one (*in pari materia*).

- Where a conflict exists between statutes, the more specific statute prevails over the general statute, unless the legislature intended otherwise (*generalia specialibus non derogant*).

- Where a conflict exists between statutes enacted at different times, the later statute prevails, unless the earlier statute is clearer and more explicit.

- The repeal or amendment of a statute by implication is not favored.

- A statute is to be construed to avoid an absurd result (i.e., that no reasonable person could approve).

- The legislature is presumed to be aware of the rules of interpretation and construction.

E. Other Relevant Cases of Interest

***In re Rivas*, 30 Misc.3d 1207 (A), 2011 WL 32792 (N.Y. Sur. Ct. January 5, 2011).**

Facts**:** Bank of America served as Trustee of a trust that had existed for over 60 years. Pursuant to the Deed of Trust and Agreement, the Settlor directed that income generated by the Trust be used to operate and maintain the Helen Woodward Clinic at the University of Rochester (the "Clinic"). Further, the Trust Agreement created an Investment Advisory Committee (the "Committee") consisting of three people who had sole and exclusive power and control over the Trust's investments and included explicit language that "The Trustee shall be charged with no responsibility or duties with respect to the investment or reinvestment of trust funds, other than to carry out the written directions or communications received by it from the Committee." In a 2009 meeting, the Committee directed the Trustee to invest all of the trust assets in the University of Rochester's long-term investment pool. In response to the Trustee's stated concerns, the Committee drafted up a contract with additional terms that further concerned the Trustee. Accordingly, the Trustee sought an interpretation from the Court as to whether the contract drawn up by the Committee was consistent with the Settlor's intent and the provisions of the original Trust Agreement.

Standard**:** Despite clear language in the Trust Agreement absolving the Trustee from liability for carrying out the written duties of the Committee, the Court held that accountability is an essential element of all fiduciary relationships that cannot be waived. Thus, in a situation where a Trustee is concerned that following directions of an advisory committee may result in a breach of fiduciary duty, the Trustee is required to come before the Court for instruction, in a similar manner to when two fiduciaries do not agree upon how to administer an estate.

Analysis**:** As it pertains to the directed trust component of this case, the Court reiterated that the Trustee correctly brought the issue before it and would have been liable for a breach of fiduciary duty had it failed to do so. Ultimately, the Court did agree with the Trustee that the proposed instructions violated the Settlor's intent and ruled that the provisions of the Trust must be executed pursuant to the initial Trust Agreement.

Note: New York does not currently have a directed trust statute.

***Shelton v. Tamposi*, 164 N.H. 490 (2013).**

Facts**:** This matter concerned an action for declaratory judgment where a trustee and investment directors sought a ruling that the trustee was required to act in accordance with the written directions of the investment directors, and that, in doing so, the trustee would incur no liability. The provisions at issue state:

(c) The trustee shall make purchases, pledges, sales or other dispositions of securities, real estate interests and other operating entities only as the investment directors from time to time may direct in writing.

(d) The trustee shall entrust to the investment directors the management, control, handling, financing, refinancing and structuring of any and all real estate interests and other operating entities from time to time include in the trust property. In no event shall the trustee assume any responsibility in connection with the management, control and handling of such real estate interests or other operating entities.

(e) The investment directors shall have full power and authority to direct the retention or sale of all other assets from time to time included in the trust property and to direct the purchase of property with any principal cash included in the trust property. The trustee shall have no responsibility for any loss that may occur by reason of acting without question upon any such direction by the investment directors.

Standard**:** When courts construe a trust instrument, the intent of a settlor is paramount, and that intent is determined, whenever possible, from the express terms of the trust instrument itself.

Analysis**:** In each of the three provisions, the authority of the trustee is subordinate to that of the investment directors. The trustee has authority to make dispositions of trust property *only* as directed in writing by the investment directors. The trustee is specifically prohibited from assuming any responsibility for the management, control, and handling of the trust assets. Thus, the trustee is an "excluded fiduciary" with respect to the investment of trust assets. The full power and authority to direct the retention or sale of assets and to direct the purchase of property with any principal cash reserves is vested exclusively in the investment directors.

Note: New Hampshire has adopted a "no duty" statute with respect to "excluded fiduciaries." N.H. RSA § 564-B:12-1205.

***Jo Ann Howard and Associates, P.C. v. Cassity,* 868 F.3d 637 (8th Cir. 2017).**

Facts: This matter arose from a nationwide fraud scheme concerning sales of pre-need funeral contracts. PNC Bank served as the successor trustee of certain "pre-need trusts," which held the funds that the contract seller ("NPS") was statutorily obligated to pay into trust. PNC was sued on the grounds that its predecessor breached its fiduciary duties as trustee, was negligent, and aided and abetted a fraud when it allowed NPS to take policy loans on the trust-owned insurance policies, failed to ensure that the loans were adequately secured, neglected to account adequately for the funds in the NPS pre-need trusts, and failed to verify trust account records. As part of its defense, PNC argued that once NPS had hired an investment advisor, PNC's predecessor was relieved of all liability relating to investment decisions for trust property.

Standard: Relative to PNC's "investment advisor argument," the Court applied then-Mo. Rev. Stat. § 436.031.2 which provided that, for pre-need trusts, investment decisions could be made by a qualified investment advisor but that in "no case were control of said assets to be divested from the trustee nor may said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in." The Court also relied upon Restatement (Third) of Trusts §§ 90, 91 (2007), which provides that a trustee always has a duty to ensure that

trust assets are invested prudently, whether the trustee is investing the assets himself or monitoring the investment decisions of an investment advisor.

Analysis: Investment advisor or not, the Court held that the trustee could not be relieved of liability because the trustee had an ongoing duty to monitor and ensure that the trust assets were prudently invested. PNC's predecessor failed to do so.

Important Note: Missouri has a adopted a new directed trustee liability standard that provides, in part, that "[a]ny trustee of a directed trust shall not be accountable under the law or equity for any act or omission of a trust protector and shall stand absolved from liability for executing the decisions or instructions from a trust protector or for monitoring the actions or inactions of a trust protector."

***Ron v. Ron*, No. 3:19-CV-00211, 2020 WL 1426392 (S.D. Tex. Feb. 4, 2020).**

Facts**:** Settlor created a trust and appointed her husband to serve as Trustee and Defendant as Trust Protector. The settlor delegated to the Trust Protector the authority to add or remove beneficiaries to the trust. Under this provision, the Trust Protector appointed the husband as beneficiary of the trust. Settlor alleges that appointment of the Trustee as a beneficiary was done to complete the Trustee's fraud and fraudulent transfers of various assets. The Settlor brought three claims against the Trust Protector, including a claim for breach of fiduciary duty.

Standard**:**

1. Section 114.0031(a) of the Texas Trust Code states:

> If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
>
> > (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
> >
> > (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision.

2. Under Texas law "to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to and apart from the agreement made the basis of the suit

Analysis**:** The Court concluded that the Texas Trust Code only discusses a trust protector in their role as an advisor to the trustee. The Court interpreted this as suggesting that the fiduciary relationship is between the trust protector and the trustee rather than the trust protector and the trust. In other words, Texas law does not create a formal fiduciary relationship between a settlor and a trust protector, but ostensibly does create one between the trust protector and the trustee.

In Court noted that in the complaint, the Settlor makes no mention of a special relationship of trust and confidence that existed prior to, and apart from, the trust at issue and fails to allege facts to support an inference that there was such an informal fiduciary relationship. Accordingly,

under Texas law, the Settlor had not alleged the existence of an informal fiduciary relationship between herself and the Trust Protector.

Note: This case is particularly interesting because it reads as if the Court is feeling its way through this new statutory scheme and acknowledging the dearth of case law bearing on the relationships between directed trustees and trust directors. Further, the statute relied upon by the Court also contains the standard for determining the liability of a directed trustee for following the instructions of a trust director. Tex. Prop. Code § 114.0031(i) (applying a "willful misconduct" standard).

***Rogers v. Wilmington Trust Co.*, 2022 WL 621690 (3rd Cir. March 3, 2022):**

Facts: Plaintiffs asserted that defendant trust company breached its fiduciary duties when, *inter alia*, it served as both trustee and investment advisor to the trust.

Standard: The Court applied Delaware's statute concerning the authority and obligations of trust "advisers" (Del. C. 12 § 3313(a)), which provides that an "advisor may be 'given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions."

Analysis: Here, neither the trust agreement nor the statutory authority prohibited the trustee from serving as an investment advisor to the trust. Thus, the trustee's act of serving in both roles did not amount to the breach of a fiduciary duty.

Note: Subsection (b) of the statute the court relied upon codifies the Delaware standard, stating that "[i]f a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act."

***Accident Insurance Co. v. U.S. Bank National Assoc*., No. 21-1504, 2022 WL 3713512 (4th Cir. Aug. 29, 2022).**

Facts**:** U.S. Bank was serving as Trustee for deposits made by Grantor for the benefit of Plaintiff. The Grantor appointed an Administrative Agent to manage certain securities being held under trust. The Administrative Agent had the exclusive responsibility to value the units, maintain the official book of registered unitholders, and had the sole discretion to approve all unit transfers and unitholders. Grantor became insolvent and the Plaintiff assumed all liabilities. Plaintiff sent a withdrawal notice to the Bank, seeking transfer of all trust assets. The Bank informed Plaintiff that withdrawal of the securities would require approval from the Administrative Agent, and the assets remained in trust. Plaintiff asserted claims against the Bank for, *inter alia*, breach of fiduciary duty. The thrust of Plaintiff's complaint was that the Bank had improperly accepted the securities in violation of the Trust Agreement because they were non-transferable.

Standard**:** The Trust Agreement absolved the Bank of any "duty or responsibility" involving the qualification, character, or valuation of trust assets. The Bank could also follow and rely upon all instructions from Plaintiff and Grantor unless the Trust Agreement provided

otherwise. Paragraph 8(b) required the Bank, before accepting any asset for deposit, to determine that such asset is in such form that plaintiff or the Bank could negotiate without consent or signature from any other entity. The Bank wouldn't incur any liability for actions it took in "good faith reliance" on such instructions. Nor would the Bank be liable for any loss arising out of performance of its contractual duties unless its own negligence, willful misconduct, or lack of good faith caused the loss (this was the standard appearing in the Trust Agreement).

Analysis**:** Under the Trust Agreement there were situations where the Bank would not be acting as a directed trustee. Both provisions the Bank relied on explain that its directed-trustee role was subordinate to contract terms providing otherwise. Therefore, the trust agreement obliged the Bank to reject any proposed asset that it determined was nonnegotiable (i.e., nontransferable) without third-party consent.

***Hurtado v. Rainbow Disposal Co.*, No. 817CV01605JLSDFM, 2018 WL 3372752 (C.D. Cal. July 9, 2018)**

**This is an ERISA case but is useful by way of analogy.*

Facts: Employer established the Rainbow Employee Stock Ownership Plan. A committee appointed by Employer's Board of Directors ("ESOP Committee") was to serve as fiduciary of the Plan with authority to control and manage its operation and administration, while a Trustee retained the authority to invest the assets. GreatBanc served as Trustee during the events giving rise to this litigation. The plan's assets were invested in companies owned by Employer's Executive Chairman and President, respectively, which resulted in decreased stock value. Plaintiffs, beneficiaries under the Plan, sued GreatBanc for, *inter alia*, failure to manage a "chose in action." Plaintiffs allege that as Trustee, GreatBanc had a fiduciary duty to bring a shareholder action against the Chairman and President for investing assets in companies for which they personally held ownership interests.

Analysis: GreatBanc argued it could not be liable because it did not have the power to bring a derivative action absent direction from the ESOP committee. The Court rejected this argument finding that even if GreatBanc could not act without direction from the ESOP committee, "directed trustees" remain subject to the "duty of prudence." Under the duty of prudence, a directed trustee can disobey the named fiduciary or director's directions when it is plain that the directions are imprudent. Thus, Plaintiffs plausibly alleged that GreatBanc violated its fiduciary duty by failing to act in the face of a self-dealing transaction. Even if a derivative suit would not ultimately have been the appropriate remedy, GreatBanc nevertheless had a duty to investigate the relevant facts to explore alternative courses of action. Thus, directed trustees may be subject to liability for breach of the duty of prudence even where they do not have authority to act or are only acting pursuant to the direction of a director with authority.

Directed Trust and Arizona Law

Presented by Jim Lee
Fennemore Craig, P.C.

AZCLE® from the State Bar of Arizona

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Prefatory Note to the Uniform Directed Trust Act

There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative" or "directed trustee", with regard to actions taken or directed by the nontrustee. Existing uniform trust and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

Overview

- Why Directed Trusts?
- Fiduciary Duties
- Uniform Directed Trust Act (UDTA)
- Arizona Delegation and Directed Trust Statutes
- Directed Trust Statutes of Other States and UDTA

Why Directed Trusts?

- General concept
- Lower trustee fees
- Retain control over investments or distributions
- Directed trusts from the trust company perspective

Fiduciary Duties

- Duty to administer trust
- Duty of loyalty
- Duty of impartiality
- Duty of prudent administration
- Duty of control and protection of trust property

Uniform Directed Trust Act

- *Trust director* and *directed trustee*
- Mandatory minimum standard of conduct
- Exoneration
- Duty to monitor
- Duty to share information

Arizona Delegation and Directed Trust Statutes

- Delegation by trustee – A.R.S. § 14-10807
- Delegation of investment and management functions; duties; limitations – A.R.S. § 14-10907
- Powers to direct – A.R.S. § 14-10808

Delegation by trustee 14-10807

- A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.
- The trustee shall exercise reasonable care in:
  - Selecting an agent
  - Establishing the scope and terms
  - Monitoring performance and compliance
- Agent owes a duty to the trust
  - Exercise reasonable care
  - Comply with terms of delegation
- Trustee not liable to beneficiaries or trust for action of agent

Delegation of functions 14-10907

- Fiduciary may delegate investment and management functions as prudent person of comparable skills might delegate.
- Fiduciary is not responsible for investment decisions or actions delegated if reasonable care, skill, and caution in:
  - Selecting investment agent
  - Establishing scope and specific terms
  - Reviewing agent's actions periodically to monitor performance and compliance
- Investment agent:
  - Must comply with scope and terms
  - Must exercise delegated function with reasonable care, etc.
  - Is liable to trust for failure to do so
  - If represent having special investment skills, must exercise
- Co-fiduciary may delegate investment and management functions to another co-fiduciary if has greater skills. Delegating co-fiduciary not responsible if exercises reasonable care, etc., in establishing scope, specific terms, and in reviewing/monitoring.

Powers to direct
14-10808

- If trust provides that assets are subject to direction of the settlor, a co-fiduciary, beneficiary, or third party, then the trustee:
  - Has no duty to review the direction
  - Has no duty to notify the beneficiaries (share information) regarding the direction
  - Is not responsible for the purchase, monitoring, retention or sale of assets subject to the direction
  - Is not liable if acts pursuant to a direction, even if action constitutes breach of fiduciary duty, unless trustee acts in bad faith or with reckless indifference

    Query: Is trustee liable if trustee does not act pursuant to direction?
- Person with direction power (other than a beneficiary) is presumptively a fiduciary
  - Act in good faith
  - Liable for any loss resulting from breach of a fiduciary duty

Directed Trust Statutes of Other States and UDTA

- *Trust Director* - person with power to direct
  - UDTA (FL, WA)
    - Has fiduciary duty in exercise and nonexercise of power of direction (same as nondirected trustee)
    - Mandatory minimum standard of conduct ("MMSC") – same as nondirected trustee; no exculpation or exoneration if below standard
  - Other state law approaches
    - Trust director is a fiduciary unless trust agreement overrides (DE, IL, NV). MMSC is generally willful misconduct.
    - Trust director is a fiduciary and trust agreement cannot override (TX). MMSC is good faith and adherence to trust terms.
    - Trust director is a fiduciary and its unclear whether trust agreement can override (TN). MMSC is to act in accordance with trust terms and purposes and interest of the beneficiaries. Whether trust director could be relieved of duty of good faith is unclear.
    - Many states have imposed mandatory minimum standards of conduct on a trust director via application of common law and establishing a willful misconduct standard for directed trustees.
    - A minority provide that a trust director is a fiduciary with liability for breach of trust. Some commentators argue that adoption of a willful misconduct standard for a directed trustee should result in a similar minimum standard of conduct for a trust director-fiduciary.
  - Public Policy Query: In states where a trust director can serve as a nonfiduciary, who is the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the direction of a nonfiduciary trust director?

Directed Trust Statutes of Other States and UDTA

- *Directed Trustee* – person directed by a trust director
  - UDTA
    - Must take reasonable action to comply
    - MMSC – willful misconduct (i.e., must not comply with trust director's exercise or nonexercised of a power of direction to extent compliance would cause directed trustee to engage in willful misconduct)
  - Other state law approaches generally
    - Same as nondirected trustees
    - Willful misconduct (DE, IL, TX).
      - DE: Trust agreement can override common law duties, but cannot exculpate or indemnify if willful misconduct.
      - TX: Trust agreement can override common law duties, but cannot annul good faith standard and requirement to act in accordance with trust terms.
      - TN: Trust agreement may vary or eliminate trustee duties with respect to a directed trustee. Courts must strictly construe statutes in derogation of common law and give maximum effect to principle of freedom of disposition and enforceability of trust instruments.
    - Excluded trustee: In some states this term is generally equivalent to a *directed trustee*. The Delaware concept of an excluded trustee is that of a nonfiduciary (see 12 Delaware Code § 3313A).

Directed Trust Statutes of Other States and UDTA

- Nevada

NRS 163.5549 Limitations on liability of directed fiduciary [directed trustee].

1. A directed fiduciary is not liable, individually or as a fiduciary for any loss which results from:

(a) Complying with a direction of a directing trust adviser [trust director], whether the direction is to act or to not act; or

(b) Failing to take any action proposed by a directed fiduciary if the action:

(1) Required the approval, consent or authorization of a person who did not provide the approval, consent or authorization; or

(2) Was contingent upon a condition that was not met or satisfied.

2. A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.

3. The provisions of this section do not impose an obligation or liability on a custodian of a custodial account for providing any authorization.

Directed Trust Statutes of Other States and UDTA

Comment regarding Nevada statute: In general, a directed trustee is not liable as a fiduciary as to those acts with respect to which it is being directed. Notwithstanding the "no liability" standard, a directed trustee may be subject to a minimum fiduciary duty to act in the interests of the trust purpose or beneficiaries with respect to the directed act. For example, Nevada has adopted a statute (N.R.S. § 163.004) that allows a trust agreement to expand, restrict, eliminate or otherwise vary a fiduciary's powers, duties, standard of care, etc. However, that statute does *not* expressly authorize the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or gross negligence. Nevertheless, in theory, if a directed trustee is considered a nonfiduciary with respect to a directed act, then ***it should be able to be indemnified*** under the terms of a trust agreement for complying with a directed act, including where its compliance was itself an act of willful misconduct or gross negligence.

Directed Trust Statutes of Other States and UDTA - Other Directed Trust Concepts

- Exoneration
  - In general, a directed trustee is exonerated for loss if complies with the trust director's direction.
    - The term "loss" is yet to be defined by courts.
    - The term "loss" could be understood to mean a financial loss. It is unknown whether the term "loss" would refer to a distribution of trust principal where a beneficiary objects to a trust distribution.
  - UDTA: No exoneration for trust director or directed trustee if willful misconduct. (No exoneration for directed trustee when compliance is itself an act of willful misconduct.)
  - DE: Similar to UDTA, except if trust director is not a fiduciary, trust agreement might permit indemnification for the nonfiduciary trust director's acts of willful misconduct.
  - NV: Similar to DE. Specific wording also contemplates exoneration of directed trustee for loss resulting from the directed trustee failing to act when the direction was subject to a condition that was not met or did not occur.

Directed Trust Statutes of Other States and UDTA - Other Directed Trust Concepts

- Scope of Duty to Monitor
  - UDTA: Unless trust agreement provides otherwise:
    - No duty of a directed trustee to monitor a trust director.
    - No duty of a trust director to monitor a directed trustee.
    - Neither a directed trustee nor a trust director assumes the duty to monitor the other merely by taking an action that could be construed as monitoring the other.
  - State law examples:
    - Some of the directed trust statutes explicitly waive the duty to do an investment review or provide advice in the context of an investment decision, but do not waive the duty to warn the beneficiary (share information) about the directed act. (See next slide.)
    - DE: No duty to monitor or to provide advice to or consult the trust director (advisor).
    - NV: Waives what would otherwise be a trustee's duty to evaluate the merits of an investment made by a trust director or provide advice to the trust director with respect to an investment.

Directed Trust Statutes of Other States and UDTA - Other Directed Trust Concepts

- Duty to Share Information

  - UDTA: Unless trust agreement provides otherwise, neither a directed trustee nor a trust director has a duty to inform or give advice to a settlor, beneficiary, or to the trust director or directed trustee (as applicable) concerning an instance in which that trustee or director might have acted differently. Neither a directed trustee nor a trust director assumes the duty to share information (inform or give advice) merely by taking an action described in the previous sentence.

  - DE: No duty to warn or apprise the beneficiary. Imposes a duty to keep co-fiduciaries informed upon request.

  - NV: No apparent duty.

Directed Trust Statutes of Other States and UDTA - Other Directed Trust Concepts

- Scope of Trust Director's Investment Authority

  - UDTA: No default statutory powers for trust directors. Per section 6, the existence and scope of a power of direction must be specified by trust agreement. Under section 6(b), a trust director is granted those further powers that are appropriate for the exercise of powers granted under the trust agreement.

  - State law provisions: Many directed trust statutes are unclear as to the scope of a trust director's authority and what actions constitute an "investment." Because many directed trusts own interests in complex structures (e.g., entities with multiple layers), ambiguities can and often do arise in connection with the investment and management of those interests in directed trusts. For example, is the making of a business decision for an entity an investment decision at the trust level? Many directed trust statutes address valuation of nonpublicly traded assets as part of a trust director's (or investment trustee's or advisor's) authority, but they often stop there.

Looking Forward

What do we want in the future for Arizona's directed trust statute?

- Trust director: fiduciary status, liability exposure, and exoneration
- Directed trustee: liability exposure , exoneration, and other duties (monitoring; sharing of information)
- Allocation of powers and responsibilities between a trust director and a directed trustee (particularly as to investment decisions)
- Power to override or vary the effect of *any* provision of a directed trust statute, via the trust agreement
- Banking / trust company perspective on these issues (see attachment to the Arizona outline)
- Drafting and administration considerations (see Section 14 of the Arizona outline)

2024 CLE by the Sea: Estate, Trust & Probate Track - Wednesday

July 10, 2024

8:15 AM - 12:30 PM

Coronado Island Marriott Resort & Spa
Coronado, CA

Arizona Probate Legislative and Case Law Update

2024 CLE by the Sea – Probate Track

July 16, 2024

Robert B. Fleming
Fleming & Curti, PLC
www.Elder-Law.com
1745 E. River Rd., Suite 101
Tucson, AZ 85718
520-622-0400

Arizona Legislative Changes

2024: The Second Regular Session of the Fifty-sixth Legislature is still in session as of the mid-June preparation of these materials, though it had completed nearly all of its scheduled work other than final budget negotiations. The following bills of interest to trust, estate and elder law practitioners have already been signed by the Governor (and "Chaptered"). They will become effective 90 days after the legislature's final adjournment:

Chapter 22 (HB2081): Cremation by "natural organic reduction." Very exciting possibility here. You (or your family) can choose to be, well, composted – in addition to the prior options of burial, cremation or alkaline hydrolysis. In a sly way, composting is not a wholly new option. It's just that cremation has been redefined to include natural organic reduction – the "contained, accelerated conversion of human remains to soil."

Chapter 122 (HB2521): the Uniform Partition of Heirs Property Act (but all the changes are actually in Title 12: Property) attempts to avoid non-family members purchasing fractional interests in inherited (but un-probated) property in order to force sale of the remaining heirs' shares.

Chapter 152 (HB2744): spells out some rights held by guardians and health care agents for individuals subject to court-ordered mental health treatment, including a guardian's right to notice of any mental health commitment hearing. Requires the mental health treatment agency to notify the applicant (often a family member) if the application is denied or a petition for court-ordered evaluation is not ultimately filed. Originally would have authorized family members and guardians to directly file petitions for court-ordered mental health treatment with the court (bypassing Arizona's fifty-year-old gatekeeper system), but those provisions were stripped out before passage.

2023: The First Regular Session of the Fifty-sixth Legislature finally adjourned on July 31, 2023 (which means that the bills passed during that session in most

cases became effective on October 30, 2023). Three new laws particularly affect the trusts, estates and probate arena:

Chapter 32 (HB2197): adds a Probate Code definition of "electronically present" – but limits its applicability to only electronic wills execution. Thus, an electronic will can now be completed with the testator in one location, two witnesses in remote locations (so long as they are in the United States) and, presumably, a notary in yet another location. Sadly, this is unlikely to make Arizona's electronic will statute any more useable or useful.

Chapter 123 (SB1038): this legislation creates a "Probate Advisory Panel" in the Governor's office. The Panel is charged with holding public hearings at least quarterly, and soliciting suggestions for how to "improve the adult guardianship and conservatorship laws through statutory changes." The panel will consist of eleven members:

- Two public members who are guardians or conservators of an adult child or sibling
- Two public members who are guardians or conservators of a family member other than a child or sibling
- Two members who are "advocates for family members" involved in the guardianship and conservatorship system
- One public fiduciary from a county of less than 500,000 population
- One private fiduciary from a county of more than 500,000
- One attorney with at least four years guardianship and conservatorship experience
- One judicial officer with at least two years experience presiding over guardianship and conservatorship proceedings (from a county with more than 500,000 residents)
- One clerk of the superior court

The first three categories (six members) are appointed by the leaders of the House and Senate. The next four members are appointed by the Governor, and the final member is to be appointed by the Chief Justice of the Supreme Court.

(For reference: Maricopa and Pima counties are clearly over 500,000 population; Pinal County is within 35,000 of the bill's cutoff.)

Chapter 195 (SB 1291): makes a number of significant changes in the probate and guardianship/conservatorship practice, including: (1) requiring most notices of hearing on a petition to be sent by registered or certified mail rather than regular, first-class mail, (2) spelling out a list of specific duties for court-appointed counsel in guardianship and conservatorship matters, and establishing that violation of those duties may be punishable as contempt of court, (3) elevating the significance and priority of agents under powers of attorney for consideration as guardian or conservator appointees, (4) mandating inclusion of the right to a jury trial in notices of hearing in guardianship and conservatorship

matters, (5) switching the presumption against a guardian who attempts to limit contact with those with a significant relationship with the person under guardianship, and requiring proof by clear and convincing evidence to uphold an order restricting contact, and (6) clarifying that the standard of proof in conservatorship matters is clear and convincing evidence.

At the eleventh hour, an amendment (apparently intended to secure Democratic support) grafted a previously languishing "supported decision-making" structure onto the existing bill. The result is a watered-down version of the concept. It applies only to disabled adults who are not incapacitated (though one reading of the statute might allow a person who is in fact incapacitated, but who has not been adjudged to be so, to sign a supported decision-making agreement). The "supporter" is not authorized to sign documents on behalf of the principal, and can not bind the principal to any agreement. The statute lays out a form for a supported decision-making agreement, and the agreement as entered must be in substantially that form. The legislative form is attached for reference.

Reported Arizona Cases

In re Wood, 123 Arizona Cases Digest 23, ____ Ariz. ____, ___ P.3d ____ (May 30, 2024). Arizona's guardianship statutes violate due process by automatically removing incapacitated persons from voting rolls.

Annette Wood acknowledged that she needed a guardian and consented to appointment of the Coconino County Public Fiduciary. But she insisted that she should retain the right to vote.

Arizona's guardianship law permits appointment of a "limited" guardian and an affirmative determination of the ward's capacity to vote (proven by clear and convincing evidence), but Ms. Wood insisted that she should not have an obligation to prove her ability. The Coconino County probate judge ruled that there was no basis for a limitation on the guardianship (noting that a limitation affected the guardian's powers, not the ward's) and that in any event the judge had no statutory or case law guidance to direct the considerations in determining whether Ms. Wood retained "sufficient understanding to exercise the right to vote" (A.R.S. §14-5304.02). Accordingly, the court appointed the public fiduciary as plenary guardian.

On appeal, Ms. Wood argued that the state guardianship law – and Arizona Constitution Article 7, Section 2(C) – violated both her due process and equal protection rights under the U.S. Constitution. She argued that the statute and the Constitutional provision could not be interpreted in any way that would permit them to stand. Several *amicus curiae* briefs supported the right of persons under guardianship to vote.

The Court of Appeals agrees that the automatic disenfranchisement violated Ms. Wood's due process rights. Because of its holding in connection with the due process protection, it declined to address the equal protection claim.

According to the Court of Appeals, an individual's right to vote may not be automatically taken away because of a generalized finding of incapacity. In order to permit removal of Ms. Wood's right to vote, someone (the Court did not say who, but presumably it could be the guardian, a County office or a State official) would need to file a petition to that effect, and then prove (by clear and convincing evidence) that the ward lacks the capacity to vote.

On remand, the Court rules, the Coconino County Public Fiduciary would have the burden of proving Ms. Wood's lack of capacity to vote. The opinion did not address the statutory scheme at A.R.S. §16-164(D), which requires the clerk of each Superior Court to transmit a list of persons who have had "a guardian of the person and estate … appointed" to the County Recorder, and the County Recorder to remove them from the voting rolls. Happily, that provision does not seem to have been followed (for decades) by any Superior Court Clerk.

Rosenberg v. Sanders, 256 Ariz. 328, 539 P.3d 120 (December 11, 2023). Evidence of signer's statement (post-execution) that he then feared his girlfriend was irrelevant to determining undue influence at the time of signing a beneficiary deed.

This matter is perhaps less important for its holding than for the fact that it overturned a surprising Court of Appeals decision (*Rosenberg v. Sanders*, 512 P.3d 1027 (AZ App May 31, 2022)) which had invented a new, ninth consideration for determining undue influence. The Supreme Court disagree with the utility of that new test, and determined that the trial court had been correct to grant summary judgment to the girlfriend named in the beneficiary deed.

In the Matter of the Conservatorship of Chalmers, 536 P.3d 1247 (AZ App September 21, 2023). Professionals' failure to file a notice of intent to charge fees and method of calculation (as required by statute) precludes recovery of fees for at least the first accounting period.

Initially, the trial court had declined to reverse orders approving fees to a conservator, guardian *ad litem*, court appointed attorney and attorney for the guardian/conservator. It first ruled that the protected person had not timely objected and could not later initiate a separate attack on those approved fees. The Court of Appeals reversed and remanded to determine whether the various professionals' failure to file a notice under ARS §14-5109(A) precluded them from collecting fees.

On remand, the trial court ruled that the penalty for failing to file a notice of method of calculating fees was that no fees could be approved for the initial

accounting period. It found that the penalty for failure to file the required notice was a prohibition on collecting fees.

In this second appeal, the Court of Appeals, in a 2-1 decision, affirms the trial court's denial of fees for the initial 9-month period. But the appellate court rules that there is some basis on which the trial court could determine that the very filing of the initial petition for fees, including (as it did) the details of fee calculation, might cure the penalty for subsequent fee collection petitions. It affirms the denial of fees for that initial period, but reverses and remands as to later fees for a determination as to whether the subsequent fee claims should be approved.

The dissenting judge would have allowed the professionals to collect "reasonable" fees despite failure to file the required notice, and would have continued the "reasonable" fee approval for later accounting periods.

Cocchia v. Testa, 536 P.3d 273 (AZ App September 12, 2023). Doctrine of issue preclusion requires trustee to make all arguments about personal jurisdiction in first challenge to proceedings.

Claimant sued decedent in Connecticut and included claim of fraudulent conveyance of Arizona real estate into decedent's revocable living trust. Decedent died before litigation was concluded and claimant amended lawsuit to name successor trustee, an Arizona resident. Trustee objected to Connecticut default proceedings, alleging that he had not been properly served and that the claimant lacked personal jurisdiction. Connecticut courts disagreed.

Claimant then brought the Connecticut judgment to Arizona and sought enforcement. The trustee defended, arguing that the Connecticut judgment was invalid because there were insufficient contacts with Connecticut. The Arizona trial judge agreed and ruled the judgment void.

The Court of Appeals reverses. The appellate court rules that once the Arizona trustee appeared in Connecticut to challenge personal jurisdiction it was required to litigate any related defenses it might have. As the court notes, "in for a penny, in for a pound."

Matter of Tsosie, 535 P.3d 965 (AZ App August 31, 2023). Public Fiduciary does not have discretion to decline to accept court appointment as guardian.

Flagstaff City Attorney's office initiated a guardianship petition on Dennis Tsosie, a homeless person with mental health issues and "a long record of criminal conduct." After pending criminal matters were dismissed because Tsosie was found incompetent and not restorable, he continued to be arrested for various offenses. Ultimately, the City Attorney decided to force the Public Fiduciary to accept guardianship.

The court-appointed investigator and physician both opined that Tsosie needed a guardian, and the Probate Court judge appointed the Public Fiduciary over its

objection. The Public Fiduciary appealed, arguing that the office could exercise its discretion to decline the appointment.

The Court of Appeals disagrees. Reliance on the 1994 appeals court decision in *Vanderheiden v. Superior Court* was inappropriate, according to the current decision. The *Vanderheiden* decision determined that the Public Fiduciary could not be forced to initiate a guardianship petition; it did not hold that the Public Fiduciary could decline an appointment once the court ordered the guardianship.

Sowards v. Sowards, 533 P.3d 959 (AZ August 17, 2023). Portion of personal injury settlement that was for punitive and economic damages was community property.

In divorce proceedings, wife asserted that husband's personal injury settlement for unnecessary surgery was community property. Trial court ruled that, since the claim was resolved by a settlement agreement, it took the settlement payments "out of the community property realm."

The Court of Appeals ruled that the settlement agreement was effectively a valid and enforceable postnuptial agreement (as between the spouses) and affirmed the trial court. The Supreme Court disagrees, and rules that the punitive and economic damages portion of the settlement are community property. The matter is remanded for a determination of the community property interest and allocation of the structured settlement payments.

Silverman v. Arizona Department of Economic Security, 532 P.3d 340 (AZ App June 13, 2023. Confidential reports of abuse, neglect or exploitation may be reviewable by free-lance journalist but only on showing that she is engaged in "bona fide research".

Amy Silverman, a freelance journalist working on a story for the Arizona Daily Star, asked the Department of Economic Security to allow her to review confidential records about vulnerable and disabled adults. She pointed to the statute establishing the records' confidentiality (A.R.S. §46-460(D)(8) and its exception for "bona fide research" projects.

The trial court granted her motion for summary judgment, denied DES's motion for summary judgment, and ordered disclosure of the records in question. The Court of Appeals vacates that ruling and remands for further proceedings to determine whether a journalist's inquiry is in fact "bona fide research." The Court notes that even if the trial judge determines that her work qualifies, DES still has the ability to determine whether the request should be honored, and their determination would only be reviewable for an abuse of discretion.

(Note: the Arizona Supreme Court granted Review and oral argument was concluded on April 9, 2024)

In re: Lindquist, 525 P.3d 1100 (AZ App February 28, 2023). Trial court must hold evidentiary hearing to determine that an individual is a vulnerable adult

before allowing an interested person to file an exploitation action on behalf of the individual.

The three sons of Wanda Lindquist did not agree about her care or management of her affairs. Ms. Lindquist had signed a durable power of attorney naming her oldest son, Greg, as agent in April, 2019. In May of that same year, she signed a new power of attorney naming her youngest son, Kyle, as agent and revoking the earlier power. When Greg learned that he had been removed, he and the middle son, Todd, visited Ms. Lindquist in her home and, as she later testified, were "very intimidating" and "threatening." She secured an order of protection prohibiting Greg from contacting or visiting her.

At about the same time, Ms. Lindquist was diagnosed as having Parkinson's disease. Greg and Todd then accused Kyle of exploiting her financially, and Greg filed a guardianship and conservatorship petition.

Ms. Lindquist, through her retained counsel, objected to the petition. Two physicians were appointed to evaluate her. One, her personal physician, opined that she "does not have dementia," and could "make appropriate judgments…". The second appointed physician, a neurologist, did not evaluate Ms. Lindquist, but a physician assistant reported that an evaluation "suggests mild cognitive impairment."

At an evidentiary hearing, Ms. Lindquist agreed that Kyle could be appointed as temporary guardian. That temporary order expired five weeks later, and was not extended. Ms. Lindquist then moved to dismiss the conservatorship action, which motion was granted over Greg's objection. Greg appealed, but an agreement led to dismissal of the appeal and the order of protection.

Six months after that agreement, Greg and Todd filed an exploitation action under ARS §46-456, alleging that Kyle was exploiting Ms. Lindquist and should have his inheritance rights terminated. Ms. Lindquist and Kyle (through separate attorneys) objected and sought dismissal. After briefing and oral argument, but without an evidentiary hearing, the trial court denied the motion to dismiss and allowed the older brothers to file the exploitation action as interested persons.

Six months later, Ms. Lindquist moved to substitute into the exploitation action as plaintiff. The trial court approved the substitution, noting that she had priority under the statute. Ms. Lindquist and Kyle then appealed the earlier order allowing Greg and Todd to file the exploitation action as interested persons. Greg and Todd cross-appealed, challenging the order allowing Ms. Lindquist to substitute as plaintiff.

The Court of Appeals agrees with Ms. Lindquist and Kyle that, before the court grants leave to an "interested person" to file an ARS §46-456 action, it must first receive evidence that the person to be protected is a "vulnerable adult." Here, since no evidentiary hearing had been held to establish that condition precedent, the trial court should have granted Ms. Lindquist's (and Kyle's) motion to

dismiss. Because the complaint should have been dismissed, the appellate court did not reach the question raised by Greg and Todd: whether Ms. Lindquist should have been allowed to substitute as plaintiff in the underlying action.

***Wise v. Aspey, Watkins & Diesel*,** 524 P.3d 827 (AZ App February 3, 2023). Severance of parental relationship removes biological child from category of statutory beneficiaries under wrongful death statute.

Robert DeHardy was divorced from his wife (and mother of his five children) in 2014. His parental rights were severed as to all five children a few months later. Both actions occurred in Maine.

In 2017 DeHardy was killed in a motor vehicle collision in Arizona with a tribal police officer. By the time of his death he had remarried and had children by his new wife.

DeHardy's widow instigated a wrongful death action in federal court in Arizona, bringing the action on her own behalf "and on behalf of all statutory beneficiaries." After mediation she settled the claim for a total of $1.5 million, and allocated none of the proceeds to the five children whose relationship had been severed.

DeHardy's ex-wife first sought to intervene in the federal trial court proceeding. When the court denied her request, she filed a state court action in Arizona against the widow and the law firm that had represented her and negotiated the settlement. She argued that the Maine children were statutory beneficiaries and that the defendants owed a fiduciary duty to consider and protect their interests.

The trial court granted a Rule 12(b)(6) motion to dismiss. The Court of Appeals concurs. In its analysis, it cites Maine's law on termination of the parental rights, which provides that severance "divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other…." This is true even though Maine law would expressly allow a wrongful death action to be brought on behalf of the child whose relationship had been severed. So Maine law governed the effect of the severance, but Arizona law governed the status as a statutory beneficiary (or not).

***Borja v. Borja*,** 522 P.3d 699 (AZ App December 20, 2022). Though the court has discretion to award visitation to grandparents in accordance with ARS §25-409, the visitation must be "minimally intrusive on a parent's rights."

Mother and father of three minor children divorced, and mother was awarded sole legal decision-making authority. Paternal grandparents requested periodic visitation. Mother did not object to all visitation, but did object to the amount of time grandparents requested.

After a hearing, the Superior Court ruled that grandparents would have one weekend each month, two weeks during summer break, at least one holiday visit per year and birthday visits, plus weekly telephone calls with the children.

Mother was also ordered to provide grandparents with the children's schedules and notice of school, athletic, club or other extracurricular activities.

The Court of Appeals affirms that the Superior Court had discretion to order visitation under the facts of this case – especially the disagreement about visitation between mother and father. But the appellate court, noting that the trial judge's order amounts to approximately 51 days of visitation per year, rules that the extensive visitation schedule is far more intrusive than the "minimally intrusive" standard that should apply. Furthermore, the requirement that mother notify the grandparents about school and extracurricular activities, and the order that mother *require* the children to have weekly telephone contact, were both excessive. The court reverses the terms of the visitation order and remands for further consideration.

Coincidentally or not, the *Borja* case was decided on the same day as two other grandparent visitation/custody cases, though both of the others were memorandum decisions (see *Alupoaiei v. Correa* and *Hand v. Mills* below).

Estate of Brady v. Tempe Life Care Village, Inc., 519 P.3d 707 (AZ App October 4, 2022). Estate pursuing wrongful death claim for statutory beneficiaries has a fiduciary duty to all beneficiaries, but not to the extent of making individual claimant's trial disclosure and argument.

When Richard Brady, Sr., died in Tempe, he was 82 years old and had eight children. He apparently was largely estranged from six of them. One, daughter Barbara, was appointed personal representative and in that capacity filed a lawsuit for personal injuries and wrongful death, naming all eight children as statutory claimants under the wrongful death statute.

As trial neared, Barbara and her brother Patrick made disclosure of the basis for their wrongful death claims and disclosed that the other children were represented by separate counsel and would make their own disclosures. She listed them as witnesses, identifying that they were expected to testify about their relationships with their father and their individual losses. She communicated with a lawyer representing several of her siblings about the need to make their own cases, but that lawyer did not appear, did not disclose witnesses and did not participate in the case.

Defendants eventually moved for summary judgment as to claims by the other children, and entered into a settlement agreement with Barbara and Patrick. The trial court approved the settlement, granted summary judgment as to the other children, and entered a final order settling the civil case. Three of the children appealed from the dismissal of their individual claims.

The Court of Appeals rules that Barbara did have a fiduciary duty to the other children, but not to make their cases for them. Their failure to comply with disclosure requirements, identify their own losses or participate in the litigation did not prevent her or her brother Patrick from settling their individual claims

with the remaining defendant. And Barbara's bare-bones disclosure of the possibility that they might have individual claims (a) satisfied her fiduciary duty to the siblings and (b) failed to comply with disclosure requirements applying to those siblings so that dismissal of their claims was appropriate.

Brucklier v. Brucklier, 516 P.3d 526 (AZ App August 25, 2022). Property acquired during marriage was not community property where purchasing spouse had an equitable interest before the date of the marriage.

Michael Brucklier made an earnest money deposit of $50,000 on a piece of property just before marrying Jennifer Brucklier in 2005. The transaction was finalized just after the marriage, by payment of $418,716 from a §1031 exchange of property owned by Michael before the marriage. In the 2017 divorce proceeding, the domestic relations judge ruled that the LLC owned by Michael, and the property held in the LLC, was community property subject to equitable division. The Court of Appeals reverses that ruling, finding that the fact that Michael had an equitable interest prior to the marriage, and did not use marital assets to complete the purchase, overcame any presumption of community property.

Unreported Arizona Cases

In Re the Marriage of Weinstein & Locke, 2024 WL 2354079 (AZ App May 23, 2024). Transfer of separate property into trust identified as community property effected conversion of the property. Trust provision allowing either spouse to terminate trust and distribute property back in form originally received did not permit one spouse to unilaterally transfer trust assets to himself as separate property after dissolution proceedings had been initiated (and automatic preliminary injunction issued).

Allen v. Ieng, 2024 WL 1739285 (AZ App April 23, 2024). Purported daughter of decedent secured appointment as PR, transferred property to her own granddaughter, and then failed to show up at trial for decedent's actual grandson's quiet title action. No one represented on appeal and grandson/appellee filed no briefs. Nonetheless, Court of Appeals upholds trial court's judgment against purported daughter.

Goodman v. Wilson-Goodman, 2024 WL 1717127 (AZ App April 22, 2024). Divorce case involving the validity and effect of a premarital agreement and the later creation of a joint revocable trust. After the trust was created (with language indicating property would remain separate if identified as such by the owner), the couple created an LLC to manage the wife's law practice. To complicate the matter further, the wife later declared bankruptcy and valued the property at $0. The trial court found the wife's law practice had become community property during a series of structural and partnership changes; the Court of Appeals disagreed and remanded for entry of partial summary judgment in favor of the wife.

***Nguyen v. Nguyen*,** 2024 WL 1072030 (AZ App March 12, 2024). Father's payment of down payment on home and continued residence in home with son and daughter-in-law (and payment of all mortgage payments and final pay-off) established fact of ownership despite titling in son's/daughter-in-law's names. Son and daughter-in-law later signed quit-claim deed to daughter and son-in-law, who moved in and stayed with father for several months but left a decade before litigation. That quit-claim deed was eventually set aside and ownership confirmed in father in quiet title action upheld by Court of Appeals.

***In re: Guardianship of Herrera v. Herrera*,** 2024 WL 1007235 (AZ App March 8, 2024). Temporary guardianship obtained despite existing valid health care power of attorney was properly dismissed; temporary guardian who moved ward to another county was not thereby entitled to a change of venue.

***Matter of Corner Stone Land Trust*,** 2024 WL 488288 (AZ App February 8, 2024). A "pure trust" created primarily for the purpose of income tax evasion but managed as if it were a trust is actually a trust and subject to both trust rules and civil procedure requirements.

***Tripodi v. Beaufeaux*,** 2024 WL 339215 (AZ App January 30, 2024). In trust dispute, plaintiff's filing of a motion to amend did not stay the time for response to defendants' motion to dismiss. When plaintiff failed to respond, Superior Court properly dismissed his complaint.

***In the Matter of the Estate of Ely*,** 2024 WL 89625 (AZ App January 9, 2024). Daughter's claim that her father intended home purchase to be a joint venture, entitling her to receive the residence despite no provision in father's will, is rejected and eviction proceedings enforced.

***In the Matter of the Guardianship of and Conservatorship for Lange*,** 2023 WL 7138498 (AZ App October 31, 2023). When married couple modified their trust a year before wife's death, there was a presumption that husband was competent to make amendment. Evidence showed that he lacked capacity at a later amendment, but no evidence invalidated the earlier amendment. Nonetheless, contestants attorneys fees and costs were legitimately awarded in connection with guardianship, conservatorship and trust challenge proceedings.

***In re Estate of Chalker*,** 2023 WL 6940732 (AZ App May 4, 2023). In this fourth visit to the Court of Appeals, a decades-old attorney fee dispute is adjusted to preclude the estate from collecting fees from the successful contestant, and the matter is remanded for a determination of whether the contestant is instead entitled to fees from the estate.

Note: on October 20, 2023, the Arizona Supreme Court ordered the opinion in this matter depublished. Accordingly, it is treated here as a Memorandum Decision.

This dispute has been well-litigated, both before and after the death of Chalker. The decedent had incurred $273,000 in legal fees in the course of her divorce,

which was entered in 1995. Because of a long-running dispute over ownership of investment accounts, she and her attorneys agreed to a new fee arrangement, whereby the attorneys would be entitled to one-half of the investment accounts if they could recover them for her.

The decedent died in 2005. The investment accounts were finally released to her estate in 2014. Her divorce attorneys then sought one-half of the $1.2 million proceeds from those accounts.

The trial court first ruled that, because the attorneys had not been involved in actually securing the accounts, they were entitled to a *quantum meruit* recovery against the estate. The court entered judgment for $275,438.33. Because that was less than the $300,000 offer made by the estate prior to judgment, the court awarded $190,000 in fees to the estate.

In the first appeal, the attorneys prevailed in getting the court to order prejudgment interest against the fees portion of the award. On remand, the trial court modified the award by first deducting the $190,000 fee award and then applying the prejudgment interest calculation.

The attorneys appealed again, arguing that the attorneys fee award to the estate should not reduce the *quantum meruit* calculation before calculation of prejudgment interest and that if properly calculated the award would exceed the $300,000 offer (and therefore preclude an award of attorneys fees to the estate). The Court of Appeals agreed with the first contention and remanded, but ruled that the second issue should have been included in the earlier appeal and was therefore waived.

On remand, the trial court performed what it called a "ministerial act" of recalculating the award and interest, and awarded $352,655.88 to the attorneys. They filed a Rule 60(b)(5) motion, which the trial judge denied. This appeal followed.

While the Court of Appeals acknowledges that it had ruled that the question of an award of attorneys fees to the estate had been waived by the first appeal, it now decides that it would be "manifestly unjust" to allow the attorneys fee award to the estate to stand. The appellate court reverses the award of attorneys fees to the estate and remand for a recalculation of the final judgment and a determination of whether the attorneys should be entitled to an award of attorneys fees as the "successful party" in the litigation.

Estate of Dominguez v. Torres, 2023 WL 6876426 (AZ App October 18, 2023). Judgment against surviving spouse for fraudulent activity against her deceased husband's estate upheld after *pro per* appeal, treated as special action, denied.

In the Matter of the: Furst Family Trust, dated July 1, 1988, 2023 WL 6476472 (AZ App October 5, 2023). Sister's objections to independent trustee's settlement of her brother's claim against the trust are overruled on appeal based on her

submission of the matter before the probate court and her apparent participation in the proceedings.

In Re Guardianship of Adrian R., 2023 WL 6379824 (AZ App September 29, 2023). Procedurally confusing case, but when consenting parent withdraws consent, guardianship of a minor must terminate.

Estate of Pastrano, 2023 WL 5919986 (AZ App September 11, 2023). A purported self-proving will that did not satisfy the requirements for being self-proved may still be a valid will under A.R.S. §14-2502.

In Re Estate of Smith, 2023 WL 4777192 (AZ App July 26, 2023). PR re-opened probate in order to sell real estate that he alleged had been distributed to him. Thereafter his brother (the only other heir) appeared at a series of hearings that the PR skipped, and ultimately the probate judge ordered the PR to distribute one-half of the sale proceeds to his brother. The Court of Appeals affirms the judgment at least partly because the PR did not provide any record on appeal.

In Re Estate of Kaler, 2023 WL 4583557 (AZ App July 18, 2023). When respondent filed a notice of "no position regarding" the appeal but failed to file any brief, Court of Appeals treated the failure as a confession of error and reversed the trial court's determination that a contested document was ineffective as either a will or a trust amendment.

Garber v. Garber-Nevins, 2023 WL 4571160 (AZ App July 17, 2023). Once co-trustees distributed all trust property to themselves, any dispute about equalization of values could not be entertained in trust interpretation proceeding.

Azin v. Dresselhuys, 2023 WL 4445281 (AZ App July 11, 2023). In dispute between father and maternal grandparents of a minor child, the parties had agreed that father would exercise sole legal decision-making authority, that the grandparents would have visitation rights, and that father would not take the child out of the country without grandparents' consent or a court order. After a contested trial, the court ordered that father could take the child to his native Iran to meet and visit with paternal family members, conditioned on his posting a $100,000 performance bond. Trial court did not abuse discretion in making that determination.

Meyer v. 23526 Florence, LLC, 2023 WL 3843321 (AZ App June 6, 2023). On mother's death, house did not get distributed out of her trust to the beneficiary son. Son moved into the house in 2006 and lived there (without objection from the trustee(s)) for five years. After one year, he signed a "warranty deed" as "grantee" (after crossing out the "grantor" portions of the pre-printed form) and recorded it. A month later he signed a quitclaim deed as both grantor and grantee, and recorded that. In 2020, still living in the property (though he was briefly imprisoned and then transferred to a mental health facility in the interim) he signed a contract to sell the property to Higher Offer, LLC, which immediately

flipped the property to the defendant in this action. The trustee sued to quiet title and for damages for unjust enrichment, and the buyer countersued. The trial court granted summary judgment to the trust, and the Court of Appeals upholds that ruling. The buyer was not a creditor or assignee of the beneficiary, and had no standing to assert any right he might have to a distribution. Also, the son's continued occupancy was not adverse and not pursuant to a colorable claim of right, and so he acquired no adverse interest in the property – which the buyer could not have asserted on his behalf in any event. In a footnote to the opinion the appellate court neatly summarizes that the trust "is not itself a jural entity, and is therefore incapable of holding property, transacting business, pursuing or defending litigation, or otherwise acting in its own right." That's OK here, though, because the trustees have acted on behalf of the trust; the court is just explaining why they write about the trust acting as if it were acting on its own (for brevity and convenience, if you were wondering).

In the Matter of Estate of Davis, 2023 WL 3714852 (AZ App May 30, 2023). Slayer statute prevented husband/murderer from receiving any share of deceased wife's community property – including real property titled in husband's name but acquired during marriage (despite wife having executed disclaimer deed at time of purchase). Also, husband/murderer properly declared a vexatious litigant.

Henry v. Spetzler, 2023 WL 3477868 (AZ App May 16, 2023). Court of Appeals vacates domestic relations contempt finding against father over imprecise language in a decree requiring payment of extraordinary support for an adult disabled child based on the decree's requirement that the parties "shall jointly maximize the use of state funded care programs" for that child.

Thompson v. Manten, 3474778 (AZ App May 16, 2023). In a convoluted story involving a missing trust, the Court of Appeals disagrees with the trial court about whether proof of existence of a trust was established by a deed for real property naming the trust and the grantors as beneficiaries. Yes, that creates a trust, rules the appellate court – but there is no evidence of who the remainder beneficiaries might be, and so the trial court's determination that the defendant has no interest is upheld. This case also involves a transfer from the (missing) trust to a later trust for the same lifetime beneficiaries, and a defective deed out of that (second) trust to a successor beneficiary, now deceased.

McPherson v. McPherson, 2023 WL 2317560 (AZ App March 2, 2023). Paternal step-grandmother's visitation rights with a minor child can be continued even after (a) paternal grandfather died, (b) father remarried and stepmother adopted child, and (c) paternal step-grandmother moved to Minnesota and visitations would require minor child to fly to the visits (at step-grandmother's expense) – if the court finds that the visitation would be in the child's best interests.

Phillips v. Peterson, 2023 WL 2206543 (AZ App February 23, 2023). Brother's promise to share a portion of deceased mother's accounts (which brother received as joint owner) with his sister did not create enforceable contract.

Hepler Family Trust v. Hepler, 2023 WL 1860514 (AZ App February 9, 2023). Forcible entry action against the daughter of trustors who transferred a residence into their revocable living trust. Small interesting elements, but mostly interesting for the trustors' decision to purchase a house for their daughter, then title it to themselves, then transfer it to a trust that, though revocable, allowed her to live in the property rent-free and provided that she would receive it outright at their deaths. A year later they amended the trust to remove any right for her to live in or receive the house, and then successfully sought her eviction.

Bahr v. City of Scottsdale, 2023 WL 1838773 (AZ App February 9, 2023). City zoning panel did not err in ruling that resident failed to show that a nine-foot wall was necessary to protect her from noise and light that was more difficult for her to handle as a result of her autism disorder, when the zoning ordinance already permitted an eight-foot wall. Resident had relied on the ADA and Fair Housing Act as support for her challenge to the zoning limitation.

In re The Simpson Family Trust, 2023 WL 1228304 (AZ App January 31, 2023). Probate court did not violate trustee's constitutional rights by failing to appoint counsel or set jury trial on petition to remove the trustee for breach of fiduciary duties.

Matter of Oakland Living Trust, 2023 WL 1126749 (AZ App January 31, 2023). In this second trip to the Court of Appeals, the appellate panel upholds the probate court's decision not to invoke the disinheritance penalty of the trust's no-contest provision, even after the probate court's finding that the trustee and one sibling violated their fiduciary duties to the other beneficiaries.

Olesen v. Daniel, 2023 WL 1126735 (AZ App January 31, 2023). On remand after a 2021 Court of Appeals reversal, the trial court gave maternal grandparents sole decision-making authority and almost all parenting time, citing father's history of domestic violence. Father appealed, but Court of Appeals affirms, ruling that father's treatment as an abuser can limit his parenting rights even as against intervenor grandparents.

Dickey v. Dickey, 2023 WL 140427 (AZ App January 10, 2023). In this dissolution appeal, the court affirms an order that (among other things) directed the cremated remains of the couple's child to be split evenly, rather than (a) given to one spouse for a time equal to the time the other spouse had held them before trial, and then (b) interred in a particular cemetery selected by one spouse.

Matter of Newbanks Family Revocable Trust Dated May 16, 1985, 2023 WL 107381 (AZ App January 5, 2023). After A/B trust split, second spouse's will included an *in terrorem* provision. Probate court improperly applied it to

daughter's contest, since second spouse's will could not modify terms of first spouse's subtrust. Also, second spouse's will left his estate to the first spouse's subtrust, so contesting daughter's share of second spouse's estate was also unaffected. Also, several other rulings by the probate court were remanded for reconsideration. Probate court's award of (substantial) attorneys fees against contesting daughter also reversed.

Bredvig v. Mason, 2022 WL 17982932 (AZ App December 29, 2022). A 2019 consent agreement and paternity order identified Bredvig as father of Mason's oldest child. When Bredvig sought to modify parenting time, Mason asserted that another man was the real father – and produced genetic testing which demonstrated that to be true. The trial court ultimately set aside the paternity order because of mother's fraud upon the court, and the Court of Appeals upholds that decision. **(Note:** this opinion seems to be contrary to the holding of the Ct of App in *Johnson v. Edelstein in and for County of Maricopa*, 501 P.3d 742 (AZ App October 26, 2021), described above).

Atkison v. Shafer, 2022 WL 17982927 (AZ App December 29, 2022). Maternal grandmother sought *in loco parentis* status over her grandson after the death of the child's mother. The trial court granted her petition for temporary custody, but denied the petition for permanent custody after a hearing (finding that evidence of past drug abuse and domestic violence against the child's now-deceased mother was not persuasive). The Court of Appeals affirms the ruling, but remands for determination of the amount of child support due from father for grandmother's care during the interim period of custody.

Hand v. Mills, 2022 WL 17816701 (AZ App December 20, 2022). Maternal grandparents sought to step into their daughter's visitation schedule after custody was awarded to the minor's father. After disputes, father sought to eliminate the court-ordered visitation. Court of Appeals upholds the reduction of visitation to weekly phone calls and in-person visitation at father's discretion.

Alupoaiei v. Correa, 2022 WL 17816693 (AZ App December 20, 2022). Maternal grandmother petitioned for *in loco parentis* designation and court-ordered visitation, alleging that the child had been left with her while both parents were deployed overseas. Father objected, noting that he had been redeployed stateside so that he could care for his child. By the time of hearing, mother had also been redeployed to the states, and the child was living with mother and had "adjusted well." The Court of Appeals upholds the trial court's finding that there was no justification for either a custody or visitation order in favor of grandmother.

Simonson v. Almada-Negrete, 2022 WL 17815052 (AZ App December 20, 2022). Six days before his death, decedent signed a $420,000 check to his long-time girlfriend and delivered it to her with a note explaining that it was a gift and urging her to cash it quickly. Though she attempted to do so, the financial institution did not honor it before his death. Here the appellate court upholds the probate judge's

determination that the handwritten note did not amount to a holographic will, and the girlfriend could not pursue the uncashed check's balance as a "bad check."

Estate of Norman, 2022 WL 17588231 (AZ App December 13, 2022). Notice by the estate's personal representative of a lawsuit claiming exploitation of a vulnerable adult and seeking a money judgment and to set aside transfers by the decedent was inadequate when the personal representative seemed to have significant information that the defendant (her sister) lived in Mexico and had no US presence. Judgment set aside and entry of default vacated.

Matter of Furst Family Trust, dated July 1, 1988, 2022 WL 17258422 (AZ App November 29, 2022). In one small part of a sprawling family dispute, the appellate court upholds the probate court's dismissal of an action filed by one sibling against his sister, seeking to invalidate a 2018 power of attorney signed by their parents. One parent had died; the other had revoked the power of attorney by signing a new document. The sister agreed that her power of attorney was invalid, and noted that there were pending proceedings in California courts (where all the parties now live). The probate court dismissed the complaint and assessed fees against the brother for improperly attempting to expand the scope of the litigation; the Court of Appeals not only affirms but adds appellate fees to the judgment. The appellate decision refers to the litigation as "a high-conflict probate dispute" and notes that there are three separate Arizona cases filed by the brother against the sister in addition to the California proceedings. An additional Court of Appeals ruling dated October 5, 2023, is described above.

Bullington v. Bullington, 2022 WL 16848670 (AZ App November 10, 2022). Court of Appeals upholds removal of co-trustees for failure to provide accountings to trust beneficiary after multiple requests, and for entering into a lease encumbering trust property without having secured a vote of beneficiaries as required by the terms of the trust document. Trustees not permitted to rely on one beneficiary's oral representation that she would not oppose a future request for approval (which was never in fact made).

Beaumont v. Beaumont, 2022 WL 16844449 (AZ App November 10, 2022). Stocks inherited by wife during marriage and added to a joint trust account may not have become community property unless there was clear and convincing evidence of an intent to gift the stock to the community. Divorce court's finding that it was more likely than not that a gift was intended was an error, and the finding is reversed and remanded for reconsideration.

Maggie T. v. Sally T., 2022 WL 14985795 (AZ App October 27, 2022). Mother's parental rights terminated to allow grandparents to adopt child. Argument that grandparents "used" Title 14 guardianship to cause mother to abandon child was unavailing.

Conservatorship of Chalmers, 2022 WL 14971946 (AZ App October 26, 2022). Another chapter in the continuing saga of fees for attorneys, conservators and

guardians *ad litem* in a conservatorship case that was terminated. This installment upholds the imposition of sanctions against the former protected person for continuing litigation.

***Griego v. Didomenico*,** 2022 WL 6593514 (AZ App October 11, 2022). Colorado's common-law marriage statute was not met by cohabiting couple, despite having a child together and even owning property as joint tenants with the intent of making a common estate plan to benefit their child.

***Anderson v. Logue-Anderson*,** 2022 WL 4545990 (AZ App September 29, 2022). Despite short-duration marriage, and despite husband's assertion that he transferred separate property into joint ownership under duress, trial court's determination that the property became community property is upheld on appeal.

***Kunasek v. Johnson*,** 2022 WL 4377299 (AZ App September 22, 2022). Jury award of $10,500,000 in actual damages and $10,500,000 in punitive damages against the trustees of a trust, the trust's attorneys and the settlor (for conspiring with the trustees and their attorney) is upheld. Very interesting discussion of the statute of limitations as applied to breach of fiduciary duty, and the use of attorney/expert witnesses to establish attorney duties and trustee fiduciary duties.

***Koizumi v. Morogiello*,** 2022 WL 4243827 (AZ App September 15, 2022). Stocks inherited by one spouse during the marriage, and added to a joint tenancy brokerage account, nonetheless remained separate property of inheriting spouse to the extent that they could be identified; standard of proof to show continuing separate property nature is clear and convincing evidence.

***In Re Conservatorship of Hernandez; Knight v. Hernandez*,** 2022 WL 4230379 (AZ App September 13, 2022). In community property with right of survivorship title, one spouse can unilaterally terminate the right of survivorship by deeding his or her interest to him or herself. Subsequent beneficiary deed is effective to transfer spouse's community property interest to the named beneficiary.

***Sesma v. Marquez*,** 2022 WL 3589612 (AZ App August 23, 2022). ARS §33-431(B) does not require prospective joint tenants to sign accepting the joint tenancy in order to be effective. Where father transferred his property to himself and his son as joint tenants, and subsequently died, the property passed to his son despite the son never having accepted the joint tenancy title, and despite the father having later (a) remarried, and (b) entered into a preliminary agreement with a third party to sell the entire property.

***Novak v. Novak*,** 2022 WL 2981764 (AZ App July 28, 2022). A forcible detainer judgment is upheld in favor of the son and daughter-in-law of a home's resident, despite the resident's assertion that he was the true owner of the property and his son's name was put on only because his own credit was inadequate to

purchase the home, and that his own name was only taken off the title to allow his son to refinance.

In the Matter of Conservatorship for A.R.; Chambers v. Lattimer, 2022 WL 2921286 (AZ App July 26, 2022). Ct of Appeals agrees with probate court that fee for personal injury attorney was properly denied in conservatorship estate where attorney had conflict of interest and unclear fee agreement.

SUPPORTED DECISION-MAKING AGREEMENT

This agreement is governed by the Arizona supported decision-making agreement statute §14-5722, Arizona Revised Statutes. For the purposes of this agreement, "decision-maker" means an adult with a disability who executes an agreement for the purpose of designating an individual to serve as the decision-maker's supporter when the decision-maker makes certain decisions that are listed in the agreement.

PURPOSE OF AGREEMENT

The purpose of the supported decision-making agreement is to support and accommodate a decision-maker to make informed decisions and choices about certain aspects of the adult's daily life.

ROLE OF SUPPORTER

To assist a decision-maker, a supporter may:

1. Assist the decision-maker with getting information to be able to understand available choices.

2. Assist the decision-maker in understanding choices so the decision-maker can make the best personal decisions.

3. Assist the decision-maker in communicating decisions to the right people and organizations.

REVOCATION OR TERMINATION OF AGREEMENT

A. The decision-maker or the supporter may revoke this agreement at any time.

B. This agreement terminates as a matter of law at any time the decision-maker becomes an incapacitated person as defined in §14-5101, Arizona Revised Statutes.

C. This agreement terminates as a matter of law on the appointment of a guardian for any reason or purpose pursuant to title 14, chapter 5, article 3, Arizona Revised Statutes.

D. If either the decision-maker or supporter has questions about the agreement, the decision-maker or supporter should speak with a lawyer before signing this supported decision-making agreement.

IMPORTANT INFORMATION FOR SUPPORTERS ABOUT THE LIMITS TO THIS AGREEMENT

A. You may not make a decision for or on behalf of the decision-maker.

B. Neither you nor any organization for whom you are employed or serve as a volunteer may receive any financial support, remuneration or compensation, either directly or indirectly, for or related to your services and role as a supporter to the decision-maker.

C. When you agree to provide support to an adult under this supported decision-making agreement, you have a duty to and you shall:

1. Act in good faith.
2. Act with loyalty to the decision-maker.
3. Act without self-interest.
4. Avoid conflicts of interest.
5. Stop serving as a supporter at any time that you question the capacity of the decision-maker to continue making decisions even with your support.

D. Stop serving as a supporter at any time that the supported decision-making agreement is revoked by the decision-maker or you, or the agreement ends as a matter of law.

E. Respect the decision-maker's relationships with friends and family members and not attempt to isolate or alienate the decision-maker from those friends and family members.

APPOINTMENT OF SUPPORTER

I _____, (name of adult, (the "decision-maker")), am of sound mind and enter into this agreement voluntarily.

My disabilities are: (describe briefly)

_____

_____

_____.

I choose _____ to be my supporter.

Supporter's address: _____

Supporter's telephone number: _____

Supporter's email address: _____

SUPPORTER'S ROLE AND LIMITATIONS ON THAT ROLE

My supporter may help me with life decisions about each of the following which I have marked with an "x":

Yes ___ No ___ obtaining food, clothing and a place to live.

Yes ___ No ___ my physical health and health services.

Yes ___ No ___ my mental health and mental health services.

Yes ___ No ___ managing my money or property.

Yes ___ No ___ getting an education or other training.

Yes ___ No ___ choosing and maintaining my services and supports.

Yes ___ No ___ finding a job.

Yes ___ No ___ other: _____ (specify)

Yes ___ No ___ my supporters may see my private health information under the health insurance portability and accountability act of 1996 (P.L. 104-191) if I first choose to provide a signed release.

Yes ___ No ___ my supporters may see my educational records under the family educational rights and privacy act of 1974 (20 United States Code §1232g) if I first choose to provide a signed release. This agreement is effective when signed and will continue until _____ (date) or until my supporter or I end the agreement or the agreement ends by operation of law, including the appointment of a guardian for me.

DECISION-MAKER'S SIGNATURE

Signed this _____ (day) of _____ (month), _____ (year)

_____ _____

(signature of decision-maker) (printed name of decision-maker)

CONSENT OF SUPPORTER

I (name of supporter), _____ consent to act as a supporter under this agreement.

_____ _____

(signature of supporter) (printed name of supporter)

This agreement must be signed in front of two witnesses or a notary public

_____ _____

(witness 1 signature) (printed name of witness 1)

_____ _____

(witness 2 signature) (printed name of witness 2)

Or

Notary public

State of _____

County of _____

This document was acknowledged before me on _____(date) by

_____ _____

(name of decision-maker) (name of supporter)

_____ _____

(signature of notary) (printed name of notary)

(seal, if any, of notary)

My commission expires: _____

WARNING: PROTECTION FOR THE DECISION-MAKER WITH A DISABILITY

IF A PERSON WHO RECEIVES A COPY OF THIS SUPPORTED DECISION-MAKING AGREEMENT OR WHO IS AWARE OF THE EXISTENCE OF THIS AGREEMENT HAS CAUSE TO BELIEVE THAT THE DECISION-MAKER IS BEING ABUSED, NEGLECTED OR EXPLOITED BY THE SUPPORTER, THE PERSON SHALL REPORT THE ALLEGED ABUSE, NEGLECT OR EXPLOITATION TO THE DEPARTMENT OF ECONOMIC SECURITY'S ONLINE REPORTING SYSTEM BY CALLING THE ADULT PROTECTIVE SERVICES, ADULT ABUSE HOTLINE OR BY CALLING THE LOCAL POLICE DEPARTMENT.



Probate (and Elder Law) Update

CLE by the Sea, 2024

Probate Practice Changes

- Most probate (and guardianship, conservatorship and trust) notices must be sent by registered or certified mail
- Presumption in favor of contact with individuals with "significant" relationship
- Court-appointed attorneys given specific duties and potential contempt for non-compliance
- Supported decision-making comes to Arizona
- Electronic will witnesses can now be remote

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Probate Advisory Panel

- Created by 2023 legislature
- Tasked with suggestions to “improve the adult guardianship and conservatorship laws through statutory changes”
- Not yet formed, not listed among Governor’s “Boards and Commissions”

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Not Yet Effective

- Human composting! ("Natural Organic Reduction")
- Uniform Partition of Heirs Property Act
- Guardians' and health care agents' role in civil commitment proceedings

Interesting Case Law Developments I

- *In re Wood* automatic disenfranchisement by guardianship violates due process
- *Conservatorship of Chalmers* re: notice of basis of fee
- *Matter of Tsosie* – Public Fiduciary not allowed to refuse to accept appointment as guardian

Interesting Case Law Developments II

- *In re: Lindquist* requires a finding of vulnerability before allowing a mere "interested person" to file an APSA claim
- A batch of grandparent visitation cases, mostly allowing but limiting visits
- *Meyer v. 23526 Florence, LLC* (memorandum) is the most fun you can have reading case law

Elsewhere…

- Big changes to Supplemental Security Income rules coming in October 2024:
  - Food permissible under In-kind Support and Maintenance (ISM) rules
  - Speaking of ISM, rent paid at ≥ $334.33/month [(943/3)+20] results in no reduction in SSI
  - Payback rules dramatically eased

ABLE and 529 Plans

- ABLE Act contributions Arizona-deductible up to $2,000
- Transfers into or out of ABLE account *never* count as available resources (except in one rare case)
- 529 conversion to ABLE permissible

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“Taxification” of Disability

- Qualified Disability Trusts (IRC §642(b)(2)(C)) vs. self-settled SNTs (42 USC §1396p(d)(4)(A))
  - Social Security: “solely for the benefit of…”
  - IRS: “all of the beneficiaries [are] disabled”
- SECURE
  - No distributions during beneficiaries’ lives to anyone not disabled
  - Definitions reference SSA, but in IRC
- SECURE 2.0: remainder beneficiaries of Type II AMBT ignored for distribution calculations

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Nonjudicial Settlement Agreements

State Bar of Arizona

July 10, 2024

Daren J. Layton

Legal Disclaimer

These materials are by no means a substitute for careful tax and legal planning and the recipient of these materials is strongly encouraged to consult with a tax and legal professional familiar with these rules and the recipient's particular situation. These materials are meant as a general introduction of the topics included and are not meant as an exhaustive representation of each topic or all issues related to each topic. Each person in possession of these materials should conduct his or her own independent research of each topic covered in the materials or he or she should seek his or her own independent legal counsel, and he or she should not rely on these materials independently. These materials are not meant as a tax opinion or to be used to avoid tax penalties.

I. Introduction

Trusts are valuable tools that can be used to accomplish many objectives. Even the most well-drafted trust instrument cannot anticipate all the contingencies that might arise, particularly as trusts last for longer and longer. Sometimes a trust does not work as intended or the circumstances surrounding the trust or its intended beneficiaries have changed in unforeseen ways (or sometimes there are just factual or clerical errors in the trust agreement). When such situations arise and the trust remains amendable and/or revocable (see A.R.S. §§ 14-10602 and 14-10603), then the person who has the power to amend and/or revoke the trust may exercise such power to change the trust. However, when a trust is unamendable and irrevocable, and the trust agreement does not explicitly provide a mechanism for the modification or termination of the trust, then addressing such situations often becomes more difficult.

Traditionally, resolution of such matters for irrevocable trusts has been completed by way of the courts, which can be expensive, time-consuming, and result in delays. Rather than engaging the courts to address and resolve such matters, there are two possible alternatives: (i) decanting (see A.R.S. § 14-10819); and (ii) a nonjudicial settlement agreement (see A.R.S. § 14-10111). The focus of these materials is on nonjudicial settlement agreements under A.R.S. § 14-10111.

A.R.S. § 14-10111 is attached to these materials as Exhibit A. And, because Arizona's nonjudicial settlement agreement statute is modeled after the Uniform Trust Code's statute[1], Uniform Trust Code (UTC) § 111 with Comments is attached to these materials as Exhibit B.

II. Subject Matter of a Nonjudicial Settlement Agreement

Subject to three limitations, interested persons may enter into a binding nonjudicial settlement agreement with respect to *any* matter involving a trust.[2]

A. Limitation No. 1. Interested persons may enter into a nonjudicial settlement agreement with respect to a trust *except* for modification or termination of a trust as otherwise permitted pursuant to the trust instrument.[3] This limitation is not in UTC § 111, and is specific to A.R.S. § 14-10111.

1. In other words, if the trust instrument already permits or provides a mechanism for the desired modification or termination, then a nonjudicial settlement agreement may not be used for such purposes.

2. For example, if a trust agreement grants X the power to remove a trustee and X is able to exercise such power, then a nonjudicial settlement agreement may not be used for such purpose. If X is incapacitated, deceased or otherwise unable to exercise such power, then a nonjudicial settlement agreement may be used since

[1] *See State v. Sanchez*, 174 Ariz. 44, 47, 846 P.2d 857, 860 (Ct. App. Div. 1 1993) (stating that when statutes are based on model acts, Arizona courts assume the legislature meant to adopt the comments to the model acts).

[2] A.R.S. § 14-10111(A).

[3] A.R.S. § 14-10111(A).

the desired modification is no longer permissible or possible pursuant to the trust instrument.

B. Limitation No. 2. A nonjudicial settlement agreement is valid only to the extent it includes terms and conditions that *could* be properly approved by the court under this chapter [A.R.S. Title 14, Chapter 11 – Arizona Trust Code] or other applicable law.[4]

1. Purpose of Limitation.[5] One of the aims of nonjudicial settlement agreements is to resolve matters by nonjudicial means, which is highly encouraged.[6] In order to achieve such purpose, nonjudicial settlement agreements are given the same effect as if approved by the court. In order to achieve such certainty, nonjudicial settlement agreements may only contain terms and conditions that *could* be properly approved by the court and may not be used to produce a result not authorized by law.

2. Illustrative List. A.R.S. § 14-10111(C) provides a list of matters that may be resolved by a nonjudicial settlement agreement. The list of matters in A.R.S. § 14-10111(C) mirrors the matters listed in UTC § 111(d). The comments to UTC § 111 provide that such list is nonexclusive. Furthermore, UTC § 111 does not attempt to precisely define "interested persons" "[b]ecause of the great variety of matters to which a nonjudicial settlement may be applied".

3. Matters under Arizona Trust Code. It would be very difficult (if not impossible) to create an exhaustive or nearly exhaustive list of matters that could be addressed by a nonjudicial settlement agreement given the number of scenarios that could arise. Accordingly, the Arizona Trust Code should be the guide by which it is determined whether the matter *could* be properly approved by the court.

C. Limitation No. 3. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust.[7] **Note:** This limitation is really one of the many other subset of limitations that fall under the limitation referenced directly above, but it is explicitly identified in the statute.

1. Purpose of Limitation. The material purpose rule safeguards the settlor's freedom of disposition; the beneficiaries cannot overcome a material purpose of the settlor.

2. Explicit Material Purpose. Some trust instruments explicitly state that a certain provision or set of provisions constitute a material purpose of the trust (e.g., spendthrift provisions, no contest clauses, etc.). If the purpose(s) for which the trust is created are expressed in the instrument by which the trust is created, a different purpose cannot be shown by extrinsic evidence.[8] If, however, the

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4 A.R.S. § 14-10111(A) and A.R.S. § 14-10111(B).
5 *See* UTC § 111 cmt.
6 *See* UTC § 111 cmt.
7 A.R.S. § 14-10111(A) and A.R.S. § 14-10111(B).
8 Restatement (Second) of Trusts § 337 cmt. e (Am. L. Inst. 1959).

purposes for which the trust is created are not expressed in the instrument, extrinsic evidence of the surrounding circumstances to aid in the construction of the instrument is admissible in order to determine the purposes of the trust.[9]

3. Implicit Material Purpose. The Arizona Trust Code does not provide any explicit guidance or direction for determining whether a particular provision or set of provisions constitute material purpose of the trust. However, the Uniform Trust Code discusses the *Claflin doctrine*[10] and its application in discerning the material purpose(s) of a trust when discussing the modification or termination of an irrevocable trust.[11] In particular, the Uniform Trust Code provides as follows:[12]

> The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:
>
> > Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.
> >
> > Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

There is a bit of conflict here as the Uniform Trust Code cites the Restatement (Third) of Trusts but Arizona follows the Restatement (Second) of Trusts.[13] However, Arizona "courts assume that the legislature that passed a statute based upon a model or uniform act intended to adopt the construction placed on the act by its drafters."[14]

To the extent Restatement (Second) of Trusts applies for purposes of determining the material purpose(s) of a trust, § 337 discusses the modification and termination of a trust with the consent of all of the beneficiaries, and the comments provide various examples of modifications and terminations that did

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9 Restatement (Second) of Trusts § 337 cmt. e (Am. L. Inst. 1959).
10 *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889).
11 *See* UTC § 411 cmt.
12 *See* UTC § 411 cmt.
13 A.R.S. § 14-10106(B).
14 *State v. Sanchez*, 174 Ariz. 44, 47, 846 P.2d 857, 860 (Ct. App. 1993).

or did not violate a material purpose of the trust. The prevailing view is that the following constitute material purposes: (1) spendthrift provision,[15] (2) the beneficiary is not to receive the principal until attaining a specified age (i.e., enjoyment is postponed),[16] or (3) discretionary trust.[17]

4. Spendthrift Provisions; Material Purpose. UTC § 411 contains an optional provision that explicitly provides that a spendthrift provision is not presumed to constitute a material purpose of the trust.[18] Arizona did not adopt such provision when enacting A.R.S. § 14-10411. The comments to UTC § 411, when discussing the optional provision, note that spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor,[19] and call this result troublesome because spendthrift provisions are often added to instruments with little thought. The comments continue by saying that the optional spendthrift provision does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor but that the question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

III. Parties to Nonjudicial Settlement Agreement

A. Permitted Parties. As previously stated, A.R.S. § 14-10111(A) provides that "interested persons" may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

B. Definition of Interested Person. For purposes of A.R.S. § 14-10111, the term "interested person" has the same meaning prescribed in A.R.S. § 14-1201.[20] In particular, A.R.S. § 14-1201(34) defines "interested person" as follows:

> "Interested person" includes any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. Interested person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

The "interested persons" or parties who may enter into a nonjudicial settlement agreement will vary depending on the circumstances. However, for most nonjudicial

[15] Restatement (Second) of Trusts § 337 cmt. l (Am. L. Inst. 1959).
[16] Restatement (Second) of Trusts § 337 cmt. j (Am. L. Inst. 1959).
[17] Restatement (Second) of Trusts § 337 cmt. n (Am. L. Inst. 1959).
[18] See UTC § 411.
[19] See Restatement (Second) of Trusts Section 337 (1959).
[20] A.R.S. 14-10111(F).

settlement agreements the parties will often include the settlor(s), trustee(s), and beneficiary(ies).

C. Required / Desired Parties. A.R.S. § 14-10111 does not explicitly define or determine who *must* be a party to a nonjudicial settlement agreement. However, as discussed previously, a nonjudicial settlement agreement is valid only to the extent it includes terms and conditions that *could* be properly approved by the court. Consequently, if a person's consent would be required in order for the subject matter of the nonjudicial settlement agreement to be approved by the court, then such person is required to be a party to the nonjudicial settlement agreement. Furthermore, a nonjudicial settlement agreement is only binding on those parties to the agreement and is *not* binding on nonjoining parties. As a result, and as a general rule, every person whose interest will be or could be affected by the nonjudicial settlement agreement should be a party to the nonjudicial settlement agreement.

In an Illinois case, *Estate of Adames*, 2020 IL App (1st) 190573 (September 30, 2020), the Illinois Court of Appeals held that a trustee was a necessary party to a nonjudicial settlement agreement under Illinois's pre-U.T.C. statute, reversing a trial court decision that the trustee in question was not a necessary party to the agreement.

D. Representation by Others. Trusts often have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, a binding nonjudicial settlement agreement can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements.[21] To that end, A.R.S. § 14-10301 permits such representation for a nonjudicial settlement agreement (see A.R.S. §§ 14-1404 thru 14-1408), the basic rules of which are as follows:

1. The holder of a general power of appointment, including a general testamentary power of appointment, may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power.
2. To the extent there is no material conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:
   (a) A conservator may represent and bind the estate that the conservator controls.
   (b) A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed.
   (c) An agent who has authority to act with respect to the particular question or dispute may represent and bind the principal.
   (d) A trustee may represent and bind the beneficiaries of the trust.

[21] *See* UTC § 111 cmt.

(e) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(f) A parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed, except that the parent may not represent the child to consent to a modification or a termination of a trust if the parent is the settlor of the trust.

3. Unless otherwise represented, a minor, incapacitated person, unborn child or person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another person who has a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no material conflict of interest between the representative and the person represented with respect to the particular question or dispute.

4. At any point in a proceeding brought under this title, the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn or unascertained person or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, the court may appoint a guardian ad litem to represent several persons or interests. In its order appointing the guardian ad litem, the court shall state the basis for the appointment.

IV. Court Involvement

Before or after the parties enter into a nonjudicial settlement agreement, any interested person may request the court to approve a nonjudicial settlement agreement to determine whether the representation as provided in Article 3 of Arizona Trust Code was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.[22] Unless the interested person asks the court to rule without regard to A.R.S. § 14-10111(E), the court may either approve the agreement or decline to approve the agreement, but may not disapprove or deny the effectiveness of the agreement.[23] If the court does not approve the agreement, the failure to approve is not any prejudice against the effectiveness of the agreement and is not a final judgment or judicial precedent with respect to the agreement or subsequent agreements pursuant to A.R.S. § 14-10111.[24]

V. Cases

A. Arizona Cases. Arizona does not have any cases involving A.R.S. § 14-10111 or nonjudicial settlement agreements.

B. Cases from Other Jurisdictions.

1. Nebraska. In *In re McGregor*, 954 N.W.2d 612 (Neb. 2021), the Supreme Court of Nebraska invalidated a nonjudicial settlement agreement. In this case three

[22] A.R.S. § 14-10111(D).
[23] A.R.S. § 14-10111(E).
[24] A.R.S. § 14-10111(E).

beneficiaries of a trust entered into a nonjudicial settlement agreement in May 2011 to terminate the trust and distribute its assets to two of the beneficiaries. However, no one represented the interests of unborn and undetermined beneficiaries in the negotiation of the agreement.

In May 2017, however, one of the three beneficiaries (Evelyn) purported to revoke the agreement. This caused one of the other beneficiaries to ask a court to approve the agreement under Nebraska's version of U.T.C. § 111 (Neb. Rev. Stat. § 30-3811). Evelyn objected to the petition for approval, claiming that not all interested persons had signed the agreement and that the agreement violated a material purpose of the trust because the trust had a spendthrift clause (Nebraska's version of U.T.C. § 111 provides that a "spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust").

The trial court agreed with Evelyn and issued an order invalidating the agreement for three reasons. The first reason was that the agreement failed to include unknown and undetermined beneficiaries, who were among the "interested persons" who were necessary parties to the agreement. The second reason was that the changes the beneficiaries agreed to in the agreement were not permissible subjects of nonjudicial settlement agreements under the Nebraska version of U.T.C. § 111. Finally, the trial court concluded that the agreement violated a material purpose of the trust in its provisions substituting outright distributions for continued trusts for the beneficiaries.

The Nebraska Supreme Court affirmed the trial court's decision on the grounds that the agreement violated a material purpose of the trust given that the trust had a spendthrift clause. Because the court determined the agreement was invalid on grounds of the agreement violating a material purpose of the trust, it did not reach the question of the lack of representation of the unborn and unascertained beneficiaries.

2. Tennessee. In *Miller v. Maples*, 2018 Tenn. App. LEXIS 697, following the settlor's death, the settlor's daughters (the trustees and beneficiaries of the settlor's trust) engaged in mediation, which resulted in a settlement agreement concerning the distribution of the trust's assets. The sisters agreed to early distribution of the Trust assets, such that each would receive an immediate distribution, and agreed that the settlement would terminate the trust.

   Before the settlement was approved by the trial court, one of the daughters died, and her estate was substituted in the lawsuit. The surviving siblings then joined in a complaint seeking a determination concerning whether the terms of the settlement agreement violated a material purpose of the trust so as to be unenforceable and was executed in violation of the applicable statutory procedure. The deceased daughter's estate argued for enforcement of the settlement agreement so that the estate would receive the deceased daughter's share of the trust.

The dispositive provisions of the trust provided for discretionary distributions of income and principal to or for one or more of the child and the child's issue for their health, education, maintenance, and support. In addition, the trust provided for a distribution of a portion of the principal each year for 10 years until the trust was exhausted.

The trial court granted summary judgment in favor of the estate of the deceased sister, holding that the settlement was enforceable since the early termination of the trust did not violate a material purpose of the trust and the court proceedings effectively cured any deficiencies in the execution since all the necessary parties to a termination were parties to the court proceedings. The appellate court confirmed that the settlement agreement was enforceable.

VI. Effect on Tax Authorities[25]

Nearly every transaction has tax consequences (i.e., income, gift, estate, and/or generation-skipping transfer tax), and the parties to a transaction cannot simply agree as between themselves what the tax consequences of the transaction will be. The shifting of property rights as a result of litigation, in compromising bona fide disputes between adverse parties, or by voluntary rearrangement of property rights will have tax consequences to the parties that are largely dependent upon the existence of a bona fide dispute, the nature of the underlying claim, the existence of an enforceable right as between the settling parties, and the change in property rights.[26] For example, amounts received in settlement of a will contest are generally treated as an inheritance, and as a result, are not subject to income tax.[27] Similarly, a shift of property rights as the result of a bona fide settlement of a dispute does not give rise to the imposition of gift tax.[28]

Conversely, a settlement agreement when there is no actual dispute will be recognized by the IRS for what it is (i.e., a voluntary rearrangement of property interests).[29] In such cases, the IRS may either (i) conclude that the exchange of a property interest was a gift and impose transfer tax if it appears that parties with significant interests have forfeited their interests for donative purposes and without adequate consideration; or (ii) conclude that there has been a sale or exchange if full and adequate consideration for the property interest compromised appears to have changed hands.[30]

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[25] Significant Portions of this Section were derived from Melissa J. Willms and Mickey R. Davis, *Knowing the Ropes & Binding the IRS: Income & Transfer Tax Issues of Settlement & Modifications That Every Fiduciary Should Know* (2018), and from Philip Jones, *Tax Consequences of Trust and Estate Litigation and Settlement Agreements* (2020).

[26] *See Lyeth v. Hoey*, 305 US 188 (1938); *see also Ahmanson Found*. v. U.S., 674 F.2d 761 (9th Cir. 1981).

[27] *See Lyeth v. Hoey*, 305 US 188 (1938).

[28] Treas. Reg. § 25.2512-8.

[29] *Comm'r v. Vease*, 314 F.2d 79 (9th Cir. 1963).

[30] *See Kenan v. Comm'r*, 114 F.2d 217 (2d Cir. 1940); *Allen v. First Nat'l Bank & Trust Co.*, 157 F.2d 592 (5th Cir. 1946); *Comm'r v. Brinckerhoff*, 168 F.2d 456 (2d Cir. 1948); *Bell's Est. v. Comm'r*, 137 F.2d 454 (8th Cir. 1943); Rev. Rul. 72-243, 1972-1 CB 233; Rev. Rul. 69-486, 1969-2 CB 159, distinguished by Rev. Rul. 83-61, 1983-1 CB 78; PLRs 9649015, 9830017; TAM 8145026; *see also* CCA 201651013 (aff'd by CCA 201747005).

The shifting of interests in a settlement document without proper substance and made solely to bring about a change in tax characterization will likely be ignored by the IRS.[31] Many parties who negotiate to achieve tax advantageous property interests on substantially equivalent economic terms as those to which the parties would not have otherwise been entitled will not likely qualify for the intended tax status. Moreover, the parties are generally bound by the terms of their agreement, and cannot, having characterized the transaction among themselves, argue that the transaction should be recharacterized in a different fashion when the transaction is reported.[32]

To resolve any doubt regarding the tax consequences of a proposed settlement, whether as result of a bona fide dispute or as a means to achieve certain tax results, the taxpayer could seek a private letter ruling asking the IRS to approve the tax consequences of the action.

The following is a discussion of the binding nature of nonjudicial settlement agreements with respect to the IRS when there is a genuine dispute.

A. Overview. In *Commissioner v. Estate of Bosch*, 387 US 456 (1967), the U.S. Supreme Court addressed whether and to what extent the IRS (or the tax court deciding the issue) is bound by a state court adjudication of property rights when the U.S. is not a party. The Court ruled that the IRS is not "conclusively bound" by a state trial court ruling regarding those property interests. Rather, (i) when a state law property right has been decided by the highest court of the state, the decision should be followed and respected as the best authority for that state's law; and (ii) when a state law property right has not been decided by the highest court of the state, federal authorities (IRS or a tax court deciding the issue) "must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." In adopting this rule, the Court recognized that it requires the deciding authority to sit "as a state court." In reaching its decision, the Court reiterated its longstanding holding that property rights are determined by state law.

B. Bona Fide Dispute. The IRS will not respect a settlement agreement based on "friendly" or "collusive" litigation where no bona fide dispute exists.[33] The IRS will not consider a settlement agreement to be a bona fide unless the parties' claims are bona fide and satisfied on an economically fair basis.[34] While truly adverse positions must be settled, the courts have held that a settlement among the parties may be

[31] PLRs 200004014, 9716011, 9423015.

[32] *See Insilco Corp. v. U.S.*, 53 F.3d 95 (5th Cir. 1995); *Comm'r v. Danielson*, 378 F.2d 771 (3rd Cir. 1967).

[33] *See Grossman v. Campbell*, 368 F.2d 206, 18 AFTR2d 6251 (5th Cir. 1966); *see also Commissioner v. Vease*, 314 F.2d 79, 11 AFTR2d 1800 (9th Cir. 1963), rev'g. 35 T.C. 1184 (1961); *Aronson v. Commissioner*, T.C. Memo 2003-189; *Brandon v. Commissioner*, 86 T.C. 327 (1986), rev'd on other grounds, 828 F.2d 493 (8th Cir. 1987), on remand 91 T.C. 829 (1988); *Simpson v. Commissioner*, T.C. Memo 1994-259; Rev. Rul. 89-31, 1989-1 C.B. 277.

[34] *See* PLRs 201606002, 8902045.

honored even in those situations where the disagreement is short of a "full scale war."[35]

C. Enforceable State Law Rights. If interests are modified as a result of what is deemed to be a bona fide controversy, the IRS will generally respect the transaction and will apply the tax treatment in accordance with the principles applicable to the interests of the parties under the settlement or other disposition of the dispute.[36] However, a party to a settlement should not assume that the property and proceeds received or paid in settlement will automatically be deemed to have passed in accordance with the stipulations of the parties in a settlement agreement if such is not based on enforceable state law rights. For example, in *Roberts v. Commissioner*, T.C. Memo 1995-171, a caregiver had been promised to receive a substantial sum upon the decedent's death. After the death, the caregiver brought suit and received $50,000 in a settlement. The IRS argued that the sum was compensation for services rendered and taxable income to the caregiver, but the caregiver argued that the sum was an inheritance. The Tax Court ultimately held that the sum was a nontaxable inheritance, because the underlying claim was for breach of a contract to make a will.

D. Quantitative Issues. The IRS may further scrutinize the outcome to ensure that the amount of the settlement is consistent with the underlying claim. For example, someone who had a right to contest a will and obtain an intestate share of $100,000 may have any interest received in excess of $100,000 characterized as something other than an inheritance by the IRS.

E. Qualitative Issues. The IRS generally will not recognize the tax treatment of an interest created pursuant to settlement that qualitatively departs from the nature of the underlying claims or property rights that the party could have obtained if all claims were litigated pursuant to state law. For example, someone whose only right in litigation would have been to sue to obtain a greater share in trust for life would generally not have a settlement interest recognized that grants significant and immediate property rights or distributions outright.[37] Although it may be difficult to ascertain the exact qualitative rights to which parties may be entitled, the IRS will generally accept settlements, and their tax characterization, that are within the range of reasonable outcomes that the parties might expect in litigation, after giving appropriate effect to allowances for uncertainty and compromise.[38]

F. Filing of Lawsuit. If a dispute is resolved by means of a settlement agreement instead of a final judgment by the court, the IRS will generally respect the outcome so long as

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[35] *See Citizens and Southern Nat'l Bank v. U.S.*, 451 F.2d 221 (5th Cir. 1971); *see also Est. of Hubert v. Comm'r*, 101 TC 314 (1993), aff'd, 63 F.3d 1083 (11th Cir. 1995) (marital deduction allowed for payments to spouse in settlement of bona fide will contest).

[36] *See, e.g.*, PLRs 199948014, 9848009; TAM 9005003.

[37] *See Est. of Agnello v. Comm'r*, 103 TC 605 (1994); TAM 9610004; *Bel v. U.S.*, 73-1 USTC ¶12,925 (W. D. La. 1972); *Citizens & Southern Nat'l Bank v. U.S.*, 451 F.2d 221 (5th Cir. 1971).

[38] *See Kightlinger v. Commissioner*, T.C. Memo 1998-357; *Robinson v. Commissioner*, 102 T.C. 116 (1994), aff'd 70 F.3d 34 (5th Cir. 1995), cert. denied 519 U.S. 824 (1996); *Bagley v. Commissioner*, 105 T.C. 396, 406 (1995).

the settlement agreement resolves a bona fide dispute and the participants are bona fide claimants. Accordingly, from a tax standpoint, the settlement of a bona fide dispute should be accorded the same effect as a judgment by a court. According to the court in *Estate of Barrett v. Commissioner*, 22 TC 606 (1954):

> In *Lyeth v. Hoey*, the Supreme Court found too formal for substance the distinction between a payment made to an heir pursuant to judgment in a proceeding contesting a will and a payment made in compromise, in advance of trial, of the claims made in the proceeding. We think, similarly, that the distinction pressed by the respondent, on the basis of his regulations, between a payment made pursuant to an order of a local court after a fully litigated proceeding and a payment made in settlement of claims that avoids a will contest is without merit. A will contest can exist without full blown legal proceedings and we have no doubt that the executor in this case recognized the threat made on his sister's will. If the proceeding had ever come to issue and trial, the executor may well have opposed Barrett's claim, though recognizing as a danger that there was a possibility that Barrett might succeed and be awarded a substantial sum of money. If Barrett had litigated his claim and been awarded a judgment, the amount received by him would qualify as a marital deduction as an interest passing by inheritance. We find nothing in the statute or in logic that would deny similar treatment to a settlement payment made in advance of the contest where there is sufficient basis for a reasonable belief that only such payment would avoid a serious and substantial threat to the testamentary plan provided by the decedent.

G. Nature of Resolution. Whether the dispute is resolved by construction or reformation vs. revocation or rescission vs. modification vs. decanting can affect the resulting tax treatment arising from any change that occurs.

1. *American Nurseryman Publishing Co. v. Commissioner*, 75 TC 271 (1980). A shareholder's transfer of stock to revocable trust of which she was sole trustee and beneficiary terminated a Subchapter S election. At the outset, the tax court noted that there is no merit in the shareholder's argument that the tax court should give retroactive effect to the state court order voiding the transfer of the shareholder's stock in trust. There is no dispute that the shareholder desired to transfer her stock in trust, and there is no dispute that she actually transferred her stock in a valid and completed transaction. As between the shareholder and the trust, the state court order may have had retroactive effect, but the tax court and the courts of appeals have consistently expressed the view that "not even judicial reformation can operate to change the federal tax consequences of a completed transaction."
2. *Harvey C. Hubbell Trust v. Commissioner*, TC Summary Opinion 2016-67. Upon decedent's death, a trust was created for a number of noncharitable beneficiaries that was to provide for periodic distributions to such noncharitable

beneficiaries for their lifetimes with the remainder being paid to charitable organizations. However, during the lifetimes of the noncharitable beneficiaries, the trust made a number of contributions to charitable organizations and claimed a charitable deduction on its income tax return. The trustees sought and obtained from the probate court an order that modified the terms of the trust to retroactively provide for charitable distributions during the lifetimes of the noncharitable beneficiaries as well as upon termination of the trust. The tax court denied the effect of the retroactive modification to the dispositive provisions of the trust.

3. Revenue Ruling 73-142. The decedent made substantial gifts of property in trust for the benefit of his wife and children. Under the terms of the trust instrument, the decedent reserved the unrestricted power to remove or discharge the trustee at any time and appoint a new trustee, with no express limitation on so appointing himself. The trustee was given unrestricted power to withhold distribution of income or principal and to apportion between income and principal notwithstanding any rules of law to the contrary. In 1965, in a non-adversary action in which the decedent was petitioner, a lower state court construed the trust instrument to mean that the decedent had reserved the right to remove and appoint a trustee only once, that this power did not include the right to appoint himself; and that once having exercised that power, decedent would have exhausted his reserved powers. The decedent, subsequent to the decree, did remove the original trustee and appoint another (not himself) so that under the interpretation of the court he no longer had such a right as of the date of his death in 1970.

   A close reading of the *Bosch* decision discloses that it does not in any way indicate that a lower court decree that is inconsistent with the ruling by the state's highest court on the particular issue is void as between the parties to the action. The problem involved in Bosch concerns the effect to be given such lower court decree where the same issue is critical in the determination of a Federal tax question. The Court concluded that "federal authorities are not bound" by a determination of a property interest by a state trial court. This does not mean that the parties to the state court action are not bound by the decree.

   Unlike the situation in *Bosch*, the decree in this case was handed down before the time of the event giving rise to the tax (that is, the date of the grantor's death). Thus, while the decree would not be binding on the Government as to questions relating to the grantor's power to appoint himself as trustee prior to the date of the decree, it is controlling after such date since the decree, in and of itself, effectively extinguished the power. In other words, while there may have been a question whether the grantor had such power prior to the decree, there is no question that he did not have the power thereafter.

4. PLR 202009012. The IRS approved and upheld various modifications by reformation of the trust instrument by the state court due to various scrivener's errors. The IRS concluded that the state court order reforming the trust instrument to correct this scrivener's error is consistent with applicable state law that would be applied by the highest court of the state.

VII. Tax Considerations - Consent or Failure to Object

A person's consent to a modification may result in a transfer for gift/estate tax purposes.

1. Sexton v. U.S. For example, in *Sexton v. U.S.*, 300 F.2d 490 (7th Cir. 1962), the trust agreement provided that the trust was to terminate at the expiration of twenty years after the death of the decedent, at which time the principal was to be divided and distributed among the beneficiaries. The trust agreement also provided that the trust agreement "may be amended and modified from time to time by an instrument in writing, delivered to the Trustees, signed by the Beneficiaries owning and holding at least two-thirds in value of the certificates issued hereunder by the Trustees, and by at least a majority of the then existing Trustees." The beneficiaries and trustees exercised their power to extend the term of the trust beyond the initial twenty years.

   The IRS's contended that even though the trust was validly extended and did not terminate according to its initial terms, the result for federal estate tax purposes should be the same as if it had terminated. The IRS argued that the amendment of extending the duration of the trust was tantamount to a transfer of the property with retention of interest within the meaning of §§ 2036, 2037 and 2038.

   The taxpayer contended that the decedent could not relinquish a right to an equal share of the principal which share would have been hers if there had been no extension of the trust. According to the taxpayer, the decedent did not have a right to the principal because she could not unilaterally prevent the extension of the trust if two-thirds of the beneficial interests and the trustees desired to extend; consequently, she relinquished no right to property when she joined in the extension.

   The court, siding the IRS, noted that the taxpayer's argument might be persuasive if the decedent had not in fact joined with the other beneficiaries to extend the trust (which extension was consented to by all of the beneficiaries). The joint action unquestionably constituted a relinquishment by the group, severally and jointly, of the property interests in the principal which would have been distributed to them absent an extension of the trust. Therefore, by participating in the group action, the decedent affirmatively acted to relinquish her right to her share of the trust principal.

2. CCA 202352018. In Year 1, A establishes and funds an irrevocable *inter vivos* trust for the benefit of A's child and child's descendants. The trust is a grantor trust for income tax purposes. The trustee is and must be a person not related or subordinate to A within the meaning of § 672(c) of the Code. Per the trust

agreement, the trustee may, in the trustee's absolute discretion, distribute income and principal to or for the benefit of child. Upon child's death, the trust's remainder is to be distributed to child's descendants, per stirpes. Neither State law nor the governing instrument requires or provides authority to a trustee of the trust to distribute to A amounts sufficient to satisfy A's income tax liability attributable to the inclusion of the trust's income in A's taxable income.

In Year 2, Trustee petitions State Court to modify the terms of the trust to provide a trustee of the trust the discretionary power to reimburse A for any income taxes A pays as a result of the inclusion of the trust's income in A's taxable income. Pursuant to State Statute, child and child's issue consent to the modification.

IRS Holding: As a result of the Year 2 modification of the trust, A acquires a beneficial interest in the trust property in that A becomes entitled to discretionary distributions of income or principal from the trust in an amount sufficient to reimburse A for any taxes A pays as a result of inclusion of the trust's income in A's gross taxable income. In substance, the modification constitutes a transfer by child and child's issue for the benefit of A. Thus, as a result of the Year 2 modification, child and child's issue each have made a gift of a portion of their respective interest in income and/or principal.

The IRS noted that the result would be the same if the modification was pursuant to a state statute that provides beneficiaries with a right to notice and a right to object to the modification and a beneficiary fails to exercise their right to object.

EXHIBIT A
A.R.S. § 14-10111

A.R.S. § 14-10111. Nonjudicial settlement agreements; definition

A. Except as otherwise provided in subsection B of this section, and except for modification or termination of a trust as otherwise permitted pursuant to the trust instrument, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

B. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

C. Matters that may be resolved by a nonjudicial settlement agreement include:

1. The interpretation or construction of the terms of the trust.
2. The approval of a trustee's report or accounting.
3. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power.
4. The resignation or appointment of a trustee and the determination of a trustee's compensation.
5. The transfer of a trust's principal place of administration.
6. The liability of a trustee for an action relating to the trust.

D. Before or after the parties enter into a nonjudicial settlement agreement, any interested person may request the court to approve a nonjudicial settlement agreement to determine whether the representation as provided in article 3 of this chapter was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.

E. Unless the interested person, pursuant to subsection D of this section, asks the court to rule without regard to this subsection, the court may either approve the agreement or decline to approve the agreement, but may not disapprove or deny the effectiveness of the agreement. If the court does not approve the agreement pursuant to this subsection, the failure to approve is not any prejudice against the effectiveness of the agreement and is not a final judgment or judicial precedent with respect to the agreement or subsequent agreements pursuant to the section.

F. For the purposes of this section, "interested person" has the same meaning prescribed in section 14-1201.

Note No. 1: The phrase "Before or after the parties enter into a nonjudicial settlement agreement," of subsection D was added in 2013 after the initial adoption of § 14-10111.

Note No. 2: Subsection E was added in 2013 after the initial adoption of § 14-10111.

EXHIBIT B
Uniform Trust Code § 111 with Comments

Uniform Trust Code § 111. Nonjudicial settlement agreements

(a) 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.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;
(2) the approval of a trustee's report or accounting;
(3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
(5) transfer of a trust's principal place of administration; and
(6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

Comment

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual

representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3.

Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

APPENDIX OF FORMS

SYNOPSIS

Form 1.01 Notice of Change of Situs

Form 1.02 Petition to Transfer Trust's Principal Place of Administration

Form 2.01 Waiver of Notice

Form 2.02 Petition to Appoint Guardian ad Litem

Form 2.03 Petition to Appoint Statutory Representative

Form 4.01 Petition to Determine Status as Omitted Spouse

Form 4.02 Petition for Instructions Concerning Omitted Child[ren]

Form 5.01 Petition for Family Allowance Pursuant to A.R.S. §14-2404

Form 5.02 Order Directing Family Allowance Pursuant to A.R.S. §14-2404

Form 13.01 Application for Informal Appointment of Personal Representative

Form 13.02 Acceptance of Appointment as Personal Representative

Form 13.03 Notice of Filing Certificates of Completion for On-Line Training for Personal Representative

Form 13.04 Renunciation of Right to Appointment as Personal Representative and Nomination of Personal Representative to Serve Without Bond

Form 13.05 Waiver of Bond

Form 13.06 Order to Personal Representative and Acknowledgment and Information to Heirs and Devisees

Form 13.07 Statement of Informal Appointment of Personal Representative

Form 13.08 Letters of Personal Representative

Form 13.09 Letter of Personal Representative -Tardy Probate

Form 13.10 Notice of Informal Appointment of Personal Representative

Form 13.11 Proof of Mailing Notice of Informal Appointment and Order to Personal Representative

Form 13.12 Cover Sheet for Recording Letters of Personal Representative

Form 13.13 Proof of Recorded Letters of Personal Representative

Form 13.14 Notice to Creditors (Known)

Form 13.15 Proof of Mailing Notice to Known Creditors

Form 13.16 Notice to Creditors (Unknown)

Form 13.17 Inventory and Appraisement

Form 13.18 Proof of Mailing Inventory and Appraisement

Form 13.19 Waiver of Inventory and Appraisement and Waiver of Accounting

Form 13.20 Waiver of Final Accounting and Release of PR

Form 13.21 Cover Sheet for Recording Deed of Distribution

Form 13.04

Renunciation of Right to Appointment as Personal Representative and Nomination of Personal Representative to Serve Without Bond

[Attorney Name], [State Bar Number]

[Firm Name or Logo]

[Address]

[City, State, and Zip]

[Telephone Number]

[Email Address]

Attorneys for Applicant, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **RENUNCIATION OF RIGHT TO APPOINTMENT AS PERSONAL REPRESENTATIVE AND NOMINATION OF PERSONAL REPRESENTATIVE TO SERVE WITHOUT BOND**

I, [Name of Individual], state:

1. I have priority for appointment as Personal Representative of this Estate under A.R.S. § 14-3203 because [Relationship to Decedent].

2. I renounce any right to appointment as the Personal Representative.

3. I hereby nominate and consent to [Client Name] serving as Personal Representative of the Estate of [Decedent Name] to serve without bond.

. . .

. . .

DATED this _____day of _____20_____.

_____
[NAME OF INDIVIDUAL]
[ADDRESS]

STATE OF [STATE OF NOTARIZATION])
) ss.
County of [County of Notarization])

The foregoing instrument was acknowledged before me this _____day of _____20_____, by [Name of Individual].

My Commission Expires:

_____

Notary Public

Form 13.05

Waiver of Bond

[Attorney Name], [State Bar Number]

[Firm Name or Logo]

[Address]

[City, State, and Zip]

[Telephone Number]

[Email Address]

Attorneys for Applicant, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **WAIVER OF BOND**

STATE OF [STATE OF NOTARIZATION])
) ss.
County of [County of Notarization])

The undersigned, [Name of Individual], hereby waives the requirement of filing of bond in connection with the appointment of [Client Name] as the Personal Representative of the above-captioned estate.

DATED this _____day of _____20_____.

_____
[Name of Individual]
[Address]

SUBSCRIBED AND SWORN TO this _____day of _____20_____ by [Name of Individual].

My Commission Expires:

_____
Notary Public

0034 [ST: 1] [ED: 100000] [REL: 2023] **Composed:** Wed Oct 25 03:19:10 EDT 2023
XPP 9.6.2.0 SC_00197 nllp 3986 form:form,13.06,S,1
VER: [SC_00197-Master:17 Oct 23 02:10]**[MX-SECNDARY:** 12 Sep 23 12:15]**[TT-:** 29 Jul 21 00:02 loc=usa unit=03986-app0001] 0

Form 13.06

Order to Personal Representative and Acknowledgment and Information to Heirs and Devisees

[Attorney Name], [State Bar Number]

[Firm Name or Logo]

[Address]

[City, State, and Zip]

[Telephone Number]

[Email Address]

Attorneys for Personal Representative, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME] Deceased.	Case No. **ORDER TO PERSONAL REPRESENTATIVE AND ACKNOWLEDGMENT AND INFORMATION TO HEIRS AND DEVISEES**

Warning: Your appointment is not effective until the Clerk of the Superior Court has issued letters appointing you as personal representative.

You have asked the court to appoint you as the personal representative of the Estate of the deceased ("decedent"). While you serve as the Estate's personal representative, you will be under this court's authority and supervision.

This Order generally explains your duties to the Estate and this court. You may have additional duties imposed by statutes, rules, or the court. By separate order, the court may modify or excuse you from performing a specific duty described below.

In Arizona, beneficiaries and creditors of an estate are expected to protect their interests in the Estate. You must provide them with sufficient information to enable them to protect their interests. However, the court may review or supervise your actions if an interested person files a written request asking the court to do so. In addition, the court may hold you personally liable and responsible for any damage or loss to the Estate resulting from a violation of your duties.

YOUR DUTIES AS PERSONAL REPRESENTATIVE

Chapter 3, Title 14 of the Arizona Revised Statutes (A.R.S.) sets forth the powers and duties of a personal representative. You are responsible for knowing and performing your duties according to these statutes. The following is an outline of some of your duties as a personal representative.

1. **General Fiduciary Duties.** As a personal representative, you are a fiduciary

Form 13.19

Waiver of Inventory and Appraisement and Waiver of Accounting

[Attorney Name], [State Bar Number]

[Firm Name or Logo]

[Address]

[City, State, and Zip]

[Telephone Number]

[Email Address]

Attorneys for Personal Representative, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of [NAME], Deceased.	Case No. **WAIVER OF INVENTORY AND APPRAISEMENT AND WAIVER OF ACCOUNTING**

I, [Name of Individual], a beneficiary to the Estate of [Decedent Name] state as follows:

1. I waive any formal Inventory and Appraisement by the personal representative of this estate.

2. I waive any formal accounting by the personal representative of this estate.

Dated this _____day of _____, 20_____.

_____
[Name of Individual]
[Address]

STATE OF [STATE OF NOTARIZATION])
) ss.
County of [County of Notarization])

SUBSCRIBED AND SWORN TO before me this _____day of _____, 20_____, by [Name of Individual].

My Commission Expires:

_____
Notary Public

0063 [ST: 1] [ED: 100000] [REL: 2023] **Composed:** Wed Oct 25 03:19:12 EDT 2023
XPP 9.6.2.0 SC_00197 nllp 3986 form:form,13.24,S,1
VER: [SC_00197-Master:17 Oct 23 02:10]**[MX-SECNDARY:** 12 Sep 23 12:15]**[TT-:** 29 Jul 21 00:02 loc=usa unit=03986-app0001] **0**

Form 13.24

Receipt of Final Distribution and Release of Personal Representative

[Attorney Name], [State Bar Number]

[Firm Name or Logo]

[Address]

[City, State, and Zip]

[Telephone Number]

[Email Address]

Attorneys for Personal Representative, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **RECEIPT OF FINAL DISTRIBUTION and RELEASE OF PERSONAL REPRESENTATIVE**

The undersigned, [Name of Individual], an heir of the Estate, states as follows:

1. The undersigned acknowledges receipt of final cash distribution in the amount of $[amount received].

2. The undersigned acknowledges the distribution listed herein represents the entire share of this Estate to which the undersigned is entitled.

3. The undersigned further releases and consents to the discharge of Personal Representative for the Estate, [Client Name] from further liability or accountability in connection with the administration of the estate.

Dated this _____day of _____, 20_____.

_____
[NAME OF INDIVIDUAL]

Consents & Waivers:

What Are They and How Are They Used in Estate and Trust Administration

Presented by: Nora L. Jones

AZCLE® from the State Bar of Arizona

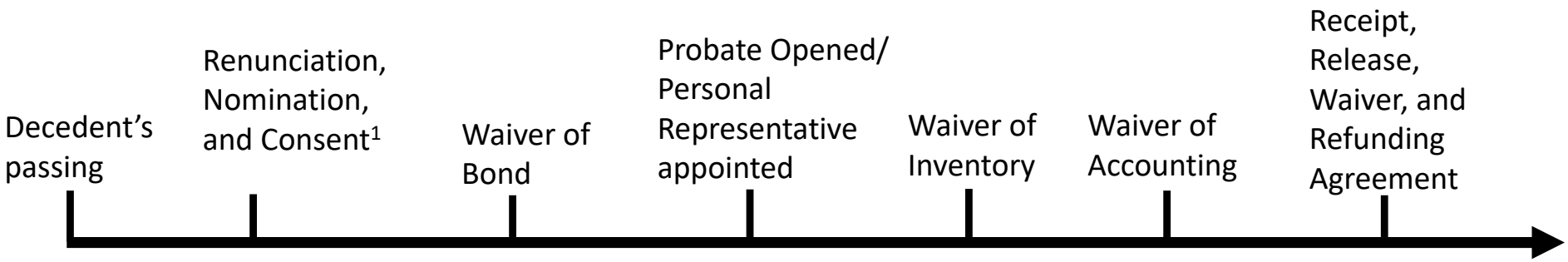
CLE by the SEA 2024

Agenda:

1. Estate administration and the most common Consents/Waivers (with tips on specific provisions to consider)
2. Trust administration and the unique options for consents/waivers to protect your client's interests
3. Ethical considerations with consents/waivers

Estate Administration

Timeline of Consents and Waivers in Estate Administration



1: Renunciation of Right to Appointment as Personal Representative and Nomination and Consent to Appointment of Personal Representative

Renunciation, Nomination, and Consent Form (combined with Waiver of Bond)

Form 13.04

Renunciation of Right to Appointment as Personal Representative and Nomination of Personal Representative to Serve Without Bond

[Attorney Name], [State Bar Number]
[Firm Name or Logo]
[Address]
[City, State, and Zip]
[Telephone Number]
[Email Address]
Attorneys for Applicant, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **RENUNCIATION OF RIGHT TO APPOINTMENT AS PERSONAL REPRESENTATIVE AND NOMINATION OF PERSONAL REPRESENTATIVE TO SERVE WITHOUT BOND**

I, [Name of Individual], state:

1. I have priority for appointment as Personal Representative of this Estate under A.R.S. § 14-3203 because [Relationship to Decedent].

2. I renounce any right to appointment as the Personal Representative.

3. I hereby nominate and consent to [Client Name] serving as Personal Representative of the Estate of [Decedent Name] to serve without bond.

. . .
. . .

DATED this _____day of _____20_____.

_____
[NAME OF INDIVIDUAL]
[ADDRESS]

Waiver of Bond

Form 13.05

Waiver of Bond

[Attorney Name], [State Bar Number]
[Firm Name or Logo]
[Address]
[City, State, and Zip]
[Telephone Number]
[Email Address]
Attorneys for Applicant, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **WAIVER OF BOND**

STATE OF [STATE OF NOTARIZATION])
) ss.
County of [County of Notarization])

The undersigned, [Name of Individual], hereby waives the requirement of filing of bond in connection with the appointment of [Client Name] as the Personal Representative of the above-captioned estate.

DATED this _____day of _____20_____.

_____
[Name of Individual]
[Address]

SUBSCRIBED AND SWORN TO this _____day of _____20_____ by [Name of Individual].

My Commission Expires:

_____
Notary Public

from the State Bar of Arizona

Waiver of Inventory and Appraisement / Waiver of Accounting

AZCLE®
from the State Bar of Arizona

Form 13.19

Waiver of Inventory and Appraisement and Waiver of Accounting

[Attorney Name], [State Bar Number]
[Firm Name or Logo]
[Address]
[City, State, and Zip]
[Telephone Number]
[Email Address]
Attorneys for Personal Representative, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of [NAME], Deceased.	Case No. **WAIVER OF INVENTORY AND APPRAISEMENT AND WAIVER OF ACCOUNTING**

I, [Name of Individual], a beneficiary to the Estate of [Decedent Name] state as follows:

1. I waive any formal Inventory and Appraisement by the personal representative of this estate.

2. I waive any formal accounting by the personal representative of this estate.

Dated this _____day of _____, 20_____

_____
[Name of Individual]
[Address]

STATE OF [STATE OF NOTARIZATION])
) ss.
County of [County of Notarization])

CLE by the SEA 2024

Waiver of Notice

- A.R.S. § 14-1402 provides "[a] person, including a guardian ad litem, conservator or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding."
- Can be used to simplify proceedings where someone's interest in an ongoing litigation probate matter terminates, but probate administration continues.

Receipt, Release, Waiver, and Refunding Agreement

- Benefits:
  - For PR, it can be a release of liability
  - Great for partial distributions when there may be outstanding liabilities (refunding portion)
  - Allows PR to explain a holdback of funds for final expenses

Important provisions to include in agreements

- Release of fiduciary liability
- Statement regarding opportunity to consult with independent legal counsel
- Statement regarding voluntary signing
- Waiver of formal accounting
- Severability clause
- Execution availability in multiple counterparts

Receipt and Release Agreements (simple)

Form 13.24

Receipt of Final Distribution and Release of Personal Representative

[Attorney Name], [State Bar Number]
[Firm Name or Logo]
[Address]
[City, State, and Zip]
[Telephone Number]
[Email Address]
Attorneys for Personal Representative, [Client Name]

SUPERIOR COURT OF ARIZONA
COUNTY OF [COUNTY]

In the Matter of the Estate of: [NAME], Deceased.	Case No. **RECEIPT OF FINAL DISTRIBUTION and RELEASE OF PERSONAL REPRESENTATIVE**

The undersigned, [Name of Individual], an heir of the Estate, states as follows:

1. The undersigned acknowledges receipt of final cash distribution in the amount of $[amount received].

2. The undersigned acknowledges the distribution listed herein represents the entire share of this Estate to which the undersigned is entitled.

3. The undersigned further releases and consents to the discharge of Personal Representative for the Estate, [Client Name] from further liability or accountability in connection with the administration of the estate.

Dated this _____day of _____, 20_____.

_____
[NAME OF INDIVIDUAL]

RECEIPT, RELEASE, WAIVER, AND REFUNDING AGREEMENT

THE ESTATE OF JOHN SMITH

The undersigned, _____, a qualified beneficiary of the Estate of John Smith (the "Estate"), hereby agrees to this Receipt, Release, Waiver, and Refunding Agreement (the "Agreement") and states as follows:

1. John Smith ("Decedent") died on January 1, 2022.

2. Jane Smith is currently serving as Personal Representative of the Estate, which is currently pending in Maricopa County Case No. PB2022-000001.

3. The undersigned acknowledges the anticipated receipt of a partial distribution to which she is entitled to from the Estate with a value of $25,000 (the "Distribution") upon execution of this Agreement.

4. Conditional upon and effective upon the undersigned's receipt of the Distribution, the undersigned releases and discharges Jane Smith from any and all liability as Personal Representative of Estate, including all claims, demands, actions and causes of action, and any liability whatsoever, whether or not previously asserted, even though unknown or unsuspected, with respect to the Estate, from the inception of such service through the date of this Agreement.

5. In the event the Distribution to the undersigned renders the Estate unable to meet its obligations and leaves the Estate with insufficient funds to pay creditor claims, currently-unexpected Estate administration expenses, or currently-unexpected claims by taxing authorities, the undersigned shall repay the Estate the Distribution, in whole or in part, on a *pro rata* basis with the other heirs, but only if, and to the extent necessary, to pay such claims or expenses.

6. The undersigned acknowledges that the Personal Representative has retained Estate funds for final expenses, including taxes, accounting expenses, legal expenses, and Personal Representative. The undersigned further understands and agrees that to the extent there are any remaining Estate funds after all Estate expenses have been paid, that he will receive a *pro rata* share of said remaining Estate assets following payment of such final administrative expenses.

7. The undersigned willingly signs this Agreement after the opportunity to consult with independent legal counsel about the effect of signing, free from duress or undue influence, and with the intent to be legally bound.

8. The undersigned acknowledges and agrees that all aspects of this document shall be governed by and construed in accordance with the laws of the State of Arizona.

DATED: _____ _____

(Heir Name)
Heir of the Estate of John Smith

STATE OF _____)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2024, by _____.

Trust Administration

Consents & Waivers previously mentioned are often relevant in Trust administrations. However, in addition to the prior consents and waivers, there are additional consents and waivers available for Trustee actions.

Trust Administration: Consents and Waivers for breaches of trust issues

- Beneficiaries can:
  - Consent to a trustee's action that would otherwise be a breach of trust,
  - Release a trustee for the breach of trust, or
  - Ratify the transaction taken by the trustee which constituted a breach.
    - See A.R.S. § 14-11009
- Consent, can occur before or at the time of the conduct which constitutes a breach of trust. Release and ratification can occurs after a breach.
- Consent, release or ratification must be an affirmative act2

Limits to consent waivers approving trustee misconduct

- A beneficiary's consent, release, or ratification is only effective if the beneficiary has knowledge of their rights and the "material facts relating to the breach."
- Consent, release or ratification cannot be induced by improper conduct of the trustee act was induced by fraud, duress, or undue influence by the trustee.
  - A.R.S. § 14-11009(1).
- Trustee cannot induce consent, ratification, or release by abusing the fiduciary relationship (e.g. threatening to withhold a distribution).
  - Restatement (Third) of Trusts § 97 comment f,

What constitutes knowledge of "material facts?"

- Beneficiaries don't need to be aware of ALL details.
- Restatement (Third) of Trusts § 97 tells us that material purpose means the beneficiary is "sufficiently informed to understand the character of the act or omission and was in a position to reach an informed opinion on the advisability of consenting, ratifying, or granting a release."

Test for Sufficient Knowledge to Consent:

- Beneficiary must understand:
  - (i) that the trustee's act or omission would or might be, or was or might have been, a breach of trust;
  - (ii) the relevant information about, and the implications of, the act or omission in question; and
  - (iii) the beneficiary's right to prevent or remedy trustee misconduct
    - Restatement (Third) of Trusts § 97 comment e.
- NOTE: For transactions involving self dealing, in addition to a beneficiary's consent, release, or ratification, the transaction must be fair and reasonable. UTC § 1009 comment.

Ethical Considerations

Estate Administration

- A personal representative is a fiduciary with a legal duty of fairness and impartiality to the beneficiaries and creditors of the Estate (*In re Estate of Fogleman*, 197 Ariz. 252, 258 17, 3 P.3d 1172, 1178 (App. 2000).

Trust Administration

- Trustee's owe a duty of loyalty to all beneficiaries of the trust.
- A.R.S. § 14-10802(A) provides that a trustee must "administer the trust solely in the interests of the beneficiaries"
- Maintain clear boundaries with beneficiaries that you, as attorney for a trustee, do not represent them and as such, cannot provide legal advice
- A.R.S. § 14-10803 provides a trustee is required to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."

What happens if a beneficiary or heir refuses to sign a final distribution waiver?

- For consent, release, or ratifications of trustee's breach of trust, nonconsenting beneficiaries' rights are generally unaffected by beneficiaries who consent, unless someone consents on their behalf.
- For court approval of a compromise, a written agreement must be executed by all people who will or may be affected by the compromise. A.R.S. § 14-3952.
  - Failure to include all affected people before court approval does not void the agreement, rather the court approval does not make the agreement binding on all parties.
  - Practice tip: if you do not obtain all signatures, ask the court to approve the action you are seeking, rather than approval of the agreement.

Representation, who can sign?

"Notice to a person who may represent and bind another person under this article has the same effect as if notice were given directly to the other person." A.R.S. § 14-1404(A)

- Holder of a general power of appointment. A.R.S. § 14-1405.
- As long as there is no material conflict of interest, the following rules apply:
  - Conservator for Estate it controls
  - Guardian for ward's estate (if no conservator)
  - Agent with authority
  - Trustee for beneficiaries
  - PR for estate and interested persons
  - Parent for minor or unborn child (note a parent cannot bind their child to consent to terminate or modify a trust if said parent is also the trustee). A.R.S. § 14-1406
- Virtual Representation – A.R.S. § 14-1407
- Guardian Ad Litem – A.R.S. § 14-14078
- Statutory Representative – A.R.S. § 14-10302(A)



Nora L. Jones
nlj@tblaw.com
(602) 255-6014

Nora Jones is a skilled trial attorney specializing in probate and trust litigation, elder law, guardianships and conservatorships, and estate and trust administration. Nora is board-certified as a specialist in estates and trusts by the State Bar of Arizona, a distinguished honor reserved for lawyers who have substantial experience, the respect of their peers, and demonstrated special knowledge, skills and proficiency in this area of law. She has been repeatedly recognized as a Top Lawyer by Phoenix Magazine and as a Rising Star by Super Lawyers and has been honored for her vision, influence, and leadership in Elder Law by Arizona Business Leaders. Nora is also an acting Judge Pro Tempore with the Superior Court of Maricopa County for the Probate Court division and serves on the Estate and Trust Advisory Commission for the State Bar of Arizona's Board of Legal Specialization.

Questions?

Checklists and Practice Management Tips for a Busy T&E Practice

State Bar of Arizona – CLE by the Sea
Estate Planning, Trust and Probate Seminar

July 10, 2024

Trust Administration Information and Checklist

Client:	Relationship to Grantor:	
Mailing Address:		Phone:
Trustee (co-Trustees):		
Address:		Phone:
Date of acceptance of trusteeship:		
Decedent SSN:	DOB:	DOD:
Name of Trust:		
Date the Trust was created:	Trust EIN:	

Beneficiaries:		
Legal Name	Address/Phone/Email	% Distribution

BEFORE INITIAL CONSULTATION		
DOCUMENT OR TASK	**DATE COMPLETED**	**STAFF**
Run Conflict Check		
Obtain a copy of the Trust and any amendments or restatements, and financial statements		
Draft fee agreement		
Initial document review before consult		

Trust Administration Checklist

INITIAL CONSULTATION		
DOCUMENT OR TASK	**DATE FILED/ COMPLETED**	**STAFF**
Obtain a copy of the Trust and any amendments or restatements		
Determine scope of representation and review fee agreement with client		
Collect any retainer		
Collect authorizations to speak to third-parties (CPA, Financial Advisor)		
Confirm client contact information		
Create client file/matter		
AFTER FEE AGREEMENT IS SIGNED		
DOCUMENT OR TASK	**DATE COMPLETED**	**STAFF**
Save Fee Agreement		
Set staffing with legal assistant		
Obtain end of year statements on all accounts		
Set follow up appointment to touch base with client		
Create a DOD inventory (list of assets on date of death)		
Create a list of known debts		
Notice of Assumption of Duties (if required)		
Provide DOD inventory to Client for approval		
Discuss if Form 706 needs to be filed		
Certificate of Trust- record with death certificate, if applicable, and record in every county where trust owns real property		
Complete form for Assessor's Office to change mailing address so tax statements go to the new trustee		
Obtain EIN for trust (or collect EIN from CPA)		

DOCUMENT OR TASK	DATE COMPLETED	STAFF
Provide Notice to Qualified Beneficiaries and information form with W-9 form		
W/in 60 days: provide trustee's name, address, phone number and if trustee will be compensated		
W/60 days of learning that trust is irrevocable: add ID of settlor, right to relevant portions and trustee's report		
Confirm receipt of completed W-9		
ATC Notice re: change in trustee's compensation (30 days in advance)		
To shorten statute of limitations on actions to contest a trust, send notice to persons pursuant to ARS 14-10604		
Waivers of Trustee Report pursuant to ARS 14-10813(D)		
Calendar Trustee Report (if not waived)		
Publish and Mail Notice to Creditors (14-6103)		
Calendar creditor claim period end date: 4 months after first publication date		
Send trustee instruction letter		
Discuss any claims for life insurance		
Require Trustee to provide inventory		
If trust split:		
Secure date of death values on all assets		
Assign EINs		
Certificates of trust for each trust		
Retitle assets		
Disclaim any assets?		

ADMINISTRATION		
DOCUMENT OR TASK	**STATUS**	**RESPONSIBLE PARTY & DUE DATE**
Distribute specific distributions of property to entitled persons		
Distribute specific distributions from trust to entitled beneficiaries		
Appraisal of any necessary assets		
Review assets and investments and liquidate if necessary for distribution		
Proposal for distribution letter with consents		
Make appropriate distributions with receipts/releases/waiver or approval of accounting		
Obtain receipts/releases/waiver or approval of accounting		
Prepare and record deed of distribution for real property in county where trust owns property (if applicable)		
Annual ATC notice (unless waived): send trustee's report (property, liabilities, receipts and disbursements) to distributees, permissible distributees		
Decedent's final income tax return		
Annual fiduciary income tax returns		
IRS Form 4810: Request for prompt assessment of tax after returns are filed		
Send closing letter to client		

Probate Information and Checklist

Decedent:	DOB:	DOD:
Decedent SSN:	Estate EIN:	
County where Decedent died:		
Personal Representative:		
Address:		Phone:
County Where Probate Needs to be Filed:	Case No.:	
County Where Ancillary Probate Filed:	Case No.:	
Date of Decedent's Last Will & Testament:		

Heirs		
Legal Name	Address/Phone/Email	% Distribution

BEFORE INITIAL CONSULTATION		
DOCUMENT OR TASK	**DATE COMPLETED**	**STAFF**
Run Conflict Check		
Obtain copy of Will and any financial statements		
Draft fee agreement		
Initial document review before consult		
INITIAL CONSULTATION		
DOCUMENT OR TASK	**DATE FILED/ COMPLETED**	**STAFF**
Determine scope of representation and review fee agreement with client		
Collect any retainer		
Collect authorizations to speak to third-parties (CPA, Financial Advisor)		
Confirm client contact information		
Create client file/matter		

Probate Checklist

AFTER FEE AGREEMENT IS SIGNED		
DOCUMENT OR TASK	**DATE FILED/ COMPLETED**	**STAFF**
Application (Informal)		
File Original Will (if testate)		
Probate Information Sheet		
Verified Statement of PR		
Acceptance of Appointment as PR		
Letters of PR		
General Order to PR &		
Review file for Demand for Notice		
Notice of Application in Informal Probate to anyone who filed demand (and file Proof of Mailing Notice)		
Notice of Hearing on Petition		
Proof of Notice (Petition and Notice)		
Publish Notice of Hearing		
File Affidavit of Publication of Notice		
Renunciations and Consents		
File bond		
Waivers of Bond		
Training - Certificate of Completion – Overview – Personal Representative		
Statement of Informal Probate (Informal), or Order Appointing PR (Formal)		

PROBATE ADMINISTRATION			
DOCUMENT OR TASK	**DATE CREATED**	**DATE FILED COMPLETED**	**STAFF**
Notice of Informal/Formal Probate of Will and Appointment of PR – Mail to heirs and distributees w/in 30 days of appointment – Attach will if testate and copy of General Order			
Proof of Mailing Notice of Informal/Formal Probate and Proof of Mailing General Order and Information to Heirs			
Mail letter of instruction to PR			
Publish Notice to Creditors			
File Affidavit of Publication			
Date of First Publication:		Creditor Period Expires:	
Mail Notice to Known Creditors			
Proof of Mailing Notice to Creditors			
Statement of No Known Creditors			
Acceptance/Rejection of Claims			
Statutory Allowances?			
Record certified Letters of PR in any county where decedent owned real estate			
Complete form for Assessor's Office to change mailing address so tax statements go to the fiduciary			
Apply for Social Security death benefit and veteran's burial allowance			
Inventory and Appraisement			
File Inventory with Court			
Proof of Mailing Inventory			

CLOSING			
DOCUMENT OR TASK	**DATE CREATED**	**DATE FILED COMPLETED**	**STAFF**
Proposal for Distribution			
Proof of Notice re Proposal for Distribution			
Deeds and Instruments of Distribution			
Notify distributees of basis of property received IRS Form 5970			
Receipt, Release of PR, Waiver of Notice and Waiver of Accounting			
If not waived, prepare accounting			
Petition for Approval of Accounting (and related pleadings)			
Closing Statement (informal closing)			
Proof of Mailing Closing Statement			
Petition for Approval of Final Accounting and Distribution of Estate (formal closing)			
Notice of Hearing and Proof of Notice			
Order Approving Final Account and Distribution of Estate			
Petition to Close Estate & Discharge PR			
Notice of Hearing			
Order Closing Estate & Discharging PR			
Release bond			
Status Report (if open 2 years +)			
Proof of Mailing Status Report			
Proposal for Distribution			

IRS AND ADOR		
DOCUMENT OR TASK	**DATE FILED/ COMPLETED**	**STAFF**
Obtain EIN		
Obtain copies of Decedent's previous tax returns		
IRS Form 56: Notice Concerning Fiduciary Relationship		
ADR Form 210: Notice of Assumption of Duties		
IRS Form 706: Estate Tax Return		
File Decedent's Final Return (IRS 1040 & AZ 140)		
File Fiduciary Returns (1041 & 141)		
IRS Form 4810: Request for prompt assessment of tax after return is filed		
Obtain Certificate of Release from the Income Tax Division of the ADOR prior to formal closing of probate if estate is over $20K and there are 1 or more out of state beneficiaries. ARS 43-1361 etc.		
Close Probate– Send closing letter		



Checklists and Practice Management Tips
Trust and Estate Administration

ER 5.1. Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

- Make "reasonable efforts" to implement internal policies and procedures
- Systems should apply to lawyers and nonlawyers
- Example of policies/procedures: conflicts check, calendaring, accounting for client funds, systems to ensure staff are properly supervised

Supervising Attorneys & Staff

- The degree of supervision required depends on circumstances, e.g. experience of the person who is being supervised and the amount of work supervised.
- Supervising attorney is responsible for another lawyer's violation of Rules of Professional Conduct if she ratifies the conduct, fails to take reasonable remedial action
- Must intervene to prevent avoidable consequences if supervisor knows that the misconduct occurred

Supervising Nonlawyers

- ER 5.3.
- Need to take reasonable measures and adopt policies and procedures to ensure that the conduct of the nonlawyer is compatible with the professional obligations of the lawyer.
- Nonlawyers should comport themselves in accordance with the lawyer's ethical obligations.

Standard Practices

- Reduce the chance for error by creating systems
- EVERYONE should know how to run a conflict check
- Do NOT begin work without a signed fee agreement
- Standard documents should be templates
- The benefits of checklists

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Orientation and Onboarding

- Training is essential for all staff, not just new people
- How to share new rules, changes to case law?
- Who is responsible for training?
- Who is responsible for evaluating conflicts?
- Strategies to promote staff development and leadership
- Build a supportive culture where questions are welcome

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READ THE DOCUMENTS

- Resist the temptation to skim the will or trust
- Is the document valid?
- The document review is an opportunity to build a foundation for the file
- Keep your summary notes where the staff can find them

Good

- Walk the walk, use the system that you develop
- Anticipate deadlines and build in time
- Encourage input when systems fail
- TECHNOLOGY
- Use difficult cases as teachable moments

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Bad

- Fixing mistakes (in silence) yourself
- Do not assume everyone will sign a waiver/consent
- Cutting and pasting instead of using templates
- Blaming staff
- Expecting broken systems to improve

Checklists

- When do you need them?
- Who uses them?
- Why bother?
- Trust and Estate Administration cases are well-suited to checklists
- Checklists should be standard forms, reviewed annually

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