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Decedent mother, the sole surviving parent, passed away, leaving behind her minor twin daughters. In her will, Decedent provided for a non-relative couple to be appointed as guardian(s) of her daughters. Decedent’s sister challenged the appointment.

The will expressed the appointment through precatory language—“It is my wish.” The question presented to the Court was whether the precatory language used was sufficient for the appointment to be valid as the Decedent’s testamentary right under Conn. Gen. Stat. § 45a-596 (2015). The Court concluded that, despite the use of precatory language in the will, the Decedent intended for the provision on guardianship to be binding.

1. **Wills: Testator’s Intent**

The primary objective in construing the language of a will is to ascertain and effectuate the testator’s intent. In construing a will for the testator’s intent, the words must be interpreted in light of their context and with reference to the will in its entirety.
2. Wills: Testator’s Intent

If the intent of the testator is apparent in the will, courts will give effect to that intent, though the testator may have used precatory language to express her objective.

3. Guardianship: Appointment

Conn. Gen. Stat. § 45a-596 (2015) states that a parent may by will or other writing appoint a person to serve as guardian for his/her minor children.

4. Guardianship: Generally

A parent’s testamentary choice of guardian will be presumed to be in the best interests of the child. This presumption may be rebutted only by a showing that it would be detrimental to the child to permit the testamentary guardian to serve as such.

**Opinion**

The COURT FINDS that: Notice was given in accordance with all orders of notice previously entered.

The COURT FURTHER FINDS that: Joan M. (hereinafter “Joan”) died in this District in January of 2015, leaving behind her twin daughters, S and I. The minors’ father, August M., had predeceased their mother, dying in October of 2014.

Joan’s Will, dated December of 2014, was admitted to probate in June of 2015. At issue before the Court is the appointment of a guardian of the person of S and I.

Article VIII of the Will states:

It is my wish that Melina and Frank T. of Trumbull, Connecticut, or the survivor of them, be appointed as the Guardians of the person of my minor children. If Melina and Frank T. should predecease me or be removed as Guardians, it is my wish that my sister, Teresa A., be appointed as the Guardian of the person of my minor children. If Teresa A. should predecease me or be removed as Guardian, it is my wish that my step-daughter, Michelle M. H. of Bridgeport, Connecticut, be appointed as the Guardian of the

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1 This opinion has been modified to maintain the privacy of the minor child. Names and other identifying information of the parties have been edited to preserve confidentiality. To preserve the privacy of the minor child, some of the materials referred to and quoted herein have not been verified or reviewed by the Editors of the Quinnipiac Probate Law Journal.
person of my minor children. I further direct that any such Guardian appointed hereunder, caring for my children, shall be permitted to reside in my property located [in]...Trumbull, Connecticut or any other future residence without payment of rent or other such costs; provided however that the residence for my children shall remain Trumbull, Connecticut until such time as my daughter, [I], completes her special needs program...

Teresa A. (hereinafter “Teresa”), sister of the decedent, is challenging the appointment of Melina and Frank T (hereinafter “the Ts”) as guardians. Upon her sister’s death, Teresa had expectations of being named as the guardian of S and I.

Application was made for the immediate appointment of the Ts after Joan’s death so that the twins would have a guardian. Owing to the objection of Teresa to the outright appointment of the Ts this Court appointed them and Teresa as temporary co-guardians in March of 2015. Teresa, through her counsel, objected to the appointment of the Ts and raised the issue that the language in Article VIII directing the Court to appoint the guardians is precatory in nature and not mandatory. Counsel for the Ts, as well as counsel for Teresa, thereafter submitted pre-trial briefs on the issue.

[1] In construing Article VIII the Court must look to the language of the Will. “Our primary objective in construing the second paragraph of the testatrix’s will is to ascertain and effectuate her intent.” Dei Cas v. Mayfield, 199 Conn. 569, 572, 508 A.2d 435 (1986); Hartford Nat’l Bank & Trust Co. v. Thrall, 184 Conn. 497, 502, 440 A.2d 200 (1981); Kimberly v. New Haven Bank H.B.A., 144 Conn. 107, 113, 127 A.2d 817 (1956). In searching for that intent, we look first to the precise wording employed by the testatrix in her will, as the meaning of the words as used by the testatrix is the equivalent of her legal intention— the intention that the law recognizes as dispositive. Wisely v. United States, 893 F.2d 660, 665 (4th Cir. 1990). “The question is not what [s]he meant to say, but what is meant by what [s]he did say.” Conn. Junior Republic v. Sharon Hosp., 188 Conn. 1, 20, 448 A.2d 190 (1982); see Thrall, 184 Conn. 497, 440 A.2d 200; Warren v. First New Haven Nat’l Bank, 150 Conn. 120, 123, 186 A.2d 794 (1962); see also Hunter v. United States, 597 F. Supp. 1293, 1295 (W.D. Pa. 1984); Canaan Nat’l Bank v. Peters, 217 Conn. 330, 335-36, 586 A.2d 562 (1991). The meaning of the words used by the testatrix is not to be deduced by extracting and examining the words in artificial isolation. The words must be interpreted in light of their context within the paragraph and with reference to the will in its entirety. Peters, 217 Conn. at 336.
Precatory expressions are “merely recommends or request...without ordering or directing such disposition.” 46 Am. Jur. 2d, Wills § 23 (2nd 2015). It is true that words such as “it is my desire” are primarily precatory, indicating a wish or expectation rather than an express direction. However, an expression may be imperative in its real meaning, although couched in language that is not imperative in form. When it appears to have been used in this sense by the testator, the courts will give it due effect. Cumming v. Pendleton, 112 Conn. 569, 153 A. 175 (1931).

[2] A vast number of cases could be collected in which the words “will,” “wish,” “desire,” and other words have been held to create trusts, and probably as many where this result has not occurred. These words have no invariable construction. Pendleton, 112 Conn. at 574. If it can be seen from the whole instrument that the definite will of the testatrix is expressed, it is to be given that effect. In other words, if the intent of the testatrix is apparent, effect will be given to it, though she may have used inappropriate terms to attain her objective. Peters, 217 Conn. at 336.

The testatrix has the right to make such disposition as she wishes of her own property. The expression of that wish is equivalent to a command; and where such expressions are used to declare the disposition of her property after her death, and not as a request or prayer directed to a devisee or legatee concerning such devise or legacy, they are treated as expressing the real intent of the testatrix, and have the force of a dispositive command and a positive direction, binding upon the court in the distribution of the estate. Pendleton, 112 Conn. at 575.

[3] Conn. Gen. Stat. § 45a-596 (2015) provides in relevant part that a parent “may by will or other writing signed by the parent and attested by at least two witnesses appoint a person to serve as guardian....” In this case, Joan’s Will provides that it is my wish that [the Ts]...be appointed as the Guardian of the person of my minor children.” The question is whether the language used is sufficient to invoke the statute, or whether the use of the words “it is my wish” require a different result.

The Connecticut Supreme Court has observed that the statute “provides a testamentary vehicle for Connecticut parents to choose guardians for their children.” In re Joshua S., 260 Conn. 182, 200, 796 A.2d 1141 (2002). The Court described such a document as a “predeath statement of preference.” In re Joshua S., 260 Conn. at 205. Further, the Court recognized a “strong public policy in favor of encouraging parents to make a testamentary selection” of guardians for their children. Id. at 206.
It has also been said that the statute “is based on the premise that the parent is in the best position to determine what is in the best interests of his or her child. It is the parent who knows most about the needs of the child and the ability of the named guardian to satisfy those needs.” *Bristol v. Brundage*, 24 Conn. App. 402, 406, 589 A.2d 1 (Conn. App. Ct. 1991). The ordinary meaning of the words of the statute is that a parent may choose by testamentary appointment a guardian for his or her child. The statute would have no useful purpose if the appointment by the parent could be ignored without a reason. *Bristol*, 24 Conn. App. App. at 407.

In Article VIII the testatrix quite clearly expressed her choice as to whom should be appointed as guardian for her children in the event of her death. She even provided several alternates in the event that the named individuals should predecease her or be removed as guardian. There could be no clearer expression as to whom she wanted to serve in that capacity. The fact that she used the word “wish” in connection with her designation does not diminish its clarity.

The words “it is my wish” appear in each of the first three sentences of Article VIII. Those sentences designate the individuals the decedent wishes to serve as guardian, including alternates. The fourth sentence begins with the words “I further direct.” Without question, “direct” is generally seen as being mandatory in nature. The words “I further direct” indicate that the decedent viewed the preceding language as being mandatory as well. Viewing Article VIII as a whole, it is clear that the testatrix intended a testamentary designation of guardianship that would be mandatory and binding.

It has been held that where precatory language is expressive of a desire or recommendation as to the direct disposition of the estate, as distinguished from the use which the testatrix desires the legatee or devisee to make of it, it operates as a bequest or devise and is obligatory. *Peters*, 217 Conn. at 338. In this case the decedent’s “wish” that certain individuals be appointed is not directed at those individuals, but at the Court that will ultimately appoint the guardians. This also supports a construction of Article VIII as being mandatory in nature.

Characterizing the phrase “it is my wish” as “precatory” would essentially nullify Article VIII of the subject Will. This hyper-technical reading of that Article would be contrary to the clearly expressed intent of the testatrix. It would also be at odds with our strong public policy in favor of encouraging parents to make a testamentary selection of guardians for their children. *In re Joshua S.*, 260 Conn. at 206.
For the foregoing reasons, the Court construes the language of Article VIII as mandatory, and not merely precatory, establishing a binding testamentary designation of guardian under the provisions of Conn. Gen. Stat. § 45a-596 (2015). Accordingly, the Court must now turn its attention to an analysis of Conn. Gen. Stat. § 45a-596 (2015).

[4] The case of *Bristol v. Brundage* is instructive in applying Conn. Gen. Stat. § 45a-596 (2015) to the instant case. 24 Conn. App. 402, 589 A.2d 1 (1991). In *Bristol*, the testatrix, using mandatory language in her Will, appointed her brother as guardian for her son. 24 Conn. App. at 403. The Probate Court appointed not only the brother, but also a grandmother, as co-guardians. *Id.* at 403-04. An appeal ensued, and the Appellate Court overturned the Probate Court’s co-guardianship appointment. *Id.* at 406-07. The Appellate Court reasoned that:

...§ 45a-596(a) should be interpreted as mandating the appointment of the sole surviving parent’s testamentary choice of a guardian because it should be presumed that the best interests of the child are served by that appointment. This presumption...may be rebutted only by a showing that it would be detrimental to the child to permit the named testamentary guardian to serve as such.... The ordinary meaning of the words of §45a-596(a) is that a surviving parent may choose by testamentary appointment a guardian for his or her minor child who must be appointed guardian. The statute would have no purpose if the appointment by the surviving parent could be ignored without a reason.... [T]he independent determination could lead to no other conclusion than that the appointment of the plaintiff as sole guardian was mandated as a matter of law because the trial court had no evidence before it that the plaintiff was not a fit guardian.

*Id.* at 406-07.

The contesting party makes the argument that the “primary, binding” holding in *Bristol* was that there is a requirement that a contestant put forth evidence that the appointment of the named parties was not in the child’s best interests. She further argues that this rebuttal could include evidence of unfitness, but also evidence that the children’s interests are best served by being raised by a close family member rather than a non-relative.

Indeed, much evidence was offered as to the fitness and appropriateness of Teresa as a guardian. This evidence included
multiple witnesses, who were generous in their testimony, praising Teresa and her caring and loving nature. Nevertheless, at least to this Court, there is no dispute that the holding in *Bristol* creates a presumption in favor of the named guardians, in this case, the Ts. Considerable, credible testimony in favor of the Ts was offered on their behalf. The Ts own testimony reinforced this evidence, and revealed them to be a stable, loving family with whom S and I are very close. In any event, there was no absolute testimony or evidence offered to this Court that the Ts would be anything but loving, caring, and capable guardians of S and I.

In losing both of their parents within three months of each other, life has dealt S and I a tragic blow. Fortunately the children have loving, blood and non-blood family supporting them. This Court finds that the intent of the testatrix in appointing the Ts as guardians is clear, and the statutory presumption of Conn. Gen. Stat. § 45a-596(a) (2015) has been satisfied.

Accordingly, this Court hereby appoints the Ts as Guardians of the persons of S and I. The Court also appreciates the representations of both Petitioner and Contester alike that whatever the outcome, they would continue to be active in the lives of these wonderful young ladies. The Court expects those representations to be carried out, as the love of family and friends alike will doubtlessly be invaluable support to S and I for years to come.


/s/ 

T.R. Rowe, Judge
The Decedent allegedly executed a will five days before passing away, but the will was not submitted to probate. The Decedent's surviving partner possessed many of her assets, specifically her furniture. Both the Decedent's partner and the Decedent's children asserted claims to these assets and the Court accepted jurisdiction to resolve the matter. The assets in question were set out in an affidavit in lieu of a probated will. The issue before the Court was to determine who was legally entitled to her personal property.

The surviving partner claimed that the Decedent gave him the assets at issue when she brought them to their shared home for the couple's combined use and enjoyment. The Decedent's children claimed entitlement to the assets because the Decedent had owned most of those items long before she began her relationship with her partner. Further, the Decedent's children had already taken most of her personal items with the surviving partner's consent. Consequently, the Court granted those assets to her children. As to the shared property within the couple's home and the couple's dog, the Court found the surviving partner to be legally entitled to those assets.

1. Jurisdiction: Probate Court

jurisdictional authority to determine the persons entitled to distributions of a small estate where no probate proceedings have been made in connection with that estate.

2. Jurisdiction: Probate Court

Conn. Gen. Stat. § 45a-98(a)(3) (2015) gives a probate court the authority to determine title or rights of possession of tangible or intangible property that constitute all or any part of a decedent’s estate.

3. Wills: Validity

Under Conn. Gen. Stat. § 45a-251 (2015), a valid will must be (1) subscribed by the testator, and (2) attested by two witnesses in the testator’s presence.

4. Inter Vivos Gifts

In order for an inter vivos gift to be valid, there must be: (1) delivery; (2) donative intent on the part of the donor; (3) acceptance by the donee; and (4) relinquishment on the part of the donor of all dominion over the property in question.

5. Inter Vivos Gifts: Burden of Proof

The donee has the burden of proving the essential elements of an inter vivos gift by clear and satisfactory evidence.

6. Evidence: Standard of Proof

The clear and satisfactory evidence standard requires proof that it is “highly probable” that there is a “substantial greater probability” that the facts are true instead of false. This standard has been construed to equate to the clear and convincing evidence standard.

7. Animals: Ownership of

Under Conn. Gen. Stat. § 22-350 (2015), a dog is deemed to be personal property over which the court may assert jurisdiction to determine title to it.

Opinion

Sharon Rita Derene died a resident of Stratford, CT, on January 31, 2015. She purportedly executed a Last Will and Testament on January 26, 2015, but this document was not submitted to probate. Rather, this matter was brought before the Court pursuant to Chapter 802b, Part I of the General Statutes, Settlement
of Certain Small Estates Without Letters of Administration or Probate of Will.

An Affidavit in Lieu of Probate of Will/Administration, Form PC-212, was filed with the Court on March 24, 2015. This document lists various solely owned assets of Ms. Derene, particularly “personal property located at 199A Bayfield Lane, Stratford CT, $20,000.00” and “dog adoption certificate attached $300.00.” Attached to this form is a “List of Assets for Sharon Derene’s Will” (hereinafter “List of Assents”), which enumerates furniture and other personal property. Finally, a Request for Order of Distribution, Form 212A, was submitted to the Court, requesting that all of these items be distributed to the children and heirs of Ms. Derene.

On April 7, 2015, a Petition/Estate Examiner for Limited Purposes, Form PC-207, was filed by Maurice P. Streicker, who identified himself as the “surviving partner” of Ms. Derene. As will be discussed in more detail in this decision, Mr. Streicker cohabitated with Ms. Derene for a number of years prior to her demise. A hearing was held on his petition on April 21, 2015, and the Court denied the petition. It is not necessary to discuss the merits of this petition nor the reasons for its denial, but what is significant is that at this hearing, it was brought to the Court’s attention that many of the items referred to on the “List of Assets” as attached to the Affidavit in Lieu of Probate were still in the possession of Mr. Streicker under his claim that the items belonged to him.


[I]f the court finds that no probate proceedings have been instituted in connection with the estate of the decedent, the court shall determine…the persons entitled to distributions from the decedent’s estate….”

[2] Inasmuch as Ms. Derene’s children and Mr. Streicker all claimed to be legally entitled to the remaining assets listed within the Affidavit in Lieu of Probate, particularly the “List of Assets” appended thereto, this Court accepted jurisdiction to adjudicate these claims pursuant to Conn. Gen. Stat. § 45a-98(a)(3) (2015). This law empowers the Court to “determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of any decedent’s estate....” Id.

At the outset, and in accordance with Conn. Gen. Stat. § 45a-98(a)(3) (2015), the Court assumed jurisdiction over this matter after finding that the matter is not in dispute in another court of competent jurisdiction, that this Court has not declined jurisdiction, and that the
parties have not filed an affidavit of their intention to claim a trial by jury.

The issue before the Court, therefore, is who is legally entitled to these items of personal property. The Court is required to determine the title to the same in order to answer this question.

A trial was held on June 17, 2015, at which all parties were represented by counsel. After hearing extensive testimony and reviewing numerous exhibits, the Court makes the following findings of fact:

Ms. Derene and Mr. Streicker began dating in 2001 or 2002. Ms. Derene moved into Mr. Streicker’s residence in Rye Brook, New York in 2004, where they cohabitated. Mr. Streicker testified that at that time his home was “fully furnished” and that Ms. Derene moved “a full truck load of her belongings” into his home. He further testified that Ms. Derene “asked him to discard his personal items and furniture,” and that those furnishings which she had moved into his home would become “their main furniture.” In 2013, Mr. Streicker sold his home in Rye Brook and used the proceeds to purchase a condominium in Stratford, CT, where he and Ms. Derene continued to cohabitate until her death.

Todd Derene, Ms. Derene’s son, testified that most, if not all, of the items on the “List of Assets” belonged to his mother for some time prior to her living arrangements with Mr. Streicker. He presented numerous photographs of these furnishings in Ms. Derene’s prior residence, long before her cohabitation with Mr. Streicker. Todd Derene also produced receipts for some of these items, which clearly indicate that they were purchased by Ms. Derene. He also produced photographs of many of these items that were taken contemporaneously with the preparation of the “List of Assets.”

[3] There was also testimony concerning the circumstances under which the “List of Assets” was compiled. Although clearly marked as “List of Assets for Sharon Derene’s Will,” her actual will was never submitted to probate, and therefore no inventory of her Estate was ever filed. Further, the “List of Assets” cannot be construed as a will inasmuch as it does not comply with the requirements for a valid will in this state under Conn. Gen. Stat. § 45a-251 (2015). It is not subscribed by Ms. Derene, nor attested by two witnesses who have subscribed the same in her presence. Id. Evidence was presented that a dispute arose between Ms. Derene and Mr. Streicker that may have caused this document to have been prepared. However, it serves only as the point of contention between these parties as to whom is entitled to possession of the assets listed therein.
Although there are various means by which one acquires title to personal property, including purchase, inheritance, abandonment, or adverse possession, Mr. Streicker claims that the items within the “List of Assets” were given to him by Ms. Derene. He claims, therefore, that they constitute a “gift” from her to him.


However, where it is alleged that the gift was made by a decedent, the donee must prove these essential elements by clear and satisfactory evidence. Long v. Schull, 184 Conn. 252, 255, 439 A.2d 975, 977 (1981) (citing Kukanskis, 169 Conn. at 32, 362 A.2d at 898); Dalia v. Lawrence, 226 Conn. 51, 70, 627 A.2d 392, 403 (1993) (citing Kukanskis, 169 Conn. at 32, 362 A.2d at 898). This standard of proof by clear and satisfactory evidence has been construed to be the same as clear and convincing evidence. See Colin C. Tait, Tait’s Handbook of Connecticut Evidence, 141-42 (3d ed. 2001). This standard requires proof that it is “highly probable” that there is a “substantial greater probability” that the facts are true instead of false, and that demands a “higher standard of belief” on the part of the trier. Lopinto v. Haines, 185 Conn. 527, 534, 441 A.2d 151, 155-56 (1981) (citing Dacey v. Connecticut Bar Ass’n, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976)).

In beginning its analysis of this matter, what strikes the Court as noteworthy is that many items of personal property or possessions which were owned by Ms. Derene, and, as set forth on the “List of Assets,” were removed and/or taken by her children, are not in dispute. These assets consist of a music stand, a ram’s horn from Israel, an antique scissor box and thimble, a large ceramic bowl under the coffee table, a jewelry chest and box, including all jewelry in the bedroom, an antique thimble collection, and a car. At the trial in this matter, there was also testimony that at least one piece of artwork was taken. There obviously is a clear distinction between the parties
themselves as to these items of personal belongings and furniture.

Insofar as the furniture is concerned, it seems quite clear that most, if not all, of these items were acquired by Ms. Derene years ago and prior to her cohabitating with Mr. Streicker. Evidence was introduced that these items were purchased by Ms. Derene (an office desk, file cabinet, and navy sofa bed), or that they were within her possession prior to her relationship with Mr. Streicker (a pink recliner, buffet in dining room, a Japanese vase, a fish on the coffee table, the screen over the buffet, an antique ink well, a three-tiered rice basket, two living room lamps, the white bar in the dining room, four dining room chairs, a dressing table, and remaining art work). It is unclear when other items were acquired or from where they came (chair, book cases). Testimony was also given that pots and pans “were replaced over the years,” and it is unclear who purchased a “recumbent bike,” although evidence was presented that it was acquired while Ms. Derene and Mr. Streicker cohabitated.

However, Mr. Streicker testified, without any rebuttal evidence, that the furniture, a “truck full,” was initially brought by Ms. Derene to his home in Rye Brook when she moved in with him. He testified that she specifically requested that he dispose of his own furniture, which he did. He testified that they used the furniture as their “main furniture,” with the understanding that it would become part of “[their] home.”

The Court finds that Mr. Streicker has met his burden of proof by clear and satisfactory evidence that Ms. Derene made a gift of this furniture to him. She clearly had the donative intent to do so upon moving in with him. She desired that her furniture be moved into his house and that it be used by both of them, not by her exclusively. She specifically requested that Mr. Streicker dispose of his own furniture, and he did so. It was to be used as their furniture without limitation or restriction. She delivered the furniture to him under these circumstances and relinquished her sole dominion over it. Mr. Streicker accepted the furniture, used it together with Ms. Derene, and continues to use it as his own. The Court finds that it is highly probable and that there is a substantially greater probability that the facts as testified to by Mr. Streicker are true rather than false.

What is even more persuasive is that Mr. Streicker disposed of his own furniture at Ms. Derene’s request and upon the commencement of their cohabitation. This action gave rise to an implied contract between them, the consideration being not only his disposal of his furniture but the parties continued relationship of cohabitation, love, and affection, albeit without the benefit of marriage. Their acts and conduct clearly indicate an agreement between them to share this furniture. Ms. Derene expressly asked
Mr. Streicker to dispose of his furniture, which would be replaced by Ms. Derene's furniture used by them jointly. *See Boland v. Catalano*, 202 Conn. 333, 337, 521 A.2d 142, 144 (1987).

However, the Court finds that Mr. Streicker has not met his burden insofar as the personal belongings of Ms. Derene. As noted above, many of these items were removed from his premises, and/or returned to her children, with his acquiescence, acknowledgement, and consent. The Court cannot find by clear and satisfactory evidence that there was a complete gift of these items.

[7] Finally, the dog is not on the “List of Assets.” It only appears on the Affidavit in Lieu of Probate. Under Connecticut law, a dog is deemed to be personal property, and, as such, this Court has jurisdiction to determine title to it. Conn. Gen. Stat. § 22-350 (2015); Conn. Gen. Stat. § 45a-98(a)(3) (2015).

Evidence was presented that Ms. Derene purchased this dog, Charlie, from the Central Westchester Humane Society in 2009. However, Mr. Streicker presented evidence that he paid for Charlie’s veterinary care and treatment. Inasmuch as Charlie was acquired while the parties cohabitated, Mr. Streicker need not prove that Charlie was a gift from Ms. Derene to him. Charlie is a companion dog, a pet, and a member of the family, irrespective of who paid for him. He has lived and had a relationship with Mr. Streicker for almost seven years. Absent evidence of abuse, neglect, or abandonment, which there is none, the Court will not upset that bond between a man and his dog.

Accordingly, the Court hereby makes the following orders as to whom is legally entitled to the items listed on the Affidavit in Lieu of Probate, particularly the “List of Assets,” pursuant to Conn. Gen. Stat. § 45a-273(d) (2015):

To Mr. Streicker: Ms. Derene’s office desk, chair, file cabinet, two bookcases, computer, printer, recumbent bike, recliner (pink), octagonal table, lamp, navy sofa bed, two matching coffee tables, buffet in dining room, screen over buffet, antique table on stairway, three-tiered rice basket table, two living room lamps, one brass base, one oriental base, linen desk in living room, white bar in dining room, four dining room chairs (rust color with white wood), bedroom furniture (includes wicker bench), dressing table, utensils within kitchen vase, pots pans, electric skillet, and casseroles in kitchen and laundry room.

To the children and heirs of Ms. Derene: desk accessories, fine china in buffet and crystal assorted pieces, Japanese vase on top of buffet, fish on coffee table, antique ivory book ends (Mommers),
antique ink well, antique Louise Sherry tin, entire contents of living room curio cabinets (includes Yadro, Hummels, Wedgewood, etc...), large ceramic bowl under coffee table, kitchen vase, and remaining artwork.

There was also testimony at the trial that various items of Ms. Derene’s personal belongings remain within Mr. Streicker’s premises, although not on the “List of Assets.” These include her personal pictures in a box, three to four hand-knitt Afghan blankets, and hand-knit Yamakas.

Let the Court be clear: Any and all furniture within Mr. Streicker’s household is his and his alone. Any and all items of personal belongings that belonged to Ms. Derene prior to the beginning of her cohabitation with Mr. Streicker are the property of her children and heirs. All of her personal belongings which were acquired by her after their cohabitation began belong to Mr. Streicker.

It is so ORDERED.

Dated at Stratford, Connecticut, this 3rd day of September, 2015.

/s/

Kurt M. Ahlberg, Judge
BOOK REVIEW

A REVIEW OF ALEXANDER A. BOVE, JR., TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS

RICHARD C. AUSNESS*

Alexander A. Bove, Jr. has recently written a thoughtful, comprehensive, and practical book entitled, “Trust Protectors: A Practice Manual with Forms.” Mr. Bove is a practicing lawyer in Boston and has taught courses in estate planning for many years at Boston University School of Law. He frequently serves as an expert witness and has lectured extensively in the United States and Europe on trusts, wills, asset protection, and estate planning. In addition, he has written numerous books and articles on these subjects.

The book describes the powers and rights of a trust protector, as well as the fiduciary duties and potential liabilities associated with this position. The author examines the relationship between the trust protector and the trustee. He also discusses the role of the courts in this area and identifies a number of practical issues that lawyers should consider when they draft trust instruments that contemplate the appointment of a trust protector. Finally, the author provides an extensive collection of forms, both in print and on a compact disc, to assist drafters.

* Associate Dean for Faculty Research and Jr. Professor of Law, University of Kentucky; B.A. 1966, J.D. 1968 University of Florida; LL.M. 1973 Yale University.

1 See Alexander A. Bove, Jr., TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS (2014) [hereinafter TRUST PROTECTORS].

2 TRUST PROTECTORS, supra note 1, at xiii-xiv.

In Chapter Two, the author examines the origins and characteristics of the office of a trust protector. A trust protector is a person who exercises power over a trust, but who is not a trustee. According to the author, “[t]he position of protector is typically included in a trust for the purpose of allowing or causing the trust to adjust to future changes of any nature affecting the purposes of the trust, the interests of the beneficiaries, and the intentions of the settlor.” Although the term seems to have first been used in connection with offshore asset protection trusts, the idea of someone exercising power over a trust is not a new one. Trust advisors have performed a similar function in the United States and other countries for almost a hundred years. However, legislatures, courts, and many commentators have failed to recognize this connection and, therefore, have tended to treat the office of trust protector as sui generis.

Chapter Three identifies the trust protector as a fiduciary. A recurring theme throughout the book is that trust protectors normally exercise their powers in a fiduciary capacity. This characterization as a fiduciary provides the basis for many of the author’s observations about the powers and rights of trust protectors, their duties and liabilities, and their relationship to trustees. Considering the trust protector as a fiduciary also provides the courts with a basis in enforcing the decisions of trust protectors and reviewing the exercise of their powers. The exact nature of a trust protector’s fiduciary duties will depend on the powers that they exercise, but at a minimum those duties will include loyalty, impartiality, and good faith. The fiduciary status of trust protectors will be discussed in more detail later in this review.

Chapter Four concerns the powers of a trust protector. These powers are typically enumerated in the trust instrument, although in some states, potential powers are also set forth in statutory form. In this chapter, the author provides an extensive list of powers that may be vested in a trust protector, including the powers to: (1) remove, add, and/or replace trustees; (2) add and replace protectors; (3) veto or direct distributions from the trust by the trustee; (4) settle disputes
among parties to the trust; (5) add or delete trust beneficiaries; (6) change the situs and governing law of the trust; (7) veto or direct investment decisions; (8) authorize special investments or holdings; (9) require consent in order to exercise the power of appointment; (10) grant a power of appointment; (11) determine whether an event of duress has occurred (a power often found in asset protection trusts); (12) amend the trust’s administrative provisions; (13) amend the trust’s dispositive provisions; (14) amend the trust in response to changes in the law or circumstances that may affect the purposes of the trust; (15) approve trustee accounts; (16) terminate the trust and direct disposition of the assets; and (17) establish terms and conditions with regard to any of the foregoing. Furthermore, as in the case of trustees, additional powers may be implied when necessary for the trust protector to perform essential functions.

Despite the multitude of potential powers that can be vested in a trust protector, the author warns against giving trust protectors too much authority, declaring that:

The objective in granting powers is not to pile on as many powers as one can think of but rather to select those powers that, given the duration and purposes of the trust, would seem most useful in furthering the smooth administration of the trust and the realization of the settlor’s intentions.

The author also addresses the question of how each trust protector should exercise his or her vested powers when the settlor appoints multiple trust protectors. He concludes that the rule of unanimity, which applies to co-trustees and requires multiple trustees to act unanimously, should apply to co-trust protectors as well unless the trust instrument provides otherwise.

In Chapter Seven, the author states the trust must provide certain rights in order for a trust protector to carry out his or her duties effectively. These rights include the right to information, standing to enforce claims on behalf of the trust, indemnification for reasonable expenses, and compensation for work performed on behalf of the trust. The author points out that the trust protector’s right to

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12 TRUST PROTECTORS, supra note 1, at 46.
13 Id.
14 Id. at 47.
15 Id. at 49-50.
16 Id. at 49.
17 See TRUST PROTECTORS, supra note 1, at 71.
18 Id.
information is similar to that of a beneficiary and would include:

...[I]nformation to which the beneficiaries and the protector in a fiduciary position would have the right to view would include the trust instrument itself, and any documents modifying it or appended to it; accounting and financial statements; tax returns and all related schedules; fiduciary appointments and related documents and correspondence, such as removal and appointment of trustees and protectors; trustee minutes; and generally, where the protector is concerned, any information or documents reasonably necessary to enable the protector to knowledgeably consider the exercise of his duties and powers.\textsuperscript{19}

Another necessary right of a trust protector is the ability to sue on behalf of the trust in order to enforce claims.\textsuperscript{20} Normally, it is the trustee’s responsibility to enforce these claims, but there may be some instances where the trustee cannot bring suit because he/she is an adverse adverse party or has some other conflict of interest.\textsuperscript{21} Although there is little case law on this issue, a trust protector should have standing to sue when necessary to carry out his duties to the trust.\textsuperscript{22} Like a trustee, a trust protector should be indemnified for any expenses incurred on behalf of the trust.\textsuperscript{23} Finally, trust protectors should be reasonably compensated for their work.\textsuperscript{24}

According to the author, a trust protector serving in a fiduciary capacity has a number of duties that are inherently attached to that office.\textsuperscript{25} These are discussed in Chapter Five. One of the most controversial of these duties is the duty to monitor the trustee.\textsuperscript{26} This issue arose in \textit{Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.},\textsuperscript{27} when a successor trustee sued the trust protector for failing to monitor the activities of a trustee who depleted the assets of the $1.7 million trust set up to support a quadriplegic accident victim.\textsuperscript{28} Reversing a summary judgment for the defendant, a Missouri appeals court remanded the case back to the trial court to determine whether

\begin{footnotesize}
\textsuperscript{19} \textit{TRUST PROTECTORS}, supra note 1, at 73.
\textsuperscript{20} \textit{Id.} at 75-80.
\textsuperscript{21} \textit{Id.} at 78-79.
\textsuperscript{22} \textit{Id.} at 71.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{TRUST PROTECTORS, supra note 1, at 75-83.}
\textsuperscript{25} \textit{See id.} at 55.
\textsuperscript{26} \textit{Id.} at 57-59.
\textsuperscript{27} \textit{TRUST PROTECTORS, supra note 1, at 58 (citing Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C., 283 S.W.3d 786, 789-92 (Mo. Ct. App. 2009)).}
\textsuperscript{28} \textit{TRUST PROTECTORS, supra note 1, at 1.}
\end{footnotesize}
the trust protector had a duty to monitor the trustee’s actions, and if necessary, to remove him.\textsuperscript{29} The author, who served as an expert witness for the plaintiff in that case, strongly believes that such a duty exists when the trust protector has the power to remove the trustee.\textsuperscript{30}

In addition, the author expresses the idea that, when exercising a power, a trust protector must act impartially and may not personally benefit from his actions.\textsuperscript{31} Moreover, a trust protector should avoid conflicts of interest and should exercise independent judgment rather than acting as an agent of the trustee or the trust beneficiaries.\textsuperscript{32} Consequently, when a trust protector’s consent is required for certain purposes, he should not give blanket \textit{ex ante}\textsuperscript{33} consent to the trustee, but instead should retain his right to oversee the trustee’s actions.\textsuperscript{34}

Like a trustee, a trust protector who violates or fails to carry out his fiduciary duties risks being held personally liable for any losses the trust suffers as a result of his breach of duty.\textsuperscript{35} In Chapter Six, the author considers this issue as well as the wisdom and effectiveness of exculpatory clauses. Responding to the common practice of relieving trust protectors from liability for breach of their fiduciary duties, the author declares that “[w]here the position is a fiduciary one, total exculpation would be against public policy, although exposure can be limited to acts which are in the category of gross negligence, bad faith, dishonesty, fraud, or willful misconduct.”\textsuperscript{36}

In Chapter Eight, the author explores the complex and potentially contentious relationship between trust protectors and trustees. Since the trustee, not the trust protector, holds title to the trust property, it is often the trustee who will carry out the directions of the trust protector.\textsuperscript{37} In cases where the trust protector’s powers are negative, such as the power to veto distributions, the power to veto will trump the power to distribute. For this reason, a number of state statutes purport to exonerate a trustee who merely carries out a trust protector’s instructions.\textsuperscript{38} However, as the author points out, these statutes have “the deleterious effect of undermining, if not

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.} at 3.
  \item \textsuperscript{30} \textit{Id.} at 59.
  \item \textsuperscript{31} \textit{Id.} at 60.
  \item \textsuperscript{32} \textit{Id.} at 62-63.
  \item \textsuperscript{33} “Based on assumption and prediction, on how things appeared beforehand, rather than in hindsight.” Ex ante, \textsc{Black’s Law Dictionary} (8th ed. 2004).
  \item \textsuperscript{34} \textsc{Trust Protectors, supra} note 1, at 60-62.
  \item \textsuperscript{35} \textit{Id.} at 65.
  \item \textsuperscript{36} \textit{Id.} at 68.
  \item \textsuperscript{37} \textit{Id.} at 11, 85-86.
  \item \textsuperscript{38} \textit{Id.} at 89, 91.
\end{itemize}
disregarding altogether, the basic role of the trustee, which is to administer and protect the integrity of the trust.”

Therefore, according to the author, at the very least, “...the trustee [as a fiduciary] has a duty to make a reasonable inquiry into the details and propriety of the protector’s instructions, rather than to blindly follow such instructions.” If the trustee believes that the terms of the trust do not permit the trust protector’s instructions, he should refuse to comply with them, and, if necessary, apply to the appropriate court for instructions.

Chapter Nine examines the interaction between courts and trust protectors. As the author points out, there are almost no cases involving this issue in the United States. On the other hand, he laments:

[the fact that there have been hundreds of cases dealing with the subject of trust advisors unfortunately has been totally ignored by the [American] courts, despite the fact that the roles are the very same and that such cases may offer the courts important insight in the process of resolving issues involving the protector.]

The author concedes that courts do not have much of a role to play when the trust protector is not a fiduciary, because a non-fiduciary is free to do as he pleases as long as he does not act contrary to the terms of the trust. However, a court’s potential involvement in the trust’s affairs is greatly increased when the trust protector is deemed to be a fiduciary. In that instance, courts should have the power to oversee or review the trust protector’s conduct.

This judicial oversight may take a number of forms. For example, the author identifies a foreign case in which a court appointed a trust protector when the settlor failed to do so. Other foreign courts exercised the power to remove a trust protector for a serious breach of trust. Based on these foreign cases, and Papiernik

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39 TRUST PROTECTORS, supra note 1, at 92.
40 Id. at 99.
41 See RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. c (2007).
42 TRUST PROTECTORS, supra note 1, at 111.
43 Id.
44 Id. at 113-14.
45 Id. at 117.
47 Id. at 117, 119 (citing Re Freiburg Tr., Mourant & Co., Trs., Ltd. v. Magnus [2006] 6 ITELR 1078 (Jersey RC); Centre Trustees (C.I.) Ltd. & Langy Tr. Co. (C.I.) Ltd. v. Pabst, 2009 JLR 202 (RC2009); In the Matter of the Circle Tr., [2006] CILR 323 (Cayman Is.).
v. Papiernik, an Ohio case involving a trust advisor, the author concludes that American courts should have the power to appoint or remove trust protectors when circumstances warrant such action. In addition, the author argues that a court, upon the request of an interested party, should be able to review the appointment of a trust protector, who, like a trustee, is a fiduciary under the trust.

Relying on Re Rogers, a Canadian case involving a recalcitrant trust advisor, the author concludes that following a trust protector’s exercise of a power, or his refusal to exercise a power, a court may override his decision and take action on its own if it determines that the trust protector’s conduct was improper under the circumstances. Similarly, a court should also have the authority to suspend a trust protector’s powers to prevent a breach of fiduciary duty, considering it has the power to remove a protector as well as override his decisions. Furthermore, the author concludes that a court has the power to surcharge a trust protector when his wrongful conduct causes a financial loss to the trust. This result is consistent with the way courts treat trust advisors. Finally, although courts are generally reluctant to interfere with the exercise of a discretionary power, in certain cases, it may become necessary for a court to compel the exercise of a trust protector’s power.

Practicing lawyers, particularly those who are new to the area of trust protectors, will find the material in Chapter Ten especially useful, as it contains a copious amount of practical planning and drafting advice. The first issue for a drafter and his client to decide is whether or not to provide for a trust protector in the trust instrument. The author cautions that trust protectors should not be used in conjunction with certain entities, such as LLCs, partnerships, and corporations. On the other hand, irrevocable trusts can benefit from the addition of a trust protector, particularly if the trusts are expected to be of long duration. Trust protectors can also be used in connection with revocable trusts if there is reason to think that the

48 Id. at 120 (citing Papiernik v. Papiernik, 544 N.E.2d 664, 45 Ohio St. 3d 337 (Ohio 1989)).
49 TRUST PROTECTORS, supra note 1, at 117-20.
50 Id. at 120.
51 Id. at 122 (citing Re Rogers, [1929] 1 D.L.R. 116 (Can. Ont., C.A.)).
52 TRUST PROTECTORS, supra note 1, at 122-23.
53 Id. at 123-24; see also Re M. Settlement [2009] JRC 140 para. 2 (Jersey RC).
54 TRUST PROTECTORS, supra note 1, at 124-25.
56 TRUST PROTECTORS, supra note 1, at 125-26.
57 Id. at 130.
58 Id.
59 Id. at 138.
settlor may become incapacitated at some time in the future.60

Once the decision is made to utilize a trust protector, the parties must decide what qualities they are looking for in a potential appointee. According to the author, “to some extent, the knowledge, experience, and judgment required in a candidate for the position of protector will depend upon the extent of the powers to be given the protector.”61 If the trust protector’s powers are narrow and do not require any special knowledge, then a candidate may be suitable simply by way of being responsible, sensible, and trustworthy.62 On the other hand, the appointment of an individual with a professional background, such as an attorney, accountant, or trust officer, may be necessary if the trust is complicated, large, or of long duration.63 It is also in the best interests of the settlor and beneficiaries not to have a person who maintains an interest in the trust be a trust protector, in order to avoid concerns of self-interest, bad faith, or breach of fiduciary duties.64

Another issue a drafter and his client may face is whether the settlor should appoint more than one person to serve as trust protector. Although there are certain advantages to having a single individual act as a trust protector, the author notes that a use of a committee might be better in some cases.65 He also considers the pros and cons of appointing a corporation or a limited liability company to serve as trust protector.66

Some of the most practical information in the book is located in the section on drafting considerations.67 The author declares that the trust instrument should clearly state that the trust protector is a fiduciary and will act in a fiduciary capacity.68 The drafter should also set forth the basis upon which the trust protector shall be compensated.69 The trust protector should be authorized to hire agents to assist him in carrying out his duties.70 Like a trustee, a trust protector should be entitled to reimbursement from the trust for expenses incurred to defend against claims brought against him. However, a trust protector should not be reimbursed for successful

60 Id. at 138.
61 Trust Protectors, supra note 1, at 138.
62 Id. at 138-39.
63 Id. at 141.
64 Id. at 139.
65 Id. at 145.
66 Trust Protectors, supra note 1, at 146.
67 Id. at 146-47.
68 Id. at 147.
69 Id. at 148.
70 Id. at 148-49.
lawsuits against him that involve bad faith, gross negligence, or willful misconduct.\footnote{71 \textit{Trust Protectors}, supra note 1, at 149.}

The trust instrument should enumerate the trust protector’s powers. As the author observes, this “array of powers may be very brief or very broad, depending upon the objectives of the settlor, the purposes of the trust, the duration of the trust, and the circumstances of the family or other beneficiaries.”\footnote{72 \textit{Id}.} The author identifies and discusses at least twenty powers, rights, and restrictions that the drafter should consider including in the provisions of the trust: 1) the power to remove and replace the trustee; 2) the power to enforce claims; 3) the right to reimbursement; 4) the right to information; 5) the power to amend the trust; 6) the power to add or delete beneficiaries; 7) the power to decant; 8) the power to appoint into another trust; 9) the power to change the situs or governing law of the trust; 10) the power to terminate the trust; 11) the power to consent to or veto the trustee’s actions; 12) a prohibition against actions that would adversely affect the tax situation of the settlor’s or a beneficiary’s estate; 13) the provision of a mechanism for filling vacancies or appointing successor trust protectors; 14) a list of parties who are excluded from serving as trust protectors; 15) a provision dealing with the resignation of the trust protector; 16) a provision dealing with the trust protector’s incapacity; 17) insolvency or disappearance; 18) a savings provision in case some aspect of the trust violates the Rule Against Perpetuities; 19) standards for limiting the trust protector’s liability; 20) a reference to statutory powers that may be incorporated by reference; and 21) an anti-duress provision.\footnote{73 \textit{Id}. at 150-67.}

The author has several other suggestions to offer the drafters of trust instruments. One helpful technique is a non-binding “letter of wishes” to assist the trust protector in the exercise of his discretion.\footnote{74 \textit{Id}. at 167-68.} The trust instrument may also provide for a “springing” protector who would be appointed under certain circumstances by the trustee, a disinterested third party, or a majority of the beneficiaries.\footnote{75 \textit{Id}. at 175-76.} Finally, the author examines some of the tax consequences that might arise in connection with the selection of a trust protector and the exercise of his powers.\footnote{76 \textit{Trust Protectors}, supra note 1, at 179-86.}

As the foregoing description indicates, the author’s book contains a wealth of practical information and sage advice about trust protectors and their role in trust administration. However, there are
two recurring themes that run throughout the book which merit further discussion. The first is that drafters and their clients need to have a clear idea about the trust's structure, assets, and objectives. They also should know something about the character and circumstances of the trust's beneficiaries. Armed with that knowledge, they can select the right person to serve as trust protector and identify the powers that he will need to perform his duties effectively. In other words, the trust instrument should give the trust protector all of the powers necessary to do his job, but at the same time, it should not vest him with unnecessary powers that may cause friction with the trustee or interfere with the efficient administration of the trust.

The second recurring theme is whether, and under what circumstances, a trust protector should be considered a fiduciary, as seen in Chapter Three. The author first considers the difference between a personal power and a fiduciary power. As he points out:

A personal power is one that can be exercised by the powerholder for the powerholder's own benefit, or for the benefit of other parties or purposes, without regard, in either case, to the settlor's intentions (other than as may be expressed in the terms of the power...) and without regard to any sense of fairness, reasonableness, or common sense.

A personal power may be general or limited. The donee of a general power may exercise the power for the benefit of anyone, including himself, his estate or his creditors. On the other hand, if the power is limited or special, the donee may only exercise the power for the benefit of a specific beneficiary class. The donee of a personal power owes no fiduciary duties; however, any exercise that constitutes a fraud of the power is void and can be revoked by a court.

In contrast, the donee of a fiduciary power, such as a trustee, must act for the benefit of another, and in so doing must place the interest of that person ahead of his own interests. A fiduciary owes a duty of loyalty, prudence, and impartiality to the beneficiaries of the

77 See TRUST PROTECTORS, supra note 1.
78 Id.
79 See id. at 11.
80 Id. at 20.
81 See id. at 20-21.
82 TRUST PROTECTORS, supra note 1, at 20.
83 Id. at 21.
84 Id. at 20.
85 Id. at 21.
trust and may be held liable for actions or decisions that violate these fiduciary duties.86

The author states that most of the early offshore asset protection statutes provided that all powers granted to a trust protector were assumed to be personal unless the trust instrument provided otherwise.87 This approach was also adopted by a number of American statutes.88 Consequently, many trust and estate lawyers assume that trust protectors should not be described as fiduciaries. According to the author:

...[T]he legal community in general began to regard the protector as a party who could be granted virtually unlimited powers over a trust but who, at the same time, could be free from all liability for any exercise, failure to exercise, negligence, or even refusal to exercise a power in the face of a danger to a trust.89

There are two reasons for the preference for personal powers. First, trust lawyers believed that broad immunity from liability was necessary to induce people to agree to serve as trust protectors.90 Second, they were concerned that treating trust protectors as fiduciaries would encourage trustees and beneficiaries to more easily overturn their actions in court.91

Nevertheless, the author makes a compelling argument that trust protectors should be treated as fiduciaries in most cases.92 First, he examined the reasoning of those courts from foreign jurisdictions that have found trust protectors to be fiduciaries.93 He also surveyed American court decisions involving trust advisors and found that most courts held that trust advisors were fiduciaries.94 Even if trust protectors are not exactly the same as trust advisors, their functions are sufficiently similar that it would be illogical to treat one as a fiduciary but not the other. The author also maintains that trust protectors occupy an office or position that is inherently fiduciary in

86 Id. at 21-23.
87 TRUST PROTECTORS, supra note 1, at 13.
88 Id. at 14.
89 Id. at 15.
90 Id. at 13-14.
91 Id. at 14.
92 TRUST PROTECTORS, supra note 1, at 16.
94 TRUST PROTECTORS, supra note 1, at 9 (citing Warner v. First Nat'l Bank of Minneapolis, 236 F.2d 853, 861 (8th Cir. 1956); Lewis v. Hanson, 128 A.2d 819, 36 Del. Ch. 235 (Del. 1957); Gathright’s Tr. v. Gaut, 124 S.W.2d 782, 276 Ky. 562 (Ky. Ct. App. 1939)).
Having concluded that one who holds the office of trust protector must be considered a fiduciary, there remains the question of what exactly this means. The duties and powers vested in a trustee provide some guidance to this question. For example, trust protectors are often given the power to direct or veto investment decisions. In such instances, it would seem that they should have the same duty of prudence with respect to these investment decisions that a trustee would have. Likewise, if a trust protector is given the power to direct or veto distributions from the trust to various beneficiaries, he should be held to a standard of fairness and impartiality in the same manner as a trustee. On the other hand, when a trust protector is vested with powers that are not analogous to those commonly vested in a trustee, the scope of a trust protector's fiduciary duties must be determined from the nature of the power that he is tasked with exercising.

One such duty is the duty to monitor the trustee's actions. The author argues persuasively that if the settlor authorizes the trust protector to remove the trustee, there is an implied duty on the part of the trust protector to monitor the trustee's behavior to determine whether removal might be warranted. In other words, even if the power to remove the trustee is discretionary, the trust protector still has a duty to behave in a responsible manner.

This issue came up recently in Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C., which the author discusses in Chapter One. In that case, the plaintiff, a successor trustee, alleged that the trust protector should have removed the prior trustee, when evidence first came to light that the prior trustee might be spending the trust's money improperly. Unfortunately, the trust instrument was somewhat contradictory. It provided that “[t]he Trust Protector's authority...is conferred in a fiduciary capacity and shall be so exercised, but...” then went on to declare that “…the Trust Protector shall not be liable for any action taken in good faith.” In the first appeal, the appellate court reversed the trial court's summary judgment for the trust protector, finding that there were disputed issues, including the nature of the trust protector's fiduciary status,
which needed to be resolved in subsequent proceedings.\textsuperscript{102} Although the \textit{McLean} decision suggested that the trust protector was a fiduciary in some respects, it shed little light on what these duties might be. The court in \textit{McLean} also failed to determine the extent to which the trust’s exculpatory clause affected these duties.

Despite the lack of controlling case law in the United States on the issue of a trust protector’s fiduciary duties, the author firmly believes that trust protectors have such duties and that they are an inherent aspect of the position.\textsuperscript{103} This, in turn, suggests that settlors cannot entirely relieve a trust protector of all liability for breach of these duties by means of an exculpatory clause. In his view, a court should disregard any exculpatory provision that purported to relieve a trust protector of liability for bad faith, fraud, or willful misconduct when these actions caused harm to the trust or its beneficiaries.\textsuperscript{104}

To conclude, legal commentators agree that trusts are one of the most flexible tools available to clients for the efficient disposition of their property. However, as the author observes:

\begin{quote}
The protector is probably one of the most significant developments to date in trust law and practice. Through the use of protectors, trusts that have been rendered ineffective or that have proven to fall short of the settlor’s objectives because of changes in circumstances or changes in the law can be revised, restored, and in some cases even re-written by a protector given the powers to do so.\textsuperscript{105}
\end{quote}

Legal scholars will appreciate the author’s description of the rise of the trust protector in the United States, as well as his analysis of a trust protector’s powers, rights, duties, and liability. For practicing lawyers, the author presents a detailed list of do’s and don’ts to guide them when they include a trust protector in a trust instrument. Those who practice in this area will also benefit from the comprehensive collection of drafting forms that are included at the end of the book and on a compact disc. These forms are clearly written and can be understood by settlors and other lay persons, as well as by those with legal training. Together, they cover virtually any contingency that may arise in connection with the role of a trust protector. In sum, this book is a significant contribution to the literature on trust protectors and a great benefit to the field of trusts.

\textsuperscript{102} For a discussion of the subsequent history of the case, see Ausness, \textit{supra} note 10, at 296-301. \textit{See also} \textit{TRUST PROTECTORS}, \textit{supra} note 1, at 3.
\textsuperscript{103} \textit{TRUST PROTECTORS}, \textit{supra} note 1, at 4.
\textsuperscript{104} \textit{Id.} at 16.
\textsuperscript{105} \textit{Id.} at 193.
and estates.
Part I: Introduction

If your dream is to start your own trusts and estates practice, there are some practical steps to take to get started. There are initial considerations, like the scope of your practice and its location. There are matters of office and administrative resources, including assistants, partners, and other practicalities of office life. There are steps to take with licensing and accreditation, both with respect to the practice of law and regarding other designations that prove useful in practice. You will need to organize your business, choose its form, and establish a name. You should consider financial matters such as billing, accounting, and marketing. Trusts and estates practitioners engage in a variety of networking and professional organizations that you will want to consider. You should mind ethical standards of practice. Finally, you will want to know what resources are available for a new practitioner. Though this list may seem daunting, these tasks are very manageable.

The goal of this manual is to provide a comprehensive overview of the practical tasks involved in establishing a new trusts
and estates practice. It is designed primarily with new graduates in mind, although more experienced lawyers may find it helpful as well. The reader will find that specific examples throughout reference the state of Alabama, although many of the considerations are the same regardless of where a lawyer practices. It is my hope that with this instruction manual as your guide, you can start something new and entirely your own.

Part II: Initial Considerations

a. Scope of Practice

An initial concern in starting a trusts and estates practice is determining the scope of the projects that you intend to cover. A traditional trusts and estates practice will cover both estate planning and estate administration, although some practitioners specialize in one or the other.

An estate planning process will entail the production of documents used to convey property at death. This process includes probate transfers, such as the drafting of a will, and nonprobate transfers, such as those in connection with the drafting of a trust. Estate planners also offer services relating to planning for incapacity and provide clients with a durable power of attorney document, which permits an agent called an “attorney-in-fact” to take actions with respect to the client’s property during their incapacity. Most lawyers also offer basic planning with respect to healthcare choices and will provide clients with the documents necessary to appoint a healthcare proxy to make medical decisions if the client is unable to communicate. This basic planning can also include establishing a living will, which explains the client’s preferences as to heroic medical measures.

An estate administration practice will provide services relating to the probate process, both for testate and intestate estates of deceased individuals. In this context, the client is generally the personal representative of the estate. A probate lawyer oversees all of the court filings in connection with the administration, such as the Petition for Letters (of Administration or Testamentary), the Petition to Probate the Will, the Inventory, and the Final Settlement paperwork. The probate attorney also supervises the payment of the estate’s debts and ensures compliance with notice procedures for creditors of the estate.

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1 I am licensed in Alabama myself, and a 50-state discussion might be a wee bit overwhelming, so it seemed a natural choice.
Aside from these two core functions of trusts and estates—planning and administration—lawyers vary as to the scope of additional services they will provide. Perhaps the most critical decision a trusts and estates lawyer makes in his or her practice is whether his or her practice will handle tax matters, or whether his or her practice will outsource tax matters to another lawyer or an accountant. Lawyers who specialize in estate taxes often offer services in estate planning relating to minimizing federal income taxes and, in larger estates, minimizing federal transfer taxes (gift, estate, and generation-skipping transfer taxes). In the estate administration context, lawyers often advise clients regarding the income tax treatment of the estate and any associated trusts, and advise as to the preparation of the decedent’s final income tax return, and the federal estate tax return, as well as any additional state taxes returns that must be filed.\footnote{Preparation of associated state income tax returns may also be necessary, although some states, including Alabama, do not require an estate or inheritance tax return.}

You will also need to determine whether the scope of your practice will entail long-term care planning or Medicaid planning. This service requires an additional degree of sophistication and background to provide appropriate special needs trusts and other planning devices to manage the costs of extended health care. Lawyers who wish to specialize in this area might consider an LL.M. in Elder Law or additional training, perhaps through the National Association of Elder Law Attorneys, described later in this article.

Another necessary decision as to the scope of practice is whether to accept trusts and estates litigation. Some trusts and estates practitioners are comfortable taking business relating to will contests, trust disputes, or allegations of breach of fiduciary duty. Others prefer to maintain a solely transactional practice and refer litigation matters to someone else. Keep in mind that litigation may entail additional resources and skill sets that a purely transactional practice does not require. Before beginning your practice, you will want to give some thought as to whether you will accept litigation cases or if you intend to refer those clients elsewhere.

There are other areas of law connected to trusts and estates into which trusts and estates lawyers will sometimes venture. It is not unusual for a trusts and estates practice to include guardianship work, both with respect to serving as guardian ad litem of minor beneficiaries and with respect to establishing formal guardianships for minors. Guardianship work is also commonly used to appoint a guardian to incapacitated adults. This work may bleed over into a
practice that handles involuntary commitments or other mental health cases. Additionally, some trusts and estates lawyers expand the scope of their practice to include family law matters, such as premarital planning, divorce, and adoption.

Finally, you will need to consider the level of sophistication of your practice and the level of affluence of your clients. As a general rule, clients with more assets tend to need more sophisticated planning, including complex tax planning. Business relating to high-net-worth individuals may be more lucrative, but a new attorney should be mindful of the additional risk that comes with venturing into tax planning without adequate preparation. The beginning practitioner may need to associate with attorneys more experienced in this field when taking on more complex estate and tax planning cases.

b. Location of Practice

Next, a new practitioner must decide where to work. You will need to consider whether there is sufficient demand in that location for the services you intend to provide. For example, a high-net-worth estate planning practice is likely to do better in Boca Raton than in Omaha. A myriad of other considerations, such as where you (and perhaps your family) would like to live, also weigh into the location decision. Beyond choosing the physical location of your practice, you should also determine whether you will have a traditional brick-and-mortar office, a home office, or whether a virtual office might better suit your needs.

Solo and small-firm practitioners have a few choices for locating their practice: a home office, a rented or shared office, or a purchased office building. Setting up an office within a residence can be convenient for maintaining a flexible schedule and may offer tax benefits. Problems associated with a home office, however, include the need for storage, meeting space, and separation of office space.

3 Compare Boca Raton, Florida, U.S. Census Bureau (Dec. 2, 2015), http://quickfacts.census.gov/qfd/states/12/1207300.html with Omaha, Nebraska, U.S. Census Bureau (Dec. 2, 2015), http://quickfacts.census.gov/qfd/states/31/3137000.html (According to U.S. Census data, the average home value in Boca Raton is $355,600 and household income $70,699, compared to Omaha’s values of $133,500 and $48,052, respectively).
4 Keith McKerall, Cumberland School of Law Continuing Legal Education Seminar: Solo Out of the Gate (and later), Office Startup Essentials, Including Choice of Entity 9 (Oct. 17, 2014) (McKerall noted that the choice of practice location is driven by considerations such as “the type of practice involved, the community and professional contacts that the lawyer may already have with a particular venue, distance from home, family considerations, and costs.”)
5 Id. at 9-11.
6 See id. at 9.
from residential space. Furthermore, it may be difficult to hire staff to work within a home office. One potential option is to reach an agreement with a law firm or office located close to your home where you can hold client meetings and other conferences associated with cases. It is also wise for solo practitioners to receive business-related mail at a post office box, so business-related mail does not get confused with residential mail. An additional benefit is that having a post office box may help an attorney establish privacy and make relocation simpler in the future if he or she decides to move the practice.

A second location option is to rent an office or share office space with other attorneys. Such an arrangement “provides a built-in networking opportunity, availability of professional advice, camaraderie and mentoring, as well as expanded opportunities both to make and receive referrals from colleagues.” Sharing space also relieves solo practitioners and small firms from having to bear sole financial responsibility for support staff, as their services can be shared among several businesses. Lawyers who share support staff, however, must accept that their employees may not always be available to tend to emergency affairs that can arise in the law office. Shared office arrangements may still be worth this risk because they provide solo practitioners with services that a solo or small firm might not be able to afford otherwise, such as “receptionist services, conference room space, photocopying/scanning, phone lines...and additional file storage capacity.”

A third option that is more expensive in the short term is to purchase an office building or a building that can be converted into an office. This arrangement is attractive to attorneys looking to expand their practice in the future and invest in their business. Even if the attorney does not choose to expand he or she may still profit from owning the building by renting space out to other professionals.

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7 *Id.* 9-10 (McKerall also suggests establishing a firm understanding within the home regarding the boundaries between work space and time and personal space and time).
8 *Id.*
10 *Id.* at 9-10.
11 *Id.* at 11.
12 *Id.*
13 *Id.*
15 *Id.* at 11.
c. Office and Administrative Resources

i. Assistants, Associates, and Partners

Some people are better off going it alone. Having your own solo practice gives you the ultimate control over your business, your schedule, and your work life. That said, in some cases, associating with others is a complement to practice and can result in better client service and a more successful business.

Hiring an associate or having a partner can be beneficial in that a new attorney does not have to practice in isolation. Furthermore, working with a partner or associate relieves some of the burden felt by a sole practitioner in that he or she is not solely responsible for the entire business. Working with a larger group of people, however, increases the need for assistants and support staff.

ii. Paralegals and Legal Secretaries

Although secretaries and paralegals may seem like luxuries to a new lawyer starting a practice, having a support staff can provide many benefits to attorneys. Secretaries can especially help attorneys who lack organization skills.\(^\text{16}\) Paralegals can complete many of the routine practice tasks an attorney would otherwise need to handle personally. This can promote economic efficiencies in practice allowing for reduced legal fees for clients and a potentially more profitable business.\(^\text{17}\)

Organization is essential to running a practice smoothly. When an assistant ably manages this task, the lawyer can focus on lawyering, assisting clients with problem-solving strategies and planning for accomplishing goals.\(^\text{18}\) Benefits of having support staff who assist with organization include increasing efficiency, meeting deadlines, enhancing communication and facilitating cooperation with other attorneys and staff.\(^\text{19}\) These benefits help to establish and maintain an attorney’s reputation, personally and professionally, and

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\(^\text{16}\) Jeremy W. McIntire, Cumberland School of Law Continuing Legal Education Seminar: Solo Out of the Gate (and later), Ethics, IOLTA, Record Keeping, Fees and More...for Solos/Small Firms 2 (Oct. 17, 2014).

\(^\text{17}\) Id. (Furthermore, paralegals can “make significant contributions that advance the client’s objectives and they are often the client’s preferred contact for routine communications.” Arthur G. Greene & Therese A. Cannon, Paralegals, Profitability, and the Future of Your Law Practice 8 (Am. Bar Ass’n, 2003)).

\(^\text{18}\) McIntire, supra note 16, at 2; see also William I. Weston, Paralegals—You’ve Come a Long Way, in Effectively Staffing Your Law Firm 97 (Jennifer J. Rose, ed. 2009); see Greene & Cannon, supra note 17.

\(^\text{19}\) McIntire, supra note 16.
help attorneys avoid malpractice claims and ethics violations.\(^{20}\)

In addition to assisting with an ongoing practice, experienced support staff can be essential in helping new attorneys learn the ropes of the practice of law.\(^{21}\) Paralegals and legal secretaries who have more experience than new attorneys can help with legal procedures or may know people who can give advice regarding procedures, customs at different courts, researching topics, and locating forms.\(^{22}\) Remember that paralegals and administrative staff are part of your team, not subjects of your kingdom, and should be treated with appreciation and respect.

There are several alternative paths (and most lawyers implement several) to finding qualified administrative staff. To begin, many lawyers will post job listings on popular job search engines on the Internet, like monster.com.\(^{23}\) Attorneys can also list job postings on their own business’s website.\(^{24}\) Another source for finding legal secretaries and paralegals is through job recruiters or educational programs.\(^{25}\) Experienced recruiters write job postings, know what kinds of qualities to look for in applicants, and know what may best suit the hiring attorney’s needs in light of the marketplace.\(^{26}\) Regardless of the method chosen for searching for administrative help, the listing for each position should describe the job in detail and the qualifications needed in order to reduce the amount of unqualified applicants.\(^{27}\)

d. Tax and Organizational Issues with Employees

The tax obligations that accompany hiring employees can be complex, because employees “are subject to various state and federal taxes and tax withholding (plus additional employer’s contributions) including but not limited to Social Security, Medicare, unemployment, and other local taxes such as municipal and/or county taxation.”\(^{28}\) Observing deadlines for each of these taxes is important and a business can face penalties for incorrect reporting methods or

\(^{20}\) Id.

\(^{21}\) Id. at 4.

\(^{22}\) Id.


\(^{24}\) Id.

\(^{25}\) Id. at 56.

\(^{26}\) Id. (As one author explains, recruiters specializing in the legal field often know the status of the legal climate well enough to know “the person to call, when to call, and how to position your firm and the opportunity it presents.”)

\(^{27}\) Id. at 55.

\(^{28}\) McKerall, *supra* note 4, at 18.
Even with only a few employees, it is sometimes better to hire an accountant or qualified payroll service to perform the work rather than the attorney trying to keep track of it himself. Some of these services can be inexpensive and help small firms avoid unnecessary trouble.

**e. Bank Accounts: The Business Account and the IOLTA Account**

A law firm’s business account should only contain money belonging to the law firm; client funds should not be kept in the business account. To clearly indicate the account is for the operation of the law firm, the account should be designated as such by terms like “business account, professional account, office account, general account, payroll account, or regular account.” The accounts established must generally comply with state bar Interest On Lawyers’ Trust Accounts (hereinafter “IOLTA”) requirements. Client funds that are held for a time long enough to accrue interest should be placed in individual trust accounts in order to bear interest for the client. By contrast, smaller client funds not large enough or not held in the account long enough to bear substantial interest must be commingled into an IOLTA account. Additionally, “all client trust accounts not set up to earn interest for an individual client must be IOLTA accounts.”

The IOLTA program enables attorneys to put funds into an IOLTA account, and the interest generated by deposits go to law-related charitable purposes, such as providing free legal aid to those who cannot afford representation in civil cases. Attorneys certify their compliance with the IOLTA requirements for their client trust accounts each year in connection with their annual bar renewal.

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29 Id.
30 Id.
31 Id.
33 Id. at 7 (internal quotation marks omitted).
35 Id.
37 The IOLTA program was established by the Alabama Bar Foundation in 1987 and similar versions exist in most states. *IOLTA, supra* note 34. An IOLTA account may only be opened at “eligible banks, savings [and] loan associations or investment companies which comply with the interest or dividend requirement of [the] rule.” *Info for Lawyers, supra* note 36.
38 McIntire, *supra* note 16, at 16 (Attorneys should be familiar with the process of certification and what to do each year, along with any deadlines).
Attorneys do not have to create an IOLTA account if they do not hold non-interest bearing client trust funds.39

When a lawyer opens an account or seeks a loan from a new bank, the bank will often want to see relevant documentation, such as governing documents of the business, its financial information, year-end and quarterly statements, budget for the business, and personal financial information of the business owners.40 Thus, establishing a good working relationship with your bank can be important to the success of your practice.41

f. Malpractice Insurance

Malpractice insurance is a must for a solo practitioner. In recent decades, our society has become more litigious and clients are more inclined to sue attorneys when work does not appear satisfactory. Attorneys performing work related to real estate face the highest risk of being sued for malpractice.42 Since trusts and estates work can involve real estate, trusts and estates attorneys can be at a higher risk for malpractice suits than other attorneys.43

If a client or a former client sues you, malpractice insurance can help you and your business stay afloat as you defend your claim. Malpractice insurance often includes defense coverage for insureds facing malpractice claims.44 Such arrangements can help insured attorneys avoid ethical dilemmas with clients, can help facilitate efficient resolution of the matter, and can minimize damages.45

The amount of insurance a solo practitioner or small practice needs to purchase depends on a number of risk factors, such as the number of people working for the practice, the size of the practice’s client base, the exposure of the practice to potential claims, and the potential for substantial losses in the event a client prevails in a malpractice claim.46 Attorneys should be aware that malpractice suits

39 *Info for Lawyers*, supra note 36.
42 *See* Henry T. Henzel, Cumberland School of Law Continuing Legal Education Seminar: Solo Out of the Gate (and later), Insurance Needs for the Solo 6 (Oct. 17, 2014), noting that with respect to risk of malpractice suits, “[r]eal estate practice is the most dangerous area of practice for most attorneys.”
43 *Id.*
44 *Id.* at 11.
45 *Id.* at 9, 11.
46 *Id.* at 3.
often include damages and defense costs.\textsuperscript{47} Once an attorney decides how much insurance he or she should purchase, malpractice insurers recommend purchasing a limit slightly higher than what the attorney estimates he or she will need, just to be on the safe side.\textsuperscript{48}

After determining the extent of insurance coverage he or she will need, an attorney should consider how much of a deductible to elect.\textsuperscript{49} Factors affecting the deductible amount include the size of the practice, the financial status of the practice, and the number of claims an attorney covered during a policy period.\textsuperscript{50} Malpractice insurers recommend that smaller practices purchase a low deductible, as “high deductibles usually yield negligible savings [and] increase deductible exposure.”\textsuperscript{51}

Insurers also recommend that solo practitioners buy an Extending Reporting Endorsement, also known as “tail coverage.”\textsuperscript{52} Tail coverage serves to extend a malpractice insurance policy that is currently in force by extending the amount of additional time purchased by the insured.\textsuperscript{53} Such an extension provides security for claims that arise after an attorney moves on from the practice for which the initial policy was purchased.\textsuperscript{54}

g. Municipal Business Licensing Requirements

In order to be considered an established business within a municipality, some cities require businesses to purchase a license, pay taxes, and pay occupational fees. Whether licensing is required depends upon the law of the municipality where a law practice is located. Consider consulting an accountant, whose advice may help determine the extent of fees necessary to obtain a license.\textsuperscript{55} Some yearly business licenses and occupational taxes can be quite expensive; some taxes are assessed based on a percentage of a business’s gross income.\textsuperscript{56} Attorneys can inquire as to what the municipal licensing requirements are in their respective city by either calling the local city hall or, in Alabama, by contacting the Alabama
League of Municipalities.  

**Part III: Accreditation and Licensing**

**a. Becoming a Member of the State Bar**

Of course, as an initial matter, an attorney starting his or her own trusts and estates practice must be a member of the State Bar in which he or she wishes to practice. Detailed information about the process can be located at the Alabama Bar website, as well as the state bar websites in other jurisdictions. A new lawyer must wait until passing the bar examination before initiating the practice of law. In certain cases, lawyers who are already admitted to practice in other states may waive into a state’s bar without taking the bar exam. Attorneys whose practice spans several states should be aware of any restrictions on multi-jurisdictional practice. These restrictions are described in more detail in the section on professional responsibility lawyers later in this manual.

**b. Becoming a Notary Public**

Because routine estate planning documents often require (or benefit from) an affidavit executed before a notary public, a lawyer starting his or her own trusts and estates practice ought to seek appointment as a notary. The application process is generally simple and inexpensive. In Alabama, it involves the completion of a simple form, the endorsement of three supporters, and a $42 application fee. Notaries are required to obtain a $25,000 bond for their appointment, which costs approximately $50 (in my personal experience) and can be obtained from most insurance companies, such as State Farm.

Notaries will need certain tools to complete their duties—a seal, a stamp, and a log to record documents that have been notarized.

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60 *Infra* Part VII.
62 See *id.*
There are many Internet resources for purchasing these supplies, such as Corporate Connection. Additionally, there are several associations for notaries, such as the National Notary Association and the American Society of Notaries, but most lawyers will not find involvement with such organizations to be necessary.

**Part IV: Getting Organized**

**a. Choice of Entity—Considerations in Selection**

Solo practitioners have several options for organizing their business. In choosing a business structure, a solo practitioner must consider the tax consequences of the organizational form and how the business structure will shield employees from personal liability. Another factor to consider is the amount of time required to operate and maintain the business.

**b. Limited Liability Company**

Limited Liability Companies are governed by the Alabama Limited Liability Company Law of 2014 or similar statutes in other states. A Limited Liability Company (hereinafter “LLC”) include the protections enjoyed by a corporation, yet this type of entity possesses the tax arrangement and operational organization of a partnership. The owners of an LLC are called “members,” and the members may consist of one or more people. While corporations are taxed as business entities separate from their owners, the taxes imposed on an LLC pass through the LLC and are taxed directly to each member. Similar to a partnership, a member of an LLC reports the LLC’s financial information on his or her personal tax return.

An LLC provides a business owner with several advantages. As mentioned above, an LLC partially shields the members from being personally liable for any negative consequences of the business decisions or actions of an LLC. If an LLC provides professional

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69 Id.
70 Id.
71 Id.
72 Id.
73 Limited Liability Company, supra note 68.
services, its members are liable for “any negligent or wrongful act or omission in which the individual personally participates to the same extent the individual would be liable if the individual rendered the services as a sole practitioner.”

The members of an LLC are not liable, however,

...solely by reason of a being a member, for a debt, obligation, or liability of the limited liability company or a series thereof, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, agent, or employee of the limited liability company or a series thereof.

Furthermore, LLCs require less paperwork and formation costs than other business entities. The members of an LLC decide who contributes what amount to the company and how much each member takes away from the company.

When considering whether to form an LLC, it is important to note the disadvantages, including an LLC’s potential limited life span and the members’ statuses as self-employed. If a member leaves an LLC, the other members have an obligation to take the necessary legal and business steps to close the business; at that point, the members may then decide either to form a new LLC or end the business venture altogether. However, when forming an LLC the members may designate that the business entity shall continue to exist despite the departure of one member. Also, the members of an LLC, as self-employed individuals, must pay tax contributions toward programs such as Medicare and Social Security.

To form an LLC in Alabama, you must file various forms and documents with the Business Services division of the Alabama Office of Secretary of State. The first step is choosing a name for the LLC. Generally, the name chosen for an LLC must meet three

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76 Limited Liability Company, supra note 68.
77 Id.
78 Id.
79 Id.
80 Id.
81 Limited Liability Company, supra note 68.
83 Limited Liability Company, supra note 68.
requirements. First, the name must be unique so as to avoid confusion with any other LLC within the state. Second, the name must indicate that the business operates as an LLC. Specifically, the business’s name “must contain the words Limited Liability Company or the abbreviation L.L.C. or LLC.” Third, the name must not include any words restricted by the state which would cause people to confuse the LLC with a state or federal agency. After deciding upon a name for the LLC, you must file a Certificate of Name Reservation with the Alabama Secretary of State. This step must be completed before proceeding with filing formation documents.

Next, one must file a Domestic Limited Liability Company Certificate of Formation, provided by the Alabama Secretary of State. The members must file the original certificate and two copies in the probate court of the county where the registered office of the LLC currently is or will be located.

Additionally, the members should file Articles of Organization and an Operating Agreement. The Articles of Organization consist of a short document listing information about the LLC, such as its business name, address, and information about its members. An Operating Agreement governs the finances and organization of an LLC and enables the LLC to abide by listed rules and regulations that ensure its smooth operation. Operating Agreements also typically include information regarding the members’ ownership interests, obligations, and privileges, as well as information outlining how finances are to be handled.

While Operating Agreements are not required to form an LLC, members would be wise to have them in place. If an LLC does not have an Operating Agreement, statutory default rules govern how certain aspects of the LLC are to be handled. An Operating

84 Id.
85 Id.
86 Id.
87 Organizing Your Domestic Limited Liability Company, supra note 82.
88 Limited Liability Company, supra note 68.
89 Organizing Your Domestic Limited Liability Company, supra note 82.
90 Id.
91 Id.
92 Id.
93 Limited Liability Company, supra note 68.
94 Id.
95 Id.
96 Id.
97 Id.
98 MAYNARD COOPER & GALE PC, Doing Business in Alabama: An Introduction to Laws
Agreement allows the members of the LLC to control how they want matters to be handled within the LLC. Creating such an agreement avoids the risk of the members being subject to default rules with which they may not agree.99

c. Limited Liability Partnership

Limited Liability Partnerships are governed by the Alabama Registered Limited Liability Partnership Act or similar statutes in other states.100 In a Limited Liability Partnership (hereinafter “LLP”), two or more people share ownership of a business while having limited personal liability and a limited say in the management decisions of the business.101 The amount of influence each partner has in the business depends on the size of the business share that he or she owns.102

Advantages of an LLP business structure include inexpensive start-up costs accompanied by the shared resources of the people involved with the partnership.103 Because each partner is invested in the business, each partner is likely to make an effort to see the business succeed, whether in the form of providing work or financial resources.104 Also, because partnerships expand easily by adding additional partners, partnerships attract people willing to work hard in order to own a part of the business.105 Furthermore, both LLCs and LLPs shield the partners from liability except in instances of negligence, wrongful acts, or omissions in performing professional services.106

LLPs also have some disadvantages. Partners must consult one another when making decisions, and all partners must resolve

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99 Id.
100 Ala. Code § 10A-8-10.01 et seq. (2015).
102 Id.
103 Id.
104 Id.
105 Id.
disagreements. Each partner is invested in a portion of the business and therefore has a say in how the business is run. Thus, coming to a consensus may be a difficult. Furthermore, the shared profits of a partnership may create discord if one partner contributes more than another.

To form an LLP in Alabama, you must first reserve a name with the Alabama Secretary of State. The business name of an LLP must either include “Limited Liability Partnership,” or the abbreviation of “L.L.P.,” or “LLP.” Then, you must file an original Registered Limited Liability Partnership Certificate of Formation and two copies with the probate court in the county in which the registered office or agent of the LLP is located. Also, once established LLPs must either file an Annual Notice or an Annual Report with the Secretary of State, which is accompanied by a fee.

d. Professional Corporations

Professional Corporations are governed by the Alabama Professional Corporation Law or similar statutes in other states. A Professional Corporation (hereinafter “PC”) is organized “only for the purpose of rendering professional services and services ancillary thereto within a single profession.” PCs may issue shares, but only to qualified persons, which are persons who hold a license in the field of professional services that the PCs renders. Like LLCs and LLPs, individuals in PCs are personally liable for errors in rendering professional services, but “[t]he personal liability of a shareholder, employee, director, or officer of a domestic professional corporation, ...shall be no greater in any respect than that of a shareholder, employee, director, or officer of a corporation organized under the Alabama Business Corporation Law.”

Advantages of PCs include limited liability, the ability to generate capital, and corporate tax treatment. Generally, shareholders in a PCs are only responsible for the money they

107 Partnership, supra note 101.
108 Id.
110 Id.
111 Id.
112 Ala. Code § 10A-4-1.01 (2015).
personally invest in the company. However, professional companies can alleviate some of the financial liability of shareholders by selling more stock and thus raising more money for the company. Furthermore, PCs are taxed separately from the shareholders.

Disadvantages of PCs include costly start-up expenses, double taxation, and increased paperwork. PCs typically take more time and money to create than LLCs or LLPs. Furthermore, PCs are technically taxed twice: once when the PC generates income, and a second time when money is paid to the shareholders. Another disadvantage is that maintaining a PC often requires the completion of more paperwork than is required for an LLC or LLP because of the heightened recordkeeping burdens placed on owners.

To establish a PC, you must first file a name reservation. The name must designate the business as a PC by including the words “Professional Corporation” or “PC.” Then, you must file a Domestic Business Corporation Certificate of Formation along with Articles of Incorporation. The Articles of Incorporation must include a statement explaining the purpose of the PC, which is the rendering of a particular professional service. Furthermore, the Articles of Incorporation must indicate that the business is incorporating as a PC.

e. Sole Proprietor

A sole proprietorship is an unincorporated business structure in which the person and the business are one entity, and a sole proprietorship is not governed by statute under Alabama law. The owner of a sole proprietorship does not have to take any action to form his or her business; he or she is entitled to all profits and responsible

\[117 \text{ Id.} \]
\[118 \text{ Id.} \]
\[119 \text{ Id.} \]
\[120 \text{ Id.} \]
\[121 \text{ Corporation, supra note 116.} \]
\[122 \text{ Id.} \]
\[123 \text{ Id.} \]
\[124 \text{ See ALA. CODE } \text{§ 10A-1.5-5.08 (2015); see also State of Alabama Domestic Entity Name Request Form, ALA. SEC’Y ST., (last visited Jan. 27, 2016) (noting that “the name of a professional corporation must contain the words “professional corporation” or the abbreviation “P.C.” or “PC.”) } \]
\[126 \text{ ALA. CODE } \text{§ 10A-4-2.02 (2015).} \]
\[127 \text{ Id.} \]
\[128 \text{ Sole Proprietorship, U.S. SMALL BUS. ADMIN., http://www.sba.gov/content/sole-proprietorship-0 (last visited Dec. 13, 2015).} \]
for all losses and liabilities of the business. Thus, the owner pays
taxes directly on any profits obtained by the sole proprietorship.

If the owner of a sole proprietorship in Alabama wants to
operate under a name other than his or her own, he or she will need
to file an application and pay a fee for a “service mark” with the
Alabama Secretary of State. A service mark identifies services
rendered by the sole proprietorship. Filing such an application and
having the application granted makes the sole proprietor the owner of
that service mark. Under Alabama law, “once [a person] adopts and
uses a mark and [is] documented as the first to use such mark, [that
person] is entitled to exclusive rights to that mark” per the common
laws of adoption and usage in Alabama. If there is “[a]ny conflict of
ownership,” that issue “is handled outside the Secretary of State’s
Office and is an issue for the courts.” The Alabama Office of
Secretary of State has a database that contains information for all
marks registered in Alabama.

A sole proprietorship has its advantages in that the owner can
easily and inexpensively form the business, has complete control over
the business, and does not have to prepare a separate tax return.
Furthermore, the tax rates for a sole proprietorship are the lowest of
any business structure. The disadvantages of a sole proprietorship,
include the unlimited personal liability, difficulty in raising money to
keep the business afloat, and the burden of operating a business
single-handedly.

Some solo practitioners may want to use their personal name
as their business name, but others wish to operate the business under
another name. While some business structures, such as LLCs, LLPs,
and PCs, require the designation of a name during legal formation,
others, such as sole proprietorships, do not. For businesses that do
not have to reserve a business name as part of their formation yet
seek to have the legal rights to a specific business name, obtaining a

129 Id.
130 Id.
131 Trademarks, ALA. SEC’Y ST.,
132 Id.
133 Id.
134 Trademarks, supra note 131.
135 Search by Mark Name/Description, ALA. SEC’Y ST., http://arc-
sos.state.al.us/CGI/TMMARK.MBR/INPUT (last visited Dec. 13, 2015).
136 Sole Proprietorship, supra note 128.
137 Id.
138 Id.
service mark is a wise idea.\textsuperscript{139}

One important consideration in choosing a business name is the image that the name will convey.\textsuperscript{140} If a business specializes in a specific area of the law, the owner may consider crafting a name that suggests such a specialty.\textsuperscript{141} Business owners must be careful, to avoid names that may imply connections with government agencies or charitable services.\textsuperscript{142} Another category to avoid is names that mislead the public as to the size or capabilities of the business. Some state bar associations have frowned upon practices such as adding “and Associates” to a business name when only one attorney operates the business, or using the term “offices” when the business only has one office.\textsuperscript{143}

Another important consideration is the uniqueness of the business name,\textsuperscript{144} so that it will not be confused with other businesses.\textsuperscript{145} Furthermore, a unique name allows for a business to claim a website address containing the name of the business, and to establish an easily recognizable presence on social media.

f. Forms and Resources for Creating Your Legal Entity in Alabama

Forms for creating your LLC, LLP, or PC can be downloaded from the Alabama Secretary of State website.\textsuperscript{147} Attorneys using any form will want to complete the State of Alabama Name Reservation Request Form for Domestic Entities and a State of Alabama Application to Register Trademark, Service Mark, or Trade Name in Alabama. Those forming an LLC will complete a State of Alabama Domestic LLC Certificate of Formation. Those forming an LLP will complete the State of Alabama Domestic Registered Limited Liability Partnership Certificate of Formation. Finally, those forming a

\textsuperscript{139} Trademarks, supra note 131. According to the Alabama Secretary of State service mark application process, a service mark is “any word, symbol, logo, slogan or combination thereof adopted and used by the applicant to identify services rendered.” See Instructions to Application to Register Trade Mark, Service Mark, or Trade Name in Alabama, available at http://www.sos.state.al.us/downloads/land/int-1.pdf?8040799 (last visited Jan. 11, 2016).


\textsuperscript{141} Id.

\textsuperscript{142} James Ellis Arden, Ethics Perils of Opening a Law Office, 31 GPSOLO 1 (Jan./Feb. 2014); see also MODEL RULES OF PROF’L CONDUCT r. 7.5 (2014); ALA. RULES OF PROF’L CONDUCT r. 7.5 (2015).

\textsuperscript{143} Arden, supra note 142.

\textsuperscript{144} Choose Your Business Name, supra note 140.

\textsuperscript{145} Id.

\textsuperscript{146} Id.

\textsuperscript{147} Business Entities Downloads, supra note 125.
Corporation will complete the State of Alabama Domestic Business Corporation Certificate of Formation\textsuperscript{148}

\textbf{Part V: Financial Matters}

\textit{a. Pricing Services—Generally}\textsuperscript{149}

Pricing presents multiple challenges for the new trusts and estates practitioner. Considerations include following state Rules of Professional Conduct on fees, understanding the role of the courts in compensation, discerning payment for legal services from payment for administrative services, and deciding whether to use flat rates, hourly billing, or retainers based on different levels of client engagement. Despite the complexities of picking the right price for your legal advice, the key for the practitioner in each of these considerations often is simply discussing the matter with a prospective client and memorializing the fee arrangement in the engagement letter.

A trusts and estates practice has the potential to encounter “tremendous variation in the scope of problems...in settling estates,” everything from simple wills and their prompt administration to complex estates that potentially require years to administer.\textsuperscript{149} In any particular instance of estate administration, some problems may arise that the attorney and client did not anticipate at the beginning of their relationship.\textsuperscript{150} While setting forth the basis of the attorney’s fee in the client engagement letter will reduce the potential for misunderstanding, the engagement letter must also anticipate and provide for the possibility of revision as administration proceeds. This minimizes the risk of surprising or frustrating clients if and when additional expenses are incurred. Therefore, it is important to address potential eventualities in the engagement letter that may not have existed initially.\textsuperscript{151}

\textit{b. Pricing—Flat Rates for Fixed Services}\textsuperscript{152}

Flat rates for fixed services are a popular and broadly accepted method of charging legal fees for a variety of estate plans and estate

\textsuperscript{148} Id.; Trademarks, supra note 131.


\textsuperscript{150} Id. at 28.

\textsuperscript{151} Id. at 28-29; see also \textit{AM. COLL. TRUST & ESTATE COUNSEL, ENGAGEMENT LETTERS: A GUIDE FOR PRACTITIONERS} 73 (2d ed. 2007) (hereinafter “\textit{ENGAGEMENT LETTERS}”).

In the \textit{ENGAGEMENT LETTERS} forms, accommodation is partly achieved through language like the following: “Significant changes in the scope of the services required or significant revisions to any documents that we have prepared will be charged separately, but any additional charges will be explained to you before any revisions are begun.”
administration. Flat fees are particularly appealing to clients in simple trust and estate matters because they provide certainty in pricing. For attorneys, flat fees offer high profit potential where attorneys can quickly and efficiently render services and produce quality trusts and estates documents. Flat fees act like prepayment by the client for the particular legal services that the attorney must perform. In Alabama, a flat fee received prior to the conclusion of representation is not considered “earned” until the contemplated services have been performed or completed. To the extent those services have not yet been rendered, the fee is refundable to the client and must be held in the attorney’s IOLTA account. Even when using a flat fee, the prudent trusts and estates practitioner should keep records tracking time spent and progress made on the tasks necessary to achieve the client’s goals. Keeping records may help insulate the attorney in the unfortunate event that a client disputes a fee (whether as a result of sticker shock or displeasure with the attorney’s performance) and seeks redress through the courts.

In addition to time spent, a trusts and estates practitioner using a flat rate for fixed services can only benefit from detailing and recording the added value resulting from the quality of work the attorney provides and the strategic decision-making advice the attorney provides. Many potential clients will come into a practitioner’s office knowing that they can go online and download a simple last will and testament form for less than ten dollars.

153 Douglas R. Richmond, Understanding Retainers and Flat Fees, 34 J. LEGAL PROF. 113, 114 (2009-10).
154 See Jennifer J. Rose, The Ten Commandments of Family Law Economics, 39 PRAC. LAW, 83, 85-86 (1993) (warning, however, that misjudging a client’s needs will result in working for a reduced effective hourly rate).
155 Richmond, supra note 153, at 118-19. Thus, “it is important to spell out in detail what the client should expect to be done” in the engagement letter. Reynolds, supra note 152, at 389. See also ENGAGEMENT LETTERS, supra note 151, at 73. (A form engagement letter with sample language detailing the flat fee and other expenses).
157 Id. at 65-6; see ALA. RULES OF PROF’L CONDUCT r. 1.15 (2015).
158 See Ala. State Bar v. Hallett, 26 So.3d 1127, 1137 (Ala. 2009) (An example of how lawyers can mislead themselves into thinking that a flat fee arrangement obviates the need for record-keeping and wind up in a lot of trouble, even when they obtain written fee agreements from clients).
159 Richmond, supra note 153, at 134-35.
160 See id. at 135.
161 Websites like LegalDocs.com and LegalZoom.com sell generic and customizable
Unless potential clients already know that they require beyond a bare-bones form, the attorney may have to explain to them why the attorney’s services are more valuable and thus more costly—or why a different attorney would charge a different price for the same service.\textsuperscript{162} Factors like an attorney’s expertise and the relative complexity of a client’s estate planning form a useful part of a client’s understanding of what he or she is contracting for through a flat fee, i.e., reduced risk, improved quality, customer support, and peace of mind.

c. Pricing—Hourly Billing

Hourly rates vary and are not set by any guidelines or national standards.\textsuperscript{163} Keeping professional conduct rules in mind, flat fees and hourly rates similarly require trust and estate practitioners to keep prospective clients in mind when formulating and describing their rates.\textsuperscript{164} The engagement letter with an hourly rate client should set forth the attorney’s rate, whether the hourly rate may change, and how often the client will be billed.\textsuperscript{165} Charging an hourly rate provides an attorney some measure of protection against lost profitability in cases where the time commitment required is lengthy or uncertain.\textsuperscript{166} For clients, however, agreeing to hourly billing means giving up “some measure of control regarding the direction and cost of their legal services,” and even incentivizing inefficiency.\textsuperscript{167} Providing an estimate of the cost of the entire representation can help reduce client anxiety about turning over some price control to the attorney.\textsuperscript{168} Conversely, for the novice practitioner, accurately estimating the amount of time a case may take remains challenging until he or she gains the experience

\textsuperscript{162} Consider how lawyer rating websites and forums facilitate communication between clients and potential clients about the costs they have encountered for legal services—and how that can increase pressures to compete on price.


\textsuperscript{164} See Reynolds, supra note 152, at 390; Link, supra note 149, at 26-27.

\textsuperscript{165} Reynolds, supra note 152, at 390; ENGAGEMENT LETTERS, supra note 151, at 73.

\textsuperscript{166} See Rose, supra note 154, at 86.


\textsuperscript{168} See Reynolds, supra note 152, at 389.
necessary to establish a reliable timing baseline.169

Lawyers must also be sensitive to the balance between technological efficiency and sustainable hourly rates. Just as increasing access to common legal documents online exerts downward pressure on trusts and estates practitioners' flat fees, an attorney's own collection of documents drafted for former clients reduces the time required for the attorney to produce similar documents on behalf of future clients.170 Cut-and-paste techniques can cut into profits for the attorney using hourly rates. This creates the ethical dilemma of wanting to bill clients equitably for the value they receive, while maintaining sufficient billable hours to meet the attorney's overhead without charging one client for time the attorney spent working for another client.171 While the engagement letter is a powerful tool for explaining to clients what exactly they are paying for, technological efficiency can only be expected to increase over time and remain an intractable problem for systems centered exclusively on hourly rates.172

d. Pricing—Alternative Approaches

Enterprising lawyers building their own trusts and estates practice have the opportunity to explore alternative billing arrangements which large, established firms may not feel free to pursue. Incentive fee arrangements, in which the lawyer's fee varies based upon the client's outcome, could be used in litigation scenarios.173 Incentive fee arrangements have the advantage of aligning attorney interests (higher fees) with client interests (lower settlement or judgment costs, preservation of trust or estate assets).174 Task-based billing could be adopted in transactional work where the

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169 Advancements in time keeping and billing software can help attorneys monitor their own work over time and assess the value of their services more easily than in the past. See Jones & Glover, supra note 167, at 307.

170 See id. at 299-300.

171 Id. at 300-03.

172 See id. at 296-97 (Among possible (if unlikely) solutions: increased productivity attracts more business, law firms downsize or trim margins, or clients agree to increased hourly rates). Given that since 1973 productivity growth has increased by 80.4% while real hourly compensation for the median worker has increased by only 10.7%, no one should expect attorneys (and all but their richest clients) to be immune to the myriad forces which have decoupled productivity and pay. See Lawrence Mishel, The Wedges Between Productivity & Median Compensation Growth, ECONOMIC POLICY INSTITUTE 3 (Apr. 26, 2012), http://www.epi.org/publication/ib330-productivity-vs-compensation/.

173 See Jones & Glover, supra note 167, at 304-05 (The lower the cost at which the attorney resolves the dispute on behalf of the client, the higher percentage of her fee she earns—but if costs exceed expectations, she earns less).

174 Id. at 305.
trusts and estates practitioner and client have clear expectations
about the work that needs to be produced, such as a will or power of
attorney document. The task-based attorney can gain efficiency if
she completes the work early, while the client gains greater control
over cost compared to a client paying by the hour. Additionally,
task-based billing affords the attorney and client scalability to
complex estate administration or tax planning activities traditionally
covered by hourly rates (and outside the scope of flat fees). As long
as the activities can be broken down into discrete phases and tasks,
and the attorney and client agree on the value of those parts,
planning and communication between attorney and client can proceed
without the ambiguities of traditional billing structures.

e. Pricing—Retainers

The engagement letter is a vital tool to communicate how and
when an attorney is entitled to invade a fee paid as a “retainer.”
Attorneys and clients should make very clear to one another what
they understand a “retainer” to mean. The typical language of a
retainer clause in an engagement letter often expresses a security
or advance fee deposit for future legal work rather than a general
retainer paid to secure the attorney’s representation exclusively for
the paying client. Such security retainers are useful ways for
attorneys to reduce the risks of client nonpayment over the course of
representation. These arrangements can also help protect an
attorney in situations where protracted litigation depletes the trust or
estate assets a client had intended to use to pay the attorney.

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175 Id. at 305-306.
176 Id. at 306.
177 Id.
178 Jones & Glover, supra note 167, at 307.
179 See McLain, supra note 157, at 66.
180 See e.g., ENGAGEMENT LETTERS, supra note 151, at 89 (“We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit...when we expect that we will incur substantial costs on your behalf.”) (Such advance payment retainers are “present payment[s] to a lawyer as compensation for...specified legal services in the future.”)
181 Richmond, supra note 153, at 115-17 (Classic retainers for an attorney’s employment are “deemed to be earned when paid,” and “[a]s a practical matter...are rare,” reflecting the few situations that require them (and the few attorneys who can command them)).
182 Id. at 117. For more advice on avoiding the pitfalls of retainer drafting, see Mark A. Neubauer, Attorney Fees: How to Avoid a Conflict with your Client, 28 GPSOLO 2 (Mar. 2011), http://www.americanbar.org/publications/gp_solo/2011/march/attorney_fees_how_to_avoid_a_conflict_with_your_client.html.
183 The alternative retainer language in ENGAGEMENT LETTERS, supra note 151, at 89-90,
Attorneys must exercise caution when using either general or special retainers. Consider for example, the Alabama Supreme Court has declared nonrefundable retainers “forbidden in Alabama” and looks with intense skepticism upon unearned fees or retainers. While “a true availability-only retainer,” in writing and approved by the client in advance of payment, may be an exception to the rule, “[a]ny attempt by an attorney to circumvent the rule that all retainers and fees are refundable by mischaracterizing a fee as an availability-only retainer would be an ethics violation.” Disputed retainers will be scrutinized for their substance over form. Thus, clear and specific drafting should be supplemented with evidence. In the case of a general retainer, a written agreement should explain the retainer’s relationship to Alabama Rules of Professional Conduct (hereinafter “ARPC”) Rule 1.5(a)’s factors or other state’s similar rules. In some circumstances, the agreement should also explain the retainer’s relationship to the income a lawyer foregoes by representing the retaining client to the exclusion of others. In the case of a special retainer, a written agreement should include documentation of time and expenses applied against client funds held in trust. Because of the usefulness of retainers (and likewise flat fees) in securing attorney compensation and the potential ethical concerns that can accompany them, substantial care is warranted.

f. Pricing—Sophisticated Representation

Trusts and estates practitioners encounter additional challenges in pricing their services when taking on sophisticated cases involving extensive taxes, Medicaid planning, or the management of complex assets such as a closely-held business. The particulars regarding how outside professionals like accountants and appraisers will be handled should be made clear in the engagement
When the attorney works as both the fiduciary and the attorney to the fiduciary—providing both legal services and administrative services to an estate or trust—care should be taken to avoid commingling time and expense records for each of those roles.

The Alabama Supreme Court has recognized that an attorney serving as executor may employ himself or herself as an attorney without creating a conflict of interest. Nevertheless, fees earned in either capacity may be subjected to judicial review for reasonableness, reinforcing the importance of careful and separate documentation.

Under Alabama law, reasonableness of an attorney’s fee is determined in relation to the ARPC Rule 1.5(a). When a trial court exercises its discretion to adjust an attorney’s fee it considers unreasonable, the court must provide a sufficient explanation of what factors it evaluated in making that determination. Similarly, a court examining the reasonableness of a personal representative’s compensation looks to a statutory list of factors. Because many of the same factors point to the reasonableness of both attorney fees and fiduciary compensation, lawyers can leverage practices developed

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189 See ENGAGEMENT LETTERS, supra note 151, at 4-8. Other chapters in ENGAGEMENT LETTERS provide supplemental checklists for various situations, such as when an estate-planning attorney also serves as a fiduciary.


191 Mills v. Neville, 443 So.2d 935, 937-38 (Ala. 1983) (allowing the attorney serving as executor to represent the estate in a wrongful death suit and earn a contingency fee); Ruttenberg v. Friedman, 97 So.3d 114, 137-39 (Ala. 2012) (allowing attorneys serving as co-executors to retain their law firms to assist them with bankruptcy litigation and estate-tax return preparation related to the estate’s administration, particularly in light of the decedent’s will expressly providing such authorization).

192 Kuo, supra note 190 (“The nearly universal benchmark for attorney’s fees in trusts and estates is whether they are ‘reasonable.’”)


194 See ALA. CODE § 43-2-682 (2015) (“[T]he court having jurisdiction…may also fix, determine and allow an attorney’s fee or compensation, to be paid from such estate…”); Van Schaack, 530 So.2d at 749.

195 See Kiker v. Prob. Ct. of Mobile Cty., 67 So.3d 865, 868 (Ala. 2010) (remanding a probate court order to award attorney’s fees because it did not indicate “how the probate court calculated the attorney fees nor provide[d] a basis for ascertaining the exact amount” by applying the Van Schaack factors).


197 Compare ALA. CODE § 43-2-848(a), with Van Schaack, 530 So.2d at 749 (§ 43-2-848(a) differs chiefly from the Van Schaack factors by including a percentage limit on total compensation).

ALA. CODE § 43-2-849 (2015) allows a personal representative to pay reasonable attorney
in one aspect of their work to anticipate fee disputes in another as they take on more complex cases.\textsuperscript{199}

\textbf{g. Billing—Software}

Pricing and billing are two sides of the same coin. Just as the engagement letter should detail how much the attorney will charge, the letter should also explain how and when the attorney will bill the client.\textsuperscript{200} Technology allows the attorney to track costs and time spent. In turn, the attorney has more ways than ever to itemize and report costs to clients, whether in terms of hourly rates or in terms of set-value services.\textsuperscript{201} Billing software available to attorneys today ranges from simple timekeeping tools to integrated practice management suites that encompass timekeeping, billing, scheduling, document drafting, client communication, and research.\textsuperscript{202} Software like Clio, Rocket Matter, and LexisNexis Firm Manager all offer timekeeping, expense-tracking tools, and invoice generators.\textsuperscript{203} Many programs offer applications for mobile devices, which assist an attorney in tracking time when working away from the office.\textsuperscript{204} The key to a trusts and estates practitioner’s success is to find a tool that helps the practitioner build good habits of contemporaneous timekeeping, even if his or her billing software is good old-fashioned pen and paper.\textsuperscript{205}

A solo or small firm practitioner should note that learning to use new software systems and getting those systems to work with different kinds of hardware may potentially eat into billable hours fees incurred in good-faith legal proceedings. “Reasonable” fee and compensation standards also appear in trust law and guardianship/conservatorship law. See ALA. CODE § 19-3B-708(a), (b) (2015) (reasonable trustee compensation); ALA. CODE § 19-3B-816(a)(28) (2015) (trustee power to pay reasonable attorney’s fees); ALA. CODE § 26-2A-142(a) & (b) (2015) (reasonable compensation for conservators and guardians ad litem).

\textsuperscript{199} See Info for Lawyers, supra note 36, and accompanying text.

\textsuperscript{199} See Pharmacia Corp. v. McGowan, 915 So. 2d 549, 553-54 (Ala. 2004) (criticizing the trial court and the attorney-administrator ad litem for failing, respectively, to demand or provide time records supporting a disputed fee).

\textsuperscript{200} See, e.g., ENGAGEMENT LETTERS, supra note 151, at 74 (sample language for bills due when rendered).

\textsuperscript{200} See Jones & Glover, supra note 167, at 307.

\textsuperscript{201} See Wells H. Anderson & JoAnn Hathaway, All-in-One Practice Management Applications, 31 GPSOLO 4, 51-52 (July/Aug. 2014).

\textsuperscript{201} See Ann M. Guinn, Tasty Solutions for Timekeeping, Billing, and Accounting, 31 GPSOLO 4, 46, 48 (July/Aug. 2014). (For more information on Clio, visit www.goclio.com; for Rocket Matter, www.rocketmatter.com; and for LexisNexis Firm Manager, www.firmmanager.com/features/).

\textsuperscript{204} See Guinn, supra note 203.

\textsuperscript{204} \textsuperscript{Id.} at 48 (Capturing time as close as possible to when it is billed reduces the potential for inaccurate recollection, preventing income loss and billing clients more fairly).
and even personal time. Unlike lawyers at a large firm, solo practitioners have great flexibility and freedom in choosing what technologies they use. Solo practitioners are often more likely than attorneys at large firms to use Macs, newer versions of Windows, and web-based or cloud services. Hiring a qualified technology professional to assist with setting up computers, networks, and software can save an attorney valuable time. When evaluating which billing software to use, the trusts and estates practitioner should keep in mind whether he or she plans to use flat fees, hourly billing, or other alternative billing methods. Timekeeping is critical for an attorney regardless of how he or she plans to price his or her work. For attorneys using task-based billing, effective timekeeping has to be supplemented with using the software to efficiently and consistently identify and track tasks, phases, and activities.

h. Billing—Credit & Debit Cards

A trusts and estates attorney must also consider the ways in which a client might pay for services. In addition to informing the client about the basis and timing of billing, the engagement letter also offers an important opportunity to determine payment methods. Some clients may prefer the convenience of paying with credit or debit cards, as opposed to checks or cash, and practitioners who accept them may find that acceptance attracts clients, increases cash flow, and reduces collection costs. Accepting credit and debit cards lets a firm add an online bill payment option to its webpage, and with a mobile credit card reader attached to a smartphone, an attorney can potentially handle billing anywhere he or she happens to be. The chief concern with accepting credit card payments is the risk of

207 Solo Technology Trends: Survey Shows Solos Leading in Some Areas, Lagging in Others, 37 LAW PRAC. 8, 23 (2011) (Note, however, that the onus falls squarely on the solo practitioner to consider things like backup services and how to budget for technology).
208 Lisson, supra note 206, at 69.
209 Guinn, supra note 203, at 48 (noting how timekeeping provides essential feedback about non-hourly work’s value).
210 David S. Goldstein, Task-Based Timekeeping: Technology’s Role in Solving the Puzzle, 15 LEGAL MGMT. 73, 73-74 (1996); see id. at 76 (Other important features to consider are automation and customization).
211 Amy Porter, Boost the Bottom Line: Accepting Credit and Debit Cards Pays Dividends for Law Firms, 28 LEGAL MGMT. 18, 18 (2009).
212 Id. at 20.
213 SQUARE, INC., (2015), http://www.squareup.com (Consider how mobile devices can facilitate attorney interactions with clients whose movement is impaired or restricted and cannot easily travel to an attorney’s office—or how an attorney could eventually go “officeless” if everything from document assembly to probate recordation to billing can be done from the convenience of a tablet computer. Smartphone and tablet-enabled credit card readers include products like Square).
chargebacks, but this concern can easily be addressed by documenting the work done by the law firm and taking care to obtain client signatures authorizing credit card transactions.\textsuperscript{214}

\textbf{i. Accounting and Bookkeeping}

To open a trusts and estates practice, solo or small-firm practitioners must be willing to take responsibility for their finances.\textsuperscript{215} Basic budgeting will help “maintain control over expenses and exert discipline over…spending.”\textsuperscript{216} Understanding where cash flows out of the business begins with listing known expenses for the operation of the office, especially recurring monthly expenses like the phone bill and less frequent ones like estimated quarterly tax payments.\textsuperscript{217} Accounting software can make this process easier.\textsuperscript{218} Based on estimates of each month’s expenditures, an attorney can determine how much money he or she must earn each month to break even. This calculation will help determine the correct hourly rate the attorney must charge and the number of billable hours necessary to achieve that goal.\textsuperscript{219} Accounting software that generates a chart of accounts facilitates monitoring the firm’s income and expenses.\textsuperscript{220}

Because a law firm’s IOLTA account will require separate accounting, legal-industry specific accounting software may be more useful than general business accounting programs.\textsuperscript{221} In keeping with ARPC Rule 1.15(e), an attorney evaluating accounting software should make sure the program can generate ledger records for each of her client trust accounts, track all transfers and disbursements, and reflect individual bills for legal services rendered.\textsuperscript{222} Some examples of accounting software attuned to the needs of lawyers include: Tabs3 Financial Software,\textsuperscript{223} QuickBooks,\textsuperscript{224} and cloud-based FreshBooks.\textsuperscript{225}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{214} Porter, supra note 211, at 20.
\item\textsuperscript{215} Laura A. Calloway, \textit{Going Solo: Do You Have What It Takes?}, 72 ALA. LAW 376, 377 (Sept. 2011).
\item\textsuperscript{217} Id.
\item\textsuperscript{218} Id.
\item\textsuperscript{219} Id.
\item\textsuperscript{220} Natalie R. Thornwell, \textit{Accounting}, 20 GPSOLO 8, 55 (Dec. 2003).
\item\textsuperscript{221} Id.
\item\textsuperscript{223} Thornwell, supra note 220, at 55 (for more, TABS3 (2015), http://tabs3.com).
\item\textsuperscript{224} Frank T. Lockwood, \textit{Ten Things a Small Firm Owner Should Never Do}, 31 GPSOLO 1, 62, 64 (Jan./Feb. 2014) (for more, INTUIT QUICKBOOKS (2015), http://quickbooks.intuit.com).
\end{itemize}
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Deciding to handle bookkeeping, accounting, and related tasks like payroll internally does mean that the attorney will have to set aside time to learn the accounting software, make the necessary entries, and take responsibility for any errors. Should an attorney decide to hire a bookkeeper or outsource bookkeeping functions, the attorney will, as a tradeoff, incur additional expense and lose some measure of control and immediate access to the firm’s present financial status. However, software like QuickBooks, which facilitates monitoring and automates the generation of financial reports, mitigates some of the drawbacks of adding additional layers of administration. Even if an attorney hands the firm’s accounting work over to a staff member or outside bookkeeper, the attorney is still obligated to safeguard client funds. The attorney must regularly review the firm’s finances and understand the significance of the numbers on the balance sheet.

**Part VI: Building Your Business and Professional Development**

**a. Marketing and Advertising**

Understanding how to market and advertise a lawyer’s services requires integrating those concepts into the lawyer’s overall business strategy. Marketing and advertising entails an analysis of client needs, attorney services, and their happy union through the alchemy of supply and demand. Part of a lawyer’s marketing and advertising plan should therefore include a catalogue of the types of services the attorney is able to provide. To better frame what these services are, both for purposes of identifying them to assess their economic value and to communicate them to potential clients, a trusts and estates lawyer may wish to contrast what he or she can offer to a client with two things: (1) what the state’s intestacy statute provides as a default estate plan and (2) what the probate code demands in administrative activities like distributions or the sale of property.

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226 Id.
227 Lockwood, supra note 224, at 64.
228 Id.
229 Calloway, supra note 215, at 377.
231 See id.
232 Id.
233 See id.
234 Link, supra note 149, at 111 (discussing legal education as marketing). See also Cynthia
Any lawyer opening his or her own practice should note that: “[t]he most successful self-employed lawyers are the ones who can recognize emerging problems that other lawyers aren’t even aware of yet and devise affordable legal solutions for average, middle-class clients.”

Access to legal services generally skews towards corporations and the very wealthy, despite “significant unmet need” among Americans with incomes below the top twenty percentage.

Creative solo and small-firm practitioners can find ways to keep overhead costs low in order to reach price-sensitive middle-income clients. Community involvement can provide the attorney with avenues to hear potential clients’ concerns and identify unmet needs. In addition, an attorney’s engagement with various communities shapes how clients and other referral sources view the attorney beyond his or her work as a lawyer.

Once a lawyer has decided what services to utilize, a marketing and advertising strategy puts that decision into action. “Referrals are the most cost-effective and most productive marketing” an attorney can do. Social media makes building and maintaining relationships and contacts easier and cheaper than ever. Lawyers should effectively communicate the skills and services they can offer to the public. In order to do this, practitioners should make use of alumni networks and LinkedIn profiles, and should publish articles and teach Continuing Legal Education (hereinafter “CLE”) seminars. This real-world connectivity will heighten awareness of the practitioner’s quality of services and reputation, and is a strategy that can lead to many referrals from fellow attorneys and other professionals. Among clients, an attorney has opportunities to

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Sharp, "Low-Cost (or No-Cost) Marketing for Lawyers," 31 GPSolo 4, 43-44 (July/Aug. 2014) (on differentiation from competitors).
Calloway, supra note 215, at 377.
Id. at 115-17.
Id. at 132-33. Also, professionals in related fields like social work, nursing care, and medicine can be important collaborators and sources of information for attorneys planning an elderly or disabled client’s care.
See Sharp, supra note 234, at 45.
Wheeler, supra note 239, at 16 (on social media’s potential to get your knowledge and expertise in front of others).
Sharp, supra note 234, at 44-45 (describing brand-building as an expert in a field).
Rose, supra note 154, at 86-87 (evaluating cases taken for “professional profit” over financial profit).
generate additional business by cross-marketing his or her other services to established clients, as well as by drawing in additional referral clients. Consider how unbundling the entire estate planning package into its constituent elements allows a trusts and estates attorney to lower the cost of entry for a middle-income client by offering an à la carte selection of services. The attorney gets a client who could not have gone to a firm that does all-inclusive high net worth tax planning, and the client gets estate planning services customized to fit his or her needs and ability to pay.

b. Organizations and Networking

An important part of building a trusts and estates practice is becoming involved in suitable organizations that can lead to networking opportunities as well as professional support. Birmingham, Alabama is fortunate to have a robust and friendly estate planning community with many organizations that can further an attorney’s practice. Many of these organizations are members of national groups, so lawyers practicing in other areas of the country may be able to locate your local chapter.

One key organization to join is your local branch of the National Association of Estate Planners and Councils (hereinafter “NAEPC”). Information on how to join, as well as dues owed and monthly meeting dates, is listed on the website. A local branch of the NAEPC functions to bring together the broad collection of professionals whose careers touch upon estate planning, including lawyers, insurance underwriters, trust officers, and accountants. NAEPC also offers certifications to its members, including the Accredited Estate Planner certification (hereinafter “AEP”) and Estate Planning Law Specialist (hereinafter “EPLS”). Birmingham, Alabama’s branch of the NAEPC is the known as the Estate Planning Council of Birmingham.

Many trusts and estates lawyers also find it helpful to join the American Bar Association’s Section on Real Property and Trusts and

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245 Id. at 92-93 (encouraging attorneys to think about how available services intersect as client needs evolve).

246 Juergens, supra note 236, at 133-34 (assessing the tradeoffs of unbundling legal services to lower costs).


248 Id.

249 Id.; see also Application Form, EST. PLANNING COUNS. OF BIRMINGHAM, INC. (2015), http://birminghamepc.org/members/application.


Estates (hereinafter “RPTE”). RPTE hosts frequent CLEs as well as other events for its members to gather. RPTE also offer quality publications, including the highly regarded Real Property, Trust and Estate Law Journal. Law students may join RPTE at a reduced price while still in law school.

Trusts and estates lawyers whose practice focuses on Elder Law may also find it helpful to join the National Academy of Elder Law Attorneys (hereinafter “NAELA”). Elder Law is generally considered to include estate planning, probate, and other matters that affect the aged, such as elder abuse and disability planning. NAELA offers educational seminars, including online seminars, as well as several publications on Elder Law. They also host meetings and other events for members. NAELA’s membership is open to new lawyers and even to law students.

Another networking and professional development opportunity, although not strictly an organization, is the Heckerling Institute on Estate Planning, hosted by the University of Miami School of Law. Every January, hordes of estate planning lawyers

descend upon Florida for excellent CLE, networking, and camaraderie. Many consider this convention to be the most important national gathering of trusts and estates specialists. The meeting tends to focus on current developments and is geared toward the advanced practitioner.262

A final organization of note to new practitioners is the American College of Trust and Estate Council (hereinafter “ACTEC”).263 Membership requires fellows to have a minimum of ten years of experience, exhibit unusual professional accomplishment, and be elected by their peers.264 Although joining as a new lawyer is not possible, the website offers many useful resources, including a list of Fellows by state, which can be handy if you need to collaborate with an experienced expert or refer a complicated matter.265

There are also multiple organizations that are not unique to trusts and estates but are open to lawyers in general, such as the American Bar Association,266 State Bar Associations,267 City Bar Associations,268 and other groups.269 There are also additional certifications that can be obtained by lawyers and other individuals who specialize in certain areas, such as trust administration, financial planning, and insurance. Examples of these designations are the Certified Trust and Financial Advisor (“CTFA”),270 Certified Financial Planner (“CFP”),271 and the Chartered Life Underwriter (“CLU”).272 Obtaining these certifications and joining their associated groups may

264 See id.
271 The CFP designation is offered by the Certified Financial Planner Board of Standards. See CFP Certification Requirements, CFP BOARD, http://www.cfp.net/ (last visited Dec. 16, 2015).
also lead to networking and professional development opportunities.

Part VII: Legal Ethics in Trusts and Estates

A trusts and estates lawyer’s responsibilities as a professional reflect the standard of care owed by any attorney; however, trusts and estates practice routinely presents a number of particular issues that warrant special attention. The American Bar Association (hereinafter “ABA”) adopted its Model Rules of Professional Conduct (hereinafter “MRPC”) as standard guidelines for attorney ethics across the country and across practice areas.273 “ACTEC” issued a set of Commentaries to the Model Rules to provide additional guidance to Trusts and Estates practitioners.274 In Alabama, the Alabama Legal Services Liability Act defines the basic standard of care required of attorneys in the state,275 and the ARPC set forth Alabama lawyers’ ethical responsibilities.276 Attorneys practicing in other states should consult their own local ethics variations, although many are similar responsibilities. Each of these sources of direction help the trusts and estates attorneys chart their courses on the sea of competing interests.

a. Competence

A bedrock rule of the MRPC is Rule 1.1, which states that “[a] lawyer shall provide competent representation to a client[,]...[which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”277 Because “[f]requent changes in the federal laws affecting the taxation of estates and trusts, deferred compensation, and pension benefits...increase the likelihood that an attorney giving advice in this area will encounter a


a. The standard of care applicable to a legal service provider is that level of such reasonable care, skill, and diligence as other similarly situated legal service providers in the same general line of practice in the same general locality ordinarily have and exercise in a like case.

b. However, if the legal service provider publishes the fact that he or she is certified as a specialist in an area of the law or if the legal service provider solicits business by publicly advertising as a specialist in an area of the law, the standard of care applicable to such legal service provider shall be such reasonable care, skill, and diligence as other legal service providers practicing as a specialist in the same area of the law ordinarily have and exercise in a like case.

277 Model Rules of Prof’l Conduct r. 1.1 (2014).
higher level of complexity” from one year to the next. Thus, the trusts and estates attorney must do more research to maintain the requisite level of knowledge and skill related to the field in order to provide competent representation. According to the MRPC, maintaining competence includes not only continuing legal education but also keeping up to date with the benefits and risks of using new technology.

Attending CLE seminars and evaluating and utilizing new technologies like practice management software are an important part of staying current on new ways to better serve clients’ needs. Another vital source of knowledge for a trusts and estates practitioner is the Internal Revenue Service (“IRS”), which regularly publishes updates to critical estate planning provisions in the tax code that are tied to inflation. Additionally, publications by professional associations like ACTEC and the RPTE Section of the ABA provide expert perspectives on current and emerging issues in the field. Note, however, that knowledge and skill regarding trusts and estates law is only the tip of the iceberg.

Two recommendations in the ACTEC Commentaries on MRPC Rule 1.1 that are useful for any trusts and estates practitioner cover supervising the execution of estate planning documents and training and overseeing staff. In most instances, “...the lawyer who prepares estate planning documents for a client should supervise their execution.” Deciding whether written instructions about the execution will suffice if the attorney cannot be present depends on the attorney’s assessment of the client’s sophistication and reliability. Similarly, the attorney must assess the training and skill of non-lawyer staff members when deciding what work should be delegated

278 Link, supra note 149, at 13.
279 See MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (2014).
280 See id.
283 ACTEC COMMENTARIES, supra note 274, at 15 (noting also that in some jurisdictions, execution supervision constitutes the practice of law and may not be delegated to a non-lawyer); see also ALA. CODE § 34-3-6(b) (2015) (defining the practice of law in Alabama).
284 See ACTEC COMMENTARIES, supra note 274, at 15.
to them. Each of these choices reflects the lawyer’s responsibility as the manager of a process, which may involve delegating some responsibilities to the client and others to staff members. Ultimately, the attorney must answer for any such decision that impacts the client’s interest.

The ACTEC Commentaries also point out that meeting the needs of a client demands a certain level of self-awareness on the attorney’s part. It also demands the courage to be candid with a potential client about whether the representation will require the attorney to spend time and money performing additional research and preparation, or whether the attorney may likely choose to consult or involve another lawyer on the matter, which can raise confidentiality concerns. For the beginning practitioner, evaluating your own competence to tackle certain matters cannot be done in light of past experience. While a lack of experience is not a bar to competency, the importance of “determining what kind of legal problems a situation may involve” becomes paramount. The ACTEC Commentaries on MPRC Rule 1.1 emphasize the importance of gathering “complete and accurate information regarding relevant matters such as the ownership and value of assets and the state of beneficiary designations under life insurance policies and employee benefit plans.” Unless the beginning trusts and estates practitioner makes a thorough investigation of a potential client’s situation, the attorney may find herself snagged on an obstacle lurking beneath the placid surface of a “simple” will.

b. Communication

The concepts of competence, diligence, and informed consent are intensively applied in attorney-client communications. MRPC Rule 1.4 states that “[a] lawyer shall...promptly inform the client of any decision or circumstance with respect to the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules.” Additionally, the Rule requires the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be

285 See id. at 16.
286 Id. at 15.
287 Id.
288 MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2 (2014).
289 ACTEC COMMENTARIES, supra note 274, at 15.
290 See id. at 56-57.
291 MODEL RULES OF PROF’L CONDUCT r. 1.4(a)(1) (2014) (emphasis added); see also MODEL RULES OF PROF’L CONDUCT r. 1.0(e) (2014) (defining “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”)
accomplished,” to “keep the client reasonably informed about the status of the matter,” to “promptly comply with reasonable requests for information,” and to “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”

The Rule heavily emphasizes maintaining contact with the client throughout the representation. The Rule’s final requirement, that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,” further reinforces the importance of attorney-client communication to obtain informed consent. The official comment to the Rule broaches a particularly relevant issue for trusts and estates practitioners: communicating information to clients who are children or who suffer from diminished capacity may be more difficult than with a competent adult, and additional considerations apply.

The ACTEC Commentaries on MPRC Rule 1.4 encourage lawyer-client communication in every phase of representation, including the client interview and engagement, estate planning, estate administration, and the dormant periods between each. The Commentaries also emphasize the importance of personal communication to ensure that any estate planning documents prepared by the attorney accurately reflect the intentions of the client. As a corollary, the Commentaries strongly urge trusts and estates practitioners not to provide clients or prospective clients with “samples of estate planning documents that might be executed by lay persons without legal advice.” During the estate administration process, the attorney can greatly assist the client’s personal representative through communications about timing and deadlines, the effect of various elections and waivers, and the impact of distribution decisions.

An additional consideration for trusts and estates

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293 Model Rules of Prof’l Conduct r. 1.4(b) (2014).
294 Model Rules of Prof’l Conduct r. 1.4 cmt. 6 (2014); see also Model Rules of Prof’l Conduct r. 1.14 cmt. 1 (2014) (reminding attorneys that while maintaining an “ordinary” client-lawyer relationship may not be possible in all respects with a diminished-capacity client, such clients—whether young, old, or disabled—are often quite able to take part in the decision-making process and must be treated with the same attention and respect as any client).
295 ACTEC Commentaries, supra note 274, at 56-57.
296 Id. at 56.
297 Id.
298 Id. at 57 (noting also that the lawyer should make reasonable efforts to inform beneficiaries substantially affected by estate administration decisions).
practitioners is the importance of keeping open lines of communication with clients after the primary work of estate planning or setting up of a trust. Though not necessarily obligated to do so, the lawyer can provide additional customer service to “dormant” clients in the form of a newsletter or other device containing information about changes in the law or reminders to review or update estate planning documents in light of the client’s changed circumstances. While language of MRPC Rule 1.4 squarely aims to safeguard client interests, trusts and estates practitioners can also benefit themselves and their clients by developing effective personal communication skills and building a virtuous cycle of improved communication, decision making, and trust between attorney and client.

c. Fees

MRPC Rule 1.5 admonishes lawyers for setting unreasonable fees, charging unreasonable amounts for expenses, and failing to explain to the client the basis or rate for fees or expenses. This Rule lists various factors that reflect on the reasonableness of the fee including the time, labor, and skill required for the attorney’s service; local custom; the nature and length of the relationship between attorney and client; and the attorney’s experience. However, the list of factors is not exclusive, nor is each factor relevant or conclusive in any particular instance. Circumstances dictate whether a fee is reasonable.

As noted in the ACTEC Commentaries, the major changes to MRPC Rule 1.5 in 2002 were the requirements for attorneys to advise potential clients of the basis for any fee and obtain consent to the fee arrangement. Additionally, the Commentaries note the requirement for attorneys to explain to clients, “preferably in writing, before or within a reasonable time after commencing the representation,” the obligation of clients to cover various expenses related to the representation. Engagement letters are now widely regarded as an effective opportunity to establish service fees with clients. ACTEC’s Engagement Letters: A Guide for Practitioners (hereinafter “ACTEC Engagement Letters”) provides useful checklists and forms to help trusts and estates lawyers draft engagement letters

299 Id.
300 See Model Rules of Prof’l Conduct r. 1.5(a) & (b) (2014).
302 See Model Rules of Prof’l Conduct r. 1.5 cmt. 1 (2014).
303 ACTEC Commentaries, supra note 274, at 63 (noting also the exception for the attorney’s established base of previously-represented clients).
304 Id.
305 Reynolds, supra note 152 at 388.
that respond to client needs and reflect the requirements of professional conduct rules. The ACTEC Engagement Letters checklists provide practitioners useful reminders about what attorneys need to describe fully to clients within the engagement letter.

d. Confidentiality

Like competency, diligence, and informed consent, confidentiality is an undercurrent running through many aspects of any legal practice. MRPC Rule 1.6 begins with a broad prohibition against disclosures of “information relating to the representation of a client” made without the client’s informed consent and follows with over half a dozen exceptions under which an attorney may do just that. Many of the exceptions function to prevent “reasonably certain death or substantial bodily harm;” to prevent the client from committing a crime or fraud “reasonably certain to result in substantial injury to the financial interests or property of another;” and to prevent, mitigate, or rectify the same such financial injury resulting from the client’s crime or fraud. The other exceptions are geared towards protecting the attorney. These exceptions include: obtaining legal advice about compliance with the Rules of Professional Conduct, establishing a defense against claims made by a client against the lawyer or resulting from a client’s conduct, complying with “other law or a court order,” or detecting and resolving conflicts of interest.

MRPC Rule 1.6(c) urges attorneys to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” This part of the Rule becomes increasingly important as practitioners integrate technology into their practice and as the costs of information security technologies continue to fall. Just as no competent attorney thirty years ago would leave his office door wide open and file cabinets unlocked after going home for the evening, no attorney today can entertain any serious pretentions to the

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306 See ENGAGEMENT LETTERS, supra note 151.
307 See, e.g., ENGAGEMENT LETTERS, supra note 151, at 7.
308 MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (2014).
309 MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (2014).
310 MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1-3) (2014).
311 MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(4-7) (2014).
312 MODEL RULES OF PROF’L CONDUCT r. 1.6 (2014) (emphasis added).
313 See MODEL RULES OF PROF’L CONDUCT r. 1.6 cmts. 18 & 19 (2014) (recommending attorneys carefully assess whether additional safeguards should be employed, such as when storing or transmitting particularly sensitive information).
confidentiality of his or her clients’ information while operating an unsecured wireless network or a database without basic password protection.

The ACTEC Commentaries to MPRC Rule 1.6 are extensive and reveal how often confidentiality concerns surface in a trusts and estates practice.314 The duty of confidentiality impacts any decision an attorney makes regarding his or her client, including the decision to consult with another attorney or professional, to disclose information to an estate beneficiary or creditor, or to take on joint clients, such as spouses.315

The ACTEC Commentaries note, for one, that the duty of confidentiality to a client survives the client’s death.316 This life-after-death of attorney-client confidentiality, along with its sibling, the postmortem attorney-client privilege,317 persists subject to a few longstanding common law principles.318 The ACTEC Commentaries point out that the client has the option of expressly or impliedly authorizing the attorney to disclose information related to the “client’s dispositive instruments and intent, including prior instruments and communications relevant thereto.”319 While the best option for the client and the trusts and estates attorney remains a well-drafted testamentary instrument free of ambiguities and vagueness which could give rise to a contest, the possibility remains that a client sometimes may not want to put his or her wishes in writing, and the attorney may be called upon to fill in the gaps, whether through testimony or other disclosures.320

314 See ACTEC COMMENTARIES, supra note 274, at 72–77.
315 Id. at 15, 57, 75-76.
316 Id. at 73.
317 See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3 (2014) (explaining that privilege gives effect in judicial proceedings and the professional conduct rule in situations without the compulsion of law—each reflects the same principle of attorney-client confidentiality).
319 ACTEC COMMENTARIES, supra note 274, at 73; see also Blackburn v. Crawford’s Lessee, 70 U.S. 175, 18 L.Ed. 186 (1865) (stating that a client may, by express or implied waiver, forego the protection of the rule privileging attorney-client communications even after death).
320 See, e.g., Crawford’s Lessee, 70 U.S. 175, 18 L.Ed. 186 (1865) (involving a dispute between decedent’s cousins and allegedly illegitimate nieces and nephews—the children of decedent’s predeceased brother’s secret marriage to their mother some twenty-five years prior—about whose legitimacy the predeceased brother’s attorney could offer testimony based on his client interviews done in the course of preparing the predeceased brother’s will).

While questions of marriage and legitimacy may have less legal significance today, they are no less sensitive. Other prejudices, pressures, and family dynamics play upon clients’
The ACTEC Commentaries suggest that “[a] lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention.”321 Rather than relying on an implied authorization or waiting for litigation to trigger the exception to the privilege, the trusts and estates practitioner can discuss the possible need for disclosures with the client during planning, and the attorney and client can reach an express expectation. Anticipating litigation, asset waste, disputes among heirs, and other frustrations of testamentary intent, and planning for situations when the client is unable to make the decision herself or to explain a decision to those affected goes to the very heart of what a trusts and estates practitioner does.

Another situation discussed in the ACTEC Commentaries on MPRC Rule 1.6 is when one joint client imparts information in confidence to the attorney that the client does not wish shared with the other joint client.322 The classic example involves estate planning for spouses. For example, one spouse reveals a past infidelity to the attorney in confidence, or one spouse reveals something with direct bearing on the other spouse’s interest in the divulging spouse’s estate, such as an intention to remove the other as an insurance beneficiary.323 The ACTEC Commentaries suggest several courses of action the trusts and estates practitioner should consider:

1. taking no action with respect to communications regarding irrelevant (or trivial) matters;
2. encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and
3. withdrawing from the [joint] representation if the communication reflects serious adversity between the parties.324

321 ACTEC COMMENTARIES, supra note 274, at 73 (“Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.”); see also Glover v. Patten, 165 U.S. 394, 406, 17 S.Ct. 411, 416 (1897) (“[I]n a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not... when the contest is between the heirs or next of kin.”)

322 ACTEC COMMENTARIES, supra note 274, at 76.

323 Id.

324 Id.
These courses of action, along with any other decided upon by the attorney, must be considered in light of the attorney’s duty of loyalty to each client, the potential harm that could result to the clients’ relationship, and possible legal consequences.\footnote{Id. at 76-77.}

Discussing those considerations with the client is a proper way to promote required disclosures, but “[i]f the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action.”\footnote{Id. at 77.} To avoid situations where the attorney has no choice but to withdraw from representation of one or both clients, the trusts and estates practitioner may again rely on the ever-useful engagement letter, which should set out how disclosures will be handled and even require authorization to disclose as a condition of representation, whether to joint clients, beneficiaries, or other professionals like accountants or investment advisors.\footnote{ENGAGEMENT LETTERS, supra note 151, at 6-7.}

e. Conflicts of Interest

Several points in MRPC Rules 1.7 and 1.8 have particular relevance for trusts and estates lawyers in the regular course of practice. MRPC Rules 1.7 and 1.8 cover conflicts of interest involving current clients. MRPC Rule 1.7 prohibits representation where “the representation of one client will be directly adverse to another client” or where the representation of one or more clients runs a significant risk of being “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.”\footnote{MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1) & (2) (2014).} Despite the presence of a concurrent conflict of interest, an attorney may still represent a client if the attorney “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client,” the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client the lawyer represents in the same matter, and each client gives informed consent confirmed in writing.\footnote{MODEL RULES OF PROF’L CONDUCT r. 1.7(b)(1-4) (2014).} MRPC Rule 1.8 delves into specific events which create conflicts, such as when an attorney enters into a business transaction with a client or acquires an interest.
adverse to a client. 330  MRPC Rule 1.8(c) states that:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship. 331

These Rules have obvious importance given the trusts and estates practitioner’s stock and trade.

The ACTEC Commentaries feature extensive treatment of MRPC Rule 1.7. 332 Proactively addressing conflicts of interest greatly affects the trusts and estates practitioner because joint representation of clients is “often appropriate.” 333 In some instances, “clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations.” 334 In recognizing the generally non-adversarial nature of estate planning and administration, the ACTEC Commentaries nevertheless emphasize the necessity of addressing confidentiality concerns in multiple representation. 335

Informed consent remains an important factor as well, such as when a conflict is prospectively waived. 336 Another area of concern for trusts and estates attorneys arises when serving as a fiduciary:

The designation of the lawyer as fiduciary will implicate the conflict of interest provisions of MRPC 1.7 when there is a significant risk that the lawyer’s

330 MODEL RULES OF PROF’L CONDUCT r. 1.8 (2014). Some of these instances can be cured by the clients’ informed consent and the opportunity to consult other counsel. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.8(a) (2014).
331 MODEL RULES OF PROF’L CONDUCT r. 1.8(c) (2014).
332 See ACTEC COMMENTARIES, supra note 274, at 91-96.
333 Id. at 91.
334 Id.
335 Id. at 91-92.
336 See id. at 93-95 (A surviving spouse acting as personal representative may wish to “waive” a future conflict so that her attorney may also represent her child who is a beneficiary of the estate—each must provide informed consent to the dual representation and the representation must not otherwise be prohibited or constitute attorney misconduct or a breach of fiduciary duty to either client).
interests in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. 337

The ACTEC Commentaries on MRPC Rule 1.8 reflect the practical considerations the Rule’s provisions suggest.338 The trusts and estates practitioner is well advised to avoid entering purchase or sale transactions with clients or beneficiaries of estates for which the attorney serves as fiduciary or counsel to the fiduciary, unless the attorney follows the mandatory procedural safeguards of Rule 1.8(a).339 Handling “relatively common” situations where a person other than the client pays for the client’s estate planning services, such as a parent, spouse, or employer, requires the attorney to consider conflicts and observe the safeguards of MRPC Rule 1.8(f).340 Substantial gifts, particularly bequests, made by a client to a lawyer or to a person related to the lawyer are restricted under MRPC Rule 1.8(c) to gifts only from a “related person.” The ACTEC Commentaries recommend taking special care if a proposed gift to the attorney is disproportionately large compared to proposed gifts to other equally related recipients.341 A lawyer, or person related to the lawyer, cannot assist an unrelated client in making a substantial gift to the lawyer or person related to the lawyer.342 The underlying concern of undue influence may still remain even when an attorney has satisfied the rules of professional conduct.343

f. Client Capacity

MRPC Rule 1.14 urges attorneys to “maintain a normal client-lawyer relationship” with clients who, “whether because of minority, mental impairment or for some other reason” exhibit a diminished capacity “to make adequately considered decisions in connection with a representation.”344 This Rule also encourages attorneys to take protective action when they reasonably believe a client “has diminished capacity, is at risk of substantial physical, financial or

337 ACTEC COMMENTARIES, supra note 274, at 95.
338 See id. at 111-14.
339 Id. at 112; see MODEL RULES OF PROF’L CONDUCT r. 1.8(a)(1-3) (2014).
340 See ACTEC COMMENTARIES, supra note 274, at 113; MODEL RULES OF PROF’L CONDUCT r. 1.8(f)(1-3) (2014).
341 Id. at 112; MODEL RULES OF PROF’L CONDUCT r. 1.8(c) (2014).
342 ACTEC COMMENTARIES, supra note 274, at 112.
344 MODEL RULES OF PROF’L CONDUCT r. 1.14(a) (2014).
other harm...and cannot adequately act in the client’s own interest."345 Lastly, this Rule relaxes the confidentiality requirements of MRPC Rule 1.6 when the attorney takes protective action, “but only to the extent reasonably necessary to protect the client’s interests.”346

The text of the Alabama rule regarding clients with diminished capacity is identical to MRPC Rule 1.14.347

The ACTEC Commentaries on MRPC Rule 1.14 urge attorneys to keep in mind the client’s wishes, whether in contemplating preventive measures for competent clients or in relying upon the implied authority under MRPC Rule 1.14(b) and (c) to make disclosures and act on behalf of a client with diminished capacity.348 In addition, the ACTEC Commentaries urge particular caution when a client’s testamentary capacity is uncertain. Evidence regarding the client’s testamentary capacity becomes very important where a client’s testamentary capacity appears to be “borderline,” and recourse to court supervision or other judicial proceeding should be pursued where a client’s testamentary capacity is “doubtful.”349

Lastly, the ACTEC Commentaries review the various permutations of representation where the diminished client capacity creates extra pressures on the attorney to observe other rules of professional conduct, particularly MRPC Rules 1.2, 1.6, and 1.7.350 When acting as a fiduciary to a client with diminished capacity, whether before or after the onset of the client’s diminished capacity, the attorney must remember his or her duties and the importance of acting consistently with the client’s expressed wishes.351

The elder law attorney’s first question is “Who is my client?” The answer to that question often relates to the competing interests in the parent’s long-term care and the children’s inheritance.352 When diminished capacity is an issue, “the attorney needs to be aware that the issue can be an important one when questions of undue influence and lack of capacity [may be] raised by third parties, especially when such documents as a durable power of attorney or a will are being

345 Model Rules of Prof’l Conduct r. 1.14(b) (2014).
346 Model Rules of Prof’l Conduct r. 1.14(c) (2014).
347 Cf. Ala. Rules of Prof’l Conduct r. 1.14 (2015). While some of the text of the comments to ARPC Rule 1.14 differs slightly from that of the MRPC Rule 1.14 comments, they are substantially the same as well.
348 See ACTEC Commentaries, supra note 274, at 131-32.
349 See id. at 132.
350 See id. at 133.
351 See id.; see also McKerall supra note 4.
352 See ACTEC Commentaries, supra note 274, at 133.
executed.” The attorney must then ask how other laws like Medicaid, Health Insurance Portability and Accountability Act, and the Affordable Care Act shape the options available to clients. As such, estate planners must stay updated on healthcare law and practice tools in order to provide competent service to diminished capacity clients.

g. Unlicensed Practice of Law—Multi-jurisdictional Practice

The law prohibits lawyers and non-lawyers alike from engaging in the unlicensed practices. Specifically, MRPC Rule 5.5 prohibits the unlicensed practice of law and is chiefly concerned with a lawyer’s practice in a jurisdiction “in violation of the regulation of the legal profession in that jurisdiction.” This Rule’s close companion is MRPC Rule 8.5, which subjects an attorney to disciplinary authority in the attorney’s home jurisdiction as well as in the jurisdiction where any misconduct occurs. MRPC Rule 5.5 does permit attorneys to be admitted to provide legal services in another jurisdiction on a temporary basis. This is particularly important when a client has moved to another jurisdiction, has significant connections to the lawyer’s jurisdiction, or when “the client’s activities or the legal issues involve multiple jurisdictions.” Each of these aspects of the MRPC Rules can present themselves in trusts and estates matters where clients, assets, and interested third parties may be dispersed across multiple jurisdictions.

The ACTEC Commentaries on MRPC Rule 5.5 indicate that estate planning attorneys have especially benefitted from the addition of MRPC Rules 5.5(c) and (d), particularly MRPC Rule 5.5(c)(4), which

354 See generally Anne R. Moses, Planning Ideas to Manage the Maze of Medicaid Eligibility, 40 EST. PLAN. 24, 24 (Feb. 2013) (presenting options for estate planning practitioners to consider when advising clients and their families).
355 See id. at 32 (“Estate planning practitioners are increasingly required to focus on planning to protect their clients and their assets from the reach of Medicaid, rather than the claws of the IRS.”)
356 See, e.g., Lynn Campisi, The Nuts and Bolts of Special Needs Trusts, THE ALA. FAMILY TR. (Oct. 2012) (looking at ways to provide for the care of loved ones in nursing homes or with disabilities).
357 See, e.g., ALA. CODE § 34-3-6(b) (2015) (“Whoever...is practicing law.”)
358 MODEL RULES OF PROF’L CONDUCT r. 5.5(a) (2014).
359 MODEL RULES OF PROF’L CONDUCT r. 8.5(a) (2014).
360 MODEL RULES OF PROF’L CONDUCT r. 5.5(c)(4) (2014); MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. 14 (2014); see also ACTEC COMMENTARIES, supra note 274, at 162 (applying the “reasonably related” factors to common estates practice situations, such as when services are required for ancillary probate administration in non-admitted jurisdictions).
covers pro hac vice admission for transactional legal services in non-admitted jurisdictions. Nevertheless, the attorney must remember that the definition of “practice of law” will vary significantly from jurisdiction to jurisdiction, as will many other laws and rules with which the attorney must be familiar in order to provide competent representation. Accordingly, the ACTEC Commentaries suggest that when a lawyer is providing services in a state in which he or she has not been admitted to practice, the client must provide informed consent in writing to the representation, including limitations on the lawyer’s services. Other alternatives include seeking admission to practice law in the non-admitted jurisdiction and associating with counsel in the non-admitted jurisdiction.

The ACTEC Commentaries also caution estate planners to avoid relying on the ostensibly liberal interpretation in Comment 6 to MRPC Rule 5.5 of the Rule’s “temporary basis” requirement. The Comment is not binding, and repeated personal visits to clients in a non-admitted jurisdiction could appear to be something more than a “temporary basis.” Attorneys holding themselves out as experts in federal, nationally-uniform, or international law should take special care to ensure their recognition as experts by obtaining certification, participating in bar sections and national associations related to the expertise, writing scholarly articles, teaching, and participating in seminars and panel discussions, and other activities demonstrating the expertise.

Attorney’s marketing and advertising are areas requiring further consideration of the MRPC’s impact. Clearly stating where the lawyer is admitted to practice as a member of the state bar (and not in any other jurisdictions) helps manage the problem of

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361 ACTEC COMMENTARIES, supra note 274, at 160; see MODEL RULES OF PROF’L CONDUCT r. 5.5(c)(4) (2014).
362 ACTEC COMMENTARIES, supra note 274, at 160.
363 Id.
364 Id. at 161 (noting limitations imposed: the temporary basis requirement persists, and the local counsel must “actively participate” in the matter, i.e., “deed preparation, will execution formalities, and similar services.”)
365 MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. 6 (2014) (“Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.”)
366 ACTEC COMMENTARIES, supra note 274, at 162.
367 Id. at 162 (including recognized expertise in “retirement planning, charitable planning, estate and gift tax planning, or international estate planning”); see also MODEL RULES OF PROF’L CONDUCT r. 7.4(d) (2014) (on stating or implying that one is certified as a specialist in a particular field of law).
advertising reaching potential clients in non-admitted jurisdictions.\textsuperscript{368}
Websites, particularly interactive ones, may pose an increased risk to potential clients, the public, and the courts that the attorney’s offered services may run afoul of the MRPC.\textsuperscript{369} In maintaining a website, the lawyer should make sure, “at a minimum, the website...identif[ies] the lawyer or each lawyer in the firm and each lawyer’s admitted jurisdictions.”\textsuperscript{370} In addition, “a lawyer should consider identifying the website as ‘advertising materials,’” and “includ[e] a disclaimer indicating that the lawyer is not offering any legal services or advice through the website.”\textsuperscript{371}

Part VIII: Resources and Forms

There are many form books and other resources available to attorneys practicing in trusts and estates, and quite a few should be available through your local law library.

In addition to these library resources, attorneys are also likely to find helpful the selection of probate forms on disk available from local bar associations, such as the Birmingham Bar Association in Alabama (hereinafter “BBA”). The BBA Probate Forms compact disc is available to licensed attorneys for $55 and can be purchased through the instructions on their website.\textsuperscript{372} The BBA also offers a broader collection of forms in the Interactive Legal Forms compact disc that apply to a wide variety of practice areas. This compact disc includes useful letters and other documents that would be relevant in a trusts and estates practice. The cost and method of purchase of this compact disc is the same as the BBA Probate Forms compact disc.

The ACTEC is an additional resource for a variety of trusts and estate matters. Most notably, the website offers free model engagement letters for nearly every imaginable aspect of trusts and estates practice, from estate planning to fiduciary representation.\textsuperscript{373} ACTEC also offers tax tables, client guides, and other useful resources.\textsuperscript{374}

\textsuperscript{368} ACTEC Commentaries, supra note 274, at 164.
\textsuperscript{369} See id. at 164-65.
\textsuperscript{370} Id. at 164.
\textsuperscript{371} Id. at 165.
There is also an abundance of technological resources for the trusts and estates practitioner, which go far beyond traditional legal research like Lexis or Westlaw. More tax-focused legal research guidance can be found through RIA CheckPoint\textsuperscript{375} or the BNA Tax Management Portfolios.\textsuperscript{376} Lawyers can also purchase products to assist in the drafting of estate planning documents, such as the Thompson Reuters product, Drafting Wills and Trusts Agreements,\textsuperscript{377} and Cowles Estate Practice System.\textsuperscript{378} HotDocs is another document assembly system that can be used in a trusts and estates practice.\textsuperscript{379} LexisNexis offers automated forms for several states, although Alabama is not currently one of these states.\textsuperscript{380} There is a robust market of tax products that offer assistance in everything from calculating the tax benefits of various estate planning strategies to completion of tax returns.\textsuperscript{381} Technology, however, is a moving target, so it is hard to recommend specific resources. Some information on technology in a trusts and estates practice is posted on the ACTEC website.\textsuperscript{382}

Finally, as an electronic appendix to this Article, four additional lists of resources are available on the website for the law library of the Cumberland School of Law.\textsuperscript{383} These resources include (A) a description of library services and electronic resources available at the Cumberland Law Library for lawyers (including but not limited to Cumberland graduates), (B) a selected list of books on the topic of starting a law practice, (C) a selected list of books on legal technology,

\textsuperscript{381} See, e.g., OneSource Trust & Estate Administration, THOMSON REUTERS, http://onesourcetrust.thomson.com/trusttax/estate/ (formerly known as zCalc); see also NumberCruncher, LEIMBERG, http://www.leimberg.com/products/software/numbercruncher.html (last visited Dec. 18, 2015).
\textsuperscript{383} The appendices can be accessed at http://lawlib.samford.edu/wp-content/uploads/2016/01/T&E.pdf.
and (D) a selected list of books on trusts and estates.

**Part IX: Conclusion**

As the scope of this article indicates, beginning your own trusts and estates practice is an extensive endeavor, but there are ample resources to support you on your way. To very loosely quote Peter Pan, building a trusts and estates practice takes wills, trust, and a little bit of pixie dust. May this article provide you with the pixie dust needed to get your new venture up and running.
RISING FROM THE DEAD: AN EXAMINATION OF THE RIGHTS OF AN ALLEGED DECEDEDENT UPON RETURN IN THE STATE OF NEW YORK

BRETT RONDEAU*

I. Introduction

Spoiler Alert! *Batman: The Dark Knight Rises* ends with the hero sacrificing himself for the people of Gotham as he flies an atomic bomb over the ocean.¹ Batman’s heroic action takes Gotham out of the bomb’s blast radius, saving countless lives, but ending his own.² A memorial statue of Batman is erected at City Hall to thank the hero for saving the City of Gotham.³ Mysteriously, and without any explanation, Bruce Wayne also dies, and his estate is dispersed.⁴

The audience soon discovers that Bruce Wayne, the man behind the Batman mask, is alive and well, as he is seen having lunch in a small town in France.⁵ It is not uncommon in the comic book world for a superhero and his alter ego to perish, only to come back to life, or to be found never to have died at all. If the fictitious city of Gotham is considered in the context of the real state of New York, using Bruce Wayne as an example testator, the question arises of how quickly Bruce Wayne’s estate would be dispersed after his mysterious death.

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¹ *Batman: The Dark Knight Rises* (Warner Brothers 2012).
² *Id.*
³ *Id.*
⁴ *Id.*
⁵ *Id.*
disappearance. An even greater concern is the effect of Bruce Wayne’s return to Gotham after his estate had already been dispersed based on the belief that he was dead, and what, if any, chance he had to regain his property.

The answers to these questions can be found in New York’s statutes, entitled “Presumption of Death from Absence” and “Rights of Alleged Decedent Upon Return.” Other states have similar statutes addressing the same scenarios, outlining how and when a person can be declared dead and at what point his or her estate can be distributed. This Note will distinguish the differences among state statutes addressing the declaration of death of absentee testators and the distribution of their estates, concluding that New York’s statutes are the most effective and practical.

The first part of this Note details the background and history of New York Estate Powers and Trusts Law Section 2-1.7, the relevant statute for having an absentee declared dead in New York. This section also addresses the statute’s multiple requirements, including the “specific peril of death” situation. The second part of this Note outlines the background and history of New York Estate Powers and Trusts Law Section 2226, the relevant New York statute for determining what an absentee who was wrongly presumed dead can regain from his or her already distributed estate. This section also considers the variety of potential approaches a state may take when redistributing the estate of an absentee who was declared dead. The third part of this Note analyzes the effectiveness of New York’s statutes compared to other state statutes. This section concludes that New York’s relatively “progressive” statutes are actually more effective than similar statutes in other states in both declaring an absentee dead and distributing his or her estate, and that New York’s statutes should be a model for other states when drafting or redrafting their own similar statutes.

II. Background and History

In the state of New York, if a physician is accompanying a person at the time of his or her death, that physician may certify the cause of death and sign the death certificate. Otherwise, pursuant

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6 N.Y. EST. POWERS & TRUSTS LAW § 2-1.7 (2015); N.Y. SURR. CT. PROC. ACT LAW § 2226 (2015).
7 N.Y. EST. POWERS & TRUSTS LAW § 2-1.7.
8 Id.
9 N.Y. SURR. CT. PROC. ACT LAW § 2226.
to New York Law:

If death occurs without medical attendance, the coroner of the county or, if there be more than one, the coroner having jurisdiction of the district in which the body is removed, or the medical examiner or, in the County of Erie, the medical director, shall be notified and shall certify to the cause of death and sign the certificate.\(^\text{11}\)

When someone dies, his or her death needs to “be registered immediately, and no later than seventy-two hours after death.”\(^\text{12}\) Once the death certificate is completed, the estate can be distributed according to New York Estate Powers & Trusts Law § 4-1.1 (2015) if the decedent does not have a will.\(^\text{13}\) If the decedent does have a will, the will should be probated, provided that the formal requirements of New York Estate Powers & Trusts Law § 3-2.1 (2015) are met.\(^\text{14}\) The process for family members when the decedent’s body is not present is more difficult. When a body cannot be found, the person believed to be dead is considered an absentee. In 1969, the Uniform Probate Code addressed the presumption of death due to absence and set five years as the standard time period that must elapse before an absent person may be declared dead.\(^\text{15}\) New York has specific statutes that differ from the Uniform Probate Code, known as New York Estate Powers & Trusts Law § 2-1.7 (2015) (hereinafter “Section 2-1.7”) and New York Surrogate Court Procedure Act Law § 2226 (2015) (hereinafter “Section 2226”), which also address how an “absentee” is legally declared dead and how the estate is distributed.\(^\text{16}\)

a. Section 2-1.7: Presumption of Death from Absence

In order for a court to consider declaring a presumption of death under Section 2-1.7, three years must have elapsed from the date the person went missing to the time the petition was filed.\(^\text{17}\) Section 2-1.7 only applies when a person has disappeared entirely.\(^\text{18}\) However, in order to invoke this statute, the reviewing court must be convinced that the alleged decedent is actually dead. Each New York court handles the circumstances surrounding the petition to declare a

\(^{11}\) Id.

\(^{12}\) N.Y. CLS PUB. HEALTH § 4140 (2015).

\(^{13}\) Id.; N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (2015).

\(^{14}\) N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (2015).


\(^{16}\) Compare N.Y. EST. POWERS & TRUSTS LAW § 2-1.7 and N.Y. SURR. CT. PROC. ACT LAW § 2226, with UNIF. PROBATE CODE § 1-107.

\(^{17}\) N.Y. EST. POWERS & TRUSTS LAW § 2-1.7.

\(^{18}\) Id.
person dead differently.

Before New York enacted, and later amended, Section 2-1.7 to set the specified time period of three years, New York courts had to look elsewhere to determine an acceptable time period to presume death. Prior to enacting Section 2-1.7, the New York legislature, examined the history of presumption of death in other states and set a time period of seven years for application of the presumption.¹⁹

The presumption of death after the unexplained absence of seven years developed after 1800. Prior to that date, in the absence of evidence to the contrary, an absent person was presumed to be living even though he might have been ninety or one hundred years old at the time the question arose.²⁰

The Butler case is an interesting introduction into Section 2-1.7 because the court analyzed the circumstances of Butler’s absence in a way similar to how a court today would use Section 2-1.7, though the statute was not yet enacted at the time Butler was decided. The Court stated that the alleged decedent must be absent from his or her home and unheard from for seven years to be legally pronounced dead.²¹ The presumption from Butler was codified in New York’s Decedent Estate Law Section 80-a, the predecessor to Section 2-1.7.²²

Section 2-1.7 was enacted in 1966, and reduced the waiting period for a presumption of death from the seven years to five years.²³ The time period was reduced in order “to comport with the period used in dissolution of marriages on the basis of absence.”²⁴ The 1993 amendment to Section 2-1.7 further shortened the waiting period from five years to three years.²⁵ The Bill Jacket did not provide any reason for decreasing this time period.²⁶ Although New York decided to decrease the specified time period to three years, other states

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²⁰ Id. at 199.
²⁵ 2000 N.Y. Assembly Bill A10421.
²⁶ Id.
adopted the Uniform Probate Code’s five-year period. Even so, other states continue to use the original seven-year model for presumption of death.

In 2000, the New York legislature amended Section 2-1.7 and made two more important modifications to the three-year period. The first modification allows a court to use convincing evidence to declare someone dead before the three-year time period has passed. The second modification was the inclusion of the specific peril of death situation, in which a court may declare someone dead following his exposure to a specific peril of death.

Once the statutory period of three years has elapsed, or there is evidence of a “specific peril of death” situation, an additional requirement must be met before an absentee can be presumed dead. The court must be satisfied that there are no other reasons why the absentee may have gone missing. Interestingly, the Butler case, which established the original specified time period in New York, is also a case in which the Court determined that the absentee was in fact not dead based on the evidence presented. The Court in Butler refused to proclaim the absentee dead even though he had not been heard from for over seven years and his whereabouts were unknown. Butler illustrates that a reviewing court should evaluate the specific circumstances and relevant evidence in order to reach a conclusion of death, regardless of whether the Section 2-1.7 requirements met.

The Butler case chronicles the presumption of death of Charles Butler, who was originally from Rochester, New York, and who moved to the Midwest for work at the age of twenty-two. He continued to move throughout the Midwest to perform a series of odd jobs. He consistently wrote to his mother and father whenever he moved or changed jobs and sent money to them, with promises of sending more. In September 1907, he wrote to his father asking for a letter of recommendation from his father’s friend for a potential job. His father ignored this letter, and in October Charles wrote to his parents.

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27 See IND. CODE § 29-2-5-1 (2015); N.J. REV. STAT. § 3B:27-1 (2015) (these states have adopted the five-year period pursuant to their statutes).
29 2000 N.Y. Assembly Bill A10421.
30 Id.
31 Butler, 225 N.Y. 197, 121 N.E. 758.
32 Id. at 203, 121 N.E. at 760.
33 Id. at 200, 121 N.E. at 759.
34 Id.
35 Id.
36 Butler, 225 N.Y. at 205, 121 N.E. at 760.
simply stating he was going further west.\footnote{37} Seven years later, Charles’ parents tried to have him declared dead for insurance purposes. The parents “offered no direct evidence of his death, relying on the presumption of death arising from his absence, unheard of, during more than seven years.”\footnote{38} The Butler court analyzed the facts of the case, specifically focusing on Butler’s ignored requests to his parents, and decided that Butler’s “future appearance [was] not improbably.”\footnote{39}

Since Butler, New York courts have required convincing evidence that an absentee is in fact dead to supplement the other requirements of Section 2-1.7.\footnote{40} Similar language has been used in other cases, such as the Matter of Seals, where the court stated:

The law contains the general presumption that a person who has been continuously absent from his home or place of residence, and unheard from or of by those who, if he had been alive, would naturally have heard of him, through the period of seven years, is dead. The presumption does not arise, however, when there exist circumstances or facts which reasonably account for his not being heard of, or his absence and abstention from communication are reasonably explained without assuming his death, or where diligent inquiry as to whether he is alive or dead has not been made.\footnote{41}

The need for evidence that the absentee is dead, or lack of evidence that the absentee is alive, continues to be an extremely important aspect of Section 2-1.7 analyses. This requirement is also necessary for cases that fall within the second modification of Section 2-1.7: specific peril of death situations.

i. Specific Peril Situation

If a court decides that an absentee likely perished in a specific peril of death situation, the court can bypass the statutory time period requirement and declare a presumption of death before the time period elapses.\footnote{42} Even though New York first included the specific

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\footnote{37 Id. at 202, 121 N.E. at 759.}  
\footnote{38 Id. at 199, 121 N.E. at 759.}  
\footnote{39 Id. at 206, 121 N.E. at 761.}  
\footnote{40 See e.g. In re Bobrow’s Estate, 179 N.Y.S.2d 742, 14 Misc. 2d 816 (N.Y. Surr. Ct. 1955).}  
\footnote{41 Matter of Seals, 42 Misc. 3d 1235(A), 988 N.Y.S.2d 526 (N.Y. Surr. Ct. 2014) (emphasis in original).}  
\footnote{42 N.Y. Est. Powers & Trusts Law § 2-1.7.}
peril of death situation in the second amendment of Section 2-1.7, this concept had existed in New York common law for many years. Prior to this amendment, the courts applied specific peril of death to situations “where the facts demonstrate[d] an irresistible inference that death occurred in the face of some fatal danger which would have destroyed any evidence of death with the missing person.”

New York courts have used different approaches to determine whether an absentee likely perished in a specific peril of death situation, depending on the specific circumstances of each case.

New York courts more liberally applied the specific peril of death situation following the disappearance of many people in World War II. Prior to World War II, “New York courts showed little inclination to expand the rigid application of the specific peril of death doctrine, finding that death had occurred before the lapse of seven years only under the most conclusive circumstances.” The realities of war allowed the courts to develop a lower standard to determine whether someone had perished in a specific peril of death situation. In the case of an absentee in a concentration camp, the Court only needed to be convinced that the absentee was involved in the war and may have been in a concentration camp. There was no need to present physical evidence or even testimonial evidence.

This lower standard can be applied in extremely rare specific peril of death circumstances. More recently, the lower standard was applied in cases following the terrorist attacks on September 11, 2001. After the attacks on the World Trade Center, the Governor of New York “instituted expedited procedures to provide death certificates for the victims” through Executive Order No. 113.24. For all persons who fell under the criteria of Executive Order No. 113.24, their date of death was declared as September 11, 2001. A person fell under the criteria of Executive Order No. 113.24 if he or she was:

- Either employed in the World Trade Center or the Pentagon, or was in such buildings, or in the immediate vicinity, when the terrorist attacks of September 11, 2001 occurred, or was a crew member or passenger on any of the airline flights involved in the is...
disasters on that date, or was a police officer, firefighter, emergency medical service provider, or rescue volunteer at one of those building sites on that date who is missing or deceased.\textsuperscript{48}

The Executive Order would “temporarily suspend, alter or modify specific provisions of any statute, local law, ordinance, orders rules or regulations, or parts thereof,” which would keep families of the victims of the terrorist attacks from getting immediate relief.\textsuperscript{49} This Executive Order did not render Section 2-1.7 useless, but essentially applied the specific peril of death concept to the attacks on the World Trade Center, Pentagon, or the involved airline flights.\textsuperscript{50}

The Court in \textit{In re Lafuente} determined that the World Trade Center attacks did, in fact, fall under the specific peril of death concept.\textsuperscript{51} The Court examined the absentee’s relationship with his wife and found that they had a healthy relationship, with no financial stress, and enjoyed good relationships with their daughters.\textsuperscript{52} A witness also testified that, a few days prior to the terrorist attacks, he overheard that the absentee was planning on attending a meeting at the World Trade Center.\textsuperscript{53} The Court noted that none of the absentee’s possessions were missing and that his credit cards had not been used since the attacks.\textsuperscript{54} After considering this extrinsic evidence, the Court found that there was “no reasonable explanation for his disappearance other than death by an act of terrorism” and determined Mr. Lafuente had died on September 11, 2001.\textsuperscript{55} Since Mr. Lafuente fit the criteria of the Executive Order, there was no need to present any additional evidence for him to be presumed dead.

In other instances, New York courts have considered the circumstances surrounding the absentee’s disappearance along with testimonial evidence to conclude that the absentee perished in a specific peril of death situation. \textit{In re Morgan’s Will} involved a woman, Annie Morgan, who had potentially died in a hotel fire.\textsuperscript{56} The Court looked at conflicting evidence regarding whether or not Ms. Morgan had been in the hotel at the time of the fire.\textsuperscript{57} Some witnesses

\textsuperscript{48} N.Y. Exec. Order No. 113.24, 32 FR 1075.
\textsuperscript{49} Id.
\textsuperscript{51} Id. at 683, 191 Misc. 2d at 583.
\textsuperscript{52} Id. at 681, 191 Misc. 2d at 580.
\textsuperscript{53} Id. at 682, 191 Misc. 2d at 581.
\textsuperscript{54} Id. at 681, 191 Misc. 2d at 580.
\textsuperscript{55} \textit{In re Lafuente}, 743 N.Y.S.2d 678, 684, 191 Misc. 2d 577, 584.
\textsuperscript{56} \textit{In re Morgan’s Will}, 63 N.Y.S. 1098, 30 Misc. 758 (N.Y. Surr. Ct. 1900).
\textsuperscript{57} Id. at 1098, 30 Misc. at 579.
claimed they saw her leave the hotel before the fire started, others claimed they never saw her leave, and one witness claimed he saw her standing by a window engulfed in flames. The Court determined that since Ms. Morgan was of sound body and mind, and even though her body or remains had not been recovered due to the severity of the fire, she would have turned up later if she had escaped.

*Matter of Rice* presents another example of a court using both surrounding circumstances and testimonial evidence to determine whether the absentee perished in a specific peril of death situation. The absentee, Thomas Rice, was one of four passengers who were thrown from a boat when it hit a large wave. They were thrown into freezing water and remained there for approximately four hours until a passing vessel saw their boat. The remaining three survivors testified that Thomas had been comatose, and that they tried to support his weight for three hours. When they could no longer support his weight, they watched him disappear under the water. No one saw or heard from Thomas since the boat crash two years prior to the first official hearing before the Court. The Court determined that the circumstances satisfied the specific peril of death criteria and declared Thomas dead before the statutory five-year time period.

A third approach is to weigh the surrounding circumstances with both testimonial evidence and physical evidence. The Court’s analysis in *In re Bobrow’s Estate* included testimonial evidence that the woman in question had been home at the time her house caught fire, and that her husband was using the only vehicle owned by the family at that time. The house fire had left almost no evidence of her body, except for a few bones. The Court found that there was sufficient evidence to determine that the woman had died in the fire, stating:

> [I]t is generally accepted law where a person has disappeared, that it is not always necessary to wait for

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88 Id. at 1099, 30 Misc. at 579.
89 Id.
90 Estate of Thomas W. Rice, NYLJ, June 19, 1985, at 12.
91 Id.
92 Id.
93 Id.
94 Id.
95 1966 N.Y. Sess. Laws 2039 (McKinney); Estate of Thomas W. Rice, supra note 60.
96 In re Bobrow’s Estate, 179 N.Y.S.2d at 744, 14 Misc. 2d at 817.
97 Id.
98 Id. at 745, 14 Misc. 2d at 818.
seven years before attempting to prove him dead. The facts surrounding his disappearance may of themselves be sufficient to show death. Where a disaster has occurred and it is known that the person was at that place, this may be sufficient proof of death. In such cases, it is to be determined as a question of fact depending upon evidence when death probably occurred, and if the circumstances known are sufficient to authorize such a conclusion, the decision may be placed at such a time short of the seven years as the proof may indicate.\textsuperscript{69}

In re Bobrow’s Estate also addresses another modification to Section 2-1.7—the need for clear and convincing evidence that someone has died. Interestingly, this case appears to combine the two modifications instead of addressing them separately. Even though the absentee’s body could not be found, there was clear and convincing evidence, both testimonial and physical, that the woman had died in the fire, which amounted to a specific peril of death situation.\textsuperscript{70}

b. Section 2226: Rights of Alleged Decedent Upon Return

Once the requirements of Section 2-1.7 are satisfied and a court has declared an absentee to be presumed dead, the estate may be distributed. In instances where there is only a presumption of death, the decedent may very well still be alive, because there is no definitive proof of death without physical evidence of a body. In cases where a person is wrongfully declared dead and returns, New York courts turn to Section 2226. Section 2226 states:

His or her fiduciary shall not be liable for moneys or assets disbursed or delivered by him or her in good faith and the person alleged to be dead may not, upon his or her return, review any matter or recover any property embraced in any account of his or her fiduciary which may have been finally settled by decree entered prior to the date when his or her fiduciary shall have had actual notice that he or she is still living.\textsuperscript{71}

This statute provides that while the person wrongly presumed dead

\textsuperscript{69} Id. at 744-45, 14 Misc. 2d at 817-18 (quoting Matter of Brevoort’s Will, 190 Misc. 328, 332, 73 N.Y.S.2d 216, 219 (N.Y Surr. Ct. 1947)).

\textsuperscript{70} See id.

\textsuperscript{71} N.Y. SURR. CT. PROC. ACT LAW § 2226.
would be able to recover anything still held by the fiduciary, the individual would not be able to recover any of his or her assets that the fiduciary already distributed.\textsuperscript{72}

When a court incorrectly classifies an absentee as presumed dead, and that absentee tries to recover his or her property from the estate, there are three general approaches a state may take.\textsuperscript{73} The first approach is that once a person is declared dead, he or she no longer has any claims to his or her former estate.\textsuperscript{74} The second approach allows a person to recover any remaining assets in the hands of any executor, fiduciary, or ordinary beneficiary.\textsuperscript{75} The third approach is a combination of the first two, and allows the person to recover any assets in the hands of the executor or trustee, but does not allow him or her to recover any assets that have already been distributed to beneficiaries.\textsuperscript{76}

The previous three approaches were simplified for purposes of this Note, because most states have exceptions or more complicated provisions modifying the approach used by their courts.\textsuperscript{77} For example, New Jersey law allows full recovery of an absentee’s estate when the absentee was wrongly presumed dead,\textsuperscript{78} while Virginia law allows full recovery with the exception of any disbursements of assets that were sold to a bona fide purchaser “under sales made by the personal representative or by any heir at law, devisee, next of kin, legatee, survivor, beneficiary, or other successor.”\textsuperscript{79} Pennsylvania law entitles an absentee, who was wrongfully presumed dead to full recovery of his or her estate in a unique way. This law requires the personal representative to obtain the court’s permission to distribute any property.\textsuperscript{80} The personal representative may then distribute the property subject to a refunding bond.\textsuperscript{81}

The bond shall be conditioned that, if it shall later be established that the absentee was in fact alive at the time of distribution, the distributee upon demand will return the property received by him, or, if it had been

\begin{itemize}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} This statement is based on the author’s conclusion that there may be three different ways to treat a returning absentee’s redistribution of his or her estate, based on an analysis of state laws on the subject. \textit{See N.Y. Est. Powers & Trusts Law} § 4-1.1.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{See e.g. N.J. Stat. Ann.} § 3B:27-2 (2015).
\item \textsuperscript{78} N.J. Stat. Ann. § 3B:27-2.
\item \textsuperscript{79} \textit{Va. Code Ann.} § 64.2-2307 (2015).
\item \textsuperscript{81} \textit{Id.}
\end{itemize}
disposed of, will make such restitution therefore as the court shall deem equitable.\footnote{Id.}

The requirement of a refunding bond ensures that the absentee either recovers his or her property or receives the value of such.

Prior to enactment of Section 2226, New York allowed decedents to recover all the assets from his or her estate.\footnote{N.Y. Surr. Ct. Proc. Act Law § 2226.} However, prior to Section 2226’s enactment, New York took the approach of allowing the alleged decedent to recover all of the assets from his estate.\footnote{1966 N.Y. Laws ch. 685, § 2225.} Originally enacted, this statute allowed the returned absentee to “recover from any person who shall have received distribution of moneys or other assets from his fiduciary such moneys or the value thereof,” along with the ability to collect any property still in the hands of the fiduciary.\footnote{Id.} In 1993, Section 2226 was amended for a third time, making significant changes to the assets the alleged decedent could recover.\footnote{1993 N.Y. Laws ch. 514, § 2226.} This third amendment removed the language allowing the alleged decedent to recover his or her assets from anyone who had already received them from the fiduciary, and added language prohibiting the alleged decedent from recovering any assets that the fiduciary had already distributed.\footnote{Id.}

Research does not reveal any statutes prohibiting an alleged decedent from any recovery or having any claims over his or her former estate if he or she was wrongfully declared dead. However, some state statutes disqualify a decedent from recovering any assets after the statutory time period has elapsed. For example, Section 59-2705 of Kansas’s statutes does not allow an absentee to bring an action to recover his estate if the absentee learned of the distribution more than one year prior to the action.\footnote{Kan. Stat. Ann § 59-2705 (2015).} Furthermore, the absentee would not be allowed to bring an action if the distribution had occurred more than six years prior to his or her attempt to recover his or her assets.\footnote{Id.} For those decedents who do not qualify under Section 2226, New York courts may apply New York Surrogate Court Procedure Act Section 911 (hereinafter “Section 911”).\footnote{N.Y. Surr. Ct. Proc. Act Law § 911 (2015).}

Section 911, “Final Determination and Distribution of an Absentee’s Estate,” can be used to distribute the estate of someone
who is considered an absentee and has not yet been declared dead under Section 2-1.7. 91 A court may refuse to declare the absentee dead under Section 2-1.7 if it believes there is insufficient evidence to show that the alleged decedent is dead. 92 The absentee’s property may be distributed either by will or intestacy if the absence has lasted five years or if a court has declared an absentee dead under Section 2-1.7. 93 Once the absentee’s estate has been distributed, “the absentee has no right to sue for or recover the moneys or the value of other assets distributed.” 94 According to the legislature, “the distributees receiving the money after a final accounting are more entitled to protection than the missing person who shows up after a 3 or 5 year absence.” 95

Together, these statutes help to provide guidance for courts on the very uncommon occasions of a claimant who desires an absentee be declared dead, or the return of an absentee legally declared dead who wants his estate returned.

III. Analysis

Legislatures need to take into account the interest of potential parties to an estate action where the decedent is presumed dead. For example, the decedent’s heirs might request a shorter time frame for presumption of death and a provision in the declaration that the absentee not be able to recover any of his estate should he or she turn out to be alive. Should the request be granted, the heirs would receive their portions of the estate more quickly and not be subject to loss of those distributions if the decedent were actually alive. Potential absentees, by contrast, may request a longer specified time frame and a provision that provides for the absentee to receive all or some of his or her upon return. While many states’ relevant statutes attempt to weigh both sides of the time-frame conflict, New York has the most fair and progressive statutory structure and this model should be followed throughout the country.

Prior to the adoption of any statutory time period, “life was deemed to continue unless there was evidence adduced to the contrary.” 96 With time, the development of communication made

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91 Id.  
92 Id.  
94 Id.  
96 Id.
declarations of death of an absentee much easier.\textsuperscript{97} In the eighteenth and early nineteenth centuries the world was a much larger place than it is today. The courts recognised [sic] that in the poor communications of the times disappearance did not necessarily suggest death.\textsuperscript{98} As the nineteenth century progressed the steam age radically improved communications. Disappearance of a person unheard of gave rise, as time went on, to a progressively stronger inference that he was dead. To give effect to that inference the presumption of death was evolved.\textsuperscript{99}

It is possible, though not proven, that the legislature, in enacting Section 1-107 to the 1969 Uniform Probate Code considered the development of technology and improving communications when it reduced the required presumption of death from seven years to five years.\textsuperscript{100}

New York has progressively shortened the required presumption of death from seven years to five years, and most recently, from five years to three years.\textsuperscript{101} As Margaret Valentine Turano stated, the reason for reducing the time period was that “[a] missing person could easily contact his or her family if alive and if he or she desired to do so.”\textsuperscript{102} It has now been twenty-two years since the last amendment to Section 2-1.7, and some scholars are of the opinion that the three years requirement should be reduced yet again.\textsuperscript{103} Rebecca Goldberg concludes that through inputting information and data about missing persons into governmental databases “there would be very little negative impact if the New York Legislature were to reduce the waiting period from three years to two years.”\textsuperscript{104} There are proposals in New York to reduce the statutory time period to two years, but other states still maintain the requirement of seven years.

The three-year statutory time period could arguably present opportunities for fraud, in that an alleged decedent could have more incentive to fake his own death, while a longer waiting period may help to avoid fraudulent behavior altogether. In the Arkansas case,

\textsuperscript{98} Id.
\textsuperscript{99} UNIF. PROBATE CODE § 1-107.
\textsuperscript{100} 2000 N.Y. Assembly Bill A10421.
\textsuperscript{102} Rebecca T. Goldberg, \textit{Proposal to Amend EPTL § 2-1.7(a)}, 46 NYSBA 8 (2013).
\textsuperscript{103} Id.
Southern Farm Bureau Life Insurance Company v. Burney, the defendant, after being involved in an accident, faked his own death.\(^\text{104}\) Because his body was never found, he was presumed dead, but then resurfaced six years later. Burney thought the presumption of death law was seven years but returned after six due to his ailing father. However, the presumption of death law at the time was set at five years, making it easy to see how the element of fraud could have played into the case.\(^\text{105}\) If Arkansas actually had its presumption of death law set at seven years, then Burney’s disappearance likely would have had no legal consequence by the time he reappeared, as his life insurance policy would not yet have been paid out to his heirs. For a state like New York, with a significantly shorter presumption of death time frame, there exist legitimate concerns as to fraudulent disappearances.

Cases such as Burney, however, are very rare due to the combination of peculiar facts. In Burney, there were circumstances that suggested the decedent had perished.\(^\text{106}\) Even though the body was not found, two fishermen claimed to have seen a body.\(^\text{107}\) The Sergeant in charge of the investigation was convinced that the decedent had either died or killed himself.\(^\text{108}\) A private investigator hired by the decedent’s wife also believed the decedent was dead upon completion of his investigation.\(^\text{109}\) Considering these facts, it is understandable why the Court was convinced that the absentee was no longer alive. Note that convincing evidence of death is a requirement under Section 2-1.7.

In Re Cyr, the absentee was a former member of the biker gang the Hells Angels.\(^\text{110}\) He went to Vancouver where he met with some of the members and was not seen or heard from after that meeting.\(^\text{111}\) The Court concluded that although there was sufficient evidence that the absentee may have been killed, there was also plenty of motive for him to disappear.\(^\text{112}\) The Court refused to declare him dead until the police provided more evidence to that point.\(^\text{113}\) Though Re Cyr is a Canadian case, it is a perfect example of what a

\[^{105}\] Id.
\[^{106}\] Id. at 1019.
\[^{107}\] Id.
\[^{108}\] Id.
\[^{109}\] Burney, 500 F.Supp. at 1019.
\[^{110}\] Re Cyr, [2006] B.C.J. No. 2703, 2006 BCSC 1523 (Can.).
\[^{111}\] Id.
\[^{112}\] Id.
\[^{113}\] Id.
United States’ court would have to do in order to decide a presumption of death question. It is less likely that a New York court will have to decide an extremely rare case such as Burney and more likely it will thoroughly consider all the evidence as the Court did in Re Cyr, because of the requirements of Section 2-1.7.\(^{114}\)

While New York courts can delay declaring an absentee dead due to a lack of convincing evidence, they can also declare an absentee dead before the statutory time period of Section 2-1.7 if there is specific evidence of a specific peril of death situation.\(^{115}\) The specific peril of death provision in Section 2-1.7 allows a faster process for the distribution of the absentee’s estate to family members who may have been dependent on the absentee.\(^{116}\) Having this provision allows family members to collect their inheritances earlier than three years when the evidence shows the absentee is more than likely dead.

New York’s approach to estate redistribution is the most fair and balanced if an absentee’s estate is distributed because he was wrongly declared dead. New York takes into account the preferences of both the returning absentee and the beneficiaries.\(^{117}\) Instead of returning the whole estate to the absentee or preventing the absentee from recovering any of his estate, New York allows the absentee to collect the portion of his estate that is still in the hands of the fiduciary while the beneficiaries are allowed to keep what has already been distributed to them.\(^{118}\) While this procedure may seem unfair to the absentee, the beneficiary may rely on the property he or she received from the absentee’s estate. One example may be a child using his or her share of the estate to pay for his or her college tuition. If he or she is already enrolled and has a limited income, it is unfair to demand repayment of that portion of the estate that was distributed to him or her when he or she relies so heavily on that money.

If we return to the Bruce Wayne hypothetical from *Batman: The Dark Knight Rises* posed in the introduction, there are many factors to consider when trying to determine how a court might rule in declaring Bruce Wayne dead. A court must consider if there was a specific peril of death situation and if there was enough evidence to show that he in fact perished in that situation. If the court did not find convincing evidence that he did perish, the issue could be revisited after three years from the time he went missing. A court

\(^{114}\) N.Y. EST. POWERS & TRUSTS LAW § 2-1.7.
\(^{115}\) Id.
\(^{116}\) Id.; Margaret Valentine Turano, Practice Commentary, McKinney’s Cons Laws of NY, 2015 Electronic Update, Estate Powers & Trusts Law § 2-1.7.
\(^{118}\) Id.
could also factor in reasons why Bruce Wayne may want to disappear, such as starting a new life outside of Gotham. Once a court declares him presumptively dead under Section 2-1.7, it would appear that if Bruce Wayne returned, he would be able to collect any portion of his estate that was still in the hands of his fiduciary, most likely his trusted butler, Alfred.

IV. Conclusion

In situations like the one presented in Batman: The Dark Knight Rises, a proper determination of presumption of death is critical. An absentee's estate should not be distributed without strong evidence of death. For this reason, New York's presumption of death statutes should be the model standard across the country. New York presents a model standard due to their flexibility and consideration of outside factors, such as the specific peril of death situation. If other states adopt New York's model, they would be more effective in deciding even the most difficult of presumption of death cases, such as the case of Bruce Wayne/Batman.
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