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# QUINNIPIAC PROBATE LAW JOURNAL

## TABLE OF CONTENTS

### OPINIONS OF THE CONNECTICUT PROBATE COURT

<table>
<thead>
<tr>
<th>Opinions</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>ESTATE OF: CHARLOTTE M. BALZ TRUST, FBO FLORENCE NEWMAN (Will Contest)</td>
<td>229</td>
</tr>
<tr>
<td>IN RE: ESTATE OF HELEN RUTSKI (Estate Distribution)</td>
<td>234</td>
</tr>
<tr>
<td>IN RE: MINOR CHILD (Guardianship)</td>
<td>253</td>
</tr>
</tbody>
</table>

### ARTICLES

<table>
<thead>
<tr>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>TRUST LAW IN THE TWENTY-FIRST CENTURY: CHALLENGES TO FIDUCIARY ACCOUNTABILITY</td>
<td>261</td>
</tr>
<tr>
<td>Alan Newman</td>
<td></td>
</tr>
</tbody>
</table>

### NOTE

<table>
<thead>
<tr>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>WHAT GHOST UP MUST COME DOWN: THE HIGHS AND LOWS OF PSYCHIC MEDIUMS IN PROBATE LAW</td>
<td>310</td>
</tr>
<tr>
<td>C. Lily Schurra</td>
<td></td>
</tr>
</tbody>
</table>

### APPENDIX

<table>
<thead>
<tr>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>CUMULATIVE TOPIC INDEX</td>
<td>331</td>
</tr>
</tbody>
</table>
A remainder beneficiary of a testamentary trust predeceased the then surviving lifetime beneficiary of the trust. In determining what was to become of her remainder interest, the Court considered whether the will expressed a contrary intention to the general principle that the law favors early vesting of estates for the purposes of bequests through a testamentary trust. Additionally, the Court considered whether the bequest to the remainder beneficiary had lapsed. The Court held that because the interests of the remainder beneficiary vested at the time of the testator's death, and because the anti-lapse statute was inapplicable to this specific bequest, the remainder interests should be distributed in four equal shares, three to the surviving beneficiaries, and one to the estate of the predeceased remainder beneficiary.

1. Testamentary Trust: Distribution

Where a remainder beneficiary survives the testator but predecease the lifetime beneficiary, the remainder interests devolve to the estates because the law favors early vesting of estates.

2. Estates and Future Interests

A limitation over after a life estate vests upon the testator's death,
although the right of possession is postponed until the termination of the life estate.

3. Wills: Exception to Principle of Construction

One exception to the principle of construction favoring early vesting of estates is if the will discloses a contrary intention.

4. Wills: Anti-Lapse Statute

In order for Connecticut’s anti-lapse statute to apply to a lapsed bequest, the beneficiary must be within a degree of relationship specifically mentioned in the anti-lapse statute. Conn. Gen. Stat. § 45a-441 (2015).

5. Wills: Anti-Lapse Statute

Connecticut’s anti-lapse statute applies only where the legatees or beneficiaries predecease the testator.

Opinion

The issue in this matter concerns the distribution of the share of a trust to a remainderman who predeceased the lifetime beneficiary of the trust. The pertinent facts are as follows:

Charlotte M. Balz died on October 1, 1975, leaving a will dated February 14, 1975, that was admitted to probate on June 6, 1977. The Second Article of Ms. Balz’s Will created a testamentary trust with the following dispositive provisions:

I hereby give, devise and bequeath to my niece, Florence Newman, and her husband, Philip Newman of 6 Cedar Place, Massapequa Park, Long Island, New York, as joint trustees, all of the right, title and interest which I now possess in the following securities, and any additional securities which I may hereafter acquire....

I direct...that the said trustees shall have full use, for their benefit as they see fit, any distribution of dividends, interest or any payments whatsoever, which may accrue from said securities during their lifetime.... Upon the demise of the survivor trustee, all right, title and interest in said securities shall pass to the children of said trustees, Robert, Philip, Edward and Elizabeth, equally, share and share alike to be disposed of as they may see fit.
Mr. and Mrs. Newman enjoyed the benefits of this trust during their lifetimes as reflected in the several accountings filed and approved by the Court over the years. Phillip Newman died on June 29, 2001.

Florence Newman died on October 25, 2013. The trust, therefore, terminated on that date.

As noted above, the trust provided that upon the demise of the survivor trustee, the securities held in trust would pass to the children of the trustees, namely Robert Newman, Philip Newman, Edward Newman, and Elizabeth Newman. Unfortunately, Elizabeth Newman died before Florence Newman, the survivor trustee. The issue before the Court, therefore, is what happens to Elizabeth Newman’s remainder interest?

[1][2] The West Hartford Probate Court answered this very question in In the Matter of Harry Servis, 13 QUINNIPIAC PROB. L.J. 307 (1998). In that case, three of the four remainder beneficiaries of a testamentary trust survived the testator but predeceased the lifetime beneficiary. The Court held that their remainder interests should devolve to their estates based on the rule of construction that “the law favors the early vesting of estates....” Id. at 309-10 (quoting Hartford Nat’l Bank & Trust Co. v. Birge, 159 Conn. 35, 266 A.2d 373, 376 (1970) and Smith v. Groton, 147 Conn. 272, 275-76, 160 A.2d 262, 264 (1960) (“[a] limitation over after a life estate vests upon the testator’s death, although the right to possession is postponed until the termination of the life estate.”)) Thus, in this matter the remainder interests of Robert Newman, Philip Newman, Edward Newman, and Elizabeth Newman vested upon the death of the Testatrix.

[3] An exception to this principle of construction is if a will discloses a contrary intention. Servis, 13 QUINNIPIAC PROB. L.J. at 310; Birge, 266 A.2d at 376. The only thing remaining here, then, is an examination of the Will to see if a contrary intention to early vesting is disclosed. The Court finds that no contrary intention is disclosed in the Will.

[4][5] In her undated Final Account received by the Court on December 17, 2014, the trustee stated that the bequest to Elizabeth Newman lapsed and was not saved by Connecticut’s anti-lapse statute, Conn. Gen. Stat. § 45a-441 (2015), since she was the Decedent’s niece and, therefore, not within the degree of relationship specifically mentioned in that statute. In addition, the anti-lapse statute applies only where legatees or beneficiaries predecease the testator, not a life tenant. Servis, 13 QUINNIPIAC PROB. L.J. at 309 n.1. Under either theory, the Court agrees that Section 45a-441 is inapplicable to the facts in this case.
In the account, Schedule C-1 showed a proposed distribution of three equal shares to the surviving remaindermen, Robert Newman, Philip Newman, and Edward Newman. If Elizabeth Newman’s interest did lapse the result would be different, since the Will provides that any lapsed legacy would pass as part of the residuary clause that provided bequests to four charities. The Court’s finding, however, means that the bequest to Elizabeth Newman did not lapse, since it vested upon the death of the Testatrix.

Along with her Motion For Construction, the Trustee filed a replacement Schedule C-1 that shows a proposed distribution of four equal shares, one each to Robert Newman, Philip Newman, Edward Newman, and one to Alanna Newman, Elizabeth Newman’s daughter, who is described as her sole heir. On the record before the Court, a distribution to Alanna Newman cannot be approved since the Court has no way of knowing if she is Elizabeth Newman’s sole heir.

As noted above, because title vested in Elizabeth Newman on the date of death of the Testatrix, her share of the remainder estate must go to her estate. The Court does not know who is entitled to inherit from Elizabeth Newman and cannot approve the distribution to Elizabeth’s daughter without an order of distribution from a court of competent jurisdiction. In the absence of such an order, the Court can only order distribution to the estate of Elizabeth Newman and leave the ultimate distribution of her estate to another day and, perhaps, another court. Consequently, the Court will adjust the account to show distribution of the remainder in equal shares to Robert Newman, Philip Newman, Edward Newman, and the estate of Elizabeth Newman. WHEREFORE, it is ORDERED AND DECREED that:

Schedule C-1 of the Final Account is adjusted to show distribution of the trust assets on hand in equal shares to Robert Newman, Philip Newman, Edward Newman, and the estate of Elizabeth Newman.

The Final Account, as so adjusted, is allowed and approved and shall be recorded and filed.

The rest, residue, and remainder of said trust is to be distributed, transferred, and paid by the fiduciary thereof in accordance with the findings of the Court as indicated above.

It is further ORDERED AND DECREED that said fiduciary

---

1 During the administration of this trust estate Elizabeth Newman's address was listed as 6 Cedar Place, Massapequa New York, NY. The Court is unaware as to whether an estate was probated for Elizabeth in New York or anywhere else.
make due return of compliance with this Order.

Dated at Torrington, Connecticut, this 15th day of September, 2015.

          /s/

     Michael F. Magistrali, Judge
This opinion regards the validity of the Decedent’s Will. The Decedent was ninety-nine when she passed away and had revised her Will at the age of ninety-five. The revised Will resulted in one of the Decedent’s three children being substantially disinherited. In the Will, the Decedent explained that her son was “well provided for” and that was the reason she disinherited him. The disinherited son brought this lawsuit claiming: (1) the Will was not executed with the requisite legal formalities; (2) the Decedent lacked testamentary capacity at the time the Will was signed; and (3) the Decedent was unduly influenced in the preparation of signing the Will. The Court determined that the Decedent was of sound mind at the time the Will was signed, and that there was no evidence of undue influence. Therefore, the Court declared the Will to be valid.

1. Disposition of Property: Generally

Pursuant to Conn. Gen. Stat. § 45a-250 (2015), individuals eighteen years of age or older and of sound mind may dispose of their estates by will.

2. Wills: Requirements Of

For a will to be valid under Conn. Gen. Stat. § 45a-251 (2015), it must be: (1) in writing; (2) subscribed by the testator; and (3) attested by two witnesses in the testator’s presence.
3. Wills: Validity


4. Wills: Burden of Proof—Generally

The proponent of the will must establish by preponderance of the evidence the issues of due execution and testamentary capacity.

5. Wills: Burden of Proof—Shift Of

In Connecticut, if a will is contested on the basis of undue influence, fraud, or mistake, the contestant has the burden of proof in establishing these elements. Where a special relationship exists, the burden shifts to the proponent to prove fair dealing or the absence of undue influence.

6. Wills: Undue Influence

There are four elements of undue influence: (1) a person who is subject to influence; (2) the opportunity to exert influence upon the testator; (3) a disposition to exert influence; and (4) a result indicating undue influence. Tyler v. Tyler, 151 Conn. App. 98, 93 A.3d 1179 (Conn. App. Ct. 2014).

7. Wills: Validity

A witness is not required to have first-hand knowledge of the testator's capacity. The witness need only show that the decedent had the requisite capacity to have mind and memory sound enough to understand the business in which she was engaged. In re City Nat’l Bank & Trust Co., 145 Conn. 518, 521, 144 A.2d 338, 340 (1958).

8. Undue Influence: Burden of Proof

To prove undue influence, a party must show that the testator was isolated from others, such that the behavior or thinking of the testator changed as a result of the influence.

Opinion

This is a story of an elderly Mother with three adult children, two of whom lived close to her and cared for her on a daily basis. After a difficult winter in which this Mother broke her hip and required two surgeries, the Mother became very angry with one son whom she felt was not there enough for her, and decided to substantially disinherit him from her will. This disinheritance had happened to this son before; his own father had done the same thing
to him, but he had not challenged the will that time. This time, however, the son needed to have his day in court.

FACTS:

Helen Rutski (hereinafter the “Decedent,” “Mother,” or “Grandmother”) died on October 11, 2014, at the age of ninety-nine. She was the Mother of three children, Richard Rutski (hereinafter “Richard” or “Contestant”), Carol Miller (hereinafter “Carol”), and David Rutski (hereinafter “David”). The oldest, Richard, moved to New Jersey many years ago, marrying Dolores and adopting her children, then aged nine and thirteen. Carol lived locally in New Canaan, and had no children. David, the youngest by ten years, bought a house next door to his Mother, where he lived with his wife Nancy and their two children.

At the age of ninety-five, the Decedent made her last will and testament, dated March 19, 2010 (hereinafter “the Will”), signed in the presence of two witnesses, Perpetual Ofori (hereinafter “Ms. Ofori”) and Robert Stein (hereinafter “Mr. Stein”). Attached to the Will was a self-proving affidavit notarized by the drafting attorney, Christine O’Sullivan (hereinafter “Attorney O’Sullivan”).

Article THIRD of the Will provides the following:

THIRD: All of the rest, residue and remainder of my estate, whether, real, personal or mixed property, wherever located and of whatever kind and character, including any legacy, devise or bequest which may for any reason lapse or fail to take effect (all of which is sometimes collectively hereinafter referred to as “my residuary estate”), I devise and bequeath to my beloved children as follows: $25,000 to my son, RICHARD RUTSKI. I leave this sum to him knowing that he is otherwise provided for. The remainder of my estate, I bequeath and devise to my daughter, CAROL MILLER and my son, DAVID RUTSKI. In the event that any of my children shall predecease me I direct their share shall be divided equally between ALYSSA RUTSKI and MICHAEL RUTSKI.

Article FIFTH of the Will appoints Carol as the executrix of the Estate.

The Will was submitted to probate in this Court on October 22, 2014. Richard objected to the submission of the Will by letter dated January 7, 2015. After the objection, Carol petitioned to be appointed temporary administratrix to begin the process of cleaning out the
Decedent’s home to ready it for sale. There was no objection to this petition. Carol was appointed temporary administratrix by decree dated January 14, 2015. Bond was set at $1,000.

The Estate consists of a house on Cottage Lane, which is subject to a reverse mortgage. The estimated equity interest is approximately $200,000. There are no bank accounts, life insurance, or pension funds. There is also a one-seventh interest in another estate, which is a parcel of land in Westport, the value of which is not able to be determined at this time.

Richard objects to the Will on the following grounds:

1. The Will was not executed with the requisite legal formalities.

2. The Decedent lacked testamentary capacity at the time of signing the Will.

3. The Decedent was unduly influenced in the preparation and signing of the Will.

The Court took testimony at several hearings held throughout 2014 and 2015. Many witnesses testified. Following the final hearing in June of 2015, the attorneys filed post-hearing briefs, the latest received on July 10, 2015.

With respect to the objection on the ground of legal formalities, the witness Ms. Ofori could not be located to testify. However, Carol testified that Ms. Ofori spoke English and had been recently employed by the Decedent when she witnessed the Will. The witness Mr. Stein did testify, as did Attorney O'Sullivan.

Mr. Stein testified that he witnessed the Will at the Decedent’s home with Attorney O'Sullivan and the Decedent present, as well as an African American woman whose name he did not know. Mr. Stein testified that the Decedent declared, “this is my will,” and that he witnessed the Decedent’s signature, as well as the other witness’s signature. He further testified that the Decedent was in her bed in her house in Westport, and that the bed was not in the bedroom. Mr. Stein testified that this was the first time he had ever witnessed a will. He said the Decedent’s eyes were clear, and although she looked tired and old, she knew what she was doing. He estimated that the entire ceremony took about a half hour. Mr. Stein testified that the Decedent seemed to be of sound mind and memory and under no duress. Mr. Stein concluded by stating that he had no concerns about the Decedent’s mental state and he repeated that he had determined that she knew what she was doing.
Attorney O’Sullivan testified that she had written a Will for the Decedent in 2005. In 2010, Carol called and told Attorney O’Sullivan that her Mother wanted to change her Will. Attorney O’Sullivan testified that Carol brought the Decedent in to see her and that Attorney O’Sullivan spoke alone with the Decedent. In her testimony, Attorney O’Sullivan referred to the notes she had taken at the meeting with the Decedent. The Decedent and Attorney O’Sullivan discussed what distributions were “fair.” In the prior will, all three children were left one-third each. However, in this Will, the Decedent changed the bequest to Richard, leaving him $25,000 instead of one-third of her Estate. Attorney O’Sullivan stated that the Decedent gave her the following reasons for changing her Will: (1) that Richard was well provided for; (2) the other children were performing services for her; and (3) specifically, that her son David lived next door and was always available and did everything and anything she needed him to do. Attorney O’Sullivan said that the Decedent was sharp, clear, lucid, and logical. Attorney O’Sullivan testified that the Decedent said, “This is what I want to do.” Attorney O’Sullivan never got the impression it was anyone else’s idea. She further testified, when asked, that another difference between the 2005 Will and the 2010 Will was that the 2010 Will omitted any provision for grandchildren from Richard, whereas the 2005 Will provided that if Richard or Carol died, those grandchildren were to be included in the Estate.

Attorney O’Sullivan further testified that she was present when the witnesses signed the Will and for the self-proving affidavit. Attorney O’Sullivan testified that the witnesses signed the Will at the Decedent’s house.

Upon cross-examination, Attorney O’Sullivan testified that the first meeting took place at her home office, on the second floor of her house. For the Will signing, Attorney O’Sullivan brought the witness Mr. Stein with her; the Decedent was in a bed in her living room at her home, and the other witness was Ms. Ofori, a caretaker.

With respect to the objections raised as to capacity and undue influence, the proponent of the Will offered testimony from the Decedent’s doctor, as well as various friends and neighbors who interacted with the Decedent both before and for years after the Will was executed. The Contestant offered testimony from himself, as well as his wife, his children, and two siblings of the Decedent. The Contestant offered no medical testimony.

Carol testified that on October 23, 2009, her Mother fell and broke her hip. She was taken to Norwalk Hospital where she had her first surgery, followed by a stay at Carrollton Rehabilitation in Fairfield (hereinafter “Carrollton”). After this rehab stint, the
Decedent required a second surgery on December 21, 2009, followed by a second stay in Carrollton. After she was released from Carrollton, in March of 2010, the Decedent went back to her home with a full-time caregiver schedule.

Carol contradicted Attorney O’Sullivan’s testimony with respect to the first meeting for the 2010 Will. Carol said that the meeting occurred at the Decedent’s home, rather than at Attorney O’Sullivan’s office.

Carol testified that at the time of the Will signing, the Decedent was taking Lipitor, a thyroid medicine, baby aspirin, and Tylenol. She was not taking “heavy drugs.” However, the Decedent had a distinct hearing problem and wore a hearing aid most of the time. She also needed eyeglasses.

Carol testified that the Decedent’s mental state in March of 2010 was “great, happy, safe, [and] content.” She was aware of her surroundings and knew her family. She was very close to her grandchildren. Her family visited often.

Carol also testified that her brother, Richard, hurt her Mother deeply and was not there for her. She testified he did the “bare minimum.” Carol stated that she kept Richard in the loop by email and phone, and wanted Richard to be more involved in their Mother’s care. Carol was named on the health care proxy, so the hospital staff would tell her what was going on with her Mother’s condition.

The Decedent’s sister, Wanda Ornovsky (hereinafter “Wanda”), twelve years younger than the Decedent, therefore at the time approximately eighty-seven years old, testified that the Decedent was one of ten siblings, four of whom are still alive. Wanda and the Decedent were close; they often went shopping together. After the Decedent broke her hip in the fall of 2009, Wanda visited her in the hospital and in Carrollton. She said they talked about Wanda’s grandchildren, but not about the Decedent’s grandchildren. She said the Decedent never said she was disappointed in her children and that she was “her own person.” However, after she fell, the Decedent would repeat the same thing over and over again. When asked, “Were you persuaded that your sister understood you?”, Wanda answered “I think so.”

Anthony Michael Rutski (hereinafter “Anthony”), Richard’s son, also testified. Anthony testified that he was adopted by Richard after Richard married his mother. Anthony and his sister were ages thirteen and nine at the time. He testified that Richard and Carol had a distant relationship, but that Richard and David had been close. Anthony said that at David’s wedding, years before the Will
was signed, Anthony and his sister were asked to step out of the family photo because they were adopted. Anthony was very insulted by this. He further testified that he felt it was overly difficult to communicate with his Grandmother while she was in the hospital and later at rehab. He testified that when he identified his name as “Anthony,” the telephone operator did not put him through. Anthony stated that he saw his Grandmother in 2004, in 2007 at a party, and the last time he saw his Grandmother was in 2008.

Anthony also testified that one day he “slipped through” and was able to speak to his Grandmother. He stated that he “felt his Grandmother understood him” and that she had mentioned that she had spoken with Anthony’s sister as well at the hospital. He further stated that he knew of a fight between Richard and Carol and that Carol had hung up on Richard. Anthony testified that generally he spoke to his Grandmother two to three times per year, for birthdays or holidays, and that she knew he had a girlfriend and a dog.

Most significantly, Anthony testified that to his knowledge, Richard spoke to the Decedent every day while she was in Carrollton in those months before she executed the Will.

Testimony was introduced to show the extent of Richard assets. Richard owns two rental properties in addition to his own home, a timeshare, and a site in an RV trailer park, as well as an RV. He has been retired for approximately ten years.

Dolores Rutski (hereinafter “Dolores”), Richard’s wife, also testified. She has been married to Richard for forty-two years, and visited the Decedent every holiday. She testified that her husband did a lot of things for his Mother, including changing batteries in smoke alarms, fixing plumbing and heating fixtures, and putting an air conditioner in the window. The Decedent would have a list for Richard and he would do the assigned tasks. On the Decedent’s ninetieth birthday, five years before the Will was signed, Dolores and Richard brought their whole family to see her, including their children, grandchildren, and great-grandchildren. At the time, Richard brought his Mother a dryer which he installed. Dolores testified that the Decedent could not see or hear well, and that she often fell down.

Dolores testified that the Decedent called her “Yvonne” sometimes. Yvonne was Richard’s first wife. Dolores stated that she was sure the Decedent was not aware that Richard’s children were omitted from the Will. Dolores was very upset because she believed that none of her handmade cards made it to Carrollton, even though she had spent time and effort making and sending them.
Dolores testified that after the Decedent came home in the winter of 2010, she eventually left her house to live with Carol in New Canaan for about a year. In either November or December of 2010, Dolores filed a petition alleging elder abuse. She felt that the Decedent was alone too much of the time and was concerned about her falling. Dolores stated she did not know anything about the Will.

Dolores said they resumed seeing the Decedent after about a year, in July of 2011. She further testified that she was not surprised about the Decedent’s Will. In fact, she said she was “surprised there was anything at all in the Will for Richard.” She stated that Richard had already been excluded from his father’s will because Carol had told Richard’s father that Richard was “well provided for.”

In December of 2011, Dolores wrote to the Department of Social Services again but never heard from anyone. Richard and Dolores made an offer to the other siblings to take the Decedent into their home for four months per year, but they were told that was not going to happen. On cross-examination, Dolores admitted that the Decedent seemed to be aware of her insurance issues at the time she was in Carrollton.

Dorothy Rutski Hauser (hereinafter “Dorothy”) testified. She is the adopted daughter of Richard, and the natural daughter of Dolores Rutski. After the fall, Dorothy visited the Decedent in Carrollton, and said that David and Carol questioned her about why she wanted to visit. She answered that she “wanted a relationship with [her] grandmother.” Dorothy said they quarreled, and she was upset that no cards from their family were in the room at the rehab center.

Marxianna Moe-Cook (hereinafter “Missy”) testified. Missy was a neighbor of the Decedent for twenty-nine years. They went to the same church. Missy spoke at the Decedent’s funeral and was with the Decedent four days before she died, as they prayed together. Missy said she was familiar with the time period around when the Decedent fell and when the Decedent signed the Will. Missy said the Decedent was lucid, clear, knew her, and was interested in the close-knit people who lived on the street. Missy testified that four days before her death, the Decedent was still lucid.

Leslie Meredith (hereinafter “Leslie”), another neighbor, testified as well. She lived across the street from the Decedent for twenty years. Leslie said that after the Decedent fell, Leslie would bake for the Decedent and bring her food. They would talk about the news, Westport, and the caretakers. In fact, the Decedent had made a beautiful scrapbook for her grandson Michael as a gift and they talked about that book after the Decedent’s fall. The Decedent had a hearing
problem, but their talks continued until approximately six months before the Decedent died, in 2014, four years after the Will was signed.

Judith Brown (hereinafter “Judy”), a friend of the Decedent’s, also testified. Judy knew the Decedent since 1954, when her family first moved to Westport. Judy visited the Decedent after she came home from Carrollton. Judy testified that the Decedent was well-dressed, happy to be home, and complained about “the normal things.” In her words, the Decedent “was in good shape.” Judy remembers the Decedent saying, “I couldn’t do this without David and Carol,” which Judy interpreted as meaning, living at home. She said “Carol’s car is parked here all the time.” Judy saw David get the mail every day and bring it to his mother. Judy saw David fixing windows and the roof. Judy concluded that the Decedent was very grateful to Carol and David for all they did for her, and particularly because she was able to stay at home thanks to their efforts.

The Decedent’s friend, Pat Zagozan (hereinafter “Pat”), testified they were friends for sixty years. Pat visited the Decedent’s house twice per month and visited her at Carrollton and at the hospital. Pat put the battery in the Decedent’s hearing aid. Pat testified that the Decedent’s “mind was very good for her age in my opinion.” Pat testified that Richard called his mother every Sunday, but they never talked family or finances. For her ninety-ninetieth birthday, Pat testified that himself, the caretaker, Richard, and Dolores were there.

David testified that the Decedent sold the land underneath his house to him in 1987. It was not a building lot so David had to invest time and money to build a house for himself. Then he borrowed $100,000 from his uncle and paid back every dollar over a period of ten years. David works in the landscaping business and has held the same job for many years. He does not own the company.

David testified that the three children had held a meeting during the fall of 2009 to discuss caring for their Mother. Dolores wanted to be there, but David and Carol insisted that it be among themselves. Dolores was angry that she was excluded, as opposed to David’s wife Nancy, who understood why she was not asked to be there. At the meeting, Richard got angry and banged the table, saying: “My family’s in New Jersey.” David believed that meant Richard was telling him “[he] did not want anything to do with what was ahead of us.” Carol said she was overwhelmed with paperwork in caring for their Mother. The siblings discussed taking out a reverse mortgage on the Decedent’s house. There was stress among them; Richard’s grandson had passed away from a brain tumor, and David and Carol accused Richard of traveling around the world, basically
ignoring the fact that their Mother needed them all.

David testified that he visited his Mother every day after he finished work. After the Decedent arrived home from Carrollton, David placed a First Alert baby monitor in the house. He also took all the doors off the hinges so his Mother could more easily maneuver in her wheelchair. David testified that he “didn’t understand how he could be accused of preventing someone from seeing mom.” He stated that he would never exclude anyone or prevent anyone from seeing or calling his Mother, stating: “I don’t know of anyone who would do that.” When Dolores came to visit in Westport, the Decedent was at Carrollton, but David testified that Richard knew that she was there in Fairfield, and not in Westport. David also denied the incident about the wedding picture that had been brought up by Richard’s son. David said he did everything for his Mother that winter, except when he was sick with the flu. The Decedent was stubborn; she would mow the lawn herself if David did not do it right away.

David testified that after the Decedent was home from Carrollton, she was able to cook and eat and even do her exercises, although she complained about them. With respect to the elder abuse complaint, David testified that the health care aid reported that his Mother was in the best of care. No further action ensued. David testified that at the age of ninety-four, his Mother was in the stands watching her grandson Michael play baseball and cheering him on. She was very proud that he was the first to graduate college in the family.

Nancy, David’s wife, testified. She has been married to David for twenty-seven years and lived next door to the Decedent, her mother-in-law, for twenty-six of those years. She has also been a clinical orthopedic nurse for Bridgeport Hospital for the past twenty-five years, and regularly deals with elderly people with hip problems and mobility problems in general. Nancy testified that she might see the Decedent daily, or go several weeks without seeing her at all, due to Nancy’s training schedule. Nancy and the Decedent never discussed estate planning or finances. When the Decedent fell in her driveway, nobody found her for forty minutes. While inside her home, Nancy heard the Decedent calling from the driveway where she had fallen. Nancy moved the Decedent inside, and called for an ambulance.

Nancy testified that at Norwalk Hospital, where the Decedent was brought after her fall, the hospital staff never barred access to a room. Nancy further testified there was no change in the Decedent’s speech pattern or personality after the Decedent came home from the hospital. When Nancy heard about the Will change, she was saddened, but not surprised. Nancy’s testimony was: “No one would
make her do anything that she didn’t want to do.”

Richard, the Contestant, testified as well. The Court finds his testimony to be credible, persuasive, and ironically, most damaging to his own case, for it is Richard who supplied the relevant facts relating to the status of his Mother’s mind when she changed her Will. Many years ago, the Decedent and her husband had divorced. The Decedent’s husband had moved down to Florida; initially, the Decedent did not come, but later she did move there. David, who was ten years younger than Carol, lived in Florida with his parents. In 1988, when their father died, Richard was disinherited from his father’s estate with the same words, that Richard was “well provided for.” Richard believes that phrase comes from Carol. However, on cross examination, Richard admitted that his Mother was aware of his travels to Florida, Cancun, and other places. She knew about his rental properties. There were no mortgages on either his own house or his two rental properties. His Mother knew that Richard had other money, as well, as a result of his wife’s inheritance from her late parents. In short, Richard did not deny that his mother reasonably believed that he was “well provided for.”

Richard testified that he spoke to his Mother often when she was at Carrollton. During one phone call in February of 2010, the Decedent asked him to visit and to help more. According to Richard’s own testimony, when he told his Mother that he could not do what she asked, she said she was disowning him. His exact testimony was that his Mother said to him: “Then I’m disowning you, you’re not family anymore.” Then Richard hung up on his Mother.

David testified that he was there with his Mother during the February phone call to Carrollton between her and Richard. David said his mother was very upset and cried after Richard hung up. Carol testified that while she was not with her Mother for this phone call, they talked about it that night and her Mother was crying and very upset. After that phone call, family relations went from bad to worse. Carol admitted that she told Richard that if he came to her property, she would have him “arrested for trespassing.” However, the Decedent went to live with Carol after she signed the Will, not before. And the Decedent eventually went back to her own home, where she continued to receive friends, family, and neighbors on a regular basis.

When Richard was asked why he did not call his brother David and ask him to intervene to repair the rift between himself and his Mother, his answer was: “I don’t know.”

Dr. Sujatha Kumar (hereinafter “Dr. Kumar”) testified. She was the Decedent’s internist and nephrologist for twenty to thirty
years and is now retired. She testified that the Decedent’s last office
visit was in 2012 and the last time she saw the Decedent was in 2013
in the hospital. She recalled that as of 2009 the Decedent was an
“active lady.” She did not recall the broken hip, did not review the
records from 2009, and did not remember a fall. However, she
recalled that medically, the Decedent was a strong person. Dr.
Kumar referred to notes taken from March 18, 2010, just a week after
the Decedent signed her Will. She stated that the Decedent was
taking medicines for thyroid, cholesterol, aspirin, a stool softener, and
a water pill. The blood thinner and the antibiotics had been
discontinued. She testified that none of the drugs she was taking
would produce any side effects regarding her judgment. Referring to
her notes taken in August of 2010, six months after the Will was
signed, Dr. Kumar testified that while she had high cholesterol,
osteoporosis, aches and pains, and an underactive thyroid, the
Decedent had no conditions that affected her mental status. Dr.
Kumar testified that in June of 2013, the Decedent told the doctor
how she was being cared for. She knew Dr. Kumar as her doctor, she
knew where she was, and she was able to eat. There were no
concerns about Alzheimer’s disease. Furthermore, Dr. Kumar
testified that four doctors had seen the Decedent in 2013, and all the
doctors reported that she was alert and oriented. As recently as 2013,
there were no notes of dementia whatsoever. When asked by the
court if the Decedent had dementia, Dr. Kumar said, “no.”

THE LAW:

person eighteen years of age or older, and of sound mind, may dispose
will or codicil shall not be valid to pass any property unless it is in
writing, subscribed by the testator and attested by two witnesses,
each of them subscribing in the testator’s presence….” Conn. Gen.
Stat. § 45a-285 (2015) provides that a will may be proven by a “self-
proving” affidavit, that is to say that:

Any or all of the attesting witnesses to any will may, at
the request of the testator or, after his decease, at the
request of the executor or any person interested under
it, make and sign an affidavit before any officer
authorized to administer oaths in or out of this state,
stating such facts as they would be required to testify
to in court to prove such will. The affidavit shall be
written on such will or, if that is impracticable, on
some paper attached thereto. The sworn statement of
any such witness so taken shall be accepted by the
Court of Probate as if it had been taken before such
Testamentary capacity, the “sound mind” of the statute, is a requirement that the testator have mind and memory sound enough to know and understand the business upon which he is engaged at the time of the execution of the will. In re City Nat’l Bank & Trust Co., 145 Conn. 518, 521, 144 A.2d 338 (1958). The issue of testamentary capacity is focused on the moment of the execution of the will. Jackson v. Waller, 126 Conn. 294, 302, 10 A.2d 763 (1940).

The proponent of the will must establish by a preponderance of the evidence the issues of due execution and testamentary capacity. Crane v. Manchester, 143 Conn. 498, 501, 123 A.2d 752 (1956). The proponent is entitled to a presumption of capacity after available attesting witnesses have been produced and examined upon due execution and testamentary capacity, but testamentary capacity being a statutory issue the burden of proof remains on the proponent. Wheat v. Wheat, 156 Conn. 575, 578, 244 A.2d 359 (1968). In Connecticut, those contesting the admission of a will have the burden of proof in establishing issues of undue influence, fraud or mistake as matters in avoidance of the will. R. Folsom, Probate Litigation in Connecticut 2nd, Chapter 1, Section 1:2

...If, however, a confidential [fiduciary] relationship is proved, then the burden of proving fair dealing or the burden of showing the absence of undue influence shifts to the defendant or the fiduciary, and that burden must be sustained by clear and convincing evidence.” Cooper v. Cavallaro, 2 Conn. App. 622, 626, 481 A.2d 101 (App. Ct. 1984). See Dunham v. Dunham, 204 Conn. 303, 322, 528 A.2d 1123 (1987). The factor to be considered in determining whether a fiduciary relationship exists is: “characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the other.” Albuquerque v. Albuquerque, 42 Conn. App. 284, 287, 679 A.2d 962 (1996); Konover Development Corp. v. Zeller, 228 Conn. 206, 219, 635 A.2d 798 (1994).
Unlike a fiduciary relationship, the burden of proof is upon the party seeking to establish undue influence or lack of capacity even where there is a confidential relationship between parent and child. *Berkowitz v. Berkowitz*, 147 Conn. 474, 162 A.2d 709 (1960).

*Achin*, 2010 LEXIS 1199, at *5-6.

The *Achin* decision goes on:

Many years ago this Court held the following to be a correct statement of what constituted undue influence sufficient to invalidate a will: [T]he degree of influence necessary to be exerted over the mind of the testator to render it improper, must from some cause or by some means be such as to induce him to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment. That his free agency and independence must have been overcome, and that he must, by some dominion or control exercised over his mind, have been constrained to do what was against his will, and what he was unable to refuse and too weak to resist. But that moderate and reasonable solicitation, entreaty or persuasion, though yielded to, if done intelligently and from a conviction of duty, would not vitiate a will in other respects valid.

*Achin*, 2010 LEXIS 1199, at *6 (quoting *St. Leger’s Appeal*, 34 Conn. 434, 442, 449, 1867 Conn. LEXIS 54 (1867)).

The *Achin* court elaborated as follows:

Importunity or threats, such as the testatrix has not the courage to resist, moral command asserted and yielded to for the sale of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testatrix’s judgment, discretion or wish, is overborne, will constitute undue influence, though no force was either used or threatened. The existence and exercise of such undue influence is not often susceptible of direct proof. It is shown by all the facts and circumstances surrounding the testatrix, the family relations, the will, her condition of mind, and of body as affecting her mind, her condition of health, her dependence upon and subjection to the control of the person influencing, and the opportunity of such person
to wield such an influence. Such an undue influence may be inferred as a fact from all the facts and circumstances aforesaid, and others of like nature that are in evidence in the case, even if there be no direct and positive proof of the existence and exercise of such an influence.

_Achin_, 2010 LEXIS 1199, at *6 (quoting _In re Hobbes_, 73 Conn. 462, 467, 470, 47 A. 678 (1900); _Dale's Appeal_, 57 Conn. 127, 134, 135, 17 A. 757 (1888)).


...It is stated generally that there are four elements of undue influence; (1) A person who is subject to influence; (2) An opportunity to exert undue influence; (3) A disposition to exert undue influence; and (4) A result indicating undue influence. Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction...consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [or her] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth...failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

_Tyler_, 151 Conn App. at 106, 93 A.3d at 1184 (citations omitted; internal quotation marks omitted) (quoting _Pickman v. Pickman_, 6 Conn. App. 271, 275-76, 505 A.2d 4 (1986)).

**DISCUSSION:**

The Decedent’s Will was in writing, dated March 19, 2010, and subscribed by two witnesses, Mr. Stein and Ms. Ofori, in the presence of Attorney O’Sullivan. As per Mr. Stein and Attorney O’Sullivan’s own admissions in their affidavits and testimony, the Will was signed in the presence of each witness, the drafting attorney, and Decedent; the Decedent declared the Will to be her own. Attorney O’Sullivan’s self-proving affidavit is hereby accepted by this court as proof of due execution, in accordance with Conn. Gen. Stat. § 45a-285 (2015).
The Contestant submits that the testimonies of Mr. Stein and Attorney O'Sullivan should be deemed ineffective for purposes of due execution due to a failure by Mr. Stein to have met Decedent previously and Attorney O'Sullivan’s imperfect memory regarding the location of an earlier meeting with the Decedent. These contentions fail to be supported by statute or case law. The law does not require such knowledge by a witness to admit a will. Significantly, in *Wheat v. Wheat*, 156 Conn. 575, 584, 244 A.2d 359 (1968), the Connecticut Supreme Court stated:

> If, because of inattention, forgetfulness, or even malice, an attesting witness fails to testify as to an essential element for admission of the will to probate, whether under General Statutes § 45-160 or § 45-161, it is not, in and of itself, fatal to the validity of the will. Any other competent, available evidence may be introduced in proof of that essential element.

*Wheat*, 156 Conn. at 584. A witness is not required to have first-hand knowledge of a testator’s complete mental state. All that is required to show that decedent had the requisite testamentary capacity is that decedent have mind and memory sound enough to know and understand the business upon which she was engaged at time of execution. *In re City Nat’l Bank & Trust Co.*, 145 Conn. 518, 521, 144 A.2d 338, 340 (1958).

Mr. Stein testified that the Decedent acknowledged her Will and executed it before him, and that he was without concerns regarding whether she knew she was executing a will or her mental state. Attorney O’Sullivan testified that she had no doubts that the Decedent was of sound mind and referred to contemporaneous notes to refresh her memory as to the reasons her client had decided to change her Will.

Further, this Court finds there is ample additional evidence in this case to support testamentary capacity, and no evidence at all to suggest incapacity. The Decedent’s doctor testified that her patient did not suffer from dementia years after she had signed the Will. At least four other doctors who examined the Decedent in the years after she signed her Will did not note any signs of dementia. Three friends testified about the ongoing mental condition of the Decedent; one testifying that as late as four days before her death, four years after the Will was signed, the Decedent was lucid, praying alongside her friend.

Moreover, there is clear and convincing evidence offered by the Contestant himself as to the reason the Decedent changed her Will. The Decedent was angry with her son Richard because he could not
meet her demands to help her as she saw fit. She was both grateful to and feeling guilty about relying solely on her other two children, whom she recognized were spending a substantial amount of time seeing to her comfort and her needs. The Decedent had an argument over the telephone with her son Richard just a few weeks before she signed the Will, stating point-blank that she was going to disown him. In fact, the Decedent did not disown her son, but she did follow through on her threat to substantially disinherit him. As far as the reason that the Decedent gave her lawyer for the change—that her son was well provided for—that, too, had a rational basis in fact. The Decedent viewed Richard as wealthy, in that she knew he was able to afford vacation timeshares, a recreational vehicle, and live off of his retirement income while maintaining a middle-class lifestyle.

The Court finds that the Will was executed with the requisite legal formalities and that the Decedent had the requisite mental capacity to make her Will.

Richard’s third objection to the Will is that the Decedent was the subject of undue influence exerted on her in the time period after the Decedent fell and broke her hip, during the fall of 2009, and throughout the winter of 2010. The Contestant has the burden of proving by clear and convincing evidence that proponents exerted undue influence over the Decedent in the creation of the Will. *Daly v. Blinstrubas*, CV990156584S, 2002 LEXIS 4065, at *3, 2002 WL 31898259, at *3 (Conn. Super. Ct. Dec. 12, 2002). The Court finds that the Contestant has failed to sustain this burden.

[8] Considering the elements of undue influence in this case, there was no evidence to suggest that anyone influenced the Decedent at all, much less unduly. On the contrary, the testimony from Nancy, who was not only a medical professional but who knew the Decedent quite well, was that no one could make the Decedent do anything she did not want to do. The Court finds this testimony credible and consistent with the testimony of other friends and relatives. To prove undue influence, a party must show there is isolation from others, such that the typical behavior or thinking of a person has been changed over time as a result of being subject to the thinking of the person exerting such influence. Who would be the person exerting the influence here? The Contestant offers no one. During the winter of 2010, the Decedent was visited by all who chose to come and make the effort. The Decedent, although hard of hearing, spoke to her son *almost every day* she was in the rehab facility. That is the opposite of isolation. In fact, the testimony revealed that the Decedent was hurt because her son did not visit her enough.

The fact that Anthony had trouble getting through by telephone to the Decedent’s room is hardly indicative of a plot to bar
him from seeing his Grandmother. He could have gotten into the car and shown up for a visit. He knew his Grandmother was hard of hearing and that an in-person visit would obviously be preferable. The fact that some handwritten cards were missing from the Decedent’s hospital room is unfortunate, but does not persuade the Court that the Decedent was either kept from seeing anyone in particular nor that she was acting under the influence of anyone else.

Carol facilitated the Will signing by making the appointment with an attorney for her Mother, who no doubt had difficulty communicating via telephone with those with whom she was not regularly in contact. But Carol did not exert control over her Mother. On the contrary, it appears that the Decedent was so strong-willed that she persuaded Carol to allow her to move home to Westport as soon as practicable, even though that required extensive personal management of her care.

The Court also notes that the Decedent made no attempt to change her Will in the four years that elapsed between the signing of her Will and her death. Although she resumed seeing Richard, the Decedent continued to express to friends her gratitude towards David and Carol who were making many sacrifices so that she could age in her own home.

This Court makes no judgment as to the wisdom of the Decedent in writing her Will as she did. Rather, the Court recognizes that, generally speaking, Richard was a good and dutiful son to his Mother for her entire life to the extent he was able to be, given his own circumstances. However, the Decedent was a woman with a mind and will of her own, until the end of her very long life. Her wishes are entitled to be respected. There has been no showing of undue influence. The Will is hereby ordered admitted.

CONCLUSION:

This is a case in which a woman of sharp mind, strong will, and advanced age decided to substantially disinherit one of her three children. She did so because she was hurt that this particular son was not paying enough attention to her. Simultaneously, she felt guilty and grateful that her other two children were doing so much for her. This son believes this is unjust, in that he was as good a son as he knew how to be to his Mother. This Court does not disagree with either assessment. However, the law is clear. A person of sound mind can do what she wants with her property. In this case, the Court finds no facts to support the argument that this Mother was either of unsound mind, nor unduly influenced by anyone. The Decedent was surrounded by family and friends with whom she spoke freely. She was neither isolated nor under any duress. This Court
rules in favor of the proponents of the Will.

WHEREFORE, it is ORDERED and DECREED THAT:

1. The last Will and testament of Helen Rutski, dated March 10, 2010, is hereby admitted to probate.

2. Carol Miller is hereby appointed executrix in accordance with the Will. The bond is released.

3. The Executrix shall file an inventory on or before December 10, 2015.

So Ordered.

Dated at Westport, Connecticut, this 6th day of November, 2015.

/s/

Hon. Lisa K. Wexler, Judge
After having previously lost guardianship of her minor child to her parents (the child’s maternal grandparents), the Mother filed for reinstatement as guardian. In determining whether reinstatement was appropriate, the Court considered whether the factors that led to her removal as guardian had been resolved, as well as what was in the best interest of the minor child. The Court found that the Mother had greatly improved her mental health, lifestyle, and relationship with the minor child, and had thus satisfactorily resolved the factors that had resulted in her removal as guardian. Though the Court reappointed the Mother as guardian, the Court further found that immediate physical custody was not in the best interest of the child, and held that physical custody should remain with the maternal grandparents until the minor child and the Mother could establish a stronger, healthier relationship through therapy and more consistent visitation.

1. Parental Rights: Reinstatement

In determining whether a parent should be reappointed as guardian of a minor child, a Court must determine whether the factors that resulted in the removal of the parent as guardian have been resolved satisfactorily, as well as if reinstatement is in the best interests of the child. Conn. Gen. Stat. § 45a-611(b) (2015).
2. Parental Rights: Determination of Minor’s Best Interest

In a determination of what is in the best interest of the child for purposes of guardianship, the law generally presumes that it is in the best interest of the child to be in the custody of a parent versus a nonparent. This presumption may be rebutted by a showing that it would be detrimental to the child to permit a parent to have custody. Conn. Gen. Stat. § 46b-56b (2015).

3. Guardian: Defined


4. Guardianship: Generally


Opinion

[1] In November of 2011, the petitioner/mother (hereinafter “the Mother”) was removed as guardian of the minor child and the maternal grandparents were appointed guardians (hereinafter “the Guardians”). Before the Court is the Mother’s petition for reinstatement as guardian of the minor child. Pursuant to Conn. Gen. Stat. § 45a-611(b) (2015), the Court must determine whether the factors that resulted in the removal of the Mother have been resolved satisfactorily and whether reinstatement is in the best interests of the minor child. For the reasons stated in this decree, the Court finds that the factors that resulted in the removal of the Mother have been resolved satisfactorily and that reinstatement of guardianship is in the best interests of the minor child. For that reason, the implementation of this decree should be delayed until August of 2015.

The background of this matter is summarized as follows:

From the time the minor child was one or two months old, the minor has lived with the Guardians. For approximately the first three years of the minor child's life, the Mother also lived in 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.
household with the minor child and the Guardians. There was often friction between the Mother and the Guardians. The Mother was, in her own words, an absentee parent. She frequently went out without telling the Guardians where she was going. She often would be gone for days at a time, leaving the minor child in the Guardians’ care.

In March of 2011, the Guardians filed an application to remove the Mother and Father as guardians of the minor child. In connection with the removal application, they also filed an application for temporary custody that the Court granted in March of 2011 based on the Mother’s consent. The Father failed to appear.

In July of 2011, the Mother moved that custody of the minor child be restored to her. A hearing was held on that motion in August of 2011, at which the parties agreed to allow the temporary custody order to remain in place. They also agreed to a parenting plan that included specified visitation between the Mother and the minor child. However, that same day the Mother moved out of the household, leaving her minor child behind. The Mother did not participate in either the parenting plan or visitation. After she moved out of the household in August of 2011, the Mother had no contact with the minor child for approximately eight or nine months.

Sometime in 2012, the Mother moved in with her grandmother—the minor child’s great-grandparent—and resumed contact with the minor child, primarily by telephone. She visited with the minor child approximately every other weekend, mostly at her grandmother’s home and occasionally at the Guardians’ home.

In February of 2013, the Mother applied to be reinstated as guardian of the person of the minor child. Throughout 2013, the Mother continued to visit with the minor child every other weekend. The visits were mostly supervised. In 2014, the visits increased to every weekend and were unsupervised. Sometimes the visits took place at the Guardians’ home and sometimes the Mother took the minor child to different places in the community, such as the library, a fabric store, restaurants, the movies, or bowling. During both 2013 and 2014, she also had frequent telephone contact with the minor child.

Since February of 2013, the Court has held several hearings on the application for reinstatement and has issued several decrees concerning, inter alia, visitation, therapy for the minor child, therapy for the Mother, and family therapy for the Mother and the Guardians. Many, but not all, of the terms of those decrees were agreed to by the parties, including the attorney for the minor child. The intent of those decrees was to move toward reunification of the Mother and minor child. The expectation of the Court was that ultimately the
parties would agree that reinstatement was in the child’s best interest. For various reasons, the orders of the Court were not completely complied with and the Court’s expectations were not realized. Because reunification was not forthcoming by agreement, the Mother pressed forward with her reinstatement application and hearings were held in March and April of 2015.

The Court is convinced that the factors that resulted in the Mother’s removal have been resolved satisfactorily, and the Court commends her on her progress. She testified that at the time of her removal she was suffering from mental health issues and showed little interest in being a mother to the minor child. She described herself as being “disconnected” as a parent and “not there emotionally” for her minor child. She attributed her issues in part to her relationship with the minor child’s father and in part to her relationship with the Guardians, which was abrasive and confrontational. She was frequently absent from the home because she was unable to deal with her emotional upset.

At the time of her removal, the Mother was not employed. She also was not engaged in treatment for her mental health or emotional issues.

In July of 2012, the Mother entered a residential treatment program (hereinafter “the Program”) and made tremendous progress there. She was referred thereafter becoming homeless. In a letter dated January of 2013, it was reported that while in the Program, the Mother had been compliant with all the program requirements, including attending counseling and meetings. She had procured employment. A Program employee noted: “Having observed behaviors over the past 6 months there has been nothing our staff has noted that precludes [the Mother] from being a full active parent in her daughter’s life.”

In addition to the Program, between September of 2012 and October of 2012, the Mother successfully completed five parenting education classes. Since September of 2012, she also has engaged in individual and group therapy at various treatment centers. Although no longer officially in a program at the treatment center, the Mother continues to visit there occasionally for moral support and an occasional counseling session.

With support from a counselor at the Program, the Mother was able to find employment and has been steadily employed since October of 2012, first at a grocery store, and since November of 2013 at a dental clinic.
Also with that support she obtained housing and has been in the same apartment since November of 2013.

It is undeniable that the factors that resulted in the removal of the Mother have been resolved satisfactorily. The more difficult issue for the Court to determine is whether reinstatement is in the best interest of the minor child.

[2] There is a presumption that as to the custody of a minor child involving a parent and a nonparent, as is the case here, it is in the best interest of the child to be in the custody of the parent, which presumption may be rebutted by showing that it would be detrimental to the child to permit the parent to have custody. Conn. Gen. Stat. § 46b-56b (2015). The Court does not find that it would be detrimental to the child to permit the Mother to have custody due to any shortcomings on the part of the Mother, but due to the minor child’s emotional fragility as testified to by the minor child’s therapist since March 2013. The minor child’s therapist did not testify that reunification with the Mother, in and of itself, would be detrimental to the child, but only that removing her from her present living situation and her present school at this time would be harmful. She testified that changing schools now would be “disastrous.” This decree addresses that concern.

The Court is mindful of the issues that the minor child faces in reunification with the Mother after so many years of living with and being cared for by the Guardians. The minor child’s therapist testified that the minor child has formed a “primary attachment” to her maternal grandmother, and that the transfer of physical custody should only follow joint therapy between the Mother and minor child. She also testified that joint therapy needed to follow individual therapy between the minor child and the Mother. Arranging that individual therapy proved to be a stumbling block after the Court’s September 2014 order, which was a result, in the Court’s view, of a miscommunication between the maternal grandmother and the Mother and also payment issues, not a willful failure to comply by the Mother.

Many of the aforementioned decrees of the Court over the past several years were intended to facilitate the reunification of the Mother and minor child by including orders for visitation and various permutations of counseling. For various reasons, not all of the counseling that the Court ordered has occurred. The reasons include the Mother’s precarious financial situation, which has improved with her continued employment, her transportation issues, work scheduling conflicts, and some miscommunication with the minor child’s therapist.
It is the opinion of the Court, however, that the more significant impediment to reunification of the Mother with the minor child has been the conduct of the Guardians, particularly the maternal grandmother, who has vigorously resisted the Mother’s, and the Court’s, efforts at reinstatement. The Court discussed this issue in its decree dated June of 2014, where it noted that maternal grandmother had failed to comply with the Court’s January 2014 order for family therapy by unilaterally cancelling sessions because she felt that the family therapist, who was also the Mother’s individual therapist, was one-sided and prejudiced against her. Her attorney reported that she felt “marginalized.” As the Court noted in that decree, the maternal grandmother has, throughout the three-and-a-half years of this proceeding, been inflexible and demanding to the detriment of the minor child. She has in various ways been obstructive in the Court’s and the Mother’s efforts to arrange for family therapy and therapy for the minor child, complaining about time lost from work and about the expense of caring for the minor child, to the point where she requested, and the Court ordered in May of 2013, that the Mother reimburse her for travel expenses when transporting the minor child to visit. She has made all these proceedings more difficult than they needed to be. It is the Court’s view that she has behaved in this manner because she is not at all interested in the Mother being reinstated as guardian. In fact, at one of the many hearings in this manner she expressly stated that reinstatement was not her goal, but that, in her view, termination of the Mother’s parental rights was in the minor child’s best interest.

The Court believes that the longer this matter lingers and the minor child remains under the control of the Guardians, the longer the minor child and the Mother will not receive the joint therapy they need to reach the goal of reunification. The Court is not convinced that the maternal grandmother will be cooperative in that goal. The time has come to put an end to this matter. If the maternal grandmother in fact places the best interest of the minor child before her own, she will see to it that the joint therapy takes place, whatever it takes.

While the Court finds that the factors that resulted in the removal of the Mother have been resolved satisfactorily and that reinstatement is in the best interests of the minor child, it also finds that the immediate transfer of physical custody of the minor child from the guardians to the Mother is not in her best interest. Delaying the full-time, physical reunification of the Mother and minor child is not inconsistent with the Court’s finding that the Mother should be reinstated as guardian. “‘Guardian’ means a person who has the authority and obligations of ‘guardianship’ as defined in subdivision (5) of [Section 45a-604].” Conn. Gen. Stat. § 45a-604(6) (2015).
Subdivision (5) states:

‘Guardianship’ means guardianship of the person of a minor, and includes: (A) The obligation of care and control; and (B) the authority to make major decisions affecting the minor’s welfare, including, but not limited to, consent determinations regarding marriage, enlistment in the armed forces and major medical, psychiatric or surgical treatment....

Id.

Thus, a removed parent may be reinstated as guardian and given the authority to make decisions on behalf of her minor child, including the decision as to who shall have physical custody of the child. The reinstated Mother may herself decide to allow physical custody to remain with the Guardians. Here, however, despite reinstating the Mother, the Court agrees that physical custody should remain with the Guardians until a later, finite date. It also finds that the necessary therapy cannot be left to the whims of the Guardians and that it is in the best interest of the minor child to increase visitation with the Mother and will issue orders accordingly.

It is therefore, ORDERED AND DECREED that:

The application of the Mother for reinstatement as guardian of the minor child be and hereby is GRANTED. The implementation of this Order and Decree shall be deferred until August of 2015, on which date the minor child shall be delivered to the care and custody of the Mother. The present Guardians are removed as Guardians and the Mother is affirmed as the sole guardian of the minor child, also effective August of 2015. Between the date of this decree and August of 2015, the Mother shall have unsupervised visitation with the minor child from 12:00 p.m. to 3:00 p.m. every other Saturday; unsupervised, overnight visits every alternate weekend from Saturday 12:00 p.m. to Sunday 3:00 p.m.; and unsupervised visits every Wednesday from 4:30 p.m. to 6:45 p.m.

In addition, between the date of this decree and August of 2015, the Mother and the minor child shall participate in joint therapy with the child’s therapist to prepare the minor child for the August of 2015 transfer of physical custody to the Mother.
Dated at Torrington, Connecticut, this May of 2015.

/s/

Michael F. Magistrali, Judge
I. Introduction

By definition, a trust is a fiduciary relationship.¹ Traditionally, the fiduciary nature of the relationship between the trustee and the beneficiary “demands of [the trustee] an unusually high standard of ethical or moral conduct,”² that has been characterized as “one of highest duties of care and loyalty known in the law.”³ Consistent with the fiduciary relationship between the trustee and the beneficiary being a fundamental characteristic of a trust, the widely adopted Uniform Trust Code (hereinafter “UTC”⁴

¹ See Restatement (Third) of Trusts § 2 (2015) (“A trust…is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”)
prohibits the terms of a trust from negating “the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” The rationale for that prohibition is straightforward: “a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity.” Despite fiduciary accountability being at the heart of a trust, however, states are increasingly enacting legislation that dilutes, and may even eliminate, fiduciary accountability in a variety of circumstances.

This Article analyzes recent legislative trends in trust law that undermine—sometimes intentionally and sometimes inadvertently—fiduciary accountability in the administration of trusts. A primary focus in this analysis is the growing use of third parties, often referred to as “advisers” or “protectors,” who are authorized to exercise control over the trustee’s administration of the trust, and newly enacted statutes addressing their use in many jurisdictions. But fiduciary accountability for trustees has been weakened in recent years by state legislatures in a variety of other ways. Before turning to recent legislation addressing trust advisers and protectors, this Article examines statutes addressing: (i) exculpatory clauses; (ii) the trustee’s duty to account; (iii) the limitations period for a beneficiary to pursue a claim against a trustee for breach; (iv) the trustee’s duty of loyalty; (v) the nature of a beneficiary’s interest in a discretionary trust; and (vi) trust decanting.

II. Exculpatory Clauses

A direct limitation on the fiduciary accountability of a trustee is a provision, referred to as an exculpatory clause, in the terms of a trust that exonerates the trustee from liability for breach of duty. A hundred years ago, it was uncertain whether such clauses were enforceable. Today, however, in most jurisdictions, the issue—

6 Id. at § 105(b)(2) & cmt.
8 See generally RESTATEMENT (THIRD) OF TRUSTS § 96 (2015).

In the early twentieth century, it was unclear whether trustees could escape liability through the use of exculpatory provisions in trust instruments. Some courts found trustees liable by construing these clauses narrowly. Courts in other jurisdictions found such clauses to be “unenforceable as against public policy.” Still other courts readily invoked exculpatory clauses, resulting in trustees being shielded from
typically addressed by statute—i—is not whether exculpatory clauses are enforceable, but rather what the limitations are on their enforceability. Under the UTC, for example, there are both substantive and procedural limitations on the enforceability of such clauses:

(a) [An exculpatory clause is] unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately

liability for negligent acts.


In addition to statutes generally validating exculpatory clauses, at least thirteen jurisdictions have enacted legislation specifically providing for the protection of trustees from liability with respect to the administration of a trust owning an insurance policy on the life of the settlor. For a discussion, see Trent S. Kiziah, Statutory Exculpation of Trustees Holding Life Insurance Policies, 47 Real Prop. Tr. & Est. L.J 327 (2012).

According to one commentator, citing numerous pre-UTC cases:

Although the vast majority of state courts routinely announce that exculpatory clauses are enforceable, in reality, courts tend to shield the trustee from liability in only four situations: (1) the trustee exercised reasonable care notwithstanding the exculpatory clause; (2) the trustee is a non-professional or uncompensated; (3) the exculpatory provision relates directly to the settlor’s direction that the trustee retain specific, relatively risky investments, and the beneficiaries seek to hold the trustee liable for their handling of those investments; or (4) there is other evidence that the settlor possesses full information. In cases where the trustee’s negligence is apparent, courts often find the trustee liable on the ground that the exculpatory clause does not protect the trustee from the negligent acts.

communicated to the settlor.\textsuperscript{13}

With respect to the UTC’s substantive limitations, exculpatory clauses are unenforceable only to the extent that they purport to shield the trustee from liability arising from bad faith\textsuperscript{14} or reckless indifference.\textsuperscript{15} As a result, the UTC allows such a clause to shield a trustee from liability not only for its negligence, but also for its gross negligence.\textsuperscript{16}

\textsuperscript{13}\textsc{Unif. Trust Code} § 1008 (2015). Not all jurisdictions that have enacted a version of the UTC have included all of its exculpatory clause safeguards for beneficiaries. In Ohio, for example, subsection (b) was omitted. See \textsc{Ohio Rev. Code Ann.} § 5810.08 (2015-16). Similarly, Michigan’s Trust Code provision upholding exculpatory clauses also omits UTC Subsection 1008(b), and adds a specific provision validating a trust term protecting a trustee from liability for acquiring or retaining a particular asset or asset class or not diversifying trust investments. See \textsc{Mich. Comp. Laws} § 700.7908 (2016).

\textsuperscript{14}In a recent, unreported decision from Delaware, the court treated “bad faith” as synonymous with the absence of good faith and held that good faith was not a purely subjective standard:

The argument that good faith is a purely subjective standard, defined entirely by a fiduciary’s intent to cause harm, cannot withstand scrutiny…. [G]ood faith in the context of a fiduciary’s conduct contains both subjective and objective elements. The “honesty in fact” portion of the definition refers to whether a fiduciary subjectively believed that his actions were appropriate. In contrast, the “observance of reasonable standards of fair dealing” portion of the definition is objective and requires the Court to consider whether the trustee acted beyond the bounds of a reasonable judgment. There is some conduct that is “so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.” \textsc{Mennen v. Wilmington Tr. Co.}, C.A. No. 8432-ML, 2015 WL 1914599, at *23 (Del. Ch. Apr. 24, 2015) (footnotes omitted).

\textsuperscript{15}In a recent case from Ohio, which has adopted the UTC’s substantive limitations on the enforceability of exculpatory clauses, the exculpatory clause at issue shielded the trustee from liability except with respect to “bad faith or willful default.” \textsc{Newcomer v. Nat’l City Bank}, 2014-Ohio-3619, 19 N.E.3d 492, 503 (Ohio Ct. App. 2014). The Court held that “willful default” did not incorporate “reckless indifference.” \textit{Id.} at 504. Rather, reckless indifference was a basis of potential liability for the trustee distinct and separate from willful default. \textit{Id.}

\textsuperscript{16}Some non-UTC states’ statutes on exculpatory clauses do not allow them to shield trustees from liability for grossly negligent conduct. See, e.g., \textsc{Cal. Prob. Code} § 16461(b) (2015). Prior to its enactment of its version of the UTC, Montana’s trustee exculpation statute also prohibited exonerating the trustee for its gross negligence. See \textsc{Mont. Code Ann.} § 72-34-512 (2013) (current version at \textsc{Mont. Code Ann.} § 72-38-1008 (2015)), which includes the UTC’s bad faith or reckless indifference standard limiting the enforceability of exculpatory clauses. Like the UTC’s, some exculpation statutes in non-UTC states allow exculpatory clauses to protect a trustee from liability for its gross negligence. See, e.g., \textsc{Del. Code Ann. tit. 12, § 3303} (2015) (applied in \textsc{Mennen}, 2015 WL 1914599, at *21-22).

The Restatement (Third) of Trusts does not directly address whether an exculpatory clause may validly protect a trustee from liability for grossly negligent conduct. Rather, its substantive limitations on the validity of exculpatory clauses are “bad faith” and
Assuming that the settlor of a trust knows that its terms include an exculpatory clause and understands the clause’s effect, whether the clause should be enforced raises two related issues: (i) whether fiduciary duties are default rules subject to waiver by the settlor or are mandatory rules that may not be waived; and (ii) whether trusts are essentially contractual in nature or fundamentally are arrangements subject to the law of property under which non-waivable fiduciary duties with respect to the administration of the trust res are an essential part of the fiduciary relationship between the trustee and beneficiaries. To a significant extent, those questions, which have received substantial attention in recent years, have been

“indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries.” RESTATEMENT (THIRD) OF TRUSTS § 96(1)(a) (2015). A comment addresses gross negligence:

[An] exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can the trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable effort to understand and conform to applicable fiduciary duties. In some situations, courts have, not inappropriately, sought to distinguish between simple and gross negligence, while authorities in analogous contexts have emphasized fiduciaries’ sustained inattention to their duty of care. It is not possible to state with precision and uniform applicability the permissible limits of exculpatory relief, especially recognizing that it is appropriate in this regard to take account of what may be reasonable to expect of a particular trustee.

Id. at cmt. c. Cf. RESTATEMENT (SECOND) OF TRUSTS § 222(2) cmt. a (2015) (an exculpatory clause may validly protect a trustee from liability for conduct committed with indifference to the beneficiaries’ interests as long as the indifference is not reckless).

Professor Langbein’s view of the UTC’s treatment of exculpatory clauses is that it is an application of the Code’s mandatory requirement that trustees act in good faith, and that if such a clause purported to apply to bad faith conduct of the trustee, it “must have been improperly concealed from the settlor or otherwise misunderstood by the settlor when propounded, because no settlor seeking to benefit the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship.” John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. Rev. 1105, 1123-24 (2004) [hereinafter “Mandatory Rules”].

resolved by treating trust law as default law, except with respect to certain, specific rules the settlor may not override in the trust’s terms. With respect to exculpatory clauses, the UTC’s limitations on their validity are mandatory. As noted in the Restatement, such limitations, as well as the strict construction to which exculpatory clauses traditionally are subject, are not new and are partly based on the essence of a trust being a fiduciary relationship.

Under the UTC’s procedural limitations on the enforceability of exculpatory clauses, such a clause is invalid to the extent that it is included in the trust’s terms as a result of the trustee’s abuse of a fiduciary or confidential relationship to the settlor. Moreover, if the trustee drafted the exculpatory clause, or caused it to be drafted, the clause is presumed to be the product of such an abuse and thus will be unenforceable “unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.” In placing the burden of proof on the trustee, the UTC declined to follow a 1991 Massachusetts appellate court decision in which an exculpatory clause inserted in a trust instrument by the settlor’s attorney, who also served as trustee, was upheld because the beneficiary’s successor could not prove that the inclusion of the exculpatory clause in the trust’s terms was an abuse of a fiduciary relationship. Note, however, that the UTC

prevalingly contractarian institution.”); Trusting Trustees, supra note 12, at 119 (“The move to reconceptualize fiduciary duties as simple default rules, divorced of any normative content, is likely to have serious consequences for many trust settlers and beneficiaries.”); Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 CORNELL L. REV. 621, 627 (2004) (“Advanc[ing] the claim that trust law blends features familiar from both property and contract law…. [And is thus] properly classified, and best understood, as organizational law.”)

19 See, e.g., UNIF. TRUST CODE § 105; RESTATEMENT (THIRD) OF TRUSTS § 4, cmt. a(1) (2015). See generally Mandatory Rules, supra note 17 (dividing mandatory rules of trust law into rules that defeat settlor intent and thus restrict the settlor’s autonomy, and rules that implement the settlor’s true intent).

20 UNIF. TRUST CODE § 105(b)(10).

21 See, e.g., Rafalko v. Georgiadis, 777 S.E.2d 870, 875, 2015 Va. LEXIS 154, at *11-12 (Va. 2015). Presumably, the strict construction traditionally applied to exculpatory clauses, though not explicitly codified by the UTC, will continue to apply in UTC jurisdictions. See UNIF. TRUST CODE § 106 (2015) (“The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”)

22 RESTATEMENT (THIRD) OF TRUSTS § 96 cmt., Reporter’s Notes. A second rationale for limiting the enforceability of exculpatory clauses noted by the Reporter’s Notes is “the principle that ‘a private trust, its terms, and its administration must be for the benefit of its beneficiaries.’” Id.

23 See UNIF. TRUST CODE § 1008(a)(2).

24 Id. at § 1008(b).

treats the trustee as having satisfied its burden of proving both the fairness of an exculpatory clause and its adequate communication to the settlor if the settlor was represented by independent counsel.\footnote{See Unif. Trust Code § 1008 cmt. In such a case, “the settlor’s attorney is considered the drafter of the instrument even if the attorney used the trustee’s form.” Id. For a critical analysis of the effect of the comments to UTC § 1008, concluding that they “threaten to gut the protections the statutory language provides,” see Trusting Trustees, supra note 12, at 108. \textit{See also} David Horton, \textit{Unconscionability in the Law of Trusts}, 84 Notre Dame L. Rev. 1675, 1731 (2009) (arguing that the unconscionability doctrine from contract law should be incorporated into trust law to, among other things, address the possibility that the attorney of a settlor whose trust instrument includes an exculpatory clause might have been “beholden to an institutional trustee for a steady revenue stream.”)}

III. The Duty to Account

Although some jurisdictions still require judicial accountings by trustees, increasingly, jurisdictions are not requiring trustees to account in court, even if the trusts they are administering are testamentary.\footnote{See \textit{Amy Morris Hess, George G. Bogert, George T. Bogert, \& Alan Newman, The Law of Trusts and Trustees} § 966. (3rd ed. Supp. 1984) [hereinafter “Bogert \& Newman, et. al., The Law of Trusts and Trustees”].} In the absence of judicial accountings, fiduciary accountability of trustees is dependent upon beneficiaries having sufficient information about their trusts to be able to protect their interests. Towards that end, the UTC includes, but only as default rules, detailed provisions on the trustee’s duty to inform and report to beneficiaries about the trust.\footnote{See Unif. Trust Code § 813 (2015).} More important for purposes of this Article, Section 105(b) of the UTC lists fourteen mandatory rules the settlor may not override in the terms of the trust.\footnote{Unif. Trust Code § 105(b).}

Included on that list are two rules that address the trustee’s duty to inform and report to beneficiaries:

(b) The terms of a trust prevail over any provision of this [Code] except:...

....

(8) the duty...to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports;

(9) the duty...to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports
and other information reasonably related to the administration of a trust;\(^{30}\)

Under those two mandatory rules, the trustee must, without regard to terms of the trust to the contrary, provide to qualified beneficiaries,\(^{31}\) who are at least twenty-five years old,\(^{32}\) enough information so that they may hold the trustee accountable and protect their interests.\(^{33}\) Thus, except with respect to beneficiaries who are not qualified beneficiaries, and qualified beneficiaries under the age of twenty-five, the UTC’s mandatory information and reporting rules protect the right of beneficiaries to hold trustees accountable.

For various reasons, however, trust settlors occasionally do not want beneficiaries to know of the trust, its assets, and the trustee’s administration of the trust for at least some period of time.\(^ {34}\) As a result, the UTC’s two mandatory information and reporting provisions have been among its most controversial.\(^ {35}\) Many UTC jurisdictions

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\(^{30}\) *Id.* at (8)-(9) (brackets omitted).

\(^{31}\) Generally, qualified beneficiaries under the UTC are current and so-called first-line remainder beneficiaries; excluded are beneficiaries with remote remainder interests. More specifically, under the UTC, a qualified beneficiary is a beneficiary who, on the date the beneficiary’s qualification is determined:

(A) is a distributee or permissible distributee of trust income or principal;

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or

(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

*Unif. Trust Code* § 103(12) (2015). For example, if a trust is for A for life, remainder to B, but if B does not survive A, then remainder to C, during the lifetimes of A and B, they are the trust’s qualified beneficiaries. If B dies before A, C would become a qualified beneficiary.

\(^{32}\) The UTC allows the settlor to waive the trustee’s duty to inform qualified beneficiaries about the trust if they are under age twenty-five in response “to the desire of some settlors that younger beneficiaries not know of the trust’s bounty until they have reached an age of maturity and self-sufficiency.” *Unif. Trust Code* § 105 cmt. (“However, pursuant to subsection [105](b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond.”)


\(^{34}\) See Donald D. Kozusko, *In Defense of Quiet Trusts*, 143 Tr. & Est. 20, 22 (Mar. 2004).

\(^{35}\) Explaining the bracketing of UTC Subsections 105(b)(8) and (b)(9) by amendment in 2004, the Section’s comment states that those Subsections:

...have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.
have not enacted either reporting rule,\textsuperscript{36} while others have significantly reduced the scope of one or both.\textsuperscript{37} In those jurisdictions that have omitted both of the mandatory reporting rules, apparently a settlor may validly create a trust that the trustee may administer for an indefinite period of time without ever informing the beneficiaries of the trust’s existence, their interests in it, or the trustee’s administration of it.\textsuperscript{38}

Although authorizing trust terms that eliminate the trustee’s otherwise applicable duties to inform and report to beneficiaries about the trust seriously jeopardizes the ability of beneficiaries to hold trustees accountable, it does not necessarily prevent beneficiaries from doing so. Even in a jurisdiction that allows the settlor to direct that beneficiaries not be informed about the trust, a settlor may not validly direct that a trustee not be accountable for its administration of the trust.\textsuperscript{39} As stated in the Bogert treatise:

[B]ecause there can be no fiduciary relationship without accountability, and no trust without a fiduciary relationship, the settlor of a trust cannot


\textsuperscript{38} For a discussion rejecting the argument that, because a trust cannot exist in the absence of fiduciary accountability, a trust so structured might not be a trust at all, see Alan Newman, \textit{The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?}, 38 Akron L. Rev. 649, 678 (2005) [hereinafter \textit{The Intention of the Settlor}].

\textsuperscript{39} See Bogert & Newman, \textit{et. al.}, \textit{The Law of Trusts and Trustees}, supra note 27, at § 965 (footnotes omitted):

At the heart of every trust is a fiduciary relationship between the trustee and the beneficiary. Accountability of the trustee to the beneficiary is, in turn, at the heart of their fiduciary relationship. Thus, there is a fundamental and irreconcilable contradiction in a settlor purporting to create a trust with respect to which the trustee is not to be accountable.
relieve the trustee of the fundamental duty to account…. A provision in a trust instrument purporting to eliminate any duty of a trustee to account, which essentially constitutes an attempt to oust the court of its inherent equitable, constitutional, or statutory jurisdiction, is violative of public policy and void. As stated by Judge Learned Hand: “no language, however strong, will entirely remove any power held in trust from the reach of a court of equity.” The courts’ refusal to enforce trust terms that purport to relieve the trustee from the duty to account is analogous to their refusal to enforce an exculpatory clause purporting to relieve a trustee from any liability for breach of duty, regardless of the nature of the breach, and their refusal to give literal meaning to a settlor’s attempt to grant the trustee “absolute” or “uncontrolled” discretion.40

The principle that a settlor may not relieve the trustee from its fundamental duty to account, regardless of the settlor having validly overridden the trustee’s otherwise applicable duties to inform and report to beneficiaries about the trust, is illustrated by a recent North Carolina case.41 In that case, although the North Carolina UTC authorized the settlor to waive the trustee’s information and reporting duties, and the settlor had done so, the trust beneficiaries nevertheless were entitled to information about the trust when they sued the trustee alleging serious breaches of duty.42 In so holding, the court concluded:

...that the information sought by Plaintiffs is reasonably necessary to enable them to enforce their rights under the trust. [Section] 36C-8-813 does not override the duty of the trustee to act in good faith, nor can it obstruct the power of the court to take such action as may be necessary in the interests of justice. Such action would clearly encompass the power of the court to compel discovery where necessary to enforce the beneficiary’s rights under the trust or to prevent or redress a breach of trust, any contrary provision in the trust instrument notwithstanding.43

40 Id.
42 Id. at 714-15, 203 N.C. App. at 51.
43 Id. (citations omitted) (quoting Wachovia Bank v. Willis, 454 S.E.2d 293, 295, 118 N.C. App. 144 (N.C. Ct. App. 1995)) (“It is a fundamental rule that, when interpreting wills and
However, the essential and fundamental right of a beneficiary to hold the trustee accountable will, as a practical matter, be an empty one if the beneficiary lacks such basic information about the trust as the trust’s existence, the beneficiary’s interest in it, and the trustee’s identity. In the many UTC jurisdictions whose trust codes explicitly state that the terms of the trust prevail over the terms of their trust codes, except as to a list of specific mandatory rules that does not include any information and reporting duties of the trustee, that appears to be a distinct possibility.44

IV. The Statute of Limitations for Claims against Trustees for Breach

The ability of a settlor in many UTC jurisdictions to limit or eliminate the rights of a beneficiary to information about a trust, and the corresponding possibility that the beneficiary will not know or have the opportunity to know of the trust’s existence, the beneficiary’s interest in it, or the trustee’s administration of it45 is particularly problematic in light of the UTC’s statute of limitations on beneficiaries’ actions against trustees for breach.46 Generally, under pre-UTC law, a beneficiary’s claim for breach could not be time-barred without the beneficiary knowing, or having had the opportunity to know, of the claim.47 By contrast, under the UTC, the claim of a
beneficiary who did not receive adequate notice of the existence of a potential claim 48 nevertheless will be time-barred “five years after the first to occur of: (1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary’s interest in the trust; or (3) the termination of the trust.” 49 For a claim to be time-barred under this five-year rule, which “is intended to provide some ultimate repose for actions against a trustee,” 50 there is no requirement that the beneficiary knew, or should have known, of the claim, the identity of the trustee, or even of the trust and beneficiary’s interest in it in time to assert the claim. 51

If the UTC’s mandatory information and reporting rules are in effect in a jurisdiction, a beneficiary’s claim for breach rarely will be time-barred under the five-year rule without the beneficiary having at least had an opportunity to protect his or her interest in the trust. 52 However, as discussed in the preceding Section of this Article, most UTC jurisdictions have either omitted the UTC’s mandatory information and reporting rules altogether, or have significantly limited the scope of one or both of them. 53 Further, many UTC jurisdictions that have omitted the trustee’s information and reporting duties from their lists of mandatory rules have not only adopted the UTC’s approach of time-barring claims by beneficiaries based on the occurrence of specified events, without regard to whether the beneficiary knew or had the opportunity to know of the existence of a claim, but have shortened the UTC’s five-year limitations period. 54

48 There is a one-year limitations period for claims as to which a beneficiary “was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.” Unif. Trust Code § 1005(a).
49 Id. at § 1005(c).
50 Id. at cmt.
51 The applicable UTC comment states that the five-year limitations period “applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements” of an adequate disclosure notice. Id. “It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation.” Id. Section 1005 does not address the possible tolling of the limitations period “for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the state.” Unif. Trust Code § 1005(c) cmt. For a discussion, see Time-Barred Claims, supra note 37, at 483-85, 489-90.
52 As discussed in supra notes 31-33, and the accompanying text, the UTC’s mandatory information and reporting rules are not applicable to qualified beneficiaries who are under age twenty-five or to beneficiaries whose interests are too remote for them to be qualified beneficiaries.
53 See supra notes 35 and 36, and the accompanying text.
The net effect of allowing settlors to waive entirely the trustee’s duties to inform and report to beneficiaries about the trust, combined with statutes of limitations that apparently can operate to bar a beneficiary’s claim for breach even in circumstances in which the beneficiary neither knew nor had an opportunity to know of the existence of the claim, is an egregious, although unintended, illustration of recent trust legislation not merely undermining fiduciary accountability, but potentially eliminating it.55

V. The Duty of Loyalty

Characterized as “perhaps the most fundamental duty of the trustee,”56 the duty of loyalty requires the trustee:

[T]o administer the trust solely in the interest of the beneficiary. The trustee must exclude all self-interest, as well as the interest of a third party, in his administration of the trust.... The trustee must not place himself in a position where his own interests or that of another enters into conflict, or may possibly conflict, with the interest of the trust or its beneficiary. Put another way, the trustee may not enter into a transaction or take or continue in a position in which his personal interest or the interest of a third party is or becomes adverse to the interest of the beneficiary.57

The classic and often quoted statement of the traditional attitude of the courts towards the duty of loyalty is from a 1928 opinion of the New York Court of Appeals authored by Justice Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the

55 For a discussion of various arguments a beneficiary in such a situation might make to avoid that result, see Time-Barred Claims, supra note 37, at 482-94.
57 Id.; see also RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2015).
The “uncompromising rigidity” with which courts have viewed the trustee’s duty of loyalty is reflected in the common law, “no-further-inquiry” rule by which it is enforced. With few exceptions, the trustee is simply prohibited, not only from self-dealing, but also from engaging in a transaction with a third party when the trustee’s relationship with the third party creates the possibility of the trustee not acting solely in the best interests of the beneficiaries. Under the no-further-inquiry rule, if the trustee engages in either of those forms of prohibited conduct, the trustee is in breach of its duty of loyalty, without regard to how the trust was affected, whether the trustee acted in good faith, or whether the trustee’s actions were in the best interests of the beneficiaries. As set forth in the Restatement (Third) of Trusts:

[The rationale for the rule] begins with a recognition that it may be difficult for a trustee to resist temptation when personal interests conflict with fiduciary duty. In such situations, for reasons peculiar to typical trust relationships, the policy of the trust law is to prefer (as a matter of default law) to remove altogether the occasions of temptation rather than to monitor fiduciary behavior and attempt to uncover and punish abuses when a trustee has actually succumbed to temptation. This policy of strict prohibition also provides a reasonable circumstantial assurance (except as waived by the settlor or an affected beneficiary) that beneficiaries will not be deprived of a trustee’s disinterested and objective judgment.

At common law, the no-further-inquiry rule was equally applicable to transactions in which the trustee was interested personally and to transactions involving third parties with whom the trustee’s relationship created a serious conflict of interest. Thus, for example, a transaction between the trustee and the trustee’s spouse, or a transaction between the trustee and an entity which the trustee

60 See Restatement (Third) of Trusts § 78 cmt. b.
61 See id.; Bogert & Hess, et. al., The Law of Trusts and Trustees, supra note 2, at § 543.
62 Restatement (Third) of Trusts § 78 cmt. b.
63 Id.
controls, was subject to the no-further-inquiry rule. Some courts have treated a transaction between the trustee, in its fiduciary capacity, and a non-spouse relative as voidable under the no-further-inquiry rule, while others have required beneficiaries to prove that the conflict affected the transaction. Still others have required the third party seeking to uphold the transaction to prove its fairness. Similarly, as a general rule, a transaction between a trustee and an entity which the trustee controls is subject to the no-further-inquiry rule, but there is uncertainty whether the rule applies to transactions between a corporate trustee and an entity which the trustee does not control, but which has common directors or shareholders with the corporate trustee.

The UTC has considerably lessened the reach of the no-further-inquiry rule when the trustee, as fiduciary, deals with related or affiliated third parties. Under the UTC, such transactions are not subject to the no-further-inquiry rule, regardless of how closely related the trustee is to the third party. Rather, under Section 802(c), there is a presumption that a conflict affects a transaction between the trustee, in its fiduciary capacity, and one of the following parties:

1. the trustee’s spouse;
2. the trustee’s descendants, siblings, parents, or their spouses;
3. an agent or attorney of the trustee; or
4. a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment.

Consequently, in the event that the trustee enters into such a transaction, the trustee will not be in breach of its duty of loyalty if it can establish that the conflict did not affect the transaction.

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64 BOGERT & HESS, ET. AL., THE LAW OF TRUSTS AND TRUSTEES supra note 2, at § 543.
65 Id.
66 See id., and cases cited therein.
67 Id.
68 UNIF. TRUST CODE § 802(c) & cmt. (2015).
69 Id.
70 Id. at cmt. (“Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.”) For criticism of the UTC’s handling of such conflicted transactions, see Melanie B. Leslie, In Defense of the No Further Inquiry
As fundamental to the trust and demanding of the trustee as the duty of loyalty is, it has never absolutely prohibited a conflicted trustee from dealing with the trust. Rather, in a variety of circumstances, the common law has allowed the trustee to engage in transactions with the trust in which it is personally interested, or is conflicted, so long as the trustee acts fairly and in good faith to further the interests of the beneficiaries. 71 The more significant of these common law exceptions allows the trustee to self-deal or act in the face of a conflict under court authority, under express or implied authority from the terms of the trust, or with the consent of all beneficiaries. 72 Other common law exceptions, based on “generalized considerations of efficiency and beneficiary interest, as well as the minimal or manageable degrees of risk involved” 73 are:

1. for trustee compensation; 74
2. for the trustee providing “compensated services for which the trustee has a special competence;” 75
3. for the trustee being reimbursed, without interest, for “advances of a trustee’s personal funds for proper expenses of administration or for the protection of the trust estate;” 76
4. for “loans by a trustee personally, with reasonable interest, when borrowing is necessary for proper needs of administration because (and for as long as) funds for this purpose are not reasonably available from other sources on equally favorable or better terms;” 77
5. for “the deposit of trust funds in a regulated financial-services institution operated or controlled by, or affiliated

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71 See RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c.
72 Id. at cmt. c(3).
73 Id. at cmt. c.
74 Id. at cmt. c(4).
75 Id. at cmt. c(5).
76 RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(6).
77 Id.
with, the trustee;”78 and

6. “for trustees in their fiduciary capacity...dealing with other trusts or with decedents’ or conservatorship estates, including trusts and estates of which the trustee is a fiduciary.79

More important, under the UTC and statutes in most states, many of which were in place before the UTC was promulgated,80 financial institutions that serve as trustees are permitted to invest trust assets in mutual funds for which they (or an affiliate) provide investment advice and other services, even though they (or an affiliate) receive fees from the mutual funds for those services, as well as regular trustee’s fees.81 As noted in a UTC comment, such mutual fund investment by trustees offers both advantages and disadvantages to trust beneficiaries.82 The UTC drafters attempted to

78 Id.
79 Id. at cmt. c(7).
80 See UNIF. TRUST CODE § 802 cmt. (noting that prior to the UTC “[n]early all of the states [had] enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation.”)
81 See, e.g., UNIF. TRUST CODE § 802(f); OHIO REV. CODE ANN. § 1111.13 (2015-16).
82 The comment explains:

By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee’s duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee’s total compensation, both direct and indirect, is excessive.

UNIF. TRUST CODE §802 cmt.
preserve the advantages of mutual fund investment, while also protecting beneficiaries’ interests, by requiring that any such investment must comply with the trustee’s investment responsibilities under the Prudent Investor Act,83 and that a trustee who receives compensation from a mutual fund in which it has invested trust assets must disclose its compensation from the mutual fund to the beneficiaries.84 Moreover, while under the UTC a trustee is not prohibited by its duty of loyalty from investing trust assets in mutual funds to which it (or an affiliate) provides compensated services, the trustee remains subject to the requirement of the duty of loyalty that in making the decision to do so, it “must not place its own interests ahead of those of the beneficiaries.”85 Finally, although a trustee may be entitled to both trustee’s fees and fees for providing investment services to mutual funds, the delegation of investment responsibilities that is implicit in mutual fund investments can result in the trustee’s regular trustee’s fee being reduced.86

It is subject to debate whether those qualifications on the trustee’s ability to steer trust investments to mutual funds for which it (or its affiliate) provides services and receives additional compensation are sufficient to adequately protect trust beneficiaries.87 The clear conflict of interests such investments present may be mitigated, to some extent, by the requirements of disclosure and compliance with the Prudent Investor Act. However, neither those requirements, nor the statutory declaration that there is no presumption of a conflict when such investments are made,88 eliminate the actual conflict. While the UTC states only that a trustee who complies with the Prudent Investor Act in its investment of trust assets in mutual funds will not be presumptively in violation of its duty of loyalty, as a practical matter the statute likely operates as a broad authorization of such investments. Although the trustee’s otherwise applicable fiduciary duties are not intended to be waived or lessened by the statute’s excepting mutual fund investment from the

83 See UNIF. TRUST CODE § 802(f).

84 Id.

85 Id. at cmt.

86 Id.

87 See John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 YALE L.J. 929, 989 (2005) (arguing that a self-dealing or conflicted transaction of the trustee should be upheld if the trustee can prove the transaction was prudent and in the beneficiaries’ best interests); In Defense of, supra note 70, at 549, 586 (arguing that the no-further-inquiry rule provides important protection to beneficiaries, and that Professor Langbein’s proposed best-interest approach would significantly underdeter trustee opportunism).

88 UNIF. TRUST CODE § 802(f).
no-further-inquiry rule, it is likely that in its absence such conflicted investments will routinely be made, and it will be up to trust beneficiaries to enforce the trustee's duties.

In that regard, trust beneficiaries often are poor monitors of trustee conduct for a variety of reasons: they may be minors or lack investment experience—the very reasons that may have motivated the settlor to provide for them in trust, rather than outright—and thus be unable to evaluate whether the trustee's investments in mutual funds from which the trustee is directly or indirectly compensated are in the beneficiaries' best interest; they may simply assume, with little or no question, that their trustee is trustworthy; and if they do attempt to monitor the trustee's investment decisions, they may be unable to recognize investments as to which the trustee was conflicted and will likely find it difficult to compare the trustee's investment choices with market alternatives, to determine whether the trustee made those choices in their best interests.

Finally, the UTC arguably has weakened the trustee's fundamental duty of loyalty by treating it as just another default rule the settlor may override in the terms of the trust. Under Section 105(b), the terms of the trust prevail over any contrary provision of the UTC, except with respect to the aforementioned fourteen specified mandatory rules. The trustee's duty of loyalty under Section 802 is not on that list. Rather, the comment to Section 802 explicitly states: "Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust." That does not necessarily mean, however, that under the UTC a broad provision in the terms of a trust authorizing the trustee to self-deal, or otherwise

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89 Id. at cmt.
90 See In Defense of, supra note 70, at 558-60.
91 Id. at 558-59.
92 Id. at 559.
93 Id. Professor Leslie's conclusion is that:

In short, to monitor trustee behavior adequately, the beneficiary would need the same knowledge of the market, financial sophistication, and information the trustee has. This would defeat the very purpose of a trust that outlives the settlor, which is to relieve the beneficiary of the responsibility for asset management. A regime that expects the beneficiary to monitor the trustee is a regime in which the beneficiary is essentially performing the trustee's job.

94 See Unif. Trust Code § 802 cmt.
95 Unif. Trust Code § 105(b).
96 Id.; see also Unif. Trust Code § 802 cmt.
97 Unif. Trust Code § 802 cmt.
relieving the trustee from the duty of loyalty, would protect a trustee who administered the trust in such a way as to benefit the trustee personally or a third party at the expense of the trust’s beneficiaries.\(^9\)

Although the trustee’s duty of loyalty—to act “solely in the interests of the beneficiaries”\(^99\)—is not mandatory under Section 105(b), its duty “to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries”\(^100\) is mandatory, and thus cannot be waived by the settlor in the trust’s terms.\(^101\)

Accordingly, while the settlor may authorize the trustee to self-deal or otherwise engage in a transaction with respect to which the trustee has a conflict of interest, the trustee cannot be relieved of its fundamental fiduciary obligation.\(^102\)

VI. The Nature of a Beneficiary’s Interest in a Discretionary Trust

An increasingly important objective of many wills, trusts, and estates practitioners and their clients is protecting assets from the claims of creditors, including both the settlors’ assets in self-settled trusts and the beneficiaries’ assets in trusts created by third parties.\(^103\)

In an effort to strengthen the protection trusts provide from creditors’ claims, a few states have enacted legislation in recent

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\(^9\) The trustee may, of course, also be a beneficiary of the trust, either by being directly so named, or indirectly by virtue of the terms of the authorization to self-deal. If, for example, the trust terms authorized the trustee to buy trust property for less than its fair market value, the trustee essentially would be a beneficiary of the trust and its bargain purchase of the trust property in accordance with the trust’s terms would not raise a duty of loyalty issue. See RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(2).

\(^99\) See UNIF. TRUST CODE § 802(a).

\(^100\) See UNIF. TRUST CODE §105(b)(2).

\(^101\) Id. The Restatement addresses the limits on the settlor’s power to waive the duty of loyalty imposed by the fiduciary relationship between the trustee and beneficiary more directly:

[Even] the vital fiduciary duty of loyalty is a default rule that may be modified by the terms of the trust. This is so at least to the degree of allowing the settlor to eliminate strict prohibitions, such as that against self-dealing.... [But] to some extent the duty of loyalty involves (as do other duties) more than default law—that is, that there are limits to the settlor’s freedom, thereby protecting the fundamental fiduciary character of trust relationships recognized by the law.

RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(2).

\(^102\) See also RESTATEMENT (THIRD) OF TRUSTS cmt. b (the settlor may relieve “a trustee of the otherwise strict prohibitions against conduct involving divided loyalty....[but the settlor may] not eliminate the trustee's duty to act fairly, in good faith, and in the interest of the beneficiaries, as well as with prudence.”) See also TRUSTING TRUSTEES, supra note 12, at 116 (“Characterizing fiduciary duties as default rules ignores their important norm-enforcing function.”)

\(^103\) See generally Duncan E. Osborn & Mark E. Osborn, ASSET PROTECTION TRUST PLANNING, CV032 ALI-CLE 673 (2014).
years providing that if the beneficiary’s receipt of distributions from the trust is subject to the exercise of discretion by the trustee, the beneficiary does not have a property interest with respect to the trust. Some such statutes go further and define the beneficiary’s interest in a discretionary trust as a mere expectancy.

Even in the absence of such a statute, some courts have denied claims of creditors of beneficiaries of discretionary trusts on the ground that because the beneficiary could receive distributions from the trust only at the trustee’s discretion, the beneficiary did not have a property interest with respect to the trust that the creditor could reach. For example, the following question was certified to the Minnesota Supreme Court by a United States District Court as a part of a federal tax collection proceeding, whether:

[under Minnesota law...the beneficiary of a discretionary trust...has property or any right to property [for purposes of satisfying a federal tax lien] in nondistributed trust principal or income before the trustees have exercised their discretionary powers of distribution under the trust agreement?]

In answering the question “no,” the court stated:

Under a discretionary express trust, a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to distribute * * * the beneficiary cannot compel the trustee to pay him or to apply for his use any part of the trust property.... Because discretionary trusts give the trustee complete discretion to distribute all, some, or none of the trust assets, the beneficiary has a “mere expectancy” in the nondistributed income and principal until the trustee elects to make a payment.... Creditors, who stand in the shoes of the beneficiary, have no remedy against the trustee until the trustee distributes the property.

107 Id.
108 Id. at 577, 1994 Minn. LEXIS at *3 (brackets omitted) (citations omitted); see also In re Bass, 171 F.3d 1016, 1028, 1999 U.S. App. LEXIS 7251, *31-31 (5th Cir. 1999) (“A universal canon of Anglo-American trust law proclaims that when the trustee’s powers of distribution
Because an expectancy is “[t]he mere hope or probability of inheriting” by intestate succession or will, its holder generally does not have standing to protect it. Thus, if, in fact, the beneficiary of a discretionary trust had only an expectancy with respect to the trust, arguably the beneficiary would be unable to hold the trustee accountable to enforce the trust. However, as noted elsewhere, “[t]he difficulty with this theory is that it is not true.” Although there is a longstanding debate whether a beneficiary of a trust has a property interest in the trust assets, merely a claim against the trustee, or both, it is well-established that: (i) the beneficiary’s interest in the trust itself is property, regardless of whether the trust terms provide that distributions to the beneficiary are at the trustee’s discretion; and (ii) the beneficiary may enforce them.

are wholly discretionary, the beneficiary has no ownership interest in the trust or its assets until the trustee exercises discretion by electing to make a distribution to the beneficiary.

See Expectancy, BLACK’S LAW DICTIONARY (10th ed. 2014).

See, e.g., Ames v. Reeves, 553 So. 2d 570, 571-72, 1989 Ala. LEXIS 747, *1-5 (Ala. 1989) (grandchild of decedent who was a permissible appointee under a power of appointment granted by an earlier will of the decedent lacked standing to contest a later will that provided for the grandchild, but eliminated the power of appointment under which the grandchild might later have received a larger share); see also JPMorgan Chase Bank, N.A. v. Wemple, 919 N.E.2d 33, 35, 396 Ill. App. 3d 88, 89 (Ill. App. Ct. 2009) (caretaker and named executor who were designated as beneficiaries under a ward’s will lacked standing to challenge an amendment to the will by the court); see also Brown v. Kirkham, 926 S.W.2d 197, 198, 201, 1996 Mo. App. LEXIS 1147, *1 (Mo. Ct. App. 1996) (named devisee under will of living testator lacking standing to pursue a claim for tortious interference with expectancy to set aside a conveyance allegedly procured by undue influence); see also In re Guardianship of Barnhart, 859 N.W.2d 856, 864, 290 Neb. 314, 324 (Neb. 2015) (holder of expectancy lacked standing to challenge a guardianship or conservatorship proceeding).


See RESTATEMENT (THIRD) OF TRUSTS, Introductory Note (“Inherent in the Anglo-American trust is a separation of interests in its subject matter, the beneficiaries having equitable property interests and the trustee having a property interest that is normally a legal interest.”); Jeffrey N. Pennell, Third Party Trusts in Divorce, CW001 ALI-CLE 477 (2014) (“Trust lawyers know that a beneficiary’s equitable trust interest is an asset—a property interest—that the beneficiary may enforce.”); Rounds, Jr & Rounds, III, supra note 112, at § 5.3.1 (“The beneficiary’s equitable interest...is an interest in property.”); Scott & Ascher, supra note 112, at § 13.1 (noting that although for historical reasons English law chancellors initially regarded the use, the trust’s predecessor, as merely a personal relationship between the feoffor and the cestui que use, the trustee’s and beneficiary’s predecessors, beneficiaries today have property interests in trusts’ assets).

Thus, as noted by the Seventh Circuit in its 2012 decision in *Scanlan v. Eisenberg*, cases denying the claims of creditors of beneficiaries of discretionary trusts are best understood not as evidence that such a beneficiary does not have an enforceable property interest with respect to the trust, but rather as reflecting the courts’ policy-oriented decision that when distributions to the beneficiary are subject to the trustee’s discretion, the beneficiary’s creditors may not reach the beneficiary’s interest even though the beneficiary may protect it. In *Scanlon*, where discretionary trusts had suffered losses in excess of $200 million due to the economic failure of an entity in which the trusts were heavily invested, the trustee defended a breach of duty claim brought by the sole current beneficiary of the trusts by arguing that she lacked standing. In part, the trustee’s argument, which relied on cases rejecting claims of creditors of discretionary trust beneficiaries to reach their trust interests, was that “under some circumstances a discretionary beneficiary’s present interest in the trust property—before a trustee has made a distribution—is too attenuated to be considered the beneficiary’s property.” In reversing the lower court’s dismissal of the beneficiary’s claim, the Seventh Circuit stated:

> It is true that in some circumstances, e.g., for purposes of public aid eligibility and determining the bankruptcy estate, a discretionary beneficiary’s interest in the trust assets is too remote to count as property. Likewise, in some cases, creditors are prevented from attaching the assets of a discretionary trust and have no remedy against the trustee until the trustee distributes the property.

These rules, however, are the result of underlying principles and policy considerations involving restraints on involuntary alienation. Those concerns, which are not present here, are distinct from the equitable principles of trust law at work in this case; namely, a beneficiary’s right to hold trustees accountable and ensure that they properly discharge their fiduciary duties when administering trust property. That in some contexts [the beneficiary’s] interest in the [t]rusts’ assets may not rise to the level

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116 *See* JESSE DUKEMINIER & ROBERT H. STIKOFF, WILLS, TRUSTS, AND ESTATES 689 (9th ed. 2013).
118 *Id.* at 846, 2012 U.S. App. at *20.
of a “property interest” does not negate the fact that she and the [t]rustee stand in a fiduciary relationship....

In Scanlon, the Seventh Circuit was not faced with a state statute, like those recently enacted in several jurisdictions, stating that the interest of the beneficiary of a discretionary trust is not property, or stating that the beneficiary’s interest is an expectancy. If a trustee in one of those jurisdictions were to make a similar argument to that of the trustee in Scanlon—that the beneficiary lacked standing—it should be rejected, just as it was in Scanlon, for several reasons. First, it has long been held that beneficiaries of discretionary trusts have standing to compel the trustee to account. Second, the recently enacted statutes stating that beneficiaries of discretionary trusts do not have property interests with respect to those trusts are part of the enacting jurisdictions’ trust codes addressing the rights of beneficiaries’ creditors, not the relationship between the trustee and beneficiaries, and appear intended to apply only in the creditors’ rights context. Third, two of those statutes expressly state that they do not limit the beneficiary’s right to pursue a claim against the trustee for an abuse of discretion or failure to comply with a standard for distributions. If a beneficiary’s interest in a trust is sufficient to support a claim against a trustee for breach with respect to distributions, it should also be sufficient to grant the beneficiary standing to hold the trustee accountable for other breaches. Fourth, the definition of “beneficiary” in trust codes, at least those following the UTC, is broad and clearly includes beneficiaries to whom distributions are subject to the trustee’s discretion, and those trust codes also include provisions addressing the trustee’s duties to those broadly defined beneficiaries.

119 Id. at 846-47, 2012 U.S. App. at *20 (citations omitted).
120 See supra notes 104 and 105.
121 See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. b; BOGERT & NEWMAN, ET AL., THE LAW OF TRUSTS AND TRUSTEES, supra note 27, at § 967; see also UNIF. TRUST CODE § 106 (2015) (“The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”). Note also that neither side in the classic debate of whether a beneficiary of a trust has a property interest in the trust’s assets or a claim against the trustee or both, see supra note 112, and accompanying text, argues that the trustee does not owe enforceable duties to the beneficiary.
123 See MO. REV. STAT. § 456.5-504(2); WIS. STAT. ANN. § 701.0504(4)(a).
124 See, e.g., UNIF. TRUST CODE § 103(3) (defining a beneficiary to include someone who “has a present or future beneficial interest in a trust, vested or contingent.”)
125 See, e.g., UNIF. TRUST CODE § 801 (codifying the trustee’s duty to “administer the trust in good faith, in accordance with its terms and purposes and the interests of the
Accordingly, statutes that purport to negate the property interests of discretionary trust beneficiaries should not be construed to eliminate or even reduce the rights of such beneficiaries to hold trustees accountable. Nevertheless, such statutes are problematic. In defending claims for breach, trustees can be expected to make arguments similar to that of the trustee in Scanlon, particularly if a statute in the jurisdiction provides that the beneficiary of a discretionary trust has only an expectancy with respect to the trust. More important, in light of the inability of holders of expectancies to protect their expectant “interests,” some courts applying such a statute may conclude that beneficiaries of discretionary trusts who cannot show that an alleged breach jeopardized the trustee’s ability to meet the needs of the beneficiary under the discretionary standard may conclude that the beneficiary lacks standing to pursue a claim for breach against the trustee. In addition, such statutes create uncertainty by raising other issues.

Thus, for the reasons set forth above, if a legislature intends to strengthen the protection discretionary trusts offer their beneficiaries from the claims of creditors, enacting a statute providing that such beneficiaries do not have property interests or have mere expectancies with respect to their trusts is not the best way to accomplish that objective. A better approach would be to identify the additional protection intended to be provided, and then to provide it directly. For example, if the intention is that, unlike under the UTC, a creditor of a beneficiary of a discretionary trust (the terms of which do

128 For example, in a jurisdiction with a disclaimer statute providing for the disclaimer of “property,” (see, e.g., UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 3) and a statute stating that a beneficiary of a discretionary trust does not have property with respect to the trust, would the beneficiary be able to disclaim the interest? See In re Estate of Gilbert, 592 N.Y.S.2d 224, 226-27, 156 Misc.2d 379, 384 (N.Y. Sur. Ct. 1992) (rejecting an argument that a discretionary trust beneficiary did not have a property interest he could disclaim until the trustees exercised their discretion to make a distribution to him).
129 Note that in most jurisdictions, discretionary trusts already provide substantial protection from the claims of beneficiaries’ creditors. For example, the general rule under the UTC is that without regard to whether the trust terms include a spendthrift provision, such a creditor may not compel a distribution the creditor can reach regardless of whether the trustee has abused its discretion or failed to comply with a standard for distributions. UNIF. TRUST CODE § 504(b) (2015). The only exception to that rule is that if it is established that a trustee has abused its discretion or failed to comply with a distribution standard, the court may order a distribution to a claimant who is a child, spouse, or former spouse of the beneficiary and who has obtained a judgment against the beneficiary for support or maintenance. Id. at § 504(c)(1). Even in such a case, the court is directed to order the trustee to pay the child, spouse, or former spouse no more than “such amount as is equitable under the circumstances.” Id. at § 504(c)(2).
130 See id. at § 501.
not include a spendthrift provision) not be able to attach distributions the trustee decides to make to or for the benefit of the beneficiary, a statute so providing could be enacted. Similarly, if the intention is that a beneficiary’s interest in a discretionary trust not be subject to property division, or considered in making alimony determinations in a divorce proceeding, the legislature should simply enact a statute that directly accomplishes that objective.\footnote{131} Alternatively, if a legislature decides to strengthen the asset protection planning discretionary trusts offer by enacting a statute stating that a beneficiary of a discretionary trust does not have a property interest with respect to the trust, despite the potential problems such statutes present, such a statute should make clear that it applies only in the context of creditors’ rights and public benefits eligibility and does not affect the ability of discretionary trust beneficiaries to hold trustees accountable.

\section{VII. Decanting}

In recent years, trust decanting has received substantial attention as a way to modify the terms of an irrevocable trust.\footnote{132} A

\begin{footnotesize}
\begin{itemize}
\item In some states, decanting also may be accomplished as a matter of common law, without statutory authority. See, e.g., In re Estate of Spencer, 232 N.W.2d 491, 1975 Iowa Sup. LEXIS 1190 (Iowa 1975)\footnote{131}; Morse v. Kraft, 992 N.E.2d 1021, 466 Mass. 92 (Mass. 2013)\footnote{131}.
\end{itemize}
\end{footnotesize}
modification by decanting is accomplished by the trustee exercising a power to distribute principal of a trust (referred to in this Article as the “first trust”) to another trust (referred to in this Article as the “second trust”) with different terms that are deemed preferable to those of the first trust. Among the uses of decanting are to


Decanting is only one of many ways to modify, or even terminate early, an “irrevocable” trust. To illustrate, under the UTC: (i) the dispositive, as well as administrative provisions of a trust, can be modified, or the trust terminated, to accomplish the settlor’s purposes when unanticipated circumstances occur, Unif. Trust Code § 412(a) (2015); (ii) the administrative provisions of a trust may be modified without regard to whether unanticipated circumstances have occurred if it would be impracticable or wasteful or impair the trust’s administration for the trust to continue on its existing terms, id. at § 412(b); (iii) an uneconomic trust may be terminated or its terms modified to replace the trustee, id. at § 414 (2015); (iv) with clear and convincing evidence, trust terms, even if unambiguous, can be reformed to conform the trust’s terms to the settlor’s intention to correct a mistake of fact or law, id. at § 415; (v) trust terms can be modified to achieve the settlor’s tax objectives, as long as the modification is “not contrary to the settlor’s probable intention,” Unif. Trust Code § 416; and (vi) with the consent of the beneficiaries (even if less than all of them, as long as the interests of those who do not consent are adequately protected), trust terms can be modified, or terminated early, if doing so would not be inconsistent with a material purpose of the settlor, id. at § 411. Moreover, a trust may be terminated early, or its terms effectively modified, in other circumstances, without regard to the settlor’s purposes for the trust, without risk to the trustee, if the trustee secures from the beneficiaries a consent, release or ratification to conduct that otherwise would constitute a breach (as long as the trustee did not induce the consent, release or ratification by improper conduct, and the beneficiaries knew of their rights and the material facts relating to the breach). Id. at § 1009 (2015). The relative ease with which “irrevocable” trusts can be terminated early, or their terms modified, has led some to question whether we have come too far in advancing flexibility for beneficiaries and trustees at the expense of the settlor’s intentions and purposes for the trust. See, e.g., Scott Bieber, ALI CLE, Is Any Trust Really Irrevocable? Potential Pitfalls of the New Flexibility (July 2014); Charles A. Redd, Flexibility vs. Certainty—Has the Pendulum Swung Too Far?, Tr. & Est. (Feb. 23, 2015) (footnote omitted), http://wealthmanagement.com/estate-planning/flexibility-vs-certainty-has-pendulum-swung-too-far (“In the 21st century, a trust that’s said to be irrevocable is, in truth, often nothing of the sort.”)

133 In some jurisdictions, decanting is conditioned on the trustee having a discretionary power to distribute principal that is not limited by a standard. See, e.g., Fla. Stat. § 736.04117(1)(a) (2016). In others, decanting is available even if the trustee’s discretion to distribute principal is limited by a standard. See, e.g., Tenn. Code Ann. § 35-15-816(b)(27) (2016). In still others, the scope of the trustee’s power to decant varies depending on whether its discretion to distribute principal is or is not limited by a standard. See, e.g., Ohio Rev. Code Ann. § 5808.18(A)(1), (B) (2015-16). See also N.Y. Est. Powers & Trusts Law § 10-6.6(c) (McKinney 2016); Ivan Taback & David Pratt, When the Rubber Meets the Road: A Discussion Regarding a Trustee’s Exercise of Discretion, 49 REAL PROP. TR. & EST. L.J. 491 (2015) (addressing the question of how different jurisdictions determine whether a trustee has abused its discretion, including with respect to exercising its power to decant).

134 See Anne Marie Levin & Todd A. Flubacher, Put Decanting to Work to Give Breath to Trust Purpose, 38 Est. Plan. 1, 3, 6 (Jan. 2011), http://www.mnat.com/assets/attachments/173.PDF (“There are almost as many uses for decanting as there are reasons that beneficiaries and trustees wish that the terms and conditions of an existing trust could somehow be different.”)
change the administrative terms of a trust to improve its administration;\(^{135}\) expand the trustee’s powers;\(^{136}\) add investment flexibility for the trust’s assets;\(^{137}\) restrict beneficiaries’ rights to information about the trust;\(^{138}\) accomplish tax planning;\(^{139}\) provide protection from claims of beneficiaries’ creditors;\(^{140}\) change the situs of a trust;\(^{141}\) correct drafting errors;\(^{142}\) divide a trust into multiple trusts;\(^{143}\) and consolidate trusts.\(^{144}\)

While most of those uses of decanting can be characterized as modernizing a trust’s terms to improve its administration for the benefit of its beneficiaries, other uses are more directly related to the trust’s dispositive provisions. As set forth in a recent thorough analysis of the decanting statutes of the twenty-one states listed in footnote 132,\(^{145}\) under some decanting statutes, the trustee’s power to decant includes powers that go well beyond improving the administration of a trust by modernizing its terms. For example, under some statutes the power to decant includes the power:

1. To eliminate a beneficiary’s mandatory distribution rights in a trust (other than a marital or charitable deduction trust).\(^{146}\)

2. To eliminate a beneficiary’s mandatory withdrawal rights.\(^{147}\)

3. To designate as beneficiaries of the second trust persons who were not beneficiaries of the first trust, or to eliminate beneficiaries of the first trust from the second trust.\(^{148}\)

4. To eliminate the interests of remainder beneficiaries of the first trust.\(^{149}\)

\(^{135}\) Id. at 7.

\(^{136}\) Id. at 8.

\(^{137}\) Id. at 8-9.

\(^{138}\) Id. at 9.

\(^{139}\) Levin & Flubacher, supra note 134, at 9.

\(^{140}\) Id.

\(^{141}\) Id. at 9-10.

\(^{142}\) Id. at 10.

\(^{143}\) Id.

\(^{144}\) Levin & Flubacher, supra note 134, at 10.


\(^{146}\) See, e.g., DEL. CODE ANN. tit. 12, § 3528(a)(3) (2015).


\(^{149}\) See, e.g., 18 R.I. GEN. LAWS § 18-4-31(a) (2015).
5. To accelerate the interest of a remainder beneficiary of the first trust by making him or her a current beneficiary of the second trust.\footnote{See, e.g., Mo. Rev. Stat. \textsection 456.4-419(2)(1) (2015).}

6. To change the standard for discretionary distributions from that governing the first trust.\footnote{See, e.g., N.H. Rev. Stat. Ann. \textsection 564-B:4-418(b)(5), (c) (2015) (with exceptions if an interested trustee is decanting or if a beneficiary has a power to remove and replace the trustee with the beneficiary or a related or subordinate party).}


8. Not to grant an identical power of appointment in the second trust that was granted in the first trust.\footnote{See, e.g., Mich. Comp. Laws \textsection 556.115a(2)(a) (2016).}

9. To create a special needs trust for a beneficiary.\footnote{See, e.g., N.Y. Est. Powers \& Trusts Law \textsection 10-6.6(n)(1) (McKinney 2015); see also In re Kroll, 971 N.Y.S.2d 863, 866, 41 Misc. 3d 954, 958-59 (N.Y. Sur. Ct. 2013) (shortly before incapacitated beneficiary of an IRC \textsection 2503(c) trust reached age twenty-one, when he would have had a right to withdraw the entire trust principal, trustee successfully petitioned the court for an order authorizing a decanting distribution to a new third-party supplemental needs trust, without a payback provision, for the beneficiary).}

In a decanting, the second trust usually is created by the trustee of the first trust.\footnote{See Greta E. Solomon, Decanting with No Carafe – The Trust Way, COHEN AND WOLF (July 18-19, 2013), www.cohenandwolf.com/9D19DD/assets/files/News/EPCMJ1312_Solomon.pdf.} Thus, in a very real sense, when a trustee decants, it rewrites the settlor’s terms for the first trust.\footnote{See Thomas E. Simmons, Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts, 55 S.D. L. Rev. 253, 258 (2010) (“Some practitioners – the author included – have reservations about the scope and startling reach of this newly enacted trustee power….’’); Bieber, supra note 132 (“The power to decant may allow a trustee to entirely rewrite an irrevocable trust. For example, in Illinois, if an independent trustee has absolute discretion to make distributions, then distribution standards can be changed, beneficiaries eliminated, objects of powers of appointment can be broader or otherwise different than under the original trust and different provisions related to trustees can be included.”).} An obvious question raised is what limitations exist in regard to such trustee rewrites. In a state with a statute authorizing decanting, generally that question will be answered, at least in large part, by the governing statute. Some decanting statutes essentially provide

\footnote{For a list of such states, see supra note 132.}

\footnote{Generally, even in jurisdictions in which there are comprehensive trust statutes, the common law and principles of equity may supplement trust statutes. See, e.g., Unif. Trust Code \textsection 106 (2015).}
that the trustee’s power to decant is subject to its fiduciary duties.\(^{159}\)

Generally, that also should be the case in jurisdictions in which decanting statutes do not address the question.\(^{160}\) Some jurisdictions offer additional protection for beneficiaries from trustees abusing decanting powers. For example, some jurisdictions require trustees to provide notice to beneficiaries before decanting,\(^{161}\) and prohibit such

\(^{159}\) See, e.g., ALASKA STAT. § 13.36.158(e) (2015) (requiring the decanting power be exercised “in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances”); DEL. CODE ANN. tit. 12, § 3528(e) (2015) (applying the fiduciary standard applicable to outright distributions to decanting distributions); 760 ILL. COMP. STAT. 5/16.4(b) (2015) (decanting power may only be exercised “in furtherance of the purpose of the trust”); MO. REV. STAT. § 456.4-419(6) (2015) (limiting decanting to circumstances when it is “necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution”); N.H. REV. STAT. ANN. § 564-B:4-418(o) (2015) (“In exercising the power to decant, a trustee has a duty to exercise the power in a manner that is consistent with the settlor’s intent as expressed in the terms of the trust, and the trustee shall act in accordance with the trustee’s duties under this chapter and the terms of the first trust.”); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b) (McKinney 2016) (requiring the decanting power be exercised “in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances”); OHIO REV. CODE ANN. § 5808.18(f) (2015-16) (requiring the trustee to exercise its decanting power reasonably and in good faith); S.D. CODIFIED LAWS § 55-2-15 (2015) (requiring a trustee to exercise a power to decant taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution); TEX. PROP. CODE ANN. § 112.072(e) (2015) (requiring a decanting power to be exercised “in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries”). The Uniform Trust Decanting Act is more explicit: “In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties....” UNIF. TR. DECANTING ACT § 4(a) (2015). The comment elaborates:

[Generally], in exercising the decanting power, the authorized fiduciary is subject to the same fiduciary duties as in exercising any other discretionary power....

An exercise of a decanting power must be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor’s intent but to modify the trust to effectuate better the settlor’s broader purposes or the settlor’s probable intent if the settlor had anticipated the circumstances in place at the time of the decanting....

...[I]n exercising a decanting power the trustee cannot place the trustee’s own interests over those of the beneficiaries....

\(^{160}\) See RESTATEMENT (THIRD) OF TRUSTS § 70 cmt. a (stating that under the Restatement, the trustee’s authorized powers are set forth in the “broadest of terms” but must “be exercised only in accordance with the rigorous standards of fiduciary conduct.”)

\(^{161}\) See, e.g., FLA. STAT. § 736.041117(1)(b)(4) (2015) (sixty days’ notice); IND. CODE ANN. § 30-4-3-36(d) (2015) (sixty days’ notice); MO. REV. STAT. § 456.4-419 (2016) (requiring trustee to notify the permissible beneficiaries of the second trust, but not of the first); NEV. REV. STAT. § 163.556(7); (permits but does not require notice to beneficiaries); N.C. GEN. STAT. § 36C-8-816.1(f)(2) (2015) (sixty days’ notice).
powers from being exercised so as to: (i) increase the trustee’s compensation; 162  
(ii) reduce the trustee’s liability for breach; 163  or (iii) eliminate a trust term under which beneficiaries may remove the trustee. 164 

In the absence of a violation of such a specific limitation on a trustee’s decanting power, it is difficult, if not impossible, to predict how courts will hold trustees accountable for exercising decanting powers. 165  There is very little case law on trust decanting. 166 

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162 In Alaska and New York, decanting may not increase trustee compensation unless approved by the court. See Alaska Stat. § 13.36.158(b) (2015); N.Y. Est. Powers & Trusts Law § 10-6.6(n)(5) (McKinney 2015). In Ohio, decanting may increase trustee compensation if approved by either the current beneficiaries of the second trust or the court. See Ohio Rev. Code Ann. § 5808.18(C)(6)(a) (2015–16). In Illinois and Texas, decanting may not be used solely to increase the trustee’s compensation, but if there is another proper purpose for decanting, the trustee’s compensation may be brought into conformance with what is allowed under other state law. See 760 Ill. Comp. Stat. 5/16.4(q)(1); Tex. Prop. Code Ann. § 112.087 (2015).

163 Generally, under the Uniform Trust Decanting Act, trustee compensation may not be increased by decanting unless approved by the second trust’s qualified beneficiaries or the court. Unif. Tr. Decanting Act § 16(a)-(b) (2015).


165 Presumably because of the breadth of the trustee’s power to decant, many of the statutes expressly negate any duty of a trustee to decant. See, e.g., Alaska Stat. § 13.36.158(g); Fla. Stat. § 736.04117(6) (2015); Ind. Code § 30-4-3-36f; N.Y. Est. Powers & Trusts Law § 10-6.6f (McKinney 2016). So too does the Uniform Trust Decanting Act. See Unif. Tr. Decanting Act § 4(b). The comment explains:

The Uniform Trust Decanting Act does not impose a duty on the authorized fiduciary to decant. To impose a duty on the authorized fiduciary to consider whether any possible decanting could improve the administration of the trust or further the trust purposes would create unfair risks and burdens for fiduciaries and also might, in some situations, present impartiality issues. A trustee cannot possibly consider all the possible ways in which a trust could be improved by decanting.

Id. at cmt. However, as the comment also notes, citing and quoting from subsection 66(2) of the Restatement (Third) of Trusts: “There may be…circumstances in which the authorized fiduciary or trustee has a duty under general trust law to seek a deviation from the terms of the trust even if the authorized fiduciary or trustee does not have a duty to exercise a decanting power.” Id. (Subsection 66(2) of the Third Restatement provides: “If a trustee knows or should know of circumstances that justify judicial action [to modify the terms of a trust] with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the
Presumably, the most problematic decantings will be those that alter beneficiaries’ interests or result in adverse tax consequences. As a practical matter, as many commentators have suggested, trustees considering decanting in the near future likely will exercise their powers to decant only with approval of the beneficiaries or the court. No doubt, however, there will be cases when trustees will proceed with decantings that significantly affect beneficiaries’ interests without their approval or the approval of the court. Such cases will determine the extent to which traditional fiduciary duties will limit the remarkably broad powers to decant that many state legislatures have granted to trustees.

VIII. Divided Trusteeship

The fundamental role of a trustee is to manage trust assets, as a fiduciary, for the benefit of trust beneficiaries. Included within
that role are custodial and administrative duties with respect to such matters as: taking control of trust property; managing and safeguarding it; keeping adequate records; and reporting to beneficiaries. Other important trustees’ duties include investing trust assets and making distributions to beneficiaries. In recent years, increasing numbers of settlors have been allocating various functions that the trustee traditionally served to one or more non-trustee third parties, often referred to as advisers or directors, rather than relying on a single person or entity who may not be best suited to perform all of the trustee’s traditional duties. Common subjects the trustee to duties to deal with the trust’s property for the benefit of its beneficiaries. Restatement (Third) of Trusts § 2 (2015).

174 See, e.g., Unif. Trust Code § 809.
175 See, e.g., id. at § 810.
176 See, e.g., id. at § 813 (2015).
179 Having non-trustee third parties participate in the administration of a trust, particularly with respect to trust investments, is not a new phenomenon. See Note, Trust Advisers, 78 Harv. L. Rev. 1230 (1965); Jocelyn Margolin Borowsky, Directed Trusts from a Delaware Perspective, TSWB20 ALI-CLE 67 (2015) (“Directed trusts have been in use in Delaware for almost 100 years.”); Kathleen R. Sherby & Justin T. Flach, ALI CLE, “Directed Trust?” Or “Enhanced Trust Flexibility?” Is there a Difference? The Nature and Effective Use of “Trust Advisors” and “Trust Protectors” as Third Party Decision Makers, § 3 (March 2015) (discussing case law on trust advisers dating to the 1950s).
180 The increasingly common use of non-trustee third parties to participate in trust administration has been characterized as “one of the most significant recent developments in American trust law.” Sherby & Flach, supra note 179, at § 1.
181 Many factors other than specialized expertise also are contributing to divided trusteeship structures:

The primary developments contributing to this trend are dramatic recent changes in trust law, distrust of traditional trustees, a desire to relieve trustees of liability, growing sophistication and complexity in the investment world, growing assertiveness among settlors and families seeking to exercise greater control over certain trust functions, growth in dynasty trusts, special purpose trusts requiring special expertise to administer, federal tax law limits on family involvement in distribution decisions and vigorous competition between several states for trust business.


Other alternatives for involving a third party in the administration of a trust include naming the third party a co-trustee or delegating authority to the third party. There are drawbacks with respect to each, however. Generally, co-trustees share responsibility for the administration of a trust. See, e.g., Unif. Trust Code § 703. In that regard, in many jurisdictions, co-trustees are required not only to participate in fulfilling the trustee’s duties, see, e.g., id. § 703(c), but also to “exercise reasonable care to: (1) prevent a co-trustee from committing a serious breach of trust; and (2) compel a co-trustee to redress a serious breach of trust,” id. § 703(g). In most jurisdictions a trustee may delegate duties to third
example include naming an adviser or director who is authorized to
direct trust investments, manage a family business interest held in
trust, or direct the trustee with respect to making discretionary
distributions to beneficiaries.\(^{182}\)

A related development in modern trust planning is the use of
“trust protectors.” To some extent, “trust protector” is simply another
name for the third-party trust adviser that has long been a part of
trust law.\(^{183}\) The broad powers often given to trust protectors,
however—which may include the power to remove and replace a
trustee or trust adviser, terminate a trust or modify its terms
(including to change beneficial interests), or change its situs\(^{184}\)—differ
qualitatively from the powers over such traditional trustee functions
as investments or discretionary distributions commonly given to trust
advisers.\(^{185}\) The origin of the use of trust protectors\(^{186}\) who are given
such broad powers is commonly attributed to offshore, self-settled

\(^{182}\) See David A. Diamond & Todd A. Flubacher, *The Trustee’s Role in Directed Trusts*, 149
Tr. & Est. 24, 24 (Dec. 2010); Richard W. Nenno, *Directed Trusts: Making Them Work*,
CV005 ALI-ABA 481 (2013).

\(^{183}\) See Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77, 78
(2011) [hereinafter “The Case Against the Trust Protector”].

\(^{184}\) See generally Stuart J. Kohn, ALI CLE, *Trust Protectors in Depth: Analyzing the
Implications and Ramifications of the Use of Trust Protectors* (June 2014); Raymond C.
Radigan, *Defining Responsibilities when Multiple Parties Administer Trusts*, 40 EST.
PLAN. 12 (Jan. 2013).

\(^{185}\) See generally Sherby & Flach, * supra note 179.

A recent Florida case illustrates the modern use of trust protectors. In *Minassian v. Rachins*, 152 So.3d 719, 2014 Fla. App. LEXIS 19608 (Fla. Dis. Ct. App. 2014), the court upheld a trust protector’s amendments to the terms of a trust, made during litigation between the settlor’s surviving spouse and children, that benefitted the surviving spouse at the expense of the children. In doing so, it explained:

Based upon our conclusion that the trust agreement was ambiguous and
the trust protector’s amendments were made to effectuate the settlor’s
intent, the amendments that he made to the trust are within his powers.
The amendments may have disadvantaged the children, but the trust
protector was authorized the [sic] correct ambiguities with the limitation
that he act either to benefit a group of beneficiaries or to further the
husband’s probable wishes. He acted to correct ambiguities in a way to
further the husband’s probable wishes. As the drafting agent, he was
privy to what the husband intended.

*Id.* at 727, 214 Fla. App. LEXIS at *20.

\(^{186}\) Professor Ausness attributes the term “protector” to a 1989 Cook Islands statute.
Richard C. Ausness, *When is a Trust Protector a Fiduciary?*, 27 QUINNIPIAC PROB. L.J. 277,
278 (2014) (citing Richard Lewis, Note, *The Foreign Irrevocable Life Insurance Trust as
Asset Protection: Potential for Abuse and Suggestions for Reform*, 9 CONN. INS. L.J. 613, 618
(2003)).
trusts that are designed to protect settlors’ assets from their creditors. But as lawyers became more accustomed to protectors and the flexibility they offer to deal with unanticipated circumstances without judicial proceedings, the use of protectors spread to domestic asset protection and other trusts, particularly trusts designed to last for long periods of time.

Although the origins of trust advisers and trust protectors may

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[T]he real genesis of the trust protector [is] asset protection planning and the use of offshore trusts. In this context, the advisor grew into the role of a “protector”—someone designated to protect the trust by overseeing the actions of the offshore trustee who had little to no connection with the settlor or the trust’s beneficiaries. The basis for utilizing offshore trusts is creditor protection for the settlor. Even though the settlor is often a beneficiary of the trust, U.S. courts do not have jurisdiction over the trust because the trustee is a non-U.S. person or institution. As a result, the trust assets are protected from judgments against the settlor entered in U.S. courts. However, the U.S. settlor typically has no real connection to the offshore trustee. Therefore, incorporating a trust protector (selected and known by the settlor) to oversee the offshore trustee gives the settlor a level of comfort. The use of asset protection trusts moved from “offshore” planning to “domestic” planning in 1997 when Alaska enacted the first domestic asset protection trust legislation in the United States. A number of other states have since followed suit with some form of domestic asset protection trust statutes....

Kohn, supra note 184 (footnote omitted).

188 See Alexander A. Bove, Jr., Trust Protectors: A Practice Manual with Forms, 7-8 (2014) [hereinafter “Trust Protectors”]:

As more and more [offshore] trusts began to utilize the position of protector, and as drafting attorneys began to see the tremendous flexibility the protector offered to the administration of the trust, the powers given to the protector expanded along with its recognition, as did its application to other forms of trusts.... Attorneys began to use protectors in domestic trusts of almost all types, but particularly trusts designed to continue for long periods of time, and even perpetual trusts, where no one could conceive of the circumstances or the law that might exist 100 or 300 years or more into the future, the idea being that the presence of a protector in such trusts would allow the trust to be adjusted to suit the great likelihood of changing circumstances and changing law.

Id. (citing Edward Rock & Michael Wachter, Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants, 96 Nw. U. L. Rev. 651 (2002)); see also Sherby & Flach, supra note 179, at § 4.3; Sterk, supra note 187, at 2764-67.
differ, as may the powers they typically hold, they share a fundamental characteristic: both advisers and protectors have powers over trusts for which they do not serve as trustees. Because of that essential similarity, some commentators and statutes do not distinguish between the two and sometimes use the terms interchangeably. Whatever the terminology, the widespread and growing use of such third-party nontrustees raises three questions:

1. Are such third-party non-trustees who have powers over trusts accountable for them as fiduciaries?

2. What duties and potential liabilities does the trustee have

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189 Under the most recent draft of a new uniform act on divided trusteeship, however, advisers and protectors, who are referred to as “trust directors,” may also be co-trustees. See DIVIDED TRUSTEESHIP ACT § 2(5) (UNIF. LAW COMM’N, Committee Meeting Draft, Oct. 2015) (“‘Trust director’ means a person that is given a power under Section 5 whether or not the terms of the trust designate the person as a trust director, trust protector, trust advisor, or otherwise, and whether or not the person is also a trustee. The term excludes a holder of a nonfiduciary power of appointment.”)

190 See, e.g., The Case Against the Trust Protector, supra note 183, at 78.

191 The UTC, for example, authorizes directed trusts, with no mention of trust protectors in its statute doing so. See UNIF. TRUST CODE § 808. Its comment, however, notes that the statute ratifies the use of trust protectors and advisers. Id. at cmt. Similarly, a Missouri statute broadly defines a trust protector to include “a person, other than the settlor, a trustee, or a beneficiary, who is expressly granted in the trust instrument one or more powers over the trust.” MO. REV. STAT. § 456.8-808(2) (2015); see also DEL. CODE ANN. tit. 12, § 3313(f) (2015) (“For purposes of this Section, the term ‘advisor’ shall include a ‘protector’….”); N.H. REV. STAT. ANN. § 564-B:12-1201 (2015); VT. STAT. ANN. tit. 14A, § 1101 (2015).

192 For an argument that the terms “adviser” and “protector” should not be used interchangeably, see Sherby & Flach, supra note 179, § 2.2:

Much of the confusion surrounding the terms used to describe a third party decision maker can be eliminated if these terms, trust adviser and trust protector, are not used interchangeably. Rather the term “adviser” should be used in a trust instrument for the person to whom one or more powers are given to direct the trustee in carrying out the trustee’s traditional trustee duties, and the term “trust protector” should be used in the trust instrument for the person to whom one or more powers have been given that relate to one or more specific trust matters but do not involve or infringe on the trustee’s performance of traditional trustee duties.

193 A variety of terms in addition to “trust adviser” or “trust protector” also are used to refer to non-trustee third parties who hold powers over trusts. See TRUST PROTECTORS, supra note 188, at 9-10 (listing trust “monitor,” “guardian,” and “conservator”); Sherby & Flach, supra note 179, at § 1 (listing “trust decision-maker,” “investment adviser,” “trust director,” “directing party,” “power holder,” “distribution adviser,” “trust committee,” and “trust appointer”).

194 This question has received considerable attention in recent years. See, e.g., TRUST PROTECTORS, supra note 188, at 11-41; Ausness, supra note 186; Kohn, supra note 184; Sherby & Flach, supra note 179; Sterk, supra note 187.
When a non-trustee holds a power over a trust?\(^{195}\)

3. Finally, and most important for purposes of this article, is whether fiduciary accountability—of the power holder, trustee, or both—to trust beneficiaries is preserved when a non-trustee is given a power over a trust?

As others have noted, there is significant uncertainty and a dearth of case law with respect to these and other questions arising from the use of advisers and protectors in trust administration.\(^{196}\)

The primary focus of this Section of this Article is on how the UTC and the many relatively new, non-UTC statutes regarding such powers and their holders address those three questions.\(^{197}\) Before considering them, though, it is useful to distinguish traditional powers of appointment from powers that an adviser or protector might hold over a trust. Traditional powers of appointment over trust property, sometimes referred to as “discretionary” powers, allow their holders to direct the distribution of property to appointees they select (as long as their appointees are among those designated as permissible by the settlor in the terms of the instrument creating the power).\(^{198}\) Although holders of powers of appointment can control the

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\(^{195}\) For one commentator’s discussion of the relationship between the protector and trustee, see TRUST PROTECTORS, supra note 188, at 85-109.

\(^{196}\) See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 64, Reporter’s Notes, cmts. b-d (2015) (“The diverse types and uses of protectors, not to mention broad variations in the powers conferred upon them, make it difficult to generalize about the nature of the protector’s role and obligations.”); Sherby & Flach, supra note 179, at § 1 (“Trust protectors can and do play a very useful role in trust administration, but because the use of these third party decision makers is relatively new in domestic trusts, the legal landscape is largely unknown territory. Many of the existing statutes provide little real guidance to practitioners, and relevant case law is scarce.”)

\(^{197}\) Many UTC jurisdictions have enacted its provision on advisers and protectors, Section 808, with little or no change and have not enacted other legislation addressing advisers and protectors. As a result, the analysis of the fiduciary accountability of advisers and protectors, and trustees when advisers or protectors are used, under the UTC is applicable to them as well. Such jurisdictions include the District of Columbia (D.C. CODE § 19-1308.08 (2016)), Alabama (ALA. CODE § 19-3B-808 (2015)); Arkansas (ARK. CODE ANN. § 28-73-808 (2015)); Florida (FLA. STAT. § 736.0808 (2015)); Kansas (KAN. STAT. ANN. § 58a-808 (2015)); Kentucky (KY. REV. STAT. ANN. § 386B.8-080 (2015)); Maine (ME. STAT. tit. 18-B, § 808 (2015)); Massachusetts (MASS. GEN. LAWS ch. 203E, § 808 (2016)); Montana (MONT. CODE ANN. § 72-38-808 (2015)); Nebraska (NEB. REV. STAT. § 30-3873 (2015)); New Mexico (N.M. STAT. ANN. § 46A-8-808 (2015)); North Dakota (N.D. CENT. CODE § 59-16-08 (2015)); Pennsylvania (20 PA. CONS. STAT. § 7778 (2015)); and West Virginia (W. VA. CODE § 44D-8-808 (2015)).

\(^{198}\) See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 cmt. g. (2015).

\(^{199}\) See id. (“A power of appointment is a power that enables the donee of the power to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.”); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER
disposition of trust assets, they are not subject to fiduciary standards with respect to their exercise or non-exercise. As a result, powers of appointment do not raise the fiduciary accountability issues that are the focus of this Article and are thus not considered further.

UTC Section 808 ratifies the use of non-trustee advisers and protectors and expressly addresses the first two of the three questions set forth above. First, an adviser or protector “is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.” Second:

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


RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 cmt. g.


Id. at § 808(d).

Id. at § 808(b). The comment explains:

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

Id. at cmt.

Under the Restatement, a directed trustee is held to a somewhat higher standard:

Except in cases covered by § 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the
Thus, under the UTC, as a general rule: (i) trust advisers and protectors are held to fiduciary standards with respect to the powers they hold; and (ii) trustees are required to follow directions given by an adviser or protector, but retain some fiduciary responsibility to prevent such powers from being improperly exercised. With respect to the first of those two general rules, however, the fiduciary nature of the role of trust advisers and protectors under the UTC is only presumptive. In that regard, a UTC comment states that a settlor could provide that a powerholder not be held to a fiduciary standard with respect to the power. Presumably that is not the only circumstance in which a non-trustee powerholder can avoid fiduciary status under the UTC. A powerholder also should not be accountable as a fiduciary if it is evident the settlor intended the power to benefit the powerholder personally. Such powers are sometimes referred to as personal powers:

Personal powers “arise where the settlor’s intention is to confer some individual benefit or protection or right of patronage upon the donee.” The donee is intended in

trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.

Restatement (Third) of Trusts § 75 (2015).

As commentators have noted:

Unlike the UTC, under the Restatements, a trustee can be liable if the direction does not comply with the terms of the trust, even if the inconsistency is not “manifestly contrary to the terms of the trust.” In addition, there is no threshold as to the seriousness of the advisor’s breach of a fiduciary duty before the trustee would be liable for following a direction that constitutes a breach.


Section 808 of the UTC is not limited to powers to direct with respect to such traditional trustee functions as making investment and discretionary distribution decisions. It also authorizes trust terms that “confer upon a [non-trustee] a power to direct the modification or termination of the trust.” Unif. Trust Code § 808(c). Thus, the UTC’s presumptive treatment of nontrustee power holders as fiduciaries applies not only to advisers who participate in traditional trustee functions such as managing investments and making discretionary distributions, but also to protectors who hold powers beyond those traditionally held by trustees, such as powers to change beneficial interests.

See id. at § 808(d).

Id. Settlers’ providing in trust terms that protectors are not fiduciaries apparently is common. See Sherby & Flach, supra note 179, at § 2.2 (“Most often the trust instrument provides that the trust protector is not acting as a fiduciary, because the powers given to the trust protector are not typically traditional trustee powers.”)

See Restatement (Third) of Trusts § 64; David Hayton, English Fiduciary Standards and Trust Law, 32 Vand. J. of Transnat’l L. 555, 579-80 (1999); Trust Protectors, supra note 188, at 28-31.

Hayton, supra note 207, at 579-80.
his lifetime to have full dominion so that he can discharge his legal or moral obligations to objects of the power or use the trust fund to benefit persons he would otherwise seek to benefit from his own resources, or so that he can protect his own position, for example, as occupier of a house owned by the trustees or as director of a company controlled by the trustees.

....

The donee of a personal power does not need to consider periodically whether or not he should exercise his power, and then to consider the range of possibilities within the power and the appropriateness of particular exercises of the power. The power is the donee’s personal power to use or not use as he wishes within the scope of the power. Whether the donee releases the power, or never bothers to consider exercising the power, or exercises the power irresponsibly for personal, spiteful or malicious reasons, the court cannot intervene.209

If a power held by an adviser or protector is not a personal power, but the settlor has provided in the terms of the trust that the powerholder is not to be held to a fiduciary standard, presumably the powerholder would be accountable for the power under a lesser standard. However, it is not clear what that standard might be, how it would be applied, and how it would differ from a fiduciary standard.210 At a minimum, an adviser or protector with powers over

209 Id. at 580-81 (footnotes omitted). Indiana’s directed trust statute codifies the distinction between third party fiduciary and personal powers. See IND. CODE § 30-4-3-9 (2015). If a nontrustee’s power is a fiduciary power, “the trustee has a duty to refuse to comply with any direction which he knows or should know would constitute a breach of a duty owed by that person as a fiduciary.” Id. at § 30-4-3-9(b)(1). By contrast, if a nontrustee “holds the power solely for his own benefit, the trustee may refuse to comply only if the attempted exercise of the power violates the terms of the trust with respect to that power.” Id. at § 30-4-3-9(b)(2).

210 In the context of fiduciary relationships generally, what it means to be a fiduciary has been described as follows: A fiduciary must be beneficent. He must be zealous to serve the interests of the beneficiary. He has an especially high duty of disclosure: He must go beyond avoiding fraud and false statements; he is obliged to “volunteer” information. He must treat beneficiary confidences with the highest respect. His duty of “good faith” is especially strong—stronger than that which applies in commercial arrangements generally. He is sometimes required to refrain from competing with the beneficiary, from taking the beneficiary’s “opportunities,” from profiting from transactions with the beneficiary, from developing other adverse interests, and even
a trust that are neither fiduciary nor personal would not be allowed to exercise them fraudulently and presumably would at least be held to a good faith standard. Further, if, as typically would be the case if

from profiting for himself in other ways, at least in matters related to the fiduciary relationship. His dealings with a potential beneficiary—even preliminary dealings—readily put him under fiduciary obligations, and he is restricted in his right to terminate the relationship.

FitzGibbon, supra note 18, at 308-09 (footnotes omitted).

What conduct is required of a fiduciary, however, may depend on the circumstances. In the context of planning for the use of a protector in the administration of a trust, practitioners have been advised:

Do not rely on the use of terms such as “fiduciary”, “fiduciary capacity” and “fiduciary duty.” Interpretation of these terms may result in unintended duties and liabilities being imposed on the trust protector. The most basic meaning of the term “fiduciary” is one who acts for the benefit of another. Although this implies that a fiduciary should not act for his or her own self interest, it does not clarify whether and to what extent the settlor intended to create additional duties for the trust protector. Fiduciary duties differ for each fiduciary relationship. As a result, explaining that a trust protector is a “fiduciary”, must act in a “fiduciary capacity”, or has “fiduciary duties” does little to clarify what those duties and liabilities consist of and to whom these duties are owed and for what the trust protector could be found liable.

Depending on the powers granted to the trust protector, the appropriate standard of care will vary. There is no one size fits all rule for what standard of care should apply to a trust protector.

Sherby & Flach, supra note 179, at § 8.7.


A life tenant with an unrestricted power of sale has been held not to owe fiduciary duties to the holder of the remainder, but nevertheless to be subject to a good faith standard. See generally Alford v. Thibault, 990 N.E.2d 93, 83 Mass. App. Ct. 822 (Mass. App. Ct. 2013); cf. In re Estate of Miller, 594 P.2d 167, 225 Kan. 655 (Kan. 1979) (life tenant, with power to sell, is in a fiduciary relationship to the holder of the remainder and owes to the remainder person the highest duty to act honorably and in good faith). Note that even parties dealing with each other at arm’s length in commercial transactions are required to act in good faith. See, e.g., Sheltry v. Unum Life Ins. Co. of Am., 247 F.Supp.2d 169, 2003 U.S. Dist. LEXIS 2699 (D. Conn. 2003). Further, good faith is referenced in at least fifty different provisions of the Uniform Commercial Code. See Tory A. Wiegand, The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts, 88 Mass. L. REV. 174, 178 (2004).

It has been suggested that a non-fiduciary powerholder would not be liable for reckless or negligent conduct with respect to the power. See Daniel R. Griffith & Emily S. Pan, Trust Protectors: Does Ohio Law Leave More Questions than Answers?, 25 No. 2 OHIO PROB. L.J. NL 3 (2014); see also Carla S. Ranum & Elizabeth L. Mathieu, Trust Protectors: A Pandora’s Box? The ADVOCATE 36, 36-37 (Aug. 2012), http://www.mathieuranum.com/wp-content/themes/mathieuranum/media/Trust-Protectors-Published-Advocate-Aug-2012.pdf (“If a trust protector’s conduct is subject to a personal standard of liability, rather than a fiduciary standard, then, short of fraud or violation of the trust’s terms, the trust protector can make decisions on a whim, with no reasonable basis, benefiting him/herself,
the power were not personal, the power had been granted to the
adviser or protector to further the settlor’s purposes in benefitting the
trust’s beneficiaries, it presumably could not be exercised for the
powerholder’s own benefit.\footnote{See \textit{Centre Trustees (C.I.) Ltd. and Langry Trust Co. (C.I.) Ltd. v. Pabst}, 2009 JLR 202
114.003 (2015). Similarly, some non-UTC adviser and protector statutes treat them as
fiduciaries unless the instrument provides otherwise. See, \textit{e.g.}, \textit{Alaska Stat.} \S\S 13.36.370 & 13.36.375 (2015); \textit{Ariz. Rev. Stat. Ann.} \S
14-10818 (2015). An exception to the protector-is-not-treated-as-a-trustee rule is that
a protector with the power to direct the trustee as to the trustee investment and
distribution functions “shall [with respect to such functions] have the same duties and
liabilities as if serving as a trustee under the trust instrument.” \textit{Id.} at \S 456.8-808.7.}

Jurisdictions with non-UTC adviser and protector statutes
take a variety of approaches to the first of the three questions set
forth above: whether such a powerholder is accountable as a fiduciary.
Like the UTC, some non-UTC statutes presumptively treat advisers
and protectors as fiduciaries,\footnote{See, \textit{e.g.}, \textit{Nev. Rev. Stat. Ann.} \S 163.5551
protectors of charitable trusts are treated as fiduciaries).} although several provide that such
power holders are not fiduciaries unless the instrument provides
otherwise.\footnote{See, \textit{e.g.}, \textit{760 Ill. Comp. Stat. 5/16.3(e)} (providing that an adviser or protector with a
power to direct is “subject to the same duties and standards applicable to a trustee unless
the governing instrument provides otherwise, but the governing instrument may
not...relieve or exonerate a directing party from the duty to act or withhold acting as the
trust protector shall act in a fiduciary capacity in carrying out the
powers granted to the trust protector in the trust instrument, and shall
have such duties to the beneficiaries, the settlor, or the trust as set forth
in the trust instrument. A trust protector is not a trustee, and is not
liable or accountable as a trustee when performing or declining to
perform the express powers given to the trust protector in the trust
instrument. A trust protector is not liable for the acts or omissions of
any fiduciary or beneficiary under the trust instrument. \textit{Id.} at \S 456.8-808.6(1).

Id. at \S 456.8-808.6(1). An exception to the protector-is-not-treated-as-a-trustee rule is that
a protector with the power to direct the trustee as to the trustee investment and
distribution functions “shall [with respect to such functions] have the same duties and
liabilities as if serving as a trustee under the trust instrument.” \textit{Id.} at \S 456.8-808.7.

\footnote{See, \textit{e.g.}, \textit{760 Ill. Comp. Stat. 5/16.3(e)} (providing that an adviser or protector with a
power to direct is “subject to the same duties and standards applicable to a trustee unless
the governing instrument provides otherwise, but the governing instrument may
not...relieve or exonerate a directing party from the duty to act or withhold acting as the
}
differ significantly from the UTC by distinguishing between advisers and protectors in terms of their powers and their accountability as fiduciaries. For example, in South Dakota, an adviser with power over investments or distributions is a fiduciary, while a protector that is given other powers is not a fiduciary unless the instrument so provides. Finally, like the UTC, most of the statutes under which trust advisers or protectors may not be accountable as fiduciaries do not address whether they could be accountable under a lesser standard, and, if so, what that lesser standard would be.

With respect to the second of the three questions set forth above—what the duties and potential liabilities of the trustee are when a third party, non-trustee holds powers over a trust—the UTC provides that a trustee has a duty not to follow the directions of an adviser or protector if doing so would be “manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.”220 As with the question of fiduciary accountability of an adviser or protector, non-UTC statutes also differ significantly on the trustee’s duties when such a powerholder is serving. At least one such statute follows the UTC approach, while others hold the trustee to a lower standard
than that of the UTC.\textsuperscript{222} Another approach is to simply provide that trustees are not liable for following directions of an authorized powerholder, with no stated exception.\textsuperscript{223} Many statutes provide further protection to directed trustees by negating any duty to monitor the conduct of the adviser or protector, perform investment reviews, or warn trust beneficiaries with respect to matters subject to the control of an adviser or protector.\textsuperscript{224}

With respect to the third of the three questions listed above—whether fiduciary accountability to beneficiaries is preserved when trust advisers or protectors are used—that is the case under the UTC, at least when the non-trustee’s power is not a personal one.\textsuperscript{225} First, absent the settlor having relieved the powerholder from fiduciary accountability in the terms of the trust, the powerholder is accountable as a fiduciary to trust beneficiaries for the power.\textsuperscript{226} Second, although the UTC’s presumption that an adviser or protector is a fiduciary can be overridden by the trust’s terms,\textsuperscript{227} the trustee has


\textsuperscript{224} See, e.g., ALASKA STAT. § 13.36.375(c) (2015); COLO. REV. § 15-16-806(2) (2015); DEL. CODE ANN. tit. 12, § 3313(e); IDAHO CODE § 15-7-501(2) (2015); 760 ILL. COMP. STAT. 5/16.3(f) (2015); MISS. CODE ANN. § 91-8-1204(a) (2015); MO. REV. STAT. § 456.8-808; NEV. REV. STAT. § 163.5549(2) (2015); N.H. REV. STAT. ANN. § 564-B:12-1204(a) (2015); N.C. GEN. STAT. § 36C-8A-4(d) (2015); OR. REV. STAT. § 130.735(4) (2015); VT. STAT. ANN. tit. 14A, § 1104; (2015); VA. CODE ANN. § 64.2-770(E)(3) (2016).

Many of these statutes were enacted in response to the decision of a Virginia court in \textit{Rollins v. Branch Banking and Tr. Co. of Va.}, 56 Va. Cir. 147, 2001 Va. Cir. LEXIS 146 (Va. Cir. Ct. 2001). In \textit{Rollins}, the court held that because trust beneficiaries had the exclusive power to control investments, the trustee had no liability for losses associated with lack of diversification, but that the trustee could be liable for failing to warn the beneficiaries/investment advisers about information that could adversely affect their interests in the trust. \textit{Id.} at 147-48, 2001 Va. Cir. LEXIS at *2-4.

\textsuperscript{225} For a discussion of personal powers, see supra notes 207-209, and accompanying text.

\textsuperscript{226} See UNIF. TRUST CODE § 808(d).

The comment to the UTC’s power to direct statute provides:

The provisions of this section may be altered in the terms of the trust.

See Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary.

\textit{Id.} § 808 cmt. Note that the comment authorizes the settlor to require the trustee to accept
a duty under the UTC not to follow an adviser's or protector's direction if “the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.”

Moreover, under the UTC, the trustee’s fundamental fiduciary duty—to “administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries”—is mandatory, and thus presumably would apply to dictate that the trustee exercise, as a fiduciary, oversight with respect to the power even if the settlor in the trust’s terms: (i) appointed an adviser or protector; (ii) granted the adviser or protector a power to direct the trustee; (iii) specified that the adviser or protector not be a fiduciary; and (iv) provided for the trustee to follow directions from the adviser or protector with no associated duties or potential liability.

In sum, under the UTC, when an adviser or protector holds a power over a trust, the trustee has fiduciary responsibilities to beneficiaries with respect to the power, as does the adviser or protector unless the trust’s terms provide otherwise.

Although some non-UTC statutes also ensure fiduciary accountability when an adviser or protector holds a power over a trust, a number of them do not. Rather, under the non-UTC adviser and protector statutes of at least five jurisdictions, it appears that: (i) an adviser or protector could be a non-fiduciary with respect to the powerholder’s decision without question or relieve the powerholder of fiduciary accountability. Presumably, the comment was not intended to authorize the settlor to do both.

228 UNIF. TRUST CODE § 808(d). If the powerholder is expressly made a non-fiduciary, her attempted exercise of a power could not be a breach of fiduciary duty. In a circumstance in which an attempted exercise would have been a serious breach had the powerholder been a fiduciary, however, presumably the trustee’s duty not to comply with the attempted exercise would continue to apply.

229 Id. at § 801 (2015).

230 Id. at § 105(b)(2).

231 That conclusion is consistent with other UTC provisions that preserve fundamental fiduciary responsibilities of the trustee without regard to terms of the trust to the contrary. See, e.g., UNIF. TRUST CODE at §§ 1008 and 105(b)(10) (making unenforceable a trust term purporting to relieve a trustee from “liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries”); UNIF. TRUST CODE § 814(a) (2004) (requiring a trustee to “exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries” without regard to the breadth of the trustee’s discretion and it being characterized as “absolute,” “sole,” or “uncontrolled”).


233 See, e.g., DEL. CODE ANN. tit. 12, § 3313(a) (2015).
to his or her powers; and (ii) the trustee could be relieved from fiduciary responsibilities in acting in accordance with the adviser’s or protector’s exercise of the power.\textsuperscript{234} Those jurisdictions are Delaware,\textsuperscript{235} Idaho,\textsuperscript{236} Nevada,\textsuperscript{237} New Hampshire,\textsuperscript{238} and Ohio.\textsuperscript{239} The Delaware statute provides for a trustee to be accountable with respect to the power under a willful misconduct standard,\textsuperscript{240} but the statutes of the other four jurisdictions do not include any stated exception to the trustee’s statutory protection from liability for losses resulting from following a power holder’s directions.\textsuperscript{241} Presumably, however, even in those jurisdictions, trustees would not escape liability for bad faith or fraudulent conduct in complying with a powerholder’s directions.\textsuperscript{242} Moreover, although adviser and protector statutes typically do not expressly condition a trustee’s insulation from fiduciary responsibility on the powerholder being a fiduciary, implying such a condition to preserve fiduciary accountability to the trust’s beneficiaries would be an appropriate way for a court to respond in a case in which beneficiaries otherwise would be without


\textsuperscript{235} Powerholders are considered fiduciaries with respect to their powers unless the governing instrument provides otherwise. DEL CODE ANN. tit. 12, § 3313(a). A trustee that acts in accordance with a direction from an authorized powerholder is not liable for any resulting loss except in cases of willful misconduct. Id. at § 3313(b).

\textsuperscript{236} Investment trust advisers are considered fiduciaries with respect to their powers unless the governing instrument provides otherwise. IDAHO CODE § 15-7-501(4) (2015). A trustee “is not liable, either individually or as a fiduciary,” for any loss that results from complying with a direction of an authorized powerholder. Id. at § 15-7-501(2).

\textsuperscript{237} Investment trust advisers are considered fiduciaries with respect to their powers unless the governing instrument provides otherwise. NEV. REV. STAT. § 163.5551 (2015). An excluded fiduciary, which includes a trustee who is excluded from exercising investment powers that are exercisable by an investment trust adviser, NEV. REV. STAT. § 163.5539, “is not liable, individually or as a fiduciary for any loss that results from” complying with a direction from an authorized powerholder. NEV. REV. STAT. § 163.5549.

\textsuperscript{238} Trust advisers are fiduciaries with respect to their powers except as otherwise provided by the trust terms. N.H. REV. STAT. ANN. § 564-B:12-1202(a) (2015). A trustee that is required to follow the directions of a powerholder, and does so, is an excluded fiduciary. N.H. REV. STAT. ANN. § 564-B:7-711(b). An excluded fiduciary is not liable for any loss resulting from any action or inaction of a powerholder. N.H. REV. STAT. ANN. § 564-B:12-1205.

\textsuperscript{239} A powerholder is presumptively a fiduciary. OHIO REV. CODE ANN. § 5808.08(D) (2015-2016). As an excluded fiduciary, a trustee that complies with the directions of an authorized powerholder is not liable for any resulting losses. OHIO REV. CODE ANN. § 5815.25(C).

\textsuperscript{240} See DEL. CODE ANN. tit. 12, § 3313(a) (2015).

\textsuperscript{241} See IDAHO CODE § 15-7-501(2) (2015); NEV. REV. STAT. § 163.5549 (2015); N.H. REV. STAT. ANN. § 564-B:12-1205 (2015); OHIO REV. CODE ANN. § 5815.25(C) (2015-16).

\textsuperscript{242} See RESTATEMENT (THIRD) OF TRUSTS § 70, cmt. d (2015) (“Although a trustee’s duties, like trustee powers, may be affected by the terms of the trust, the fiduciary duties of trusteeship are subject to minimum standards that require the trustee to act in good faith and in a manner consistent with the purposes of the trust and the interests of the beneficiaries.”)
recourse to any fiduciary for what could be a significant loss occasioned by egregious conduct.\textsuperscript{243}

\textbf{IX. Conclusion}

The fiduciary relationship between the trustee and the trust’s beneficiaries is at the core of a trust, and necessarily so. Trustees hold legal title to trust property and typically have “the broadest possible powers”\textsuperscript{244} with respect to its management.\textsuperscript{245} Trusts, though, are established by settlors to benefit their beneficiaries, not their trustees. The mechanism for protecting beneficiaries’ interests from mismanagement by trustees is the enforcement of trustees’ fiduciary duties.\textsuperscript{246}

However, recent legislation in many jurisdictions has undermined the fundamental fiduciary relationship between trustees and beneficiaries. Exculpatory clauses can leave beneficiaries without recourse not only for losses occasioned by trustees’ negligence, but also by their gross negligence.\textsuperscript{247} In many jurisdictions, short of court action, the trustee may be relieved of any duty to account to beneficiaries for its administration of the trust.\textsuperscript{248} Moreover, statutes of limitation in many of those jurisdictions may bar beneficiaries from pursuing claims for breach against trustees without regard to whether the beneficiaries knew or had the opportunity to know of

\begin{itemize}
  \item \textsuperscript{243} See BOGERT & NEWMAN, ET. AL., THE LAW OF TRUSTS AND TRUSTEES, supra note 27, at § 965 ("If...the trustee is protected from liability for a loss incurred by reason of complying with the direction of the non-trustee who held a power to direct the trustee, and if the terms of the trust provide that the non-trustee is not a fiduciary and is not accountable to the beneficiaries, presumably the court would hold such a provision unenforceable if its effect would be that no one is accountable to the beneficiaries for the results of the conduct directed by the non-trustee."); Sherby & Flach, supra note 179, at § 6.3 ("It would be unconscionable if the settlor and trustee could slice and dice the duties of the trustee in a manner that relieves the trustee of its fiduciary duties without creating any fiduciary duties for the trust advisor exercising those trustee powers."); TRUST PROTECTORS, supra note 188, at 92 (opining that a statute exculpating a trustee from liability for following the directions of a non-fiduciary powerholder, when doing so would be a clear breach of duty, would be unenforceable as against public policy).
  \item \textsuperscript{244} See UNIF. TRUST CODE § 815 cmt. (2015).
  \item \textsuperscript{245} See, e.g., id. at § 815 (authorizing trustees to exercise all powers granted in the terms of the trust and, unless the trust terms provide otherwise, all other powers “which an unmarried competent owner has over individually owned property,” and “any other powers appropriate to achieve” the proper administration of the trust).
  \item \textsuperscript{246} For a discussion of the development of trust law from limiting trustees’ powers to those expressly granted in the trust’s terms to giving trustees the broadest possible powers, but subjecting them to fiduciary law to safeguard beneficiaries’ interests, see John H. Langbein, Rise of the Management Trust, Tr. & Est. Oct. 2004, at 52.
  \item \textsuperscript{247} Supra Part II of this Article.
  \item \textsuperscript{248} Supra Part III of this Article.
\end{itemize}
their claims.\textsuperscript{249} The protections beneficiaries are afforded by trust law's most fundamental duty—the duty of loyalty—and its ancillary no-further-inquiry rule have been substantially diluted in many jurisdictions.\textsuperscript{250} A few jurisdictions have enacted statutes that define the interest of a beneficiary of a discretionary trust, not as an interest in property, but as a mere expectancy.\textsuperscript{251} In a growing number of jurisdictions, trustees’ discretionary powers to distribute principal may be exercised to decant assets from the trust the settlor established to a new trust created by the trustee, the terms of which may vary significantly from those of the original trust.\textsuperscript{252} Finally, in some jurisdictions critical functions the trustee traditionally performed can be allocated to non-trustee third parties, apparently with neither the trustee nor the third parties being accountable for them as fiduciaries.\textsuperscript{253}

Most, if not all, of these inroads on trustees’ traditional fiduciary accountability can be avoided by settlors who choose to do so, which places a premium on lawyers for settlors understanding the risks these developments in trust law present, counseling settlors with respect to them, and drafting trust terms to eliminate or reduce such risks as appropriate.\textsuperscript{254} Treating fiduciary law, however, as

\textsuperscript{249} Supra Part IV of this Article.

\textsuperscript{250} Supra Part V of this Article.

\textsuperscript{251} Supra Part VI of this Article.

\textsuperscript{252} Supra Part VII of this Article.

\textsuperscript{253} Supra Part VIII of this Article.

\textsuperscript{254} With respect to the use of trust protectors, for example, the risk to beneficiaries of neither the protector nor the trustee being accountable as a fiduciary can be avoided by providing in the terms of the trust that one or both of the trustee and powerholder is accountable under a fiduciary standard. See Ranum & Mathieu, supra note 211, at 38 (“Obviously, if the grantor insists on a personal standard of liability for a trust protector, the trust instrument should not name the trustee as an ‘excluded fiduciary.’”); The Death of the Trust, supra note 234, at 13 (“How many of our settlors would proceed with their trusts if they really understood that their beneficiaries had no enforceable rights in the event of gross negligence or even reckless misconduct of the trustee, or of any misconduct, incompetence or negligence of the non-fiduciary advisor, short of outright fraud?”).

Similarly, a settlor might choose to include an exculpatory clause in the terms of a trust naming a family member or friend as trustee who, despite lacking the financial and other skills of a professional trustee, is deemed suitable to serve because of their knowledge of the beneficiaries and the settlor’s intentions.

In such a case, the trustee might lack financial expertise. The settlor might not want to see the trustee sued for errors in investment decisions, and the fear of potential liability might make the potential trustee reluctant to serve, depriving the settlor of the family expertise that she seeks. Both settlor and trustee might want an exculpatory clause to give the trustee some room to maneuver without fear of liability.

\textit{T Luxing Trustees, supra note 12, at 101. Further, there are various ways settlors who do
optional default rules presents its own risks. 255

not want beneficiaries to be apprised of a trust in which they have an interest can preserve fiduciary accountability, including designating a representative for such beneficiaries to whom information about the trust would be provided. See generally David Diamond, Michael M. Gordon & Daniel F. Hayward, ALI CLE, The Silent Trust: Using State Statutes to Delay Notification of a Trust (Aug. 2014).

255 As noted by Professor Leslie:

First, fiduciary duty law supports and reinforces social norms that require trustees to act with care and to refrain from self-dealing. Characterizing fiduciary duties as optional strips fiduciary duties of moral force and would, over time, weaken the social norms embodied in those duties. The end result would be a decline in the value of the trust mechanism, not merely for settlors and beneficiaries whose trusts include waiver provisions, but also for settlors and beneficiaries who seek to retain traditional fiduciary protections.

Second, if parties increasingly vary fiduciary terms, there will, over time, be less consensus about the meaning and content of fiduciary terms.

Tusting Trustees, supra note 12, at 89.
WHAT GHOST UP MUST COME DOWN: THE HIGHS AND LOWS OF PSYCHIC MEDIUMS IN PROBATE LAW

C. LILY SCHURRA*

I. An Introduction to a Supernatural Legal Concept

Beyond broad contemplations of the significance of life and death is a troubling thought: if life does not end at death, what does this mean for the purposes of the law? So much of estate law is centered on the concept that life ceases both literally and legally at death—the law’s struggle with the controlling “dead hand” is but one example of this idea.1 As Thomas Jefferson once stated in a letter to James Madison, “[t]he earth belongs in usufruct to the living; the dead neither have powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be.”2 Many probate disputes concern the intent of the deceased regarding the distribution of property. This Note examines the importance of testator intent together with the notion that life can extend beyond death. Notwithstanding traditional notions such as those of Thomas Jefferson, this Note explores nontraditional methods of determining testator intent, particularly the use of psychic mediums to more aptly devise a testator’s property.

A psychic is “[a] person who is regarded as particularly susceptible to supernatural or paranormal influence; a medium; a

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1 JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 27 (9th ed. 2013).

2 Id. at 1 (quoting THOMAS JEFFERSON, 7 JEFFERSON’S WORKS 454 (Monticello ed. 1904)).
clairvoyant.” More commonly, a psychic medium is defined as someone who is “able to make contact with the world of spirits” or someone “believed to be in contact with the spirits of the dead and to communicate between the living and the dead.” Regardless of whether one believes in the veracity of the messages psychic mediums purport to receive, the value of these messages lies in the comfort they bring to grieving friends and relatives of the deceased. A psychic medium’s communications present the opportunity for healing to those who seek an end to their grief—a mother desperately hoping to connect with the spirit of her child, or a husband searching for one last opportunity to hear from his wife. Through their communication with the deceased, psychic mediums present the living with a chance to engage in additional communications with their departed loved ones. These communications can lead to much-needed closure, release of guilt or similar negative emotions associated with someone’s passing, and/or the elucidation of questions left unanswered or issues left unresolved. The emotional value of these messages, however, is beyond the scope of this Note. When the recipient of a psychic medium’s messages begins acting in response to those messages with regard to his or her legal decisions, such as a grieving widow changing her will in response to a communication from her deceased husband, then psychic mediums and their messages can become problematic.

The goal of this analysis is to take an in-depth look at the way spiritualism has evolved in its connection to the law, particularly in regard to the role psychic mediums have played in that development, as well as what role they should play in the future. Despite the obvious evidentiary concerns of psychic mediums’ presence in the courtroom, both case law and society have slowly begun to recognize the potential advantages that coincide with their use. Though certain preliminary steps necessarily must occur before including psychic mediums in probate law, there is a conceivable benefit to their use, as the trend toward societal acceptance through the last century indicates.

In acknowledging “the modern appetite for psychic

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3 Psychic, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/153857?redirectedFrom=psychic#eid (last visited Feb. 5, 2016) (Note that this particular definition of “psychic” is meant to apply to psychics of any kind. The Oxford English Dictionary does not provide a separate definition for “psychic medium;” thus, this Note will use this general definition for explanatory purposes).


6 See, e.g., Christine A. Corcos, Law and Magic Conference: Seeing It Coming Since 1945: State Bans and Regulations of “Crafty Sciences” Speech and Activity, 37 T. JEFFERSON L.
phenomena,\textsuperscript{7} probate courts can enter a new age of dispute resolution, in which they utilize psychic mediums as resources to achieve a mutually beneficial solution for all involved, including closure for the people most deeply affected by the passing of a loved one.

II. Background

Earlier cases were hastily dismissive of the idea of including psychic mediums in the resolution of probate disputes, attributing psychic mediums and their services to be evidence of either undue influence or mental incapacity on the part of the testator.\textsuperscript{8} As society has become both more aware of and more open to the concept of psychic mediums and the spiritual realm with which they communicate, there is a clear shift in the way in which the law views psychic mediums. This evolution in society has resulted in courts leaning more toward acceptance of the employment of psychic mediums. However, some reluctancy remains. The hesitancy against the implementation of psychic phenomena into the legal system is derived from unfamiliarity and a lack of understanding, which leads to public fear and misconception. With a proper understanding of the concepts of spiritualism and mediumship, the law may slowly begin to accept that psychic mediums may hold more value in probate law than previously thought.

A. Important Terms Defined and Historical Context

As Blewett Lee states in his article, \textit{Psychic Phenomena and the Law}, “[t]he main difficulty about psychic phenomena is not with the law, but with the \textit{facts}, and what is worse, the explanation of them.”\textsuperscript{9} Society’s general misconception about spiritualism, mediumship, and all that accompanies them makes the entire concept one that most people easily and thoughtlessly dismiss. Therefore, in order for this Note to advocate for the potential value of psychic mediums in the field of probate law, its readers must first understand who and what mediums are.

Psychic mediums are associated with spiritualism, which is

\textsuperscript{7} Zechariah Chafee, Jr., \textit{The Progress of the Law}, 1919-1922, 35 HARV. L. REV. 673, 694 (1922).

\textsuperscript{8} See \textit{In re Willits' Estate}, 175 Cal. 173, 165 P. 537 (1917); \textit{In re Bishop's Estate}, 2 Cal.2d 132, 39 P.2d 201 (1934); \textit{Robinson v. Adams}, 62 Me. 369, 1870 Me. LEXIS 128 (1870); \textit{In re Smith's Will}, 52 Wis. 543 (1881); \textit{Buchanan v. Pierie}, 205 Pa. 123, 54 A. 583 (1903).

sometimes mistakenly understood in a religious context. Though spiritualism is considered a religion by its followers’ “belief in a transcendent realm,” “it [does not] have a body of theology,” and is therefore not a true religion. Spiritualism, by definition, is a belief in life after death, specifically, “the belief that the spirits of the dead can hold communication with the living, or make their presence known to them in some way,” which most often occurs through a psychic medium. While spiritualists share a common belief, they are not all meant to be understood as a single religious unit, because spiritualists beliefs are varied, and not all who believe in spiritual communication are followers of the designations of the same religious sects. All spiritualists, psychic mediums or otherwise, are “united in believing that communication with spirits is possible,” and consideration of spiritualism as a belief, and not a religion, is vital to this discussion, which considers spiritualism only in that context.

B. The Development of Modern Spiritualism

Modern spiritualism found its roots in the mid-nineteenth century, after news spread rapidly throughout the country that the Fox sisters in New York received communications from the spirit world in the form of rapping noises in their home. Spiritualism quickly gained popularity, “not just because it could entertain and provide comfort to the believer, but also because it” combined “the empirical methods and discoveries of science (such as the invisible force of electricity) with the religious idea of the afterlife.” As interest in spiritualism grew, mediums became more influential and the number of people who believed in their abilities increased. By the late nineteenth and early twentieth centuries, society came to understand spiritualism in a supplementary context; it “provided religious people with evidence that there was more to the world than

11 Id.
16 Id.
17 Id.
scientists had discovered.” 18 Spiritualism, then, was not seen as a separate religion, but instead as providing further proof in “both life after death and the existence of the soul.” 19

The rise of spiritualism since the mid-nineteenth century is attributable to the growing “acceptance of spirit communication as real.” 20 What is most important for legal purposes is not that spiritualism (as a belief) or mediumship (as an ability) exists, nor whether people believe in it; instead, what matters is “that some people believe that they receive communications from the dead, and that under the influence of this belief they do various legal acts in which such a belief has legal importance.” 21 This influence is how two seemingly unconnected areas—spiritualism and the law—have been forced to interact. The problem with this amalgamation is that spiritualism tends to be emotionally driven, as is evident in the many cases where the employment of psychic mediums is at issue, while the law tends to be logical and analytical. The law requires evidence, much of which spiritualism and psychic mediums either do not possess or cannot provide. For this reason, the early American probate cases involving psychic mediums employed as spiritual advisors to testators in the creation of their wills tended toward findings of undue influence and/or mental incapacity. 22

III. Analysis

A. The Early Cases

In will contests, probate courts place significant value on the testator’s intent, which often leads to flawed or ambiguous wills being admitted to probate. 23 Will contests are litigated disputes in which persons who hope to take property under the will attempt to determine the will’s validity. 24 In order to make this determination, courts give great effect to the intention of the testator, even allowing the use of extrinsic evidence to ascertain the testator’s true intent. 25

18 Id.
19 Id.
21 Lee, supra note 9, at 626.
22 See Willits’ Estate, 175 Cal. 173, 165 P. 537; Bishop’s Estate, 2 Cal.2d 132, 39 P.2d 201; Robinson, 62 Me. 369; Smith’s Will, 52 Wis. 543; Buchanan, 205 Pa. 123, 54 A. 583.
25 Id.
Oftentimes, the court will look to surrounding circumstances in the testator's life, such as the testator's relationships, emotions toward those relationships, passions, knowledge of his or her own estate and of the law, and capacity in order to determine the testator's intent. Unfortunately, the same factors that the court uses to determine the testator's intent in the hopes of probating the will can often lead to determinations of invalidity. In the earlier cases discussed below, psychic mediums were involved in will creation, and courts were careful not to invalidate those wills solely on the testator's belief in spiritualism. However, these cases show courts' initial hesitancy to accept the legitimacy of psychic phenomena, as these courts found belief in spiritualism to be a strong indicator of fraud, undue influence, mental incapacity, or insane delusion.

Earlier cases, decided in the late nineteenth and early twentieth centuries, tended to focus primarily on psychic mediums' use as spiritual advisors and assessed how the employment of a spiritual advisor affected the validity of a testator's will. In some earlier cases, such as In re Willits' Estate, the continued presence of a psychic medium in the testator's life provided a clear finding of undue influence. For Mr. Willits, like many other grieving widowed spouses in similar cases, the loss of a loved one sparks an increased interest in spiritualism. Mr. Willits became fixated on spiritualism after his wife's passing, holding séances three or more times a week. He believed that the spirits with whom he connected provided

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26 Id. at §§ 16-17.
27 See Willits' Estate, 175 Cal. 173, 165 P. 537; Bishop's Estate, 2 Cal.2d 132, 39 P.2d 201; Robinson, 62 Me. 369; Smith's Will, 52 Wis. 543; Buchanan, 205 Pa. 123, 54 A. 583.
28 Willits' Estate, 175 Cal. 173, 165 P. 537.
29 Id. See also Irwin v. Lattin, 29 S.D. 1, 12, 135 N.W. 759, 764 (1912), in which the court stated:

"...a believer in spiritualism may have such extraordinary confidence in spiritualistic communications—whether those communications reach him through mediums, or are received by him, as he believes, directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of the testator and is therefore not admissible to probate." Id.
30 Willits' Estate, 175 Cal. at 175, 165 P. at 538.
31 Séance, Encyclopædia Britannica, http://www.britannica.com/EBchecked/topic/530953/seance (last visited Feb. 5, 2016) (A séance is a “meeting centred on a medium, who seeks to communicate with spirits of the dead. Because strong light is said to hinder communication, a séance usually takes place in darkness.... It generally involves six or eight persons, who normally form a circle and hold hands.”)
32 Willits' Estate, 175 Cal. at 175, 165 P. at 538.
messages and “directions as to the conduct and management of one’s worldly affairs.” In fact, he believed that he had a “band of spirits” as guides for his life in the physical world.

What is alarming in Mr. Willits’ case is not his belief in spiritualism nor his alleged communication and connection with spirits, but his interactions with psychic mediums and the actions he took based upon the messages that he received through those mediums. In perhaps the most disturbing encounter, Mr. Willits, through a psychic medium, received a message from the spirit of Mr. Burdick, a man whom Mr. Willits had known in life, who told Mr. Willits that Mr. Burdick had loaned “$5,000...to the Mt. Pleasant Park,” a spiritualist camp where spiritualists and psychic mediums held annual meetings, and that it “was the best investment he (Mr. Burdick) had ever made.” Mr. Burdick’s spirit further informed Mr. Willits that this loan was the reason Mr. Burdick had received good treatment in the spiritual realm. Mr. Burdick allegedly explained that “the more [one] did for spiritualism in [the physical] world the better off [one would be] with the spirits in the next world.” These communications led Mr. Willits to leave his entire residuary estate to his spiritual advisor, Miss Helmer. Miss Helmer was not a psychic medium, but a fellow spiritualist who aided Mr. Willits in his quest for spiritualism, traveling with him and living with him for the last three years of his life.

Two of Mr. Willits’ sons contested the will, claiming that the testator was not of sound mind at the time of the execution and that Miss Helmer unduly influenced him prior to and during the execution of his will. Fortunately for the contestants, there was no money for Miss Helmer to take under the will, as Mr. Willits had devised more money in his will than he actually possessed. Although there was no

33 Id. at 175, 165 P. at 538-39.
34 Id. at 175, 165 P. at 539.
35 See id.
36 Id. at 177, 165 P. at 539.
37 Willits’ Estate, 175 Cal. at 177, 165 P. at 539
38 Id.
39 Id.
40 Id.
41 Id. at 175, 165 P. at 538.
42 Willits’ Estate, 175 Cal. at 174, 165 P. at 538.
43 Id.
44 Id.
money to take under the will on its face, there was still a real property interest to consider.  Mr. Willits had lived and traveled with Miss Helmer for the final three years of his life, during which time he gave her significant financial support, as well as all of his real property. This inter vivos disposition of Mr. Willits’ property left little to devise at the time his will was submitted for probate. Were the court to find for the contestants, Mr. Willits’ heirs-at-law would still be left with nothing, because the bequests to Miss Helmer, though invalid, fell into the residuary of the estate and were thus hers to take. The court therefore affirmed the lower court’s ruling, invalidating the will and its bequests on the basis of undue influence and mental incapacity, which left Miss Helmer with nothing.

In re Bishop’s Estate presents an even more distressing case of undue influence by a spiritual advisor. In this case, fraud was the more pressing concern. The testator’s holographic will left small monetary gifts to his sisters and the entirety of his remaining estate to Mrs. Gertrude Dickson. Mrs. Dickson and her husband, both spiritualists, held séances, which the testator regularly attended, and “convinced him that he was in communication with the spirit of his deceased wife.” The Dicksons’ fraudulent behavior came in the form of the messages that they conveyed to the testator, which they alleged came from his deceased wife. They claimed that in these messages, his wife “urg[ed] him to join her and [told] him to make his will in favor of Mrs. Dickson, so that she could use it in furtherance of the Spiritualist Church.” After receiving these communications, Mr. Bishop committed suicide on April 26, 1932. Like Mr. Willits, the testator here became “wholly engrossed with spiritualism.” Mr. Bishop refused to act without the direction of his spiritual guides with whom he made contact during séances. Here, too, the court invalidated the will, but based on fraud instead of undue influence, as in Mr. Willits’ case.

45 Id. at 174, 165 P. at 538.
46 Id.
47 Willits’ Estate, 175 Cal. at 175, 165 P. at 538.
48 Id. at 186, 165 P. at 543.
49 Bishop’s Estate, 2 Cal.2d at 133, 39 P.2d at 201.
50 Id.
51 Id.
52 Id. at 133, 39 P.2d at 202.
53 Id.
54 Bishop’s Estate, 2 Cal.2d at 132, 39 P.2d at 201.
55 Id. at 133, 39 P.2d at 202.
56 Id.
57 Id. at 133, 39 P.2d at 201.
These cases are not determinative of the validity or value of a psychic medium as a spiritual advisor; in both, there is clear evidence of the psychic medium having substantial, problematic influence over the testator. Though fraud was not an issue in Willits’ Estate, Miss Helmer still had a significant influence over the testator; her constant companionship during the last three years of his life strongly impacted his decisions in the distribution of his property.\textsuperscript{58} During those three years, Mr. Willits gave Miss Helmer almost all that he owned.\textsuperscript{59} The possibility remains, that had Mr. Willits’ financial support of Miss Helmer not been so substantial as to leave his heirs-at-law with almost nothing, the court may have decided the case differently.\textsuperscript{60} The issue, then, seems to stem neither from Miss Helmer’s beliefs in spiritualism nor her supporting Mr. Willits’ similar beliefs, but from the magnitude of the bequests she received both during his life and after his death.

In contrast, Mrs. Dickson’s influence on the testator in Bishop’s Estate was based less on the strength of a relationship and more on her purposeful manipulation of the testator.\textsuperscript{61} Unfortunately, people like Mrs. Dickson weaken the potential for society to see the benefits of psychic mediums.\textsuperscript{62} Mrs. Dickson and her husband ruthlessly took advantage of the testator’s grief, using it as a vehicle to assert their own financial gain. The court’s decision to invalidate the will thus acts as a deterrent, a warning for people like the Dicksons that fraudulent behavior will not go unchecked.

In other cases, courts were careful not to make the immediate assumption that a testator’s belief in spiritual communication rendered his or her will invalid.\textsuperscript{63} In Robinson v. Adams, the testator believed that her deceased husband, through spiritual communication, had approved of the distributions she made in her will.\textsuperscript{64} Despite her belief, the court affirmed the admission of the will to probate, stating that it was for the jury to decide whether her beliefs had made her of unsound mind.\textsuperscript{65} This same rule was applied

\textsuperscript{58} Willits’ Estate, 175 Cal. at 174-75, 165 P. at 538.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Bishop’s Estate, 2 Cal.2d at 133, 39 P.2d at 202.
\textsuperscript{62} Spiritualism at a Glance, supra note 10 (quoting G.K. Chesterton, Skepticism and Spiritualism, ILLUSTRATED LONDON NEWS (1906) (“No conceivable number of false mediums affects the probability of the existence of real mediums…. No conceivable number of forged bank-notes can disprove the existence of the Bank of England.”))
\textsuperscript{63} See generally Robinson, 62 Me. 369; Smith’s Will, 52 Wis. 543; Buchanan, 205 Pa. 123, 54 A. 583.
\textsuperscript{64} Robinson, 62 Me. at 395.
\textsuperscript{65} Thompson v. Hawks and Others, 11 Bliss. 440, 14 F. 902, n.1 (1883) (citing Robinson, 62 Me. 369).
in *In re Smith’s Will*, in which the court upheld the will of a man who believed that he was able to communicate with his deceased wife through the use of psychic mediums, and who used the advice of these mediums to manage his affairs.\(^{66}\) Because the court was unable “to find evidence of insane delusion, or of any peculiar exposure or liability to undue influences,” the will remained valid.\(^{67}\) Likewise, in *Buchanan v. Pierie*, the testator, who believed he communicated with the spirit of his deceased son through psychic mediums, did not appear to have ever used the information obtained through these communications in the preparation of his will.\(^{68}\) Thus, where a testator is not guided by advice or suggestions from spiritual communications in the distribution of his estate, a court will likely uphold the will, absent other circumstances lending toward invalidity.\(^{69}\)

It is important to note that courts, such as those in the foregoing cases, have never considered spiritualism in itself to be determinative of mental incapacity.\(^{70}\) While courts are quick to invalidate wills like that in *Bishop’s Estate*, they have not automatically assumed that a testator using a spiritual advisor and/or employing psychic mediums in an attempt to communicate with spirits is mentally incapable for that reason alone.\(^{71}\) The law, then, is not concerned with an individual’s belief in spiritualism; problems arise only when that belief affects a person’s actions with respect to the law. For example, even in the 1923 English Chancery case *In re Hummeltenberg*, in which “the testator had bequeathed a substantial sum in trust for the purpose of training and developing suitable persons, male and female, as mediums,”\(^{72}\) the court would not go so far as to diminish or openly criticize his belief in spiritualism.\(^{73}\) In *Hummeltenberg*, the court chose to focus on the issue at hand—the

\(^{66}\) *Id.* at n.m (citing *Smith’s Will*, 52 Wis. at 549).

\(^{67}\) *Smith’s Will*, 52 Wis. at 550.

\(^{68}\) *Buchanan*, 205 Pa. at 129, 54 A. at 585.

\(^{69}\) *Id.*

\(^{70}\) Lee, supra note 9, at 630-31, n.21 (quoting *Steinkuehler v. Wempner*, 169 Ind. 154, 164-65, 81 N.E. 482, 486 (1907)) (“A mere belief in spiritualism may be harmless and of no concern to any one other than its possessor, but [such] ’revelations’ cannot be permitted to control the practical affairs of this world, and the belief upon this subject and consequent conduct of the testatrix with reference to the making of her will was particularly relevant upon the question of undue influence.”)

\(^{71}\) 64 Cal. Jur. 3d *Wills* § 89 (2015) (“The mere taking of an interest in spiritualism is not the same thing as being a spiritualist, and even one who is a spiritualist is not for that reason alone insane.”)


\(^{73}\) *Id.*
validity of the trust the testator had created—and only hinted at the possibility of the trust being “invalid on public policy grounds.”74 Because “[t]he trust was a perpetuity and...had to be declared invalid unless it was found to be charitable,” the court was able to avoid any question regarding the legitimacy of psychic mediums by finding that “the training of mediums did not confer a public benefit and that the trust was therefore invalid.”75

The law is much more concerned with how the testator’s beliefs affect his will than it is with the validity of those beliefs. In O’Dell v. Goff, the Supreme Court of Michigan invalidated a will that left almost all of the testator’s estate “to be used as a nucleus in founding, building and equipping a home for poor and aged mediums.”76 Unlike the trust in Hummeltenberg, the O’Dell bequest was considered to be a “valid charitable aim” rather than an attempt to advance a particular set of beliefs, i.e., spiritualism, as the trust in Hummeltenberg had attempted to do.77 However, the O’Dell court still found that the testator “believed that his will was dictated to him by spirits,” and invalidated the will due to “testamentary incapacity and undue influence.”78

For psychic mediums today who hope to become involved in probate law, the early cases are of little service. While the foregoing cases do not attack the legitimacy of psychic mediums and their messages, they do nothing to validate them either. However, in the latter half of the twentieth century, there is a noticeable change in the way in which both the law and society view the potential advantage of including psychic mediums in probate matters.

B. The Shift in the Law and in Society’s Dealings with Psychic Mediums

Major developments in the law’s treatment of spiritualism and psychic mediums are more evident in the management of client affairs than in case law. Few reported cases consider the use of psychic mediums in probate law; their use is far better suited to mediation or client counseling. Although cases decided in the latter half of the twentieth century mark a slight shift toward acceptance of psychic mediums involvement in legal proceedings, issues with their employ are still a matter of concern to many courts. When there is clearly

74 Id. at 594.
75 Id. at 593 (italics omitted).
76 Id. at 593, n.90 (quoting O'Dell v. Goff, 149 Mich. 152, 154-55, 112 N.W. 736, 737 (Mich. 1907)).
77 Id.
78 Id.
evidence of a psychic medium's influence on a testator's disposition of his or her estate, such as in *Estate of Baker*, courts continue to use the traditional considerations,°79 particularly analyzing undue influence.°80 The law’s current concern with psychic mediums is almost purely evidentiary, such as the authenticity of the psychic medium's messages or advice. These concerns must be resolved before psychic mediums can be widely utilized in resolving probate matters.

The court in *Alsup v. Montoya* addresses the concern of the lack of authentication for psychic mediums, stating: “The only authentic evidence...which we have of the survival of life after death is the ability of judges to read the intention of the testator long after he has been buried.”°81 This statement is unfortunately true; there is currently no factual basis upon which courts can rely to embrace evidence produced by a psychic medium as authentic. In the eyes of a court, the only “ghost” allowed in the courtroom is the executor’s representation of the testator. The executor thus functions as the only “ghost” to have any effect on the court, as the testator’s “legal ghost.”°82 As the law currently stands, the executor is the only person who can truly represent the wishes of the deceased to a court of law, but developments in the implementation of psychic mediums into the legal system show great potential for their eventual inclusion in the legal realm.

The most important case outlining the law’s growth toward acceptance of spiritualism is *Stambovsky v. Ackley*.°83 Mr. Stambovsky purchased a home from Ms. Ackley only to discover that it was “widely reputed to be possessed by poltergeists.”°84 The defendant seller had reported the presence of the ghosts in her home on several occasions: (1) to Reader’s Digest; (2) to a local newspaper; and (3) in

°79 Traditional considerations are namely, fraud, undue influence, mental incapacity, and insane delusion. *See supra* note 27, and accompanying text.

°80 In *Estate of Baker*, a woman named Alta represented herself to the testator, Dorothy, “as a medium able to communicate with the spirits of the dead.” 131 Cal. App. 3d 471, 475, 182 Cal. Rptr. 550, 553 (Cal. App. 2d Dist. 1982). This was appealing to the testator, as she had lost both her mother and her brother. *Id.* at 477, 182 Cal. Rptr. at 554. For the next three years (until Dorothy’s death in 1978), Alta relayed messages from Dorothy’s mother and brother, “instructing her to do or not do certain things.” *Id.* at 482, 182 Cal. Rptr. at 557. Alta thus inserted herself into Dorothy’s life, directing her financial matters and her preparation of her will. *Id.* The court concluded that “Alta’s control over Dorothy’s mind and her influence so pervaded Dorothy’s thought processes that they completely subverted her will to the wishes and domination of Alta, and that this imposition continued from the moment Dorothy was convinced Alta was a true psychic and medium to immediately before her death.” *Id.* at 482, 182 Cal. Rptr. at 558.

°81 *Alsup v. Montoya*, 488 S.W.2d 725, 728 (Tenn. 1972).


°84 *Id.* at 255-56, 572 N.Y.S.2d at 674.
“promotional efforts,” which publicized the home as haunted.\textsuperscript{85} The home was even included in a walking tour of Nyack, New York, and was publicized as haunted.\textsuperscript{86} Though the court quickly dismissed the idea that a haunting could be ascertainable upon home inspection,\textsuperscript{87} this case was the first in recorded American legal history to hold that a home could be “haunted as a matter of law.”\textsuperscript{88} Applying the doctrine of \textit{caveat emptor},\textsuperscript{89} but carefully stating that not all nondisclosures are actionable,\textsuperscript{90} the court found that because the seller had created the haunted condition by publicizing and marketing the home’s poltergeists, “nondisclosure constitute[d] a basis for rescission as a matter of equity.”\textsuperscript{91} Though not directly related to psychic mediumship, the findings in this case are significant. If a court can hold that a home is haunted as a matter of law, then the law might also recognize the existence of spiritualism in future decisions. Despite this impressive advancement in the recognition of spiritualism in a court of law, many more issues must be resolved before any form of spiritualism can enter the rigid realm of litigation.

Because of the seemingly impossible feats in advancing the use of psychic mediums in litigation, psychic mediums have been more accepted and more widely used in the alternative dispute resolution context. Nevertheless, there are still major hurdles that psychic mediums must overcome before their inclusion in probate law matters can be widely accepted. The only hope for psychic mediums to be officially included in probate disputes necessarily requires the occurrence of three things: (1) a method of authentication for psychic mediums to assuage the evidentiary concerns; (2) the law’s recognition of the spiritual world as real in order to further validate psychic mediums and their messages; and (3) society’s recognition of psychic mediums and the messages they receive to be authentic as a force of support for their inclusion. There have been attempts at all three, as psychic mediums become more present in the media, more involved in legal disputes and law enforcement, and more valuable.

\textsuperscript{85} Id. at 256, 572 N.Y.S.2d at 674.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 257, 572 N.Y.S.2d at 675.
\textsuperscript{89} \textit{Stamboulsky}, 169 A.D.2d at 258, 572 N.Y.S.2d at 676 (“The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission.”)
\textsuperscript{90} Id. at 258, 572 N.Y.S.2d at 675.
\textsuperscript{91} Id. at 259, 572 N.Y.S.2d at 676.
While there are undoubtedly issues with each attempt, what psychic mediums have been able to provide to the legal field as of late is promising, and there is much potential for what they can provide in the future.

Much of the current utilization of psychic mediums is in law enforcement. Psychic mediums are not official consultants to law enforcement officers; rather, their involvement tends to be “under the table.” No matter who employs psychic mediums or how often they are utilized, the approaches and results have been extremely inconsistent. These inconsistencies are damaging to the reputation of psychic mediums, a reputation that is further tainted by people who “deliberately fake” mediumship abilities in order to take advantage of vulnerable people. “Genuine psychics can aid an investigation,” says Kathlyn Rhea, a “psychic investigator based in California,” who has three decades worth of experience providing guidance and information to law enforcement. Unfortunately, it is unlikely that the many issues with using psychic mediums in criminal investigations will be resolved, since there is no evidence that points to any of these “investigators” reaching the same, or even similar, conclusions.

Other psychic mediums have a different connection to the law; take, for example, Mark Anthony, the “psychic lawyer.” Mr. Anthony is an Oxford-educated attorney and certified mediator, who makes his living as a “psychic medium, legal analyst...and paranormal expert.” Mr. Anthony’s approach is unique in that he is able to “combin[e] his gifts as a psychic medium with his experience as an attorney,” which enables him to “relate to each client on a personal level.” Interestingly, despite what his website pronounces, Mr. Anthony, as a “psychic lawyer” seems to be practicing only as a psychic medium. He purports to provide psychic readings or

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92 Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
96 Id.
97 Id.
98 Id.
100 Id.
101 Id.
evaluations, but none of his services reflect an interwoven psychic/legal practice. The designation “psychic lawyer,” then, seems merely nominal. Although his website alludes to his having worked as a “legal analyst” in criminal cases, his work seems to involve very little, if any, legal practice. The combination of law and mediumship may be merely a marketing tactic, but Mr. Anthony still charges clients a fee of $250 an hour, and there is a “six-month wait for a telephone reading with [him].” What Mr. Anthony may fail to achieve, then, is any legitimate connection between his two specialties. His portrayal of himself as a “psychic lawyer” thus seems to be illusory, and leaves psychic mediums no more able to enter the legal field than they were before he began his “practice.” However, there are some lessons to be learned from what Mr. Anthony does, which may aid psychic mediums in their potential association with the legal field. If psychic mediums can provide what Mr. Anthony purports to—a personal connection with clients that more aptly helps them overcome their grief—then these mediums could conceivably provide a benefit to probate law. By making the resolution of probate disputes more focused on the client’s healing than on settling the legal issue itself, there may be greater opportunity for successful resolution of probate matters. Though this method is mostly therapeutic, its value in the legal field stems from its potential for fostering peace among parties in highly emotional legal disputes.

One of the most innovative developments in the use of psychic mediums in probate law is in the field of mediation. Robert Hansen, an “internationally acclaimed lecturer and psychic medium,” offers private readings, group readings, “Love Never Ends” seminars—which emphasize the importance of the loved ones “staying with” family members even after death—and Psychic Development Workshops, in which he aids fellow psychic mediums in the crafting and understanding of their gifts. While he holds many roles, one of

102 See id.
103 See id.
105 About Mark Anthony, supra note 99.
106 This statement is without reference to any potential ethical concerns, which are outside the scope of this analysis.
109 Id.
his most intriguing is that of psychic mediator. In early 2010, TLC aired the pilot episode of *Paranormal Court*, in which renowned “psychic medium Robert Hansen help[ed] families in crisis solve their long-standing disputes with help from the dead.” Mr. Hansen was kept completely separate from the families with which he would be working; security made sure that he met no one involved before filming. Once both parties and Mr. Hansen were brought to the home in which the filming took place, the parties told Mr. Hansen only that they needed an issue in the family to be resolved. He was then asked to determine through his readings—without any other information or prior knowledge of the family—what the turmoil was and to use his connection to the dead in order to find a solution.

Mr. Hansen worked with three separate families to resolve disputes over the disposition of their deceased loved one’s intestate property. The items at issue included: the automobile of a young man killed in a car crash; a cross belonging to a child who died of cancer; and the bedroom and belongings of a murdered child. In each situation, the parties to the dispute both agreed to be bound by the findings of their psychic mediator. Mr. Hansen received messages from the deceased, and resolved the disputes by providing these families with exactly what they needed—closure. For example, the mother of the murdered child had enshrined her daughter’s bedroom for four years after her passing and refused to let anyone enter that part of the house. The rest of the family tried to convince her to move on, but she was not comfortable doing so without knowing how her daughter would feel about that decision. In the case of the automobile, the sister and mother of the young man who had passed away had differing views regarding what to do (one wanted to sell the vehicle, the other, to keep it). In each of the three cases, Mr. Hansen provided both sides of the dispute with the answers they were seeking, and each family was able to resolve their respective disagreements.

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111 Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
112 Id.
113 Id.
114 Id.
115 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
Mediation of familial disputes is not Mr. Hansen’s only experience in law; he has worked with attorneys and law enforcement throughout his career.\textsuperscript{122} For three years, Mr. Hansen worked with a prominent attorney in Southern Florida who assisted retired athletes.\textsuperscript{123} This attorney had Mr. Hansen “read” the athletes and used these readings to better understand his clients’ needs.\textsuperscript{124} Working with this attorney led Mr. Hansen into dealings with law enforcement officers, who used his gift not to solve problems, but as a tool to give insight into the best strategies to resolve those problems.\textsuperscript{125} What is most remarkable about Mr. Hansen’s experiences is the way in which he was able to utilize his gifts. Instead of presenting himself as an unassailable problem-solver, Mr. Hansen has instead taken a more user-friendly approach. By providing insight instead of claiming to provide unequivocal answers, Mr. Hansen is able to act as a resource, and not as an authority.\textsuperscript{126}

Psychic mediums who wish to use their gifts to benefit the legal field should take a similar approach to that of Mr. Hansen. The psychic medium who involves himself or herself in the law needs to act not as an authority or an enforcer, but as a resource, using therapeutic strategies to guide parties to agreeable resolutions. Mr. Hansen describes people who are grieving as the “walking wounded”; they are blinded by their pain, easily susceptible, and looking for an opportunity to heal as much as they are searching for answers.\textsuperscript{127} These people are fragile, and should be treated very delicately, as should their legal disputes. The legal issues that grieving people face are so deeply rooted in emotion that perhaps a courtroom or similarly adversarial setting is not appropriate for their needs. Instead, a relaxed mediation setting, in which parties are able to speak freely, is more apt to lead to satisfaction for both parties. Such a setting is where psychic mediums like Mr. Hansen have the most potential.

\textbf{IV. Codification of Relevant Laws}

A major development in this area is the codification of laws involving psychic mediums and their employ. The California laws, discussed directly below, are based mostly on the earlier cases, but their codification is important because California law now officially recognizes the use of psychic mediums. While California law is slow to recognize the potential benefit of the use of psychic mediums, both

\begin{enumerate}
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
  \item \textsuperscript{127} Id.
\end{enumerate}
Rhode Island and South Dakota have developed laws that are far more favorable. The fact that these laws exist could be very useful in the psychic medium who desire to enter the legal realm, as states become more comfortable with psychic mediums being involved in the resolution of legal disputes.

California jurisprudence includes two statutes that make reference to the presence of psychic mediums and/or spiritualism in probate law. In the first California statute, the “belief in spiritualism” is codified in its connection to a testator’s capacity: “the mere taking of an interest in spiritualism is not the same as being a spiritualist, and even one who is a spiritualist is not for that reason alone. However, irrational belief in spiritualism may have the same effect on testamentary capacity as an insane delusion.”128 This statute is foundational, though it is not actually beneficial to the argument in favor of including psychic mediums in probate law. Yet, the fact that such a law exists is important to this analysis because a concrete, codified law shows legislative acknowledgement of spiritualism, which is key to the eventual acceptance of psychic mediums.

Further progress is evident in the second California statute, which involves “[s]piritualist adviser[s] to testator[s].”129 This statute states:

The suspicion of undue influence is naturally increased when there is, in addition to an extramarital relationship, a common belief in spiritualism, which gives one party an unusual opportunity to influence the other. Accordingly, the denial of probate may be proper where the testator’s disposition was unduly influenced by a spirit medium’s claim to be receiving messages from deceased relatives of the testator.130

While it is important to note the benefit of having such a law in place, it is equally important to recognize the obstructive nature of that law, as it creates heightened concern for the presence of undue influence. It is vital for courts to ensure that psychic mediums are not taking advantage of vulnerable, grief-stricken people. However, even the harshest courts recognize that belief in spiritualism or in the messages of psychic mediums is not alone evidence of mental incapacity.131 The typical case of a psychic medium advising a

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129 Id. at § 192.
130 Id.
131 See Willits’ Estate, 175 Cal. 173, 165 P. 537; Bishop’s Estate, 2 Cal.2d 132, 39 P.2d 201;
testator would not likely include an extramarital relationship, and undue influence would then be unnecessary for the court to even consider if the medium is not benefitting from the terms of the will. Therefore, this statute is an important development in probate law’s acceptance of psychic mediums. When a psychic medium is simply advising a testator in his or her will creation, and does not at all benefit from the will once it is created, then the situation is no different than if the testator had sought the advice of a priest. In this advisory context, courts should not consider the use of a psychic medium as evidence of mental incapacity or insane delusion, but should instead treat the will and its validity as it would under any other situation in which the testator had sought the advice or counsel of another.

Rhode Island and South Dakota have per-se rules that treat relationships between testators and their spiritual advisors as confidential relationships. In his article, Jeffrey G. Sherman recommends a legal presumption of per-se confidentiality “between a testator and her spiritual advisor,” but subsequently notes that “the confidentiality designation does not give rise to a presumption of invalidity unless the contestant can produce evidence of a ‘suspicious circumstance.’” Courts have no place deciding the validity of the spiritual advisor’s guidance when the advice given has not unduly influenced the testator to the benefit of the advisor under the will. If a testator seeks out a psychic medium merely for emotional or spiritual support, his or her decisions are no more influenced by that spiritual advisor than they would be had the testator discussed his or her emotions with a friend or a priest. Therefore, laws such as Rhode Island’s and South Dakota’s, which treat these advisor/advisee relationships as confidential, are highly beneficial to reducing the psychic medium’s plight in entering the legal field.

V. Recommendation

Psychic mediums are no more than interpreters; they receive messages, and use them to provide information to the living. There is hope for psychic mediums with good intentions, regardless of their legitimacy or of anyone’s belief in their abilities, to enter into the legal setting as a valuable resource. Throughout the twentieth century, courts and society alike slowly began to look at psychic mediums less as immediate indicators of undue influence or mental incapacity and more as potential resources of valuable information. This

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Robinson, 62 Me. 369; Smith’s Will, 52 Wis. 543; Buchanan, 205 Pa. 123, 54 A. 583.

132 Sherman, supra note 72, at 640.

133 Id. at 643.

134 Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
development is important, whether psychic mediums become influential in law or not, because it shows an open-mindedness that seemed nonexistent in early court decisions. Regardless of the legitimacy of psychic mediums’ abilities, since the mid-nineteenth century people have consulted mediums “not only about making wills but about all sorts of business,” and undoubtedly will continue to do so.\textsuperscript{135} The best way for courts to approach this situation “is to treat the person who consulted the medium” and subsequently acted upon messages from the dead “the same way as if he had consulted a living person and received the same advice.”\textsuperscript{136} If a testator chooses to use a psychic medium as a consultant or advisor, then courts should not use that relationship as an indication of undue influence, as they have in the past.\textsuperscript{137} Instead, courts should view a psychic medium who is advising or consulting a testator in the same way they would view any other consultant or advisor.\textsuperscript{138}

Within the legal field, psychic mediums hold the most potential in the areas of mediation and client counseling. However, as previously mentioned,\textsuperscript{139} three things must first occur before psychic mediums can be utilized in probate disputes: (1) the creation of a method of authentication to evade evidentiary concerns; (2) the law’s recognition of the existence of the spiritual; and (3) society’s belief in the authenticity of psychic mediums and their messages. Authentication will be the most difficult hurdle for psychic mediums to overcome. Mr. Hansen, the aforementioned psychic mediator, underwent an authentication process with Harvard professors.\textsuperscript{140} These Professors placed a subject for Mr. Hansen to read in a room across the hall, while Mr. Hansen was kept in a separate room, having never met or interacted with the subject.\textsuperscript{141} Mr. Hansen was then instructed to “read” the subject, i.e. receive messages about the subject and her loved ones and relay them to the professors.\textsuperscript{142} He readily passed all authentication tests.\textsuperscript{143} All psychic mediums who wish to be involved in dispute resolution must likewise be required to

\begin{thebibliography}{100}
\bibitem{135}Lee, supra note 9, at 630.
\bibitem{136}Id.
\bibitem{137}See \textit{Willits’ Estate}, 175 Cal. 173, 165 P. 537; \textit{Bishop’s Estate}, 2 Cal.2d 132, 39 P.2d 201; \textit{Robinson}, 62 Me. 369 (1870); \textit{Smith’s Will}, 52 Wis. 543; \textit{Buchanan}, 205 Pa. 123, 54 A. 583.
\bibitem{138}See Sherman, supra note 72, at 637-38 (“[J]udgments about which forms of religious influence are ‘undue’ will often (though not always) lead to improper consideration of whether the religion seems unreasonable…” Therefore, it is vital that courts not consider the religion of the advisor in their consideration of the validity of the advice.)
\bibitem{139}See Section III (B).
\bibitem{140}Telephone Interview with Robert Hansen, Psychic Medium (Jan. 15, 2015).
\bibitem{141}Id.
\bibitem{142}Id.
\bibitem{143}Id.
\end{thebibliography}
go through an authentication process. Fortunately for psychic mediums hoping to become involved in mediation, law and society have both begun to accept and acknowledge mediums and their messages as reliable. Once psychic mediums are authenticated, more probate disputes can be mediated in a similar manner to that of Mr. Hansen’s Paranormal Court.

VI. Conclusion

The problem with the use of psychic mediums in probate disputes is not their legitimacy, but what people do with the messages they receive. As Blewett Lee states in his article, Psychic Phenomena and the Law, “[t]he important fact for legal purposes is that some people believe that they receive communications from the dead, and that under the influence of this belief they do various legal acts in which such a belief has legal importance.” The influence of a psychic advisor naturally must go through a consideration of the effect of that influence upon the testator, as the suspicion of factors such as undue influence, fraud, mental incapacity, and insane delusion is increased in that situation. However, courts should be careful in basing decisions on issues so deeply rooted in personal belief; it is not for the probate court to decide the legitimacy of a testator’s beliefs.

Outside of the advisory context, psychic mediums have the potential to provide meaningful therapeutic value as mediators. Probate disputes are highly emotional, and grieving parties may benefit from the opportunity for definitive closure that comes from a psychic medium’s messages. As the law continues to progress, the employment of psychic mediums, which was once hastily dismissed as evidence of invalidity, may become more prevalent both in the mediation and advisory contexts.

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145 Lee, supra note 9, at 626.
## CUMULATIVE TOPIC INDEX OF THE OPINIONS PUBLISHED IN THE QUINNIPIAC PROBATE LAW JOURNAL

<table>
<thead>
<tr>
<th>Topic</th>
<th>Volume:Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abandonment</td>
<td></td>
</tr>
<tr>
<td>defined</td>
<td>3:250; 21:222; 23:3; 29:7</td>
</tr>
<tr>
<td>forfeiture</td>
<td>3:35</td>
</tr>
<tr>
<td>generally</td>
<td>23:2-4; 29:3</td>
</tr>
<tr>
<td>insufficient cause</td>
<td>3:250</td>
</tr>
<tr>
<td>intent</td>
<td>3:250; 12:422</td>
</tr>
<tr>
<td>intestate share</td>
<td>3:274</td>
</tr>
<tr>
<td>physical abuse</td>
<td>12:421</td>
</tr>
<tr>
<td>question of fact</td>
<td>3:35; 3:274-75; 12:421</td>
</tr>
<tr>
<td>separation</td>
<td>3:274</td>
</tr>
<tr>
<td>statutory share</td>
<td>12:421</td>
</tr>
<tr>
<td>testate and intestate estates</td>
<td>3:35, 3:249; 12:422</td>
</tr>
<tr>
<td>Accounts</td>
<td>9:11</td>
</tr>
<tr>
<td>Administratrix</td>
<td></td>
</tr>
<tr>
<td>removal of</td>
<td>16:231; 17:255</td>
</tr>
<tr>
<td>Adoption</td>
<td></td>
</tr>
<tr>
<td>best interests of the child</td>
<td>26:38</td>
</tr>
<tr>
<td>child's preference</td>
<td>18:76</td>
</tr>
<tr>
<td>consequences of</td>
<td>23:193</td>
</tr>
<tr>
<td>establishment of parental rights</td>
<td>26:38</td>
</tr>
<tr>
<td>Full Faith and Credit Clause</td>
<td>23:194-95; 24:14-15</td>
</tr>
<tr>
<td>generally</td>
<td>23:192; 26:38</td>
</tr>
<tr>
<td>interstate recognition</td>
<td>24:22</td>
</tr>
<tr>
<td>maintenance &amp; support agreements</td>
<td>17:83</td>
</tr>
<tr>
<td>Pennsylvania Adoption Act</td>
<td>18:76</td>
</tr>
<tr>
<td>procedures</td>
<td>23:192</td>
</tr>
<tr>
<td>Topic</td>
<td>Pages</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>purpose</td>
<td>23:192-93</td>
</tr>
<tr>
<td>rights of inheritance</td>
<td>12:268</td>
</tr>
<tr>
<td>standing in loco parentis</td>
<td>17:286</td>
</tr>
<tr>
<td>statutory construction</td>
<td>23:192</td>
</tr>
<tr>
<td>statutory requirement</td>
<td>12:265; 24:14;</td>
</tr>
<tr>
<td></td>
<td>24:20</td>
</tr>
<tr>
<td>vacate, Vermont law</td>
<td>12:266</td>
</tr>
<tr>
<td>Agency</td>
<td></td>
</tr>
<tr>
<td>generally</td>
<td>24:360</td>
</tr>
<tr>
<td>roles</td>
<td>24:360</td>
</tr>
<tr>
<td>Aggrievement</td>
<td></td>
</tr>
<tr>
<td>generally</td>
<td>2:8</td>
</tr>
<tr>
<td>subject matter jurisdiction</td>
<td>2:8</td>
</tr>
<tr>
<td>Allowance to Widow</td>
<td>1:198</td>
</tr>
<tr>
<td>Ambiguity</td>
<td>13:171</td>
</tr>
<tr>
<td>extrinsic evidence</td>
<td>22:25; 25:271</td>
</tr>
<tr>
<td>generally</td>
<td>23:4</td>
</tr>
<tr>
<td>parol evidence</td>
<td>22:25</td>
</tr>
<tr>
<td>testamentary instrument</td>
<td>22:25</td>
</tr>
<tr>
<td>Animals</td>
<td>29:110</td>
</tr>
<tr>
<td>Ancient Documents Rule</td>
<td>3:10</td>
</tr>
<tr>
<td>Antenuptial Agreements</td>
<td></td>
</tr>
<tr>
<td>enforceability</td>
<td>6:184</td>
</tr>
<tr>
<td>generally</td>
<td>6:184</td>
</tr>
<tr>
<td>Appeals</td>
<td>1:68; 3:280-81</td>
</tr>
<tr>
<td>standard of review</td>
<td>27:161</td>
</tr>
<tr>
<td>Appointment of Conservator</td>
<td>2:15</td>
</tr>
<tr>
<td>Appointment of Counsel</td>
<td>14:373</td>
</tr>
<tr>
<td>Appointment of Executor</td>
<td>22:350</td>
</tr>
<tr>
<td>Athens Convention</td>
<td></td>
</tr>
<tr>
<td>damages</td>
<td>22:83</td>
</tr>
<tr>
<td>application</td>
<td>22:83</td>
</tr>
<tr>
<td>Attorney Disqualification</td>
<td>16:245; 21:36;</td>
</tr>
<tr>
<td>advocate-witness rule</td>
<td>21:36; 21:35</td>
</tr>
<tr>
<td>Attorney’s Fees</td>
<td></td>
</tr>
<tr>
<td>extraordinary circumstances</td>
<td>22:194</td>
</tr>
<tr>
<td>Topic</td>
<td>Page Numbers</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>factors and reasonableness</td>
<td>22:104; 22:105</td>
</tr>
<tr>
<td>fee agreement</td>
<td>22:194</td>
</tr>
<tr>
<td>substantial services</td>
<td>22:194</td>
</tr>
<tr>
<td>Beneficiaries</td>
<td>10:17; 16:45</td>
</tr>
<tr>
<td>indebtedness</td>
<td>27:153</td>
</tr>
<tr>
<td>Benefits</td>
<td>9:11</td>
</tr>
<tr>
<td>Bequests</td>
<td></td>
</tr>
<tr>
<td>charitable</td>
<td>16:219</td>
</tr>
<tr>
<td>churches</td>
<td>12:451</td>
</tr>
<tr>
<td>Bond</td>
<td>3:80; 13:146</td>
</tr>
<tr>
<td>Burden of Proof</td>
<td>3:10; 3:52</td>
</tr>
<tr>
<td>abandonment or non-support</td>
<td>21:222</td>
</tr>
<tr>
<td>domicile</td>
<td>7:253</td>
</tr>
<tr>
<td>lack of good faith</td>
<td>21:248</td>
</tr>
<tr>
<td>paternity</td>
<td>8:196</td>
</tr>
<tr>
<td>preponderance</td>
<td>22:202</td>
</tr>
<tr>
<td>shift to beneficiary</td>
<td>26:107</td>
</tr>
<tr>
<td>tax exemption</td>
<td>6:179</td>
</tr>
<tr>
<td>wills, execution</td>
<td>6:3; 12:301</td>
</tr>
<tr>
<td>wills, fraud</td>
<td>3:83</td>
</tr>
<tr>
<td>wills, lost</td>
<td>2:149; 2:150</td>
</tr>
<tr>
<td>wills, shift of</td>
<td>6:3; 9:198</td>
</tr>
<tr>
<td>Caregiver Services</td>
<td></td>
</tr>
<tr>
<td>family members</td>
<td>24:233</td>
</tr>
<tr>
<td>Cause for Appointment</td>
<td>1:20</td>
</tr>
<tr>
<td>Charitable Nature of Organization</td>
<td>1:12</td>
</tr>
<tr>
<td>Charitable Organizations</td>
<td></td>
</tr>
<tr>
<td>fees</td>
<td>4:207</td>
</tr>
<tr>
<td>nature of</td>
<td>1:12</td>
</tr>
<tr>
<td>private donations</td>
<td>4:205</td>
</tr>
<tr>
<td>qualifications</td>
<td>4:204</td>
</tr>
<tr>
<td>State Attorney General’s common law powers</td>
<td>17:382</td>
</tr>
</tbody>
</table>
tax exemptions.......................................................... 4:204

Charitable Purposes
activities............................................................... 4:208
broad purpose ...................................................... 4:208
Charity ................................................................. 1:11
Choice of Law ....................................................... 1:69; 10:9
Claim
notice of ............................................................... 9:187
rejection of ......................................................... 9:188
Claims Against Estate ........................................... 2:39
anti-mortem claims ............................................... 26:9
burden of proof .................................................... 2:31
care and companionship ........................................ 2:29; 3:73
college education .................................................. 2:43
liens ................................................................... 2:39
notes ................................................................. 2:39
personal services .................................................. 3:18
Claims by Estate
repayment of loans ................................................ 22:125
Code of Professional Responsibility ....................... 12:468; 15:36
extraordinary compensation ................................... 12:435
factors, reasonableness of compensation .................. 12:435; 12:468;
................................................................. 15:176; 18:61
generally ............................................................. 4:189; 14:208;
................................................................. 14:373; 15:188
Codicils
due execution ........................................................ 17:1; 25:19
Collateral Estoppel ............................................... 6:4
Community Property
acquirement of property ....................................... 4:198; 4:200
equitable distribution jurisdiction ................................ 4:198; 4:200
obtained through laws of another jurisdiction ........... 4:197
property rights at death ......................................... 4:198
rebuttable presumption ......................................... 4:198; 4:200
Compensation of Fiduciaries .................................. 3:287
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>compensation standards</td>
<td>3:287</td>
</tr>
<tr>
<td>multiple fiduciaries</td>
<td>3:287</td>
</tr>
<tr>
<td>public policy</td>
<td>3:288</td>
</tr>
<tr>
<td>theory</td>
<td>3:288</td>
</tr>
<tr>
<td>Competency</td>
<td>1:75</td>
</tr>
<tr>
<td>Conduct</td>
<td></td>
</tr>
<tr>
<td>defined, Ohio law</td>
<td>25:29</td>
</tr>
<tr>
<td>Confidential Relationship</td>
<td>3:24-5; 3:42</td>
</tr>
<tr>
<td>Confidentiality of Information</td>
<td></td>
</tr>
<tr>
<td>disclosure</td>
<td>24:33-34</td>
</tr>
<tr>
<td>exceptions</td>
<td>24:32</td>
</tr>
<tr>
<td>generally</td>
<td>24:31</td>
</tr>
<tr>
<td>presumption</td>
<td>24:33</td>
</tr>
<tr>
<td>scope of affected representation</td>
<td>24:32-33</td>
</tr>
<tr>
<td>scope of applicable material</td>
<td>24:32</td>
</tr>
<tr>
<td>Confidentiality of Probate Court Records</td>
<td>10:203</td>
</tr>
<tr>
<td>test</td>
<td>10:203</td>
</tr>
<tr>
<td>Conflicts of Law</td>
<td>23:4</td>
</tr>
<tr>
<td>marriage</td>
<td>12:283</td>
</tr>
<tr>
<td>Conservator</td>
<td></td>
</tr>
<tr>
<td>appointment of</td>
<td>2:15</td>
</tr>
<tr>
<td>approval of</td>
<td>9:2</td>
</tr>
<tr>
<td>consent of</td>
<td>9:3</td>
</tr>
<tr>
<td>duties of</td>
<td>9:2; 15:130;</td>
</tr>
<tr>
<td></td>
<td>18:35; 20:1;</td>
</tr>
<tr>
<td></td>
<td>22:215; 27:2</td>
</tr>
<tr>
<td>generally</td>
<td>3:1; 3:2; 9:2;</td>
</tr>
<tr>
<td></td>
<td>10:10; 16:10;</td>
</tr>
<tr>
<td></td>
<td>17:298; 27:2</td>
</tr>
<tr>
<td>powers of</td>
<td>9:2; 10:10; 15:46</td>
</tr>
<tr>
<td>special needs trust</td>
<td>15:129</td>
</tr>
<tr>
<td>suits against</td>
<td>14:39; 15:77</td>
</tr>
<tr>
<td>Conservatorship</td>
<td></td>
</tr>
<tr>
<td>appointment of</td>
<td>23:132</td>
</tr>
<tr>
<td>control of property</td>
<td>2:169; 23:129</td>
</tr>
<tr>
<td>executor of</td>
<td>14:39</td>
</tr>
</tbody>
</table>
generally ................................................................. 2:16; 5:184; 10:10
jurisdiction ............................................................. 2:169
restrictions ............................................................ 22:215
review of ............................................................... 9:3
Consolidation
appellate review ..................................................... 25:122
Constitution, Federal
14th Amendment, Right to Privacy ......................... 10:204
Full Faith and Credit Clause .................................. 24:20; 24:21
Constitution, State
Article 1, § 7, Right to Privacy ................................. 10:204
Construction
generally ................................................................. 13:171
power of attorney ...................................................... 8:201
proceedings to construe will ..................................... 3:65
role of the Probate Court .......................................... 12:267
will ................................................................. 3:65; 12:409;
................................................................. 12:410; 12:451;
................................................................. 15:60; 15:69
Constructive Trusts
elements ................................................................. 21:238
generally ................................................................. 17:9; 25:150
Consultation
defined ................................................................. 24:34
scope ................................................................. 24:34
Contracts
duty of disclosure .................................................... 7:24
generally ................................................................. 27:12
pre-nuptial .............................................................. 7:24
requirement of good faith in .................................. 7:23
unconscionability ................................................... 27:13
Control of Property
alleged incapable .................................................... 2:169
Controversy
generally ................................................................. 23:2
Corporation
redemption of shares ........................................ 7:269

Costs and Fees
American rule ............................................. 24:257-58
Delaware courts ........................................... 24:257
trust proceedings, Delaware law ................. 24:257

Courts
succession tax assessments ............................. 12:287

Custody
“abused” ..................................................... 24:94-5
generally ..................................................... 1:60; 29:25
right to .......................................................... 1:21
standard of assessment .................................. 24:97-8
temporary emergency custody ..................... 24:94-5

Damages
comparative negligence .................................. 22:83
shares, Delaware law ..................................... 24:255

Dead Bodies (Human Remains)
custody and control of .................................... 6:202
generally ..................................................... 1:60; 6:202
right to possession of ..................................... 6:202

Death on the High Seas Act
exclusive remedy ............................................ 22:84
generally ..................................................... 22:84
Decree .......................................................... 2:8; 3:48

Deduction
compensation of executor/administrator .......... 12:467
discretion of Commissioner ............................. 12:439
debts, sale of real estate ................................ 12:440
inclusion in a ................................................ 9:26
reasonable expenses ..................................... 12:439
selling expenses .......................................... 12:440
what is a proper ............................................ 9:26

Delaware Courts
powers .......................................................... 24:256

Dependency .................................................... 1:25

Descent and Distribution
care and control of estate property .......................... 7:239
distribution of property ...................................... 7:263
occupation of family home during .......................... 7:240
statutory share ..................................................... 7:24; 23:4
Determination of Intent ......................................... 12:433
Determination of Transfer ....................................... 1:185
Disclaimers .......................................................... 4:196; 12:440
.......................................................... 29:5
procedure .......................................................... 29:5
Disposition of Property
distribution .......................................................... 4:198
generally ............................................................. 24:344; 29:244
limitation on disposition ......................................... 4:201
mental capacity ...................................................... 23:129
testamentary disposition ......................................... 4:201
Distribution
intestate .............................................................. 3:275
joint accounts ........................................................ 9:10
spousal share, New York law .................................. 24:40; 24:41
Distributors
duties of .............................................................. 24:204
Doctrine of Approximation
defined ............................................................... 26:234
Doctrine of Cy Pres ................................................ 18:25; 23:184
application .......................................................... 23:184-85
application, Pennsylvania law .................................. 25:277
comparison to doctrine of approximation .................... 26:234
defined ............................................................... 23:184; 26:234
determination ......................................................... 23:184
exercise of power ................................................... 23:185
judicial authority in Connecticut ............................... 26:234
limitations ............................................................ 26:234
trusts and wills ...................................................... 26:233
Doctrine of Cy Pres and Approximation
remedy ............................................................... 26:234
Doctrine of Substituted Judgment ............................. 3:2
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domicile</td>
<td>1:68</td>
</tr>
<tr>
<td>abandonment of</td>
<td>2:157; 12:267;</td>
</tr>
<tr>
<td>by operation of law</td>
<td>19:8</td>
</tr>
<tr>
<td>burden of proof of</td>
<td>7:253; 19:8</td>
</tr>
<tr>
<td>change of domicile</td>
<td>19:9</td>
</tr>
<tr>
<td>choice of law</td>
<td>12:266</td>
</tr>
<tr>
<td>defined</td>
<td>19:8; 22:355</td>
</tr>
<tr>
<td>determination</td>
<td>13:17; 22:356</td>
</tr>
<tr>
<td>elements</td>
<td>22:356</td>
</tr>
<tr>
<td>factors in determination</td>
<td>13:18; 19:8</td>
</tr>
<tr>
<td>intent</td>
<td>13:18</td>
</tr>
<tr>
<td>jurisdiction</td>
<td>3:60</td>
</tr>
<tr>
<td>of conserved</td>
<td>19:9</td>
</tr>
<tr>
<td>probate of will</td>
<td>13:17</td>
</tr>
<tr>
<td>undue influence</td>
<td>19:9</td>
</tr>
<tr>
<td>Do-Not-Resuscitate Order</td>
<td></td>
</tr>
<tr>
<td>Michigan law</td>
<td>24:115</td>
</tr>
<tr>
<td>Due Process</td>
<td>9:2</td>
</tr>
<tr>
<td>final accounting</td>
<td>25:123</td>
</tr>
<tr>
<td>generally</td>
<td>21:18; 25:122</td>
</tr>
<tr>
<td>property rights</td>
<td>25:122</td>
</tr>
<tr>
<td>property rights after death</td>
<td>21:17</td>
</tr>
<tr>
<td>property rights, Colorado</td>
<td>21:18</td>
</tr>
<tr>
<td>Election</td>
<td>4:198</td>
</tr>
<tr>
<td>Emancipation</td>
<td></td>
</tr>
<tr>
<td>burden of proof</td>
<td>22:201</td>
</tr>
<tr>
<td>effect on minors</td>
<td>22:201</td>
</tr>
<tr>
<td>effect on parents</td>
<td>22:201</td>
</tr>
<tr>
<td>grounds</td>
<td>22:201</td>
</tr>
<tr>
<td>Equal Protection</td>
<td>23:194</td>
</tr>
<tr>
<td>Equitable Divation</td>
<td></td>
</tr>
<tr>
<td>application</td>
<td>22:37</td>
</tr>
<tr>
<td>generally</td>
<td>22:37</td>
</tr>
<tr>
<td>Equitable Jurisdiction</td>
<td></td>
</tr>
<tr>
<td>administering</td>
<td>4:188</td>
</tr>
</tbody>
</table>
equity ................................................................. 4:189
generally ......................................................... 24:351
judge’s equity power........................................... 4:188
Equity Powers ...................................................... 1:25

Estate Assets
business inventory and assets.............................. 12:410
distribution ......................................................... 12:411
inter vivos gifts .................................................... 12:398
life insurance proceeds ........................................ 12:410
satisfaction of encumbrances ............................... 12:411
settlement of ...................................................... 15:38
unsatisfied loans .................................................. 12:397
valuation ............................................................. 12:411
wrongful death action ........................................... 12:410

Estate
attorney’s duty to .................................................. 22:104
attorney’s duty of loyalty ......................................... 22:104
nonseparate Legal Entity ........................................ 21:36

Estate Fees
liability to third parties ......................................... 13:1
trustees ............................................................... 13:11; 13:12

Estates
expenses of administration ..................................... 24:195-96; 26:10
settlement expenses .............................................. 24:195

Estates and Future Interests .................................. 29:230

Estate Taxation
annuities ........................................................... 5:2, 5:182
deductions ......................................................... 13:300; 13:301
exemption .......................................................... 6:180
federal estate tax ................................................ 24:197
fiduciary fees ....................................................... 5:193
gifts ................................................................. 5:5, 5:13;
................................................................. 24:198-99

Estoppel: Equitable Defense .................................. 23:277

Evidence ........................................................... 1:177-78; 14:1;
................................................................. 22:14
2016] CUMULATIVE TOPIC INDEX 341

admissibility ........................................ 25:138
attorney-client privilege ................................ 21:37
due execution ........................................ 25:357
marriage certificate ................................... 12:283
proxy marriages, Connecticut ...................... 12:284
proxy marriages, Costa Rica ........................ 12:283
standard of proof ..................................... 14:1; 22:14;
... .......................................................... 29:108

Ex Parte Orders
parties’ rights .......................................... 25:123
Execution ............................................... 1:191; 13:180

Executor
appointment of successor ........................... 2:166
death of .................................................. 2:166
generally .................................................. 13:145; 16:24
of deceased fiduciary’s estate ....................... 2:166

Executors and Administrators
actions of .............................................. 7:270
compared to trustees .................................. 4:15
court acceptance of .................................... 6:189
disqualification of .................................... 21:37
duties ...................................................... 4:15; 24:199-200
duty of .................................................... 7:269; 25:124
duty to inventory ...................................... 21:196
generally .................................................. 1:60
holding and managing assets ........................ 4:15
investment by .......................................... 4:16
obligations of .......................................... 4:15; 4:16;
.......................................................... 24:199-200;
.......................................................... 24:216; 24:218
removal of .............................................. 7:270; 16:39;
.......................................................... 18:12; 18:13;
.......................................................... 20:178; 23:24
rights ...................................................... 21:37
waiver of rights ...................................... 15:60

Exempted Bequest .................................. 1:11
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exemption of Organization</td>
<td>1:11</td>
</tr>
<tr>
<td>Expectancy</td>
<td>2:8</td>
</tr>
<tr>
<td>Family</td>
<td>1:24</td>
</tr>
<tr>
<td>FDIC power over</td>
<td>10:17</td>
</tr>
<tr>
<td>fees of</td>
<td>7:38; 7:39; 10:2; 12:467; 14:207-08; 14:358; 15:36</td>
</tr>
<tr>
<td>generally</td>
<td>1:57; 2:4; 3:57; 8:200-01</td>
</tr>
<tr>
<td>impartiality</td>
<td>13:165</td>
</tr>
<tr>
<td>loyalty</td>
<td>13:165; 15:25</td>
</tr>
<tr>
<td>removal of</td>
<td>10:17</td>
</tr>
<tr>
<td>revocation of</td>
<td>3:56</td>
</tr>
<tr>
<td>Federal Rules of Civil Procedure</td>
<td></td>
</tr>
<tr>
<td>discovery laws</td>
<td>22:84</td>
</tr>
<tr>
<td>Fees and Costs</td>
<td></td>
</tr>
<tr>
<td>attorney</td>
<td>2:2; 4:189;</td>
</tr>
<tr>
<td>executor's fees</td>
<td>10:1-2; 12:468; 21:117-18</td>
</tr>
<tr>
<td>generally</td>
<td>1:69; 2:1</td>
</tr>
<tr>
<td>NY method as compared to CT method</td>
<td>7:264</td>
</tr>
<tr>
<td>objection to</td>
<td>7:263</td>
</tr>
<tr>
<td>reasonableness of</td>
<td>7:38-9; 12:468; 24:105; 24:109</td>
</tr>
<tr>
<td>records of</td>
<td>25:6; 25:126</td>
</tr>
<tr>
<td>reimbursement of</td>
<td>7:39</td>
</tr>
<tr>
<td>Fiduciaries</td>
<td></td>
</tr>
<tr>
<td>appointment of</td>
<td>9:17; 21:132; 23:284</td>
</tr>
<tr>
<td>choice of</td>
<td>21:132; 23:285</td>
</tr>
<tr>
<td>Topic</td>
<td>Page 1</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>discretion to appoint</td>
<td>9:18; 23:281</td>
</tr>
<tr>
<td>duty to collect succession taxes</td>
<td>14:35</td>
</tr>
<tr>
<td>refusal to appoint</td>
<td>9:18</td>
</tr>
<tr>
<td>Fiduciary</td>
<td></td>
</tr>
<tr>
<td>accountability of</td>
<td>2:163; 3:80</td>
</tr>
<tr>
<td>as object of decedent’s bounty</td>
<td>7:257</td>
</tr>
<tr>
<td>attorney’s duty</td>
<td>22:104</td>
</tr>
<tr>
<td>breach of trust, Delaware law</td>
<td>24:250</td>
</tr>
<tr>
<td>compensation of</td>
<td>3:287; 17:28;</td>
</tr>
<tr>
<td>court supervision</td>
<td>15:28</td>
</tr>
<tr>
<td>diligence</td>
<td>13:165</td>
</tr>
<tr>
<td>disclosure</td>
<td>15:26</td>
</tr>
<tr>
<td>discretion of</td>
<td>9:200</td>
</tr>
<tr>
<td>duty of</td>
<td>6:3; 13:11; 13:12;</td>
</tr>
<tr>
<td>court supervision</td>
<td>15:28</td>
</tr>
<tr>
<td>duty of loyalty</td>
<td>21:196</td>
</tr>
<tr>
<td>final accounting of fees</td>
<td>17:28; 26:10</td>
</tr>
<tr>
<td>generally</td>
<td>21:210; 23:23</td>
</tr>
<tr>
<td>generally, Delaware law</td>
<td>24:251; 24:252</td>
</tr>
<tr>
<td>improper payments</td>
<td>17:237</td>
</tr>
<tr>
<td>judgment</td>
<td>22:37-38</td>
</tr>
<tr>
<td>liability of</td>
<td>17:50</td>
</tr>
<tr>
<td>realtors’ duty</td>
<td>25:147</td>
</tr>
<tr>
<td>improper payments</td>
<td>17:237</td>
</tr>
<tr>
<td>representation</td>
<td>23:23; 27:2</td>
</tr>
<tr>
<td>standing</td>
<td>21:35</td>
</tr>
<tr>
<td>Fiduciary Relationship</td>
<td>21:101</td>
</tr>
<tr>
<td>burden of proof</td>
<td>25:12</td>
</tr>
<tr>
<td>creation of</td>
<td>25:146; 25:155</td>
</tr>
<tr>
<td>standard</td>
<td>25:146</td>
</tr>
<tr>
<td>Floride Settlement Statute</td>
<td>22:84</td>
</tr>
<tr>
<td>Frivolous Conduct</td>
<td></td>
</tr>
<tr>
<td>Topic</td>
<td>Pages</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Culpability, Ohio law</td>
<td>25:29</td>
</tr>
<tr>
<td>Defined, Ohio law</td>
<td>25:29</td>
</tr>
<tr>
<td>Future Interests</td>
<td>13:306</td>
</tr>
<tr>
<td>Gift</td>
<td></td>
</tr>
<tr>
<td>Authorizing conservator</td>
<td>18:35</td>
</tr>
<tr>
<td>By check</td>
<td>17:279</td>
</tr>
<tr>
<td>Guardian</td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>29:257</td>
</tr>
<tr>
<td>Powers, Michigan law</td>
<td>24:115-16</td>
</tr>
<tr>
<td>Guardian Ad Litem</td>
<td>1:20</td>
</tr>
<tr>
<td>Guardian and Ward</td>
<td>1:2</td>
</tr>
<tr>
<td>Michigan law</td>
<td>24:114-15</td>
</tr>
<tr>
<td>Guardianship</td>
<td></td>
</tr>
<tr>
<td>Appointment</td>
<td>29:100</td>
</tr>
<tr>
<td>Best interests test</td>
<td>26:229</td>
</tr>
<tr>
<td>Duties and powers</td>
<td>26:229</td>
</tr>
<tr>
<td>Generally</td>
<td>1:21; 1:175; 5:16;</td>
</tr>
<tr>
<td></td>
<td>26:228; 29:26</td>
</tr>
<tr>
<td></td>
<td>29:102; 29:257</td>
</tr>
<tr>
<td>Of an incompetent</td>
<td>2:33; 17:298;</td>
</tr>
<tr>
<td></td>
<td>18:54; 29:24-25</td>
</tr>
<tr>
<td>Preference</td>
<td>26:229</td>
</tr>
<tr>
<td>Surviving spouse</td>
<td>5:23</td>
</tr>
<tr>
<td>Removal</td>
<td>29:11</td>
</tr>
<tr>
<td>Hearsay Rule</td>
<td></td>
</tr>
<tr>
<td>Exceptions</td>
<td>23:2; 27:12</td>
</tr>
<tr>
<td>Generally</td>
<td>27:12</td>
</tr>
<tr>
<td>Montana law</td>
<td>25:167</td>
</tr>
<tr>
<td>Heirs</td>
<td></td>
</tr>
<tr>
<td>Putative father</td>
<td>3:32</td>
</tr>
<tr>
<td>Holographic Wills</td>
<td>17:271</td>
</tr>
<tr>
<td>Authentication, Montana law</td>
<td>25:167</td>
</tr>
<tr>
<td>Montana law</td>
<td>25:167</td>
</tr>
<tr>
<td>Incapable Person</td>
<td>10:9</td>
</tr>
<tr>
<td>Incapacity</td>
<td>6:189; 17:292</td>
</tr>
<tr>
<td>Incompetency</td>
<td>2:33</td>
</tr>
<tr>
<td>Topic</td>
<td>Pages</td>
</tr>
<tr>
<td>--------------------------------------------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>Inheritance Rights</td>
<td>16:17; 22:7-8</td>
</tr>
<tr>
<td>common law rule</td>
<td>24:227</td>
</tr>
<tr>
<td>courts’ powers</td>
<td>24:226; 24:228</td>
</tr>
<tr>
<td>generally</td>
<td>29:3</td>
</tr>
<tr>
<td>distribution</td>
<td>29:6</td>
</tr>
<tr>
<td>state’s claim</td>
<td>29:3</td>
</tr>
<tr>
<td>Institutionalized Spouse</td>
<td>27:3</td>
</tr>
<tr>
<td>Interpretation</td>
<td></td>
</tr>
<tr>
<td>cash assets</td>
<td>12:410-11</td>
</tr>
<tr>
<td>In Terrorem Clauses</td>
<td>17:58</td>
</tr>
<tr>
<td>Intestacy</td>
<td>3:9; 8:1; 8:2</td>
</tr>
<tr>
<td></td>
<td>8:228; 21:229;</td>
</tr>
<tr>
<td></td>
<td>22:7</td>
</tr>
<tr>
<td>partial</td>
<td>25:270</td>
</tr>
<tr>
<td>Intestacy Shares</td>
<td></td>
</tr>
<tr>
<td>rights of surviving spouse</td>
<td>13:5</td>
</tr>
<tr>
<td>Intestate Shares</td>
<td></td>
</tr>
<tr>
<td>determination</td>
<td>13:5; 21:222;</td>
</tr>
<tr>
<td></td>
<td>22:84; 23:3; 24:6</td>
</tr>
<tr>
<td>disqualification</td>
<td>21:221-22</td>
</tr>
<tr>
<td>domicile</td>
<td>13:156-57</td>
</tr>
<tr>
<td>exceptions</td>
<td>24:6</td>
</tr>
<tr>
<td>rights</td>
<td>22:85</td>
</tr>
<tr>
<td>Inter Vivos Gifts</td>
<td>29:108</td>
</tr>
<tr>
<td>burden of proof</td>
<td>29:108</td>
</tr>
<tr>
<td>Investment by Executors</td>
<td>4:16</td>
</tr>
<tr>
<td>Joint Accounts</td>
<td></td>
</tr>
<tr>
<td>establishment of</td>
<td>26:1</td>
</tr>
<tr>
<td>Joint and Survivorship Property</td>
<td></td>
</tr>
<tr>
<td>college education</td>
<td>2:43</td>
</tr>
<tr>
<td>generally</td>
<td>1:46; 2:38</td>
</tr>
<tr>
<td>joint bank account</td>
<td>2:33</td>
</tr>
<tr>
<td>liens</td>
<td>2:39</td>
</tr>
<tr>
<td>notes</td>
<td>2:39</td>
</tr>
<tr>
<td>Judgment</td>
<td>2:8</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>4:16</td>
</tr>
</tbody>
</table>
### Jurisdiction

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>based on domicile</td>
<td>3:60; 15:21</td>
</tr>
<tr>
<td>based on property</td>
<td>3:59</td>
</tr>
<tr>
<td>common law</td>
<td>3:59</td>
</tr>
<tr>
<td>equitable</td>
<td>4:3; 4:188; 4:189; 9:201</td>
</tr>
<tr>
<td>implied powers</td>
<td>7:37</td>
</tr>
<tr>
<td>inter vivos trustee</td>
<td>2:4; 9:200</td>
</tr>
<tr>
<td>limited</td>
<td>7:37</td>
</tr>
<tr>
<td>over title</td>
<td>1:1, 1:68; 1:185; 25:151</td>
</tr>
<tr>
<td>paternity</td>
<td>8:195</td>
</tr>
<tr>
<td>probate court</td>
<td>2:4; 12:266-67; 29:106</td>
</tr>
<tr>
<td>proceedings</td>
<td>12:267</td>
</tr>
<tr>
<td>statutory</td>
<td>4:3; 12:428</td>
</tr>
<tr>
<td>subject matter</td>
<td>3:64; 12:428; 18:35; 18:49</td>
</tr>
<tr>
<td>subject matter, New York law</td>
<td>24:39</td>
</tr>
<tr>
<td>to construe inter vivos trust</td>
<td>21:2</td>
</tr>
<tr>
<td>to construe testamentary trust</td>
<td>21:2</td>
</tr>
<tr>
<td>to construe trust</td>
<td>21:2</td>
</tr>
<tr>
<td>to construe will</td>
<td>1:179</td>
</tr>
<tr>
<td>trust</td>
<td>2:4</td>
</tr>
<tr>
<td>trustees</td>
<td>21:3</td>
</tr>
</tbody>
</table>

### Uniform Gifts to Minors Act

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniform Gifts to Minors Act</td>
<td>12:427</td>
</tr>
</tbody>
</table>

### Uniform Transfer to Minors Act

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniform Transfer to Minors Act</td>
<td>12:428</td>
</tr>
</tbody>
</table>

### Laches

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laches</td>
<td>14:358</td>
</tr>
<tr>
<td>administrative claims</td>
<td>26:10</td>
</tr>
<tr>
<td>equitable defense</td>
<td>23:277</td>
</tr>
</tbody>
</table>

### Legal Father

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>adjudication</td>
<td>3:32</td>
</tr>
</tbody>
</table>

### Legal Fees

<table>
<thead>
<tr>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Fees</td>
<td>13:165-66; 23:33</td>
</tr>
<tr>
<td>factors</td>
<td>10:1, 10:2</td>
</tr>
</tbody>
</table>
2016] CUMULATIVE TOPIC INDEX 347

Legal Party ................................................................. 1:19
Legislative Intent ...................................................... 2:23-24; 5:2; 22:8;
.................................................................................. 23:4

Letters of Administration

application for original letters, New York law ..... 26:364
de bonis non, New York law................................. 26:364
judicial sua sponte power, New York law .......... 26:364
kinship, New York law ......................................... 26:364
materially false facts, New York law ................. 26:364
protection of estates, New York law................... 26:364
revocation, New York law ................................. 26:364
standing for creditors, New York law ............... 26:364
standing to revoke, New York law .................... 26:363

Life Estate

beginning of ............................................................. 15:15
computation of ....................................................... 15:15
taxation of ............................................................. 15:15

Living Wills

limited objective test ............................................. 22:184
pure objective test .................................................. 22:184
requirements ......................................................... 22:184
subjective test ......................................................... 22:184

Lost Will

burden of proof ......................................................... 2:149; 2:150
contents ................................................................. 2:149
generally ................................................................. 2:39; 2:149
proof of ................................................................. 2:149; 2:150
revocation .............................................................. 2:150; 12:301

Maritime Law

duty of reasonable care ........................................ 22:83
application .......................................................... 22:83
liability ................................................................. 22:83

Marriage

common law .......................................................... 15:53
parents of illegitimate child .............................. 3:32
recognition ........................................................... 23:193
<table>
<thead>
<tr>
<th>Term</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medicaid elective shares</td>
<td>5:23</td>
</tr>
<tr>
<td>Medicaid eligibility</td>
<td>5:22; 12:457;</td>
</tr>
<tr>
<td>Medicaid resources available</td>
<td>17:175</td>
</tr>
<tr>
<td>Medicaid resource limitations</td>
<td>12:458</td>
</tr>
<tr>
<td>Medicaid minimum monthly maintenance needs allowance</td>
<td>5:22</td>
</tr>
<tr>
<td>Medicaid Estate Recovery Program</td>
<td>21:16</td>
</tr>
<tr>
<td>Medicaid capitation payments</td>
<td>21:17</td>
</tr>
<tr>
<td>Medicaid generally</td>
<td>21:17</td>
</tr>
<tr>
<td>Medicaid notice</td>
<td>21:17; 21:18</td>
</tr>
<tr>
<td>Mortgage execution of second promissory note</td>
<td>12:401</td>
</tr>
<tr>
<td>Mortgage satisfaction of original obligation</td>
<td>12:401</td>
</tr>
<tr>
<td>Motion for transfer</td>
<td>2:23</td>
</tr>
<tr>
<td>Motion for transfer leave to amend</td>
<td>22:125</td>
</tr>
<tr>
<td>Motion for transfer to strike</td>
<td>27:12</td>
</tr>
<tr>
<td>Motion for transfer to dismiss</td>
<td>2:7; 22:124</td>
</tr>
<tr>
<td>Name Change of a minor</td>
<td>8:206; 29:41</td>
</tr>
<tr>
<td>Name Change of a minor</td>
<td>1:182; 8:205</td>
</tr>
<tr>
<td>Named Beneficiaries</td>
<td>16:212</td>
</tr>
<tr>
<td>Next of Kin rights</td>
<td>20:184</td>
</tr>
<tr>
<td>Non-testamentary Transfers</td>
<td>24:7</td>
</tr>
<tr>
<td>Non-testamentary Transfers insufficient bequest</td>
<td>13:6</td>
</tr>
<tr>
<td>Notice</td>
<td>3:280; 4:8; 4:9</td>
</tr>
<tr>
<td>Notice of Pendency cancellation</td>
<td>21:247-49</td>
</tr>
<tr>
<td>Notice of Pendency generally</td>
<td>21:247-48</td>
</tr>
<tr>
<td>Ohio Rule of Civil Procedure 11</td>
<td>25:30</td>
</tr>
<tr>
<td>Omitted spouse rule</td>
<td>27:13</td>
</tr>
<tr>
<td>Order</td>
<td>2:8</td>
</tr>
<tr>
<td>Ownership</td>
<td>9:11; 12:401</td>
</tr>
<tr>
<td>Topic</td>
<td>Pages</td>
</tr>
<tr>
<td>--------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Parentage</td>
<td>13:312; 23:194;</td>
</tr>
<tr>
<td>alternative methods</td>
<td>29:39</td>
</tr>
<tr>
<td>common law</td>
<td>23:192</td>
</tr>
<tr>
<td>presumption</td>
<td>23:194</td>
</tr>
<tr>
<td>procedures</td>
<td>23:192</td>
</tr>
<tr>
<td>statute of limitations for action of</td>
<td>13:312</td>
</tr>
<tr>
<td>Parental Rights</td>
<td>17:261</td>
</tr>
<tr>
<td>artificial insemination</td>
<td>29:39</td>
</tr>
<tr>
<td>determination of minor’s best interest</td>
<td>22:116; 29:256</td>
</tr>
<tr>
<td>generally</td>
<td>24:98; 29:24</td>
</tr>
<tr>
<td>reinstatement</td>
<td>22:116; 29:253</td>
</tr>
<tr>
<td>removal</td>
<td>24:97</td>
</tr>
<tr>
<td>termination</td>
<td>19:205–06; 20:22</td>
</tr>
<tr>
<td>Parol Evidence</td>
<td>18:320; 22:25</td>
</tr>
<tr>
<td>generally</td>
<td>24:14; 27:13</td>
</tr>
<tr>
<td>scrivener’s error</td>
<td>22:25</td>
</tr>
<tr>
<td>Party</td>
<td>1:19</td>
</tr>
<tr>
<td>Paternity</td>
<td>23:194</td>
</tr>
<tr>
<td>acknowledgment of</td>
<td>8:196</td>
</tr>
<tr>
<td>burden of proof</td>
<td>23:194</td>
</tr>
<tr>
<td>determination</td>
<td>17:131</td>
</tr>
<tr>
<td>equitable estoppel</td>
<td>23:195</td>
</tr>
<tr>
<td>full faith and credit</td>
<td>8:196; 21:26; 22:7;</td>
</tr>
<tr>
<td>generally</td>
<td>22:14</td>
</tr>
<tr>
<td>jurisdiction</td>
<td>8:195; 23:195</td>
</tr>
<tr>
<td>posthumous</td>
<td>17:150; 21:26</td>
</tr>
<tr>
<td>presumptions</td>
<td>18:60; 22:7</td>
</tr>
<tr>
<td>presumptions, Delaware law</td>
<td>25:365</td>
</tr>
<tr>
<td>Patient Advocate</td>
<td>24:115</td>
</tr>
<tr>
<td>Michigan law</td>
<td>9:195</td>
</tr>
<tr>
<td>Patient Transfers</td>
<td>16:228; 21:260</td>
</tr>
<tr>
<td>Power of Attorney</td>
<td>8:201</td>
</tr>
</tbody>
</table>
duties .................................................. 24:360
generally .............................................. 8:200; 21:258-60;
........................................................................ 24:360
Pre-emption ............................................. 10:17
Preliminary Injunction ................................. 21:237-38
Pre-nuptial Agreement
  duty of disclosure in ................................ 7:24
  generally ............................................. 7:24; 27:13
Prior Pending Action Doctrine ..................... 21:3
Probate
  appeals ................................................ 1:68; 3:280-81
  bond ................................................. 2:163; 3:80
Probate Court
  accounting ........................................... 10:202
  confidentiality of records ....................... 10:203
decree .................................................. 2:8; 3:48
duty .................................................... 22:104; 23:284
jurisdiction ............................................ 2:4; 10:10; 23:267;
........................................................................ 10:202; 21:1; 22:14;
........................................................................ 22:214; 23:128-29;
........................................................................ 24:350; 25:266;
........................................................................ 27:147
order ...................................................... 2:8
powers ..................................................... 8:200; 12:444;
........................................................................ 23:267, 269, 285;
........................................................................ 21:196; 22:2
duty ....................................................... 23:129-30, 132;
........................................................................ 24:351; 26:11;
........................................................................ 27:148
procedures .............................................. 23:2; 22:83;
........................................................................ 22:98; 22:214
public access to court files .......................... 10:203
Probate Court Authority
  ascertaining distributee ......................... 3:65
change of name ...................................... 8:205
claims against the estate ......................... 4:8
equitable powers ........................................ 26:11
power to order partition ................................ 26:11
sale of real property .................................... 3:64
Probate Court Discretion ............................... 1:25
Probate District of West Hartford .................. 2:23
Probate of Wills
ancillary ....................................................... 1:57; 25:264
creditor protection ........................................ 1:57
Procedure
ex parte orders .............................................. 5:9
final accounting ............................................ 15:315
notice .......................................................... 5:9
Property, Joint/Survivorship
college education .......................................... 2:43
deeds, attested by one or no witnesses ............. 12:295
deeds, presumption of delivery ......................... 12:295
generally ...................................................... 1:46; 2:38
joint bank account ......................................... 2:33
jurisdiction .................................................... 3:59
liens ............................................................. 2:39
notes ............................................................ 2:39
valuation ....................................................... 20:7
Public Assistance
exceptional circumstances standard .................. 27:3
significant financial duress standard .............. 27:3
fair hearing ................................................... 27:3
Public Interest: Representation of.................. 23:270
Putative Father
claims for paternity ....................................... 4:11
dismissal of claims ........................................ 4:11
jurisdiction of claims ..................................... 4:11-12
Real Estate
generally ...................................................... 21:236; 25:137
sale of .......................................................... 2:160; 25:135; 25:143
Realtors' Code of Ethics & Standards of Practice
- Article 2 ........................................ 25:141
- Article 4 ........................................ 25:140
- Article 9 ........................................ 25:140
- Article 13 ...................................... 25:141
- Article 14 ...................................... 25:141
- Refusal of Treatment ........................ 22:185
- Reimbursement Principle ................. 4:187

Remedies
- breach of trust, Delaware law............ 24:249
- Removal of Executor .......................... 22:350
- conflict of interest ............................ 22:350
- Removal of Trustee ............................ 17:267
- Residue of Estate .............................. 10:28
- Res Judicata .................................... 6:4; 10:17
- Resulting Trusts ............................... 2:34
- Retirement ...................................... 17:111
- Retroactivity
  - application, retroactive effect ........ 12:268

Revocation
- alteration by partial revocation ........ 25:22
- effect of alteration ........................ 25:21; 25:24
- generally ..................................... 1:57; 1:191;
  ................................................ 1:201; 12:302;
  ................................................ 13:179; 13:180;
  ................................................ 25:20; 25:21
- lost codicil .................................. 25:19
- lost will ........................................ 2:150; 12:301
- partial ........................................ 25:21
- subsequent marriage ...................... 15:161

Right of Retainer ............................... 27:152-53
- generally ..................................... 27:152-53

Rights of Claimants .......................... 18:49

Rights of Incompetents ...................... 3:2
### Right to Die Laws
- Duty of conservator/guardian: 3:267
- Generally: 3:266
- Generally, Michigan law: 24:116; 24:116-17
- Legal guardian defined: 3:267
- Medical liability: 3:267
- Substantive right: 3:267

### Sanctions
- Generally, Delaware law: 25:368
- Generally, Ohio law: 25:31

### Settlement of Estates
- 1:24

### Social Services
- Qualification for: 15:46

### Specialty
- 2:38

### Standard of Proof
- 14:1-2

### Standing
- Aggrieved party: 3:47
- Generally: 1:19; 14:189;
- Objection to jurisdiction: 3:60
- Other litigation: 3:48
- Removal of administratrix: 17:255

### Standing in Loco Parentis
- 17:286

### Statute of Limitations
- Administrative expenses: 26:10
- Breach of fiduciary duty: 21:258; 23:276
- Breach of trust: 23: 277
- Continuing obligation: 22:124
- Contracts: 22:124
- Conversion: 21:258
- Generally: 13:312; 21:258;
- Tolling: 22:125

### Statute of Nonclaims
- 1:46

### Statute of Wills
- 3:9
requirements.......................................................... 3:180
Statutory Construction........................................... 4:206; 6:179;
.............................................................................. 12:288; 13:301
determination, mandatory or directory..................... 12:287
multiple interpretations........................................... 27:148
plain meaning rule.................................................. 27:148
presumption......................................................... 24:201

Statutory Interpretation
C.G.S. § 12-344(b)(3) .............................................. 10:29
C.G.S. § 12-350(k) ................................................. 10:29
C.G.S. § 45a-175 ..................................................... 10:202-03
C.G.S. § 45a-257a ................................................... 24:6
C.G.S. § 45a-360 ..................................................... 9:188
C.G.S. § 45a-655 ..................................................... 10:9
C.G.S. § 45a-656 ..................................................... 10:9
C.G.S. § 45a-731(a) ................................................. 24:17-18
generally ............................................................. 13:156; 24:7;
............................................................................. 24:195;
spouse, New York law ........................................... 24:40
wills ................................................................. 24:18

Statutory Share
abandonment ......................................................... 15:273; 15:289
generally ............................................................. 24:194; 24:198
income payable ..................................................... 24:204
proxy marriage ..................................................... 12:284
surviving spouse .................................................. 15:267; 15:279

Statutory Support Allowance................................. 1:198; 6:184

Sterilization.......................................................... 21:10
best interests of the respondent ............................ 21:11
best interests of the respondent, factors ................. 21:11
inability to consent .............................................. 21:10
proponent’s good faith ........................................ 21:12
reasonable opportunity for sexual activity ............. 21:11

Subscription.......................................................... 3:10
Substituted Judgment
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>doctrine of</td>
<td>3:2</td>
</tr>
<tr>
<td>Succession Taxation</td>
<td></td>
</tr>
<tr>
<td>burden on recipient of non-testamentary property</td>
<td>14:35</td>
</tr>
<tr>
<td>computation of</td>
<td>15:2; 15:3</td>
</tr>
<tr>
<td>custodial remittance</td>
<td>14:35</td>
</tr>
<tr>
<td>generally</td>
<td>1:45; 194-95;</td>
</tr>
<tr>
<td></td>
<td>2:21; 10:28-29;</td>
</tr>
<tr>
<td></td>
<td>12:288</td>
</tr>
<tr>
<td>proration of</td>
<td>14:35</td>
</tr>
<tr>
<td>Summary Judgment</td>
<td>21:258-59; 23:277;</td>
</tr>
<tr>
<td></td>
<td>26:117; 27:12</td>
</tr>
<tr>
<td>burden of proof, Montana law</td>
<td>25:166; 25:167</td>
</tr>
<tr>
<td>evidence</td>
<td>27:12</td>
</tr>
<tr>
<td>Montana law</td>
<td>25:166</td>
</tr>
<tr>
<td>Support</td>
<td></td>
</tr>
<tr>
<td>child’s assets</td>
<td>4:22</td>
</tr>
<tr>
<td>criteria</td>
<td>4:22</td>
</tr>
<tr>
<td>court ordered</td>
<td>27:2</td>
</tr>
<tr>
<td>Support Allowance</td>
<td>5:187</td>
</tr>
<tr>
<td>Surrogate Court</td>
<td></td>
</tr>
<tr>
<td>powers</td>
<td>22:38</td>
</tr>
<tr>
<td>Surrogate Decision-making</td>
<td>22:185</td>
</tr>
<tr>
<td>Taxation</td>
<td></td>
</tr>
<tr>
<td>amendments</td>
<td>1:64</td>
</tr>
<tr>
<td>ascertainable standard</td>
<td>1:188</td>
</tr>
<tr>
<td>assessments</td>
<td>1:9</td>
</tr>
<tr>
<td>comfortable support</td>
<td>1:188</td>
</tr>
<tr>
<td>construction</td>
<td>7:17</td>
</tr>
<tr>
<td>deduction</td>
<td>9:26</td>
</tr>
<tr>
<td>domicile</td>
<td>13:18</td>
</tr>
<tr>
<td>exemption, burden of proof</td>
<td>6:179</td>
</tr>
<tr>
<td>fractional values</td>
<td>9:39</td>
</tr>
<tr>
<td>generally</td>
<td>1:38; 1:45</td>
</tr>
<tr>
<td>gifts</td>
<td>7:16</td>
</tr>
<tr>
<td>gross taxable estate</td>
<td>1:194</td>
</tr>
</tbody>
</table>
interest ......................................................... 2:21
joint accounts ............................................... 9:39; 16:1
proration, death taxes paid ............................... 12:116
refunds .......................................................... 1:64
revise computations ......................................... 1:9
succession taxes ............................................. 1:45; 1:194-5;
................................................................. 2:21; 10:28-29
temporary payment ......................................... 2:21
time of ............................................................ 9:39
transfer ........................................................... 7:16
transferor’s intent .......................................... 1:34
Taxation, Estate
annuities ...................................................... 5:2, 5:182
deductions ..................................................... 13:300-01
exemption ....................................................... 6:180
fiduciary fees .................................................. 5:193
generally ......................................................... 17:317
gifts ............................................................... 5:5, 5:13
inheritance ..................................................... 15:64
state ................................................................. 17:317
Taxation, Succession
generally ......................................................... 1:45; 1:194-5;
................................................................. 2:21; 10:28-29
Termination of Parental Rights
abandonment .................................................. 21:74
attorney general ............................................. 26:354
best interests of the child .................................. 21:75; 26:28, 29,
................................................................. 37, 38; 26:354
burden of proof ................................................ 21:73
consensual termination ..................................... 26:354
consent of parent to termination ......................... 26:353
denial of petition ............................................ 26:28, 37
generally ......................................................... 3:285; 15:305;
................................................................. 16:31; 17:261;
................................................................. 26:27-29, 36,
................................................................. 37, 39; 29:12
## Testamentary Capacity

- **burden of proof**
  - 6:188-89; 7:249;
  - 21:101; 22:2; 24:344
- **burden of proof, Montana law**
  - 25:168
- **burden shifting**
  - 25:357
- **burden shifting, Montana law**
  - 25:168
- **determination of**
  - 7:249; 24:344
- **effect of**
  - 10:212
- **evidence of**
  - 7:224; 7:249;
  - 10:212; 17:72;
  - 25:358
- **generally**
  - 1:75; 3:22;
  - 5:197; 7:224;
  - 7:225; 10:212;
  - 24:344; 24:345;
  - 25:357; 25:358;
  - 26:106; 26:107
- **generally, Montana law**
  - 25:168
- **presumption of**
  - 10:212; 22:2
- **requirements of**
  - 6:187; 26:107

## Testamentary Intent

- 1:68; 1:201;
- 10:17; 12:409;
- 12:410; 12:451;
- 22:350

## Testamentary Trust

- **accounting**
  - 6:210
- **allocation of principle and income**
  - 6:210
- **distribution**
  - 29:230
<table>
<thead>
<tr>
<th>Page</th>
<th>QUINNIPIAC PROBATE LAW JOURNAL</th>
<th>[Vol. 29</th>
</tr>
</thead>
<tbody>
<tr>
<td>358</td>
<td>formation...............................</td>
<td>26:98</td>
</tr>
<tr>
<td></td>
<td>Testator</td>
<td></td>
</tr>
<tr>
<td></td>
<td>burden of proof</td>
<td>22:37</td>
</tr>
<tr>
<td></td>
<td>determination</td>
<td>13:172; 15:28</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15:147; 17:271</td>
</tr>
<tr>
<td></td>
<td>intent</td>
<td>22:25</td>
</tr>
<tr>
<td></td>
<td>power</td>
<td>13:171; 24:365</td>
</tr>
<tr>
<td></td>
<td></td>
<td>23:271</td>
</tr>
<tr>
<td></td>
<td>Testimony</td>
<td></td>
</tr>
<tr>
<td></td>
<td>burden of proof, compensation for</td>
<td>12:443</td>
</tr>
<tr>
<td></td>
<td>services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>preclusion</td>
<td>21:236; 21:237</td>
</tr>
<tr>
<td></td>
<td>weight of evidence, living claim</td>
<td>12:444</td>
</tr>
<tr>
<td></td>
<td>ant</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Transfer of Property</td>
<td>1:185; 22:98</td>
</tr>
<tr>
<td></td>
<td>Trust Assets</td>
<td>15:321</td>
</tr>
<tr>
<td></td>
<td>Trust Administration</td>
<td></td>
</tr>
<tr>
<td></td>
<td>generally</td>
<td>27:154</td>
</tr>
<tr>
<td></td>
<td>Trust Funds</td>
<td></td>
</tr>
<tr>
<td></td>
<td>interest</td>
<td>3:45</td>
</tr>
<tr>
<td></td>
<td>Trustee</td>
<td></td>
</tr>
<tr>
<td></td>
<td>authority</td>
<td>23:271; 24:214</td>
</tr>
<tr>
<td></td>
<td>breach of trust, Delaware law</td>
<td>24:249</td>
</tr>
<tr>
<td></td>
<td>defense to breach of trust</td>
<td>24:252</td>
</tr>
<tr>
<td></td>
<td>defense to breach of trust, Del</td>
<td>24:252</td>
</tr>
<tr>
<td></td>
<td>caware law</td>
<td></td>
</tr>
<tr>
<td></td>
<td>discretion of</td>
<td>19:28, 29; 23:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>271; 24:365;</td>
</tr>
<tr>
<td></td>
<td>discretion of, Pennsylvania law</td>
<td>25:277</td>
</tr>
<tr>
<td></td>
<td>duties of</td>
<td>8:231; 19:28;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24:215; 24:250</td>
</tr>
<tr>
<td></td>
<td>duties of, Pennsylvania law</td>
<td>25:276</td>
</tr>
<tr>
<td></td>
<td>duty of loyalty, Delaware law</td>
<td>24:250</td>
</tr>
<tr>
<td></td>
<td>fees</td>
<td>17:279</td>
</tr>
<tr>
<td></td>
<td>functions of</td>
<td>8:231</td>
</tr>
<tr>
<td></td>
<td>liability of</td>
<td>8:231; 21:259;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24:365</td>
</tr>
<tr>
<td></td>
<td>liability of, Delaware law</td>
<td>24:252; 24:253</td>
</tr>
<tr>
<td></td>
<td>obligations of</td>
<td>10:17; 15:46</td>
</tr>
</tbody>
</table>
removal of ........................................ 10:17; 17:267 10:55 2016]
rights of in a will ........................................ 18:36 2016]
standard of care ........................................ 8:231 2016]

Trusts
authority to create ........................................ 15:46 2016]
beneficiary accounts ........................................ 26:2 2016]
class gifts .................................................... 21:26 2016]
construction of ............................................. 9:201; 13:306 2016]
constructive ................................................... 17:9 2016]
creditor’s reach ............................................... 7:4 2016]
disabled individuals .......................................... 15:126 2016]
distribution ..................................................... 23:129 2016]
elements ......................................................... 22:98; 26:98 2016]
evidence, extrinsic ........................................... 15:257 2016]
form, determination of ..................................... 21:27 2016]
generally ....................................................... 14:358; 21:236; 2016]
exercise discretion under ................................... 7:4; 12:458 2016]
imposition, equitable trust .................................. 12:295-6 2016]
intended beneficiaries ........................................ 26:2 2016]
living trusts .................................................... 15:133 2016]
means, payments from ....................................... 7:5-6 2016]
revocation of .................................................. 20:14 2016]
settlor’s intent ................................................ 22:98 2016]
settlor’s intent, Pennsylvania law ......................... 25:276 2016]
special needs .................................................. 15:122; 26:98; 2016]
spendthrift ..................................................... 26:99 2016]
supervision ...................................................... 13:172 2016]
supplemental needs ........................................... 26:98-99 2016]
support .......................................................... 7:5; 12:459 2016]
settlement of ................................................ 23:269 2016]
validity .......................................................... 21:236; 23:130 2016]

2016]
Undue Influence

attorney's fees .................................................. 15:173
burden of proof ................................................... 3:24, 3:42;
................. .................................................. 5:197; 6:189;
................. .................................................. 7:225; 10:212;
................. .................................................. 18:6; 19:1; 19:9;
................. .................................................. 21:101; 21:132;
................. .................................................. 21:210; 22:2;
................. .................................................. 23:131; 24:345;
................. .................................................. 25:12; 25:146;
................. .................................................. 25:360; 26:107;
................. .................................................. 26:224; 29:249
burden of proof, New York law ................................. 26:118
circumstantial evidence .......................................... 25:13; 26:107;
............... .................................................. 26:224
elements of ....................................................... 6:5; 21:132; 22:2;
............... .................................................. 23:130; 25:13;
............... .................................................. 25:148; 26:107
evidence of ......................................................... 6:4; 6:188;
............... .................................................. 7:225; 10:212;
............... .................................................. 18:6; 22:2;
............... .................................................. 25:13; 27:13
execution of will ................................................ 17:65
fiduciary relationship .............................................. 5:197; 17:71;
............... .................................................. 25:12; 25:13;
............... .................................................. 25:146; 26:224
generally .......................................................... 3:23-24; 6:3;
............... .................................................. 7:225; 10:212;
............... .................................................. 17:72; 18:6;
............... .................................................. 19:8; 21:210;
............... .................................................. 23:130-31; 25:13;
............... .................................................. 25:157; 25:360;
............... .................................................. 26:107-08; 26:224;
............... .................................................. 27:13
generally, New York law ......................................... 26:118
intent of .......................................................... 6:5
inter vivos transfer ........................................ 25:147
not favored ........................................... 7:225; 10:212
presumption .............................................. 3:24; 3:40; 21:101;
.............................................................. 25:147; 25:361
shifting of burden of proof ............................ 19:2; 25:12;
.............................................................. 25:146; 25:147;
.............................................................. 25:360
standard exception .................................... 19:2
standards of ............................................. 6:189; 7:225;
.............................................................. 10:212; 19:1
.............................................................. 23:131; 25:156

Uniform Child Custody and Jurisdiction
Enforcement Act
“home state” ............................................. 24:94
jurisdiction .............................................. 24:94
standard of review .................................... 24:97
Unjust Enrichment
elements .................................................. 26:11
generally .................................................. 21:18; 26:10
trial court discretion ................................. 26:10
Virtual Visitation ...................................... 17:361
Waiver ..................................................... 23:277
Ward
estate management .................................... 15:46
Will Contest
burden of proof ........................................ 3:83; 21:210
fraud ....................................................... 15:87; 15:88
interested parties ...................................... 15:87
Will Provisions
restraints of marriage ................................ 3:65
Wills
ademption ............................................... 18:2
admission ............................................... 13:155; 15:293;
.............................................................. 21:93; 25:264;
.............................................................. 26:223
anti-laspe statute ...................................... 29:230
appointment of executor ........................................ 13:157
burden of proof - execution ...................................... 6:3; 26:106;
................................................................. 26:224
burden of proof - execution, New York Law .............. 26:118
burden of proof - fraud ........................................ 3:83; 22:98
burden of proof - generally .................................... 19:9; 25:357;
................................................................. 26:106; 29:245
burden of proof - shift of ...................................... 6:3; 9:198; 26:106;
................................................................. 26:224; 29:245
burden of proof - shift of, New York law ............... 26:118
class gifts ......................................................... 8:216
conclusiveness of probate of ................................... 7:263
condition precedent in .......................................... 7:244
conditions ......................................................... 13:149
conditions of privilege .......................................... 13:149; 13:156
conflicting with public policy .................................. 7:38
construction ...................................................... 3:65; 6:211;
................................................................. 7:243; 8:231;
................................................................. 10:28; 13:306-08;
................................................................. 14:195-96; 14:363;
................................................................. 18:25; 18:30;
................................................................. 22:25; 24:16
contest of ......................................................... 6:187
contesting .......................................................... 26:106
contingency phrases ............................................. 13:157
contrary intent in ............................................... 8:228
decedent’s estate ................................................... 18:1
determination of form ............................................ 13:150
devises of real property .......................................... 18:1
discretionary admission ......................................... 19:10
dissolution of marriage ......................................... 13:155
distribution of shares .............................................. 14:363; 21:228;
................................................................. 23:24
due execution ...................................................... 3:83; 23:129;
................................................................. 25:20; 25:357
due execution, New York law ................................... 26:118
effect of a subsequent marriage .................................. 13:5; 24:4-5
effect of presuming sanity ......................................... 26:107
exception to principle of construction ........................... 29:230
execution ........................................................................ 13:149-50; 21:229;
................................................................................. 26:106; 26:223
execution, New York law ............................................. 26:118
extrinsic evidence ........................................................... 15:143; 24:14;
..................................................................................... 24:19; 25:271
fraud .............................................................................. 15:87
fraud, New York law ..................................................... 26:118
generally ....................................................................... 1:60; 7:243;
..................................................................................... 8:216; 8:228;
..................................................................................... 13:156; 26:98
holographic wills ............................................................ 13:149; 27:160-61
impossible conditions in ................................................. 7:244
invalid amendments ....................................................... 13:171
invalidation due to undue influence ............................... 19:9
lapse ............................................................................. 14:363
lost .............................................................................. 2:149; 27:161
partial invalidity ............................................................. 19:9; 22:7
payment of federal estate taxes ..................................... 12:116
period of operation ......................................................... 13:156
property ......................................................................... 13:156
reformation ..................................................................... 22:39
requirements of ............................................................. 3:9; 25:12; 29:244
requirements of, Montana law ...................................... 25:166; 25:168
revocation ...................................................................... 21:228
right of election ............................................................. 5:23
rights of trustees ............................................................. 18:35
signature requirement ................................................... 26:106
strict compliance with statute ........................................ 26:106
testamentary capacity, New York law ............................ 26:118
testator’s intent .............................................................. 7:38; 21:228;
..................................................................................... 22:26; 24:15; 26:98
..................................................................................... 29:99, 100
testator’s state of mind .................................................. 24:15-16
undue influence ......................................................... 19:9; 20:163;
................................................................. 29:247
validity ............................................................... 23:131; 26:108;
............................................................... 27:160-61; 29:107
............................................................... 29:244; 29:248

Wrongful Death Proceeds
amount of recovery, New York law .................. 24:40
disqualification, New York law ..................... 24:40
distribution, New York law ......................... 24:40