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Vassil v. Office of Pers. Mgmt. et al., Case No. 16-13176 (E.D. Mich. Jan. 31, 2017)

Regarding beneficiary designation of life insurance policy, the Federal Employees Group Life Insurance Act provisions outlining designation procedures preempt state law and strict compliance is required.

Facts: Gary Vassil was a federal employee who participated in the Federal Employees Group Life Insurance Program. In 1997, he submitted a beneficiary designation form that designated his wife at the time, Denise Vassil, as a beneficiary of his life insurance policy. In 2003, the couple divorced, but Gary never updated his beneficiary designation. After Gary died in 2016, his children asked Denise to waive her status as a beneficiary. When Denise refused, the children asked the Office of Personnel Management ("OPM") to change Gary's beneficiary designation to exclude Denise. When OPM declined to do so without a court order, the children filed a declaratory judgment action in which they asked the court to declare that Denise was not a beneficiary of Gary's life insurance policy.

Law: The Federal Employees Group Life Insurance Act expressly preempts inconsistent state laws that relate to group life insurance. Under the Federal Employees Group Life Insurance Act, a participant's benefits must be paid in accordance with the beneficiary designation on file with the OPM except that an ex-spouse's portion may be paid to another person if and to the extent expressly provided for in the terms of a divorce decree, annulment, or legal separation, or any other related court order and so long as the applicable order is received by the participant's employing agency (or by OPM in the case of a former employee) before the participant's death.

Holding: The district court held that the beneficiary designation controlled the distribution of Gary's life insurance benefits. Plaintiffs urged the court to apply a Pennsylvania law that would have treated Denise as having predeceased Gary, but the court held that the Federal Employees Group Life Insurance Act preempted the Pennsylvania law. The court also held that the Federal Employees Group Life Insurance Act exception did not apply because the divorce decree did not speak to the life insurance policy and, even if it had, the divorce decree was not sent to OPM prior to Gary's death.

Practice Point: Current or former federal employees should ensure that their federal life insurance beneficiary designations are up to date. A federal employee who does not want his or her ex-spouse to receive a share of the employee's federal life insurance benefits should ensure that the benefits are expressly addressed in any divorce decree or related court order, and a copy of the order must be sent to the employee's employing agency (or OPM in the case of a former employee) prior to the date of death.

In re Bradley K. Brakke Trust, 890 N.W.2d 549 (N.D. Feb. 23, 2017)

The Uniform Probate Code governs settlement agreement involving disposition of estate and trust assets at settler's death and allegations of lack of capacity rather than Uniform Trust Code.

Facts: Timothy Brakke filed a petition challenging the capacity of his brother Bradley Brakke to create the Bradley Brakke Trust. The brothers had operated a family farm, which Timothy began managing in 1974. According to Timothy, even though he contributed significantly more to the farming operation, he agreed to equally split the farm profits with Bradley and, in turn, Bradley agreed that when he died he would leave half of his property to Timothy and half to their sister. In 2009, the brothers supposedly agreed that Timothy's daughter would receive Timothy's half of Bradley's property.

In September 2009, Bradley executed a will providing his wife with a life estate in his property and leaving the residue of his estate to his sister and Timothy's daughter in equal shares.

In November 2013, Bradley executed a will revoking his former will and leaving the residue of his estate to Bell State as successor trustee under the November 11, 2013 Bradley Brakke Trust. Under the 2013 Trust, Bradley conveyed his property to himself as trustee, named Bell State as successor trustee, provided his wife with a life estate, and left the residue to his sister. The 2013 Trust, therefore, effectively disinherited Timothy's daughter.

A 2014 Trust restated the 2013 Trust and added a provision authorizing the trustee to distribute 15 acres equally to the sister and to Timothy's daughter.

After Bradley died, Bell State sent letters to Bradley's wife, the sister, Timothy, and Timothy's daughter, informing all of them about the applicable will and trust instruments. Timothy's daughter assigned all of her rights and possible claims related to the estate to Timothy. Timothy then filed a petition specifically challenging Bradley's capacity to create the 2013 Trust. In his petition, Timothy alleged that Bradley lacked capacity due to a severe alcohol problem.

Bell State moved for summary judgment, claiming that Timothy lacked standing to challenge the 2013 Trust and that the statute of limitations barred his challenge to the 2014 Trust because Timothy's petition had not specifically asserted a challenge to the 2014 Trust. In response, Timothy moved to amend his petition to explicitly challenge the 2014 Trust and to request the district court's approval of an intervening settlement agreement through which Timothy's daughter would receive an additional 1000 acres of land. The district court denied Bell State's motion for summary judgment, found Timothy had standing to file his petition and then granted Timothy's motion to amend the petition and approved the settlement.

The district court ruled N.D.C.C. § 59-09-11, a provision in the Uniform Trust code relating to nonjudicial settlements, did not apply to the proffered settlement in the context of the ongoing judicial proceedings. The district court instead applied the Uniform Probate Code, N.D.C.C. §§ 30.1-22-01 and 30.1-22-02, and approved the settlement, concluding it addressed a good faith dispute, it was consented to by the necessary parties and it was just and reasonable. The district court concluded the settlement did not frustrate a material purpose of Bradley Brakke's Trust because the underlying litigation challenged his capacity to create the Trust. Bell State appealed the district court's order approving the settlement agreement.

Bell State argued the district court should have applied N.D.C.C. § 59-12-11 from the Uniform Trust Code to the proposed settlement agreement. Had the district court done so, the district court then should have rejected the settlement agreement because it changed the residuary beneficiary of nearly half of Bradley Brakke's land and was inconsistent with a material purpose of the 2014 Trust. Bell State argued the court erred in applying N.D.C.C. §§ 30.1-22-01 and 30.1-22-02 from the Uniform Probate Code to approve the settlement because the Trust unambiguously distributed Bradley Brakke's property, no good faith dispute existed about Bradley Brakke's capacity, the settlement did not provide a just and reasonable result and not all the beneficiaries consented to the settlement.

Law: The typical standard, under Section 111 of the Uniform Trust Code, for analyzing whether modification would frustrate a material purpose of the trust is inapplicable when the challenge is to the settlor's capacity to create the trust in the first place. The Uniform Trust Code does not explicitly address settlement agreements reached in judicial proceedings raising claims concerning a settlor's capacity to create a trust. By contrast, North Dakota's Uniform Probate Code does have provisions in that situation that authorize a court to consider an agreement settling litigation challenging a settlor's capacity to create a trust. In evaluating such a settlement agreement under the Uniform Probate Code, the court must consider whether (1) the claim contesting the validity of the trust was made in good faith, (2) the settlement will provide a just and reasonable result, (3) the parties to the agreement constitute the entire class of beneficiaries and (4) the parties are competent to sign the agreement.

Holding: The Supreme Court of North Dakota affirmed the district court's approval of the settlement. This court held that the Uniform Probate Code, rather than the Uniform Trust Code, applied to the district court's review and approval of the settlement agreement. The North Dakota Supreme Court held that the district court did not err in concluding that (1) Timothy's action was undertaken in good faith, (2) the settlement agreement provided a just and reasonable result, (3) prevented dissipation of the estate in further litigation and (4) was properly approved by all the parties having beneficial interests affected by the settlement.

Practice Point: In North Dakota, a court can approve an agreement settling litigation challenging a settlor's capacity to create a trust without applying the Uniform Trust Code standard for trust modifications (i.e., whether the modification would frustrate a material purpose of the trust). Where a testator might expect a potential will or trust contest after death, extra steps should be taken to document the testator's capacity at the time of executing testamentary instruments.

Ruiz v. Publix Super Markets, Inc., 2017 WL 1180095 (M.D. Fla., Mar. 30, 2017)

A federal district court held that a beneficiary designation change in an ERISA plan must strictly comply with the plan's written policies for changing beneficiaries.

Facts: Irialeth Rizo was a Publix employee who died from cancer on January 19, 2015. Rizo had participated in Publix's employee stock ownership 401(k) plans. After being diagnosed with cancer, Rizo desired to remove her nieces and nephew as her beneficiaries and to designate her companion, Arlene Ruiz, as the sole beneficiary.

Publix had a written policy detailing how to change beneficiary designations. The policy required signing and dating a beneficiary designation card. Rizo and Ruiz called Publix and asked how to change the beneficiary designations. Ruiz stated that the Publix representative told Rizo to mail a signed letter naming the new beneficiary and that person's social security number. Ruiz also stated that the representative advised them that the beneficiary designation cards were not important because Rizo was not an active employee at the time.

Rizo wrote and signed the letter as instructed and submitted it with the beneficiary designation card. Rizo did not sign the beneficiary designation card, but instead wrote, "as stated in letter" on the signature line. Publix claimed it returned the card to Rizo with an explanation, but no evidence showed Rizo had received the letter.

After Rizo's death, the plan administrator denied Ruiz's claim for benefits. Ruiz filed a lawsuit in the Middle District of Florida to compel Publix to approve her claim. After discovery, Ruiz and Publix moved for summary judgment.

Law: An expression of intent that does not strictly comply with an ERISA plan's policy is not effective. The participant must strictly comply with the plan's policy to effect a change.

Holding: The District Court for the Middle District of Florida held that Rizo had not changed her beneficiary designations. The Court held that the doctrine of substantial compliance did not apply under ERISA. Because Rizo had not strictly complied with the plan's policy, her attempt to designate Ruiz as a beneficiary was not effective.

Practice Point: ERISA plan representatives that assist participants should always advise participants to strictly follow the plan's policies. Representatives should also promptly send notices to participants when their actions do not strictly comply and confirm receipt of those notices.

Inglis v. Wells Fargo Bank, N.A., 2017 WL 637485 (M.D. Fla., Feb. 16, 2017)

Corporate co-trustee was not liable for civil theft where it transferred trust assets to the successor co-trustee within 60 days of its removal as corporate co-trustee.

Facts: This opinion follows two earlier decisions in a related matter. See Berlinger v. Wells Fargo, N.A., 2016 WL 740521 (M.D. Fla., Feb. 25, 2016); Berlinger v. Wells Fargo, N.A., 2015 WL 6125529 (M.D. Fla., Oct. 16, 2015). These earlier decisions were also topics of McGuireWoods LLP Fiduciary Advisory Services Alerts, which are available here at:
http://media.mcguirewoods.com/publications/2016/Recent-Cases-Interest-Fiduciaries-July-2016.pdf
and http://media.mcguirewoods.com/publications/2016/Recent-Cases-Interest-Fiduciaries-Feb-2016.pdf.

Wells Fargo served as co-trustee of two related trusts, the trust under the will of Rosa B. Schweiker (the "Rosa Trust") and the Frederick W. Berlinger Revocable Deed of Trust (the "Frederick Trust"). On August 17, 2011, Wells Fargo received a letter requesting it transfer the Rosa Trust assets to SunTrust Bank as successor corporate trustee. On August 24, 2011, Wells Fargo received a second letter requesting transfer of the Frederick Trust assets to SunTrust.

Wells Fargo compiled documents related to the transfer of the accounts between August 25, 2011 and September 2, 2011. On September 12, 2011, the matter was assigned to David Mull, a trust administrator at Wells Fargo. The next day, the beneficiaries signed an agreement allowing Wells Fargo a commercially reasonable amount of time to transfer the trusts' assets.

Just two weeks later, on September 27, 2011, Wells Fargo received a demand letter from those same beneficiaries alleging it had violated Florida's civil theft statute. Two days later, Mull sent an e-mail about the other litigation and advised that the bank should transfer the trust assets as quickly as possible.

On October 27, 2011, Wells Fargo transferred all but $73,214.29 of the trusts' approximately $6.4 million to SunTrust as successor trustee. Wells Fargo liquidated and transferred the trusts' remaining assets on November 1, 2011. On November 2, 2011, the beneficiaries filed a complaint in state court that included one count for civil theft. Wells Fargo removed the case to the Middle District of Florida, and the court dismissed the civil theft count for lack of standing on September 9, 2014. On October 15, 2014, Richard Inglis, as Special Trustee of the trusts, filed a complaint alleging civil theft against Wells Fargo in state court. Wells Fargo removed the case to the Southern District of Florida and the case was transferred to the District Court for the Middle District of Florida. After discovery, Wells Fargo and Inglis both moved for summary judgment.

Law: Florida's civil theft statute requires the plaintiff to prove the defendant violated the criminal theft statute and that the plaintiff suffered actual injuries. Florida's criminal theft statute requires knowingly obtaining or using the plaintiff's property with the felonious intent to deprive the plaintiff of its right to the property or to appropriate the property to the defendant's own use.

Holding: The District Court for the Middle District of Florida held that Wells Fargo did not violate Florida's civil theft statute. The court found that the undisputed facts established that Inglis had not suffered an actual injury in the transfer of the trusts' assets to the successor co-trustee. Furthermore, the court found Wells Fargo's continual communications with SunTrust showed it did not have a felonious intent to deprive Inglis, as trustee, of the trusts' assets.

Practice Point: Trustees that resign or are removed should complete their administration of a trust in a reasonable and timely manner. Trustees should discuss any unexpected delay with successor trustees and document their actions and internal and external discussions, especially where litigation is possible or ongoing.

Lee v. Rogers Agency, No. 06-15-00037-CV, 2017 Tex. App. LEXIS 1069 (App. Feb. 8, 2017)

> **The Settlor had standing to assert extra-contractual misrepresentation claims regarding insurance policies that were previously transferred to an irrevocable insurance trust.**

Facts: Michael D. Lee ("Lee") purchased three whole-life insurance policies from New York Life Insurance Company (the "Policies") with the assistance of C. Michael Rogers ("Rogers"), a New York Life Insurance Company agent. The policies provided that he could shorten the premium payment period by tendering payment in full. Lee maintains that because of Rogers' representations, he paid $238,188.15, which he understood would extinguish his obligation to pay premiums on the Policies. On June 10, 1991, he transferred ownership of the Policies to the Michael D. Lee Irrevocable Insurance Trust (the "Trust"). Following the transfer, the owner of the Policies became Richard A. Dial ("Dial") the trustee of the Trust (the "Trustee").

A consolidated class action suit was filed approximately three years later in New York state court. The class action complaint alleged that the plaintiffs were fraudulently induced and deceived into purchasing similar insurance policies, based on false and misleading sales presentations, policy illustrations, and marketing materials. This included the misrepresentation that a single prepayment of premiums would be sufficient to carry the cost of the policies for the life of the insurance. The class action alleged claims for breach of contract, fraud, negligent misrepresentation, deceptive trade practices, and unjust enrichment. The class action was settled in July 1995. Dial was mailed a notice of the settlement; however, he did not request to be excluded.

In 2012, all three of Lee's policies had lapsed due to non-payment of the premiums. In March 2014, Lee filed suit against The Rogers Agency, Rogers, and New York Life Insurance Company (the "defendants"), alleging negligence, breach of contract, violation of the Texas Insurance Code, and violations of Texas' Deceptive Trade and Practices Act ("DTPA"). The defendants filed motions for

summary judgment arguing that when Lee transferred the policies to the Trust he expressly waived or assigned his rights under the Policies, including his rights to pursue any claims against the defendants. Additionally, New York Life Insurance Company argued that Lee did not have standing to litigate these claims or that res judicata barred them because they had been litigated in the class action. The trial court granted the defendant's motion for summary judgment. Lee appealed.

Law: The settlor of a trust has standing to assert personal claims that are extra-contractual claims, even though the insurance policies were transferred to an irrevocable insurance trust. Additionally, *res judicata* does not bar the extra-contractual causes of action because a settlor and a trust do not have a "substantive legal relationship" through which the settlor may be bound.

Holding: On appeal, the Sixth District Court of Appeals of Texas upheld the trial court's summary judgment on Lee's negligence and breach of contract causes of action as those were transferred to the Trust with the Policies. However, the Court of Appeals reversed the trial court on the DTPA and Texas Insurance Code claims finding Lee had standing against the defendants and that the class action lawsuit did not bar such claims.

In Texas, DTPA and Texas Insurance Code claims are personal and not property based claims. Lee created the Trust in order to avoid federal estate tax liability for the life insurance policies. By creating the Trust, Lee was seeking to rid himself of all "incidents of ownership". The Court of Appeals therefore reviewed the DTPA and Texas Insurance Code claims to determine if these extra-contractual causes of action were "incidents of ownership". The Court of Appeals stated that these types of claims did not give Lee a substantial degree of control or economic benefit; therefore, these claims were not "incidents of ownership" and were not assigned to the Trust when the Policies were transferred. Additionally, the class action settlement did not create a *res judicata* bar to these claims because the relationship between the Trustee and Lee, as settlor, was not a "substantive legal relationship" and therefore the earlier class action settlement did not bind Lee.

Practice Point: In Texas, personal claims are not transferred when assets are moved to a trust and the settlor may retain standing to assert and pursue them.

Nelson v. Nelson, 206 So. 3d 818 (Fla. Dist. Ct. App. 2016)

Property held in an irrevocable trust was not marital property subject to equitable distribution.

Facts: During the marriage of Raymond L. Nelson ("Raymond") and Leah Ann Wiltgen ("Leah"), Raymond purchased a second home in Palm Desert, California (the "House"), and titled it in both his and Leah's names. The House was then transferred into the Leah W. Nelson Marital Trust (the "Trust"), an irrevocable trust Raymond had established for the benefit of Leah and her descendants. Leah was the sole trustee of the Trust.

During the couples' divorce proceeding in Florida, Raymond argued that when purchased, the House was a marital asset and was therefore subject to equitable distribution. The trial court agreed, and ruled that the House was a marital asset and was subject to equitable distribution. Leah was ordered to list the home for sale. Leah appealed.

Law: Under Florida law, property held in an irrevocable trust is not subject to equitable distribution upon divorce.

Holding: On appeal, the Second District Court of Appeals reversed the trial court's ruling on equitable distribution of the House. Contrary to Raymond's assertions, the Court of Appeals held that the House was an asset of the Trust and ceased to be marital property upon its transfer into the irrevocable trust. The house was originally a marital asset because it was purchased during the marriage. However, under Florida law, when the House was transferred to the Trust, it ceased to be a joint asset of Raymond and Leah. The House was now the property of the Trust, a distinct legal entity from Raymond and Leah.

While a court has the power to modify or terminate an irrevocable trust, the settlor and all of the beneficiaries must consent. Leah did not consent to the termination, and there was no evidence that her daughter, her only living descendant, consented to the termination of the trust. Without the consent

of all the beneficiaries, the trial court did not have the authority to distribute assets of the Trust. The Court of Appeals stated that assets owned by an irrevocable trust are similar to the assets owned by a corporation, limited liability company, or partnership. These assets are ordinarily third party property and cannot be divided upon divorce.

Practice Point: Irrevocable trusts can still shelter assets in the context of divorce and those trust assets are not subject to equitable distribution.

Beardmore v. JPMorgan Chase Bank, N.A., No. 2014-CA-001536-MR, 2017 Ky. App. LEXIS 60 (Ct. App. Mar. 31, 2017)

Under the UTC and Kentucky law, trusts were property modified to add directed trust provisions and to transfer the trusts to Delaware.

Facts: JPMorgan Chase Bank, N.A. ("JPMorgan") is the successor trustee of two trusts (the "Trusts") that John G. Stoll ("Mr. Stoll") created. Mr. Stoll died in 1959. Since the death of Mr. Stoll's wife in 1986, the Trusts have had identical distribution terms. As of 2014, the trusts had 28 income beneficiaries and 133 contingent beneficiaries, 54 of whom were under the age of 18. Based on the life expectancy of his youngest issue at Mr. Stoll's death, the Trusts are expected to continue for another 50 years.

The Trusts documents grant the trustee broad powers including the selection of investments and third party investment consultants. In the mid-1970's, the beneficiaries formed an informal family committee to discuss the investment portfolio. In 2013, JPMorgan decided the Trusts should be reformed to formalize the Family Trust Committee and define JPMorgan's role through the creation of a directed trust system under Kentucky law. JPMorgan also sought transfer of the situs of the Trusts to Delaware to take advantage of Delaware's favorable income tax laws.

In 2013, JPMorgan filed motions in the probate division of Fayette District Court to appoint a representative, reform the Trusts to directed trusts, and transfer the place of administration to Delaware. When JPMorgan filed the motion in 2013, there were 151 beneficiaries; 143 of them had returned executed consents. Several did not respond and one contingent beneficiary, James Beardmore ("Mr. Beardmore") objected. Because of Mr. Beardmore's continued objection, probate action was subsequently dismissed without prejudice. Instead, in April 2014, JPMorgan filed a verified petition for a declaration of rights in Fayette Circuit Court.

In June 2014, JPMorgan filed a motion for judgement on the pleadings or for summary judgement seeking the relief it requested in its petition for declaratory relief. At that point, JPMorgan had received 155 executed consents out of 165 beneficiaries. Mr. Beardmore had not entered an appearance or consented to the relief. In July 2014, JPMorgan had received and filed 161 executed consents. A hearing was scheduled for that month; however, prior to the hearing, Mr. Beardmore, through an out-of-state attorney, filed a memorandum in support of his opposition to JPMorgan's motion.

The Circuit Court heard arguments on July 14, 2014, at which time the Circuit Court ordered Mr. Beardmore's counsel to comply with Kentucky's out-of-state counsel rules. The Circuit Court also requested that JPMorgan file a notice and tender an order certifying the court's jurisdiction to rule on the pending matter. The hearing was rescheduled for July 17, 2014. Prior to the rescheduled hearing, the Uniform Trust Code ("UTC") became effective in Kentucky as of July 15, 2014.

As requested, JPMorgan filed a notice relating to the court's jurisdiction and application of the UTC. The notice stated that the recent amendments to Kentucky law did not alter the Court's jurisdiction over the case and that even under the UTC, the Circuit Court continued to have jurisdiction over adversarial probate proceedings and some trust matters. Additionally, the notice stated that returning the case to the District Court would substantially interfere with the effective conduct of the proceedings and prejudice the rights of a party, as it would cause extreme delay and expenses.

During the July 17th hearing, Mr. Beardmore argued that the Circuit Court did not have jurisdiction to decide the matter because the original probate matter should have been transferred to the Circuit Court and a new declaratory action should not have been filed. Additionally, based on the adoption of the

UTC, the court with the proper jurisdiction was the probate court. The Circuit Court, however, decided to retain jurisdiction of the matter, stating that returning the matter to District Court would substantially interfere with the effective conduct of the judicial proceedings as it could cause significant delay and expenses to the Trusts, including the need to re-serve and re-notice all of the beneficiaries.

The Circuit Court then ruled that though he had some concerns about the Family Trust Committee, the Circuit Court would modify the Trusts. The Circuit Court concluded that recent statutory changes gave the Circuit Court the power to modify the Trusts when the modification will further the purpose of the trust and to the extent practicable, the modification is made in accordance with the settlor's probable intention. The Circuit Court found that the intent of Mr. Stoll was to maximize the income payable to the beneficiaries by any legal means. Therefore, the Circuit Court allowed the modification of the Trusts by approving the directed trust provisions and transferring the Trusts to Delaware. Mr. Beardmore appealed.

Law: Kentucky law specifically permits the modification of a trust to create a directed trust system. Even though the donor could not have anticipated trust administration through this system, a trust can be modified to fulfill the donor's probable intentions because of circumstances the settlor had not anticipated. Additionally, tax savings is a proper reason to transfer the situs of a trust under the UTC to another jurisdiction.

Holding: On appeal, the Kentucky Court of Appeals upheld the directed trust provisions and the transfer of the Trusts to Delaware. First, the Court of Appeals agreed that the Circuit Court had jurisdiction as the case was initiated prior to the effective date of the UTC. Second, the Court of Appeals recognized that under Kentucky law, a trust may be modified to allow for a directed trust. Additionally, the common law of equitable deviation allows a court to modify a trust because of circumstances not anticipated by the settlor when the modifications will further the settlor's intent and the purpose of the trust.

Here, the Court of Appeals found that Mr. Stoll's intention was to maximize the income payable to the beneficiaries by whatever legal means available. Creating a directed trust would formalize the Family Trust Committee and utilize a third-party investment consultant in reaching any decision regarding the Trusts investment. Mr. Stoll could not have anticipated this type of strategy, as it did not exist when he was alive; therefore, the modification to a directed trust was proper.

Additionally, Kentucky's law (under both the repealed law and the UTC) permits a change in principal place of administration of a trust. JPMorgan argued, and the Court of Appeals agreed, that the more favorable tax laws in Delaware supported the transfer of the Trusts given that the Trusts would continue for the next 50 years and the move would provide significant aggregated tax savings. Additionally, given Mr. Stoll's intent to maximize income to the beneficiaries, tax savings were a legitimate reason to move the Trusts.

Practice Point: Large numbers of beneficiaries can create problems for administrators especially when trying to reform a trust. However, under the UTC a trust can be modified to fulfill a donor's intentions, even if there is a holdout beneficiary. Moreover, a directed trust arrangement, particularly one approved through a court order, can also reduce significantly a trustee's potential liability for management of the directed investments. Additionally, it is important to pay attention to effective dates of new laws, even if the effective date occurs after litigation has been initiated.

Williamson v. Brooks, 7 Cal.App.5th 1294 (Jan. 31, 2017)

> **A beneficiary did not suffer any compensable damages upon the loss of her house as a result of the trustees' alleged failure to inform the beneficiary of a trust for her benefit where the beneficiary was aware of the trust's existence and had other options by which to avoid the loss of her house.**

Facts: William Morgan created an irrevocable trust for the benefit of his daughter, Beverly. Under the terms of the trust, Beverly had the right to withdraw certain portions of the trust principal at 40, 50 and 60 years of age. William told Beverly of the trust on at least two occasions. After being fired from her job at her father's manufacturing company in 2010, Beverly was unable to make her

mortgage payments. As a result, in 2010 Beverly elected to quitclaim her interest in the property to her sister, Connie, who had helped her purchase the home. Upon transfer of the property to Connie, Beverly elected not to remain in the home and pay Connie $1,000/month rent, despite having adequate resources to do so. Beverly instead chose to move into her father's guest room at his ranch home, testifying that it had always been her dream to live at the ranch.

In September 2012, Beverly contacted the co-trustee for the first time and made a request to withdraw assets. After the original co-trustees resigned, Beverly caused the successor trustee to sue William, Connie, and the original co-trustees for damages suffered as a result of Beverly losing her home, claiming, inter alia, a breach of fiduciary duty for failure to inform Beverly of the trust. The trial court rejected the claims and determined that Beverly was aware of the trust, and that her lack of due diligence was the cause of her loss not the failure of the trustees to exercise their fiduciary duties. The successor trustee appealed.

Law: Under California law, a breach of fiduciary duty requires (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. Among its duties, a trustee has the duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

Holding: On appeal, the Court of Appeal affirmed the Trial Court's ruling that neither Beverly nor the trust suffered any damage as a result of the original co-trustees actions, and that the trustees did not breach their fiduciary duties. The court held that Beverly was given reasonable options by which she could have maintained ownership of her house, but ultimately decided not to stay in her home. Even if a breach of fiduciary duty did occur, Beverly did not suffer any compensable loss. The court also concluded that the trustees did not breach their fiduciary duties, finding that the trustees were under no obligation to tell Beverly every detail of the trust. Specifically, Beverly was entitled to be informed about the trust so that she could take the necessary action to gain more information. The trustees had fulfilled their duty by ensuring that Beverly was informed of the trust.

Practice Point: A trustee should take steps to ensure that a beneficiary is aware of the existence of a trust established for such beneficiary, but may not be required to volunteer details of the terms of the trust unless the beneficiary specifically inquiries about the terms of the trust.

Bresler v. Wilmington Trust Company, 855 F.3d 178 (2017)

The trustee's failure to continue paying the policy premiums and overfunding of the trust's life insurance policies constituted a breach of the agreement between the trustee and plaintiff where the language of the agreement was clear as to the trustee's obligations and the plaintiff suffered reasonably foreseeable damages as a result.

Facts: In 2004, Charlie Bresler created an irrevocable life insurance trust (the "ILIT") with Wilmington Trust as trustee. Wilmington loaned money to the trust to pay the annual multi-million dollar premiums on three life insurance policies. Charlie put up $3.7m as a one-time collateral pledge. Following the death of Charlie and his wife, Fleur, the insurance benefit would pay off the loans and the remainder would be paid into the ILIT tax free. In 2005, Wilmington told Charlie he was required to post additional collateral before Wilmington would loan additional amounts to the ILIT to cover the cost of the premiums and overfunding contributions. Charlie objected, but ultimately agreed to provide an additional $1.3m in collateral to keep the policies from lapsing. The parties continued to attempt to resolve various conflicts regarding collateral and payments until 2007, when Wilmington stopped making any payments for the policies.

In September 2009, Charlie and his son, Sidney, filed suit against Wilmington alleging breach of contract, negligence in managing the ILIT and the life insurance policies, breach of fiduciary duty, negligent, misrepresentation, fraud, and violation of the Delaware Consumer Fraud Act. Charlie subsequently died in October 2010. In September 2012, Fleur and Sidney (as personal representatives of Charlie's estate) filed a second lawsuit against Wilmington, alleging breach of an agreement to return the collateral funds upon notice of Charlie's death. The two cases were consolidated.

At trial, the jury concluded that Wilmington had breached its agreement by requiring Charlie to pledge additional collateral, by failing to make loans each year to pay the premiums on the policies, and by failing to overfund the policies after the first year. The jury further concluded that Wilmington was obligated to make premium payments for each year that the policies remained in effect. The court entered final judgment ordering Wilmington to continue loaning funds to pay the premiums upon Fleur's death. Wilmington appealed.

Law: Under Delaware law, a breach of contract claim requires (1) a contractual obligation; (2) breach of that obligation; and (3) damage to the plaintiff caused by the breach. In interpreting contractual provisions, the court looks first within the four corners of the agreement. A non-breaching party is entitled to those damages that arise naturally from the breach or that were reasonably foreseeable at the time the parties entered into the contract.

Holding: On appeal, the Fourth Circuit Court of Appeals found that the evidence supported a finding that Wilmington had agreed that Charlie would not be required to put up additional collateral beyond the initial $3.7m. The plain language of the agreement required Wilmington to continue to overfund the policies and to return the collateral upon notice of Charlie's death and their failure to do so was a breach. The plaintiff adequately proved both the existence of damages and the amount of damages awarded. Wilmington's failure to overfund the policies caused the policies to fail to grow in value as anticipated, and the net-in-trust shortfall could reasonably be estimated because the measuring event, namely Fleur's death, was not speculative. Therefore, the court affirmed the damages award representing the net-in-trust shortfall, as well as the costs incurred by Charlie and Fleur in obtaining replacement policies, as reasonably foreseeable damages at the time the parties entered into the contract.

Practice Points: Where the contract language is not so vague so as to deny a finding of a meeting of the minds, a court will look to the four corners of the agreement and the plain meaning of the language to determine each party's obligations. Corporate trustees should be aware of the terms of the agreement with the trust and to ensure that the other parties to the agreement are appraised of the expectations under the agreement.

Pizarro v. Reynoso, 10 Cal.App.5th 172 (2017)

> **An incoherent and unorganized brief caused an appellant to forfeit his arguments, and a beneficiary, who participated in the lawsuit in bad faith, taking unfounded positions, subjected her share of the trust to charge for attorney's fees and costs, though neither she nor the appellant could be personally charged with attorney's fees and costs.**

Facts: Willis Earl Jensen died in 2011, leaving his property to his Living Trust. Willis had two children, Keith and Karen. Karen has two children, Anthony and Melissa. Melissa was named as trustee of the trust. As permitted by the terms of the trust, Melissa sold certain real property held in the trust to Karen for $100,000 below its appraised value. Melissa and her husband, Miguel, obtained a loan from Wells Fargo to help Karen purchase the property. Melissa executed a deed transferring the property from the trust to herself and her husband, and executed a corresponding promissory note and deed of trust to Wells Fargo. After the loan closed, the funds were deposited in the trust, and a Trust Transfer Deed was executed transferring the property from the trust to Karen.

Anthony filed a petition alleging that Melissa, as trustee, breached her fiduciary duties by selling the real property to Karen in a sham sale and that the sale of the property must be set aside. During the trial court proceedings, Karen switched sides and positions, joining forces with Anthony in arguing that the property sale was a sham sale. The trial court held that the transactions constituted a legitimate sale, and that Melissa had not breached any duty owed to the trust. The trial court also ordered payment of the trustee's attorney's fees and costs from Karen's share of the Living Trust and against Karen and Anthony personally. Anthony and Karen appealed.

Law: A party to a suit forfeits an argument for reversal on the merits of a trial court's order where the party fails to provide complete and coherent headings and proper organization to the arguments. A court may properly exercise is equitable powers to charge the attorney's fees and costs against an

offending beneficiary's share of the trust where that beneficiary takes an unfounded position and litigates in bad faith, causing the trust to incur fees and costs.

Holding: On appeal, the Court of Appeals upheld the sale of the real property to Karen, finding that Anthony, appealing pro se, forfeited his argument by failing to organize his brief appropriately and with proper headings. Further, Anthony's arguments were unpersuasive and without authority, and he disregarded the facts as found by the trial court. When viewed reasonably and practically, the Court of Appeals concluded that the transactions made to provide financing were concurrent transactions constituting a sale by the trust to Karen. The Court of Appeals said that a contrary holding would operate to elevate form over substance.

The Court of Appeals rejected the trial court's order charging attorney fees and costs to Anthony and Karen personally. While the trial court's equitable jurisdiction over trust disputes extends to the trust's assets, it does not support making Karen and Anthony personally liable for attorney's fees and costs. Absent statutory authorization to require Anthony to pay the trustee's legal expenses, the trial court could not compel him to do so. Conversely, the court's charge of the trust's attorney's fees and costs against Karen's share of the trust was proper because she was an offending beneficiary who took an unfounded position and acted in bad faith.

Practice Point: A petitioning party's failure to properly organize and coherently present arguments for reversal on appeal may cause the party to forfeit the argument and the opportunity for review. Attorney's fees may not be charged against parties personally, but beneficiaries should be cognizant of the risk of subjecting their share of a trust to payment of attorney's fees and costs where the beneficiary participates in a lawsuit in bad faith, even if the beneficiary does not personally institute the suit.

Hickory Point Bank & Trust, FSB v. Natural Concepts, Inc., No. 3-16-0260, 2017 IL App (3d) 160260-U (Apr. 11, 2017)

> **A judgment creditor cannot reach an irrevocable trust that the judgment debtor created for the benefit of his parents during their lifetime when that trust was not a self-settled trust.**

Facts: In February 2008, Donald and Nyla Simpson transferred four parcels of real estate from a trust known as the Simpson Family Trust Agreement to their daughter, Loni L. Lange ("Lange"). Three weeks later, Lange transferred the same four parcels to herself and two of her sons as trustees of the Lange Irrevocable Trust (the "Trust"). The Trust gave the three trustees the discretion to pay income to Donald and Nyla Simpson as necessary for any purpose. Upon the death of the last to die of Donald and Nyla Simpson, the trustees were directed to distribute the trust assets 85% to Lange and 15% in equal shares to Lange's sons. The Trust was irrevocable.

In April 2013, Lange and her business partner James R. Ford personally guaranteed a loan that Hickory Point Bank and Trust, FSB ("HPBT") made to Natural Concepts, Inc. ("Natural Concepts"), a corporation they co-owned. In January 2015, Natural Concepts defaulted on the loan and HPBT secured a judgment against Lange and James R. Ford. During proceedings to execute the judgment, HPBT sought to liquidate the Trust to satisfy the judgment or, alternatively, to impose a judicial lien against the Trust property. The trial court denied HPBT's motion and HPBT appealed.

Law: Most states follow the common law rule that a creditor can reach the assets of a self-settled trust created for the settlor's own benefit. Under an Illinois statute, 735 ILL. COMP. STAT. ANN. 5/2-1403, a creditor, however, cannot reach the assets of a trust created in good faith when the settlor is someone other than the debtor or when the funds held in that trust came from someone other than the settlor.

Holding: On appeal, the Illinois Court of Appeals upheld the trial court's denial of HPBT's motion to liquidate the Trust or impose a judicial lien. The Court of Appeals also held that the common law rule allowing creditors to reach self-settled trusts did not apply to the Trust in question for three reasons. First, the Court of Appeals found that Lange created the Trust in good faith because she established the Trust five years before personally guaranteeing HPBT's loan to Natural Concepts. Second, Lange did not create the Trust for her own benefit, but rather, for the benefit of her parents so long as one of them

was living. Finally, the four parcels of real estate held in the Trust "proceeded from" Donald and Nyla Simpson and not from Lange.

Practice Point: Courts are generally hostile to self-settled asset protection trusts but will shield a self-settled trust from creditors where the trust has a bona fide purpose aside from creditor protection or where the settlor is not the primary beneficiary of the trust.

In re Hoppenstein, No. 2015-2918, 2017 N.Y. Slip Op. 30940(U), 2017 WL 1969401 (N.Y. Sur. Mar. 31, 2017)

Failure to give required Crummey notices did not prevent withdrawal rights from lapsing and did not give the beneficiaries a vested right in trust principal sufficient to void the transfer of those assets to a new trust.

Facts: Reuben Hoppenstein (the "Settlor") created an irrevocable trust in 2004 (the "2004 Trust") that gave the trustees the discretion to distribute principal to or among the Settlor's descendants in equal or unequal amounts. Under the terms of the 2004 Trust, whenever the trustees intend to make principal distributions, they must notify each of the Settlor's descendants, at which point each of them may (before the trustee makes the intended distribution) withdraw their pro-rata share of any additions to trust principal made in the current tax year. The withdrawal power was designed to qualify as a "Crummey power," making additions to the Trust eligible for the federal gift tax annual exclusion. Any unexercised Crummey powers lapsed at the end of the year. The Settlor reserved the right to exclude any beneficiary from the Crummey power.

In December 2008, due to family discord, the Settlor excluded his daughter Cheryl, her husband, and her descendants from the Crummey power. In October 2012, the trustees distributed a $10 million life insurance policy the 2004 Trust owned to a newly created trust (the "2012 Trust") that had identical terms to the 2004 Trust except that Cheryl and her descendants were not beneficiaries.

The Settlor died in May 2015, at which point the 2012 Trust received the proceeds of the life insurance policy. When the trustees of the 2004 Trust attempted to settle their account before the Surrogate's Court for New York County, Cheryl and her adult children entered objections and sought partial summary judgment voiding the distribution of the life insurance policy to the 2012 Trust. Cheryl and her children contended that because they did not receive Crummey notices for additions to the trust between 2005 and 2008, they had unexpired withdrawal rights when the trustees distributed the insurance policy in 2012. Cheryl and her children also contended that the trustees' failure to send Crummey notices was a breach of fiduciary duty.

Law: Under *Estate of Turner v. Comm'r*, 102 T.C.M. (CCH) 214 (T.C. 2011), the fact that trust beneficiaries do not receive notice of their withdrawal rights does not nullify their legal right to make withdrawals. Crummey powers are consequently subject to lapse even if the beneficiaries do not receive Crummey notices.

Holding: The Surrogate's Court denied Cheryl and her children's motion for partial summary judgment and granted summary judgment to the trustees. Finding that the withdrawal rights for Cheryl and her children had lapsed despite the lack of notice, the Court concluded that Cheryl and her descendants had no unexercised withdrawal rights when the trustees transferred the insurance policy to the 2012 Trust. Without directly answering the question of whether the failure to send Crummey notices constituted a breach of fiduciary duty, the Court also concluded that failure to send the notices did not affect the transfer of the life insurance policy, which the trustees did in full compliance with the terms of the 2004 Trust.

Practice Point: While failure to send Crummey notices will not prevent withdrawal rights from lapsing, trustees should nevertheless remain diligent in sending Crummey notices to prevent protracted legal fights when they seek to settle accounts or terminate a trust.

Ferri v. Powell-Ferri, 72 N.E. 3d 451, 476 Mass. 651 (2017)

Massachusetts does not recognize the inherent power to decant; instead, a trustee may decant a trust under the laws of Massachusetts if the settlor intended to grant the decanting power as determined from the language of the trust instrument and other evidence of the settlor's intent.

Facts: In 1983, Paul John Ferri (the "Settlor"), created the Paul John Ferri, Jr., Trust (the "1983 Trust") for the exclusive benefit of his son Paul John Ferri, Jr. ("Ferri"). Massachusetts law governed the 1983 Trust. Ferri married Nancy Powell-Ferri in 1995, but in October 2010, Nancy Powell-Ferri filed for divorce in the Connecticut Superior Court. To protect the assets of the 1983 Trust from the divorce proceeding, the trustees, without notifying Ferri, distributed all of the assets of the 1983 Trust to a new trust, the Declaration of Trust for Paul John Ferri, Jr. (the "2011 Trust"). The 2011 Trust was virtually identical to the 1983 Trust except that the 2011 Trust removed provisions that allowed Ferri to withdraw principal upon reaching certain ages.

The trustees of the 1983 Trust commenced a declaratory judgment action in Connecticut Superior Court seeking a declaration that the trustees validly transferred the assets to the 2011 Trust and that Nancy Powell-Ferri has no right or interest in the 2011 Trust. The Connecticut Superior Court held that the transfer of assets was invalid and ordered the transferred principal restored to the 1983 Trust. The trustees appealed. The Connecticut Supreme Court certified to the Supreme Judicial Court of Massachusetts the question of whether a trustee possesses the power to decant under the governing law of Massachusetts.

Law: Massachusetts does not recognize an inherent power allowing a trustee to decant. Rather, the settlor must grant the trustee of a Massachusetts irrevocable trust the authority to decant in the instrument creating the trust. The settlor's grant of authority does not need to be explicit. Whether a settlor granted the trustee the power to decant is based on the language of the trust instrument and other relevant evidence of the settlor's intent. The settlor's intent is "paramount" in determining whether a trustee has the authority to decant.

Holding: The Massachusetts Supreme Judicial Court held that the 1983 Trust granted the trustees the authority to decant based on the trustee's broad discretion to distribute assets to Ferri. The Court focused on two provisions in particular. First, the Court found that the trustees' authority to "segregate irrevocably" principal of the trust for the benefit of Ferri included the authority to transfer principal to a new trust. Second, the Court concluded that the trustees' authority to distribute principal for Ferri's "benefit" meant that the trustee could make distributions of principal to a new trust for Ferri's benefit. The Court also held that Ferri's right to withdraw principal at certain ages did not hinder the trustees' power to decant because until Ferri actually exercises the withdrawal power the trustees must continue to exercise their existing fiduciary duties, including the duty to make distributions as provided in the trust instrument.

Practice Point: As Massachusetts does not recognize a trustee's inherent power to decant, drafters of new irrevocable trusts wishing to permit decanting that will be governed by the laws of Massachusetts should explicitly grant that authority in the trust instrument. Trustees of existing irrevocable trusts with broad powers to distribute principal likely have a deemed power to decant. A trustee of a trust that only provides for distributions of income (and not principal), however, likely does not have a decanting power. Likewise, a provision that allows for distributions only under an ascertainable standard may not be broad enough to permit decanting.

United States v. Harris, 854 F.3d 1053 (9th Cir. April 20, 2017)

U.S Government's garnishment could attach to current or future distributions to the beneficiary from a discretionary spendthrift trust, although the Government did not seek to compel the trust to make a distribution.

Facts: In 1997, Michael Harris was convicted of federal criminal counts related to theft from an employee benefit plan. As part of his sentence, he was ordered to pay $646,000 in restitution to the United States. The Government then learned that Harris was a beneficiary of two irrevocable trusts that his parents had established for his benefit.

The first trust provided that the trustee (1) "shall" pay income "which in the Trustee's absolute discretion will help support [Harris], which in the opinion of the Trustee will allow [Harris] to properly manage his affairs," and (2) "may pay to [Harris] or for his benefit, so much of the principal as the Trustee deems necessary or advisable … for his health, maintenance, education, and best interest."

The second trust provides that the trustees "may" distribute income and principal for Harris' support, in the trustees' absolute discretion.

Each trust also contained a spendthrift clause, which provides that the interest of the beneficiary is not subject to the claims of any creditor.

Harris also attempted to disclaim his interest in the trusts, and he then argued that he had no interest in the trusts.

The United States applied to the district court for a writ of continuing garnishment for any property distributed to Harris from the trusts, under a procedure authorized in 28 U.S.C. § 3205(a). The trustees opposed the motion. The district court granted the Government's motion, and ordered the trustees to pay to the United States all current and future amounts distributed to Harris from the trusts. The trustees appealed.

Law: A federal restitution order is a lien in favor of the United States, and is treated just as a tax lien. For purposes of a federal tax lien, federal law provides that the lien attaches to all "property and rights to property." Statutory and case law confirm that the definition of "property" is broad, and "includes any present or future interest, whether legal or equitable … wherever located and however held (including … property held in trust (including spendthrift and pension trusts))." 28 U.S.C. § 3002(12).

To determine whether the taxpayer's interest is "property" and is subject to rights of the United States, the court looks to state law, and considers the control that the taxpayer could exercise over the property.

Holding: On appeal, the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed the award of the writ of garnishment.

The Ninth Circuit concluded that even though the amount payable to Harris "is subject to the absolute discretion of the trustees," Harris had rights under California law to compel distributions that are "necessary to fulfill the trust's purposes," and the trustees could not act "in bad faith or in disregard of the trust's purposes." The Ninth Circuit reasoned that Harris' rights in the trust differed from other property only in that his interest in the trusts had no fixed dollar value.

Because the Ninth Circuit found that Harris' rights were "property" in the relevant sense, the Ninth Circuit held that the garnishment could attach to all future payments from the trusts, such that any current or future distributions to Harris from the trusts must be paid to the United States, until the restitution judgment is satisfied. The Ninth Circuit also concluded that the spendthrift clauses had no effect on the United States' rights, because a spendthrift clause does not protect a trust's assets from the enforcement of a federal lien. Moreover, the Ninth Circuit held that Harris' disclaimer did not defeat the federal lien, presumably because he had disclaimed the interest only after the lien arose. The Ninth Circuit, however, noted that the United States was not seeking to compel distributions from the trusts to satisfy the restitution judgment. The Ninth Circuit, therefore, did not order the trustees to make any such payment to the United States at present.

Practice Point: The effect of a federal lien on a spendthrift trust involves an inquiry that is based in part in federal law and in part in state trust law, and is based on particular nuances of applicable law and the terms of the trust instrument. We have recently commented on another federal case, *Duckett v. Enomoto*, No. CV-14-01771-PHX-NVW, 2016 WL 1554979 (D. Ariz. Apr. 18 2016), available here, https://www.mcguirewoods.com/Client-Resources/Alerts/2016/7/Recent-Fiduciary-Cases-July-2016.aspx, which explored whether a federal tax lien could attach to a beneficiary's interest in a discretionary trust. That case considered at length the beneficiary's rights to the trust and the state-law distinctions between a "traditional discretionary" trust, a "traditional support" trust, and a "hybrid" of the two. In other cases, courts have examined the trust language closely to determine the extent to which the settlor expected that payments would actually be made; for example, courts have considered distinctions between a trust provision that the trustee "may" make certain distributions, versus a trust

provision that the trustee "shall" make certain distributions in the trustee's discretion. *See, e.g., United States v. Delano*, 182 F. Supp. 2d 1020 (D. Colo. 2001).

In this case, however, even though the trusts referred to distributions for Harris' "support," the Ninth Circuits imply assumed that distributions were "subject to the absolute discretion of the trustees." Although the Ninth Circuit concluded that Harris' interest in the trust was subject to the trusts' absolute discretion, the Ninth Circuit concluded that the beneficiary's interest in the trust was a property interest, and was attachable.

Importantly, however, the Ninth Circuit noted that the United States did not seek to compel a distribution from the trusts. Therefore, the beneficiary does not benefit from distributions from the trusts, but meanwhile, the trust assets appear to be protected from the federal judgment at least until the time of a proposed distribution to Harris.

Thus, while this case provides another example of a federal court examining whether a beneficiary's rights under a spendthrift trust amount to "property" for purposes of a federal lien, the case does not provide further guidance regarding the circumstances in which the federal government could actually seize assets held in a spendthrift trust as opposed to obtaining them at the time of their distribution from the trust.

Klabacka v. Nelson, 394 P.3d 940 (Nev. 2017)

Nevada self-settled spendthrift trust is protected from a child support claim.

Facts: Prior to initiating divorce proceedings in 2009, Eric Nelson ("Eric") and Lynita Nelson ("Lynita") signed a separate property agreement (the "SPA") that converted their community property into separate property and placed that property into separate property trusts for each spouse (the "Eric Trust" and the "Lynita Trust"). The SPA specified that it would control the determination of ownership of the property regardless of how the property was acquired, previously held or titled, and regardless of the type of property at issue. Eric and Lynita later converted their respective property trusts into self-settled spendthrift trusts ("SSSTs," otherwise known as domestic asset protection trusts) with nearly identical trust agreements. Each trust agreement named a third party Nevada resident as the trustee (the "Trustee") and named Eric and Lynita as the investment trustee for their respective trusts. The Eric Trust and the Lynita Trust transferred property to each other in the years prior to the divorce.

In the divorce proceeding, the SSSTs were added as necessary parties. The trial court issued a divorce decree that kept the Eric Trust and the Lynita Trust intact and ordered, among other things, that Eric's Trust pay spousal support and child support arrears to Lynita. Eric appealed, and Lynita filed a motion to enforce the decree, which was granted.

Law: The trial court had reasoned that in many other states (such as South Dakota, Wyoming, and Florida) and under the Restatement (Third) of Trusts, the assets of asset protection trusts are not immune from spousal and child support claims and had then made such awards against Eric's Trust. The Nevada Supreme Court (the "Court") rejected this analysis as directly contrary to the governing Nevada statutes. The Court then examined the statutory scheme under which the SSSTs were created and found that the statute manifested a clear intent to protect spendthrift trust assets from the personal obligations of beneficiaries, including claims pursuant to court orders. The Court noted that the governing statute provided that the payments made pursuant to such a trust must be made only for the benefit of the beneficiary and not for other persons, including those who were dependent upon the beneficiary. The Court also examined the legislative history of the statutes, concluding that the Legislature enacted these statutes in order to encourage wealthy individuals to invest their assets in Nevada. The Court finally noted that the Legislature had recently proposed changes that would permit child support and spousal support claims to reach spendthrift trust assets, but these changes were not adopted.

Holding: The Court held that the trial court had erred in ordering the Eric Trust to pay child support arrears and spousal support to Lynita, because these are Eric's personal obligations and that Nevada law prohibit their satisfaction from the assets of valid Nevada SSSTs.

Practice Point: Unlike trusts created in many other states, Nevada self-settled spendthrift trust/domestic asset protection trust is a powerful tool to protect the settlor's assets from claims for court-ordered spousal support and child support against the settlor.

In re Boisseau, 2017 U.S. Dist. LEXIS 11964, (N.D.N.Y. Jan. 30, 2017)

> **The probate exception to federal jurisdiction applied to the challenge to the lien of an ERISA plan against funds an estate had received in settlement of a personal injury claim and, thus, this ERISA lien dispute could not be removed to federal court.**

Facts: Edward Boisseau ("Decedent") received treatment for prostate cancer prior to his death, some of which was covered by an ERISA employee benefit plan ("the Plan"). Decedent and the now-executrix of his estate ("the Executrix") later brought personal injury claims against Decedent's medical providers, which ultimately resulted in a settlement.

After the settlement, the Plan asserted a lien against the settlement proceeds, and the Executrix petitioned in New York state probate court to vacate the lien. The Plan removed the case to federal court, asserting federal question jurisdiction under ERISA, and the Executrix moved to remand.

Law: Under the federal removal statute, a defendant may remove any civil action for which original jurisdiction exists, even if a related matter is currently before a state court. However, all doubts are resolved against removability. The "probate exception" provides that probate matters are excepted from federal diversity jurisdiction. The probate exception (a) grants state probate courts exclusive jurisdiction over matters of probate or annulment of a will and the administration of estates, and (b) precludes the disposition by federal courts of property in the custody of the state probate court.

However, there is a split of authority as to whether the exception applies to cases involving federal question (as opposed to diversity) jurisdiction and the Second Circuit had not yet addressed the issue. The Court traced the history of the probate exception, noting that there was "little historical justification" to apply the probate exception only to diversity jurisdiction cases, and that the paramount language of both federal jurisdiction statutes is identical, applying to "all civil actions." The Court then explained that the policy rationale behind the probate exception – to avoid federal interference with state probate matters – is equally applicable to both federal question and diversity jurisdiction cases. The Court finally noted that there is reason to carve out ERISA cases from the probate exception.

Holding: The Court held that because the claim against the settlement proceeds was necessarily a claim against Decedent's estate, the case sought the federal court's interference with property already under the control and in the custody of the probate court. Accordingly, the probate exception applied, and jurisdiction of the matter lay with the probate court. The case was therefore remanded.

Practice Point: The probate exception may vest jurisdiction solely in a state probate court where federal jurisdiction would otherwise exist on federal question or diversity grounds for any matter that may be properly classified as a probate matter.

Fiduciary Trust Int'l of Cal. V. Klein, 9 Cal. App. 5th 1184, 216 Cal. Rptr. 3d 61, 2017 Cal. App. Lexis 254 (Cal. Ct. App. Mar. 21, 2017)

> **The attorney-client privilege may not be applicable to communications rendered in concert with advice concerning trust administration and may be discoverable.**

Facts: Upon the death of Mark Hughes ("Settlor"), disputes began to arise among his widow Suzan (both on behalf of herself and on behalf of her son Alexander, who was at that time still a minor), and three trustees ("the Former Trustees") of the Mark Hughes Family Trust ("the Trust"). Alexander, the only non-contingent beneficiary of the Trust, had successfully petitioned the probate court (the "Probate Court") to suspend and remove the Former Trustees because they failed to exercise reasonable prudence in connection with the sale of certain real property. The Court of Appeals upheld the Probate Court's decision, and Fiduciary Trust International of California (the "Successor Trustee") assumed the trusteeship of the Trust.

Suzan and Alexander also objected to several trust accountings submitted by the Former Trustees. In connection with those objections, the Successor Trustee served the Former Trustees with requests for production of trust documents that included communications between the Former Trustees and their Counsel (that representation was paid for out of trust assets). In connection with those requests, the Successor Trustee told the Former Trustees that the Successor Trustee now held the attorney-client privilege with regard to matters concerning the Trust. As a result, the Successor Trustee insisted that counsel stop communicating with the Former Trustees and not disclose confidential or privileged communications to third parties without the Successor Trustee's consent.

The Successor Trustee and Alexander then attempted to compel production of the documents. The Probate Court issued a protocol by which documents were to be segregated and reviewed for privilege and privilege logs were to be submitted. The Former Trustees submitted an initial privilege log listing over 3,000 documents. The Successor Trustee and Alexander then again moved to compel production, claiming that the withheld documents were not privileged because they were not "defensive." A discovery referee was appointed and the Probate Court ordered a supplemental privilege log, which the Former Trustees provided and to which the Successor Trustee and Alexander again objected.

The Probate Court ultimately permitted the Former Trustees to withhold some, but not all, of the challenged communications. In doing so, the Probate Court held that the primary inquiry was whether the communication concerned the administration of the trust or the trustee's concerns about possible personal liability. The Probate Court also held that responding to the Trust beneficiaries' questions and objections about administration of the Trust, including objections to the Trust accountings, were not privileged communications. The Probate Court further held that the communications concerning the petitions for surcharge and removal were privileged and could be withheld. All parties appealed.

Law: Under California law, the party claiming the attorney-client privilege must establish a prima facie case for privilege – in other words, that part must set forth preliminary facts to support that the communication was made in the context of an attorney-client relationship. The burden then shifts to the party opposing the privilege to establish that the communication was not confidential or that the privilege otherwise does not apply.

Under *Moeller v. Superior Court*, in the trust context, the "client" in the relationship is the office of trustee, not any particular trustee, primarily as a result of the trustee's duty to keep the trust beneficiaries reasonably informed as to the administration of the trust and to provide them with complete and accurate information as to the same upon request. Also per *Moeller*, the ability to assert the privilege as to communications concerning matters of trust administration sought in the trustee's fiduciary capacity transfers to the successor trustee, primarily because the successor trustee may be liable for a predecessor's breach of trust if it is not properly investigated and addressed. In contrast, the privilege may remain with a former trustee only where the communication was sought or obtained in the trustee's personal capacity out of concern for possible future charges for breach of trust, and where the successor trustee hires a separate lawyer with his own personal funds.

The Court of Appeals also said that the issue of whether the trustee pays for the funds with his or her own personal funds is "material to, but not dispositive of," the issue of whether the communication is privileged. The trustee must take steps that show that his intent at the time the communication was made was that it be kept confidential.

Holding: The Court of Appeals agreed with the Successor Trustee and Alexander that the dispositive issue was whether the relationship between the Former Trustees and their counsel was "personal or fiduciary." The Court of Appeals held that simply labelling a withheld communication as "defensive"' or as relating to a petition for removal or surcharge was insufficient to establish that the communication was sought or obtained for the Former Trustees' own protection and out of concern for their personal liability. Indeed, the Court of Appeals emphasized that the privilege did not attach simply because the communications later became relevant to an issue of their personal liability; instead, the trustee's purpose <u>at the time the communication was made</u> must be to shield himself from potential personal liability.

The Court held that the Probate Court abused its discretion (1) in failing to properly apply the burden-shifting framework and the Moeller standards and (2) in permitting the Former Trustees to withhold the documents at issue based upon inadequate descriptions in their privilege log.

Practice Point: Trustees in California and the counsel that represents them should bear in mind that the attorney-client privilege attaches to the office of trustee, and that communications between counsel and trustees may be discoverable in litigation, even where the communications relate to the beneficiaries' objections to the administration of the trust. If a trustee has a genuine concern that he will face personal liability for actions taken as trustee, both the trustee and his counsel should take care to distinguish the communications as defensive, rather than administrative, from the start. Further, the trustee should hire separate counsel from the counsel charged with advising as to trust administration and pay for that counsel from personal funds, rather than the trust funds in order to insure that the attorney-client privilege shields those communications.

Stephenson v. Prudential Ins. Co. of Am., 2016 WL 6568085 (M.D. Fla. Nov. 4, 2016)

Slayer statute does not apply in case of self defense.

Facts: Terry Rigby and Maurice McGriff were domestic partners. Rigby owned a Prudential life insurance policy on his life, with McGriff as the designated beneficiary. Rigby died in 2015 when he hit his head during an altercation with McGriff, who asserted he pushed Rigby in self-defense. Rigby's sister made a claim for the life insurance proceeds under the theory that Florida's slayer statute precluded McGriff from receiving the proceeds because McGriff killed Rigby. The state attorney investigated but did not pursue prosecution of McGriff for Ribgy's death. McGriff sued Prudential for the life insurance proceeds. Prudential was permitted to interplead the proceeds with the court to permit the court to determine the proper beneficiary. See: http://media.mcguirewoods.com/publications/2017/Recent-Cases-of-Interest-to-Fiduciaries-May-2017.pdf.

Law: Under Florida law, a life insurance beneficiary may not receive the proceeds of the policy if the beneficiary unlawfully and intentionally killed the insured. If a beneficiary is not convicted of an unlawful killing, the beneficiary is not precluded from receiving the proceeds unless a civil court determines by the greater weight of evidence that the killing was unlawful and intentional.

Holding: The District Court held that although McGriff's killing of Rigby was intentional (self defense is an intentional act), the totality of the evidence did not show McGriff was acting unlawfully when he pushed Rigby because he acted in self defense. Because the slayer statute applies only when the killing is both intentional and unlawful, McGriff was not prohibited from receiving the insurance proceeds.

Practice Point: In developing a slayer statute civil case where there has been no criminal conviction related to the killing, plaintiffs often must overcome the two-part hurdle of demonstrating both an intentional act and the unlawfulness of that intentional act. Practitioners should be aware of these limitations as they advise parties in disputes of this nature.

Cohen v. Minneapolis Jewish Federation, 2017 WL 108087 (W.D. Wisc., Jan. 11, 2017)

District Court for the Western District of Wisconsin distinguishes between rights of trustees and "rights with respect to the trust" to deny trustees payment of their attorney's fees.

Facts: The Melvin S. Cohen Foundation, Inc. created the Melvin S. Cohen Trust for the Minneapolis Federation for Jewish Service (now known as the Minneapolis Jewish Federation) to benefit the Federation's charitable, educational, and religious purposes. The trust agreement provided that the trustees may designate a function, activity, or grant program to which the trust's annual distributions would be applied.

In November 2015, the trustees sent a letter to the Federation designating Donors Trust, Inc. to receive the bulk of the annual distribution. The Federation objected to this designation and replied that the trustees lacked the authority to require distributions to specific beneficiaries. In response, the trustees amended the trust agreement to allow themselves to designate specific charities to receive trust distributions.

Following the amendment, the trust (rather than the trustees) filed suit in state court to remove the Federation as the beneficiary of the trust and to confirm the amendment. The Federation removed the claim to the Western District of Wisconsin and filed a third-party counterclaim for breach of trust against the trustees, who were not previously parties to this suit. The trustees and the Federation agreed to remove the trust and to add the trustees as the petitioners.

Once the trustees were added to the case, they notified the Federation that they intended to use trust assets to pay their litigation expenses. The Federation filed a motion to prohibit the trustees from paying their litigation expenses from trust assets.

Law: The trust instrument governs whether a trustee is entitled to use trust assets to pay litigation costs associated with the administration of the trust. If the trust instrument is silent, trustees generally may pay litigation expenses from trust assets without court approval. However, the court may prohibit the trustees from paying litigation expenses from trust assets where there is a reasonable basis to believe the trustee committed a breach of trust and the trustee cannot show good cause.

Holding: The Western District of Wisconsin granted the Federation's motion to prohibit the trustees from paying their litigation costs from trust assets. The Court noted that the trust agreement authorized paying "expenses of [the] *trust* … to commence or defend legal expenses." (emphasis added). Because the trustees are legally distinct from the trust, the trust instrument was silent on whether the trustees could pay their litigation expenses from trust assets.

Turning to state law, the court found the Federation had shown a reasonable basis to believe that the trustees had committed a breach of trust by attempting to remove the Federation as a beneficiary. Because the trustees failed to show good cause to permit payment of fees from trust assets, the Court prohibited the use of trust assets to pay litigation costs.

Practice Point: Fiduciaries should understand the terms of the trust governing their duties and potential liability. Attorneys representing fiduciaries in litigation should pay careful attention to the procedural structure of a claim and its effect on substantive issues. State law and the trust instrument may distinguish between rights of the fiduciary and rights of the trust which in turn will help determine whether the trustee's legal expenses can be paid from the trust.