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In re Matter of the Estate of Anne S. Vose v. Lee, 390 P.3d 238 (Okla. Jan. 17, 2017)

Decedent's executor had a fiduciary obligation to the surviving spouse to file an estate tax return to elect portability of the deceased spousal unused exclusion amount even though under a premarital agreement the surviving spouse was not an heir or distributee of the decedent's estate.

Facts: Anne S. Vose (the "Decedent") died intestate on January 22, 2016. The Decedent and her surviving spouse, C.A. Vose, Jr. ("Vose"), had entered into a premarital agreement on May 24, 2006 (the "Premarital Agreement"). Under the Premarital Agreement, Vose relinquished all his rights to take as an heir or distributee from the Decedent's estate.

After concluding a dispute regarding the validity of a purported will the Decedent had executed in 1995, the District Court of Oklahoma County, Oklahoma, appointed Robert E. Lee, III ("Lee"), the Decedent's son from a previous marriage, as the Decedent's intestate administrator.

Through a principle known as "portability," Section 2010 of the Internal Revenue Code allows the executor of the estate of a deceased spouse, or certain other individuals, to make an election to allow the surviving spouse to use the deceased spouse's unused estate tax exemption (the "DSUEA"), for purposes of the surviving spouse's gifts during life and upon death.

On August 10, 2016, Vose filed an application to the District Court asking the Court to compel Lee to file an estate tax return to elect portability. The District Court granted the application. Lee appealed, alleging that (1) the District Court lacked subject matter jurisdiction, (2) federal law preempted the District Court's order, (3) Vose lacked standing because of the Premarital Agreement, and (4) the District Court's order violated the Premarital Agreement.

Law: Congressional preemption of state law occurs when: (1) express statutory language indicates Congress intends to preempt state law, (2) the existence of a pervasive regulatory scheme implies Congress intended for federal law to occupy the field, (3) it is impossible to comply with both state and federal law, or (4) state law thwarts the purposes of federal law.

Under Oklahoma law, standing in a probate proceeding requires the party have a pecuniary interest in the decedent's estate. Standing does not necessarily require an interest as an heir or distributee, but requires only a financial interest in the outcome of the dispute concerning the decedent's estate.

Under Oklahoma law, a premarital agreement is generally effective to waive marital rights to property, whether created by statute or otherwise. However, under Oklahoma law, a contract cannot waive future rights of which the parties have no actual or constructive knowledge or notice.

According to Oklahoma law, an executor or administrator has a fiduciary obligation to all parties interested in the estate to administer faithfully the estate's property and preserve it from damage, waste, and injury.

Holding: The Supreme Court of Oklahoma upheld the District Court's order requiring Lee to file an estate tax return to elect portability. The Supreme Court held that Section 2010 of the Internal Revenue Code does not preempt Oklahoma law. Nothing in Section 2010 demonstrates Congressional intent for federal law to occupy the field of fiduciary obligations with respect to tax elections, supplants Oklahoma law governing the fiduciary obligations of an executor or administrator, or makes it impossible for a fiduciary to comply with both Oklahoma law and the federal requirements of making the portability election. The District Court did not lack subject matter jurisdiction over Vose's petition and federal law did not preempt the District Court's order because Vose's claims concerned only Lee's state law fiduciary obligations.

The Supreme Court also held that Vose possessed standing to file his application to compel Lee to elect portability. Although Vose waived his rights as an heir and distribute of the Decedent's estate in the Premarital Agreement, the portability election still had pecuniary value to Vose. The Court held that Vose did not waive his right to the DSUEA in the Premarital Agreement because the DSUEA did not exist at the time Vose and the Decedent executed the

Premarital Agreement. Finally, the Supreme Court held that the District Court could compel Lee to file an estate tax return to elect portability of DSUEA because Lee had a fiduciary obligation to all persons interested in the estate, not just the estate's distributees.

In its analysis, the Court treated the DSUEA as an asset of the Decedent's estate that Lee, as the administrator, had a duty to protect. The Supreme Court also upheld the District Court's order requiring Vose, rather than the estate, to pay the costs of preparing and filing the estate tax return.

Practice Point: Under Oklahoma law, the DSUEA may now be a property right of the surviving spouse. Accordingly, practitioners representing couples whose net worth exceeds the federal basic exclusion amount should address the DSUEA in any marital or premarital agreements, as well as in estate-planning documents.

Practitioners should also consider amending existing marital agreements to incorporate provisions addressing the DSUEA. Marital agreements and estate-planning documents should explicitly state whether a spouse is waiving portability of the DSUEA, whether the executor of the first spouse to die has a duty to elect portability, and who should bear the cost of electing portability.

The Supreme Court also held that Lee owed fiduciary duties not just to the estate's beneficiaries, but also to "all parties having an interest in the estate." When drafting estate-planning documents, practitioners should also consider stating explicitly that the executor or trustee owes no fiduciary duties to a surviving spouse who is not otherwise a beneficiary merely because the fiduciary's decision whether or not to elect portability affects the surviving spouse.

Du Pont v. Wilmington Trust Company, C.A. No. 12839-VCS (Del. Ch. Oct. 6, 2017)

Delaware Chancery Court refuses to grant trust beneficiary's petition to remove the trustee of five directed trusts when the grounds for removal did not relate directly to matters of trust administration.

Facts: Douglas W. du Pont ("du Pont") was the beneficiary of four trusts created under agreement and one under a will (collectively, the "Trusts") for the benefit of himself and his descendants. Wilmington Trust Company, N.A. ("Wilmington Trust"), was the trustee of the trusts and had been since inception of the Trusts in the 1940s and 1950s. Each of the Trusts were total return unitrusts governed by Delaware law. At the inception of the Trusts, Wilmington Trust was closely associated with the du Pont family, many of whose members participated in the management of Wilmington Trust. During the 2008 financial crisis, Wilmington Trust was the subject of government investigations and litigation. M&T Bank, a New York corporation, subsequently acquired Wilmington Trust. No du Pont family members remained involved in the management of Wilmington Trust after the acquisition.

In 2013, du Pont became dissatisfied with the investment performance of the Trusts and requested that Wilmington Trust petition the Delaware Court of Chancery (the "Court") to amend the Trust instruments to incorporate directed trustee provisions. Wilmington Trust complied with du Pont's request. The Court granted Wilmington Trust's petition and appointed du Pont as the investment director of each of the Trusts.

In addition to serving as trustee of the Trusts, Wilmington Trust also advised du Pont regarding his personal estate planning. At the advice of Wilmington Trust, du Pont made gifts to irrevocable trusts for his children naming Wilmington Trust as trustee. Du Pont claimed he would not have made these gifts had Wilmington Trust informed him that the trusts did not include his wife as a permissible beneficiary. Wilmington Trust also made loans to du Pont, and du Pont pledged personal assets as collateral for these loans. When du Pont became unable to repay the loans, Wilmington Trust reduced his unitrust payout and liquidated low-basis assets to reduce the principal balance of the loans. The liquidation of the low-basis assets resulted in millions of dollars of capital gains tax.

In February 2016, du Pont requested that Wilmington Trust resign as trustee of the Trusts. Wilmington Trust refused his request. The governing instruments of the Trusts contained no provision governing trustee removal. Consequently, in October 2016, du Pont petitioned the Court for removal of Wilmington Trust.

In support of his petition for removal, du Pont alleged that (1) there was a substantial change in circumstances since Wilmington Trust was appointed trustee, (2) hostility between Wilmington Trust and du Pont interfered with proper administration of the Trusts, and (3) Wilmington Trust was unfit, unwilling, and unable to administer the Trusts because it miscalculated the amount of his unitrust distribution, did not sufficiently communicate with him, and rejected his reasonable request for money to cover tax liabilities. Wilmington Trust filed a motion to dismiss du Pont's petition for failing to state a claim for relief.

Law: Under 12 *Del. C.* § 3327(3), the Court may remove a trustee, even in the absence of a breach of trust, when (1) there has been a substantial change in circumstances, (2) the trustee is unfit, unwilling, or unable to administer the trust properly, or (3) when hostility between the trustee and beneficiaries threatens the efficient administration of the trust. The Court must have "due regard for the expressed intention of the trustor and the best interests of the beneficiaries."

In a case of first impression, the Court used the official comment to Section 706 of the Uniform Trust Code to interpret the meaning of "changed circumstances" under Delaware law. Changed circumstances for this purpose include a "change in the character of the service or location of the trustee" but do not include the "corporate reorganization of an institutional trustee."

Under Delaware law, a trustee is "unwilling" or "unable" to administer the trust properly when the trustee refuses to act or "exhibits a pattern of indifference." A trustee is "unfit" to act when the trustee does not treat the beneficiaries fairly or commits a breach of trust. Under Delaware law, a beneficiary's lack of confidence in the trustee or the existence of friction is not grounds for removal. A court may remove a trustee only when the hostility makes it impossible for the trustee to perform its duties.

Holding: The Court held that du Pont did not plead sufficient facts to state a claim for relief. M&T's acquisition of Wilmington Trust did not constitute a change of circumstances warranting Wilmington Trust's removal. According to the Court, du Pont failed to state how government investigations into Wilmington Trust's activities prevented it from discharging its duties as a trustee.

Additionally, Wilmington Trust did not exhibit a "pattern of indifference." Even though Wilmington Trust was a directed trustee with respect to investment decisions, it retained discretion over distribution decisions. The instruments for the Trusts required Wilmington Trust to consider beneficiaries' other resources when making distributions. Accordingly, Wilmington Trust acted within its discretion not to distribute funds to du Pont for tax liabilities. Furthermore, errors in calculating the unitrust payment did not amount to indifference.

The Court held that even if Wilmington Trust acted negligently in giving estate planning advice to du Pont, he failed to allege how negligent estate planning advice impacted Wilmington Trust's performance of trustee services. The Court also held that Wilmington Trust loaned money to du Pont under commercially reasonable terms and the loans did not amount to unfair treatment.

Finally, the Court held that du Pont failed to allege sufficient facts to show that friction between du Pont and Wilmington Trust made it impossible for Wilmington Trust to manage effectively the Trusts.

Practice Point: Delaware courts are unlikely to grant a petition to replace a trustee when the reasons given for the requested removal do not relate directly to issues of trust administration. In order to avoid uncertain and protracted court disputes, drafters of estate planning documents should also include provisions governing the resignation or removal of trustees and specify the circumstances under which a beneficiary may remove a trustee.

Saccani v. Saccani, No. C078958, 2016 WL 6068962 (Cal. Ct. App. Oct. 17, 2016)

California court interprets a shareholder agreement to permit a shareholder's pre-death transfer of shares to a revocable trust after that shareholder gave another shareholder the option to purchase the shares after the transferring shareholder's death, even though the shareholder agreement itself only authorized share transfers to trusts for the benefit of a shareholder's descendants.

Facts: Donald, Ronald, and Gary Saccani inherited equal one-third interests in Saccani Distributing Company (the "Company") from their father, Albert Saccani. On December 30, 1991, Donald, Ronald, Gary, and each of their wives entered into the Second Amended and Restated Stock Purchase Agreement of the Company (the "Shareholder Agreement"). Section 1.01 of the Shareholder Agreement stated that "[n]o Shareholder shall gift, sell, pledge, encumber, hypothecate, assign or otherwise dispose of (collectively 'Transfer')" any interest in the Company unless permitted by the Shareholder Agreement. Section 1.02 of the Shareholder Agreement allowed the shareholders to make "Permitted Transfers" to each other, their descendants, and to estate planning trusts for their descendants. At the death of a shareholder, Section 3.02 of the Shareholder Agreement caused a deemed sale of the deceased shareholder's shares to the Company unless a Permitted Transfer occurred.

Donald Saccani and his wife Phyllis transferred all their shares in the Company to a revocable trust that gave Gary Saccani the option to purchase all of Donald's shares after Donald's death. Donald died in 2007, and Gary exercised the option granted under Donald's revocable trust in 2012.

In 2013, Ronald died, and his children Todd and Antonio Saccani inherited his shares in the Company. Todd and Antonio sued Gary, Gary's wife Jill, Donald's wife Phyllis, the trustee of Gary and Jill's revocable trust, and the trustee of Donald and Phyllis's revocable trust in California Superior Court, alleging that the transfer of Donald's shares to Gary violated the Shareholder Agreement.

Todd and Antonio argued that Section 1.02 of the Shareholder Agreement did not permit Donald to give Gary an option to purchase shares held in Donald's revocable trust agreement, because Section 1.02 only permitted transfers to estate planning trusts for the benefit of a shareholder's descendants. Accordingly, at Donald's death, a deemed sale of his shares to the Company should have occurred. Disagreeing with Todd and Antonio's reading of the Shareholder Agreement, the Superior Court found for the defendants. Todd and Antonio appealed.

Law: Under California law, a court should give effect to the mutual intent of the parties when interpreting a contract. When the language of a contract is clear, a court should determine intent from the language of the contract. If a contract does not provide specialized definitions for terms, a court should use the ordinary meaning of words when analyzing the contract.

Holding: The Third District Court of Appeal of California (the "Court") affirmed the Superior Court's decision and held that the option granted to Gary was a Permitted Transfer under the Shareholder Agreement. Section 1.01 of the Shareholder Agreement defined "Transfer" to include any attempt to "gift, sell, pledge, encumber, hypothecate, assign or otherwise dispose of" shares in the Company. The Court stated that, by granting Gary an option to purchase shares of the Company after his death, Donald had encumbered the shares. The act of encumbering the shares was a "Transfer" to Gary within the meaning of Section 1.01 and was a "Permitted Transfer" within the meaning of Section 1.02 because Gary was another shareholder of the Company. Accordingly, it did not matter that Section 1.02 restricted transfers to estate planning trusts only for the benefit of a shareholder's descendants, because a "Transfer" to Gary had taken place during Donald's lifetime. Furthermore, Section 3.02 allowed a Permitted Transfer to take effect at Donald's death, not just during Donald's lifetime.

Practice Point: When drafting or interpreting shareholder agreements (and contracts in general), advisors should pay careful attention to definitional provisions and how those definitions apply when used in all places in the agreement. Advisors should consider multiple factual scenarios and the effect of the definitions under each of those scenarios. The advisor's goal should be to make sure that under any scenario the definitions conform to the parties' intent and do not cause unintended results.

Gray v. Binder, 805 S.E.2d 768 (2017)

The Commissioner of Accounts had the authority to hear a petition filed by the administrator of an estate for advice and guidance regarding the interpretation of the will and the determination of the proper heirs of the decedent.

Facts: Albert F. Bahnfleth died testate on July 19, 2012. His will, executed in 1966, was admitted to probate in the Circuit Court for Fairfax County, Virginia. Each of the named beneficiaries in Bahnfleth's will predeceased the decedent.

In Virginia, oversight of certain fiduciaries is conducted by the Commissioner of Accounts, an official who assists the local circuit court. The Administrator of Bahnfleth's estate requested guidance from, and a hearing before, the Commissioner of Accounts of Fairfax County, regarding the determination of the decedent's heirs and the interpretation of the will.

Under Virginia law, Bahnfleth's cousins were his intestate heirs. Steven C. Gray, the step-grandson of Bahnfleth, attended the hearing, claimed that Bahnfleth intended to leave him half of his estate. Bahnfleth's will in fact bequeathed a share of his estate to his step-daughter, and Gray's mother, Jean Gray, with the expressed "desire that [Jean] use it for the education of . . . Steven C. Gray." Bahnfleth's cousins argued that such language was precatory, and showed only an intent to benefit Jean.

In January 2015, the Commissioner issued a report holding that all bequests in Bahnfleth's will had lapsed, and that his estate passed pursuant to the laws of intestacy. Gray filed exceptions to the report, but the Fairfax County Circuit Court overruled the exceptions and entered an order confirming the report. Gray filed a motion to reconsider which the Circuit Court denied, holding that "the Commissioner of Accounts has properly interpreted the law on the applicable facts." The Circuit Court further denied Gray's Petition for Appeal and Petition for Rehearing.

On May 4, 2016, the Commissioner filed a routine debts and demands report with the Circuit Court, authorizing the Administrator to "distribute the remainder of the estate to the beneficiaries after the final payments of any administrative expenses and debts known to the fiduciary." Gray responded to the debts and demands report, and he challenged the jurisdiction of the Commissioner to issue its January 2015 report without an initial decree of reference from the Circuit Court.

The Circuit Court confirmed the May 2016 report. Gray then filed a motion for reconsideration and to vacate the January 2015 report and the May 2016 report. The Circuit Court suspended its order and granted the Commissioner leave to respond to Gray's motion for reconsideration. The Commissioner found that his office was vested with the "authority to hear any matter concerning settlement of a fiduciary's account." Upon the Commissioner's findings, the Circuit Court denied Gray's motion for reconsideration. Gray appealed.

Law: Pursuant to Section 64.2-1200 *et seq*. of the Code of Virginia, the Circuit Court is vested with jurisdiction over fiduciary matters, including the administration of estates. The office of the Commissioner of Accounts was established "to afford a prompt, certain, efficient, and inexpensive method" for the settlement of fiduciaries' accounts and distribution of estates. *Carter's Adm'r v. Skillman*, 60 S.E. 775, 776 (Va. 1980). However, the Commissioner serves to assist the court, not supplant it.

Holding: On appeal, the Supreme Court of Virginia considered whether the Commissioner exceeded his authority when, at the request of Bahnfleth's Administrator, he conducted a hearing and produced a report interpreting Bahnfleth's will and determining heirs without an order of reference to consider the request for aid and guidance from the Circuit Court.

The Supreme Court of Virginia held that the Commissioner had authority to interpret the will and determine the heirs without an order of reference from the Circuit Court. The Court held that, contrary to Gray's assertion that the Commissioner has limited probate jurisdiction, the Commissioner's authority with respect to the settlement of estates is an extension of the Circuit Court's jurisdiction. The Court held that the Commissioner of Accounts is not a lower tribunal of limited jurisdiction; instead, it provides supervision within the jurisdiction of the Circuit Court, and,

pursuant to Section 64.2-1209 of the Code of Virginia, the Commissioner "may hear and determine any matter which could be insisted upon or objected to by an interested person if the commission of accounts were acting under an order of a circuit court." The Supreme Court of Virginia did not consider the merits of the Commissioner's findings regarding the will and the passing of Bahnfleth's estate intestate, noting that it does not have jurisdiction to review reports provided by the Commissioner of Accounts.

Practice Point: Fiduciaries should be cognizant that the Commissioner of Accounts is a resource to the fiduciary and may be a means of receiving advice and guidance where the fiduciary is unclear regarding the terms of and interpretation of will or trust documents. Particularly in light of this case, the Commissioner of Accounts can provide a practical venue for such guidance.

Lawson v. Collins, No. 03-17-00003-CV, 2017 WL 4228728 (Tex. App. Sept. 20, 2017)

An arbitration award is final and binding on all participating parties and has the effect of a court order, regardless of whether all parties agree to the terms of the arbitration award. Absent evidence of statutory grounds for overturning such award, or evidence that such award is the result of fraud, misconduct or gross mistake, an arbitration award will be affirmed and confirmed.

Facts: Talferd Gabriel Collins died in 1997. Talferd's wife, Ella Lee Myers Collins, died in 2014, leaving a will dated May 14, 2012. Together they had eleven children. In her will, Ella named three of her eleven children – Boyd, Elizabeth, and Robert – as executors. Following application for probate of the 2012 Will, Alice Lawson (a daughter of Talferd and Ella) filed a petition asserting that (1) the 2012 Will was not valid because Ella lacked legal or testamentary capacity to execute the will and (2) the 2012 Will was executed due to fraud or undue influence of Boyd or Elizabeth. Alice further objected to the appointment of Boyd and Elizabeth as executors, and later amended her petition seeking admission of a supposedly lost will of Ella to probate.

In October 2015, the parties, Boyd, Elizabeth, Ronald, Silas and Alice, participated in mediation, which resulted in a Mediated Settlement Agreement ("MSA") that was signed by each participant in the mediation, the mediator, and the participant's attorneys. The terms of the MSA provided, *inter alia*, that Alice would withdraw her will contest and that "any disputes as to the wording of settlement documents or performance hereof shall be submitted to the Mediator, Claude Ducloux, for binding arbitration."

Following mediation, the parties were unable to agree on the terms of the longer form settlement and release documents contemplated by the MSA. Alice and Ronald refused to sign the settlement documents and refused to withdraw their will contest. Boyd and Elizabeth filed a motion to enforce the MSA and to enter judgment in accordance with its terms.

The trial court held a hearing and ordered the parties to submit their disputes for binding arbitration in accordance with the terms of the MSA. On the day before the hearing, Jeanie Carr (a daughter of Talferd and Ella) appeared for the first time in the probate proceedings to question the validity of the 2012 Will and to object to the enforcement of the MSA, stating that she should be allowed to participate in the arbitration.

The trial court instructed Jeanie that she could file her own pleadings challenging the 2012 Will and the appointment of executors, and making any other claims regarding Ella's estate. But the trial court found that (1) her claims did not preclude other heirs from entering a settlement agreement and (2) because she was not a party to the MSA, she had no standing to participate in the arbitration proceeding.

The arbitrator signed an Arbitrator's Award, including as an exhibit the final form of the settlement documents contemplated by the MSA as determined by the arbitrator. Alice opposed confirmation of the Arbitration Award and entry of judgment in accordance with its terms, filing petitions to vacate or set aside the Award and the MSA. The trial court signed an order confirming the Award and ordering that it be enforced on its terms. Alice appealed.

On a no-evidence motion for partial summary judgment that Boyd and Elizabeth filed, the trial court sustained objections to certain evidence Jeanie offered and granted summary judgment against her. Jeanie non-suited the remainder of her claims and appealed. The Court of Appeals consolidated Jeanie's and Alice's appeals.

Law: Pursuant to the Texas General Arbitration Act, a trial court must confirm the award unless grounds are offered for vacating, modifying, or correcting the award under Section 171.088 or 171.091 of the Texas Civil Practice and Remedies Code. A party may avoid confirmation of the arbitrator's award "only by demonstrating a ground expressly listed" in the statute. *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016). The common law allows a court to set aside an arbitration award only if the decision is a result of "fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." *Riha v. Smuleer*, 843 S.W.2d 289, 292 (Tex. App. – Houston [14th Dist.] 1992, writ denied).

Holding: On appeal, the Court of Appeals of Texas affirmed the trial court's order confirming the Arbitration Award and ordering it enforced in accordance with its terms.

On appeal, Alice first asserted that the trial court erroneously excluded evidence showing that Alice was coerced into signing the MSA and excluded a medical report showing that Alice was incompetent, making her participation in the mediation and arbitration void. However, the hearing record demonstrated that Alice failed to preserve a claim that the trial court erred in excluding the evidence and that the medical report was excluded on grounds of hearsay. Thus, the Court of Appeals overruled each issue. Alice further asserted that the Arbitration Award was not "final, appropriate, and/or binding" because she had not signed the settlement documents. However, the Court of Appeals held that the Award is binding, final and effective once it is signed by the arbitrator – it is akin to a court order.

With respect to Jeanie's appeal, the Court of Appeals held that Jeanie failed to present the trial court with admissible evidence to raise a genuine issue of material fact regarding whether the 2012 Will was a forgery and whether the 2012 Will was executed as a result of undue influence. The Court of Appeals examined and overruled each of Jeanie's contentions on the admission of evidence and expert testimony, finding that Jeanie failed to provide any valid arguments supporting her contentions. The Court of Appeals affirmed the trial court's summary judgment order.

Practice Point: Practitioners should develop a clear understanding of the procedural nature of mediation and arbitration proceedings with respect to estate administration under applicable law. It is important that the practitioner as well as the client understand the binding and final nature of a mediation settlement and/or arbitration award, and the scope of application of such a settlement or award, especially before proceeding through mediation or arbitration.

Ajemian v. Yahoo!, Inc. 84 N.E. 3d 766 (Mass. 2017), petition for cert. docketed sub nom. Oath Holdings, Inc. v. Ajemian (U.S. Jan. 19, 2018) (No. 17-1005).

The Stored Communications Act (the "SCA") does not *prevent* Yahoo!, Inc. ("Yahoo") from voluntarily disclosing emails from a decedent's account to the decedent's personal representatives at the request of the personal representatives; it remains to be settled whether the SCA *compels* Yahoo to do the same.

Facts: John Ajemian died intestate, and his siblings, Robert Ajemian and Marianne Ajemian, were appointed as his personal representatives. Robert and Marianne asked Yahoo to provide access to the contents of John's e-mail account. Yahoo refused to release the contents of the account, although they did provide "subscriber information" upon Robert and Marianne obtaining a court order mandating disclosure to the account holder's personal representatives.

Robert and Marianne filed a complaint in the Probate and Family Court seeking a judgment that they were entitled to unfettered access to the messages in the account. Yahoo filed a cross motion for summary judgment arguing that the SCA prohibited the requested disclosure, and, even if it did not, Yahoo was permitted to deny access to, or even delete the contents of, the account at its sole discretion based on the service contract entered into at the time the e-mail account was created.

The judge granted Yahoo's motion for summary judgment solely on the basis that the SCA barred Yahoo from complying with the requested disclosure. Robert and Marianne appealed to the Massachusetts Appeals Court, and the Supreme Judicial Court of Massachusetts transferred the case to themselves as a matter of first impression.

Law: The SCA prohibits entities that provide "service[s] to the public" from voluntarily disclosing the "contents" of stored communications unless certain statutory exceptions apply. The "agency exception" allows a service provider to disclose the contents of stored communications "to an addressee or intended recipient of such communications or an agent of such addressee or intended recipient." The "lawful consent exception" allows disclosure "with the lawful consent of the originator or an addressee or intended recipient of such communication."

Holding: The Supreme Judicial Court of Massachusetts ruled that the SCA does not prohibit Yahoo from voluntarily disclosing the contents of an e-mail account to the personal representatives of the account holder's estate, because the lawful consent exception applies.

The Court found that the agent exception does not apply because personal representatives are not agents of the decedent, as they cannot be controlled by the decedent. However, the lawful consent exception does apply such that the personal representatives of a decedent can give lawful consent to release of the content of the account. The Court reasoned that to find otherwise would result in a class of digital assets—stored communications—that could not be marshalled by personal representatives. The Court found that this was not the intent of the SCA. Therefore, based on the Court's statutory interpretation analysis, personal representatives are capable of giving "lawful consent" to the disclosure on behalf of the account holder, and "actual consent" by the decedent is not required to qualify for the "lawful consent exception" under the SCA.

Because the lawful consent exception applies, Yahoo is not prevented by the SCA from releasing the contents of the account to the personal representatives. The Supreme Judicial Court of Massachusetts remanded the issue of whether Yahoo was compelled to release the contents of the account to the Probate and Family Court, but strongly signaled that if the lower court were to find that Yahoo was not compelled to release the contents, the Supreme Judicial Court of Massachusetts would overturn that ruling and compel Yahoo to release the contents of the account.

Practice Point: A ruling that the SCA does not prevent providers from releasing content is certainly helpful to fiduciaries, however, we need to wait to see what happens on appeal to the United States Supreme Court, and how the issue of whether the disclosure is compelled is decided. In the meantime, it remains important to remind clients to keep a list of accounts and passwords with their important documents, and to utilize, to the extent possible, features designed to allow a successor to control an account, like Facebook's "Legacy Contact" designation.

Higgerson v. Farthing, 2017 WL 4224476 (Va. Cir. Ct. 2017).

A Trustee was held liable for breach of fiduciary duty and for excessive fees where the trustee was unnecessarily engaged in aggressive day trading and margin trading and his fees were not reasonable in relation to the work actually required to fulfill his fiduciary duties.

Facts: Upon the death of Ivan Higgerson, Philip Farthing became the trustee of a trust created for the benefit of Ivan's surviving spouse, Edith. Philip was an attorney, not a trained investor. As trustee, Philip engaged in extensive margin trading. At certain times, 100% of the stock account held by the trust was pledged to purchase additional stock on margin. Charles Schwab's algorithm identified Philip as a day trader.

In 2013, Philip made 2,500 trades during the calendar year, turning over the value of the portfolio approximately 55 times in that year, with little to no actual benefit. He did not disclose this information to Edith, nor did he inquire about other sources of income or assets available to Edith. Philip also did not disclose his method of calculating fees or his rate of pay. In one year he took $113,287.50 in fees, while, in the same year, cutting distributions to Edith from $80,000 to $0.

Overall, Philip took $1,057,000 in fees from the trust, which was equal to 38% of the total distributed to Edith. The trust agreement said the trustee should take "reasonable fees" but did not define the term. Philip claimed that his fees were based on a fee schedule used by his prior law firm. Edith and the remainder beneficiaries filed a complaint alleging that Philip breached his fiduciary duties and took excessive fees.

Law: In general, a trustee must administer a trust in the best interests of the beneficiary. In Virginia, and many other states, administering a trust in the best interests of the beneficiary requires a trustee to comply with the provisions of the Uniform Prudent Investor Act. The Uniform Prudent Investor Act provides that a trustee must invest and manage trust assets as a prudent investor would, "by considering the purposes, terms, distribution requirements and other circumstances of the trust." It also lists circumstances a Trustee should consider in applying that standard, including other resources of the beneficiary, needs for liquidity, and whether the trustee has special expertise. See Va. Code §§ 64.2-781 through 64.2-782.

The term "reasonable fees" is not defined in the Virginia Code, but the Supreme Court of Virginia has held that the determination of reasonable fees is based on the unique facts and circumstances of each case. *See, e.g.*, *Virginia Trust Co. v. Evans*, 193 Va. 425, 433 (1952).

Holding: The Circuit Court of Virginia, First Judicial Circuit, Chesapeake City found that Philip's aggressive investment strategy involving day trading and trading on the margin was in violation of the prudent investor rule.

The Court acknowledged that in some cases, aggressive investment strategies like day trading and margin trading might be warranted and are not a per se breach of the prudent investor standard. For example, a trustee might reasonably borrow money on margin where it is necessary to provide funds to the beneficiary, where the trustee has considered other possible sources of funds for the beneficiary, or if the market has dropped precipitously and the trustee does not wish to sell stock to meet that need. However, the Court found in this case there was no reason for Philip to engage in this risky investment activity other than to generate his own fees, and he was "betting someone else's funds."

The Court determined losses for the breach of fiduciary duty by measuring the trust's total losses against the financial benchmarks presented by the expert witness of the beneficiaries. The Court imposed damages in the amount of $1,382,653.

Additionally, the Court found that Philip's fees were excessive and unreasonable. The Court did not find Philip's argument that his fees were based on a fee schedule published by his prior law firm persuasive, in part because the fees Philip charged after leaving the law firm were dramatically more than the amount charged when he was at the law firm. Looking to executor's fees as an example, the Court stated that 5% of the total trust value might be considered reasonable, depending on the level of work necessary.

In this case, the Court found that Philip was managing "plain vanilla trusts," so there was no reason for him to take the fees that he did, and that any additional work that would have justified the higher fees were a result of his own misbehavior in engaging in risky investment activity. The Court found that out of $1,057,000 Philip took in fees, only $286,722.15 were reasonable. The difference of $770,471.33 was awarded to the beneficiaries.

Practice Point: Although aggressive investment strategies may be warranted in some limited scenarios, a trustee should be mindful to comply with the prudent investor standard. Where a trust agreement does not define "reasonable fees", a trustee should be careful that the fees charged are actually reasonable in relation to the duties performed and should not assume that a published fee schedule is reasonable.

Bradley v. Shaffer, 535 S.W.3d 242 (Tex. App. 2017).

The transfer of a beneficial interest in trust property by a beneficiary was void because the trust contained a valid spendthrift provision, and the doctrine of after-acquired title is not applicable to a void transfer.

Facts: Darell was the beneficiary of a fixed 1/8 interest in a trust. The trust held certain mineral interests in Taylor County, Texas. The trust was scheduled to terminate in June of 2013, but could be extended by the unanimous consent of all the beneficiaries. The trust contained a spendthrift provision that read, "[n]o Trustee nor beneficiary of this Trust shall have any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the Trust in any way; nor shall any such interest in any manner be liable for or subject to the debts, liabilities, or obligations of such Trustee or beneficiary or claims of any sort against such Trustee or beneficiary."

Between March and June of 2013, the beneficiaries agreed to extend the trust. In 2006, before the trust was extended, Darell executed a mineral deed in favor of Terry Bradley. The mineral deed contained language referring to Darell's beneficial interest in the trust and conveying that interest, as well as any mineral interest held in the trust that he might acquire in the future to Terry.

Before June 2013, the Trustees and one of the other beneficiaries (Darell's sister, Darlene) filed a motion seeking a judgment declaring the deed from Darell to Terry invalid because (1) Darell did not have any title in the mineral interest to convey because the title was held by the trust and not by Darell; and (2) Darell had no authority to convey any beneficial interest in the mineral interest because of the trust's spendthrift provision.

Terry's response argued that (a) the trust was always invalid because the extension provision violated the rule against perpetuities and therefore Darell did have title to the minerals at the time of conveyance; and (b) even if the trust was invalid at the time of the conveyance, the extension of the trust was invalid under the rule against perpetuities and the trust therefore terminated in June 2013, at which point Darell's mineral interest passed to Terry pursuant to the doctrine of after-acquired title. Terry did not address the spendthrift trust provisions.

The trial court ruled in favor of the Trustees and entered a final judgement declaring Darell's deed to Terry void. Terry appealed.

Law: Spendthrift trusts prohibit a beneficiary from anticipating or assigning his interest in or income from the trust, and are permitted by the Texas Trust Code. *See* Tex Prop. Code § 112.035. The doctrine of after-acquired titled provides that if the seller conveys title to a property to a buyer, a subsequently acquired interest in that property by the seller is automatically passed through to the buyer. The doctrine of after-acquired title does not apply to void transfers.

Holding: On appeal, the Court of Appeals of Texas, Eastland, affirmed the lower court's judgment and found the conveyances to Terry void. The Court held that the initial trust was valid, and rejected the challenge to the trust based on the rule against perpetuities. Further, because the Trust contained spendthrift language, Darell's conveyance to Terry could not become effective even upon the eventual termination of the trust. The Court rejected Terry's argument that he should acquire legal title upon the termination of the trust based on the doctrine of after-acquired title, because the doctrine of after-acquired title does not apply to transfers that were void from the outset.

Practice Point: This case underscores the far-reaching effects of spendthrift protection of a beneficiary's interest. If a trust contains a spendthrift provision, a beneficiary cannot transfer his or her interest in the trust or to any of its underlying assets. Conversely, if a beneficiary attempts to or is forced by a creditor to convey an interest in a trust containing a valid spendthrift provision, the trustee can void the transfer. Third parties dealing with a beneficiary should be mindful of the potential limitations and restrictions imposed by a spendthrift clause.

Hodges v. Johnson, 2017 WL 6347941 (N.H. 2017)

The Supreme Court of New Hampshire affirmed an order declaring a trust decanting void *ab initio* and removed the trustees for breach of duty of impartiality.

Facts: David Hodges created two irrevocable trusts to hold stock in a family business, with his attorney, William Saturley, and Alan Johnson, an employee of the family business, as trustees. The trusts' beneficiaries were Hodges' wife, Joanne, his three children, and his two step-children.

The trusts provided for discretionary distributions to each of the beneficiaries during Hodges' lifetime. After his death, Joanne was named the primary beneficiary. Following Joanne's death, the trustee was to divide the trust into five separate trusts for each of Hodges' children and step-children. The trustee of each separate trust had discretionary power to distribute the net income and principal to the child and his or her descendants.

The trusts also included provisions specifically related to the family business. Each trust instrument established a "committee of business advisors", chosen by Hodges, with exclusive authority to make decisions for the family business after Hodges' death. Hodges funded the trusts with non-voting stock in various entities.

In 2009, Hodges retained attorney Joseph McDonald to assist with his estate planning. Hodges stated he wished to revoke the gifts to his step-children. McDonald advised Hodges that, although the trusts were irrevocable, the trustees could decant to new trusts, of which the step-children would not be beneficiaries. McDonald also offered to serve as the trustee who would accomplish the decanting.

Over the next few years, McDonald decanted the trust three times. First, in 2010, Johnson resigned as trustee in favor of McDonald. McDonald decanted both trusts, reappointed Johnson as trustee, and resigned. The decanted trusts specifically excluded Hodges' step-children as beneficiaries of the trusts.

Second, in 2012, McDonald was appointed as trustee and decanted the trusts to exclude Hodges' biological son, David Hodges Jr. Again, to accomplish this, Johnson resigned as trustee in favor of McDonald, and McDonald decanted the trusts to new trusts that excluded Hodges Jr. and the step-children. McDonald then resigned in favor of Johnson.

Third, and lastly, in 2013, McDonald was appointed as trustee and decanted the trusts for a third time in order to exclude Joanne. Once again, after the decanting, McDonald resigned in favor of Johnson.

In April 2014, Hodges Jr. and the step-children filed a petition to invalidate the decantings and to remove Johnson and Saturley as trustees, alleging a breach of the duty of impartiality. McDonald admitted he did not consider the excluded beneficiaries' interests when he decanted the trusts, but he maintained that he was not required to do so.

The trial court agreed the trustees had breached the duty of impartiality. Therefore, it declared the decantings void *ab initio* and removed Johnson and Saturley as trustees. Johnson, Saturley, and McDonald appealed.

Law: The duty of impartiality does not require a trustee to treat beneficiaries equally. For example, a trustee may make unequal distributions among beneficiaries, or eliminate a beneficiary's non-vested interest through decanting, if the trustee treats the beneficiaries equitably in light of the trust's terms and purposes. However, a trustee may not abuse its discretion in favoring certain beneficiaries over others.

Analysis: The Supreme Court of New Hampshire affirmed the trial court's order declaring the decanting void *ab initio* and removing Saturley and Johnson as trustees. The Court noted McDonald's admission that he did not consider the excluded beneficiaries' interests when he decanted the trusts. The Court found that supporting the five named beneficiaries was a primary purpose of the trust. Therefore, McDonald abused his discretion by eliminating the beneficiaries without considering their interests or other alternatives to promote the effective administration of the trusts.

The Court also rejected the trustees' argument that the decantings were necessary to protect the family business from intra-family conflict. The Court noted that the committee of business advisors had sole authority to manage the

business, and that Hodges had the power to remove and replace committee members. The Court also observed that the trusts held only non-voting stock in the business. Therefore, the Court found that the beneficiaries' interests in the trusts did not threaten the family business.

Finally, the Court affirmed the trial court's removal of Johnson and Saturley as trustees. The Court noted its power to remove a trustee who has committed a serious breach of trust. The Court held that the trial court could have reasonably concluded that McDonald's decantings were a serious breach of trust.

Practice Point: State law generally does not require trustees to treat beneficiaries equally. However, a trustee must always act in good faith in accordance with the trust's terms and purposes, and must treat the beneficiaries equitably, based on the terms of the trust. A trustee should consider all purposes of a trust, including the interests of the beneficiaries, before making key decisions involving a trust, such as decanting. Moreover, the trustee should document that he, she or it considered those factors.

Matter of Sinzheimer, 2017 N.Y. Slip Op. 31379(U) (Surr. Ct. New York Cnty.)

Corporate trustee removed under the terms of the trust was not required to deliver the trust assets to individual co-trustee when a successor corporate trustee had not been appointed.

Facts: Ronald and Marsha Sinzheimer created an irrevocable trust under agreement dated as of January 27, 1997. The trust terms provided for discretionary income and principal payments to Marsha for her lifetime, then directed the remaining trust assets to another trust under the trust agreement.

The trust agreement provided for the removal and appointment of successor trustees. The trust agreement stated that, before Ronald's death, the trustee "may" appoint a bank or trust company as co-trustee of the trust. Upon Ronald's death, however, the trust agreement stated that the individual trustee "shall" appoint a bank or trust company as co-trustee. Furthermore, the trust agreement stated that, if the individual trustee removes a corporate trustee after Ronald's death, the individual trustee "shall" appoint a successor corporate trustee.

Ronald died in 1998. After Ronald's death, the individual trustee appointed Merrill Lynch Trust Company ("Merrill Lynch") as corporate co-trustee. The individual trustee later removed Merrill Lynch as corporate co-trustee and resigned his own trusteeship in favor of Ronald and Marsha's son, Andrew. The individual trustee did not appoint a successor corporate co-trustee.

After Andrew accepted fiduciary duties, he and Marsha requested that Merrill Lynch distribute all of the trust assets to Marsha outright. Merrill Lynch asked for Marsha's tax returns and budgets in order to evaluate the request. Marsha refused. Instead, Andrew asserted that he was not required to appoint a successor corporate co-trustee, and demanded that Merrill Lynch deliver the trust assets to him as sole trustee of the trust. Andrew also announced that he intended to exercise his discretion as trustee to distribute the trust assets to Marsha outright. Merrill Lynch refused to transfer the trust assets to Andrew.

Andrew and Marsha filed a petition in the New York Surrogate's Court to remove Merrill Lynch as corporate co-trustee and compel it to transfer the trust assets to Andrew as sole trustee of the trust. Alternatively, they sought damages equal to the trust assets. Andrew and Marsha also argued Merrill Lynch committed civil conversion of the trust assets and sought $400,000 in punitive damages.

In response, Merrill Lynch petitioned the Court for an order directing Andrew to appoint a successor corporate co-trustee or alternatively authorizing Merrill Lynch to transfer the trust assets to Andrew as sole trustee.

Law: A court will give full force and effect to the plain language of a trust unless the terms are ambiguous. A custodian of property may retain the property until the owner proves his or her right to the property.

Analysis: The Surrogate's Court for New York County held that the trust terms clearly required Andrew to appoint a successor corporate co-trustee. Analyzing the trust terms, the Court observed that, before Ronald's death, the individual trustee "may" appoint a corporate fiduciary, but the trust terms stated that a corporate fiduciary "shall" be appointed upon Ronald's death. The Court also noted that, if the individual trustee removed a corporate co-trustee, the individual trustee "shall" appoint a successor co-trustee. Therefore, the Court denied Andrew and Marsha's petition.

The Court also rejected Andrew and Marsha's claim for conversion and punitive damages. Merrill Lynch did not assert title to the trust assets. Instead, it only requested that Andrew demonstrate his right to the property. Andrew could not demonstrate that right, because the trust terms did not allow him to serve as sole trustee. The Court also found Merrill Lynch's petition, filed four months after Andrew refused to appoint a successor corporate co-trustee, was filed expeditiously.

Practice Point: A removed trustee is generally required to transfer expeditiously the trust assets to the successor trustee. However, a removed trustee may retain fiduciary duties under the trust terms until a successor trustee is appointed. When the remaining trustee refuses to comply with the trust terms, or intends to take an action that may violate the terms of the trust, it may be prudent for the removed trustee to petition for court instruction before acceding

to the remaining trustee's demands. The petition should be filed expeditiously and explain how the proposed action would violate the trust terms.

In communications with co-trustees and beneficiaries, though, the removed trustee should be careful not to assert title to the trust property. Instead, the trustee should make clear it is retaining custody only until the successor trustee proves its right to the property.

IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust U/A/D December 5, 2012, No. CV 12892-VCS, 2017 WL 4082886 (Del. Ch. Sept. 7, 2017)

Delaware Chancery Court holds that a trust instrument may allow a trust protector to act in a non-fiduciary capacity. Therefore, it dismissed a claim against a trust protector for breach of fiduciary duties.

Facts: Ronald J. Mount created the Ronald J. Mount 2012 Irrevocable Dynasty Trust under agreement dated as of December 5, 2012. Ronald named his long-time attorney, Kevin Kilcullen, as trust protector of the dynasty trust, and provided that he was to act in a non-fiduciary capacity. After Ronald died in 2015, his wife, Rene, and two children, Heather and Ian, initiated several lawsuits in multiple jurisdictions over the distribution of Ronald's estate. For a discussion of the prior proceedings, see previous McGuireWoods Fiduciary Advisory Services Case Summaries, available here.

On July 5, 2016, Rene, Heather, Ian, and Kevin (and others) entered into a global settlement agreement to resolve the various lawsuits. The settlement agreement purportedly resolved how the dynasty trust and Ronald's revocable trust would be funded and administered. First, the dynasty trust would be divided into two separate trusts, one trust for Heather and one trust for Ian. Heather's trust would be funded with $10 million, less one-half of certain expenses and taxes, and the remaining dynasty trust assets would fund Ian's trust.

After the relevant courts approved the settlement agreement, Heather, Ian, and Kevin began to disagree over the trusts' liabilities. Kevin, as trust protector of the dynasty trust, argued that Ian was required to pay a $4.2 million debt owed by the revocable trust to the dynasty trust.

Ian acknowledged that the $4.2 million debt to the dynasty trust was valid. However, he claimed that the debt was offset by a $6.9 million debt the dynasty trust owed to the revocable trust. Therefore, Ian argued the debts should partially offset, and in fact, the dynasty trust owed $1.4 million to the revocable trust.

When negotiations failed, Kevin filed a petition for instruction in the Delaware Court of Chancery. Ian filed counterclaims against Heather and Kevin alleging that Kevin had breached his fiduciary duties, notwithstanding the terms of the trust. Heather and Kevin filed separate motions to dismiss Ian's counterclaims.

Law: Under Delaware law, a grantor may allow an advisor, including a trust protector, to serve in a non-fiduciary capacity.

Analysis: The Delaware Court of Chancery dismissed Ian's breach of fiduciary duty claim against Kevin. The Court cited the terms of the dynasty trust, which stated that the trust protector did not act in a fiduciary capacity. The Delaware Code expressly allows grantors to provide that a trust protector serve in a non-fiduciary capacity.

The Court also rejected Ian's argument that the trust protector was a fiduciary despite the terms of the dynasty trust. Ian first argued that Kevin acted in a fiduciary capacity because Kevin also served on the trust's investment committee, through which he owed fiduciary duties. The Court noted that none of Kevin's alleged breaches arose in his capacity as an investment committee member. Therefore, the Court rejected Ian's argument.

Ian also argued that Kevin's expansive powers as trust protector imputed fiduciary duties upon him. Again, the Court rejected Ian's argument. Ian did not cite any statutes or case law to support his position; instead, he relied on law review articles questioning statutes that allow trust protectors to serve in a non-fiduciary capacity. In light of the clear terms of the trust and the statute, the Court rejected this argument as well.

Practice Point: State law may allow grantors to decide whether a trust protector will serve in a fiduciary or non-fiduciary capacity. In those jurisdictions, when the terms of the trust are clear, courts will give effect to trust terms even if the trust protector possesses expansive powers. Advisors should discuss with clients the benefits and drawbacks of allowing an advisor to serve with or without fiduciary duties in light of the client's goals.

Laborers' Pension Fund v. Miscevic, No. 17-2022 (7th Cir. Jan. 29, 2018)

ERISA does not preempt the Illinois slayer statute, and the Illinois slayer statute applies where the deceased was killed by an individual found not guilty by reason of insanity.

Facts: Evidence produced at her criminal trial showed that Anka Miscevic killed her husband, Zeljko Miscevic, in January 2014; however, she was found not guilty by reason of insanity. Despite the finding that she was responsible for her husband's death, Anka then claimed she was entitled to her deceased husband's pension plan, which was governed by federal ERISA law. A claim was also made on behalf of their minor son for the benefits. Their minor son was awarded the benefits from the pension plan. Anka appealed.

Law: Illinois has a "slayer statute," which provides that "a person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death." However, neither federal ERISA law nor the pension's governing documents contains an express slayer provision; therefore, if federal law governs, the named beneficiary would receive the assets, despite the operation of a slayer statute under state law.

Holding: On appeal, the Court of Appeals for the Seventh Circuit upheld the interpretation that a slayer is precluded from obtaining the benefits payable under the decedent's pension plan even if they were found not guilty by reason of insanity. The Court reasoned that slayer statutes are traditionally an area of state regulation, and it rejected Anka's argument that Congress intended to preempt the slayer statutes through ERISA. ERISA was enacted after it was well established that an individual who kills another individual cannot benefit as a result of that death. Therefore, Congress could have clearly stated that it intended to change that result in certain situations, but their failure to explicitly state that intent results in a determination that it was not their intent.

Further, the Court held that Illinois' statute that provides that "a person who intentionally and unjustifiably causes the death of another" is broad enough to encompass a situation where an individual is found not guilty by reason of insanity. They deferred to state law decisions to interpret the statute. Anka argued that the killing was justifiable because she was found not guilty. The Court rejected this argument on the grounds that an insanity defense is an "excuse" defense, not a "justification" defense. The decision rests on lower court decisions interpreting the statute, and therefore the Court does acknowledge that the interpretation may be different in other states.

Practice Point: It is important to remember that federal statutes or regulations may be affected by state statutes. Lawyers should be mindful of other statutes that may change the outcome in particular situations.

Metropolitan Life Ins., Co. v. Teixeira, Civ. No. 16.07486 (D.N.J. 2017)

Interpleader protection does not extend to counterclaims that are not claims to the interpleaded funds.

Facts: John J. Teixeira owned a life insurance policy on himself. The policy provided that the beneficiary may be any person the owner chose, but changes must be made in writing on a form approved by the insurance company and filed with the insurance provider. Teixeira's initial beneficiary designation named his wife, Janet Teixeira, as the sole beneficiary. This designation was made by telephone in March 2003. In July of 2015, Teixeira called MetLife to change his beneficiary designation to Gabriela Ramirez.

John Teixeira died in April of 2016. His daughter, Karen Sarto, claimed the benefits from the policy on Janet Teixeira's behalf. Along with her claim, she submitted a death certificate and a copy of the order stating she is the guardian of her mother, and therefore is allowed to act on her behalf. Sarto learned of the attempted beneficiary change and asserted John was incompetent at the time of the purported change. In June 2016, Ramirez also submitted a claim for the proceeds of the policy.

MetLife attempted to assist the parties in settling their dispute, but that attempt was unsuccessful. MetLife then filed an action for interpleader, alleging that it cannot determine whether the decedent was competent at the time of the beneficiary change. MetLife was granted interpleader relief. However, the Court refused to relieve MetLife from any and all liability relating to the claims. MetLife appealed.

Law: An interpleader action cannot be used to dismiss an insurance provider from liability for claims that are not related to the interpleaded funds.

Holding: Interpleader is equitable relief that allows a party that holds property more than one person claims they are entitled to join those two competing claims in one action. It allows a party who admits they are liable to one party, but fears liability to multiple parties to submit the property or money at issue to the Court and withdraw from the proceedings while the claimants litigate their claims.

The Court held that MetLife was entitled to some protection because it cannot determine which claim is superior without opening itself to double liability. The determination of who is entitled to the insurance proceeds depends on capacity of the decedent, and MetLife is not in the position to make that determination.

The Court further held that here, however, there was a possibility for an independent counterclaim based on the negligence of MetLife in allowing the oral beneficiary change when the policy states that a beneficiary change must be submitted in writing on an approved form. Therefore, there was a potential claim that is outside the scope of interpleader, and the Court concluded that MetLife cannot use impleader to relieve itself of liability for counterclaims that are not claims to the interpleaded funds.

Practice Point: Custodians or third parties can often find themselves in the middle of a dispute regarding the proper recipients of funds upon a person's death or similar situations. In such a case, interpleader can offer protection to that third party. However, interpleader actions that are granted do not protect parties like the insurance company from all liability, but rather they are only protected from liability as it relates to the interpleaded funds.

Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co., 532 S.W.3d 243 (Tenn. 2017)

Trustee had authority to enter into predispute arbitration agreement with financial advisor, and outcome of arbitration bound beneficiaries.

Facts: Alexis Breanne Gladden was the minor beneficiary of a trust ("Alexis' Trust") created in 2001 and initially funded with $2,600,000. Alexis had suffered severe injuries after a stay in the hospital as an infant, and the proceeds of medical malpractice settlements constituted the entirety of her trust's corpus.

Cumberland Trust and Investment Company ("Cumberland") became sole trustee of Alexis' Trust in 2004. Five years later, Cumberland executed an account service agreement (the "Account Agreement") with Wonderlich Securities, Inc. ("Wonderlich") and Wonderlich-employee Albert M. Alexander, Jr. ("Alexander"), each of whom had provided investment management services to the trust for a number of years. The Account Agreement, which contained a predispute arbitration clause, was signed by Alexander, Cumberland, and Wonderlich, but not by Alexis or her representatives.

In 2011, Alexis' maternal grandfather, Wade Harvey, Sr. ("Harvey") succeeded Alexis' mother as Alexis' guardian. Shortly after his appointment, Harvey realized that the value of Alexis' Trust had fallen to less than $200,000. He then brought suit against Cumberland, Wonderlich, and Alexander for breach of fiduciary and contractual duties. The defendants moved to compel arbitration of those claims, and the trial court granted that motion to compel arbitration.

The Supreme Court of Tennessee agreed to review an interlocutory appeal of the trial court's order compelling arbitration of Harvey's claims. The Court of Appeals reversed. The defendants appealed.

Law: The Tennessee Uniform Trust Code (the "TUTC") gives trustees broad authority to select the commercial means by which they fulfill their fiduciary duties. Specifically, the TUTC permits trustees to enter into predispute arbitration agreements, so long as such agreements are not explicitly prohibited by the terms of the relevant trust instrument.

Holding: On appeal, the Supreme Court sided with the trial court, and compelled arbitration of Harvey's claims.

Alexis' trust instrument did not specifically prohibit Cumberland from entering into predispute arbitration agreements. As a result, Cumberland was impliedly authorized by the TUTC and the trust instrument to enter into such agreements. Further, Alexis was bound by the provisions of the Account Agreement insofar as she was a third-party beneficiary seeking to enforce rights under its terms.

The Court returned the case to the trial court for a determination of which of Harvey's claims sought to enforce the terms of the Account Agreement and were thus subject to its predispute arbitration provisions.

Practice Point: Under the laws of Tennessee, and now, perhaps, of other Uniform Trust Code jurisdictions, corporate fiduciaries have broad authority to enter into predispute arbitration agreements absent specific language prohibiting such contracts in the relevant trust instrument. Additionally, predispute arbitration provisions might bind not only a given contract's signatories, but also trust beneficiaries who seek to enforce duties created by the contract. Despite the potentially broad reach of this Court's reasoning, the *Harvey* decision is narrow in at least one important way. In footnote 34 of the Court's decision, the Court left open the possibility that factual situations could arise in which entering into a predispute arbitration agreement could violate a trustee's fiduciary duties. Arbitration clauses are, therefore, neither automatically prohibited nor necessarily permitted. Nevertheless, this case continues courts' enforcement of arbitration clauses in the context of claims for breach of fiduciary duty. For a discussion of other cases addressing arbitration clauses in this context, see previous McGuireWoods Fiduciary Advisory Services Case Summaries, available here:

https://www.mcguirewoods.com/Client-Resources/Alerts/2014/6/Recent-Cases-of-Interest-to-Fiduciaries.aspx

https://www.mcguirewoods.com/Client-Resources/Alerts/2015/7/Recent-Fiduciary-Cases-July-2015.aspx

https://www.mcguirewoods.com/Client-Resources/Alerts/2016/7/Recent-Fiduciary-Cases-July-2016.aspx

https://www.mcguirewoods.com/Client-Resources/Alerts/2018/1/Recent-Fiduciary-Cases-January-2018.aspx