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ABBEY L. FARNSWORTH, ASSOCIATE
804 775 4782 | afarnsworth@mcguirewoods.com

LAURA A. MEIS, ASSOCIATE
804 775 7682 | lmeis@mcguirewoods.com

SCOTT W. MASSELLI, ATTORNEY
804 775 7585 | smasselli@mcguirewoods.com

FARHAN N. ZAROU, ASSOCIATE
202 857 1703 | fzarou@mcguirewoods.com

ALICIA C. O'BRIEN, ASSOCIATE
310 315 8248 | aobrien@mcguirewoods.com

MEGHAN GEHR HUBBARD, PARTNER
804 775 4714 | mghubbard@mcguirewoods.com

SEAN F. MURPHY, PARTNER
703 712 5487 | sfmurphy@mcguirewoods.com

STEPHEN W. MURPHY, PARTNER
434 977 2538 | swmurphy@mcguirewoods.com

KIMBERLY T. MYDOCK, ASSOCIATE
904 798 3236 | kmydock@mcguirewoods.com

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In the Matter of the William J. Raggio Family Trust, 460 P.3d 969 (Nev. April 9, 2020)

Nevada Supreme Court found that the settlor's surviving spouse, as trustee, did not have a duty to consider her other assets, including assets in a sub-trust, prior to making distributions to herself from a second sub-trust under the specific terms of the trust and Nevada law.

Facts:
Settlor William Raggio created the William J. Raggio Trust that split into two sub-trusts upon his death: (i) the Marital Deduction Trust; and (ii) the Credit Shelter Trust. Pursuant to the terms of the William J. Raggio Trust, petitioner Dale Checket Raggio (the settlor's second wife) was the named trustee and life beneficiary of the sub-trusts. More specifically, the sub-trust permitted Dale, as trustee, to distribute as much of the principal of the sub-trust "as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of Dale. Leslie Righetti and Tracy Chew (the settlor's daughters from his first marriage) were the remainder beneficiaries of the Marital Deduction Trust. Dale's grandchildren from her first marriage were the remainder beneficiaries of the Credit Shelter Trust.

Following the death of the settlor, the daughters sued Dale for breach of trust and breach of fiduciary duties as trustee of the Marital Deduction Trust. In sum, the daughters alleged that Dale only made distributions for her benefit from the Marital Deduction Trust resulting in the intentional depletion of the daughters' remainder interest while preserving the remainder interest of her grandchildren in the Credit Shelter Trust. The daughters further complained that the amount of the distributions from the Marital Deduction Trust were excessive pursuant to the terms of the sub-trust. During discovery in the litigation, the daughters sought an accounting and distributions from the Credit Shelter Trust.

Dale objected to the discovery requests and sought partial summary judgment. The daughters moved to compel and further argued on summary judgment that the distribution standard in the terms of the William J. Raggio Trust fell within the statutory exception under Nevada law that required Dale to consider her other sources of income in making distributions, including the Credit Shelter Trust.

Following a hearing and recommendation before the probate commissioner, and also a hearing before the district judge, the district court denied Dale's

motion for partial summary judgment. The district court found, among other things, that the "vested remainder beneficiaries are entitled to examine the need and propriety of the trustee's decision to withdraw principal from the marital deduction trust by reference to other trust and non-trust resources available for the trustee's necessary and proper support." The district court further compelled Dale to provide the discovery related to the Credit Shelter Trust.

Thereafter, Dale filed an appeal in the Nevada Supreme Court seeking a writ of prohibition, or alternatively, mandamus. The Nevada Supreme Court elected to exercise its discretion to hear Dale's writ of prohibition request since it found that the discovery order was likely to cause irreparable harm as it implicated Dale's privacy interests.

Law:

In considering specifically "whether Dale, as trustee, has an obligation to consider other assets, including those in the Credit Shelter Trust, before making distributions to herself, as beneficiary, from the Marital Trust," the Nevada Supreme Court analyzed the applicable Nevada statute, NRS 163.4175, and found that it did not require a trustee to consider other assets unless set forth in the trust agreement. The court then analyzed the terms of the trust agreement as a whole, and specifically, the distribution standard set forth above.

It found that a "fair and reasonable interpretation" of the trust agreement demonstrates that the settlor's intent was not to restrict Dale's discretion in making distributions for her benefit and did not require her to consider her other assets (including assets of the separate sub-trust). The Nevada Supreme Court explained that the words "necessary" and "proper" alone do not trigger the exception of NRS 163.4175 requiring a trustee to consider all other assets.

Review of other provisions of the trust helped confirm this analysis. The section covering administration and distribution to the descendants of a grandson gave Dale discretion to make such payments as she deemed necessary for their proper support, but only "after taking into consideration any other income or resources of such issue known to …" Dale. Thus, this language demonstrated that the settlor understood how to restrict Dale's authority but deliberately chose not to do so with regard to Dale's discretion on distributions from the Marital Deduction Trust.

In light of this analysis, the Nevada Supreme Court further ruled that the district court erred in compelling the discovery related to the Credit Shelter Trust.

Holding:
The Nevada Supreme Court held that neither the terms of the trust agreement nor Nevada trust law required the settlor's surviving spouse (as trustee) to consider her other assets (in her capacity as a beneficiary) prior to making distributions from a sub-trust. The relevant provision of the trust agreement the court considered was the provision that allowed the trustee to make distributions "as much of the principal of the Trust as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of the beneficiary. The Nevada Supreme Court further held that discovery relating to her other assets were irrelevant as to whether the trustee breached fiduciary duties and did not require its disclosure.

Canarelli v. Eighth Judicial Dist. Court in & for Cty. of Clark, 464 P.3d 114 (Nev. May 28, 2020)

Nevada Supreme Court finds there is no fiduciary exception to attorney-client privilege.

Facts:
Scott Canarelli is the beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust. Scott's parents, Lawrence and Heidi Canarelli served as family trustees of the trust and made certain discretionary distributions from the trust to Scott for his benefit. Edward Lubbers (who was also Lawrence and Heidi's personal attorney) served as the independent trustee of the trust.

Scott asserted claims that the trustees unlawfully withheld distributions from the trust. In a pre-suit demand letter, Scott threatened a lawsuit, and Scott's parents resigned as family trustees. Lubbers then became the successor family trustee. Shortly after the resignation of Scott's parents, Lubbers entered into an agreement on behalf of the trust to sell off the trust's ownership in Lawrence and Heidi's business entities.

Scott then filed a petition and sought to compel discovery from Lubbers concerning all information related to the purchase agreement, as well as an inventory and accounting related to the trust. Lubbers retained counsel and responded to Scott's petition. Scott thereafter filed a supplemental petition to add new claims of breach of fiduciary duty against his parents and Lubbers as trustees. Ultimately, Lubbers resigned as trustee and died shortly thereafter.

In the discovery process, Scott's parents and Lubbers' representative inadvertently produced documents containing Lubbers' notes and tried to rescind the production by asserting the attorney-client privilege and work product doctrine. The two categories of documents in dispute include: (1) Lubbers' notes related to a phone call with the attorneys he retained and consulted concerning responding to Scott's petition (Group 1); and (2) Lubbers' notes memorializing an in-person meeting he attended with the co-trustees, counsel, Scott and an independent trust appraiser (Group 2). Scott sought a determination of privilege for both groups of documents from both the discovery commissioner and the district court. Ultimately, the district court largely agreed with the discovery commissioner and found that a portion of the documents were discoverable and not subject to privilege or immunity.

The former trustees then filed a petition for writs of prohibition and mandamus to prevent the disclosure of any of the documents containing Lubbers' notes.

Law:
In a matter of first impression, and in looking to federal law, the Nevada Supreme Court determined that physical delivery to an attorney is unnecessary for notes to constitute "communications" under NRS 49.095 and the common-law attorney-client privilege to attach. The Nevada Supreme Court explained that "so long as the content of the notes was previously or is subsequently communicated between a client and counsel, the notes constitute communications subject to the attorney-client privilege." Therefore, it found that the Group 1 documents were subject to the attorney-client privilege and that the district court abused its discretion as the petitioners properly proved that the notes concerning the phone call discussion were communicated to counsel. It further extended the privilege to the factual information contained within the Group 1 documents to the extent it was used to obtain legal advice.

In rejecting Scott's request to apply a fiduciary exception to the Group 1 documents, the Nevada Supreme Court reasoned that "NRS 49.015 provides that privileges in Nevada are recognized only as 'required by the Constitution of the United States or of the State of Nevada' or by a specific statute. NRS 49.115 expressly lists five exceptions to the attorney-client privilege, none of which are the fiduciary exception." Thus, the Nevada Supreme Court declined to create a sixth exception.

In addition, the Nevada Supreme Court explained that the common interest exception did not apply because: (1) the counsel were not retained in common, and (2) Lubbers' communication with counsel was not related to a matter of common interest. *See* NRS 162.310(1) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal."). Finally, the Nevada Supreme Court illuminated the intent behind its ruling rejecting creation of a fiduciary exception — i.e., "allowing a beneficiary to view communications between a trustee and his or her attorney when the trustee is adverse to the beneficiary would discourage trustees from seeking legal advice."

With respect to the Group 2 documents, the Nevada Supreme Court found that they were protected by the work-product doctrine. *See* NRCP 26(b)(3)(A). Pursuant to NRCP 26(b)(3)(A)(ii), in order for documents subject

to the work product doctrine to be discoverable, the party seeking disclosure has the burden to demonstrate "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *See* NRCP 26(b)(3)(A)(ii).

In this case, the Nevada Supreme Court found that the district court abused its discretion under the totality of the facts and circumstances in finding that the Group 2 documents were not protected from discovery by the work product doctrine. In rejecting that the substantial need doctrine applied, the Nevada Supreme Court reasoned that Scott was at the meeting in question and could obtain any missing information related to the meeting by deposing one of the remaining living attendees.

Holding:
The Nevada Supreme Court found that Nevada law recognized only five exceptions to the attorney-client privilege, and that a fiduciary exception is not one of them. As a result, the Nevada Supreme Court declined to create the fiduciary exception and held that it is not recognized in Nevada.

In re Matter of Curtiss A. Hogen Trust B, 940 N.W.2d 635 (N.D. March 19, 2020)

The North Dakota Supreme Court held that an order of the district court awarding attorneys' fees, terminating a trust and affirmed on appeal continued to be subject to clarification by the district court so long as the clarification did not modify the district court's original order.

Facts:

Curtiss and Arline Hogan owned land in Barnes and Cass County, North Dakota. Upon Curtiss' death in 1993, his will directed that his undivided one-half interest in the land be retained in the Curtiss Hogen Trust, with his sons Steven Hogen and Rodney Hogen as co-trustees of the trust. Rodney remained active in farming the land under a rental agreement with the trust and Arline. Upon Arline's death in 2007, her interest in the land was devised equally to Rodney and Steven. Steven was appointed personal representative of his mother's estate. Steven believed the estate was entitled to an offset from Rodney's share of his mother's estate.

Litigation ensued, and in Estate of Hogen, 2015 ND 125, 83 N.W.2d 876, the Supreme Court of North Dakota affirmed an amount Rodney owed the estate, as well as an obligation to pay the fees of the personal representative and the fees of the estate's attorney and expert witness.

Steven subsequently petitioned the district court for supervised administration of the Curtiss Hogen Trust to compel an accounting and to recover an offset against Rodney's share of the trust, void deeds unilaterally made by Rodney, remove Rodney as co-trustee and prevent Rodney from receiving rent from the trust land. The district court entered an interim order for supervised administration, but denied the request to remove Rodney as co-trustee.

At trial, the district court held that Rodney breached his fiduciary duties as trustee and permanently suspended Rodney as co-trustee. The district court further ordered Steven to divide the trust property and authorized him to pay certain debts and expenses. The district court granted Steven's petition for approval of a final trustee's report and awarded trustee's fees in the amount of $1,750; attorney's fees in the amount of $402,916.50, with $208,000 withheld from Rodney's share; and other litigation fees and costs in the amount of $26,325.25. Lastly, the district court directed Steven to withhold $10,000 for continuing fees and expenses.

Rodney appealed again. In this second appeal, the Supreme Court held that the district court did not abuse its discretion in approving the trustee's final report. The Supreme Court further held that the trust had not terminated at Arline's death and that Rodney had breached his fiduciary duties. The Supreme Court also upheld the authorization for Steven to sell the land to offset against Rodney's share and upheld the award of attorneys' fees to Steven.

Upon remand from this second appeal, Steven filed a final report of distribution in June 2019. Rodney then filed a motion for surcharge of fiduciary and motion for attorneys' fees, arguing that he did not receive the correct amount from the trust. He argued that he should have received approximately $239,000 from the trust, the difference between the preliminary cash allocation of $447,960.13 and the $208,000 withheld from his portion of the trust assets. The district court denied the motion and terminated the trust. Rodney appealed both of these rulings.

Law:
The "law of the case" doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings. A party cannot on a second appeal relitigate issues that were resolved by the appellate court in the first appeal or that would have been resolved had they been properly presented in the first appeal.

The "mandate rule" requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms.

Holding:
On appeal, the Supreme Court of North Dakota affirmed the district court rulings, holding that the district court's increase in the amount permitted to be taken from the portion of assets devised to Rodney to account for the attorneys' fee award against him was a permissible clarification of judgment, and that the district court provided sufficient due process to Rodney in terminating the trust.

Rodney first argued that the Supreme Court's prior decision permitted only $208,000 to be taken from his share, and that the district court violated the mandate rule by not following the Supreme Court's prior decision. The Supreme Court noted that the previous appeal of a matter does not bar all corrections or clarifications. The district court's prior order stated that Steven

was awarded attorney's fees in the total amount of $401,916.50, with $208,000 of that amount withheld from Rodney's share. On appeal, the Supreme Court affirmed the district court's award of attorney's fees; it did not interpret the meaning of the district court's order. There was no remand or mandate directing the district court to construe this order in any particular way. Therefore, the district court did not violate the mandate rule in interpreting its own order.

Second, Rodney argued that the district court's prior order was binding and the order denying his motion impermissibly changed the meaning of the prior order, that the order denying his motion is a modification of the previous order permitting only $208,000 to be taken from his share. In *Matter of Hogen Trust B*, 2018 ND 117, 911 N.W.2d 205, the Supreme Court analyzed the appealability of the previous order and determined it was a final order for purposes of appeal. While an unambiguous judgment may not be modified, clarification is permissible in the event of an ambiguity.

The order at issue directed that $208,000 be withheld from Rodney's share for attorney's fees. However, the district court did not explicitly state how the remainder of the attorney's fees would be allocated between Rodney and Steven's shares. In the order denying Rodney's motion for surcharge of fiduciary and motion for attorney fees, the district court clarified that the remaining fees would be equally withheld from the remaining trust property. The district court was aware of what it intended when allocating the attorney fees and ordered Rodney to obtain a bond based on fees that may be allocated to him, other than the fees to be paid by his share of the trust assets. The Supreme Court held that this denial of Rodney's motion was a clarification, rather than a modification of a prior order and that the district court did not impermissibly change the meaning of its prior order.

Lastly, Rodney argued that the district court erred in terminating the trust without notice, which constituted a lack of due process. The order terminating the trust was issued in March 2017 and affirmed on appeal. The final report of distribution and proposed order to terminate the trust were filed June 6, 2019. In his motion filed June 12, 2019, Rodney made no arguments that the trust should not be terminated. On July 5, 2019, the district court issued an order terminating the trust. The Supreme Court held that Rodney had an opportunity to be heard on the issue and contest the termination, but instead argued only that he was entitled to additional funds from the trust. Therefore,

Rodney was not denied his due process rights when the district court terminated the trust.

Demircan v. Mikhaylov, 2020 WL 2550067 (Tex. May 20, 2020)

A Florida District Court of Appeals held that a lower court did not err in permitting the modification of a trust pursuant to common law upon agreement of the settlor and beneficiaries, and that the enactment of a statute permitting judicial modification only upon the finding of certain circumstances did not abrogate or control the common law.

Facts:
Igor Mikhaylov created the Igor Mikhaylov 2015 Irrevocable Trust in order to invest in a complex business venture involving the development of a shopping mall. The purpose of the trust was to fund the venture and to benefit his children. Genna Demircan was appointed as initial trustee and Anatoly Zinoviev was granted the power to remove the trustee or appoint additional trustees. After multiple disagreements, Igor halted all funding by the trust. Igor and the beneficiaries filed suit in the civil division to modify the trust by stripping Zinoviev of his powers and removing Demircan as trustee, naming both as defendants. Zinoviev and Demircan moved to dismiss the complaint, and Igor and the beneficiaries voluntarily dismissed the suit without prejudice. Demircan's motion for attorney's fees was denied.

Igor and the beneficiaries then refiled an identical suit in the probate division, but did not name Zinoviev as a defendant. Upon learning that Zinoviev had appointed Nelson Rincon as successor trustee, the petitioners filed an amended complaint naming Rincon as a defendant and seeking his removal. Demircan agreed to resign as trustee and sought to be dismissed from the suit.

At the hearing, Rincon argued that Zinoviev was an indispensable party who had not been joined, that the beneficiaries' consent was not sufficiently shown, and that the common law modification required consideration of factors other than consent, in accordance with Chapter 736 of the Florida Statutes.

The trial court allowed the modification of the trust, denied the removal of Demircan from the proceeding as moot, and denied Rincon's removal for lack for authority to order such. The trial court granted the motion to modify the trust pursuant to the common law rule expressed in *Preston v. City National Bank of Miami*, 294 So. 2d 11 (Fla. 3d DCA 1974).

Law:
As held in *Preston v. City National Bank of Miami*, the terms of a trust may be modified if the settlor and all beneficiaries consent. This common law modification is neither abrogated nor controlled by Section 736.04113 of the Florida Statutes, which allow judicial modification of trusts only upon certain evidentiary findings regarding, among other things, the impracticability or materiality of the trust's purpose.

Holding:
The District Court of Appeals held that the lower court did not err by failing to join Zinoviev as a party to the proceedings. An indispensable party is "one whose interest will be substantially and directly affected by the outcome of the case, where the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible." The indispensable parties to a trust action generally include the trustee, the settlor and the beneficiaries. In this case, it was not necessary that Zinoviev be joined to the proceedings, as a complete and efficient determination of the equities and rights between the other parties was possible in his absence.

Second, the District Court of Appeals held that the lower court did not err in allowing the modification of the trust pursuant to the common law as set forth in *Preston*. Rather, the court held that "a common law modification under *Preston* is neither abrogated, nor controlled by Section 736.04113's requisite findings. Judicial modifications at common law are different from, — and have so far survived, — judicial modifications under chapter 736." *Preston* allows the modification of a trust if the settlor and all beneficiaries consent, even if the purposes of the trust have not been accomplished.

The Florida Trust Code allows judicial modification of trusts, so long as the modification is not inconsistent with the settlor's intent, and upon required findings on the practicability, materiality and substantial impairment of the trust's purpose. However, the code recognizes that "the common law of trusts and principles of equity supplement [the code], except to the extent modified by this code or another law of this state." The appellate court emphasized that the section permitting judicial modification of the trusts specifically notes that "the provisions of this section are *in addition to, and not in derogation of, rights under the common law* to modify, amend, terminate, or revoke trusts" and that the sections regarding modification do not provide the exclusive means to do so.

The appellate court rejected Rincon's argument that the trust provisions included a waiver by Igor of his right to revoke or modify the trust, and therefore, *Preston* either does not apply or requires the trustee's consent, holding that such a waiver can have this effect only where the settlor waives the right expressly conditioning it on the trustee's assent. As the provisions of the trust do not include this condition, *Preston* is still applicable and the trustee has no reason in law or equity to oppose the modification.

Lastly, the appellate court agreed that the lower court had discretion to deny attorney's fees to Demircan as a former trustee, but held that it incorrectly denied attorney's fees and costs whose payment was mandated by the terms of the trust. The trust provided that the settlor intended to hold harmless and indemnify trustees from reasonable attorney's fees, expenses and costs incurred as a result of their services as trustee.

United States v. Argyris, 2020 WL 1957549 (U.S. Dist. Nev. April 22, 2020)

A spendthrift trust does not protect assets from a writ of garnishment when a federal court orders restitution in a criminal case.

Facts:
Joann Argyris and her son, Peter Argyris, co-owned a Las Vegas gas station until Peter set fire to the gas station to fraudulently collect insurance proceeds. Though Peter was the driving force behind the fraud, Joann knew or reasonably should have known that Peter's actions were fraudulent, but she deliberately avoided learning the extent of Peter's fraud. Ultimately, Joann pled guilty to one count of mail fraud.

The insurer had paid approximately $1.3 million to Joann and Peter following the fire and, after Peter's death, sought restitution from Joann for this amount. The U.S. District Court for the District of Nevada issued an order imposing restitution on Joann for the full amount and issued a corresponding writ of garnishment. When the government attempted to collect restitution from Joann, she filed a motion to vacate the district court's restitution order or, alternatively, to quash the writ of garnishment.

Joann requested that the court quash the writ of garnishment because her assets are contained in a spendthrift trust. She claimed that assets in a spendthrift trust fall outside the reach of a restitution order. In addition, Joann contended that the restitution order must be vacated because the court did not comply with the procedural requirements of 18 U.S.C § 3664 for issuing an amended judgment.

Law:
The Fair Debt Collections Practices Act (FDCPA), codified as 28 U.S.C § § 3001-3308, pre-empts all state laws that seek to protect funds from a valid federal restitution order. The FDCPA explains that state law cannot "curtail or limit the right of the United States … to collect any fine, penalty, assessment, *restitution*, or forfeiture arising in a criminal case." See 28 U.S.C. § 3003(b)—(b)(2) (emphasis added).

Holding:
The district court held that a spendthrift trust does not protect its assets from a valid federal restitution order arising in a criminal case and those assets are not exempt from a valid writ of garnishment. The court explained that while

spendthrift trusts protect their assets from some court orders, a criminal restitution order is not one of those. The district court also held that the restitution order was procedurally proper under 18 U.S.C § 3664. The court therefore denied Joann's motion entirely.

Ex Parte Huntingdon College, 2020 WL 1482371 (Alabama March 27, 2020)

The probate court had no jurisdiction to approve trustees' new funding plan because the Mobile Circuit Court approved a prior agreement governing the funding issue brought before the probate court and thus only the circuit court had jurisdiction over the action.

Facts:
The trustees and beneficiaries of the Bellingrath Morse Foundation Trust historically disagreed about the proper allocation of trust funds and entered into numerous agreements to resolve this longstanding dispute. The most recent agreement included a detailed funding plan for the trust that the Mobile Circuit Court approved in 2003.

When a new disagreement arose in 2017, the trustees filed an action in the Mobile probate court requesting approval of revisions to the funding plan in the 2003 agreement, which would allocate additional funds for the Bellingrath Gardens. Huntington College, a beneficiary of the trust, filed a motion to dismiss based on lack of jurisdiction, arguing that the current funding plan had been approved by the Mobile Circuit Court, so only the Mobile Circuit Court had jurisdiction to revise the agreement.

The probate court denied the beneficiary's motion to dismiss, concluding that it had jurisdiction over the trustees' action, and entered an order purporting to render a decision in favor of the trustees. The beneficiary then filed a petition for a writ of mandamus in the Alabama Supreme Court on the jurisdictional issue, asking the Supreme Court to direct the Mobile Probate Court to dismiss the action for lack of jurisdiction.

Law:
Concurrent jurisdiction for the Mobile probate and circuit courts under Alabama Code 1975 § 19-3B-203(b) applies only in proceedings involving a testamentary or *inter vivos* trust.

A party seeking to revise a circuit court judgment is required to file a motion for relief from that judgment pursuant to Rule 60(b) in the Alabama Rules of Civil Procedure.

Holding:
The Alabama Supreme Court held that the Mobile Probate Court had no jurisdiction to alter, amend or nullify the Mobile Circuit Court's final judgment

approving the 2003 agreement under which the parties were operating up until the time the trustees filed the proceeding in the probate court. The Supreme Court explained that the probate court did not have concurrent jurisdiction with the circuit court under Alabama Code 1975 § 19-3B-203(b); that code provision did not give the probate court authority to amend or raise a prior circuit court order or judgment. Therefore, the Alabama Supreme Court issued a writ of mandamus directing the Mobile Probate Court to dismiss the trustees' action because it lacked jurisdiction.

Furthermore, the Alabama Supreme Court found that there could "be no rational dispute that the trustees' ultimate goal in filing their petition was to attack" the 2003 agreement and "the final judgment of the Mobile Circuit Court" approving the 2003 agreement "in an attempt to substantially alter the agreed-upon and accepted limitation of funds available for the Gardens." The decision noted that the 2003 agreement provided that "the Foundation shall not increase [] payments for the support of the Gardens … at any time in the future without the unanimous consent of the Beneficiaries," and the trustees' action sought court approval to increase funds for the Gardens, in direct contradiction of the terms of the agreement. The Alabama Supreme Court held that the trustees' action was a collateral attack on the Mobile Circuit Court's judgment approving the agreement. Because the trustees sought to revise the circuit court's judgment approving the terms of the 2003 agreement, they were required to file a motion for relief from that judgment with the circuit court pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure.

In re Estate of Little, 2019 Tex. App. LEXIS 7355, 2019 WL 3928755

A settlor who had the power to revoke the trust and was the sole beneficiary of the trust while alive was free to fund the trust and dispose of its property as the settlor saw fit.

Facts:
John Little was the father of three children: Mary Ann, Jay and Dan. The Little family owned a ranch and related livestock and equipment. The father owned a 100 percent interest in the livestock and equipment. The father, Mary Ann, Jay and Dan each owned a 25 percent interest in the ranch. The father created a revocable trust with himself and Dan as co-trustees and Mary Ann, Jay and Dan as residuary beneficiaries.

In 2000, the father created two survivorship bank accounts with Dan, naming Dan as both accounts' sole surviving party owner. In 2006, the father sold his 25 percent interest in the ranch to Mary Ann, Jay and Dan in exchange for a promissory note secured by each child's interest in the real estate. There was no evidence that the father transferred the notes to the trust. The Little family sold the ranch and the accompanying livestock and equipment in 2014. The father deposited all sale proceeds attributed to his interests into the survivorship account with Dan as surviving owner.

The father died in 2015. Mary Ann and Jay subsequently sued Dan for breach of fiduciary duty for allowing the sale proceeds to be deposited into the survivorship account. They argued that Dan, as co-trustee of the trust, had a fiduciary duty to prevent such a transfer. Dan moved for summary judgment arguing that (1) Mary Ann and Jay had no standing to assert their claims against him, and (2) there is no evidence that Dan breached a fiduciary duty in connection with the deposits to the survivorship account. The trial court granted Dan's summary judgment motion. Mary Ann and Jay appealed.

Law:
"Any interested person may bring an action under Tex. Prop. § 115.001." See Tex. Prop. Code §115.011(a). An "interested person" is defined as "a trustee, beneficiary, or any person having an interest in or claim against the trust or any person who is affected by the administration of the trust." See Tex. Prop. Code § 111.004(7). A "beneficiary" is "a person for whose benefit property is held in trust, regardless of the nature of the interest." *Id*. at 111.004(2). An

“interest” is “any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible.” *Id*. §111.004(6).

Furthermore: “The duties of a trustee of a revocable trust are owed exclusively to the settlor .... [T]he rights of non-settlor beneficiaries are generally subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor’s lifetime.” See *Mayfield v. Peek*, 546 S.W.3d 252, 262 (Tex. App. 2017, no pet).

Holding:

Dan argued that Mary Ann and Jay, as contingent beneficiaries of the trust, had no standing to challenge what their father chose to do with his money during his lifetime. Mary Ann and Jay responded that they were not complaining about their father’s action; instead, their complaint concerned Dan’s conduct as co-trustee and his alleged misappropriation of trust property. On this point, the Court of Appeals agreed with Mary Ann and Jay. The Court of Appeals found that, as trust beneficiaries, Mary Ann and Jay are interested persons, and thus had standing to assert their claims against Dan as co-trustee when these challenged transactions occurred.

Next, the Court of Appeals turned to the claim of breach of fiduciary duty. Jay and Mary Ann argued that Dan wrongfully retained trust funds and commingled trust funds with his own funds. The Court of Appeals found that there was no evidence that the ranch notes or the livestock and equipment proceeds were required to be placed in the trust. The Court of Appeals added that the sale proceeds and the survivorship account funds were not trust property. Furthermore, the Court of Appeals explained that the father had authority to remove assets from the trust and held that the “Trust was a revocable Trust and Father, as settlor and co-trustee, had the power to revoke the Trust and was the sole beneficiary of the Trust while alive. Father was free to fund the Trust and dispose of its property as he saw fit.” Finally, the Court of Appeals held that Dan, as co-trustee of the trust, owed a fiduciary duty only to his father while his father was alive. Accordingly, the Court of Appeals affirmed the summary judgment for Dan.

Roth v. Jelley, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (1st Dist. 2020)

Under California law, contingent remainder beneficiaries are entitled to notice in actions that eliminate their interest, even if such an interest is subject to divestment.

Facts:
McKie Roth Sr. created a trust in his will for the benefit of his wife, Yvonne, during her life. The trust granted Yvonne a testamentary power of appointment over the remainder. The will provided that if Yvonne did not exercise the power of appointment, McKie's three adult children from his prior marriage and Yvonne's adult son from a prior marriage would each receive a share of the remaining trust assets. The will further stated that if any of the adult children did not survive Yvonne, the descendants of a predeceased child would receive that deceased child's share, *per stirpes*.

McKie died in 1988. After McKie's death, his three adult children sued the estate in an unrelated matter. As part of a settlement agreement, McKie's three adult children disclaimed their interest as remainder beneficiaries if Yvonne did not exercise the power of appointment. In 1991, the probate court issued a final order, which followed the terms of the settlement agreement, that changed the default distribution such that Yvonne's son would take the assets in the event Yvonne did not exercise the power of appointment granted in the will.

McKie died, and then Yvonne died without exercising her power of appointment. McKie's son, Mark McKie Jr., then petitioned the probate court, arguing that the 1991 order and settlement agreement were void due to lack of notice and thus did not remove him as a beneficiary of the trust. The probate court denied Mark's petition. Mark appealed.

Law:
In California, the definition of beneficiary includes a person who has any present or future interest, vested or contingent. See Cal. Prob. Code § 24.

The Supreme Court has stated that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Court of Appeals also cited a later Supreme Court ruling in *Mennonite Bd. of*

Missions v. Adams, 462 U.S. 791 (1983), which held that “notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party … if that party’s name and address are reasonable ascertainable.” See 462 U.S. at p. 800, 103 S.Ct. 2706.

Holding:
The Court of Appeals of California reversed the probate court’s decision and remanded for further proceedings. First, the Court of Appeals recognized that Mark had a cognizable property interest, not a mere expectancy, despite the fact that his interest was contingent and subject to divestment by Yvonne. Second, the settlement agreement, which disclaimed Mark’s father’s remainder interest in the trust, adversely affected Mark’s property interest. Thus, Mark is entitled to notice of this action because he was not a party to the agreement and did not consent to it.

Finally, the trustee argued that even if Mark did have a property interest, *Mullane* does not require actual notice “given the remoteness of his interest.” The Court of Appeals disagreed, asserting it believed that Mark was entitled to mailed notice, but there “can be no doubt he was entitled to some form of notice, and he was given none.” The trustee further argued that California probate requirements for notice were met, but the Court of Appeals explained that state statutory requirements do not automatically satisfy federal due process requirements. Because the 1991 order adversely affected Mark’s property interest, he was entitled to notice by mail and an opportunity to be heard because his name and address were reasonably ascertainable.

Ron v. Ron, 2020 WL 1426392 (S.D. Tex. Feb. 4, 2020)

Under Texas law, a trust protector did not owe fiduciary duties to the grantor of the trust.

Facts:
Suzanne Ron and Avishai Ron were married in 1994. In 2012, Suzanne created an irrevocable trust with Avishai as trustee and Gary Stein as trust protector. Suzanne named her three children as the lifetime beneficiaries of the trust.

The trust agreement provided that the trust protector's purpose is "to direct the trustee in certain matters concerning the trust, and to assist, if needed, in achieving [Suzanne's] objectives expressed by other provisions of [Suzanne's] estate plan hereunder." The trust agreement also permitted the trust protector to add Avishai, among others, as a beneficiary of the trust. The trust agreement stated that the trust protector's authority was conferred "in a fiduciary capacity."

Suzanne filed for divorce in 2014, and the divorce was finalized in 2017. Following the Rons' divorce, Gary, as trust protector, added Avishai as an additional beneficiary of the trust.

Suzanne sued Avishai, alleging that he had improperly transferred large sums of the couple's community property to the trust. She also sued Gary, alleging that he had assisted Avishai in making those transfers. In addition to claims for conversion and fraudulent transfer, which did not involve Gary's alleged fiduciary duties as trust protector, Suzanne alleged that Gary had breached his fiduciary duty to her as trust protector.

Gary filed a motion to dismiss Suzanne's claims for failure to state a claim. The motion was assigned to a magistrate judge to consider and then to submit his report and recommendation on the motion to the district judge.

Law:
Texas law recognizes two types of fiduciary relationships: formal fiduciary relationships and informal fiduciary relationships. A formal fiduciary relationship is expressly created by law or the terms of an agreement, such as an attorney's fiduciary duties to a client. By contrast, an informal fiduciary relationship arises from a special relationship of trust and confidence. The special relationship must exist prior to and apart from the transaction in question.

Holding:
The magistrate judge concluded that Gary, as trust protector, was a fiduciary. However, the magistrate judge held that under the trust agreement and the Texas statute governing trust protectors, Gary's fiduciary duties were owed to the trustee and not to Suzanne.

With respect to Gary's fiduciary duties created under the trust agreement, the magistrate judge noted that the trust agreement states that only a beneficiary or interested party could compel the trust protector to take an action. Because the trust agreement stated that Suzanne had no interest or incidence of ownership in the trust, Suzanne could not compel the trust protector to take an action.

Furthermore, as for Gary's fiduciary duties under Texas law, the magistrate judge found that the Texas statute only created a fiduciary relationship between the trust protector and the trustee, and not one between the trust protector and the grantor.

The magistrate judge also concluded that Suzanne failed to demonstrate an informal fiduciary relationship between herself and Gary. In her complaint, the only evidence of a "special relationship" between Suzanne and Gary was her appointment of Gary as trust protector. Suzanne did not allege any facts that would suggest that a special relationship of trust and confidence existed prior to and apart from the creation of the trust. Therefore, the magistrate judge concluded that Suzanne's complaint could not establish an informal fiduciary relationship between herself and Gary. Accordingly, the magistrate judge recommended that the claim of breach of fiduciary duty be dismissed.

Hunter v. Hunter, 838 S.E.2d 721 (Va. 2020)

A trust beneficiary may condition his request for relief on the court's determination that the request would not trigger the trust agreement's no-contest clause, and the beneficiary's request to construe a purported waiver of the trustee's duty to provide trust financial information does not trigger the no-contest clause.

Facts:

Theresa Hunter created a revocable living trust in 2011. Under the trust agreement, upon Theresa's death, the remaining trust assets were to be distributed in equal shares among Theresa's two children, Chip and Eleanor, and Theresa's granddaughter.

The trust agreement also contained a "no-contest" clause. Under the no-contest clause, if a person contested a provision of the trust agreement, he would automatically forfeit his interest in the trust. The trust agreement defined an action to "contest" a provision of the trust as "any action to invalidate, nullify, set aside, render unenforceable, or otherwise avoid the effect of such instrument, action or transaction."

Theresa died in 2015, and Eleanor became sole trustee of the trust. After Theresa's death, Chip received an account statement for the trust that allegedly showed the trust assets had declined from $4.25 million to $1.77 million over an approximately six-year period. After receiving the account statement, Chip requested additional information from Eleanor, including a report of the trust's receipts and disbursements during that time. According to Chip, Eleanor refused to provide this information, citing a provision in the trust agreement that "waive[d] the Trustee's formal requirements to inform and report under Section 55.548.13 of the Code of Virginia." (This statute has been recodified, without substantive changes, as Section 64.2-775 of the Code of Virginia.)

Chip filed a lawsuit in the Circuit Court for Williamsburg-James City County, Virginia. Ultimately, Chip's lawsuit asked the court to confirm that the trust agreement did not waive Eleanor's duty to provide him financial information about the trust.

However, to avoid the trust agreement's no-contest clause, Chip divided his complaint into two "counts," In Count II, Chip asked the court to answer the question ultimately at issue: whether the trust agreement waived Eleanor's duty to provide the requested financial information. But, in Count I, Chip

asked the court first to determine whether addressing Count II would trigger the no-contest clause. If the court determined addressing Count II ***would*** trigger the no-contest, then Chip asked the court not to rule on Count II.

Eleanor filed a counterclaim alleging that Chip's complaint triggered the no-contest clause and that Chip therefore had forfeited his interest in the trust.

The Williamsburg-James City County Circuit Court agreed with Eleanor and held that Chip's complaint had triggered the trust agreement's no-contest clause. Accordingly, it ruled that Chip had forfeited his entire interest in the trust.

Chip appealed to the Supreme Court of Virginia.

Law:
Virginia law recognizes no-contest clauses, though courts will strictly construe those clauses.

In asking the court for relief, a plaintiff is deemed the "master of the complaint." The plaintiff may plead "in the alternative" and specify the conditions under which he seeks relief.

Holding:
The Supreme Court of Virginia reversed the trial court's decision. First, the Supreme Court held that Chip could plead "in the alternative." That is, Chip could ask the trial court to rule on the question in Count II — whether the trust agreement in fact waived Eleanor's duty to provide financial information — if, and only if, it determined that the request would not trigger the trust agreement's no-contest clause. Because the trial court concluded that Chip's complaint triggered the no-contest clause, it should not have reached Count II at all. Instead, the trial court's analysis should have ended with the resolution of Count I.

The court further held that Chip's complaint did ***not*** trigger the no-contest clause. The no-contest clause sought to prevent actions to ***contest*** the trust agreement. But, the no-contest clause did not (and perhaps could not) prevent an action to ***construe*** the trust agreement. Chip was seeking to determine the meaning of the trust agreement, not to challenge its terms. Therefore, Chip's lawsuit was an action for construction, and it did not trigger the no-contest clause.

Notably, the Supreme Court did not rule on whether the Virginia law would allow the trust agreement to prohibit a suit to construe the terms of a trust agreement. The Supreme Court appeared to suggest, though, that it would take a skeptical view of such efforts to "seal the courthouse doors."

Berry v. Berry, 2020 Tex. App. LEXIS 1884, 2020 WL 1060576 (March 5, 2020)

Under Texas law, a co-trustee of a trust that owns an interest in a limited partnership cannot sue third parties through a derivative claim brought on behalf of the partnership.

Facts:
Marvin L. Berry and Laura Berry, the parents of four sons, including one named Kenneth, acquired a ranch in 1960. Laura and Marvin created the Flying Bull Ranch Limited Partnership ("the Ranch") and assigned a 2 percent general partner ownership interest to FB Ranch, a separate limited liability company. Marvin and Laura divided the limited partnership interests in the Ranch between themselves. Marvin also started Berry Contracting, which became a successful business.

Marvin died in 1997, at which time his revocable trust became a limited partner of the Ranch. In years 2000 through 2005, Berry Contracting made lease payments annually for the Ranch as shown in the Ranch ledgers.

Kenneth, as a co-trustee of the trust, on multiple occasions in 2006 requested documents, information and other records relating to the Ranch from Laura, as the general partner of FB Ranch, as his co-trustee, and from Berry Contracting and other family entities.

In 2007, Berry Contracting signed a written lease with the Ranch for exclusive use of the Ranch for the period from Jan. 1, 2000, until Dec. 31, 2024. FB Ranch, as general partner of the Ranch, and Berry Contracting signed the lease. The lease was recorded in public land records in 2007, reflecting the lease term.

In 2011 and again in 2014, Kenneth requested records, including copies of the lease and other records relating to the trust, from the Ranch.

In 2016, Kenneth and his daughter Chelsea filed suit, in part, seeking an accounting and copies of the trust and Ranch partnership documents. Kenneth and Chelsea sued Kenneth's brothers and various family entities over the Ranch, which was owned by FB Ranch as the general partner and by the trust as the limited partner. Kenneth and Chelsea alleged, in part: (1) breach of fiduciary duty as to his brothers and co-trustees, and (2) breach of the partnership agreement by the general partner and the family entities.

Kenneth brought these claims in his individual capacity as a co-trustee and derivatively on behalf of the Ranch. Chelsea brought her claims in her individual capacity as an unnamed contingent beneficiary of the trust. They claimed that Kenneth's co-trustees and FB Ranch breached their fiduciary duties by: (1) entering into the 2007 written lease with Berry Contracting in violation of the partnership agreement between FB Ranch and the Ranch; (2) entering into the lease for less than adequate consideration, in violation of the partnership agreement; (3) concealing the terms of the lease from Kenneth and Chelsea; and (iv) diverting lease payments from the limited partnership to another family entity.

In 2016, all parties and family entities entered into a consent and release agreement in which Laura acknowledged she had inadvertently deposited the lease payments into the wrong account. As part of the agreement, Laura transferred the incorrectly deposited lease payments into the correct account of the Ranch. The parties also modified the lease between Berry Contracting and the Ranch to conform to the partnership agreement. All beneficiaries, except Kenneth and Chelsea, released Laura, the trust, the Ranch and other family entities from all labilities for their actions. Kenneth and Chelsea continued to pursue their lawsuit.

The defendants challenged Kenneth and Chelsea's standing to bring suit. The trial court agreed that Chelsea lacked standing as a contingent beneficiary of the trust and that Kenneth lacked standing to bring a derivative claim on behalf of the limited partnership against the parties. The defendants also filed a motion for summary judgment alleging that Kenneth's suit was barred by the relevant statute of limitations due to the recording of the lease in the applicable land records. The trial court granted the defendants' summary judgment motion. Kenneth and Chelsea appealed.

Law:
Under § 115.011 of the Texas Code, contingent beneficiaries named as a class are not necessary parties to an action.

As a general rule, limited partners do not have the right to sue on behalf of a limited partnership. See Tex. Bus. Org. Coe Ann. §§ 153.402, 153.403.

An instrument that is properly recorded in the proper county is "notice to all persons of the existence of the instrument." See Tex. Prop. Code Ann. § 13.002(1).

Holding:
The Court of Appeals, in agreement with the trial court, found that Chelsea, as an unnamed contingent beneficiary, lacked standing under the Texas Trust Code to assert a claim against the trust.

Next, the Court of Appeals held that Kenneth, as a co-trustee, had standing to sue his co-trustees but did not have standing to bring a derivative action on behalf of the Ranch, which was based on the trust's status as a limited partner in the Ranch. As a general rule, limited partners do not have the right to sue on behalf of a limited partnership and no permissible exception to this rule existed in this case. Moreover, the other limited partners of the Ranch had released these claims against these third parties by a majority action, an action that also precluded Kenneth's derivative claims. Accordingly, the Court of Appeals agreed with the trial court's ruling that Kenneth did not have standing as a co-trustee to sue third parties through a derivative action on behalf of the Ranch and, furthermore, the prior release rendered his claims moot.

Finally, the Court of Appeals rejected the trials court's ruling that the filing of the lease in public records was sufficient to begin the statute of limitations period on Kenneth's claim for breach of fiduciary duty. Citing to a long history of Texas court rulings and an intervening decision of the Texas Supreme Court, the Court of Appeals held that the filing of the lease in public records did not furnish constructive knowledge to Kenneth. The Court of Appeals reasoned that filing a lease in the public records does not give an owner of the property constructive notice of subsequent impairments to title. Thus, the Court of Appeals remanded the case for further consideration on the statute-of-limitations issue.

Miller v. Bruenger, 949 F.3d 986 (6th Cir. 2020)

The 6th U.S. Circuit Court of Appeals held that the Federal Employee's Group Life Insurance Act does not give rise to federal-question subject-matter jurisdiction.

Facts:
Coleman Miller was a civilian federal service employee working at Tinker Air Force Base in Oklahoma. As a federal employee, Coleman participated in a group life insurance program created under the Federal Employees' Group Life Insurance Act (FEGLIA). The U.S. Office of Personnel Management (OPM) is responsible for managing FEGLIA.

In 2011, Coleman and Donna Bruenger divorced. Pursuant to their property settlement agreement, Donna was to remain the beneficiary of Coleman's FEGLIA life insurance policy. The property settlement agreement (PSA) was included in a court order, as required by FEGLIA. However, the court order was not sent to OPM or Coleman's employer prior to Coleman's death, as required under FEGLIA. Furthermore, Coleman failed to designate a beneficiary.

Upon Coleman's death, his only child, Courtenay Miller, was paid the insurance death benefit in accordance with FEGLIA's statutory order of precedence for death benefits where the insured failed to designate a beneficiary.

Donna then demanded the death benefit and made a claim in Oklahoma Probate Court. However, for reasons not made clear in the opinion, the claim made in probate court was dismissed by agreement of the parties. Courtenay, anticipating Donna's state court claim, then filed an action for declaratory relief in the U.S. District Court for the Western District of Kentucky, seeking a declaration that she is the rightful owner of the death benefit.

The district court refused to consider Courtenay's suit, finding it lacked subject-matter jurisdiction to hear the declaratory judgment action and, therefore, dismissed the suit.

Courtenay appealed.

Law:
Federal courts are courts of limited jurisdiction, meaning they can only hear cases that are authorized by the U.S. Constitution or by federal statute. This is referred to as federal subject-matter jurisdiction.

There are two bases for invoking federal subject-matter jurisdiction: (1) diversity jurisdiction, where the parties are citizens of different states and the amount in controversy exceeds $75,000, under 28 U.S.C. § 1332; and (2) federal-question jurisdiction, where the case presents a question of federal law, 28 U.S.C. § 1331.

A claim arises under federal law, for purposes of federal-question jurisdiction, when the cause of action is (1) created by a federal statute, or (2) presents a substantial question of federal law. Under the well-pleaded complaint rule, a defendant may not remove a state-law action to federal court on the basis of federal-question jurisdiction unless the complaint establishes that the causes of action arise under federal law. However, there is an exception to this rule, namely, complete pre-emption.

Complete pre-emption provides a basis for federal-question jurisdiction over certain state-law claims when a federal statute is so broad that it wholly displaces any state-law claims relating to the same subject matter. It exists in rare circumstances where Congress legislates an entire field of law, and there is a strong presumption against complete pre-emption.

Holding:
The 6th U.S. Circuit Court of Appeals held that the district court lacked federal subject-matter jurisdiction over the action and upheld the district court's dismissal.

First, there is no diversity jurisdiction, as Donna and Courtenay are both residents of Kentucky.

Second, there is no federal-question jurisdiction. Specifically, the 6th Circuit found that FEGLIA does not contain an express or implied cause of action for one private party to sue another private party over death benefits governed by FEGLIA. Rather, only suits against the federal government are expressly authorized. Additionally, the 6th Circuit found that the cause of action did not present a substantial question of federal law. Rather, the 6th Circuit viewed the action as one truly about enforcing Donna and Coleman's property settlement agreement — clearly a question of state law. FEGLIA merely

provided Courtenay with a defense to Donna’s claim, and “defenses invoking federal law do not transform a state-law claim into a federal case.”

Finally, the 6th Circuit found that FEGLIA does not completely pre-empt state law. Although, FEGLIA expressly pre-empts inconsistent state law, the 6th Circuit reasoned that the express pre-emption provision evidences Congress’ intent that FEGLIA’s pre-emption be limited, as opposed to complete.

Gowdy v. Cook, 455 P.3d 1201 (Wyo. 2020)

The Wyoming Supreme Court held that a trust beneficiary's attempt to modify the terms of a trust agreement triggered the no-contest provision and the beneficiary thereby forfeited his interest in the trust.

Facts:
In 1996, Marian L. Jackson retained Dennis C. Cook, a partner of the law firm of Cook & Associates P.C., to provide estate planning until her death in 2015. Dennis drafted numerous estate planning documents, including a revocable trust agreement, an amended and restated revocable trust agreement, and several amendments to the revocable trust agreement (as amended, the "Trust Agreement").

Marian was the trustee and the primary beneficiary during her life under the Trust Agreement. Upon her death, the trust assets were to be retained in further trust for the primary benefit of Marian's longtime domestic partner, Gerald E. Gowdy, during Gerald's life. Gerald was granted a power of appointment over a portion of the trust assets at his death. Additionally, at Gerald's death, a portion of the trust assets passed to Marian's descendants.

Marian served as the trustee during her life, and upon her death, Marian appointed Dennis as her successor trustee and Craig C. Cook, Dennis' brother and law partner, as her trust protector (collectively, the "Cooks"). In addition, under the terms of the Trust Agreement, Cook & Associates P.C., or its successor, was given the power to remove any trust protector without cause, and to appoint a successor trust protector. The Trust Agreement further provided that the trust protector or a majority of the income beneficiaries could remove a serving trustee and appoint a successor trustee. A successor trustee could be an individual or a corporate fiduciary, provided that any corporate trustee met the qualifications set forth in the Trust Agreement. Specifically, it said a corporate trustee must:

1. not be related or subordinate to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code, and
2. have assets or insurance coverage of at least $100 million.

The Trust Agreement also included a no-contest clause whereby any trust beneficiaries were to be treated as if they predeceased Marian and thereby forfeit any interest they had under the Trust Agreement if they sought to void, nullify or set aside the Trust Agreement or any of its provisions.

During Marian's life, Dennis also prepared durable powers of attorney for healthcare and living wills for Marian and Gerald, in which they named each other as their agents. On other occasions, Dennis prepared deeds for Marian and Gerald for their jointly owned property.

At Marian's death, the trust became irrevocable and Dennis began serving as trustee and Craig began serving as trust protector. Additionally, Dennis prepared estate planning documents for Gerald. Several months later, Gerald complained that the trust was being mismanaged and asked Dennis to resign as trustee. In the alternative, he asked Craig, as trust protector, to remove Dennis and replace him with another trustee. Gerald also claimed that the Cooks had conflicts of interest regarding their management of the trust and Dennis's representation of him. Craig resigned as trust protector and appointed another estate planning colleague, William Winter, in his place. Dennis refused to resign as trustee.

A year later, Gerald filed a complaint in the District Court of Wyoming, Second Judicial District, Albany County. His stated causes of action were malpractice, breach of fiduciary duties, breach of the duty of good faith and fair dealing, and negligence relating to Dennis' drafting of Marian's Trust Agreement, Gerald's various estate planning documents and the Cooks' administration of the trust. Gerald sought various forms of relief, including a request that the district court enter a self-modified trust, which was attached to the complaint, to "repair issues" due to Dennis' drafting errors. The self-modified trust removed the requirement that the corporate trustee have assets or insurance coverage of at least $100 million.

The Cooks filed an answer, and Dennis, as trustee, counterclaimed for a declaratory judgment ruling. Dennis requested that the district court declare that Gerald, under the no-contest provision, had forfeited his rights as a trust beneficiary by requesting the district court to approve and enter a decanted trust removing the requirement that a corporate trustee have assets or insurance coverage of at least $100 million.

The Cooks then filed a motion for summary judgment in their favor on all claims. Gerald also filed a motion for summary judgment in his favor on all claims. Following a hearing, the district court granted summary judgment in favor of the Cooks and denied Gerald's motion for summary judgment on all counts. In particular, the district court ruled that Gerald had forfeited his rights as a trust beneficiary under the no-contest provision when he attempted to

remove the corporate trustee qualification requirements from the Trust Agreement.

Gerald appealed, arguing that the no-contest clause should be applied only to challenges to distributions under the trust.

Law:
No-contest or *in terrorem* clauses are valid in Wyoming. See, e.g., *EGW v. First Federal Savings Bank of Sheridan*, 413 P.3d 106, 110 (Wyo. 2018); and *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983). Additionally, the intent of the settlor regarding contests to the trust is controlling. See *EWG*, 413 P.3d at 111. Furthermore, "A party's subjective intent ... is not relevant or admissible in contract interpretation; rather, we use an objective approach to contract interpretation." See *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 239 P. 3d 1077, 1084 (Wyo. 2010). Moreover, a trust instrument is construed as a whole, and a construction which renders a provision meaningless should be avoided. See *Shriners Hospitals for Children v. First Northern Bank of Wyoming*, 373 P.3d 392, 405-06 (Wyo. 2016); and *Wells Fargo Bank Wyoming, N.A. v. Hodder*, 144 P.3d 401, 409 (Wyo. 1973). Finally, a trust agreement is governed by the plain language contained in the four corners of the document. See *EWG*, 413 P.3d at 115.

Holding:
The Supreme Court of Wyoming affirmed the trial court's order granting summary judgment in favor of the Cooks and denying Gerald's motion for summary judgment on all counts.

With regard to the no-contest provision, the Supreme Court upheld the district court's declaratory judgment finding that Gerald forfeited his interest under the Trust Agreement by filing his complaint. First, the Supreme Court rejected Gerald's argument that he was merely attempting to repair issues due to Dennis' drafting errors. Rather, the Supreme Court saw Gerald's attempt to remove certain corporate trustee qualifications as an attempt to nullify a provision of the Trust Agreement, thereby triggering the no-contest clause.

Second, the Supreme Court rejected Gerald's argument that the no-contest provision be applied only to challenges to distributions because that was Marian's intent as evidenced by testimony given during the summary judgment hearing. Rather, the Supreme Court said Marian's objective intent is evidenced by the plain language of the Trust Agreement which, when read as a whole, unambiguously states that a beneficiary would forfeit his interest if

he attempted to void, nullify and/or set aside any provision of the Trust Agreement. Accordingly, the Supreme Court upheld the district court's holding that Gerald's attempt to nullify the corporate trustee requirement provisions triggered the no-contest provision.

In re Thomson, No. 1075 EDA 2019, 2020 WL 3440529 (Penn. Sup. Ct. June 23, 2020)

Pennsylvania Superior Court analyzed the discretionary distribution standard where the terms of the trust required the beneficiary, prior to being eligible to receive any trust distributions, to demonstrate to the trustee that the beneficiary remains sober and capable of holding employment and making responsible financial decisions.

Facts:

Settlor Eleanor R. Thomson created a trust for the benefit of her son, Gary Wayne Thomson. Eleanor's other son and Gary's brother, James Thomson-Caliendo, served as trustee of the trust. More specifically, Eleanor's will divided her estate equally among her five children, with Gary's share to be placed in the trust, which contained this distribution standard:

> If my son GARY WAYNE THOMSON survives me, I direct that the share of my estate distributable to him shall be retained by my Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect the income, and after paying all expenses incident to the management of the Trust, to use and apply as much of the net income and principal as may be necessary, in the sole and absolute discretion of my Trustee, for GARY's maintenance, support, and well-being, provided that GARY has proven to the satisfaction of my Trustee, in my Trustee's sole and absolute discretion, that GARY is and remains alcohol and drug free, capable of holding employment, and capable of making responsible financial decisions.

Gary's two sons were the remainder beneficiaries of the trust.

In May, 2018, Gary petitioned the orphans' court to terminate the trust or to remove James as trustee and make certain distributions from the trust. During an evidentiary hearing before the orphans' court, the testimony revealed that Gary lived in a run-down travel trailer, owed $10,000 in rent, owed the IRS over $17,000 in back taxes and interest (which resulted in a tax lien), owned a pickup truck that needed significant maintenance, and was considered disabled by the Social Security Administration after sustaining a shoulder injury. Gary had also previously abused drugs and alcohol (which his mother, Eleanor, knew), although Gary had apparently been sober since approximately 2017. Gary and James were estranged and had not spoken since their father's funeral in 2002.

Gary first requested trust distributions in February 2016. James made the first three trust distributions totaling $6,200 between April and June 2018, but only after Gary had submitted results from recent drug tests.

Following the evidentiary hearing, the orphans' court: (1) directed James to make certain distributions totaling $40,000 to Gary and ongoing monthly payments of $5,000 to Gary upon submission of quarterly proof that Gary remained sober; (2) ruled that Gary was entitled to select his own health insurance plan; (3) required that James not deny Gary sufficient and adequate housing; (4) found that drug and alcohol testing of Gary was reasonable but that James had not made distributions to Gary to enable him to complete the testing; (5) found that the obligation that Gary be capable of employment was no longer an applicable requirement under the terms of the trust in light of the SSA's determination that Gary was disabled; and (6) held that the requirement that Gary be "capable of making responsible financial decisions" was too vague and therefore unenforceable.

Although the orphans' court further found that James had "seriously breached his duties as trustee, had not acted in good faith, and that the purpose of the [T]rust was not being fulfilled," the orphans' court declined to remove James as trustee because there was no evidence that the designated successor or any other party was willing to serve as trustee of the trust and further refused to terminate the trust. *Id*. at *2-3.

James appealed the orphans' court order and questioned whether it: (1) improperly disregarded the terms of the trust requiring that Gary had to satisfy James concerning his sobriety, employment and financial situations prior to receiving any trust distribution; (2) misinterpreted the settlor's intent by forbidding James from considering Gary's government benefits in making distributions that may disqualify Gary from those same benefits; (3) disregarded trust language that required James to balance the interests of Gary as the lifetime beneficiary and those of the remainder beneficiaries; (4) wrongly ordered that Gary be allowed to select his own health insurance plan; (5) wrongly held that James as trustee could not deny Gary adequate housing; (6) wrongly ordered James to issue a check for the amount acceptable to the IRS to satisfy its tax lien; (7) ordered distributions that allowed Gary to determine the distribution amounts; and (8) improperly directed payment of Gary's attorney's fees from the trust without legal authority and evidence.

Law:

Issue 1. With respect to the first issue, the Superior Court found that "the [O]rphans' [C]our[t] improperly restricted the trustee's oversight of Gary's compliance with the trust requirements." *Id*. at *4. The Superior Court held that the plain language of Eleanor's will creating the trust gave James as trustee the "sole and absolute discretion" to make the determinations as to Gary's sobriety and whether he is capable of holding employment and making responsible financial decisions. Although the Superior Court agreed that the record demonstrated James "showed a persistent unwillingness and inability to administer the trust in the interest of the beneficiary of the trust," among other things, the Superior Court found that James had not been deficient as to his duties with respect to the three distribution conditions as provided for in Eleanor's will. *Id*. at *5-6. Thus, it found that ordering monthly payments of $5,000 going forward was improper as they did not allow James to exercise his discretion and assumed Gary would remain in compliance with the three trust requirements.

Issue 2. As to whether the orphans' court erred in ruling that James could not consider Gary's receipt of government benefits or other sources of income in deciding distribution amounts, the Superior Court found that the general Pennsylvania rule is that in the "absence of evidence of a contrary intent, an ambiguous trust provision should ordinarily be viewed as authorizing the invasion of trust principal even where the beneficiary has access to substantial income from other sources." The Superior Court recognized that this rule is not rigid and that its main purpose is to effectuate the testator's/settlor's intent. *Id*. at *6. Notwithstanding the sole and absolute discretion afforded James, the Superior Court noted that Gary's other sources of income (government distributions and food stamps) are only available given Gary's lack of other funding and that he has not been able to enjoy a comfortable standard of living as provided for under the terms of the trust through the "well-being" language in the distribution standard. In other words, while the trust terms prevented distributions if Gary could not demonstrate his sobriety, the terms did not allow James "… to limit distributions to Gary for his maintenance, support and well-being once he had reformed his unhealthy habits."

Issue 3. The Superior Court rejected James' argument as to the remainder beneficiaries and found that the duty of impartiality to successive beneficiaries is inapplicable to wholly discretionary trusts, such as this trust. The Superior Court noted that the distribution standard was broad and did not contain a

requirement to reserve any principal or income for the remainder beneficiaries.

Issue 4. The Superior Court also upheld the orphans' court's order allowing Gary to select his own health insurance plan, as the terms of the trust did not provide James the authority to make healthcare decisions on behalf of Gary. However, the Superior Court did agree that the trust terms also did not require the trustee to fully cover the total amount Gary requested for health insurance if the amount was unreasonable.

Issue 5. The Superior Court similarly held that the orphans' court's order that James not deny Gary adequate housing was not an abuse of discretion, while simultaneously finding that that provision did not automatically determine that a distribution of approximately $169,000 for a house, as Gary had requested, was necessary.

Issue 6. As to the effect of the unpaid taxes and tax lien, the Superior Court determined that Gary's failure to pay the IRS debt was not a demonstration of a lack of financial responsibility. Withholding a distribution of trust funds necessary to satisfy the tax lien, the Superior Court found, would impermissibly prevent Gary from establishing to James in the future that he was financially responsible (since he had no other adequate sources of income to pay off the debt). Thus, the Superior Court upheld the orphans' court order requiring the trust to pay Gary's IRS debt.

Issue 7. As to whether the trust was responsible for the payment of Gary's attorney's fees, the Superior Court found that exceptional circumstances existed to warrant payment since Gary lived in poverty and lacked resources to pay his attorney's fees. If they were not paid, the Superior Court found, it would "only further deepen his need for support from the trust for his maintenance, support, and well-being." *Id*. at 11. The Superior Court did hold, however, that the amount of the award lacked evidentiary support and remanded this issue to the orphans' court for further determination as to the proper amount of attorneys' fees for the trust to pay.

In the Matter of Joanne Black, etc. v. Bernard Steven Black, etc., – P.3d –, 2020 WL 1814272 (Colo. Ct. App. Apr. 9, 2020)

The Colorado Court of Appeals holds in a matter of first impression that a Colorado probate court can exercise jurisdiction over the trustees and assets of foreign trusts when those trusts were funded with assets misappropriated from a Colorado conservatorship.

Facts:
Renata Black had two children: Bernard, a resident of Illinois whose son Samuel resided in Maryland, and who is married to Katherine Litvak; and Joanne, who was diagnosed with schizophrenia. Bernard and Joanne's cousin, Dain, resides in California.

Prior to her death in 2012, Renata created several trusts. The first one was a special needs trust (SNT) for the benefit of Joanne, with Bernard and Dain as the appointed co-trustees and with Samuel later added as the third trustee. Another trust was an irrevocable trust for the benefit of her issue, referred to as the "issue trust." The issue trust was to provide for the "financial needs and medical expenses of Bernard and his children," with Bernard and Dain appointed as the original co-trustees until Dain's resignation and Samuel's acceptance to serve in Dain's place. The assets of both the SNT and issue trust were located in Illinois, and neither the SNT nor the issue trust was registered in Colorado.

Before her death, Renata revised beneficiary designations on several of her bank accounts totaling approximately $3 million to be payable on death (POD), primarily to Joanne. As a result, the bank accounts would have passed directly to Joanne upon death, outside of probate. This distribution was inconsistent with the terms of her will setting forth that 2/3 of her residuary estate would pass to the SNT and the remainder to the issue trust. As a result, Bernard filed a petition for conservatorship over Joanne in the Denver Probate Court and for permission to disclaim the POD designations, asserting that Renata inadvertently changed the beneficiary designations and that they should be placed in trust instead. The Denver Probate Court granted Bernard's petition and authorized the POD disclaimer allowing him to move 2/3 of the bank account funds to the SNT and 1/3 to the issue trust. In the process, Bernard established the "2013 trust" to receive Joanne's government benefits.

Joanne and Dain later alleged that Bernard was mismanaging Joanne's conservatorship assets. As a result, in April 2015, the Denver Probate Court froze most of Joanne's assets and suspended Bernard as conservator pending an evidentiary hearing on both issues. Bernard did not object to this order nor the Denver Probate Court's exercise of jurisdiction over him.

Although the Denver Probate Court did grant Bernard's request for payment of certain taxes and fees from the assets of the trusts, it denied him the right to pay his personal legal fees from the SNT or 2013 trust or conservatorship. Bernard apparently violated this order, resulting in Dain filing a motion for contempt against Bernard. At the time of the Denver Probate Court's proceedings on these issues, Bernard did not object to personal jurisdiction over him in Colorado.

Nearly two years later, Joanne moved to void the POD disclaimers on the basis that he had failed to provide adequate information that he intended to divert 1/3 of her nonprobate assets to the issue trust for the benefit of his children and himself. Following an evidentiary hearing, the Denver Probate Court entered an order in September 2015 finding Bernard had breached his fiduciary duties and committed civil theft. The Denver Probate Court also removed Bernard as conservator, surcharged him for the amount of diverted assets (which was also trebled for civil theft) and ordered Bernard to pay Joanne's attorney's fees and costs in association with the September 2015 order. On these findings, the Denver Probate Court entered a judgment of $4.6 million against Bernard — but did not address the request to void the POD disclaimers.

In response to Bernard's appeal, the Colorado Court of Appeals affirmed the September 2015 order and associated judgment. In May 2019, the Colorado Supreme Court denied Bernard's petition for writ of certiorari regarding the September 2015 order.

The Denver Probate Court also entered an order in February 2016, granting Dain's petition to use SNT funds to pay Joanne's attorney and accounting fees in ongoing litigation against Bernard and Samuel in Colorado, New York and Illinois, since Dain and Samuel (in their capacities as co-trustees of the SNT) refused to make distributions for this purpose. Bernard appealed the February 2016 order, arguing that the Denver Probate Court lacked jurisdiction over the SNT's assets and thus could not authorize Dain to use SNT funds to pay Joanne's professional fees.

In January 2018, the Colorado Court of Appeals found that: (1) the Denver Probate Court had subject-matter jurisdiction over administration of the conservatorship, and (2) the Denver Probate Court failed to make the requisite findings as to whether Bernard, Samuel and the SNT had sufficient minimum contacts with Colorado to support the Denver Probate Court's exercise of personal jurisdiction over them. Accordingly, the February 2016 order was vacated and remanded as to the jurisdiction question.

While the appeal of the February 2016 order was pending, in a September 2016 motion, Dain again sought to disburse SNT funds for Joanne's professional fees. Bernard objected on the same jurisdictional grounds and appealed when the Denver Probate Court granted the motion in an October 2016 order. In April 2017, Dain again filed a similar motion, which Bernard opposed on the same grounds. The Denver Probate Court granted Dain's motion in an October 2017 order and found that it had personal jurisdiction over Bernard because he availed himself of the court's jurisdiction in the conservatorship proceeding. Bernard again appealed. The Colorado Court of Appeals stayed the appeal of the October 2016 and 2017 orders pending resolution of the appeal of the February 2016 order that first asserted jurisdiction challenges.

In late 2017, Joanne again sought relief from the Denver Probate Court seeking to enjoin Bernard from further transfers of SNT funds and to authorize Dain to use SNT funds to pay her professional fees in her ongoing litigation against Bernard and others. For example, Joanne claimed that Bernard and Samuel entered into fraudulent consent judgments against the SNT assets in Illinois state court in favor of Bernard's wife and another relative, in connection with purported loans to Bernard for payment of his personal attorney's fees. In response, the Denver Probate Court entered the January 2018 order, which suspended Bernard and Samuel as trustees of all trusts benefitting Joanne and barred them from taking any actions with respect to the assets of these trusts. The January 2018 order also authorized Dain to use SNT assets to pay Joanne's ongoing professional fees. Both Bernard and Samuel appealed this January 2018 order.

In March 2018, the Court of Appeals remanded the October 2016 and 2017 orders and directed the Denver Probate Court to address the jurisdictional issues. On remand, the Denver Probate Court entered its April 2018 order and found that it had jurisdiction over both Bernard and Samuel. At the same time, the Denver Probate Court granted Joanne's request to vacate the part

of the March 2013 order that allowed Bernard to disclaim the POD designations. Bernard and Samuel appealed the April 2018 order.

Consolidating the pending appeals, the Colorado Court of Appeals analyzed several issues: (1) jurisdiction in Colorado over Bernard, Samuel, the SNT and the issue trust; (2) the voiding of the disclaimers; (3) payment of Joanne's professional fees from SNT assets; (4) suspension of Bernard and Samuel as trustees of the SNT; and (5) Samuel's entitlement to appellate attorney's fees.

Law:
Issue 1. The Colorado Court of Appeals found that the Denver Probate Court did not err in exercising jurisdiction over Bernard, the SNT and the issue trust. More specifically, the Court of Appeals first found that the Denver Probate Court properly exercised subject-matter jurisdiction over Joanne's conservatorship, because Bernard had filed the conservatorship petition in the Denver Probate Court and the Court of Appeals had previously found such jurisdiction was proper.

In so doing, the Court of Appeals rejected Bernard's arguments that: (1) the Denver Probate Court could find jurisdiction over the SNT only if it also found personal jurisdiction over the three individual trustees, and (2) the Denver Probate Court lacked *in rem* jurisdiction over the SNT and issue trust assets because the assets are located in Illinois, not Colorado. Specifically, Bernard claimed that "the probate court cannot exercise *in rem* jurisdiction over the assets of the SNT and issue trust because the disclaimer[s] caused funds from a Pennsylvania account ... to flow into a New York estate ... and then, under Renata's will, to SNT accounts in Illinois."

The Court of Appeals rejected this argument and instead found that the Denver Probate Court's April 2018 order finding that Bernard's actions (including filing the Colorado conservatorship action and unilaterally and improperly transferring conservatorship assets to other out-of-state trusts) did not remove these assets from control of the Denver Probate Court or otherwise out of Colorado's jurisdiction. The Court of Appeals further held that the removed assets were outside the state of Colorado only because Bernard deposited them in Illinois accounts and that Bernard did not challenge the Denver Probate Court's jurisdiction over the 2013 trust assets, which were also held in accounts outside the state of Colorado.

The Court of Appeals further found that the Denver Probate Court had personal jurisdiction over Bernard as well as over the assets transferred out

of state. More specifically, it found that Bernard waived any objection as to personal jurisdiction in *any* capacity by actively participating in various probate court proceedings without objection. He had also accepted appointment as Joanne's conservator, which under Section 15-14-111, C.R.S. 2019, means he submitted personally to the probate court's jurisdiction in any action related to the conservatorship. The Court of Appeals also found that the funds within the SNT are not distinct from the conservatorship assets since both also relate to the original POD accounts. In prior proceedings, Bernard had also acknowledged he was appearing either in in an individual capacity or in his capacity as conservator of Joanne.

In view of these facts and determinations, Bernard's due process rights were not violated in this exercise of personal jurisdiction over him in Colorado as it was reasonable for the Denver Probate Court to do so under the circumstances. In making this ruling, it was not necessary to address whether the Denver Probate Court had to have personal jurisdiction over all three co-trustees of the SNT before the Denver Probate Court could exercise jurisdiction over the SNT assets or whether the Denver Probate Court had personal jurisdiction over Samuel.

Issue 2. As to the validity of POD disclaimers, the Colorado Court of Appeals held that the Denver Probate Court lacked jurisdiction and authority to void the disclaimers during the pendency of the prior appeals, and therefore did not address the merits of the Denver Probate Court's underlying analysis and decision to void the disclaimers. The case was remanded for a determination of whether the disclaimers should be voided.

Issue 3. The Colorado Court of Appeals found that the Denver Probate Court did not err in granting the myriad motions to allow payment of Joanne's professional fees in litigation from SNT assets. The Court of Appeals reasoned that these assets were improperly diverted and were more appropriately assets of the conservatorship, such that they were not subject to the distribution limitations of the SNT.

Issue 4. With respect to the suspension of Bernard and Samuel as trustees of the SNT and 2013 trust, the Court of Appeals found that the suspension of Bernard, but not Samuel, was proper. As to Bernard, the court found that there was sufficient evidence of Bernard's improper conduct and that he had proper notice of the alleged violations and the request for his removal. As to Samuel, the court found that he lacked sufficient notice as to the January

2018 hearing resulting in his suspension, and thus, under Colorado law, the Denver Probate Court lacked the authority to suspend him.

Issue 5. The Court of Appeals denied Samuel recovery of his appellate attorney's fees. Although the Court of Appeals had rejected Joanne's arguments as to jurisdiction over Samuel, the Court of Appeals found that her arguments were not substantially frivolous, groundless or vexatious, and could be traced to Samuel's participation in litigation seeking to block Joanne's conservatorship from recovery of assets Bernard had misappropriated.