Recent Cases of Interest to Fiduciaries

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Potter v. Potter, 252 A.3d 17 (Maryland May 26, 2021)

A provision in a Maryland LLC operating agreement purporting to "automatically and immediately" transfer a deceased member's interest to a designated successor failed to effectively transfer the property because the provision was testamentary in nature and the operating agreement failed to satisfy the will execution requirements under Maryland law.

Facts:

James Potter owned an interest in a Maryland limited liability company, TR Steak Pasadena LLC. James' rights and obligations as a member of the LLC were defined by the terms of the LLC's operating agreement and the members' agreement. Following James' death, a dispute arose over whether his interest in the LLC would pass to the person named in the LLC agreement or to his estate.

In pertinent part, the members' agreement provided that upon the death of a member, his membership interest shall be transferred to the person designated in the members' agreement, with voting rights attached. James' wife, Ruby, was designated as the successor to James' membership interest, which carried the right to share in profits, losses and distributions, while James' voting rights were assigned to two other LLC members.

James and Ruby separated in 2016. As detailed in the separation agreement, Ruby waived any and all interest in James's membership interest in the LLC. However, James never changed the successor designation in the LLC's members' agreement.

James later married Denise and then died in 2017 without a will. Denise was appointed personal representative of James' estate and the LLC interest was identified as an asset of the estate. Six months later, Rudy filed a complaint for a declaratory judgment, asserting that she was entitled to the LLC interest because she was listed as James's successor in the members' agreement. Denise countered that the LLC interest was an asset of the estate because the LLC documents could not, as a matter of law, pass title because they did not comply with the requirements of Maryland law regarding the execution of wills.

On cross-motions for summary judgment, the circuit court found that the members' agreement was enforceable and that the designee, Ruby, was the rightful owner of the LLC interest. The circuit court granted Ruby's motion and denied Denise's motion. Denise appealed.

Law:

In Maryland, a document that transfers title to property upon the death of its owner must be executed in accordance Md. Code, Est. & Trusts § 4-102, which requires that a will be (1) in writing; (2) signed by the testator, or by some other person for him, in his presence and by his express direction; and (3) attested and signed by two or more credible witnesses in the presence of the testator. Exceptions to this rule include holographic wills and wills executed outside of Maryland.

Holding:

On appeal, the Court of Special Appeals reversed the circuit court's ruling and remanded the case to the circuit court with instructions to grant Denise's motion for summary judgment and enter judgment in her favor.

The court held that a membership interest in a Maryland LLC is an interest in property that is subject to the provision of Maryland's testamentary and probate laws. The court noted that the definition of "property" was intended to be limited to "assets which have traditionally constituted what is sometimes called in Maryland the 'probate estate,'" and not include certain assets such as insurance proceeds, property held in an *inter vivos* trust, property subject to power of appointment exercisable by the decedent, annuities, and proceeds of certain kinds of pensions and death benefits. A writing that purports to transfer the maker's property at death is testamentary in nature and must satisfy the applicable execution requirements unless it is both irrevocable and based on an otherwise enforceable legal obligation whose performance is deferred during the maker's lifetime. Here, James' designation was not irrevocable, nor was his designation of Ruby as successor based on any obligation owed to her. Rather, he had absolute freedom to change the designation at any time.

Ruby argued that the Maryland Limited Liability Company Act "expressly permits members ... to agree that the membership agreement can control the disposition of a member's interest upon the member's death." However, the court found such argument unpersuasive, noting that the statute was not

intended to allow members of an LLC to circumvent the application of Maryland's testamentary and probate laws; rather, it grants members the freedom to contract and make operating agreements "not inconsistent with ... the laws of [Maryland]."

Because the LLC interest is a property interest for purposes of Maryland's testamentary and probate laws, the court held that the provision in the members' agreement purporting to "automatically and immediately" transfer the interest to the designated successor upon the member's death was not effective because the members' agreement was not executed in accordance with the provisions of Md. Code, Est. & Trusts § 4-102.

In re Matter of ABB Trust, 491 P.3d 1120, No. 1 CA-CV 19-0845 (Arizona May 2021)

Addressing a claim by beneficiaries that the income beneficiary exerted undue influence over the settlor, who caused the trust protector to amend the irrevocable trust.

Facts:

In 2016, Austin Bates filed for divorce from his wife of 57 years. He was 78 at the time and his health was declining. Soon after, he married his caretaker, Lindi. Just before finalizing his divorce, Austin created an irrevocable trust — the ABB trust — and named his estate planning attorney as the trust protector. Managed Protective Services Inc. served as trustee. Austin expressed concerns about Lindi pressuring him to make changes to his estate plan and wanted to "free himself from the threat of exploitation and the pressures of undue influence." The trust agreement originally directed that upon Austin's death, the assets be distributed 45 percent to his former wife Kay, 45 percent to his three daughters and 10 percent to Lindi.

Although the trust was irrevocable by Austin, the trust protector was authorized to amend or modify the trust. The trust protector amended the trust twice. First, in March 2017, he added an *in terrorem* clause, which invalidated the interest of any beneficiary who "(a) contests by a claim of undue influence" or "objects" to "any [trust] amendments," or "(b) seeks to obtain adjudication in any court proceeding that [the trust] or any of its provisions is void" Second, in May 2017, the trust was amended to remove Kay as a beneficiary, make Lindi the income beneficiary after Austin's death, and authorize the trustee to distribute trust assets to Lindi for any purpose. The second amendment also reduced the daughters to remainder beneficiaries after Lindi's death and added Lindi's sons as remainder beneficiaries.

Austin's daughters and former wife, Kay, sued Lindi and others in probate court, and sought to invalidate the second amendment as a product of undue influence by Lindi. The petitioners asserted the claim against Lindi, not the trust protector, alleging that Lindi indirectly caused the trust protector to amend the trust by exerting undue influence on Austin.

Lindi filed a motion to dismiss the undue influence claim, arguing that the petitioners only alleged she unduly influenced Austin, rather than the trust

protector, and Austin had no power to amend the trust. The Superior Court granted Lindi's motion to dismiss and enforced the *in terrorem* clause. Petitioners appealed.

Law:
Under Arizona law, a trust is void, in whole or in part, to the extent its creation was induced by fraud, duress or undue influence.

Holding:
On appeal, the Court of Appeals reversed the probate court's dismissal of the undue influence claim. The court noted that A.R.S. § 14-10406 — which provides that a trust is void, in whole or in part, to the extent its creation was induced by fraud, duress or undue influence — does not require a claimant to allege the defendant exerted undue influence directly over the person with final authority to amend the trust; rather, it broadly states that the trust amendment is void if "its creation was induced" by undue influence. Accordingly, it is only necessary that the defendant's undue influence induced the creation of the amendment, even if indirectly.

The court found that the petitioners had stated a proper claim under A.R.S. § 14-10406 by alleging Lindi had exerted undue influence, stating that Austin was susceptible to undue influence, that Lindi arranged for Austin to meet with the trust protector and was "otherwise active in the procurement and execution" of the second amendment, that Lindi demanded the trust be amended in her favor, and that the trust protector did not exercise independent judgment, but rather followed Austin's direction.

Lindi argued that the petitioners' claim was defective because it alleged only indirect undue influence, and did not allege undue influence directly over the trust protector. The court noted that this argument failed to recognize the terms of the trust, which required the trust protector to "assist in achieving" Austin's objectives and ensure that the trust was construed in a manner consistent with Austin's estate planning goals. Accordingly, Austin's input remained pertinent, despite the ultimate power to amend belonging to the trust protector.

Lastly, the Court of Appeals vacated the probate court's application of the *in terrorem* clause in light of its reversal and remand of the undue influence claim.

In re Estate of Trevino, 474 P.3d 223 (Colo. App. 2020)

Where a POD account pledged as collateral for a loan could pay the loan in full after owner/decedent's death, the personal representative had authority over the account only to the extent necessary to pay off the loan after applying the estate's liquid assets to pay off the debt.

Facts:

Jerry Trevino opened an account and named his son, Tony Trevino, as the payable on death (POD) beneficiary. Jerry and his wife, Victoria, obtained a loan, for which they were jointly and severally liable, and for which Jerry pledged the account as collateral. The pledge agreement provided that no joint owner, beneficiary, surviving spouse or representative of the debtor's estate had any rights in the account in the event of Jerry's death until the obligations were paid in full.

Following Jerry's death, Victoria, as personal representative of his estate, used the funds in the POD account to pay off the balance of the loan. Tony filed a petition alleging that Victoria had misused the account and breached her fiduciary duties by using the account to pay off the loan in full. The trial court rejected the claim, finding that Victoria acted reasonably because the estate did not otherwise have the ability to pay the loan. Tony appealed.

Law:

Under Colorado law, a POD account automatically passes to the named beneficiary and does not become part of the probate estate or subject to the authority of the decedent's personal representative. However, the terms of a pledge agreement, under which the account is pledged as security for a debt of the decedent, grant the personal representative the authority over the account to the extent of the amount secured by the pledge agreement.

Holding:

On appeal, the Court of Appeals held that Victoria breached her fiduciary duties to the POD beneficiary by paying the loan with the account "to the extent there were liquid funds in the estate to pay the loan." While the pledge agreement provided that neither the account beneficiary nor the personal representative would have any interest in the account until the pledge agreement was satisfied, the personal representative has authority to decide the extent to which the account should be used to cover the pledge agreement.

The court concluded that, when a POD account is subject to a pledge agreement and the account holder dies, the personal representative of the account holder's estate has authority over the account only as to the amount secured by the pledge agreement. This does not eliminate the rights of the POD beneficiary. Rather, the POD beneficiary rights attach and entitle him to the remaining amount in the account.

Further, the court held that Victoria breached her fiduciary duties by not applying the liquid assets of the estate to the loan before paying the balance with the assets of the POD account. As personal representative, Victoria had a duty to exercise her powers in the best interest of all beneficiaries and interested persons. This duty included the recognition of Tony's interest in the portion of the account that was not needed to pay off the loan. To the extent there were other assets in the estate to pay the loan, the use of the account violated Victoria's duty to Tony.

In re Estate of McAleer, 248 A.3d 416 (Pennsylvania April 7, 2021)

While the Supreme Court of Pennsylvania held that trust beneficiaries are entitled to receive and examine billing invoices of a trustee's legal counsel if the fees are paid from trust assets in the instant case, an evenly split decision by the Supreme Court of Pennsylvania failed to resolve whether Pennsylvania recognizes the fiduciary exception to attorney-client privilege claims by trustees.

Facts:

On Nov. 30, 2012, grantor William K. McAleer created a revocable living trust for the benefit of his son, William H. McAleer (trustee), and his two stepsons, Stephen and Michael Lange (Lange beneficiaries). On May 4, 2013, the grantor died.

In March 2014, William H. McAleer, in his capacity as trustee of the trust, filed a partial accounting. After the Lange beneficiaries objected to the accounting, the trustee hired two law firms to defend the claims. In March 2016, the probate court dismissed with prejudice the objections asserted by the Lange beneficiaries.

During the course of the underlying litigation concerning the Lange beneficiaries' objections to the accounting, the trustee disclosed that approximately $124,000 in attorney's fees and expenses through December 2015 had been paid from trust assets. Upon disclosure, the Lange beneficiaries filed a petition to determine the reasonableness of the fees, and the court froze further disbursements for trustee compensation and legal fees absent a court order.

In August 2016, the trustee filed its final accounting. In November 2016, the Lange beneficiaries objected to the accounting on the basis of the reasonableness of the fees, among other things. In March 2017, the Lange beneficiaries served written discovery requesting copies of all billing statements for all trustee and attorney's fees reflected in the final accounting. The trustee never filed an objection to the request for production, but instead produced very heavily redacted copies of the billing invoices of both law firms.

In May 2017, the Lange beneficiaries moved to compel the production of unredacted billing invoices. Relying on the court's prior holding in *Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d 361 (2013), the trustee's counsel argued at the hearing that the billing invoices were protected by the attorney-client privilege. Without first conducting an *in camera* review, the court directed the trustee to turn over unredacted billing invoices. The court found that "because [the Lange] Beneficiaries effectively had paid for the legal services rendered to Trustee, ... [the Lange beneficiaries] should be entitled to see the bills that are the subject of this dispute to determine whether those bills were reasonable." *Id.* at 421. Ultimately, the trustee produced unredacted trustee invoices but appealed the portion of the order requiring the trustee to produce unredacted copies of the attorney invoices.

Upon appeal, the Superior Court of Pennsylvania unanimously quashed the trustee's appeal, finding: (i) the discovery order was not a final order; (ii) the trustee was not entitled to an interlocutory appeal as a matter of right; (iii) the trustee failed to request permission to appeal; and (iv) the appeal was not taken from a collateral order.

Nevertheless, because the appeal concerned a discovery order related to privilege, the Superior Court considered it and analyzed a trustee's duty to provide information pursuant to Section 82 of the Third Restatement of Trusts (which prevents disclosure of communications between a trustee and counsel made in the course of or in anticipation of litigation) and *In re Estate of Rosenblum*, 459 Pa. 201, 328 A.2d 158 (1964) (finding that a trust beneficiary may inspect documents notwithstanding any pending litigation because the right of inspection is tied to the beneficiary's interest in the estate). Based on the procedural facts at the trial court level, the Superior Court concluded that the law firm billing invoices were not protected communications under Section 82 of the Third Restatement of Trust and must be provided to the Lange beneficiaries.

The trustee then appealed to the Supreme Court of Pennsylvania, which accepted the appeal to answer: "Do the attorney-client privilege and work product doctrine[ ] protect communications between a trustee and counsel from discovery by beneficiaries when the communications arose in the context of adversarial proceedings between the trustee[ ] and beneficiaries?" *Id.* at 423.

The trustee argued that the fiduciary exception to the attorney-client privilege should not apply because, among other things, 42 Pa.C.S. § 5928 codifying the attorney-client privilege sets forth no such exception. *Id.* at 433.

Conversely, the Lange beneficiaries argued that Pennsylvania law permits beneficiaries access to trust administration records, including billing invoices. Put simply, they asserted that if the billing invoices were not discoverable, the Lange beneficiaries would be forced to cover from trust assets questionable attorney's fees with no way of verifying the reasonableness.

Law:
With respect to the threshold question as to whether the discovery order was immediately appealable, the Supreme Court of Pennsylvania held that the order was immediately appealable under the collateral order doctrine, because "it is well-settled that the right involved — the protection of confidentiality inherent in the privilege — is too important to be denied review and would be irreparably lost if review is postponed until after final judgment." *Id.* at 425.

As to application of the fiduciary exception to the attorney-client privilege, the Supreme Court of Pennsylvania's decision was ***evenly split***, with the chief justice abstaining.

Opinion by Justices Wecht, Todd and Dougherty:
This opinion recognized the importance of the attorney-client privilege but also noted that it was not absolute and could be waived. It further acknowledged that the appeal involved a conflicting duty whereby a trustee has a fiduciary obligation to provide information related to the trust to beneficiaries.

The opinion discussed the fiduciary exception generally and noted that as concluded in *Pittsburgh History & Landmarks Found. v. Ziegler*, 650 Pa. 406, 200 A.3d 58, 61 n.2 (Penn. 2019), communications between a trustee and a trustee's counsel concerning administration of the trust are subject to disclosure to trust beneficiaries. It further evaluated the historical evolution of the fiduciary exception and described in detail the procedural and factual background and legal analysis set forth in *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), which set forth a two-part test: "(1) the purpose for which [the memorandum] was prepared,

and (2) the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened." *Id.* at 428 (internal quotations omitted). The opinion also surveyed various states' approaches as to the fiduciary exception since Riggs. *Id.* at 430-33.

In rejecting the trustee's argument, this opinion explained: "Transparency remains the cornerstone of the fiduciary duty. Because trustees in essence serve as proxies for trust beneficiaries, their fiduciary duties compel them always to act in accordance with the latter's best interests in mind. To the extent that the attorney-client privilege obscures that fundamental obligation by frustrating beneficiaries' entitlement to information about trust management, the privilege must yield." *Id.* at 435-46.

In reaching its decision, the first opinion primarily relied upon: (i) *Rosenblum*; (ii) *Follansbee v. Gerlach*, 56 Pa. D. & C. 4th 483 (C.C.P. Allegheny 2002); (iii) *Riggs*; and (iv) the Restatement (Second) of Trusts § 173 (1959). It denied the trustee's appeal and held "where legal counsel is procured by a trustee utilizing funds originating from a trust corpus, the beneficiaries of that trust are entitled to examine the contents of communications between the trustee and counsel, including billing statements and the like" and that the attorney-client privilege does not protect those communications from disclosure to the trust beneficiaries. *In Re Estate of McAleer*, 248 A.3d at 436.

The first opinion further explained that Comment b to Section 173 of Restatement (Second) of Trusts provides that a trustee's communications with legal counsel are privileged only when the trustee personally covers the cost of such communications. In reaffirming the holding in *Rosenblum*, the opinion clarified that it was rejecting the Restatement (Third) of Trusts § 82, which the court had not adopted.

Opinion by Justice Saylor:

In Justice Saylor's brief opinion, he asserted that the legislature is in the best position to establish "beneficiaries' right to information about trust activities and the essential protections afforded by the attorney-client privilege in connection with prudent trust administration." *In Re Estate of McAleer*, 248 A.3d at 438. Justice Saylor further highlighted the policy concern that if the fiduciary exception were applied, trustees would be reluctant to seek full legal advice. Finally, he asserted that requiring trustees to pay for counsel

individually in order to maintain privilege is impracticable, especially in large/complex matters.

Opinion by Justices Donohue and Mundy:
In the final opinion, Justices Donohue and Mundy strongly disagreed with the majority's application of the fiduciary exception on policy grounds and further claimed that the opinion supported by Justices *Wecht*, Todd and Dougherty misinterpret and/or take out of context the holdings in *Follansbee and* Rosenblum. The opinion further criticized Justices Wecht, Todd and Dougherty's opinion's analysis and reliance on the two-part test in *Riggs* (a Delaware case), as unsupported and contradicted by Delaware law.

On a policy level, this opinion reasoned:

> Who would agree to accept the position of trustee if the only way to receive legal advice based on candid communications about the administration (including perceptions of the beneficiaries and/or co-trustees) was to pay for the attorney's services out of personal funds? There is no better way to deter a trustee from seeking legal advice than to require personal payment by the trustee.... Why would she agree to accept the position of trustee if she could not candidly discuss her questions and concerns about the proper trust administration with an attorney unless she wrote a check for those services out of her personal checkbook? Nothing in our trust law suggests this outcome and common sense requires a rejection of such a rule. *In Re Estate of McAleer*, 248 A.3d at 442-43.

Put simply, it found that the application of the fiduciary exception would discourage service by any trustee.

Holding:
While the Supreme Court of Pennsylvania ultimately decided the instant appeal by upholding the trial court order directing that the trustee provide unredacted copies of all legal invoices, the court was evenly split on the central issue regarding application of the fiduciary exception to attorney-client privilege. Thus, future application of the fiduciary exception in Pennsylvania remains unclear and undecided.

Ferri v. Powell-Ferri et al., Superior Court of Connecticut, June 10, 2021 (Unpublished Opinion)

The Superior Court of Connecticut held that the wife was not engaging in vexatious litigation because she believed the facts she alleged and because the decanting of the trust was troubling behavior in the context of a divorce.

Facts:

John Ferri and Nancy Powell-Ferri were a married couple proceeding through a dissolution of their marriage. One issue in the dissolution proceeding was a dispute over assets they owned. One sizable marital asset was a trust established in 1983, valued at between $60 million and $70 million. Nancy was represented by the Parrino defendants (defendant's lawyer and law firm).

The trustees of the 1983 trust filed a separate declaratory judgment action to obtain the court's approval of the decanting of the 1983 trust and distributing the trust assets to a new trust created in 2011. The Parrino defendants represented Nancy in that declaratory judgment. The Parrino defendants, in representing Nancy, filed a cross-complaint against John, alleging John violated his duty to preserve the marital assets by allowing the decanting and distribution. The trial court overseeing this declaratory judgment matter held in favor of John, finding that Nancy failed to state a cause of action. The Supreme Court of Connecticut affirmed this judgment.

Still pending for resolution was John's vexatious litigation claims against Nancy and the Parrino defendants, which alleged that both Nancy and the Parrino defendants lacked probable cause to institute the cross-complaint. The trial court held for the Parrino defendants and John appealed. The Appellate Court affirmed the trial court's decision granting summary judgment to the Parrino defendants, concluding that the Parrino defendants had probable cause to bring the cross-complaint.

Still pending, however, for resolution in the trial court were the two counts pertaining to Nancy. Those counts alleged common-law vexatious litigation and statutory vexatious litigation.

Law:

The Appellate Court of Connecticut had stated that:

"[a] vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor ... Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action ... Malice may be inferred from lack of probable cause ... The want of probable cause, however, cannot be inferred from the fact that malice was proven ... A statutory action for vexatious litigation under General Statutes § 52-568 ... differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. In either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law ..."

The key question was whether Nancy had probable cause as a litigant for her cross-claim as she did not invoke advice of counsel as a defense for her actions. According to the Supreme Court of Connecticut, probable cause can be established in a vexatious suit action when there is a "bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it ... Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted."

The trial court determined that it was possible that Nancy had engaged in vexatious litigation, even after the Parrino defendants were found to not have done so. For example, a litigant may supply false or incomplete information to its counsel, such that counsel does have probable cause to pursue litigation, while the litigant does not.

Holding:

According to the trial court, Nancy's cause of action depended on two facts: (1) John learned of the decantation after it happened, but before the cross-complaint was filed; and (2) John took no steps to return the assets to the

original trust. Indeed, John testified that he learned about the new trust after the new trust's creation, but before the cross-complaint was filed. John further testified that he made no attempts to return the assets of the 1983 trust. The trial court accepted and found these two statements as true and correct, and thus the Superior Court accepted them as fact.

Based on these factual findings, the trial court had also found that Nancy did not provide inaccurate or misleading information to the Parrino defendants. The establishment of these facts made the validity of the cross-complaint dependent on whether a "party to a dissolution proceeding [must] take action to prevent the removal of assets that would benefit him." The Appellate Court opinion recognized that there is "something intrinsically wrong, albeit not sufficiently wrong to become a recognized tort, when a spouse fails to [take] action to recapture sizable trust assets that had arguably fallen within the marital estate, and that filing a lawsuit over that matter is not a completely frivolous move." Accordingly, Nancy had a good faith belief in the facts alleged, as well as in the validity of her claim. Thus, the trial court held that Nancy had probable cause to pursue the cross-complaint.

The trial court also rejected John's assertion that the cross-complaint was unnecessary because Nancy had already sought alternative remedies. The trial court did so on the basis that those alternative methods were not guaranteed solutions to the decanting of the trust, and thus Nancy's cross-complaint was her attempt to increase her likelihood of preserving her own right in the marital assets.

Finally, John argued that because Nancy sought only money damages, and not an order restoring the assets of the 2011 trust to the 1983 trust, Nancy's cross-complaint was primarily used to harass John. The trial court did not accept this argument either, finding that money damages were a fair way to gain relief from John, since John may not have had authority to restore the assets as such authority may have belonged solely to the trustees of the 1983 trust.

In re Trust Created by McGregor v. McGregor., 308 Neb. 405, 954 N.W.2d 612 (NE. 2021)

The Nebraska Supreme Court held that the settlement agreement was in conflict with a material purpose of the father's trust and therefore would not be enforced.

Facts:

Clifford and Evelyn McGregor were a married couple in Nebraska. During their lifetimes, both Clifford and Evelyn established separate revocable trusts and funded the same with different assets. In 2009, Clifford died, survived by Evelyn, and his revocable trust became irrevocable. Evelyn became sole trustee of the trust.

The assets in the trust were used to fund a family trust. Pursuant to the terms of the family trust, upon Evelyn's death, the family trust was to be equally distributed to separate trusts for each of Clifford and Evelyn's two children, Allen and Debra. Further, the separate trusts were to be funded with equal shares of the family trust, to the extent possible. Allen and Debra were appointed as trustees of their respective separate trusts. The assets distributed to the separate trusts were to remain in trust.

During Allen and Debra's lives, Allen and Debra were to be primary beneficiaries of the separate trusts, and the separate trusts were to be non-support discretionary spendthrift trusts, with creditor protection. At Allen and Debra's deaths, they each had limited powers of appointment to any person, corporation or other entity, but not to themselves, their estates or creditors of their estates.

In 2011, Evelyn, Allen and Debra entered into a trust settlement agreement that provided for the distribution outright of the family trust assets to Allen and Debra. Under the settlement agreement, Allen also would have received an additional tract of land not originally provided for in the family trust.

In 2017, Evelyn notified Allen that she was revoking her consent to this agreement. Allen filed suit, requesting that the trial court enforce the agreement. Evelyn requested that the trial court find that (1) the agreement was nonbinding; (2) the agreement was in violation of a material purpose of

the trust; (3) the agreement did not include all potential beneficiaries; and (4) the agreement lacked consideration.

After a bench trial, the trial court rejected the agreement. The trial court found the agreement to be nonbinding because it did not include all interested persons as the assets of the separate trusts could be distributed to the descendants of Allen and Debra who were not represented in the settlement agreement.

The trial court also held that the agreement did, in fact, violate a material purpose of the family trust, because (1) Allen would have received additional land not provided for in the family trust; (2) Allen and Debra would have received the trust assets outright, as opposed to such assets being held in the separate trusts; and (3) equalization of Allen and Debra's shares would have been required, where it was not under the terms of the family trust.

Allen appealed these rulings of the trial court.

Law:
While disputes over the administration of trusts are encouraged to be resolved through nonjudicial means, Nebraska law authorizes courts to determine the validity of a nonjudicial settlement agreement under code or law.

Neb.Rev.St. § 30-3811(c) provides that "[a] nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust .... A spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust." Neb.Rev.St. § 30-3803-17 provides that a spendthrift provision means "a term of trust which restrains both voluntary and involuntary transfer of a beneficiary's interest."

Neb.Rev.St. § 30-3830 provides that the material purposes of a trust are determined by the intent of the settlor, to the extent such purposes are lawful, not contrary to public policy, possible to achieve, and for the benefit of the beneficiaries. According to the Restatement (Second) of Trusts § 337(2), if a trust must be preserved to carry out the material purpose of a trust, the beneficiaries cannot compel its termination.

Holding:

The Supreme Court of Nebraska found that Clifford's overriding intent and design of the family trust is to hold the children's interests in trust and restrain the transfer of such interests. The Supreme Court of Nebraska further observed that the trust instrument contained spendthrift provisions, and that the shares for the children were to be held in trust. Lastly, the Supreme Court of Nebraska determined that the separate trusts were to be irrevocable and not amended by any person. Accordingly, the Supreme Court of Nebraska determined that the settlement agreement violated several material purposes of the trust, by allowing the transfer of the children's interests outright. A byproduct of such an outright transfer would be that creditors of the children would have an easier path to accessing such interests, which is also in conflict with a material purpose of the trust and the limited power of appointment it provided to the children.

Allen had argued that the couple intended for their revocable trusts to be joint and reciprocal, and Evelyn's consent to the transfer spoke to Clifford's actual intent, or lack thereof, to place strict limitations on the transfer of assets. However, the Supreme Court of Nebraska found that the trust contained a detailed provision that Clifford's trust was to operate independently of Evelyn's trust.

The spendthrift provisions included in the trust established a material purpose, and the nonjudicial settlement agreement Allen pursued would have interfered with this material purpose by providing for outright distributions of trust assets.

Marshall v. Marshall., No. 14-18-00094-CV, No. 14-18-00095-CV (TX. 2021)

The Court of Appeals of Texas held that the Texas Citizens Participation Act was designed to protect the wife and son's conduct, by allowing them a right to petition the court, and that *in terrorem* clauses are violated only when conduct is inconsistent with the express language of the *in terrorem* clause.

Facts:

E. Pierce Marshall, through his last will and testament, settled the EPM marital income trust (the Texas trust), naming his wife, Elaine, the trustee and income beneficiary. Marshall further provided for two *inter vivos* trusts for his two sons, Preston and Pierce Jr. (the sons' trusts). Marshall's will contained an *in terrorem* clause. The *in terrorem* clause provided that any beneficiary who opposed the terms of Marshall's will would have their beneficial interests terminated.

Elaine established a company, and as manager and president of the company, created a new trust (the Wyoming trust), appointing herself and the company as co-trustees. Elaine then merged the Texas trust with the Wyoming trust. The Wyoming trust differed in the powers given to the trustee, the order of succession of the trustees, the choice of law applicable to the trusts, and removed the *in terrorem* clause found in the Texas trust. The Wyoming trust retained the Texas trust's primary purpose of providing financial security to Elaine, and also provided for the distribution of the trust, upon Elaine's death, to the sons' trusts.

Elaine next executed a nonjudicial settlement agreement between the trustees and all qualified beneficiaries of the Texas trust and Wyoming trust (NJSA). Elaine was the sole signatory, in her capacity as trustee of all trusts created under both trust instruments (including as representative of the company), and as qualified beneficiary. The NJSA provided for application of Wyoming law concerning trust construction and administration, adoption of the Wyoming Uniform Trust Code, merger the two trusts, division of the Wyoming trust into two separate trusts"

The company filed a petition for instructions in a Wyoming court, alleging that the NJSA would affect only administrative provisions of the Wyoming trust. The Wyoming court ratified the NJSA as well as Elaine's merger of the Wyoming trust and Texas trust, and the division of the Wyoming trust.

In the Harris County, Texas Probate Court, Preston filed two lawsuits against Elaine and Pierce Jr. The first lawsuit alleged that Elaine and Pierce Jr. violated the *in terrorem* clause of Marshall's will, and that Elaine and Pierce Jr. breached fiduciary duties owed to Preston.

The second lawsuit alleged that the company had brought a sham lawsuit to ratify Elaine's actions. Both Elaine and Pierce Jr. filed separate motions to dismiss. The probate court denied both of Elaine's and Pierce Jr.'s motions. Both appealed to the Court of Appeals of Texas, Houston (14th Dist.).

Law:

The TCPA. Both Elaine and Pierce Jr. appealed the denials of their motions under the Texas Citizens Participation Act (TCPA). To be entitled to dismissal under the TCPA, the defendant has the burden to show by a preponderance of the evidence that the plaintiff's claim "is based on, relates to, or is in response to" the defendant's exercise of the right to petition, association or speech. A court can determine the basis of the legal action by looking to the plaintiff's allegation. If the defendant satisfies this initial burden, the plaintiff must establish by clear and specific evidence a prima facie case for each element of the claim in question.

The purpose of the TCPA is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of a person to file meritorious lawsuits for demonstrable injury." Therefore, the TCPA is designed to dispose of lawsuits intended to chill First Amendment rights, not to dismiss meritorious claims.

***In Terrorem* Clauses.** The purpose of an *in terrorem* clause is to dissuade beneficiaries from filing litigation that may thwart the intent of a settlor. Courts strictly construe *in terrorem* clauses and find a breach of the clauses only when a party's acts come within the clause's express terms.

Holding:

Elaine's Appeal. Elaine argued that the TCPA applies to Preston's *in terrorem* claims and that Preston failed to establish a prima facie case for each essential element of his claims. The Court of Appeals of Texas agreed with Elaine.

Preston's argument was based on the *in terrorem* clause that prohibited beneficiaries of the trusts created under Marshall's will from opposing the terms of the will. However, the Court of Appeals of Texas held that the TCPA is designed to protect Elaine's rights to engage in her precise conduct, which included petitioning the Wyoming court. Thus, Elaine established by a preponderance of the evidence that Preston's claim is based on, relates to, or is in response to Elaine's exercise of the right to petition.

Preston argued that Elaine violated the *in terrorem* clause by: (1) altering the succession of trustees; (2) changing the governing law of the Texas trust; and

(3) introducing a different *in terrorem* clause. However, the court noted that Preston provided no evidence that any of those changes would alter the dispositive provisions of the original trust, nor did he support the conclusion that an *in terrorem* clause is violated when only administrative — not dispositive — provisions are altered.

Preston also alleged that Elaine's motion to dismiss was untimely because she had notice of his claim from an earlier petition. The Court of Appeals rejected this argument and held that because Preston's fourth amended petition contained additional claims not contained in the earlier petitions, Elaine's motion was timely in responding to the forth amended petition.

Pierce's Appeal. The Court of Appeals applied the same analysis in determining that Preston did not establish that Pierce Jr. violated the *in terrorem* clause.

However, Pierce Jr. failed to prove that he did not breach a fiduciary duty owed to Preston. Under the TCPA, a claim is subject to dismissal only to the extent it responds to conduct the TCPA protects. Because Pierce Jr. did not adequately show that Preston's claims involved conduct the TCPA protects, the Court of Appeals of Texas upheld the trial court's denial of Pierce Jr.'s motion to dismiss.

Wing v. Goldman Sachs Trust Co., N.A., 274 N.C. App. 144, 851 S.E.2d 398, 400 (2020), review allowed, 856 S.E.2d 107 (N.C. 2021), and review allowed, 856 S.E.2d 98 (N.C. 2021).

A trustee has a duty to remain neutral regarding competitive claims between putative beneficiaries and may be required to freeze payments while a court determines the rightful beneficiaries.

Facts:
The decedent created a revocable trust in August 2011. He underwent brain surgery to remove several brain tumors in October 2012. After surgery, he began to suffer a series of serious physical and mental health problems, resulting in recurring hospitalization and rehabilitative care. For the remainder of his life, decedent relapsed into heavy drinking and experienced depression, manic episodes and complications with bipolar disorder.

After removal of the brain tumors and beginning in December 2012 until Dec. 10, 2014, the decedent intermittently executed six amendments ("purported amendments") to the 2011 trust.

Under the original trust, the decedent's daughter, Wing, and son, Falls, were beneficiaries. Under the purported amendments, they were not. Conversely, two beneficiaries under the purported amendments — Sellers, the decedent's wife, and Cone, the decedent's other daughter — were not beneficiaries under the original trust. Goldman Sachs was named trustee of the trust.

The decedent died on May 11, 2015. On June 12, 2015, Goldman Sachs paid distributions from the trust to Sellers and Cone pursuant to the trust's fifth amendment. In 2016, Wing and Falls filed claims and challenged the validity of the purported amendments and gave Goldman Sachs notice of their claims. Goldman Sachs continued making distributions, despite being on notice the amendments were challenged and that Sellers and Cone were not named beneficiaries under the original trust.

Sellers and Cone, as putative beneficiaries, filed a joint motion seeking to direct the acting trustee to pay the cost of defending the trust. Plaintiff Wing filed a motion to freeze administration of the trust. Judge Edwin G. Wilson Jr.

of the Superior Court, Wake County, granted the motion to pay and denied the motion to freeze. The plaintiffs appealed.

On appeal, Goldman Sachs argued that a trustee has a duty to defend the purported amendments during pending litigation between purported beneficiaries. The Court of Appeals disagreed with Goldman Sachs and held that Goldman Sachs, as trustee, had a duty to remain neutral regarding competitive claims between putative beneficiaries. The court said the trustee is not required to pay attorney fees or legal costs unless the *res* of the trust is in peril, and in this case it was not. The court reversed the motion-to-pay order and remanded the case to the trial court for entry of an order allowing Wing's motion to freeze.

The North Carolina Supreme Court granted discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31. See *Wing v. Goldman Sachs Tr. Co., N.A.*, 856 S.E.2d 107 (N.C. 2021).

Law:

"A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust." N.C. Gen. Stat. § 36C-8-804 (2019). A prudent trustee must act impartially toward all purported beneficiaries. N.C. Gen. Stat. § 36C-8-803 (2019).

The trustee is not required to pay attorney fees or legal costs unless the *res* of the trust is in peril. See *Wing* at 405-406, adopting rule in *Whittlesey v. Aiello*, 104 Cal.App.4th 1221, 128 Cal. Rptr. 2d 742, 743 (2002).

Holding:

The acting trustee breached the duty of neutrality by deciding who the rightful beneficiaries were before pending litigation had been resolved. When the beneficiaries of the trust are in dispute and there is no final determination of who the rightful beneficiaries are, the trial court should order a freeze on distributions of the trust assets until resolution of the competing claims. "The trial court erred by not freezing and by ordering distributions from the Trust to some putative beneficiaries but not others during pending litigation." *Wing v. Goldman Sachs Tr. Co., N.A.*, 274 N.C. App. 144, 851 S.E.2d 398, 406 (2020).

The trustee is not required to pay attorney fees or legal costs unless the *res* of the trust is in peril. The *res* of the trust is not in peril where the challenge relates to the decedent's capacity to execute the amendments and the rightful beneficiaries of the trust, not the validity of the trust itself.

Furthermore, substantial rights of the plaintiffs were affected when the acting trustee distributed funds while the beneficiaries' case challenging the purported amendments to the trust was pending under N.C. Gen. Stat. 1-277 and *Beasley v. Beasley*, 259 N.C. App. 735, 742, 816 S.E.2d 866, 872-873, (2018).

Schreier v. Drealan Kvilhaug Hoefker & Co., P.A., 992 F.3d 674 (8th Cir. March 26, 2021)

A trustee's conclusory claims for malpractice, tort and RICO against an accounting firm and a law firm that administered the trust were insufficient and properly dismissed on summary judgment.

Facts:

The trustee of the parents' trusts brought action against an accounting firm and a law firm that had assisted with administration of the parents' estate, alleging malpractice and professional negligence claims, as well as claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for aiding and abetting another trustee in alleged breaches of fiduciary duty. The trial court entered summary judgment for the defendants on all claims because the plaintiff failed to present sufficient evidence or expert support. The plaintiffs appealed and the 8th U.S. Circuit Court of Appeals affirmed dismissal of all claims.

Law:

The law at that time required that an M706Q election on the decedents' tax return could be made only in a situation where the "decedent continuously owned the property for the three-year period ending on the date of death of the decedent." Minn. Stat. § 291.03, subd. 10(3). This law was later amended.

A legal malpractice claim must prove that, but for the attorney's negligence, the plaintiff "would have been successful" in the underlying transaction. *Schreier* at p. 680., citing *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren Ltd.*, 711 N.W.2d 811, 816, 819 (Minn. 2006).

Under Minnesota law, to establish a claim for aiding and abetting, the plaintiff must show: (1) the primary tortfeasor committed a tort that injured the plaintiff; (2) the defendant knew the primary tortfeasor's conduct was a breach of duty; and (3) the defendant substantially assisted or encouraged the primary tortfeasor in that breach. *Zayed v. Associated Bank, N.A.*, 913 F.3d 709, 714 (8th Cir. 2019), *citing Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). "[W]here aiding and abetting liability is alleged against professionals," courts "narrowly and strictly interpret" these elements and "require the plaintiff to plead with particularity facts establishing each of these elements." *Witzman*, 601 N.W.2d at 187.

The four-year statute of limitations for civil RICO claims begins when the plaintiff discovers or should have discovered the injury. *See Rotella v. Wood*, 528 U.S. 549, 553, 556-68, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000).

Holding:
An accounting firm was not professionally negligent in failing to wait to file tax returns until the governing law was amended to expand a deduction because the "portion of the amendment that affected John's estate return was not added to the proposed amendment until … months after Penning filed the return." *Schreier* at p. 679. Likewise, a law firm was not professionally negligent in failing to advise the decedents to wait to file tax returns where the firm did not provide legal services specifically relating to the tax returns at issue. *Schreier* at p. 680.

Providing "routine professional services" as an accountant or lawyer is "insufficient to establish substantial assistance in carrying out tortious activity," an essential element in an aiding and abetting claim, particularly where the accounting firm or law firm did not have any role in setting rental rates that allegedly caused injury to the plaintiff. *Schreier v. Drealan Kvilhaug Hoefker & Co. P.A.*, 992 F.3d 674, 681 (8th Cir. 2021)

A plaintiff complaining about the alleged damages from a RICO claim would be sufficient to start the clock on the four-year statute of limitations. *Schreier* at p. 681.

Matter of Horst Revocable Trust

Nevada Supreme Court rules that a trustee's mailing of notice without all provisions applicable to the beneficiary did not trigger the 120-day statute-of-limitations period for the beneficiary to contest the trust's validity.

Facts:

Ella Horst created a revocable trust as part of her estate planning. As initially executed, the trust provided a specific gift of $20,000 to one of Ella's grandchildren, Patricia, with the remainder divided among Ella's two children.

Eventually, Ella purchased a home with Patricia and her partner, in which Ella owned half and Patricia and her partner owned the other half. After several years, Ella acquired a 25 percent interest in the house from Patricia's partner.

Ella amended the trust four times. The first amendment reflected the death of Ella's daughter and added specific gifts to her son, Holiday. The second amendment deleted the specific cash bequest to Patricia, and instead gave her a specific bequest of the trust's interest in the home. The third amendment added an additional bequest of real estate to Patricia. Finally, the fourth amendment added a bequest of the 25 percent interest in the home that Ella had acquired from Patricia's partner.

Ella died in late 2016, and Patricia became successor trustee of the trust. In accordance with Nevada law, Patricia gave notice to the beneficiaries and other parties that the trust had become irrevocable. The notice included the original trust agreement and the first three amendments in their entirety, but it did not include the fourth amendment. None of the beneficiaries objected to the notice.

In May 2018, Patricia petitioned the Nevada District Court to confirm the fourth amendment was a valid amendment to the trust agreement. Holiday objected to Patricia's petition, arguing that the fourth amendment was not valid Holiday also argued that the second and third amendments were products of undue influence.

The District Court held that Holiday's challenge to the second and third amendments was barred by the statute of limitations. The District Court allowed Holiday's objection to the purported fourth amendment.

Holiday appealed to the Supreme Court of Nevada.

Law:

Under Nevada law, when a trust becomes irrevocable, the trustee must provide certain information, including "any" provision of the trust instrument that pertains to the beneficiary and a statement that the recipient of the notice may not contest the trust more than 120 days from the date the notice is served on the recipient. If a beneficiary fails to bring a challenge within 120 days of receiving the notice, then the beneficiary's claim to contest the trust instrument is barred by the statute of limitations.

Holding:

The Supreme Court of Nevada overruled the District Court and ruled that Holiday's challenge was timely as to the three challenged amendments. The Supreme Court ruled that the notice statute required Patricia, as trustee, to provide all provisions of the trust instrument that pertained to the beneficiary. The court further held that, because a beneficiary must have *all* the information about the trust in order to contest the trust instrument, a trustee must strictly comply with the notice statute in order to trigger the 120-day limitations period.

In re Estate of Michael R. Brinkman, 953 N.W.2d 1 (Neb. 2021)

The Nebraska Supreme Court holds that a will defining the term "issue" to include one child while failing to name another child does not disinherit the unnamed child, and such unnamed child is included in the term "issue."

Facts:

Michael Brinkman died Dec. 23, 2016. He was survived by two children, Nicole and Seth. Michael's will, naming as personal representative Kimberly Milius, the mother of Seth but not the mother of Nicole, was admitted to probate.

The relevant provisions of Michael's will include:

> ARTICLE I.
> The references in this Will to my "son" refer to my son, SETH MICHAEL BRINKMAN. The references in this Will to my "children" and/or my "issue" shall include my son, SETH MICHAEL BRINKMAN, and all children of mine born or adopted after the execution hereof.
>
> ARTICLE V.
> I give the residue of my estate to my issue, per stirpes....
>
> ARTICLE VII.
> If at any time before final distribution there shall not be in existence anyone who is, or might become, entitled to receive benefits under the foregoing provisions of this Will, any portion remaining shall be distributed to the persons to whom and in the proportions in which the same would have been distributed had I died intestate, domiciled in the State of Nebraska, owning such assets immediately following the death of the last survivor of the class composed of my issue and myself.

Nicole is not mentioned in the will.

Nicole objected to probate of the will and claimed she was entitled to one-half of the residue of Michael's estate, pursuant to the terms of the will. Following remand from the Supreme Court of Nebraska on a jurisdictional issue, Nicole

filed a motion to construe the will and contended that ambiguity exists in the term “issue.” She asserted that a proper construction of “issue” included both Nicole and Seth. Kimberly, as personal representative, and Seth claimed that the will was not ambiguous and that its terms disinherited Nicole.

The trial court agreed with Nicole and ruled that the will was “patently ambiguous” with regard to whether Michael intended to disinherit Nicole and held that the will failed to disinherit Nicole. Accordingly, the trial court determined that Nicole, as Michael’s daughter, is included under the will as a child, an issue and an heir of Michael’s.

Seth, as a beneficiary of Michael’s estate, and Kimberly, as personal representative, appealed.

Law:

The cardinal rule concerning a decedent’s will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or make a disposition contrary to some rule of law or public policy. *In re Estate of Etmund*, 900 N.W.2d 536 (2017). To arrive at the testator’s intention, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the testator understood words stated in the will. *Id.*

When language in a will is clear and unambiguous, construction of a will is impermissible. *Id.* Ambiguity exists in a will when a word, phrase or provision in the will has, or is susceptible of, at least two reasonable interpretations or meanings. *Id.*

An ambiguity that exists on the face of the will is a patent ambiguity. *Id.* A patent ambiguity in a will must be removed by interpretation according to legal principles. *Id.* The intention of the testator must be found in the will and parole evidence is inadmissible. *Id.*

Holding:

The Nebraska Supreme Court agreed with Nicole that the will was ambiguous as to whether Michael intended to disinherit her and ruled that the will language did not disinherit Nicole, because it did not clearly exclude her.

Therefore, the court determined that Nicole was entitled to a share of Michael's estate as one of Michael's issue.

The court focused on the words used in the will to include Seth by name, but not Nicole, and the residue clause leaving the residue of the estate to Michael's "issue" equally. The court held that the use of "issue" did not exclude Nicole simply because only Seth was included in the meaning of the word "children." The court noted that to include someone within a class is not to exclude another from that class. The court concluded: "No express statement disinherits Nicole or otherwise provides that she not receive from the estate."

Matter of Merrill, ___ A.3d ___, 2021 WL 1538884 (N.H. April 20, 2021)

The Supreme Court of New Hampshire held that the value of assets a trust holds for the benefit of a beneficiary should not be included in the marital estate of the beneficiary and the beneficiary's spouse, for purposes of equitable division in a divorce proceeding where the trust's provisions restrict both voluntary and involuntary transfers of the beneficiary's interest in the trust.

Facts:

Jonathan Merrill and Lee Merrill (collectively, the parties) married in February 2005. During their marriage, Lee was a homemaker by agreement of the parties and Jonathan worked at two family businesses, an excavation business and a horse farm. Jonathan owned interests in each business outright and was the beneficiary of a trust that owned an additional 20.5 percent interest in the excavation business. The trust instrument included this provision:

> The interest of each beneficiary, and all payments of income or principal to be made to or for any beneficiary, shall be free from interference or control by any creditor or spouse (or divorced former spouse) of the beneficiary and shall not be capable of anticipation or assignment by the beneficiary.

In June 2017, Jonathan filed for divorce, and in November 2019, the trial court issued a final divorce decree. In the decree, the trial court concluded that Jonathan's interests in his family businesses, including the interests the trust owned, had to be included in the parties' marital estate.

The trial court awarded Jonathan full ownership of his interests in the family businesses, but also ordered Jonathan to pay Lee $286,165.50 to equalize the distribution of the marital estate.

Jonathan appealed the final decree, arguing that the inclusion of the trust's business interests in the marital estate was improper because the quoted provision qualified the trust as a spendthrift trust. In response, Lee maintained that the provision did not meet the statutory requirements for a spendthrift trust under New Hampshire law because it does not prohibit a beneficiary transfer.

Law:
Under New Hampshire law, all marital property is subject to equitable division. N.H. Rev. Stat. § 458:16-a, II. Such marital property includes "all tangible and intangible property and assets, real or personal, belonging to either or both parties," N.H. Rev. Stat. § 458:16-a, I, except that to the extent a beneficiary's interest in a trust is subject to a spendthrift provision, such an interest is not marital property subject to equitable division. *In the Matter of Cohen & Richards*, 172 N.H. 78, 83, 207 A.3d 729 (2019).

Pursuant to New Hampshire law, a trust is subject to a spendthrift provision only if it "restrains both voluntary and involuntary transfers of a beneficiary's interest." N.H. Rev. Stat. 564-B:5-502(a).

Holding:
The Supreme Court of New Hampshire reversed the trial court's decision. The Supreme Court concluded that the plain language of the governing instrument created a valid spendthrift trust not subject to equitable division. It reached this conclusion for two reasons: First, the terms of the trust expressly prohibited all involuntary transfers of trust assets by prohibiting any interference or control of those assets by creditors, spouses and former spouses. Second, it prohibited any voluntary transfer of trust assets by preventing beneficiaries from assigning their rights under the trust instrument.

The Supreme Court decided this case in tandem with *Matter of Earley*, ___ A.3d ___, 2021 WL 1773905 (N.H. May 5, 2021), also discussed in this legal alert. This holding is contrary to recent conclusions by courts of other jurisdictions, which have held that the value of spendthrift trust assets can be included in spouses' marital estate under certain circumstances. For example, in Massachusetts, a beneficiary's interest in an irrevocable spendthrift trust created by a third party was deemed part of her and her spouse's marital estate subject to division, where the beneficiary was the sole beneficiary of such trust. See, e.g., Levitan v. Rosen, 95 Mass. App. Ct. 248, 124 N.E. 3d 148 (2019).

Matter of Earley, ___ A.3d ___, 2021 WL 1773905 (N.H. May 5, 2021)

The Supreme Court of New Hampshire held that where a valid spendthrift provision protects a beneficiary's interest in a trust by prohibiting the voluntary or involuntary transfer of such interest, the interest cannot qualify as marital property subject to equitable division under New Hampshire law.

Facts:
In 2000, Ryanne Earley's parents established an irrevocable trust for the equal benefit of Ryanne and her two siblings. The trust holds a flexible premium variable life insurance policy issued to Ryanne's parents payable on the death of the second of them to die. The terms of the trust agreement permit the trustee to make discretionary distributions for the beneficiaries' support in reasonable comfort, education and maintenance of health. The governing instrument also includes the following provision:

> Except as herein otherwise provided, the interest of any beneficiary hereunder, either as to income or principal, shall not be anticipated, alienated or in any other manner assigned of pledged or promised by such beneficiary, and shall not be reached by, or be subject to, any legal, equitable or other process, including any bankruptcy proceeding, or be subject to the interference or control of creditors or others in any way or manner, and all payments to or interest of any beneficiary shall be free from the control or claim of any spouse.

Additionally, the trust provides that if the grantors make any *inter vivos* transfer to the trust, they may direct the trustee to apportion such transfer among some or all of the beneficiaries, equally or unequally, and in the absence of such direction, the trustee shall apportion the transfer equally among the beneficiaries. The terms of the trust grant the beneficiaries an "absolute and unrestricted right" to demand their apportioned amount of any such transfer up to the annual gift tax exclusion amount applicable in the year in which the transfer is made, by the earlier of (i) 30 days from receiving notice of such a transfer or (ii) the last day of the year in which the transfer is made.

Ryanne married her spouse in 2002. Between 2001 and 2008, she received five distributions from the trust, totaling $65,000. In 2017, Ryanne and her spouse filed for divorce and the trial court held a hearing on the issue of whether Ryanne's spouse was entitled to any portion of Ryanne's interest in the trust.

The trial court concluded that both the distributions Ryanne received from the trust during her marriage, as well as her interest in receiving any future distributions from the trust, constituted marital property subject to equitable division. For that reason, the trial court awarded Ryanne's spouse one-sixth of the cash value of the life insurance policy and one-half of any future distribution Ryanne withdraws from the trust for five years following the effective date of the divorce decree.
Ryanne challenged this trial court decision through an appeal to the Supreme Court of New Hampshire.

Law:
Under New Hampshire law, all marital property is subject to equitable division. N.H. Rev. Stat. § 458:16-a, II. Such marital property includes "all tangible and intangible property and assets, real or personal, belonging to either or both parties," N.H. Rev. Stat. § 458:16-a, I, except that to the extent a beneficiary's interest in a trust is subject to a spendthrift provision, such interest is not marital property subject to equitable division. *In the Matter of Cohen & Richards*, 172 N.H. 78, 83, 207 A.3d 729 (2019).

Pursuant to New Hampshire law, a trust is subject to a spendthrift provision only if it "restrains both voluntary and involuntary transfers of a beneficiary's interest." N.H. Rev. Stat. 564-B:5-502(a).

Holding:
The Supreme Court of New Hampshire reversed the trial court's decision that Ryanne's interest in receiving any future distributions from the trust constituted marital property subject to division because New Hampshire law prohibits any interest in a trust subject to a spendthrift provision from being classified as marital property. The Supreme Court concluded that the provisions of the trust agreement include a valid spendthrift provision that protects Ryanne's interest in the trust by prohibiting both voluntary and involuntary transfers of her interests in the trust.

This case was decided in tandem with *Matter of Merrill*, ___ A.3d ___, 2021 WL 1538884 (N.H. April 20, 2021), also discussed in this legal alert. This holding is contrary to recent conclusions by courts of other jurisdictions, which have held that the value of spendthrift trust assets can be included in spouses' marital estate under certain circumstances. For example, in Massachusetts, a beneficiary's interest in an irrevocable spendthrift trust created by a third party was deemed part of her and her spouse's marital estate subject to division, where the beneficiary was the sole beneficiary of such trust. See, e*.g., Levitan v. Rosen*, 95 Mass. App. Ct. 248, 124 N.E. 3d 148 (2019).

Ochse v. Ochse, 2020 WL 6749044 (Ct. App. Tex. November 18, 2020)

Under Texas law, where a beneficiary of a trust is identified only by her relationship to another individual (i.e., spouse), but not by a specific name, a gift still qualifies as a bequest to a particular person, rather than a class capable of changing, where the identifying term could only refer to a specific individual at the time the agreement is executed and the terms of the agreement do not otherwise indicate that the identifying term is capable of including future changes in the number and/or identity of beneficiaries.

Facts:

In 2008, a grantor established an irrevocable trust for the benefit of her son William, William's descendants and William's "spouse." At the time, William was married to Cynthia Cadwallader Ochse, and William and Cynthia had two children together. Under the governing instrument of the trust, the grantor designated William as the initial trustee of the trust, and named Cynthia and Jack C. Hebdon Jr., successively, as successor trustee of the trust. Cynthia and Jack C. Hebdon Jr. were also named as co-trustees of any separate trust created for the benefit of William's descendants under the terms of the agreement.

In 2012, William and Cynthia divorced after approximately 30 years of marriage. William married his second wife, Carol Ochse, in 2015.

In 2018, William's children sued William, individually and as trustee of the trust, alleging breach of fiduciary duties, and sought his removal as trustee. The children also named Cynthia as an interested person, as a beneficiary of the trust. Cynthia filed an answer to the petition, a cross-claim against William, and a motion for partial summary judgment.

Cynthia requested a judicial declaration that the terms "primary beneficiary's spouse" and "son's spouse" as used in the governing instrument of the trust referred solely to her because she was William's spouse at the time the trust agreement was executed. Carol intervened, seeking a declaration that these terms referred to a class of persons including any future spouse of William, and referred solely to her from the date of her marriage to William to the present.

The trial court granted Cynthia's motion on the basis that the term "spouse" was used in the agreement unambiguously and specifically meant Cynthia, to whom William was married at the time the instrument was executed, and did not mean any subsequent spouse William may have. Carol and William appealed the determination.

Law:

Under Texas common law, when attempting to interpret the provisions of a will or trust, a court must determine the intent of the testator or grantor from the language used within the four corners of the instrument. See *In re Ray Ellison Grandchildren Trust*, 261 S.W.3d 111,117 (Tex. App.—San Antonio 2008, pet. denied); Eckels v. Davis, 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied). In doing so, the court "harmonizes all provisions and construes the instrument to give effect to all provisions so that no provision is rendered meaningless." *Eckels*, 111 S.W.3d at 649.

Where the language used is unambiguous, the court must focus on the meaning of the words actually used, rather than what the grantor may have intended to write. *San Antonio Area Found v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000). Further, the court shall interpret a gift as a class gift where the identifying term used by the grantor indicates that the beneficiaries are capable of future changes in number and identity, in contrast to bequests to specific individuals. See *Wilkes v. Wilkes*, 488 S.W.2d 398, 403 (Tex. 1972).

Holding:

The Court of Appeals of San Antonio affirmed the trial court's holding that the meaning of the term "spouse," as used in the trust, referred exclusively to Cynthia both during her marriage to William and after their divorce, rather than a class of persons including future spouses. In doing so, the Court of Appeals concluded it would be inconsistent with the whole of the agreement and Texas precedent to interpret the use of the term "spouse" as a status or class gift where (1) the term could identify only one specific individual, Cynthia, at the time the agreement was executed; and (2) it was clear under a plain reading of the terms of the entire agreement that the grantor did not intend the term "spouse" to encompass uncertain persons at the time of the gift.

Plofchan v. Plofchan, 855 S.E.2d 857, 859, 2021 Va. LEXIS 27, *1, 2021 WL 1220752

The Virginia Supreme Court held that the trustees and an attorney-in-fact had standing to challenge the defendant's revocation of a trust and power of attorney.

Facts:

Paula G. Plofchan and her husband had seven children. In 1997, Paula executed a general durable power of attorney under Texas law, appointing her husband to be her attorney-in-fact, and if her husband was not able to serve, appointing her son, Thomas Plofchan Jr., to be her attorney-in-fact. In 2001, after Paula's husband passed away, Thomas became her attorney-in-fact.

In 2006, Paula executed a revocable trust, with herself as grantor and trustee. Paula retained the power to revoke or amend the trust agreement. Despite her living in Texas when she executed the trust agreement, the laws of Virginia governed the trust agreement.

In 2014, while residing in New York, Paula was diagnosed with Alzheimer's disease.

In 2016, Paula resigned as trustee of the revocable trust, and named her two children, Elizabeth Plofchan and Thomas, as successor co-trustees. Shortly after her resignation, two doctors deemed Paula to be incapacitated.

In May 2018, Paula executed a revocation of durable power of attorney regarding the power of attorney that appointed Thomas as attorney-in-fact. On the same day, Paula petitioned the Supreme Court of Westchester County, New York, to appoint a guardian for her pursuant to New York law. Paula stated that she was displeased with Thomas' actions and that he was interfering with her personal choices. In her petition, Paula requested that the New York court appoint her daughter, Jennifer, as her guardian and that the court terminate all authority granted to Thomas and Elizabeth as co-trustees of the revocable trust.

In August 2018, the two doctors revoked their prior certificates of incapacity. Afterward, Paula sent to all her children a letter in which she revoked her trust.

In September 2018, the New York court held hearings regarding Paula's capacity. Thomas testified at the hearings and Paula "meaningfully participated."

In January 2019, the New York court found that Paula was not incapacitated and declined to appoint a guardian for her. Furthermore, the guardianship court found that that power of attorney and revocable trust were still appropriate and sufficient to provide Paula with protection of her assets, which also obviated the need for appointing a guardian.

In April 2019, Thomas and Elizabeth, as co-trustees of the revocable trust, and Thomas, as attorney-in-fact, filed a complaint against Paula in the Circuit Court for Fairfax County, Virginia. They alleged that Paula was incapacitated as it related to financial matters, and that she ineffectively attempted to revoke the power of attorney and revocable trust. They also claimed that Paula, along with the help of two of her daughters, frustrated the management of trust assets.

In response, Paula filed a "plea in bar" and asserted that because she revoked the power of attorney and revocable trust, the plaintiffs lacked standing to bring the action and that collateral estoppel barred the plaintiffs from relitigating the issue of her capacity because the New York court had made factual findings that she was not mentally incapacitated.

In August 2019, the circuit court sustained the plea in bar and dismissed the complaint with prejudice. Thomas and Elizabeth appealed.

Law:

Collateral estoppel prevents the same parties from "relitigating in a subsequent suit any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." *Funny Guy, LLC v. Lecego*, LLC, 293 Va. 135, 142, 795 S.E.2d 887 (2017).

To successfully assert collateral estoppel, a party must establish the following: (1) the parties to the two proceedings must be the same, (2) the

issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied. *Lane v. Bayview Loan Serv.*, LLC, 297 Va. 645 S.E.2d 709 (2019).

Standing can be established if a party alleges he or she has a "legal interest" that has been harmed by another's actions. *Howell v. McAuliffe*, 292 Va. 320, 330, 788 S.E.2d 706 (2016). Under Virginia law, trustees have the power to "prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties." Virginia Code § 64.2-778.

Holding:

Thomas and Elizabeth argued that collateral estoppel does not bar their action because the issue litigated in the New York guardianship proceeding and the issue concerning Paula's mental capacity, in Virginia, are not the same.

Paula argued that the circuit court correctly sustained her plea in bar because the issue of her capacity was actually litigated in the New York guardianship proceeding. Further, she argued that even though the standards of incapacity are different, the factual finding made by the New York court meet the requirements of both Virginia and Texas law. In addition, Paula asserted that privity is satisfied because Thomas and Elizabeth were parties in the New York guardianship proceeding.

The Supreme Court agreed with Thomas and Elizabeth for two reasons. First, the New York court evaluated Paula in terms of whether she needed a guardian under New York law, which is a different standard than what is applied when determining testamentary capacity or contract capacity under Virginia or Texas law.

Second, the issue of whether Paula had the capacity to revoke the power of attorney or trust was not actually litigated. The Supreme Court explained that the New York court analyzed the issue of Paula's capacity for purposes of deciding whether to appoint a guardian under the controlling New York standard, not the Virginia trust or Texas power-of-attorney standard regarding capacity to execute or revoke those documents. The Supreme Court further

explained that the New York court did not even apply New York's standard regarding whether Paula had the capacity to execute documents; it only determined the narrow issue of whether she needed a guardian pursuant to New York law.

Accordingly, the Supreme Court ruled that the circuit court erred in sustaining Paula's plea in bar based on collateral estoppel.

Next, Paula asserted that Thomas and Elizabeth lack standing because she lawfully revoked the revocable trust and power of attorney prior to the filing of the suit. Thomas and Elizabeth argued that Paula did not have the mental capacity to revoke her revocable trust or power of attorney, and their suit, in their fiduciary capacities, was to protect the assets and the administration of the revocable trust. Because the Supreme Court was required to take Thomas' and Elizabeth's allegations as true, the Supreme Court concluded that Thomas and Elizabeth did have standing. Therefore, the Supreme Court ruled that the circuit court erred in sustaining Paula's plea in bar based on lack of standing.

For these reasons, the Virginia Supreme Court reversed the judgment of the circuit court and remanded the case for further proceedings.

Fournier v. Secretary of the Executive Office of Health and Human Services, 170 N.E.3d 1159 (Mass. July 23, 2021)

The Massachusetts Supreme Judicial Court ruled that a limited power of appointment does not cause a trust to be a "countable" asset for purposes of determining eligibility for Medicaid benefits.

Facts:

In December 2002, Emily Misiaszek and her husband established an irrevocable trust. They appointed their daughter, Patricia Fournier, as trustee of the trust. Emily and her husband deeded their home and primary residence to the trust for no consideration. Emily, as permitted by the trust, lived in the home from time to time.

The purpose of the trust is to "manage Misiaszek's assets and to use them to allow Misiaszek to live in the community as long as possible." Emily Misiaszek is entitled to payments of trust income, which are made in the sole discretion of the trustee, but principal is to be held until the termination of the trust.

In addition, the trust grants Emily a limited power of appointment over the trust principal, in which she can appoint the principal in favor of any one or more charitable or nonprofit organizations over which she has no controlling interest. The trust is to terminate upon Emily's death or upon the trustee's determination that it shall terminate. In either case, upon termination, the remaining assets pass to Emily's children.

In 2017, after her husband's death, Emily applied for and was denied MassHealth benefits. MassHealth determined that Emily was ineligible due to the equity in the home, which exceeded MassHealth's $2,000 eligibility ceiling. Emily appealed to the Massachusetts Office of Medicaid's board of hearings, which affirmed MassHealth's denial of her application. The board subsequently agreed with MassHealth's conclusion that the power of appointment rendered the trust corpus countable, because Emily could "enter a nursing facility with an express promise to pay for her care through [her limited] power of appointment," or she could incur a debt to the facility and then subsequently appoint trust principal to the nursing facility to pay the debt.

Emily sought review of the board's decision and moved for judgment on the pleadings. The Superior Court determined that the hypothetical transfer contemplated by the board and MassHealth would be ineffective and "does not constitute circumstances under which payment from the trust could be made to or for the benefit of [Emily]."

MassHealth appealed the Superior Court's order to the Appeals Court. The Supreme Judicial Court of Massachusetts transferred the case on its own motion.

Law:

The class of permissible appointees is restricted to the class of persons or entities specifically named in the limited power, and does not include by implication the donee of the limited power. *Fiduciary Trust Co. v. First Nat'l Bank of Colo. Springs, Colo.*, 344 Mass. 1, 5, 181 N.E.2d 6 (1962).

The donee of a limited power of appointment may not circumvent the constraints on the power by appointing trust principal to a permissible appointee for the purpose of benefiting the donee. *Pitman v. Pitman*, 314 Mass. 465, 467, 50 N.E.2d 69 (1943).

A trustee is required by the Massachusetts Uniform Trust Code to "administer the trust solely in the interests of the beneficiaries." G. L. c. 203E, § 802 (a). If the trustee violates any duty to a beneficiary, the trustee will be liable for "breach of trust." *Guerriero*, 433 Mass. at 632, citing Restatement (Second) of Trusts § 201 (1959).

Holding:

The Supreme Judicial Court disagreed with MassHealth's arguments. The Supreme Judicial Court relied on its ruling in *Pitman* and concluded that MassHealth's hypothesized appointment is not permitted under established principles of the trust and property law.

MassHealth attempted to argue that *Pitman* is distinguishable because, in this case, the donor and the donee are the same person. The Supreme Judicial Court noted that *Pitman* made no such distinction, and that in *Pitman*, it was not concerned with who possessed the limited power of appointment, but rather, how it was exercised.

The Supreme Judicial Court further explained that the trust need not expressly bar Emily from exercising her limited power of appointment for her own benefit. The Supreme Judicial Court reasoned that the absence of express language prohibiting Emily from exercising her limited power of appointment for her benefit does not in turn permit her to do so.

The Supreme Judicial Court stated that the trust, considered in its entirety, gave Emily the ability to live in the home during her lifetime, to receive payments of trust income and to make charitable contributions. Furthermore, the Supreme Judicial Court stated that Emily may not exercise the power for her benefit and that such an appointment would be ineffective and a fraudulent exercise of the power.

Accordingly, the Supreme Judicial Court concluded that the terms of the trust did not allow Emily to exercise the limited power of appointment over the trust principal for her benefit, including by appointing the trust principal to a nonprofit or charity-run nursing home for the purpose of paying for her care.

The Supreme Judicial Court also noted that the terms of the trust do not permit Emily to exercise her limited power of appointment for her benefit because doing so would require the trustee to violate her fiduciary duties to Emily's children as the ultimate beneficiaries of the trust principal. The trustee would not be able to effectuate the appointment without exposing herself to civil liability for violating her fiduciary duties.

This analysis and reasoning led the Supreme Judicial Court to affirm the judgment of the Superior Court.