

SEVEN DEADLY CLAIMS

NATIONAL COLLEGE OF PROBATE JUDGES

November 15, 2017
Ponte Vedra Beach, Florida

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¹ This material was initially prepared for the 43rd Annual Heckerling Institute on Estate Planning. It is reprinted with the permission of the Heckerling Institute and the University of Miami. This original material was prepared by three authors, with each primarily responsible for the following sections in that document: the current author (Steven Mignogna) for pre-death will contests, palimony, and tortious interference with inheritance; Robert W. Goldman, of Goldman Felcoski & Stone, P.A., Naples, FL, for insane delusion and duress, and post-death divorces; and Terrence M. Franklin, of Sacks, Glazier, Franklin & Lodise, LLP, Los Angeles, CA, for substituted judgment and divorce proceedings in guardianships and conservatorships. Portions of the original text have been updated by the current author. The author gratefully acknowledges that Patricia H. Char, Esquire, of K&L Gates in Seattle, Washington, allowed the use of materials she drafted as the foundation of the section on technology-related claims.

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INTRODUCTION

As estate and trust litigation intensifies around the country, a wave of novel claims has been evolving. Most trust and estate professionals need to be educated about these claims, yet may not know of them at all. These materials survey the seven most significant causes of action:

- I. Pre-Death Will Contests
- II. Tortious Interference with Inheritance
- III. Select Trust-Based Claims
- IV. Divorce: Palimony; Post-Death Divorce; Trusts
- V. Guardianship-Related Claims
- VI. Writings Intended as Wills
- VII. Claims Stemming from Evolving Technology

I. PRE-DEATH WILL CONTESTS

An intriguing debate has evolved as to whether a will can be contested *before* the (potential) testator has died. Traditionally, courts have not permitted such litigation, on the reasoning that a will contest is not ripe until a person dies. He may revise the will before that point, and the court does not want to expend resources on an issue, which could be moot.

While courts still cite this traditional rule, in reality such contests are being permitted more regularly, perhaps since judges need to deal with disputes as to pre-death transfers, and realize that they are hearing similar evidence anyhow in those contexts. For example, increasingly a suit may encompass gifts or other asset transfers, in the midst of which the will is changed, too. Judges appear to be more willing to adjudicate the validity of the will in those situations. And while the recognition is subtle, the reality is that courts have allowed pre-death will contests in recent years.

A. California

In California, the general rule is that a testator must be deceased before his will may be contested. See CAL. PROB. CODE §§ 8000, 8004, 8250, 8250-54, 8270-72 (West 2009). Those provisions govern the power of the probate court to administer the will and require, among other things, that the testator be dead before such a contest is brought. CAL. PROB. CODE § 8000 (“At any time *after a decedent’s death*, any interested person may commence proceedings for administration of the estate [.]”) (emphasis added). Indeed, regarding the California probate procedure, it has been said, “death is the really essential element. The court’s power extends only to the property of deceased persons, and an attempt to take and distribute the property of a living person is a violation of due process [.]” 12 Witkin, *Summary of Cal. Law*. (9th ed. 1990), “Wills and Probate,” § 337, p. 373.

Though the law is clear that a will may not be contested until after the testator's death, the California Court of Appeal recently held that collateral estoppel precluded a will contest after the conservatee/testator's death where substituted judgment proceedings during the conservatee's life had adjudicated the validity of his estate plan. *Murphy v. Murphy*, 164 Cal. App. 4th 376 (Cal. Ct. App. 2008), *as modified on denial of reh'g* (July 22, 2008), *rev'd* (Sept. 10, 2008). By way of background, a conservator in California can petition for authority to perform a number of functions in relation to a conservatee's estate plan, including the power to create trusts, amend or modify existing trusts, make gifts and execute a will. CAL. PROB. CODE § 2580 (West 2009). However, the "[a]ppointment of a conservator is not a determination that the conservatee lacks testamentary capacity." CAL. PROB. CODE § 1871, cmt. Rather, the conservatee's lack of capacity must be specifically established in court. *Id.* at § 2582(a) (requiring that before an estate plan may be adjudicated, the court must make a determination about the conservatee's capacity). Where a conservator has established that a conservatee lacks testamentary capacity, he may seek court approval of an estate plan, substituting his judgment for that of the incapacitated conservatee. *Id.* at §§ 2582, 2584.

In *Murphy*, a son, William Jr., brought suit against his sister, Maureen, alleging that his father William's will, approved by a probate court in a substituted judgment action brought by William's conservator, was amended due to Maureen's undue influence. *Murphy*, 78 Cal. Rptr. 3d at 789. Maureen moved in with her parents in 1991 when her mother became ill and remained there for over a decade, during which time her mother died in 1999. *Id.* at 790. In 2000, William created an estate plan that provided basically for treatment for both siblings. *Id.* In 2001, William suffered a debilitating stroke, and that same year he replaced his will with a living trust and pour-over will, completely changing his estate plan to provide almost exclusively for Maureen. *Id.* At the request of William Jr., a conservator was appointed for William later in 2001. *Id.*

In 2003, after an attempt to terminate the conservatorship, William petitioned the probate court for a substituted judgment proceeding, requesting the court's ratification of his 2001 trust and pour-over will. *Id.* The court approved the testamentary scheme, finding, among other things, that "William had requested and was not opposed to the actions authorized by the court regarding creation of a living trust and execution of a will; ... the actions authorized by the order under section 2580 would have no adverse effect on William's estate; and ... the order was in the best interest of William and his estate." *Id.* at 795.

After William's death, William Jr. brought suit against Maureen, alleging that she had unduly influenced William during his illness and after their mother's death, causing him to amend his will; that Maureen had intentionally interfered with William's oral testamentary contract with his wife to leave their property to both children equally; and that Maureen had defrauded William by lying to him about William Jr. *Id.* at 796. Maureen argued that each cause of action was barred by collateral estoppel because issues of fraud, capacity and undue influence had been adjudicated in the substituted judgment proceeding. *Id.* at 796-97.

The trial court found that collateral estoppel did not apply and thus that the will could be contested. *Id.* at 797. The Court of Appeals reversed, finding that even if not actually litigated at the substituted judgment proceeding, fraud, capacity and undue influence are issues implicitly decided in finding an estate plan to be in a conservatee's best interest, and that William Jr.'s failure to raise those issues at that hearing precluded him from raising them later. *Id.* at 805.

Thus, in California, where a probate court has adjudicated the validity of an estate plan for a conservatee in a substituted judgment proceeding, no will contest may be brought to challenge the issues decided therein, as those issues should be litigated in the earlier conservatorship proceeding.

B. New York

Much the opposite of California, in 2008 the New York legislature expressly rejected the practice of pre-death will invalidations through guardianship procedures. Section 81.9 of New York's Mental Hygiene laws empowers the courts to invalidate, revoke or amend contracts and lifetime conveyance's, among other things, where it determines that such action is taken during a period of incapacity. N.Y. MENTAL HYG. LAW § 81.29 (Consol. 2010). Prior to 2008, some New York courts had construed this provision to allow the invalidation of wills made by incapacitated testators. *See, e.g., In re Rita R.*, 811 N.Y.S.2d 89 (N.Y. App. Div. 2006). In response, the New York legislature amended the statute in 2008 for the express purpose of preventing courts from taking such action, deeming the invalidation of a will beyond the scope of a guardianship proceeding. N.Y. MENTAL HYG. LAW § 81.29, cmt. (Consol. 2010). Accordingly, the statute was amended to provide that "[t]he court shall not . . . invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person." N.Y. MENTAL HYG. LAW § 81.29 (Consol. 2010).

C. Florida

In Florida, "[a]n action to contest the validity of a will may not be commenced before the death of the testator." FLA. STAT. ANN. § 732.518 (West 2010). It is therefore clear that, under Florida law, the validity of a will may not be contested until after the testator's death. *See Ullman v. Garcia*, 645 So. 2d 168, 170 (Fla. Dist. Ct. App. 1994). However, a cause of action for interference with expectancy in an estate may be brought prior to the testator's death under the rare circumstances in which post-death remedies are certain to be inadequate. *Carlton v. Carlton*, 575 So. 2d 239, 241 (Fla. Dist. Ct. App. 1991). Thus, a tortious interference or undue influence claim might be viable where, for example, the alleged tortfeasor has predeceased the testator, thus forcing the plaintiff-beneficiary to assert his claim against the defendant's estate or be time barred from asserting his causes of action by waiting until the testator's death. *Id.* Such a claim, however, probably may be brought only where the alleged tortfeasor is deceased, as generally, the plaintiff will be able to obtain adequate relief in probate. *All Children's Hosp., Inc. v. Owens*, 754 So. 2d 802, 807 (Fla. Dist. Ct. App. 2000).

In *Carlton*, two brothers, Ben and Winston, filed suit against the estate of their deceased brother, Mabry, for intentional interference with expectancy in their still-living parents' estates. *Carlton*, 575 So. 2d at 239-40. In their complaint, Ben and Winston alleged, *inter alia*, that Mabry had unduly influenced their aged parents - one of whom had Alzheimer's disease - to amend their wills to exclude Ben and Winston and that he had otherwise manipulated the ownership structure of a family ranching corporation so that all of its assets came within his control. *Id.* at 240. The trial judge dismissed the complaint, finding that the cause of action could not be maintained until at least one parent's death. *Id.* The District Court of Appeal reversed, finding the action maintainable. *Id.* at 243. In Florida, section 733.702 imposes a statute of limitations on actions brought against an estate. *Id.* at 241-42 (citing FLA. STAT. § 733.702 (1988)). Therefore, to

maintain a suit against Mabry's estate, Ben and Winston were required to file suit within that limitations period or be forever barred from bringing their claim. *Id.* at 242. Accordingly, though the brothers could not contest their parents' wills until after their deaths, *see* FLA. STAT. ANN. § 732.518 above, the unique circumstances of the case required that Ben and Winston bring their suit against Mabry for undue influence and interference with their inheritance from the estate. *Carlton*, 575 So. 2d at 243.

In *All Children's Hosp., Inc.*, however, the District Court of Appeal of Florida affirmed summary judgment in favor of the defendant in a similar cause of action for interference with expectancy brought before the estate had been administered. 754 So. 2d at 803. A charity, a residual beneficiary of a decedent's estate, filed suit against a defendant alleging that she had interfered with the charity's expectancy. *Id.* The court recognized the general proposition that such a claim is generally not cognizable until the estate has been administered and noted the factual exigencies present in *Carlton* were not present in the instant case. *Id.* at 806. As such, the claim, if brought before the administration of the estate, could only be properly maintained by the estate administrator. *Id.* at 807. Thus, in Florida, though a cause of action involving undue influence in relation to a will might in rare cases be brought before a testator dies or an estate is administered, those circumstances are probably confined to the facts of *Carlton*.

Apart from the tort context, the Florida statutes do not appear to allow the same sort of will contest preemption found in California. Pursuant to Section 744.441 of the Florida statutes, a guardian may take a wide range of actions on behalf of a ward, including making gifts, entering leases, creating trusts and selling property, but a guardian is not empowered to create a will. FLA. STAT. ANN. § 744.441 (West 2010). Thus, there does not appear to be a similar procedure for the lifetime litigation of a testator's estate plan, which, considering the language of Section 732.518 expressly prohibiting such pre-death litigation seems in line with Florida's statutory scheme.

D. New Jersey

While New Jersey lacks statutory authority for pre-death will contests generally, in cases of incapacity New Jersey law deems invalid any will executed "after commencement of proceedings which ultimately resulted in adjudicating a person incapacitated and before a judgment has been entered adjudicating a return to competency[.]" N.J. STAT. ANN. §3B:12-27 (West 2010). Thus, no will is valid unless a testator, previously deemed incompetent, is later adjudged competent during his life; if he dies without such adjudication of competence, the law precludes post-death litigation seeking a determination of competence and validation of his will. *Hackensack Univ. Med. Ctr. v. Rossi*, 338 N.J. Super. 139, 148, 768 A.2d 254, 258–59 (Law Div. 1998) (citing N.J. STAT. ANN. §3B 12-27 (West 2010)); *see also Matter of Estate of Frisch*, 250 N.J. Super. 438, 594 A.2d 1367 (Law Div. 1991); *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (Ch. Div. 1977), *aff'd*, 156 N.J. Super. 194, 383 A.2d 742 (App. Div.), *certif. denied* 77 N.J. 468 (1978).

In *In re Guardianship of Lillian Glasser*, 2007 WL 867783 (N.J. Super. Ct. Ch. Div. Mar. 8, 2007), *aff'd*, *In re Glasser*, No. A-0500-08T3, 2011 WL 2898956 (N.J. Super. Ct. App. Div. July 21, 2011) a New Jersey court invalidated the will of a still living yet incompetent testator where it adjudged her incompetent at the time the will was executed. Since the testator had executed the will prior to the commencement of the proceedings, N.J.S.A. § 3B:12-27 did not

cover the facts of the case, thus invalidating the will, but the court still litigated issues of the still-living testator's capacity and estate plan. The litigation took place during the testator's life, thus effectively allowing a pre-death contest over issues relevant to the validity of the will.

Similarly, in *In re Niles*, 176 N.J. 282, 823 A.2d 1 (2003), the Supreme Court of New Jersey heard an appeal from the probate court's invalidation of a still-living testator's will and trust based on her incapacity and the undue influence exerted upon her. Though the issue in the appeal dealt with attorney's fees, neither the probate court nor the Supreme Court determined that it was improper to adjudicate the validity of a will based on incapacity or undue influence where the testator was not yet deceased. *Niles*, then, seems to stand implicitly for the proposition that a will's validity, at least insofar as competence and undue influence are concerned, may in fact be litigated prior to a testator's death.

The matter thus remains unsettled in New Jersey, but the trend is moving toward allowing pre-death will contests. *See also In the Matter of Harry Sable*, No. A-3743-06T2, 2009 WL 321558 (N.J. Super. Ct. App. Div. Feb. 11, 2009), certif. denied, 200 N.J. 370 (2009); *In re Cohen*, 335 N.J. Super. 13 (App. Div. 2000), certif. denied, 167 N.J. 632 (2001) (pre-mortem settlement agreement revising estate plan of an incapacitated person was unenforceable without a hearing on the testator's best interests and probable intent as to the new plan); *Cohen v. Cohen*, No. BER-C-134-04, 2009 WL 2844402 (Trial Order) (N.J. Super. Court Ch. Div. Aug 19, 2009); N.J. STAT. ANN. § 2A:65-5 (West 2010) (action by an heir for "the waste or destruction of his inheritance, whether such waste occurred in the lifetime of his ancestor or thereafter").

E. Alaska

A recently passed bill in Alaska expressly allows a proceeding to validate a will while the testator is still alive. According to Senate Bill 60 of the 26th Legislature, which added a new subsection 530 to Section 13.12 of the Alaska statutes (on intestacy, wills and donative transfers): "[a] testator, a person who is nominated in a will to serve as a personal representative, or, with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification." S.B. 60, 26th Leg., 2d Reg. Sess. (ALASKA 2010). An equivalent provision was added for trusts: ALASKA STAT. §§13.12.535 (2010).

F. Arkansas

Arkansas also ranks among the handful of states, which expressly allow the validation of wills, thus preempting will contests, prior to a testator's death. Pursuant to Section 28-40-202 of the Arkansas Code:

- (a) Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the circuit court of the appropriate county of this state for a declaratory judgment establishing the validity of the will
- (b) All beneficiaries named in the will and all the testator's existing intestate successors shall be named parties to the action.

(c) For the purpose of this subchapter, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.

(d) Service of process shall be as in other declaratory judgment actions.

ARK. CODE ANN. § 28-40-202 (West 2010).

G. Nevada

Nevada also allows for the pre-death validation of wills. Section 30.040(2) of the Nevada Revised Statutes states: “A maker or legal representative of a maker of a will, trust or other writings constituting a testamentary instrument may have determined any question of construction or validating arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder.” NEV. REV. STAT. ANN. § 30.040(2) (LexisNexis 2013).

H. North Dakota

North Dakota, much like Alaska, Arkansas, and Nevada, statutorily provides for the declaration of a will during the testator’s lifetime. Pursuant to Section 30.1-08.1-01 of the North Dakota Code [a]ny person who executes a will disposing of the person’s estate in accordance with this title may institute a proceeding under chapter 32-23 for a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will. N.D. CENT. CODE § 30.1-08.1-01 (2009).

I. Ohio

Ohio is the final state to expressly provide a statutory procedure for the declaration of a will’s validity during the testator’s lifetime. That statute provides that:

(A) A person who executes a will allegedly in conformity with the laws of this state may petition the probate court of the county in which he is domiciled, if he is domiciled in this state, or the probate court of the county in which any of his real property is located, if he is not domiciled in this state, for a judgment declaring the validity of the will.

The petition may be filed in the form determined by the probate court of the county in which it is filed.

The petition shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed.

For the purposes of this section, “domicile” shall be determined at the time of filing the petition with the probate court.

(B) The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed shall not be construed as evidence or an admission that the will was not properly executed pursuant to section 2107.03 of the Revised Code or any prior law of this state in effect at the time of execution or as evidence or an admission that the testator did not have the requisite testamentary capacity and freedom from undue influence under section 2107.02 of the Revised Code.

OHIO REV. CODE ANN. § 2107.081 (West 2010).

II. TORTIOUS INTERFERENCE WITH INHERITANCE

A. Elements of the Cause of Action: Recognition of the Tort

The *Restatement (Second) of Torts* § 774B (1979), states: “One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.” See generally *Wilson v. Fritschy*, 55 P.3d 997 (N.M. Ct. App. 2002). The basic elements follow:

1. An Actual Expectancy Exists

Plaintiff must show that an expectancy existed sufficient to warrant the court’s protection. Certainty is not necessary, only the expectation.

2. Conduct

The expectancy may be impeded by conduct affecting the execution, alteration, or revocation of a will.

3. Intentional Interference

A plaintiff must prove that the defendant intentionally interfered with the expectancy and that the interference was tortious. *Restatement*, § 774B, cmt. c (1979).

4. Liability

Liability for tortious interference is usually limited to those who have actually interfered by means that are independently tortious in character. The interference with inheritance cannot be the result of negligence. *Hegarty v. Hegarty*, 52 F. Supp. 296, 299 (D. Mass. 1943) (“In order to find against the defendants you would have to find that they not only interfered but that they *knew* they were interfering . . . If he merely does it accidentally without thought of its effect, without *purpose or intent*, he cannot be held liable”)(emphasis added).

5. Causation

Plaintiff must prove with reasonable certainty that he would have realized the inheritance but for the defendant’s tortious acts. This must be shown by a “high degree of probability.” *Restatement*, § 774B, cmt. d (1979).

6. Timing

One point of debate around the country is whether the claim may be brought prior to the death of the testator. Some jurisdictions have permitted such an action to proceed in limited circumstances. In a Florida case, the testator remained alive but the alleged tortfeasor had died. *Carlton v. Carlton*, 575 So. 2d 239 (Fla. Dist. Ct. App. 1991). The problem was that the statute of limitations might bar their claim against the tortfeasor's estate. A Maine court held that the "lifetime suit" allows plaintiffs to seek relief for injuries during the life of the testator when they occur. *Harmon v. Harmon*, 404 A.2d 1020 (Me. 1979).

7. Damages

Plaintiff must show injury as a result of the defendant's tortious conduct. Most often, the damages are measured by the value of the property that would have been received but for the tort. "The normal remedy . . . is an action in tort for the loss suffered by the one deprived of the legacy." *Restatement*, § 774B cmt. e (1979); *In re Estate of Knowlson*, 562 N.E.2d 277 (Ill. App. Ct. 1990). Punitive damages may also be available. *King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987). Damages for emotional distress may arise, too. *Carlton*, 575 So. 2d 239. In such cases, a claimant need not prove outrageous conduct by the tortfeasor. *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992). However, damages for emotional distress have only been awarded against the tortfeasor, not against the decedent's estate. *Id.* The potential also exists for recovery of legal fees or loss of time at work. *Id.*

B. Policies Supporting the Tort

The most cited policy is that no other viable cause of action exists to address one's interference with another's inheritance. The will contest process may not afford an adequate remedy in certain situations, such as cases where the defendant prevented the decedent from making a will or induced the decedent to revoke a will, causing the estate to pass by intestate succession. Another such context is where the decedent was induced to make a probated will instead of another will that would have benefited the plaintiff. If the contest were to succeed, the will would be invalidated and the plaintiff would only receive his intestate share. If there is a potential for redress by will contest, some courts will require that the probate court proceeding be completed before a tort action may be brought. If a court determines that a probate court cannot adequately remunerate a plaintiff for his loss (claims for damages other than value of property, such as fees, emotional distress, and work compensation), a tort action may be available. *Huffey*, 491 N.W.2d 518.

C. The Current National Trends

The national trend is to recognize the tort. Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004).

To the surprise of some judges, the tort has longstanding roots. In *Lewis v. Corbin*, 81 N.E. 248 (Mass. 1907), a Massachusetts court sustained an action in tort where the plaintiff alleged that the defendant deprived the plaintiff of a legacy through fraud by inducing a testator to execute an

invalid codicil. The court stressed that the fraudulent conduct of misleading a testator to believe that a codicil was valid was a wrong perpetrated on the plaintiff as well as on the testator.

Other states have followed *Lewis*. For example, in West Virginia, a tortious interference claim by a sister was sustained against her brother who had written their father's will with dispositive provisions that were contrary to the father's wishes. *Barone v. Barone*, 294 S.E.2d 260 (W. Va. 1982). In Iowa, the courts have found that wrongfully causing the revocation of a prior will and the execution of a new will is actionable in tort. *Huffey*, 491 N.W.2d 518. North Carolina courts recognize the existence of the tort of malicious and wrongful interference with the making of a will. In *Griffin v. Baucom*, 328 S.E.2d 38 (N.C. Ct. App.), *review denied*, 332 S.E.2d 481 (N.C. 1985), the plaintiff alleged that the testator's wife and sister-in-law persuaded the testator through false representations to change his estate plan, which had left a large share of the estate to the plaintiff.

Some states, however, may find there is no reasonable expectation, regardless of other sources of remedy. *Harris v. Kritzik*, 480 N.W.2d 514 (Wis. Ct. App.), *review granted*, 485 N.W.2d 412 (Wis. 1992) (plaintiff could not proceed with her claim for tortious interference against her live-in boyfriend's son following the death of her boyfriend. The court held that plaintiff, as a mere cohabitant, did not have a reasonable expectation of the \$5,000,000 which she stated the decedent had promised to leave to her but which he had left out of his will).

In New Jersey, one of the first cases to consider this context was *Casternovia v. Casternovia*, 82 N.J. Super. 251 (App. Div. 1964), in which plaintiffs brought an action to set aside a conveyance and impress a trust on their mother's property. Plaintiffs challenged their mother's capacity and also alleged interference with her assets. With respect to the latter claim, plaintiffs complained that their brother and his wife "wilfully [sic], intentionally, and maliciously interfered with [their] economic rights by 'causing [the mother] to cut off the plaintiffs from the probable economic benefits they would have enjoyed as heirs at law.'" *Id.* at 255. In showing deference and respect to the mother's exercise of personal judgment — based on the mother's own strong testimony — the court ruled that plaintiffs had no interest in the property while the mother was still alive and that mother could distribute her property in any manner she deemed appropriate. In affirming the decision from below, the court concluded that the "plaintiffs did not have a legal status to sustain the pending action." *Id.* at 257.

An open question remains as to whether this precedent would still stand, in the face of increasing authority to the contrary in other jurisdictions, or under different facts, such as where the parent was unable to express strongly her own wishes.

More recently, in *Garruto v. Cannici*, 397 N.J. Super. 231 (App. Div. 2007), Mary Garruto died on October 30, 2004. Decedent was predeceased by her parents. *Id.* at 233–34. She never married and had no children. Her brothers were her next of kin. Her last will was admitted to probate, and letters testamentary were issued to her niece, defendant Lorraine Cannici, in November 2004. *Id.*

Approximately one-year later, plaintiffs Felix and Francisco Garruto - decedent's brothers - filed an action in the Superior Court of New Jersey, Law Division, alleging fraud by defendant

Cannici. Plaintiffs claimed that, as a result of the fraud, plaintiffs were denied their proper share of their sister's estate. *Id.*

Following discovery, defendant Cannici moved for summary judgment. The motion judge construed the complaint to set forth a cause of action for tortious interference with an expected inheritance but determined that plaintiffs were unable to support their claims factually. *Id.*

The plaintiffs appealed. In opposing summary judgment, and on appeal, defendant Cannici argued that plaintiffs' claims of tortious interference were barred by their failure to file a timely challenge to the will under *R. 4:85-1*. *Id.*

In response, plaintiffs and their counsel asserted that they did not determine to challenge the will until the requisite time for filing that challenge had passed. *Id.* at 238–39. They also noted that an unpublished decision had issued in the meantime, which recognized the tort of interference with inheritance. *Id.*

The Appellate Division acknowledged that the tort is recognized in the *Restatement (Second) of Torts* § 774B (1979). *Id.* at 240 (footnotes omitted) (“Addressing an issue that is novel in the State, we now determine that, although an independent cause of action for tortious interference with an expected inheritance may be recognized in other circumstances, it is barred when, as here, plaintiffs have failed to pursue their adequate remedy in probate proceedings of which they received a timely notice.”). The court explained that the New Jersey Statutes and Court Rules recognize the authority of the Probate Part to handle controversies respecting wills and specify the manner in which challenges to wills shall occur. *Id.* at 241. “By this means, challenges to a will based, as in this case, upon undue influence through fraud can proceed under established precedent setting forth the relevant factors for consideration, as well the quantum and burdens of proof that pertain specifically to this subject area.” *Id.*

The Appellate Division continued:

To permit a collateral attack premised upon tortious interference with an expected inheritance would, in these circumstances, unnecessarily prolong the settlement of estates, introduce the possibility of inconsistent judgments, and require consideration of a body of law governed by standards different from those applicable in a probate contest Moreover, to permit collateral attack on this basis would be inconsistent with the established precedent precluding such an attack on a valid probate judgment recognizing the validity of a will.

Id. at 241–42 (citations omitted).

The Appellate Division determined that “in reaching this conclusion, we are in accord with a multitude of courts that have held on various grounds that a claim for tortious interference with an anticipated inheritance is unavailable when an adequate probate remedy exists.” *Id.* at 242 (citations omitted).

Finally, the court held that the motion judge had correctly found that the complaint was factually unsustainable. The order of summary judgment entered against plaintiffs was affirmed. *Id.* at 242–43.

At present, a number of states currently recognize the tort of intentional interference with expectancy, in varying degrees. A survey follows:

- Florida – *Davison v. Feuerherd*, 391 So. 2d 799 (Fla. Dist. Ct. App. 1980); *Allen v. Leybourne*, 190 So. 2d 825 (Fla. Dist. Ct. App. 1966).
- Georgia – *Mitchell v. Langley*, 85 S.E. 1050 (Ga. 1915), subsequent appeal 148 Ga. 244 (Ga. 1918).
- Illinois – *In re Estate of Roeseler*, 679 N.E.2d 393 (Ill. App. Ct. 1997); *Nemeth v. Banhalmi*, 425 N.E.2d 1187 (Ill. App. Ct. 1981).
- Indiana – *Minton v. Sackett*, 671 N.E.2d 160 (Ind. Ct. App. 1996).
- Iowa – *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992); *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978).
- Maine – *Morrill v. Morrill*, 712 A.2d 1039 (Me. 1998); *Cyr v. Cote*, 396 A.2d 1013 (Me. 1979).
- Massachusetts – *Labonte v. Giordano*, 687 N.E.2d 1253 (Mass. 1997); *Monach v. Koslowski*, 78 N.E.2d 4 (Mass. 1948).
- Missouri – *Graham v. Manche*, 974 S.W.2d 580 (Mo. Ct. App. 1998); *Hammons v. Eisert*, 745 S.W.2d 253 (Mo. Ct. App. 1988).
- New Mexico – *Doughty v. Morris*, 871 P.2d 380 (N.M. Ct. App. 1994).
- North Carolina – *Griffin v. Baucom*, 328 S.E.2d 38 (N.C. Ct. App. 1985), *review denied*, 332 S.E.2d 481 (N.C. 1985).
- Ohio – *Firestone v. Galbreath*, 616 N.E.2d 202 (Ohio 1993), *aff. in part, rev. in part and remanded*, 25 F.3d 323 (6th Cir. Ohio 1994).
- Oregon – *Allen v. Hall*, 974 P.2d 199 (Or. 1999)².

²Two new cases were decided in 2011 relying on *Allen*. In *Butcher v. McClain*, 260 P.3d 611 (Or. Ct. App. 2011) the Court of Appeals of Oregon held the tort of intentional interference with inheritance was not barred by the statute of limitations because the damage to the plaintiffs by the interference to decedent’s will was when they lost their expected inheritance, not when the will was executed. *Id.* at 324. Relying on *Allen*, the court in *Briggs v. Lamvik*, 255 P.3d 518 (Or. Ct. App. 2011), found that the plaintiff failed to produce evidence that supported the claim that “defendant intentionally interfered with plaintiff’s prospective inheritance through an improper means or an improper purpose and that defendant’s interference caused plaintiff to lose the prospective inheritance.” *Id.* at 525.

- Texas – *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144 (Tex. App. 1998); *King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987).
- West Virginia – *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998), *cert. denied*, 525 U.S. 1142 (1999); *Barone v. Barone*, 294 S.E.2d 260 (W. Va. 1982).
- Wisconsin – *Harris v. Kritzik*, 480 N.W.2d 514 (Wis. Ct. App.), *review granted*, 485 N.W.2d 412 (Wis. 1992).

Other states still decline, at least for now, to recognize the tort. The Supreme Court of Arkansas refused to recognize the tort in *Jackson v. Kelly*, 44 S.W.3d 328 (Ark. 2001). The *Jackson* court found that most courts prohibit a plaintiff from pursuing an interference tort unless conventional probate relief is either unavailable or inadequate. Therefore, a claimant should exhaust all other traditional probate remedies, such as a will contest, before pursuing a tort action. The Tennessee Court of Appeals delayed a decision to adopt or deny the tort. *Fell v. Rambo*, 36 S.W.3d 837 (Tenn. Ct. App. 2000), subsequent appeal, 2001 Tenn. App. LEXIS 407 (Tenn. Ct. App. 2001). The court noted that in the particular facts of the case, two of the elements of the tort could not be satisfied, avoiding the need to address adoption of the tort. The implication, however, was that if the elements were all satisfied, the tort might be viable.

III. SELECT TRUST-BASED CLAIMS

A. Trust Protectors

Trust protectors were initially popular with offshore trusts but have become more common in other contexts. A trust protector is a third party who directs or restrains the trustees. A trust protector thus adds flexibility.

Trust protector agreements generally impose a duty of loyalty and impartiality. Further, a trust protector can be given any number of duties. A trust protector can be allowed to change the terms of the trust to comply with new laws, change the powers of a trustee, or even add, remove or replace a trustee. *See generally* R. Ausness, “The Role of Trust Protectors in American Trust Law,” 45 Real Prop. Tr. & Estate L.J. 319 (Summer 2010); Alexander A. Bove, Jr., “The Case Against the Trust Protector.” *Prob. & Prac.*, Nov.-Dec. 2011; Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (2011).

The Uniform Trust Code addresses trust protectors in section 808 (a) - (d). Subsections (b) and (d) are based in part on *Restatement (Second) of Trusts* § 185 (1959). Section D states that “A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”

Notably, the powers of a trust protector are not the same as a trustee with veto power. The comment to section 808 of the UTC explains, “A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for

initiating the decision, subject to the third party’s approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a co-trustee and is responsible for taking appropriate action if the third party’s refusal to consent would result in a serious breach of trust.”

1. Trust Protector Laws Vary Among States

<u>States that have adopted statutes expressly pertaining to trust protectors</u>	
Alaska	ALASKA STAT. § 13.36.370
Arizona	ARIZ. REV. STAT. § 14-10818
Delaware	DEL. CODE ANN. tit. 12, § 3313
Idaho	IDAHO CODE § 15-7-501
Illinois	760 Ill. Comp. Stat. Ann. 5/16.3
Michigan	MICH. COMP. LAWS SERV. § 700.7808
Mississippi	MISS. CODE ANN. §§ 91-8-1201 through 1206
Missouri	MO. REV. STAT. § 456.8-808
Nevada	NEV. REV. STAT. ANN. § 163.5547 NEV. REV. STAT. ANN. § 163.5553
New Hampshire	N.H. REV. STAT. ANN. § 564-B:12-1201 through 1206
North Carolina	N.C. Gen. Stat. § 36C-8-808
North Dakota	N.D. CENT. CODE § 59-16.2-05
South Carolina	S.C. CODE ANN. § 62-7-103 S.C. CODE ANN. § 62-7-818 S.C. CODE ANN. § 62-7-808 S.C. CODE ANN. § 62-7-1005A
South Dakota	S.D. CODIFIED LAWS § 55-1B-6
Tennessee	TENN. CODE ANN. § 35-15-1201

	TENN. CODE ANN. § 35-15-1202 TENN. CODE ANN. § 35-15-1206
Vermont	VT. STAT. ANN. tit. 14 § 1101 VT. STAT. ANN. tit. 14 § 1102
Wisconsin	WIS. STAT. ANN. § 701.0818
Wyoming	WYO. STAT. ANN. § 103 WYO. STAT. ANN. § 710 WYO. STAT. ANN. § 711

<u>States that have adopted the Uniform Trust Code section on trust protectors³</u>	
Alabama	ALA. CODE § 19-3B-808
Arkansas	ARK. CODE ANN. § 28-73-808
Florida	FLA. STAT. ANN. § 736.0808
Kansas	KAN. STAT. ANN. § 58a-808
Kentucky	KY. REV. STAT. ANN. § 386B.8-080
Maine	ME. REV. STAT. tit. 18-B, § 110 ME. REV. STAT. tit. 18-B, §105 ME. REV. STAT. tit. 18-B, §808
Massachusetts	MASS. ANN. LAWS ch. 203E, § 808
Minnesota	MINN. STAT. ANN. § 501C.0808
Montana	MONT. CODE ANN. §72-38-808

³As aforementioned, section 808 (a)-(d) of the Uniform Trust Code address trust protectors. Specifically, section D provides, “[a] person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”

Nebraska	NEB. REV. STAT. ANN. §308-3873
New Jersey	N.J. STAT. ANN. § 3B:31-61
New Mexico	N.M. STAT. ANN. §46A-8-808
Ohio	Ohio Rev. Code Ann. § 5808.08
Pennsylvania	PA. CONS. STAT. ANN. § 7778
Vermont	VT. STAT. ANN. tit. 14 § 1101 VT. STAT. ANN. tit. 14 § 1102
West Virginia	W. VA. CODE §44D-8-808

2. Directed Trustees Versus Trust Protectors

A directed trustee plays a different role than a trust protector. A directed trustee can be told to make certain investment decisions or distributions. *See* Jeffrey A. Cooper, *Dead Hand Investing: The Enforceability of Trust Investment Directives*, 37 ACTEC L.J. 365 (2011). Under some formulations of law, a directed trustee can be liable for violating the terms of the trust even if directed to do so. *See generally* Richard Nenko, “Can Directed Trustees Limit Their Liability?” Prob. & Prac., Nov.-Dec. 2007.

Trust protectors are receiving increased attention in the courts, which have grappled with the role – and potential liability – of trust protectors. Remarkably, almost half of all of the published cases dealing with trust protectors have been issued only in the last few years.

3. Cases

The Ninth Circuit has addressed trust protectors in the context of an offshore trust. In the case of *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999), the United States Court of Appeals for the Ninth Circuit affirmed the lower court’s decision, which found defendants in civil contempt after they failed to comply with a preliminary injunction by refusing to return their illicit proceeds. In that case, the defendants formed a limited liability company, which served as a telemarketer of media units. *Id.* at 1231. Their telemarketing venture offered investors the chance to participate and receive investments. *Id.* Unfortunately, the defendants were unable to sell enough products to return the promised yields to the investors, so the defendants took the later investors’ investments to pay the promised yields to earlier investors—classic Ponzi scheme. *Id.* at 1232. As a result of the Ponzi scheme, the investors suffered tremendous losses. *Id.* at 1231. Following a suit brought by the Federal Trade Commission against the defendants, the court issued a temporary restraining order and preliminary injunction requiring the defendants to repatriate any assets held for their benefit outside of the United States. *Id.* at 1232. The defendants did not comply, alleging that their co-trustee—a company licensed to conduct trustee service outside of

the United States—removed the defendants as co-trustees under the trust because of the event of duress, and therefore refused to provide repatriation of the assets. *Id.*

The court found that the defendants were the protectors of their trust and their claim that compliance with the temporary restraining order was impossible, was taken with skepticism. *Id.* at 1241-42. The court explained that “a protector has significant powers to control an offshore trust” and that “a protector can be compelled to exercise control over a trust to repatriate assets if the protector’s powers are not drafted solely as the negative powers to veto trustee decisions or if the protector’s powers are not subject to the anti-duress provisions of the trust.” *Id.* at 1242. Thus, the defendants’ trust gave them power to appoint a new trustee and make the anti-duress provision subject to their powers. As a result, the court held that the defendants could force the foreign trustee to repatriate the trust assets to the United States. *Id.*

The Washington Court of Appeals also addressed trust protectors. In the case of *Estate of Wimberley*, 349 P.3d 11 (Wash. Ct. App. 2015), the trial court removed a trust protector who was the settlor’s former estate planning attorney. *Id.* at 22. According to the trust, the protector could only be removed for violating his fiduciary duty to the settlor. *Id.* at 17. Following the settlor’s death, litigation ensued. *Id.* at 22. The trust protector filed motions against one of the beneficiaries. *Id.* The beneficiary alleged a conflict of interest between the protector’s duties and the trial court removed the protector. *Id.*

The most common issue is whether a trust protector is valid. For instance, in New Jersey, the probate code “does not accommodate [trust protectors], by name or function.” *In re Inter Vivos Trust*, No. BER-P-080-11, 2012 N.J. Super. Unpub. LEXIS 421, at *49 (Ch. Div. 2012). This sole New Jersey case to discuss trust protectors declined “to address the propriety of the utilization of Trust Protectors.” *Id.* In dicta, however, the court indicated that trust protectors are bound to respect the wishes of trust beneficiaries, which parallels the limited power approach that the UTC endorses. *Id.*

In re: Eleanor Pierce (Marshall) Stevens Living Trust, 159 So. 3d 1101 (Ct. App. La. 2015), writ denied 210 So. 3d 282 (La. 2016) upheld an appointment of a trust protector as valid under Louisiana law. The trust was established in 1979 and amended several times. A 2007 amendment appointed a trust protector and afforded that person the power to remove the trustee.

Later, after several rounds of disputes and litigation, the trustee asserted that the trust protector did not have the authority to remove the trustee. The court analyzed the trust terms and found that, “[a]lthough the office of Trust Protector is not expressly provided for by the Trust Code, Appellant cites, and we find, no law that expressly forbids such a provision. We also find no provision in the Trust Code incompatible with recognition of such an office such that would prohibit its coexistence.” *Id.* at 1110. The court likewise rejected the argument that a trust protector is against public policy. Indeed, the court determined that a trust protector guards “the settlor’s interest in managing the assets for the benefit of the beneficiaries.” *Id.* at 1111.

Even assuming that the appointment of the trust protector is valid, dispute still arise as to that person’s role, duties, and liability. For example, in *McLean v. Davis*, 283 S.W. 3d 786 (Mo. Ct. App. 2009), the Missouri Court of Appeals reversed summary judgment in favor of a trust protector on the claim that the trust protector breached his fiduciary duty to remove delinquent

trustees. Applying Missouri's form of the UTC, the court ruled that the trust protector owed at least the duties of undivided loyalty and confidentiality.

In *Midwest Trust Co. v. Brinton*, 331 P. 3d 834 (Kan. Ct. App. 2014), review denied 2015 Kan. LEXIS 599 (Kan. July 22, 2015), the Court of Appeals of Kansas dealt with when a trust protector is unable or unwilling to serve. The trustees argued that the trust protector was no longer able to serve by operation of law "due to his retirement as a certified public accountant, his failure to maintain his license, his failure to meeting continuing education requirements, and his failure to keep up with and be familiar with estate tax laws." The argument was based on a standard sentence in many trust protector provisions which says "any trust protector shall receive a reasonable compensation for his or her services, based upon such Trust Protector's then current hourly rate for professional services." The court rejected the argument and affirmed the lower court's ruling that a beneficiary failed to exercise her power of appointment because she did not meet the condition in the trust of consulting the trust protector.

Furthermore, a South Carolina court addressed the issue of whether a trust protector can qualify as a real party in interest. In *Schwartz v. Wellin*, No. 2:13-cv-3595-DCN, 2014 U.S. Dist. LEXIS 53083 (D.S.C. Apr. 17, 2014), *modified by, dismissed by, in part*, No. 2:13-cv-3595-DCN, 2014 U.S. Dist. LEXIS 172610 (D.S.C. Dec. 15, 2014), an attorney was appointed as a trust protector of an irrevocable trust. *Id.* at *3. Four years later, he filed a complaint against the trustees for frustrating the intent and purposes of the trust. *Id.* at *4-5. The trustees filed a motion to dismiss arguing that the trust protector was not a real party in interest. *Id.* at *17. The attorney, acting as the trust protector, argued that the trust provisions authorized him to bring the litigation because the amendments gave the trust protector the "power to represent the trust with respect to any litigation brought by or against the Trust if an Trustee is a party to such litigation" and to "prosecute or defend such litigation for the protection of trust assets." *Id.* The court looked to South Dakota law to determine whether a trust protector could qualify as a real party in interest. *Id.* at *18. According to South Dakota law, "[e]very action shall be prosecuted in the name of the real party in interest. A personal representative, guardian, conservator, bailee, [or] trustee of an express trust [...] may sue in his own name without joining with him the party for whose benefit the action is brought" *Id.* at *19. The court also cited to the South Dakota Supreme Court, explaining that the real party in interest requirement is satisfied if the litigant can show that he personally suffered from some actual or threatened injury. *Id.* The court found that because the trust protector did not demonstrate that he personally suffered an actual or threatened injury in the case, he was not a real party in interest. As a result, the court decided it must dismiss case. *Id.* at *22.

B. Trust Amendments: Removal of Trustee

In *Trust Under Agreement of Edward Winslow Taylor*, 2017 Pa. LEXIS 1692 (July 19, 2017), petition denied 2016 Phila. Ct. Com. Pl. LEXIS (Pa. CP. Oct. 2016), affirmed 2017 Pa. Super. 275 (Pa. Super. Ct., Aug. 23, 2017), the Pennsylvania Supreme Court declared that it is unlawful to modify a trust to add a portability provision.

Beneficiaries of the Trust Under Agreement of Edward Winslow Taylor ("Trust") appealed from the order of the Court of Common Pleas of Philadelphia County, Orphans' Court Division,

denying their petition to modify a trust agreement without court approval to allow removal of a corporate trustee “without cause” and appoint a successor corporate trustee.

On February 9, 1928, Edward Winslow Taylor (“Settlor” or “Edward”) executed an Agreement of Trust, which he amended on April 20, 1928, and September 15, 1930. In the initial trust document, Edward appointed The Colonial Trust Company, whose principal place of business was Philadelphia, as trustee. In the September 25, 1930, amendment, Taylor named the Pennsylvania Company for Insurance on Lives and Granting Annuities, successor by merger of The Colonial Trust Company. Wells Fargo Bank, N.A. (“Wells Fargo”) was the successor in interest of the original trustee. *Id.* at *1-2.

Throughout the duration of the Trust, Edward’s children and various relatives served as the individual co-trustee. *Id.* at *2-3. The Trust was to terminate 20 years after the death of the last survivor of the Settlor, his wife, or his children (-- in this case, on May 4, 2028.) *Id.* at *3.

In August 2009, Wells Fargo filed a Fourth and Final Account of its administration of the trust. With this accounting, Wells Fargo sought court approval under 20 Pa.C.S.A. § 7740.7(b) to divide the Trust into four separate trusts for each of the Settlor’s son’s four surviving children. The trustee also sought court approval of the appointment of each child to serve as co-trustee with Wells Fargo of his or her own trust. This court approved the division of the Trust and the appointment of each of the children as co-trustees by a December 7, 2009, Adjudication. The Trust was subsequently divided into four separate trusts, each with an approximate value of \$1.8 million. *Id.*

On September 4, 2013, three of the four surviving income beneficiaries of the Trust [“Petitioners”] filed a petition to modify the Trust agreement. Petitioners seek to modify paragraph FIFTEENTH of the Trust Agreement to allow for the removal of a corporate trustee, in the future, without petitioning a court for approval.

On Wells Fargo’s motion for judgment on the pleadings, the Orphans’ Court denied the petition to modify the Trust. *Id.* at *4. The Orphans’ Court found that the restrictions on trustee removal in 20 Pa.C.S.A. § 7766 must be satisfied to allow modification of a trust under 20 Pa.C.S.A. § 7740.1, and to allow for the removal of a corporate trustee. Petitioners appealed.

The Superior Court reversed the Orphans’ Court decision, finding that the modification provision (20 Pa.C.S.A. § 7740.1) operates independently of the trustee removal provision (20 Pa.C.S.A. § 7766). The Superior Court held: “Contrary to the findings of the Orphans’ Court, section 7740.1 is clear and unambiguous on its face, and must be applied as such. As written, the statute contains no language excluding from its ambit the modification of trustee-removal provisions.” *Id.* at *18. The Superior Court remanded the case to the Orphans’ Court to adjudge the request to modify the Trust on its merits. *Id.* at *20.

Wells Fargo filed a petition for allowance of appeal with the Supreme Court. The Supreme Court granted that petition and framed the issue that it will consider as follows:

whether the Superior Court erred in holding that trust beneficiaries may circumvent the requirements for removal of a trustee in Section

7766 of the Trust Act, 20 Pa.C.S.A. § 7766, by amending the trust under 20 Pa.C.S.A. § 7740.1.

In a unanimous opinion, the Supreme Court reversed and concluded “that the UTA does not permit the removal and replacement of a trustee without Orphans’ Court approval in accordance with section 7766.” *Id.* at *2. Specifically, “the scope of section 7740.1 of the UTA does not extend to modification of trust agreements to permit the removal and replacement of trustees. Instead, as the [Uniform Trust Code] comment to section 7740.1 reflects, section 7766 of the UTA is the ‘exclusive provision regarding removal of trustees.’” *Id.* at *33.

In the Supreme Court appeal, Wells Fargo, *inter alia*, argued that the Superior Court had erred in reviewing Section 7740.1 in isolation, without consideration of the UTA as a whole and Section 7766 in particular. Wells Fargo further argued that, if the Supreme Court affirmed, then beneficiaries would be able to remove trustees without going through the more burdensome court removal process and, therefore Section 7766 would be rendered superfluous. In addition, Wells Fargo pointed out the Superior Court’s failure to consider “the [Joint State Government Commission] comment following section 7740.1, which provides that section 7766 is the ‘exclusive provision on removal of trustees,’” or the legislative history by which Pennsylvania’s General Assembly declined to adopt a provision from the Uniform Trust Code by which a trust’s beneficiaries could unanimously remove a trustee. *Id.* at *12. Wells Fargo also argued that “Pennsylvania has always shown great deference to the settlor’s selection of the trustee and has never allowed trust beneficiaries to amend a trust to add a portability clause.” *Id.* at *14.

The beneficiaries argued that portability clauses are common in modern trust instruments, particularly in light of the substantial restructuring of the banking industry in recent decades. They argued that they should be given the same flexibility of beneficiaries of modern trusts, and that the settlor could not have contemplated the changes in the banking world or that the local trustee he named, The Colonial Trust Company, would ultimately become San Francisco-based Wells Fargo. The beneficiaries also argued that Section 7766 was a “default rule” in circumstances in which a trust agreement was silent on trustee removal (i.e., if the trust agreement contains a removal provision, then that trumps the statute). *Id.* at *14-15. Moreover, Section 7766 does not limit modifications under Section 7740.1, including the addition of a portability clause. *Id.* Thus, they argued, Wells Fargo created a statutory conflict that does not exist, so the issue should be resolved under the plain meaning of Section 7740.1, without resort to the rules of statutory construction.

The Supreme Court initially concluded that the Superior Court erred by not applying rules of construction to Section 7740.1(b). The Court stated that when interpreting one section of a statute, it must be read with reference to all sections of the statute (i.e., the entire UTA), because that puts the section at issue into context. *Id.* at *18-19. As such, it determined that it must construe and consider together Section 7740.1 and Section 7766. *Id.*

The Court concluded that a latent ambiguity existed because both parties’ interpretations of the statutes were plausible. *Id.* Moreover, neither statute specifically addressed the issue before the Court. As such, it resorted to the canons of construction. The Court noted that the standards for modification under Section 7740.1 require the beneficiaries to show only that the modification was not inconsistent with a material purpose of the trust and, where less than all beneficiaries

joined in the request, that the interests of the nonconsenting beneficiaries would be adequately protected. *Id.* at *21-23.

It also set forth the numerous requirements for removal under Section 7766, which requires the moving party to prove by clear and convincing evidence that (a) removal is in the best interest of the beneficiaries; (b) removal is not inconsistent with a material purpose of the trust; (c) the beneficiaries have identified a suitable successor; and (d) at least one of the following conditions is present: (i) the trustee has committed a serious breach of trust; (ii) there is a demonstrated lack of cooperation between cotrustees that substantially impairs the administration of the trust; (iii) the trustee has not effectively administered the trust as a result of unfitness, unwillingness or persistent failures; or (iv) there has been a substantial change in circumstances, other than a corporate reorganization, such as a merger or consolidation. *Id.* The Court observed that a modification under Section 7740.1 would avoid the numerous findings of fact and conclusions of law that would be required in a removal action pursuant to Section 7766.

To bolster its analysis – and recognizing that the General Assembly may have been ambiguous with respect to where it would to allow modification – the Supreme Court considered pre-UTA Pennsylvania common law and the legislative history. It reviewed prior statutes and case law whereby removal and replacement of a trustee were permitted under circumstances where the Orphans’ Court found good cause existed to do so, and concluded that “[t]he enactment of section 7766 reflects the General Assembly’s intent to retain these principles in connection with the removal and replacement of a trustee.” *Id.* at *27-28.

With respect to legislative intent, the Court turned to Section 706(b)(4) of the Uniform Trust Code (upon which Section 7766 was based). That section permits a court to remove a trustee upon the unanimous consent of the trust beneficiaries, provided the removal serves the best interests of all the beneficiaries, is not inconsistent with a material purpose, and a suitable successor trustee is available. The Joint State Government Commission recommended adopting this provision, but it was rejected by the Senate Judiciary Committee. The Supreme Court also observed that two other states that have also adopted the UTC – Iowa and Ohio – included explicit language that their modification provisions may not be used to effect the removal of a trustee, citing Iowa Code Ann. §633A.2203 and Ohio Rev. Code Ann. §5804.11. *Id.* at *20-21.

Finally, the Supreme Court referred to the Uniform Trust Code comment to its section 411, upon which Section 7740.1 was based. It noted that the prefatory comment to the UTA provides that “sections of the UTA that are substantially similar to their [Uniform Trust Code] counterparts are indicated by a reference to the [Uniform Trust Code] section number in the UTA section headings, and that the [Uniform Trust Code] comments for these designated provisions ‘are applicable to the extent of the similarity.’” *Id.* at *29. Because the heading to Section 7740.1 contains a reference to Uniform Trust Code section 411, the Court concluded it may consider the comment to section 411. That comment, which also references modification under section 65 of the Restatement (Third) of Trusts, provides that “Section 706 is the exclusive provision on removal of trustees.” Thus, the Supreme Court concluded:

By enacting section 7740.1 of the UTA in light of this comment, the legislative intent with respect to the interplay between sections 7740.1 and 7766 is clear – the scope of permissible amendments

under section 7740.1 does not extend to modifications to add a portability clause permitting beneficiaries to remove and replace a trustee at their discretion; instead, removal and replacement of a trustee is to be governed exclusively section 7766.

Id. at *31.

The Court rejected the beneficiaries' argument that the comment to section 411 regarding exclusivity must be considered in light of the fact that the Uniform Trust Code permits beneficiaries to unanimously remove the trustee, whereas the UTA does not. The Court stated that the exclusivity language was intended to distinguish the Restatement's broader treatment of modification with those in the Uniform Trust Code, under which the beneficiaries' ability to modify trusts is more limited. *Id.* at *32.

C. Deadlines for Claims

1. The UTC and Limitations of Actions

Perhaps the most important change in the law regarding trustee liability and defenses is the adoption by the UTC of a limitation of action provision. For instance, N.J.S.A. § 3B: 31-74 adopts specific time limits under New Jersey law as to when a beneficiary may bring claims against the trustee; such limits did not exist before and might only be imposed by the courts in the past based upon equitable principles such as waiver, laches, and estoppel. In particular, a report that adequately discloses "a potential claim for breach of trust" to the beneficiary and informs the beneficiary "of the time allowed for commencing a proceeding" allows the trustee to invoke the protection of a six-month statute of limitation. N.J.S.A. § 3B: 31-74(a).

When N.J.S.A. § 3B: 31-74(a) does not apply, the statute of limitations is five years from the first to occur of: removal, resignation or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust. N.J.S.A. § 3B:31-74(c). Moreover, that deadline does not apply until five years after the beneficiary: (a) attains the age of majority; (b) knows of the existence of the trust; or (c) has knowledge that he is or was a beneficiary. N.J.S.A. § 3B:31-74(c). In other words, the statute of limitations is tolled by these circumstances.

Whether a report "adequately discloses" a potential claim will be a controversial, fact-sensitive issue. The New Jersey version of the UTC indicates that such a report must provide "sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence." N.J.S.A. § 3B:31-74(b).

The comments to the Model Uniform Trust Code are instructive as to the scope of "material facts":

This may include a duty to communicate to qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. With respect to the permissible distributees, the duty articulated in subsection (a) would

ordinarily be satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). Otherwise, the trustee is not ordinarily under a duty to furnish information to a beneficiary in the absence of a specific request for the information. However, special circumstances may require that the trustee take affirmative steps to provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer (internal citations omitted).

Further, the comments to the Model Uniform Trust Code explain that the term "report" instead of "accounting" is used in the Code to negate any inference that the report must be prepared in any particular format or with a high degree of formality. In fact, the comments suggest that the reporting requirement may be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements. The key factor is not the format chosen by the trustee but whether the report provides the beneficiaries with the information necessary to protect their interests.

2. Case Law

Numerous states have statutory provisions concerning limitations on actions against trustees which mirror the NJ UTC provision. *E.g.*, O.C.G.A. § 53-12-307. While some of these statutes contain commentary or expansive provisions regarding what disclosures are presumptively adequate to trigger the limitations, Code of Ala. § 19-3B-1005; Rev. Code Wash. (ARCW) § 11.96A.070, most merely contain non-specific language similar to the New Jersey provision, *e.g.*, Tenn. Code Ann. § 35-15-1005.

In turn, some of these statutes have produced cases which can serve as examples of what constitutes adequate disclosure, at least under the facts presented. *See Ducharme v. Ducharme*, 305 Mich. App. 1, 9 (Mich. Ct. App. 2014), leave to appeal denied, 497 Mich. 946 (Mich. 2014) (noting that annual accounting contained "several items that form[ed] the basis of plaintiff's complaint" and thus finding adequate disclosure).

Several other recent examples follow:

- *In re Thomas Lawrence Reeves Irrevocable Trust Under Agreement Dated February 26, 1997*, 2015 Del. Ch. LEXIS 130, *21 (Del. Ch. Apr. 29, 2015).

The Delaware Chancery Court held that mismanagement counterclaims against a corporate co-trustee by trust beneficiaries, who were also individual co-trustees, were time-barred.

Specifically, the court found that the beneficiaries' claims were barred under 10 Del. C. § 8106 and 12 Del. C. § 3585. Pursuant to 10 Del. C. § 8106, personal tort claims arising three years after the date of the action are barred. In addition, 12 Del. C. § 3585 precludes a claim for breach of trust that occurs "two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim."

The court opined that the undisputed facts of record showed the claims were barred under both statutes because the 2010 accounting adequately disclosed the facts underlying the beneficiaries' claims. Moreover, the 2010 accounting was sent to the beneficiaries more than two years before the counterclaims and exceptions were filed. Thus, the beneficiaries had actual notice of the facts constituting their claims many years before their counterclaims were filed.

➤ *Hasty v. Castleberry*, 293 Ga. 727, 732 (Ga. 2013).

The Georgia Supreme Court first addressed what constitutes an adequate written report in *Hasty v. Castleberry*, where a trustee alleged that general correspondence from his accountant to the beneficiary was a report sufficient to trigger the shortened window. *Hasty*, 293 Ga. at 730. Unlike the NJ UTC, the Georgia statute contains a definition of "written report" outside of the section on limitations on actions against trustees. *Id.* at 732. Specifically, a report from a trustee to a beneficiary is one which includes "the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest." The court applied this definition to "report" in the context of limitations on actions and ultimately concluded that, because the general correspondence letter did not contain the "type of detailed information" necessary to constitute a report, it did not trigger the shortened window for commencing proceedings. *Id.* at 732.

The inquiry in *Hasty* ended with the conclusion that the correspondence was not a report. *Id.* The court never addressed whether a document provided by a trustee could constitute a report but still be insufficient to adequately disclose a potential claim. *Id.*

➤ *Smith v. SunTrust Bank*, 325 Ga. App. 531 (Ga. Ct. App. 2014).

The court considered a trustee's fraudulent conveyance in which only the non-fraudulent nature of the conveyance was disclosed in a quarterly accounting statement. The court found that the quarterly accounting statement did not meet the definition of a "report" due to its limited scope. *Id.* at 541. Again, the court did not address whether the statement would otherwise have provided adequate disclosure within the context of the Georgia statutes. *Id.* However, the court did consider whether the beneficiaries had exercised due diligence in discovering the fraudulent nature of the conveyance and found that the accounting statement was "not a complete disclosure of all material facts relating to the conveyance." *Id.*

➤ *Wells Fargo Bank, N.A. v. Cook*, 332 Ga. App. 834 (Ga. Ct. App. 2015).

The Georgia Court of Appeals returned to the issue in *Wells Fargo Bank, N.A. v. Cook*. In that case, the trustee was found not liable for the exhaustion of CRAT assets from the payment of an annuity to the settlors, where regular statements triggered the statute of limitations, there was no evidence of breach of duty, the depletion came from the annuity payments and market conditions, and the trust terms eliminated any claim of a contract to guarantee the annuity payments would last for the lifetime of the settlors.

The court described the detailed information contained within the trust statements:

Among other things, the Trust statements identified the Trust, the trustee, the time period covered by each statement, a breakdown of the investment funds in which the Trust was invested, and a description of every transaction and disbursement made by the trustee during the time period designated in each statement. The statements included an account summary for the designated time period and information regarding the gains and losses on investments made by the Trust, income and dividend receipts, current yields of the investment funds, and beginning and ending balances. These statements consistently showed the value of the Trust declining over time.

Id.

The court found that these disclosures “inform[ed] the plaintiffs of potential claims” and then concluded that, under the circumstances, the trust statements constituted reports. *Id.*

- *Meyers v. First Tenn. Bank, N.A.*, 2016 Tenn. App. LEXIS 371, *24 (Tenn. Ct. App. May 27, 2016).

The Court of Appeals of Tennessee cited to an Advisory Commission comment on the Duty to Inform section of the Tennessee Trust Code – based on the national UTC:

The Trust Code employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. . . .

Meyers, 2016 Tenn. App. LEXIS 371 at *24 (citing Tenn. Code Ann. § 35-15-813).

Central to the claim in *Meyers* was whether the trustee had mismanaged trust real estate by failing to inspect it. *Id.* at *5–7. Thus, the court was willing to consider emails, “phone calls, faxes, letters, and meetings between the parties” to determine whether the trustee provided the

beneficiaries with a report sufficient to trigger the shortened window for commencing proceedings. *Id.* at *26–45. Most of the trustee’s alleged “reports” failed due to technical deficiencies, such as who had sent/received them, but the court discounted two of the reports primarily because it was not clear that they “disclosed facts indicating the existence of a potential claim for breach of trust.” *Id.*

In one piece of correspondence, the trustee initially admitted that it had no record of inspecting the trust property, but later claimed that it had in fact made inspections and kept reports of those inspections. *Id.* at *36. In another letter, the trustee claimed to have met its obligations through annual inspections of the property, but had not found certain issues that became apparent after the tenants had vacated. *Id.* at *39–43. Both times, the court found that it was unclear if the disclosures indicated the existence of a potential claim. *Id.* at *37, *42–44. For the latter disclosure, the court emphasized that the trustee’s assurance that it had “met its obligations” made it less likely that a beneficiary would be put on notice of a potential claim. *Id.* at *42.

IV. DIVORCE: PALIMONY; POST-DEATH DIVORCE; TRUSTS

A. Introduction

Generally, void marriages are those where the technical requirements (such as a license) are not satisfied; a bigamous marriage; an incestuous marriage; and, in many jurisdictions, where one or both parties to the marriage lacked sufficient mental capacity at the time they entered into the marriage contract. On the other hand, at common law, a marriage that is voidable, including one procured by fraud or undue influence, must be challenged during the lifetimes of the parties to the marriage. *See* 4 Am.Jur. 2d Annulment of Marriage § 59 (2006); W.W. Allen, *Right to Attack Validity of Marriage After Death of Party Thereto*, 47 A.L.R. 2d 1393 (2007 update). Most jurisdictions continue to follow the common law rule by either statute or case law.

In states that follow the common law and majority rule, which only allows void marriages to be challenged after death, marriages procured by fraud, duress, and undue influence (which are merely voidable) afford potential heirs no ability to challenge a marriage after death. Given the extensive rights available to a surviving spouse, a wrongdoer can profit significantly by simply inducing or influencing an elderly person to enter into marriage. With that in mind, a number of states have enacted statutes that specifically authorize a challenge to the validity of marriage after death. Recently, Florida added its name to these states and because of the unique approach Florida used, we address it separately toward the end of this section of our work.

B. Palimony

With increasingly splintered marital relationships, claims of palimony are prevalent in our society. In turn, palimony claims against *estates of decedents* are increasing. This trend has caused various states to struggle with how to handle those causes of action, since one of the parties to the alleged relationship (the decedent) is no longer available. The following is a review of those states, which have treated the issue most extensively.⁴

⁴In Oregon, an express or oral co-habitation agreement is enforceable. In *Beal v. Beal*, 577 P.2d 507 (Or. 1978), the Supreme Court of Oregon held that “when dealing with property disputes of a man and a woman who have been living

1. New Jersey

In New Jersey, an upward trend of these claims has been met with a new statute requiring that the claims be based on a writing.

New Jersey first recognized a claim for palimony in *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979). In *Kozlowski*, after six years of cohabitation, the plaintiff left the defendant. 403 A.2d at 904. The defendant promised to support and care for the plaintiff if she would return to live with him. *Id.* at 904–905. The court found that “an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry.” *Id.* at 908.

In *In re Estate of Roccamonte*, 174 N.J. 381 (2002), the New Jersey Supreme Court held that a claimant could enforce a promise for support for life against the decedent’s estate. *Id.* at 381. A claim for palimony requires “the formation of a marital type relationship between unmarried persons,” and “the entry into [a marital-type relationship] and then conducting oneself in accordance with its unique character. *Id.* at 392–93.

That case involved a decedent who, although married with two children, also maintained a relationship with plaintiff during the last 40 years of his life. In particular, plaintiff and decedent met in the 1950s and lived together intermittently until the mid-1960s. Plaintiff testified that she had moved to California in the mid-1960s but had received calls from decedent, promising her that if she came back to New Jersey, he would leave his wife and provide for plaintiff financially for the rest of her life; in response, plaintiff returned to New Jersey and divorced her husband. Plaintiff and decedent then cohabitated together from 1970 until his death in 1995; plaintiff’s daughter lived with them. Decedent never divorced his wife and continued, throughout his life, to support her and their children. *Id.* at 385–87.

Decedent was wealthy. In 1973, when the apartment decedent shared with plaintiff was converted to a co-op, he purchased the apartment and placed title in plaintiff’s name. Decedent paid for improvements to the apartment. He also provided plaintiff with cash as a weekly allowance, clothes, jewelry, and vacations. He paid the college tuition and medical expenses of plaintiff’s daughter. *Id.* at 386.

Decedent died intestate. Plaintiff did receive the proceeds of an insurance policy (\$18,000) and a Certificate of Deposit in her name (\$10,000). She also retained title to the apartment. However, plaintiff claimed that, while she was living with the decedent, “he repeatedly assured

together in a nonmarital domestic relationship, [courts] should distribute the property based upon the express or implied intent of those parties.” *Id.* at 510. The court held that this is true whether or not the parties executed a written agreement. Courts should determine the intent of parties, including the factual settings in which the parties lived and their financial actions. *Id.* Relying on *Beal*, the Court of Appeals of Oregon held that a same-sex couple had an express oral agreement to pool their resources, each paying fifty percent of everything. *See Ireland v. Flanagan*, 627 P.2d 496 (Or. Ct. App. 1981) (citing *Beal*, 577 P.2d 507). The court relied on testimony as to the agreement and the parties’ financial actions including maintaining a joint checking account, joint saving account, joint loans, and two joint credit cards. *Id.*

her . . . that she had no cause for worry as he would see to it that she was provided for during her life.” *Id.* at 387.

After decedent’s death, plaintiff filed a complaint setting forth two claims: a contract to make a will and unjust enrichment. She also sought a lump-sum support award. Initially, the trial court granted summary judgment against plaintiff and in favor of decedent’s estate. *See In re Estate of Roccamonte*, 324 N.J. Super. 357 (App. Div. 1999). The Appellate Division then held that the matter was not ripe for summary judgment, in view of various questions of fact, such as the decedent’s intent. *Id.* at 364. The Appellate Division remanded the matter to the Probate Part. The trial court conducted a hearing, at the conclusion of which the court ruled against plaintiff and dismissed the complaint.

Plaintiff appealed. In its second decision, the Appellate Division concurred with the trial judge’s determination that the evidence did not support a contract to make a will, and further found no basis to question the trial judge’s discretionary evaluation that plaintiff had not met the standards for unjust enrichment or quantum merit. *In re Estate of Roccamonte*, 346 N.J. Super. 107, 117 (App. Div. 2001). However, the Appellate Division did differ with the trial judge’s analysis regarding the palimony claim. After discussing the main precedent to date, *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979), and *Crowe v. De Gioia*, 90 N.J. 126 (1982), the Appellate Division found that the plaintiff could enforce a promise to provide support to her for life. *Roccamonte*, 346 N.J. Super. at 119–21. The Appellate Division further found that the claim remained viable against decedent’s estate. Once again, the court remanded the matter to the Probate Part. The court directed the entry of judgment in favor of plaintiff and awarded damages, as determined by the trial court, based upon the prior record. *Id.* at 122. The Appellate Division noted that, as in *Kozlowski* and *Crowe*, the relationship between plaintiff and the decedent in *Roccamonte* was in the nature of a quasi-marriage. *Id.* at 119–21. In turn, the appellate judges focused on whether plaintiff had a viable palimony claim.

The New Jersey Supreme Court affirmed, holding that decedent and plaintiff had entered into a palimony contract, in which decedent promised plaintiff to support her for life, and the contract was enforceable against decedent’s estate. *See In re Roccamonte, supra*, 174 N.J. at 381. However, the Supreme Court modified the Appellate Division’s ruling and remanded the case to the Family Part.

The New Jersey Supreme Court again addressed the issue of palimony in *Devaney v. L’Esperance*, 195 N.J. 247 (2008). In *Devaney*, the Court held that a palimony claim will not *ipso facto* fail if the parties did not cohabit during the course of the “marital-type” relationship. *Id.* at 258. Cohabitation is just one factor to analyze in determining the validity of a marital-type relationship. *Id.* “It is the promise to support, expressed or implied, coupled with a marital-type relationship, that are the indispensable elements to support a valid claim for palimony.” *Id.*

However, the New Jersey Legislature amended New Jersey Revised Statute 25:1-5 on January 18, 2010 (New Jersey’s Statute of Frauds). Section (h) was added and N.J. STAT. ANN. § 25:1-5 (West 2010) now reads:

No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action

shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

....

h. A promise by one party to a non-marital relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.

The Assembly Judiciary Committee's Statement to the First Reprint of proposed legislation S2091 explicitly stated that the new legislation was drafted to contravene the effects of the New Jersey Supreme Court's recent palimony decisions, especially the decisions of *Devaney* and *Roccamonte*. See *Senate Judiciary Committee*, Statement to S.2091 (February 9, 2009).

It is important to note the breadth and restrictive nature of the statute. First, the statute applies to persons involved in "non-marital personal relationship[s]." The statute's plain language would appear to include romantic personal relationships, but also other relationships such as parent-child relationships. In addition, the requirement that both parties obtain independent advice of counsel will, from a practical standpoint, significantly restrict the universe of potentially enforceable agreements of this type in the real world. The statute, however, does not "apply retroactively to oral agreements that predated the Amendment." *Maeker v. Ross*, 219 N.J. 565, 569 (2014). As a result, an action can still be brought if it can be established that the oral promise was made prior to January 18, 2010.

Recently, in *Soskina v. Estate of Turyan*, 2016 N.J. Super. Unpub. LEXIS 2175 (App. Div. Oct. 3, 2016), the New Jersey Appellate Division denied the petitioner's palimony claim.

Inna Soskina filed a complaint against the Estate of Alexander Turyan seeking palimony and other monetary relief. The complaint named the decedent's brother, Edward, and decedent's daughter, Anna, as co-executors of the estate.

After a 24-day bench trial, the trial court denied the palimony claim, but granted other relief. The Appellate Division affirmed the trial court's findings, noting that the legal conclusions on issues of liability and damages were "unassailable." *Id.* at *3.

The trial court found Soskina was entitled to about \$94,000, representing the return of her \$20,000 loan to the decedent to buy a Florida condominium, plus 20% of the net profit from the sale of the condo. In addition, the court found Soskina was entitled to \$300,000, which the decedent directed one of his debtors -- his business associate -- to pay Soskina directly. The decedent made this direction on his deathbed, repeated it orally in front of multiple witnesses, and it was memorialized in writing. Yet, instead of paying Soskina \$300,000, the trial court found that Edward and Anna unlawfully converted the money to their own use. Lastly, the trial court ordered Edward and Anna to pay Soskina about \$50,000 in counsel fees.

On appeal, Edward contended that the trial court abused its discretion and Soskina's claims were barred by the statute of limitations. The Appellate Division found no abuse of discretion in the trial court's evidentiary rulings or in the award of counsel fees. Moreover, the court affirmed the trial court's factual findings and credibility determinations. The trial court appropriately found no written documentation to support Edward's contention that a \$29,000 check from decedent to Soskina, which she never cashed, was intended as a settlement of her claims concerning the condo. Furthermore, there was no documentation to support Edward's contention that the \$359,000 paid from the decedent's business associate to Edward was for a new business investment.

As to Edward's contention that Soskina's claim was barred by the statute of limitations, the appeals court noted that the argument was not raised before the trial court, but was nonetheless without merit.

2. Minnesota

Adopted from the common law principle that a contract based on past or future meretricious sexual services is void and unenforceable in equity, the Minnesota Legislature enacted legislation collectively referred to as the "anti-palimony" statutes. The legislation modified the state statute of frauds as follows:

513.075. Cohabitation; property and financial agreements

If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if:

- (1) the contract is written and signed by the parties, and
- (2) enforcement is sought after termination of the relationship.

MINN. STAT. § 513.075 (1980).

513.076. Necessity of contract

Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.

MINN. STAT. § 513.076 (1980).

Minnesota courts have construed Minnesota §§ 513.075 and 513.076 ("anti-palimony statutes") narrowly. *See In re Estate of Palmen*, 588 N.W.2d 493, 496 (Minn. 1999); *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983). These statutes prevent enforcement of agreements only "where the *sole* consideration for a contract between cohabitating parties is their

‘contemplation of sexual relations . . . out of wedlock.’” *Eriksen*, 337 N.W.2d at 674 (emphasis added). For example, in *Eriksen*, the Minnesota Supreme Court upheld a constructive trust on a home purchased jointly by the appellant and the decedent. *Id.* The appellant cohabited with the decedent for a number of years, during which the two orally agreed to purchase a home jointly. *Id.* at 672. Each party contributed equally toward the purchase price, insurance and mortgage of the home. *Id.* at 674. The court reasoned that the two-cohabitating individuals were more akin to business partners or joint venturers. *Id.* The anti-palimony statutes do not apply where a claimant tries “to preserve and protect her own property, which she acquired for cash consideration wholly independent of any service contract related to cohabitation.” *Id.*

In *In re Palmen*, 588 N.W. 2d 493 (Minn. 1999), the Minnesota Supreme Court held that the anti-palimony statutes did not apply to the claim of plaintiff, who, after ten years of cohabiting with the decedent, brought a claim against his estate for her labor and expenses in constructing a joint-retirement home. *Id.* at 494–95. The decedent owned the land upon which the retirement cabin was to be built. *Id.* at 495. The decedent and the plaintiff agreed to share jointly in the costs and labor to build the cabin, and the decedent promised that if the relationship between the two ended, that plaintiff would be reimbursed for her expenses and labor. *Id.* Again, the court held that the anti-palimony statutes did not apply, because the plaintiff could “establish that . . . her claim is based on an agreement supported by consideration independent of the couple’s ‘living together in contemplation of sexual relations . . . out of wedlock.’” *Id.* at 496. The plaintiff here was simply seeking to protect or assert rights to her own property, not that of a cohabitant, and therefore her claim was not barred by the statute. *Id.*

Although the courts strictly construe the anti-palimony statutes, the statutes still prevent individuals from asserting a claim for support where there is no outside consideration. The individual asserting a palimony claim in Minnesota must show that there was a promise for life-long support or sharing of property acquired during the cohabitation *and* that there exists consideration beyond a meretricious relationship. *See Olson v. Bird*, No. A-05-2477, 2006 WL 2601684 at *2–*3 (Minn. Ct. App. Sept. 12, 2006). An implied agreement for support or joint-ownership of assets is not sufficient. *Id.* (“Because Pilgrim and Bird did not have any agreement that Pilgrim, through her labor, would acquire an ownership interest in Bird’s assets, and because there is no other evidence in the record that would support a claim that Bird or his siblings were unjustly enriched as that term is used to establish an equitable claim, the district court did not err by concluding that [Plaintiff] failed to establish a claim of unjust enrichment.”).

3. Texas

Similarly, the Texas Legislature enacted an amendment to the statute of frauds to end the “abusive filing of palimony suits.” *See* Tex. S.B. 281, 70th R.S. (1987). The revised statute in pertinent part reads:

§ 26.01. Promise or agreement must be in writing.

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(3)(West 1987).

4. Rhode Island

Rhode Island does not recognize palimony claims. *Norton v. McOsker*, 407 F.3d 501, 508 (1st Cir. 2005). In *Norton*, the First Circuit applied Rhode Island law where the plaintiff asserted a palimony claim against the estate of a man with whom she had maintained a 23-year adulterous relationship. *Id.* The plaintiff argued that palimony claims were commonplace in the law, and that Rhode Island traditionally followed the legal trends of nearby states, such as New Jersey. *Id.* The First Circuit rejected this contention and dismissed the claim on summary judgment because Rhode Island does not recognize palimony claims. *Id.* at 508–09.

5. Iowa

Iowa does not recognize palimony claims against a decedent's estate. In *Coffelt v. Estate of Petry*, 680 N.W.2d 378 (Iowa Ct. App. 2004) (published opinion), the plaintiff cohabitated with the decedent in a house decedent owned. After the death of the cohabitant, the plaintiff brought an action against the decedent's estate, claiming, *inter alia*, that the decedent had promised her that she could remain in his home for the rest of her life and that the decedent's brother would give her support payments. However, Iowa courts do not recognize the claim of palimony. As a result, the court framed the legal claim as an oral contract between the brothers with the plaintiff as the third-party beneficiary, and the motion to dismiss was denied. The court worked around the prohibition of a palimony claim to find an equitable resolution in the case.

6. Florida

In Florida, a plaintiff must demonstrate consideration apart from the meretricious relationship to pass summary judgment on a palimony claim. In *Poe v. Levy's Estate*, 411 So.2d 253, 256 (Fla. Dist. Ct. App. 1982), a male plaintiff brought a claim against the estate of the woman with whom he was cohabitating prior to her death. *Id.* at 254. The couple had entered into an express cohabitation agreement that allegedly included a commitment by the decedent to support the plaintiff. *Id.* at 254–55. The trial court dismissed the claim because the couple was not married, but this decision was reversed. *Id.* at 255–56. The appellate court held that the law does not prohibit unmarried couples from contracting simply because they were unmarried. *Id.* at 256. Therefore, as long as there is lawful, valid consideration in exchange for the promise of support - apart from a meretricious relationship - the plaintiff has stated a cause of action. *Id.* at 255–56.

7. California

Under California law, oral support agreements between unmarried cohabitants are enforceable. *See Marvin v. Marvin*, 18 Cal. 3d 660 (Cal. 1976). The California Court of Appeal for the First District expanded California law to include enforcement of an oral promise for support against the estate of the alleged promisor. *Byrne v. Laura*, 52 Cal. App. 4th 1054, 1064 (Cal. Ct. App. 1997), review denied, 1997 Cal. LEXIS 3151 (Cal. May 28, 1997). In probate proceedings, the *Byrne* court reversed summary judgment in favor of the defendant, finding there was a triable issue of fact as to the existence of a contract for support. *Id.* at 1063. In *Byrne*, the decedent promised his unmarried cohabitant on multiple occasions that he would take care of her for the rest of her life. *Id.* at 1060. The couple lived together for five years, in which time they acquired joint possessions and commingled their finances. Additionally, the plaintiff performed all domestic responsibilities for the couple during this period. Furthermore, the decedent gave the plaintiff money and provided her with a comfortable lifestyle while they lived together. *Id.* at 1064. The court reasoned that the decedent's actions of caring for the plaintiff during his lifetime was further evidence for the existence of a contract for support. *Id.* While the amount of support the decedent intended to provide plaintiff was uncertain, the existence of multiple conflicting interpretations of the evidence warranted reversal of summary judgment. *Id.* at 1066.

In contrast, an oral support agreement based on meretricious consideration between an unmarried couple that does not live together is unenforceable. *Taylor v. Fields*, 178 Cal. App. 3d 653, 666 (Cal. Ct. App. 1986). In *Taylor*, the California Court of Appeal for the Second District found an oral support contract unenforceable against an estate because it was based upon illicit meretricious consideration and there was no evidence of stable and significant cohabitation. *Id.* The plaintiff in *Taylor* had a 42-year relationship with a married man who promised to take care of her financially and ensure she would live comfortably for the rest of her life. *Id.* at 657. The *Taylor* court reasoned the relationship was nothing more than a married man and his mistress. *Id.* at 658. Even though the plaintiff alleges she acted as not only a lover, but also a confidant and travel companion in exchange for his promise of lifetime financial care; the court found the rendering of sexual services inseparable from the rest of the contract. *Id.* at 665. Thus, the oral contract was unenforceable as a matter of law. *Id.* Furthermore, there is no evidence the plaintiff and decedent ever cohabitated during their 42 year relationship. The *Taylor* court found sporadic weekends spent together did not meet the cohabitation prerequisite necessary for the enforcement of an oral contract for support. *Id.* at 663.

8. Same-Sex Couples

Although there are no cases addressing palimony in a same-sex relationship when the alleged promisor is deceased, California law has recognized palimony claims in a same-sex relationship. *See Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). In *Whorton*, the plaintiff entered into an oral agreement with another man, his cohabitant, to provide for the plaintiff for life. *Id.* at 406–07. The trial court found that this agreement was based solely on a meretricious relationship, and therefore, was void as against public policy. *Id.* at 407. The appellate court held that plaintiff stated a viable cause of action because there was consideration for the life-long support independent of the meretricious relationship. *Id.* at 408–09. Specifically, plaintiff served as the promisor's chauffeur, bodyguard, secretary and business partner. *Id.* at 409. “In so holding, the court observed that the defendant did not assert that a claim for palimony

support is inapplicable to same-sex partners, and held that it could see no legal basis for making a distinction in this regard.” William H. Danne, Jr., Annotation, “*Palimony*” *Actions for Support Following Termination of Nonmarital Relationship*, 21 A.L.R. 351, §5 (2007).

The Supreme Court’s recent decision in *Obergefell v. Hodges* likely provides a definitive answer as to the availability of palimony, and other claims, to unmarried same-sex couples. 135 S. Ct. 2584, 192 L. Ed. 2d 609 (U.S. 2015). The Court held that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of” the right to marry. *Id.* at 42. The implication of this ruling is that, regardless of jurisdiction, unmarried same-sex couples are entitled to the same legal remedies and protections as unmarried opposite-sex couples. As a result, in all jurisdictions palimony is most likely available to unmarried same-sex couples to the same extent that it is available to unmarried opposite-sex couples.

C. Post-Death Divorce: States with Statutes that Permit Challenges after Death for Fraud or Duress

1. Louisiana

A marriage is voidable when the consent of one of the parties to the marriage is not freely given. Such marriage may be declared null upon application by the party whose consent was not freely given. Consent is not free when given under duress or when given by a person incapable of discernment. LA. CIV. CODE. ANN. ART. 95 (2006)

In *Succession of Ricks*, 893 So. 2d 98 (La. Ct. App. 2004), review denied, 2005 La. App. LEXIS 602 (La. App. Feb. 22, 2005), children of the decedent challenged the validity of the marriage between the decedent and his wife. Noel Ricks’ last will bequeathed half of his estate to his wife, Aleta Graves Ricks, and the remainder of his estate to his four children, subject to Aleta’s usufruct. Noel also appointed Aleta Testamentary Executrix in that will. Noel and Aleta were divorced on May 18, 2000. Under Louisiana law, the revocation of a legacy or other testamentary provision occurs when the testator is divorced from the legatee after the will is executed and at the time of his death, unless the testament provides to the contrary. However, on January 30, 2001, several hours prior to Noel’s death, Aleta remarried Noel in his hospital room. The Ricks children filed sued to remove Aleta as executrix and expressed their intention to nullify the marriage, alleging that Aleta took advantage of Noel’s infirmity to regain her status as a legatee when she remarried him hours before his death. They alleged that the decedent was incompetent at the time of the marriage and that his wife “took advantage of [his] infirmity to regain her status as a legatee when she remarried him hours before his death.” *Id.* at 99. Although the “right to demand the nullity of such a marriage is personal to the spouse whose consent was not free and does not pass on to his heirs,” the court held that the above statute permitted a court appointed administrator to bring an action to challenge a marriage.

2. New Jersey

A marriage may be declared a nullity where either of the parties “lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar, agents, or where there was a lack of mutual assent to the marital relationship; duress;

or fraud as to the essentials of marriage” and the injured party has not subsequently ratified the marriage. N.J. STAT. ANN. §2A:34-1 (West 2007).

In *Estate of Santolino*, 895 A.2d 506 (N.J. 2005), the court held that the sister of the decedent could bring a claim after death on the grounds that the decedent’s marriage was the product of fraud.

The court reasoned that the sister of the decedent had standing to challenge the validity of the marriage because New Jersey Statute § 2A:34-1(b) did not explicitly provide that marriages may not be challenged after the death of one of the parties.

More recently, in *Kay v. Kay*, 405 N.J. Super. 278, 964 A.2d 324 (App. Div. 2009), *aff’d* ..,200 N.J. 551, 985 A.2d 1223 (2010), the court held that an estate could pursue a deceased spouse’s claims against his spouse brought prior to his death (as part of a divorce proceeding) in which he alleged she misappropriated funds for her and her daughter’s benefit. In New Jersey, when spouses divorce, marital property is distributed equitably between them, according to statute. However, when one spouse dies during the pendency of an action for divorce, the action is abated and statutory equitable distribution is generally not available. *See Carr v. Carr*, 120 N.J. 336 (1990). Here, the estate sought to invoke the court’s equitable jurisdiction on the ground that the surviving spouse would be unjustly enriched if she retained all of the assets held jointly with the decedent as well as those she was alleged to have deceptively titled in her own and her daughter’s name. The Appellate Division found that a broad ruling barring such equitable claims was in tension with general principles governing the exercise of a court’s inherent equitable jurisdiction. Constructive trusts are invoked to prevent unjust enrichment or fraud. Further, a blanket prohibition against equitable claims pressed by the estate would have the inherent potential to violate public policy by encouraging spouses contemplating divorce to deal unfairly with one another prior to and during the divorce proceedings. The Appellate Division held that when the estate of a spouse, who died while an action for divorce is pending, seeks equitable relief related to marital property, the court must consider the equitable claims against the marital estate sounding in constructive trust, resulting trust, quasi-contract, or unjust enrichment.

The New Jersey Supreme Court relied on *Carr v. Carr* in *Thieme v. Aucoin-Thieme*, 227 N.J. 269 (2016). In 1999, plaintiff Michael J. Thieme was employed at a biometrics consulting firm. In late 2000 or 2001, Michael met the defendant, Bernice F. Aucoin-Thieme. By May 2002, they were living together, and their daughter was born in 2003.

Michael held no ownership interest in the firm. However, the firm’s principals offered to compensate him for his contributions to the firm’s success, in the event they sold the firm. Bernice was not employed, but rather cared for their daughter and performed all household tasks.

In an email exchange in 2010, Michael acknowledged that Bernice had given up her own career and educational aspirations so that Michael would pursue his, and noted “it is appropriate that I support you fully in recognition of this sacrifice.” In 2010, the couple wed, but they filed for divorce 14 months later. In the course of negotiations about the division of assets, Michael reiterated his view that Bernice would be entitled to a portion of any bonus he received upon the sale of the firm.

In 2012, Michael and Bernice executed their Property Settlement Agreement, and three months after the entry of their judgment of divorce, the firm was sold, and Michael was offered a one-time Closing Bonus of \$2,250,000. One of the firm's owners testified in a deposition that the firm offered Michael the Closing Bonus based upon his contribution to the company over the 13 years. Michael did not inform Bernice about the Closing Bonus.

Bernice first learned of the bonus when Michael deposited \$200,000 into a bank account that remained a joint account despite the divorce. With no notice to Michael, Bernice withdrew the deposited funds. Michael filed a complaint

After a three-day bench trial, a Family Part judge determined that Michael earned the Closing Bonus over his entire employment with the firm, and Bernice was entitled to 30 percent of the post-tax portion of the bonus earned during their 14-month marriage. The court awarded \$30,288 to Bernice and ordered her to return the remaining amount she had withdrawn from the joint account to Michael.

Bernice appealed, asserting that she was entitled to a share of the Closing Bonus for the period during which she cohabitated with Michael prior to marriage under both the equitable distribution statute and equitable theories, including unjust enrichment and constructive trust.

In an unpublished opinion, the Appellate Division affirmed the trial court's judgment. The New Jersey Supreme Court granted Bernice's petition for certification.

First, the Court held the trial court correctly allocated the distribution of Michael's Closing Bonus to premarital and marital periods and properly deemed only the portion of the compensation that was earned during the parties' marriage to be a marital asset subject to equitable distribution. However, the Court noted that such a finding does not end the inquiry.

Relying on the equitable principles expressed in the case of *Carr v. Carr*, 120 N.J. 336 (1990), the Court found the circumstances warranted the imposition of a constructive trust as a remedy for Bernice's claim of unjust enrichment.

The Court relied on *Carr*, where the Court held that "if warranted by the evidence, the equitable remedy of constructive trust should be invoked and imposed on the marital property under the control of the executor of [the deceased husband's] estate." There, the husband died during their divorce proceedings and a judgment of divorce was not entered. Thus, the wife was barred from a claim under the equitable distribution statute. Similarly, the wife was barred from receiving an elective share under the probate code by virtue of her separation from her husband and the pendency of the divorce proceedings prior to his death. The New Jersey Supreme Court imposed a constructive trust awarding to the plaintiff a share of the marital assets controlled by the husband's estate.

Here, the Court fashioned a similar remedy based on the principles expressed in *Carr*, which the Court deemed applicable with equal force to this matter. Specifically, the Court noted the prospect that Michael would be generously compensated was a significant factor in the parties' personal and financial planning from the early stages of their relationship. Michael and Bernice each relied on the expectation of deferred compensation if the firm were sold. The parties' shared anticipation that Michael would be paid deferred compensation was supported by the Statement of

Understanding, which acknowledged their intention to compensate their key employee and constituted a written commitment to Michael. This confirmation occurred early in the relationship between the parties.

Moreover, Michael himself recognized Bernice's contributions to their family should be rewarded, per his email sent to Bernice. Michael assured Bernice that if he received an unexpected bonus, they would split that bonus after the deduction of taxes. Michael expressed that view in 2003 when their child was born.

Although Michael's Closing Bonus materialized three months after the parties' divorce was finalized, the Court found that a decision constraining Bernice to a nominal share of the Closing Bonus – authorized by the equitable distribution statute – would result in unjust enrichment. Therefore, a percentage of the Closing Bonus that Michael earned during the period in which the parties cohabitated prior to their marriage should be deemed to be held by Michael in constructive trust for Bernice.

The Court remanded for the trial court to determine the precise time period for which the Closing Bonus should be shared by the parties, the percentage of the Closing Bonus that should be allocated to Bernice to avoid unjust enrichment, or the impact of taxes imposed on Michael by virtue of the Closing Bonus.

3. New York

An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by force or duress may be maintained at any time by the party whose consent was so obtained. An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by fraud may be maintained by the party whose consent was so obtained within the limitations of time for enforcing a civil remedy. Any such action may also be maintained during the life-time of the *other party* by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest in invalidating the marriage, provided that in an action to annul a marriage on the ground of fraud the limitation period prescribed in the civil practice law and rules has not run. But, a marriage shall not be annulled on the ground of duress if it appears that, at any time before the commencement of the action, the parties thereto ratified the marriage by voluntarily cohabiting as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud. N.Y. DOM. REL. LAW § 140 (McKinney 2005).

In *Bennett v. Thomas*, 38 A.D.2d 682, 327 N.Y.S.2d 139 (4th Dept. 1971), children of a deceased wife brought action to annul her marriage on grounds of fraud to prevent her husband from taking elective share. The court noted that New York law permitted challenges to marriage after death on the grounds of fraud. However, New York's elective share laws contained specific provisions requiring the annulment be obtained prior to death.

4. Vermont

A marriage may be annulled during the lifetime of the parties, or one of them, on the ground that the consent of one of the parties was obtained by force or fraud, on the complaint of the party

whose consent was so obtained or of the parent or guardian of such party or of some relative interested to contest the validity of the marriage. When such proceedings have been commenced and the party whose consent was so obtained dies before final decree, a parent or relative interested to contest the validity of the marriage may enter and prosecute such complaint. A marriage shall not be annulled on such ground if, before the commencement of the action, the parties voluntarily cohabited as husband and wife. VT. STAT. ANN. TIT. 15, §516 (2005).

In *Sweeney v. Sweeney*, 96 Vt. 196, 118 A. 882, 883 (1922), the court considered the word “voluntary” cohabitation as used in the current statute’s predecessor:

While it is true, as argued by the petitionee, that the word “voluntarily,” when used in its ordinary sense, means “willingly,” or “without compulsion,” it sometimes means more than this. Whenever, to make a statute effective, it is necessary to construe the term as implying knowledge, it is the duty of the court to so construe it. The statute before us presents this necessity.

Cohabitation is such a natural and necessary incident to marriage that the statute authorizing the annulment of a marriage consummated through fraud would be rendered wholly nugatory in most cases if we were to restrict the meaning of the word “voluntarily” in the clause above quoted to its ordinary sense. It cannot be that the Legislature intended that willing cohabitation alone should bar proceedings for annulment predicated upon undiscovered fraud. The true meaning of the term as here used embraces the element of knowledge of the essential facts. Without this, the cohabitation is not, in a legal sense, voluntary.

D. Post-Death Divorce: States with Statutes, which Prohibit Challenges to Marriage After Death for Fraud or Duress

1. Alaska

A marriage may be declared void on the ground that the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, cohabited with the other as husband and wife. A marriage may be declared void on the ground that the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband and wife. If the consent of either party is obtained by fraud or force, the marriage is voidable, but only at the suit of the party upon whom the force or fraud is imposed. ALASKA STAT. §§ 25.24.030, 25.05.031 (1974).

In *Riddell v. Edwards*, 76 P.3d 847 (Alaska 2003), the probate court could not declare a marriage void after the wife died even though her estate sought to invalidate the marriage because the wife was incompetent and the husband had fraudulently induced her to enter into marriage.

2. California

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, freely cohabitates with the other as husband or wife. An action for annulment based upon fraud may be brought by the

defrauded spouse, but must be instituted within four years after the discovery of the facts constituting the fraud. CAL. FAM. CODE §§2210-2211 (West 2005).

In *Pryor v. Pryor*, 99 Cal.Rptr.3d 853 (Cal.App. 2 Dist. 2009), the court interpreted CAL. FAM. CODE §2210, 2211 (2005). The Court held: “the Legislature expressed its intent that the injured spouse has exclusive standing to commence an action for annulment based on fraud, force, or physical incapacity” 99 Cal.Rptr.3d at 858. “In light of the clause in section 2211, subdivision (d) providing that an action for nullity based on fraud must be commenced by the defrauded spouse, we conclude that it was unnecessary for the Legislature to state that annulment had to be sought in the lifetime of one or both spouses. Such a clause would have been redundant.” *Id.* at 859.

3. Colorado

A marriage may be declared invalid where “one party entered into the marriage in reliance upon a fraudulent act or representation of the to her party, which fraudulent act goes to the essence of the marriage” or when “one or both parties entered into the marriage under duress exercised by the to her party or a third party”. However,” *in no event under such circumstances may a declaration of invalidity be sought after the death of either party to the marriage,*” except in the cases of marriages which are prohibited by law such as bigamous and incestuous marriages. COLO. REV. STAT. § 14-10-111 (2005).

In *Estate of Fuller*, 862 P.2d 1037 (Colo. App. 1993), children of the decedent challenged the validity of the decedent’s marriage on the ground that decedent lacked capacity to consent to the marriage. Colorado Statute § 14-10-111(2) provides, “In no event may a declaration of invalidity be sought after the death of either party to the marriage.” Because the action for annulment was not brought until after the decedent’s death and no exception applied, the court held that the children lacked standing to challenge the validity of decedent’s marriage. The court noted the exceptions under which a marriage may be attacked posthumously. Fraud and duress are not among the exceptions

4. Illinois

A marriage may be declared invalid where a party lacked the capacity to consent or where a party was “induced to enter into a marriage by force or duress or by fraud involving the essentials of the marriage”. A declaration of invalidity may be sought by either party or by the legal representative of the party who lacked the capacity to consent, no later than 90 days after the petitioner obtained knowledge of the described condition. In no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage. 750 ILL. COMP. STAT. §§301-302 (2006).

In *Estate of Crockett*, 728 N.E.2d 765 (Ill. App. Ct. 2000), notwithstanding this statute, the Court permitted children to challenge to marriage after death where the wife obtained marriage license, husband was mute and barely conscious during ceremony and was unable to sign marriage certificate, and representative spoke for the husband during the exchange of vows.

5. Minnesota

An action to annul a marriage, where a party lacked capacity to consent to the marriage or where consent was obtained by force or fraud and there was no subsequent voluntary cohabitation of the parties, may be brought by either party to the marriage or by the legal representative of the innocent party. However, “in no event may an annulment be sought after the death of either party to the marriage.” MINN. STAT. §§ 518.05, 518.02 (2006).

6. Montana

A marriage may be declared invalid for lack of capacity to consent or if a party was induced to enter into a marriage by force or duress or by fraud, but such relief must be sought no later than 2 years after the petitioner obtained knowledge of the described condition. A declaration of invalidity may not be sought after the death of either party to the marriage. MONT. CODE ANN. 40-1-402 (1997).

7. North Dakota

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party, with full knowledge of the facts constituting fraud, subsequently freely cohabitates with the other as husband or wife. An action to annul a marriage on the grounds of fraud may be brought by the injured party within 4 years after discovery of the facts constituting fraud. N.D. STAT. §§ 14-04-01, 14-04-02 (2005).

In *Gibbons v. Blair*, 376 N.W.2d 22 (N.D. 1985), the court interpreted these statutes and held that the “party” referenced in the statute as the “injured party” meant the defrauded party to the marriage. Further, the court explained that under North Dakota Statute §14-01-01, the marriage was voidable and thus could only be annulled on the basis of fraud by an action brought by the defrauded spouse while both parties to the marriage were living.

8. Ohio

A marriage may be annulled on the basis that the consent of either party was obtained by fraud, unless the defrauded party thereafter, with full knowledge of the facts constituting fraud, cohabitated with the other as husband or wife. An action for annulment may be brought by the aggrieved party, but must be instituted within two years after the discovery of the facts constituting fraud. A marriage may be annulled on the basis that either party has been adjudicated to be mentally incompetent, unless such party after being restored to competency cohabitated with the other as husband or wife. An action for annulment may be brought by the party aggrieved or the relative or guardian of the party adjudicated to be mentally incompetent at any time prior to the death of either party. OHIO REV. CODE ANN. §§3105.31-3105.32 (1963).

In *Hall v. Nelson*, 534 N.E.2d 929 (Ohio 1987), the son of the decedent sought to annul the marriage between the decedent and his surviving wife on the grounds that the decedent lacked mental capacity to marry, that the marriage was obtained by fraud and that the marriage was not consummated. Pursuant to OHIO REV. CODE ANN. §3105.32, the court found that only an aggrieved party may sue to have a marriage annulled because of mental incapacity, fraud or failure to consummate. Further, Ohio Statute §3105.02(C) permitted a relative or guardian of an

incompetent to sue for annulment only while the incompetent was alive. Because the son was not a party to the marriage and the action for annulment was not brought while the decedent was alive, the court held that the son lacked standing to challenge the marriage.

9. Pennsylvania

A marriage is voidable and subject to annulment where one party was induced to enter into the marriage by fraud, duress, coercion or force attributable to the other party, provided that there has been no subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. Either party may obtain an annulment to a voidable marriage. The validity of a voidable marriage, however, may not be attacked or questioned by any person if either party to the marriage has died. 23 PA. CONS. STAT. § 3305 (2007).

In *Estate of LaCorte*, No. 1855-Ap-2002, 2004 WL 3187735 (Pa. Com. Pl., Feb. 03, 2004), a sister and children (from prior marriage) of the 83 year old decedent challenged the validity of the decedent's marriage to his spouse who was 29 years younger, based on undue influence and lack of capacity. The undue influence claim was dismissed as untimely. The issue of whether these litigants had standing to challenge the marriage was noted, but not resolved.

10. Texas

"A court may annul a marriage if: (1) the other party used fraud, duress or force to induce the petitioner to enter into the marriage; (2) and the petitioner has not voluntarily cohabited with the other party" after becoming apprised of the fraud or being released from the duress of force. TX. FAM. CODE § 6.107 (Vernon 1997). "[A] marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party to the marriage." TX. FAM. CODE § 6.111 (Vernon 2007).

11. Washington

A marriage where the consent of either party is obtained by force or fraud is voidable, but only at the suit of the innocent party. WASH. REV. CODE §26.04.130 (2009).

In *In re Romano's Estate*, 246 P.2d 501 (Wash. 1952), the executor and legatees alleged that the newly employed housekeeper coerced the decedent into marriage. Applying Washington Statute §26.04.130, the court held that the marriage at issue was voidable and thus could not be set aside in a collateral attack after the death of one of the parties. The court, however, citing *Savage v. Olsen*, 9 So. 2d 363 (Fla. 1942), noted that "under exceptional circumstances indicating fraud of the grossest kind, without apparent opportunity to detect or correct the inequity during the lifetime of the deceased spouse, a collateral attack after death has been permitted."

12. Wisconsin

A court may annul a marriage if a party was induced to enter into the marriage by force, duress or fraud involving the essentials of marriage. A suit for annulment may be brought by either party, or by the legal representative of the innocent party, no later than one year after the petitioner obtained knowledge of the described condition. However, a marriage may not be annulled after the death of a party to a marriage. WIS. STAT. § 767.313 (2007).

E. Post-Death Divorce: States where Challenges on the Grounds of Fraud, Duress, or Undue Influence are Prohibited After Death by Case Law Only

1. Alabama

In *Rickard v. Trousdale*, 508 So. 2d 260 (Ala. 1987), the court held that a marriage allegedly induced by fraud is merely voidable and cannot be attacked after the death of one of the parties to the marriage. Therefore, even if the putative husband fraudulently induced the decedent to consent to marriage, the daughter of the decedent could not attack the validity of the marriage.

2. Arizona

In *Davis v. Indus. Comm'n of Arizona*, 353 P.2d 627 (Ariz. 1960), the employer of the decedent denied the surviving spouse death benefits on the basis that the decedent and surviving spouse fraudulently procured a marriage license. The court held that the denial of benefits amounted to a collateral attack upon the validity of the marriage, which was not permitted after the death of one of the spouses.

3. Arkansas

In *Vance v. Hinch*, 261 S.W.2d 412 (Ark. 1953), in construing the predecessor to ARK. CODE. STAT. § 9-12-201 (West 2006) (consent of either party was obtained by force or fraud, the marriage shall be void from the time its nullity is declared by the court), the court held that a marriage induced by fraud was voidable (despite the fact that the statute referred to such a marriage as “void”). Because voidable marriages are only vulnerable to attack during the lifetime of the spouses, the granddaughters of the decedent could not challenge the validity of the marriage.

4. District of Columbia

In *Estate of Randall*, 999 A.2d 51 (D.C. 2010), the court refused to follow New Jersey case law and held that a voidable marriage cannot be challenged after death.

5. Mississippi

In *Ervin v. Bass*, 160 So. 568 (Miss. 1935), the court noted that a marriage induced by fraud or coercion was voidable. As a result, the marriage remains valid until dissolved by court decree, which can only be rendered during the lifetime of the parties.

6. New Hampshire

In *Patey v. Peaslee*, 111 A.2d 194 (N.H. 1955), exceptions overruled 101 N.H. 26 (N.H. 1957), the heirs-at-law of the decedent sought to annul the marriage between the decedent and the surviving spouse on the basis of fraud. The court held that the heirs-at-law did not state a cause for annulment because the marriage was voidable and not brought during the lives of both parties to the marriage.

7. Nebraska

In *Christensen v. Christensen*, 14 N.W.2d 613 (Neb. 1944), the court held that the marriage was voidable, where spouses knew of the husband's physical condition prior to the marriage, but fraudulently concealed such condition in order to obtain a marriage license. [By statute in Nebraska, where the consent of one of the parties is obtained by force or fraud, and the parties have not subsequently voluntarily cohabitated, the marriage shall be deemed voidable. NEB. REV. STAT. ANN. §42-118 (West 2009).]. At common law, according to the court, a voidable marriage may only be inquired into during the lives of the parties to the marriage.

8. Oregon

A marriage is voidable where the consent of either party is obtained by force or fraud. Such marriage may be annulled, provided that the marriage was not later ratified. OR. REV. STAT. §106.030, 107.015 (2003).

In *Estate of Hunter*, 588 P.2d 617 (Or. Ct. App. 1978), *rev'd on other grounds*, *Hunter v. Craft*, 600 P.2d 415 (Or. 1979), the court interpreted these statutes as requiring that the proceeding be brought only by a party to the marriage and only during the life of both parties to the marriage. We include Oregon here because the court had to go beyond interpreting the statute and used common law concepts of voidable transactions to reach its result.

F. Post-Death Divorce: North Carolina Allows Challenge If There Are No Children

North Carolina law provides that a marriage followed by cohabitation and the birth of issue may not be declared void after the death of either of the parties to the marriage. A marriage where either party is incapable of contracting due to lack of will or understanding is void. Such marriage may be declared void upon application by either party to the marriage. No marriage followed by cohabitation and the birth of issue may be declared void after the death of either of the parties. N.C. GEN. STAT. §§51-3, 50-4 (1977).

In *Ivery v. Ivery*, 129 S.E.2d 457 (N.C. 1963), the brother of the decedent challenged the validity of the marriage between the decedent and surviving spouse on the grounds that the decedent was incompetent and the surviving spouse "persuaded and induced" the decedent to enter into marriage. The court recognized that under the above statute, marriages are immune from attack after the death of either party only when the marriage was followed by cohabitation and the birth of issue. Because the marriage was followed by cohabitation, but not the birth of issue, the court held that the marriage was subject to collateral attack by the decedent's brother.

G. Post-Death Divorce: Florida's Statute

1. Jurisprudential Background

The mere status of surviving spouse affords a myriad of significant financial benefits under Florida law, including the right to homestead property (at least a life estate in the decedent's homestead residence), an elective share (30% of the decedent's augmented elective estate), to take as a pretermitted spouse (up to 100% of the estate under the laws of intestacy), family allowance,

exempt property, and priority in preference in selecting a personal representative. In addition, Florida courts have held that a presumption of undue influence in a will contest “cannot arise in the case of a husband and wife” because the requirement of active procurement would almost always be present. *Jacobs v. Vaillancourt*, 634 So. 2d 667, 672 (Fla. Dist. Ct. App. 1994), rev. denied, 642 So. 2d 746 (Fla. 1994); *Tarsagian v. Watt*, 402 So. 2d 471, 472 (Fla. Dist. Ct. App. 1981). Most of these benefits are well deserved. It has often been said that Florida has a strong public policy in favor of protecting a decedent’s surviving spouse. *See, e.g., Via v. Putnam*, 656 So. 2d 460, 462 (Fla. 1995).

There are no Florida Statutes that authorized a challenge to the validity of a marriage after the death of one of the spouses. However, a number of Florida cases had addressed this issue.

Under that Florida case law, an invalid marriage might be void, or it might be voidable, depending on the cause and nature of the invalidity. The definitions of void versus voidable become critical because the ability to challenge a marriage after death turns on the distinction between the two.

Florida case law made it clear that an action could be maintained after the death of a spouse challenging a marriage that is *void*:

Under ordinary circumstances the effect of a void marriage so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place, and therefore being good for no legal purpose, its invalidity can be maintained in any proceedings in which the fact of marriage may be material, either direct or collateral in any civil court between any parties at any time.

Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

However, a marriage that was merely voidable could not be attacked by a deceased spouse’s heirs:

Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife, or both, a voidable marriage is good for every purpose and can only be attacked in a direct proceeding during the life of the parties.

Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. Dist. Ct. App. 1994) (citing *Kuehmsted*, 138 So. at 777).

Accordingly, the question of whether a suit to annul a marriage could be maintained after the death of one of the parties to the marriage depended on whether the marriage was void or merely voidable. *See also* 4 Am.Jur. 2d Annulment of Marriage § 59 (2006); W.W. Allen, *Right to Attack Validity of Marriage After Death of Party Thereto*, 47 A.L.R. 2d 1393 (2007 update).

The right to annul avoidable marriage was a personal right, and an action to annul such a marriage could only be maintained by a party to the marriage contract, or where the spouse seeking

annulment was under legal disability, by someone acting on his or her behalf. *See Kuehmsted*, 138 So. at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

In *Savage v. Olsen*, 9 So. 2d 363 (Fla. 1942), however, the Florida Supreme Court created some uncertainty by suggesting that fraud could serve as a ground for finding a marriage void. In *Savage*, the decedent's surviving blood relatives and heirs at law brought an action to annul a marriage between the decedent and her husband. *Id.* at 363. Sometime before the marriage, the decedent, Hannah Ford, was in a car accident and suffered a serious concussion. According to the Court, Hannah was mentally defective and lacked her normal faculties. *Id.* at 364.

At some point after the accident, the Defendant, Charles Savage, showed an unusual interest in Hannah. He subsequently proposed marriage, which was performed, but never consummated. *Id.* Savage lived apart from Hannah after the ceremony, held himself out as a single person, and executed mortgages on property belonging to Hannah without her knowledge. *Id.* The court also noted that Savage had a long criminal record. *Id.* Savage lived and cohabitated with another woman before and after his wedding to Hannah. *Id.*

Sixty days after they married, Hannah died in a car accident when the automobile in which she was a passenger, driven by Savage, plunged into a canal. *Id.* at 365. Savage escaped unharmed and when talking to officers and the funeral director after the accident, he referred to Hannah as a "friend." *Id.* The funeral was held before Hannah's relatives were informed of her death, and two days after her death, Savage became the personal representative of Hannah's estate and emptied her safe-deposit box. *Id.*

The Florida Supreme Court affirmed the lower court's ruling that the marriage was void, and stated that Hannah's mental condition, as well as Savage's "artful practices" justified the decision. *Id.* The court stated:

It is true that much of the testimony was in conflict, but it was abundantly shown that the mental condition of Hannah Ford, although she would not be said to be actually insane, made her easy prey to the machinations of Charles B. Savage. Examining together her plight and his artful practices, we think the chancellor was fully justified in the decision he rendered declaring the marriage void. The testimony which he elected to give credit fully substantiated the allegations of the bill of complaint anent fraud of one and incapacity of the other.

Id. (internal citations omitted).

The *Savage* decision suggested that fraud alone could serve as a basis to challenge a marriage after death. Other courts, under different circumstances, held that undue influence was a species of fraud. *See, e.g., In re Guardian of Rekas*, 545 So. 2d 471, 473 (Fla. Dist. Ct. App. 1989) (noting that undue influence is a species of fraud and is treated as fraud in general); *O'Hey v. Van Dorn*, 562 So. 2d 405, 405 (Fla. Dist. Ct. App. 1990) (agreeing that undue influence is a species of fraud in the inducement). Does that mean that the Florida Supreme Court blessed challenges to marriage on these additional grounds? That was precisely the argument made by the

parties in *Arnelle*, 647 So. 2d at 1049, under the factual circumstances described earlier in these materials.

In *Arnelle*, the court discussed the Florida Supreme Court's decision in *Savage* and opined that it was the combination of fraud and diminished mental capacity that rendered the marriage void. 647 So. 2d at 1049. The *Arnelle* court noted that the holding in *Savage* "at least suggests that where the *combination* of fraud and mental incapacity are present, the marriage is void and can be annulled after the death of one of the parties" *Id.* The *Arnelle* court declined to find that fraud or undue influence alone could support a challenge to a marriage after death absent at least some showing of mental incapacity. Accordingly, despite finding that Ms. Fortson was "conniving and exhibited undue influence over Mr. Fisher", the court refused to permit the decedent's heirs to challenge the marriage. *Id.*

As we all know, diminished mental capacity is frequently present in cases of undue influence. So, when was the threshold set forth in *Arnelle* of diminished mental capacity plus fraud (or undue influence) met? This question was uncertain under Florida law.

2. Florida's New Law

With that background, The Real Property Probate & Trust Law Section of The Florida Bar recommended to the Florida Legislature a statutory change to permit challenges to spousal rights that inure as the result of fraud, undue influence, or duress by the surviving spouse on the deceased spouse, resulting in marriage. This proposal did not affect the marriage or other familial relationships. Instead, the proposal carved out certain property and inheritance rights that would inure by the mere fact that the defrauding spouse was the surviving spouse. The proposed statute was adopted by the Legislature, effective October 1, 2010:

732.805. Rights procured by fraud, duress, or undue influence

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratified the marriage:

(a) Any rights or benefits under the Florida Probate Code, including, but not limited to, entitlement to elective share or family allowance; preference in appointment as personal representative; inheritance by intestacy, homestead, or exempt property; or inheritance as a pretermitted spouse.

(b) Any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) Any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) Any immunity from the presumption of undue influence that a surviving spouse may have under state law.

(2) Any of the rights or benefits listed in paragraphs (1)(a)-(c) which would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material.

(4) The contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. If ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorney's fees. When awarding taxable costs and attorney's fees, the court may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless, before payment, it received written notice of a claim pursuant to this section.

(a) The notice required by this subsection must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

(b) To be effective, notice to a financial institution or insurance company must contain the name, address, and the taxpayer identification number, or the account or policy number, of the principal obligee or person whose life is insured and shall be directed to an officer or a manager of the financial institution or insurance company in this state. If the financial institution or insurance company has no offices in this state, the notice shall be directed to the principal office of the financial institution or insurance company.

(c) Notice shall be effective when given, except that notice to a financial institution or insurance company is not effective until 5 business days after being given.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless the action is commenced within 4 years after the decedent's date of death. A cause of action under this section accrues on the decedent's date of death.

FLA. STAT. § 732.805 (2010).

H. Analogue to Post-Death Divorce: Can A Marriage Dissolution Proceeding Be Initiated or Pursued by A Guardian, Conservator or Other Representative on Behalf of a Person with Diminished Capacity?

There is substantial divergence of legal opinion as to whether a representative may initiate or pursue a marital dissolution or annulment in the context of a guardianship or conservatorship proceeding on behalf of an incapacitated person. Some jurisdictions have addressed the issue by giving express statutory authority to guardians.

For example, the Florida statute that defines the rights of "persons determined incapacitated" lists rights that are expressly retained, such as the right of privacy, the right to counsel and the right to marry. FLA. STAT. ANN. § 744.3215(2)(a) (West 1990). The statute also gives a non-exclusive list of rights that may be removed from the subject incompetent person, by an order determining incapacity and which may be delegated to the guardian, including the right to contract, and to sue and defend lawsuits. Finally, the statute lists actions, which a guardian cannot take without first obtaining specific authority from the court, including, to "initiate a petition for dissolution for the ward." (Fla. Stat. Ann. § 744.3215(4)(c) (West)⁵.

⁵Florida also has a procedural statute which sets forth the steps the court must take before granting the guardian the authority to exercise various rights including to initiate a marital dissolution:

"Before the court may grant authority to a guardian to exercise any of the rights Specified in § 744.32 15(4), the court must:

(1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act;

(2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;

(3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court;

(4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future;

(5) Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person; and

(6) In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.

It appears that the majority of courts which have considered the issue of divorce actions in the absence of a statute specifically authorizing such proceedings have concluded that an incompetent spouse may not bring or pursue an action for divorce through a guardian or conservator. However, the trend indicates that more courts are willing to permit divorces even without express statutory authority especially where the incompetent person has somehow manifested the capacity to understand the meaning of divorce and a desire to either initiate or pursue such an action.

1. South Carolina Tracing the Split of Authority

In 1993, the Supreme Court of South Carolina in *Murray v. Murray*, 426 S.E.2d 781 (S.C. 1993), surveyed the country in support of an answer to the question. In *Murray*, Fletcher Murray, an 87-year-old man, who had been married to his second wife for nearly two decades, became ill. After being hospitalized, he initially moved into the home of his son from his first marriage, and subsequently moved into a nursing home. His son was appointed as his attorney-in-fact to handle his business and later was appointed conservator and guardian of his father's estate. When Fletcher's wife sued for support, Fletcher, through his son as attorney-in-fact, sued for divorce. The court appointed a guardian ad litem for Fletcher, recognizing the potential conflict between Fletcher and his son with respect to whether the divorce should be pursued. The wife moved to dismiss the divorce action asserting that a divorce could not be brought by the son under a power of attorney because of the strictly personal nature of divorce. The family court denied the motion to dismiss ordering the case caption to be amended so that the divorce could proceed on behalf of Fletcher by his son as conservator and guardian instead of as attorney-in-fact under the power of attorney. The wife appealed the denial of the motion to dismiss.

On review, the South Carolina Supreme Court considered, respectively, the authority of a conservator, then a guardian, under South Carolina statutory law:

The appointment of a conservator vests in him title as trustee to all property of the protected person . . . A conservator has the power to manage the assets and funds of the estate . . . He may prosecute or defend actions, claims, or proceedings for the protection of estate assets. Therefore, while a conservator can take action to protect estate assets, there is no statutory authority allowing him to maintain an action with regard to personal matters. Accordingly, son cannot bring this action for divorce in his capacity as conservator.

Murray, 426 S.E.2d at 783 (citation omitted). Thus, the court found no statutory basis for a conservator to bring an action for divorce in South Carolina.

Turning to the power of a guardian to prosecute a divorce, the court cited authority for the role of a guardian: "A guardian may be appointed for an incapacitated person as a means of providing continuing care and supervision." *Id.*, citing S.C. CODE ANN. § 62-5-304 (1992). The

The provisions of this section and §744.3215(4) are procedural and do not establish any new or independent right to or authority over the termination of parental rights, dissolution of marriage, sterilization, abortion, or the termination of life support systems."

FLA. STAT. ANN. § 744.3725 (West 1997).

South Carolina statute describing the powers and duties of a guardian did not directly address whether a guardian could maintain a divorce action on behalf of the ward, even though a South Carolina rule did permit the representative, such as a general guardian to sue generally on behalf of the incompetent person. *Id.* (citing Rule 17, SCRPC).

Despite the statutory authority for a representative to sue on behalf of an incompetent person, the South Carolina Supreme Court observed that the issue of whether a suit for *divorce* could be pursued by a representative had never been directly addressed in the state. It surveyed the country and found that, “the majority rule is that, absent statutory authorization, a guardian cannot maintain an action on behalf of a mentally incompetent for the dissolution of the incompetent’s marriage.” *Id.* (citing *Jackson v. Bowman*, 226 Ark. 753, 294 S.W.2d 344 (1956); *Cox v. Armstrong*, 122 Colo. 227, 221 P.2d 371 (1950); *Scott v. Scott*, 45 So.2d 878 (Fla. 1950); *Phillips v. Phillips*, 203 Ga. 106, 45 S.E.2d 621 (1947); *In re Marriage of Drews*, 115 Ill.2d 201, 503 N.E.2d 339 (1986), cert. denied and app. dismissed 483 U.S. 1001 (U.S. 1987); *State ex rel. Quear v. Madison Circuit Court*, 229 Ind. 503, 99 N.E.2d 254 (1951); *Mohler v. Shank’s Estate*, 93 Iowa 273, 61 N.W. 981(1895); *Birdzell v. Birdzell*, 33 Kan. 433, 6 P. 561 (1885); *Johnson v. Johnson*, 294 Ky. 77, 170 S.W.2d 889 (1943); *Stevens v. Stevens*, 266 Mich. 446, 254 N.W. 162 (1934); *Higginbotham v. Higginbotham*, 146 S.W.2d 856 (Mo. Ct. App. 1940), quashed 348 Mo. 1073 (Mo. 1941); *In re Jennings*, 187 N.J. Super. 55, 453 A.2d 572 (1981); *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E.2d 921 (1943); *Freeman v. Freeman*, 34 N.C. App. 301, 237 S.E.2d 857 (1977); *Shenk v. Shenk*, 100 Ohio App. 32, 15 N.E.2d 436 (1954)).

The theory articulated by various courts supporting the refusal to permit dissolution actions to be brought by representatives on behalf of incompetents is that “a divorce action is so strictly personal and volitional that it cannot be maintained at the pleasure of a guardian, even if the result is to render the marriage indissoluble on behalf of the incompetent. *Id.*

Although the *Murray* court adopted what it said was the majority rule for a person who is incompetent as to his property *and* his person, it declined to impose an absolute bar to divorce, “if the spouse, although mentally incompetent with respect to the management of his estate, is capable of exercising reasonable judgment as to his personal decisions, is able to understand the nature of the action and is able to express unequivocally a desire to dissolve the marriage. *Id.* at 784. In other words, the son, as guardian, could pursue divorce, even in the absence of an express statute, if the record provided sufficient substantiation of his legally incompetent father’s judgment and desire to divorce. As a result, the South Carolina Supreme Court remanded the case for factual findings regarding Fletcher’s competency, and whether Fletcher expressed a desire to obtain a divorce. (The court specifically noted that, if Fletcher were sufficiently competent to divorce, that the divorce action would have to be brought by Fletcher’s guardian ad litem, since the son had a conflict of interest.)

Of the 17 jurisdictions that allow institution, five allow such action pursuant to express statute or rule (Florida, Massachusetts, Michigan, Missouri, and Illinois). Eight appear to allow the action outright (Alabama, Arizona, Hawaii, New Mexico, Oregon, Tennessee, Texas, and Washington); and five require some degree of competency on the part of the ward to express a desire for dissolution (California, Delaware, Ohio, Pennsylvania, and South Carolina).

2. New Jersey and New York - Unsettled

The authorities in New Jersey and New York are internally inconsistent. *See In re Jennings* 187 NJ Super 55, 453 A.2d 572 (Ch. Div. 1981) (divorce too intensely personal to proceed through a guardian); *but see Kronberg v. Kronberg* 263 NJ Super. 632, 623 A2d 806 (Ch. Div. 1993) (statutory authority defining powers of guardians are broad enough to empower the guardian to maintain certain to terminate marriage); *Marsico v. Marsico*, 436 N.J. Super. 483, 492 (Ch. Div. 2013) (“*Kronberg* correctly and logically supported the legal concept that a court-appointed guardian had standing to file a complaint for divorce and/or appear for an incompetent party in a divorce proceeding.”); *see also Mohrmann v. Kob* 291 N.Y. 181, 51 NE 2d 921 (1943) (insufficient legislature authority); *but see McRae v. McRae* (1964) 43 Misc 2d 252, 250 N.Y. 52d 778 (N.Y. Sup. Ct. 1964) (“in the interests of justice” guardian ad litem could be appointed to enable incompetent husband to institute and prosecute divorce on ground of adultery); *see also* 32 A.L.R 673 (1995), for a broader discussion of this topic across various jurisdictions.

In conclusion, the import of all of these cases seems to be that however courts may characterize which view is in the “majority” that a world of easier access to divorce, including “no fault” divorce requires that, even in the absence of a statute expressly authorizing a conservator or guardian to maintain a dissolution action, that Courts can find ways to permit them to proceed where there is a certain quantum of factual proof establishing the ward’s understanding of the effect of divorce and a manifest desire to dissolve the marriage.

I. The Impact of Trusts in Divorce

1. Massachusetts

In *Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105, 55 N.E.3d 933 (2016), Curt and Diane Pfannenstiehl were married in 2000, and had two children. Curt filed for divorce in 2010.

Curt was the beneficiary of an irrevocable trust that was established by his father in 2004, a few years after Curt and Diane had married. The distributions from the trust could be made among a class of beneficiaries that included Curt’s father’s “issue.” In this case, issue had included not only Curt and his siblings, but also all of the grandchildren – i.e., 11 beneficiaries to the trust.

The trust provided that the trustees were to make distributions and “shall pay to, or apply for the benefit of, a class composed of any one or more of the donor’s then living issue such amounts of income and principal as the trustee, in its sole discretion, may deem advisable, from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class.” 55 N.E.3d at 936-37.

The trial court estimated that the value of the trust was \$25 million. The court considered the trust to be a part of Curt’s “marital share” and awarded Diane 60% of Curt’s interest in the trust itself. Because he was one of 11 beneficiaries, the trial court valued Curt’s interest in the trust at about \$2.2 million, and ordered a total payment of \$1,168,794 in 24 monthly installments of \$48,700, which included a three percent (3%) interest rate. This decision was made even though the trustees had no obligation to pay funds to Curt in order to satisfy his obligations.

Curt appealed, arguing that the trial judge abused her discretion by including the trust in the marital estate. In a divided opinion, the appellate court affirmed. *Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121, 124, 37 N.E.3d (2015).

The Supreme Judicial Court of Massachusetts granted Curt's application for further appellate review, limited to issues concerning the trust.

The Court found that while a trial judge has considerable discretion in determining how to divide marital assets equitably, the question remained whether an interest in a trust is sufficiently similar to a property interest to be included in a marital estate and subject to equitable division under Massachusetts law.

The Court reversed the trial court, vacating the order which divided Curt's interest in the trust and remanding for further proceedings consistent with its decision.

In considering Curt's interest in the trust, the trial court found that the trust gave the trustees the ability to make distributions in their "sole discretion as they may deem advisable from time to time." As is the case in many trusts, Curt had no ability to force distributions from the trust because the trust is a "discretionary" trust. In other words, Curt had no more than "an eligibility for distributions." 55 N.E.3d at 940.

Diane argued that the "ascertainable standard" for distributions gave Curt a present enforceable interest to compel distributions when he needed them. However, the Court found that the trial court's mandate for distributions to be made to Curt so that he could then make payments to Diane could not actually be carried out because Curt did not have an ability to compel distributions due to the termination of the marriage.

In short, the Court found that the ascertainable standard did not render Curt's future acquisition of assets under the trust as sufficiently certain to include it in the marital estate under Massachusetts law.

2. Massachusetts and Connecticut

➤ *Ferri v. Powell-Ferri*, 476 Mass. 651 (Mar. 20, 2017)

➤ *Ferri v. Powell-Ferri*, 326 Conn. 438 (Aug. 8, 2017)

Paul John Ferri Jr. ("Paul") Nancy Powell-Ferri ("Nancy") were married in 1995. In October 2010, Nancy filed an action in Connecticut to dissolve the marriage.

Paul was the sole beneficiary of a trust created by his father in 1983 ("the 1983 Trust") when Paul was 18 years old. The 1983 Trust was created in Massachusetts and is governed by Massachusetts law.

The 1983 Trust established two methods by which trust assets are distributed to the beneficiary. First, the trustee may "pay to or segregate irrevocably" trust assets for the beneficiary. Second, after the beneficiary reaches the age of 35, he may request certain withdrawals of up to

fixed percentages of trust assets, increasing from 25% of the principal at age 35 to 100% after age 47.

In March 2011, the then-trustees of the 1983 Trust created a Declaration of Trust for Paul (“2011 Trust”). They subsequently distributed substantially all of the assets of the 1983 Trust to themselves as trustees of the 2011 Trust. As with the 1983 Trust, Paul is the sole beneficiary of the 2011 Trust.

The 2011 Trust is a spendthrift trust. Under paragraph 1(a), the trustee exercises complete authority over whether and when to make payments to the beneficiary, if at all, and the beneficiary has no power to demand payment of trust assets. At paragraph 4(b), the spendthrift clause bars the beneficiary from transferring or encumbering his interest and, as with similar provisions in the 1983 Trust, shields the trust from the beneficiary’s creditors.

The trustees decanted the 1983 Trust out of concern that Nancy would reach the assets of the 1983 Trust as a result of the divorce action. They did this without informing Paul and without his consent.

In August 2011, the trustees of the 1983 Trust and the 2011 Trust initiated a declaratory action against Nancy and Paul in Connecticut. The trustees sought a declaration that (1) they validly exercised their powers under the 1983 trust to distribute and assign the trust property and (2) Nancy had no right, title, or interest, directly or indirectly, in or to the 2011 Trust or its assets.

Nancy moved for summary judgment, and the trustees filed a cross-motion. In August 2013, the trial judge granted Nancy’s motion for summary judgment, and denied the trustees’ cross-motion. The trial judge ordered restoration of 75% of the assets of the 2011 Trust, as they were held in the 1983 Trust.

➤ Massachusetts opinion

In the case of *Ferri v. Powell-Ferri*, 476 Mass. 651 (Mar. 20, 2017), the Supreme Judicial Court of Massachusetts addressed certain questions certified by the Connecticut Supreme Court.

Most notably, the Massachusetts court addressed whether the terms of the 1983 permitted decanting to the 2011 Trust. The Court determined that a trustee of a Massachusetts irrevocable trust may be given the authority to decant assets in further trust through language in the trust. In determining whether a trustee has such authority, the intent of the settlor is “paramount.” The Court concluded that the terms of the 1983 Trust demonstrated the settlor’s intent to permit decanting, based on: the extremely broad authority and discretion afforded the trustees by the 1983 Trust, the anti-alienation provision of the 1983 Trust, the beneficiary withdrawal rights afforded under the 1983 Trust, and the settlor’s affidavit.

In a concurring opinion, Chief Justice wrote separately to emphasize what the Massachusetts Supreme Judicial Court did not decide in answering the reported questions certified by the Connecticut Supreme Court: whether Massachusetts law will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust where the sole purpose of the transfer is to remove the trust’s assets from the marital assets that might be distributed to the beneficiary’s spouse in a divorce action.

➤ Connecticut opinion

Following the Massachusetts ruling, in *Ferri v. Powell-Ferri*, 326 Conn. 438 (Aug. 8, 2017), the Connecticut Supreme Court concluded that under Massachusetts law, it was proper for the trustees to have decanted assets from the 1983 Trust, and therefore, reversed the trial court's earlier ruling that they lacked the authority to decant.

The Connecticut Supreme Court rejected Nancy's argument that because Paul was entitled to 75% of the trust at the time of the divorce, the 2011 Trust was actually reachable because it was self-settled. The Court noted that it was undisputed that the trustees created the 2011 Trust and decanted the 1983 Trust assets without informing the beneficiary (Paul) in advance and without his permission, knowledge, or consent. Because Paul took no active role in planning, funding, or creating the 2011 Trust, the Court could find no authority for Nancy's proposition that the trust should be considered self-settled.

In short, Nancy's status was that of a creditor. While the dissolution court could divide the asset while they were held in the 1983 Trust, the court could not reach them once they were moved into the 2011 Trust. Thus, the decanting was successful in removing the assets from equitable distribution.

3. New Jersey

In the case of *Tannen v. Tannen*, 416 N.J. Super. 248, 3 A.3d 1229 (App. Div. 2010), *aff'd*, 208 N.J. 409, 31 A.3d 621 (2011), the Court addressed whether the assets of the trust should be at issue in divorce proceedings. The New Jersey Supreme Court issued a *per curiam* opinion, affirming the Appellate Division substantially for the reasons expressed in the opinion of the Appellate Division. 208 N.J. 409 (2011).

In *Tannen v. Tannen*, 416 N.J. Super. 248 (App. Div. 2010), plaintiff Mark Tannen filed for divorce from his wife, defendant Wendy G. Tannen. Plaintiff and defendant were married in 1988.

In 2000, defendant's parents, Leonard and Gloria Phillips, created an irrevocable trust with defendant as the sole beneficiary and defendant and her parents as co-trustees. Section 3 of the Wendy Tannen Trust provided:

The Trustees shall apply and distribute the net income and corpus of the Trust . . . to the beneficiary . . . in the following manner:

(A) The Trustees . . . shall pay over to or apply for the benefit of the beneficiary's health, support, maintenance, education and general welfare, all or any part of the net income therefrom and any or all of the principal thereof, as the Trustees shall determine to be in the beneficiary's best interests, after taking into account the other financial resources available to the beneficiary for such purposes that are known to the Trustees. The term "best interests" shall include, without limitation and in the Trustees' sole discretion as to need and amount, payments from the Trust to help meet educational

expenses, medical expenses or other emergency needs of the beneficiary, to enable the beneficiary to purchase a home, and to enable the beneficiary to enter into a business or profession The time or times, amount or amounts, manner and form in which said distributions shall be made, or sums so expended, shall be left to the sole discretion of the Trustees and shall be made without court order and without regard to the duty of any person to support such beneficiary

(C) Notwithstanding any other provision in this Trust Agreement to the contrary, it is the express intention of the Grantors in creating this Trust that the beneficiary shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution.

The trust also contained a “spendthrift” provision, Section 14, which provided:

Distribution of both income and principal shall be made as directed under the terms of this Trust, and the beneficiary shall not have the right to alienate, anticipate, pledge, assign, sell, transfer or encumber such income or principal distribution without first procuring the written consent of the Trustees. Any endeavor of any such beneficiary to circumvent this direction in any manner shall be wholly disregarded by the Trustees, and shall be null and void.

At the time of trial, the corpus of the trust included shares of mutual funds and stock valued at \$1,155,877, as well as real estate. In the four years prior to trial, the trust generated at least \$124,000 per year in investment and rental income.

Defendant’s father also created two trusts which were irrevocable and for the benefit of the parties’ son and daughter. Each trust provided that the trustee, exercising his or her sole discretion, could make distributions that were necessary on behalf of the children. Defendant’s father was the original trustee of both trusts, though defendant had recently been substituted as trustee. Each trust instrument clearly indicated that the creation of the trusts, and any distributions made therefrom, were not intended to relieve the parties from their legal obligations to support their children. At the time of trial, there had been no distribution from either of the trusts for the children.

On March 21, 2007, the day before trial was scheduled to begin, defendant filed a motion *in limine* seeking to exclude any income generated by the trusts as an asset for alimony and child support purposes. In an order dated April 4, the judge denied the motion without prejudice to defendant renewing her objection at trial. A second order dated the same day provided that the trusts were “designated parties” to the action, and ordered plaintiff to file a third-party complaint against the trusts. On April 12, plaintiff filed an amended complaint naming the trusts as third-party defendants.

On July 20, 2007, the trusts moved to dismiss the complaint against them but the judge denied the application without prejudice. The trusts renewed their motion when the trial commenced and sought an adjournment for discovery. The judge denied both applications. Thereafter, the trusts participated throughout the trial.

The matter was tried over the course of several months and resulted in a final judgment of divorce issued on January 23, 2008.

Defendant appealed the trial result, including the ruling that the judgment required the trustees of one of the trusts to pay her \$4,000 per month. The trusts also appealed, contending among other things that: the judge erred in ordering that they be joined in the action and by forcing them to proceed without discovery; plaintiff lacked standing to bring any claims against them; the judge erred in ordering one trust to distribute \$4,000 per month to defendant; any claims against the trusts to benefit the children should have been dismissed; and the trusts should be awarded counsel fees on appeal.

Plaintiff cross-appealed, asserting that the judge erred in calculating the alimony award and in denying his request for counsel fees because defendant protracted the litigation after the trusts were joined.

The Appellate Division explained, “Whether defendant’s beneficial interest in the [trust for her benefit] was an ‘asset[] held by’ her, or whether she had ‘control’ of the income generated by the [trust] or ‘the ability to tap the income source’ it represented, requires our review of the specific language of this trust and some basic principles regarding the nature of a discretionary trust for support.” *Id.* at 264. The court continued:

We have noted that in our “search . . . for the probable intention of the . . . settlor [,] . . . , [w]e confine [our] inquiry to the four corners of the document and the language therein, and then consider the circumstances surrounding its execution and other extrinsic evidence of intention.” *In re Trust Under Agreement of Vander Poel*, 396 N.J. Super. 218, 226 (App. Div. 2007) (citations omitted), *certif. denied*, 193 N.J. 587 (2008). “The extent of the interest of the beneficiary of a trust depends upon the manifestation of intention of the settlor” *Restatement (Second) Trusts* § 128 (1959); *accord Restatement (Third) of Trusts, supra*, § 49 (“Except as limited by law or public policy . . . , the extent of the interest of a trust beneficiary depends upon the intention manifested by the settlor.”).

The Appellate Division continued, “Our courts have also repeatedly recognized the broad discretion accorded trustees of a discretionary trust, and thereby, implicitly the limits upon a beneficiary’s ability to compel a specific exercise of the trustee’s discretion.” *Id.* at 267. It also noted, “Additionally, we have examined case law from our sister states in search of guidance. Several jurisdictions have concluded that it is not appropriate to consider a party’s beneficial interest in a discretionary trust as an asset for purposes of alimony or child support because the spouse has no current right to the fund We acknowledge, however, that the decisions from

our sister jurisdictions do not reflect unanimity, frequently rely upon local statutes, and make distinctions between whether the beneficial interest in the trust is an asset, or whether it is reachable by a spouse seeking the payment of child support or alimony already awarded.” *Id.* at 267-68.

The appellate court surveyed various provisions of the *Restatement (Third) of Trusts*, including Section 50 thereof, addressing the enforcement and construction of discretionary trusts. The court explained: “As a court of intermediate appellate jurisdiction, we do not presume to adopt the *Restatement (Third) of Trusts* as the law of this state and apply its provisions to the facts of this case. . . . [S]uch determination would be more appropriately made by our Supreme Court.” *Id.* at 272.

The court continued, “[W]e conclude that under the existing law of this state, defendant’s beneficial interest in the [trust for her benefit] was not an ‘asset[] held by’ her. It was, therefore, improper to impute income from the [trust] to defendant in determining plaintiff’s alimony obligation.” *Id.* at 273.

In turn, the court reasoned, “Since the judge could not compel the Trusts to make disbursements to defendant, there was no need for them to be parties to the litigation. The judge erred in ordering plaintiff to file an amended complaint naming the Trusts as third-party defendants. As we see it, although whether income from the [trust] was imputable to defendant was clearly before the court by way of defendant’s motion in limine, any and all information and testimony necessary for a complete adjudication of the issue could have been obtained through the use of subpoenas.” *Id.*

The judges also determined that the trusts for the benefit of the children were improperly added as parties to the litigation. *Id.*

The Appellate Division remanded the matter back to the trial court for purposes of fixing an appropriate alimony and child support award. The appellate court’s decision was affirmed without opinion by the New Jersey Supreme Court.

NJ UTC

New Jersey adopted its version of the Uniform Trust Code (“NJ UTC”) in July 2016. The recent adoption of the NJ UTC has raised a question about the degree to which the NJ UTC provisions may affect the *Tannen* decision of the New Jersey Supreme Court.

Under the Uniform Trust Code (“UTC”), § 503 would grant a spouse or former spouse a right to compel distributions as an “exception creditor.” However, the provisions of *UTC* § 503 were not adopted in New Jersey as part of the NJ UTC. In fact, none of the provisions enabling “exception creditors” to compel a distribution from a trust containing a spendthrift provision were enacted.

Two other provisions under the NJ UTC do affect the obligations of a trustee to make distributions, either for creditors (*N.J.S.A.* § 3B:31-38) or for beneficiaries (*N.J.S.A.* § 3B:31-68).

N.J.S.A. § 3B:31-38, Creditor of beneficiary prohibited from compelling distribution subject to trustee’s discretion, provides in pertinent part as follows:

Discretionary Trusts; Effect of Standard.

a. Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

- (1) The discretion is expressed in the form of a standard of distribution; or
- (2) The trustee has abused the discretion.

b. This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

N.J.S.A. § 3B:31-68, Exercise of discretionary power, provides as follows:

Discretionary Powers.

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

V. GUARDIANSHIP-RELATED CLAIMS

A. Substituted Judgment

1. What is Substituted Judgment?

The judicial doctrine of substituted judgment, which has been codified in various jurisdictions, allows a conservator or estate guardian, under certain conditions, to obtain court authority to take various actions, including estate or gift planning. The procedure can be an effective tool in disputes involving persons with diminished capacity. Trust and estate litigators should be aware of how to use the procedure and how to respond when it is used by an adversary.

A New York Surrogate's court favorably cited a seminal California case, to describe the underpinning of the doctrine when used to make tax-planning gifts: "Neither a general guardian nor a court has the power to dispose of a ward's property by way of gift." *In re Estate of Christiansen* 56 Cal. Rptr. 505, 511 (Cal. Ct. App. 1967). However, such transfer may be validated by exercise of the judicial doctrine of 'Substituted Judgment' provided: (1) the conservatee does not require the funds for maintenance and support, and (2) the conservatee would be likely to make such a transfer, if capable of doing so." *In re Florence*, 140 Misc.2d 393, 394 (N.Y. 1988), *superseded by statute*, N.Y. MENTAL HYG. LAW § 81.21(e) (McKinney 2011), *as recognized by In Re Pflueger*, 181 Misc. 2d 294 (N.Y. Sup. Ct. 1999).

In California, the procedure for using substituted judgment to take action on behalf of a person under a conservatorship is set forth in a detailed statutory framework:

(a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

- (1) Benefitting the conservatee or the estate.
- (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
- (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

CAL. PROB. CODE § 2580 (West 2009).

The California statute codified the common law doctrine of substituted judgment, and is derived in part from, but substantially expands on, former Uniform Probate Code §5408, which provided for “protective arrangements and single transactions.” Former Unif. Probate Code § 5-408 (Pre-1998 Version). Under the uniform statute, the court could act in circumstances where it was “necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person.” Former Unif. Prob. Code § 5-408 (a). Indeed, the Comments to the uniform statute noted that under previous law a guardianship often had to be established “simply to make possible a valid transfer of land or securities.” In other words, the substituted judgment activity was originally intended to facilitate the most simple, or functionary transactions avoiding the more drastic remedy of depriving a person of their liberty through a conservatorship proceeding.

Interestingly, the former Uniform Probate Code Section was intended as a mechanism to facilitate transactions in *avoidance* of a conservatorship, as opposed to the California statute, which broadly authorizes various transactions to occur through a court-approved process *within* an existing conservatorship. The UPC statute permitted the Court, *without appointing a conservator*, to “authorize, direct or ratify any contract, trust or other transaction relating to the protected person’s property and business affairs if the Court determines that the transaction is in the best interest of the protected person.”

2. How Does Substituted Judgment Work?

The California substituted judgment statutory scheme provides a wide-ranging, non-exclusive catalog of potential transactions and activities, including extensive estate and tax planning that can occur through the court-approved substituted judgment procedure:

(b) The action proposed in the petition may include, but is not limited to, the following:

- (1) Making gifts of principal or income, or both, of the estate, outright or in trust.

- (2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.
- (3) Exercising or releasing the conservatee's powers as donee of a power of appointment.
- (4) Entering into contracts.
- (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. A special needs trust for money paid pursuant to a compromise or judgment for a conservatee may be established only under Chapter 4 (commencing with Section 3600) of Part 8, and not under this article.
- (6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.
- (7) Exercising options of the conservatee to purchase or exchange securities or other property.
- (8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:
 - (A) Life insurance policies, plans, or benefits.
 - (B) Annuity policies, plans, or benefits.
 - (C) Mutual fund and other dividend investment plans.
 - (D) Retirement, profit sharing, and employee welfare plans and benefits.
- (9) Exercising the right of the conservatee to elect to take under or against a will.
- (10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.
- (11) Exercising the right of the conservatee (A) to revoke or modify a revocable trust or (B) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable

trust if the instrument governing the trust (A) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (B) provides expressly that a conservator may not revoke or modify the trust, or (C) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust.

(12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

(13) Making a will.

CAL. PROB. CODE § 2580 (b) (emphasis added).

Florida Statute §744.441 provides a similar extensive catalog of actions which, after obtaining approval of the court pursuant to a petition to act, “a plenary guardian of the property, or a limited guardian of the property” may undertake. The Florida statute also permits the making of gifts of the ward’s property, “to members of the ward’s family in estate and income tax planning procedures.” FLA. STAT. ANN. §744.441(17) (West 2011) “when the ward’s will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust” FLA. STAT. ANN. §744.441(18) (West 2011); and to “create or amend revocable trusts or create irrevocable trusts of property of the ward’s estate” FLA. STAT. ANN. §744.441(19) (West 2011).

3. The Substituted Judgment Standard

Two standards have developed in the area of substituted judgment: an “objective” standard used in the majority of tax cases, and a “subjective” standard in cases involving “transfers for need.” *Florence*, 140 Misc.2d at 395.

The California common law substituted judgment doctrine, as originally described in *Christiansen*, authorized action by the Court “where it appears from all the circumstances that the ward, if sane, as a reasonably prudent man, would so plan his estate, there being no substantial evidence of a contrary intent.” *Christiansen*, 248 Cal. App. 2d at 395. Significantly, *Christiansen* did not require that a court find the ward would have acted as proposed; instead it adopted an essentially objective prudent-person standard. Thus *Christiansen* contemplated substitution of the court’s judgment for that of the incompetent person. *Murphy v. Murphy* 164 Cal. App. 4th 376, 395 (2008), rev. denied, 2008 Cal. LEXIS 10879 (Cal. Sept. 10, 2008) (citing *Christiansen*, 248 Cal. App. 2d at 424); *see also* 14 Witkin, Summary of Cal. Law (10th ed. 2005), Wills and Probate, § 1025.

The subjective standard, which is sometimes applied to situations where the transfer is for “need” and not for clear tax benefits (*Matter of Kenan*, 262 N.C. 627 (N.C. 1964); *Matter of Fleming*, 173 Misc. 851 (N.Y. Sup. Ct. 1940); *Matter of Calasantra*, 154 Misc. 493 (N.Y. Sup. Ct. 1935) seeks to determine whether the particular ward would actually have made the transfer him or herself, if he or she had capacity.

The considerations affecting the Court's discretion to grant a substituted judgment petition varies from jurisdiction to jurisdiction, regardless of the standard used. Under the former UPC section the Court was required to consider the interests of others besides the protected person: ". . . [T]he Court shall consider the interests of creditors and dependents of the protected person and, in view of the disability, whether the protected person needs the continuing protection of a conservator." Former UPC § 5-408(c).

The California substituted judgment procedure, though it purports to apply an objective standard, requires the consideration of a broad array of circumstances, some of which are laden with "subjectivity." The statute only permits the court to authorize a transaction if certain conditions are met:

The court may make an order authorizing or requiring the proposed action under this article only if the court determines all of the following:

- (a) The conservatee either (1) is not opposed to the proposed action or (2) if opposed to the proposed action, lacks legal capacity for the proposed action.
- (b) Either the proposed action will have no adverse effect on the estate or the estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of those legally entitled to support, maintenance, and education from the conservatee, taking into account the age, physical condition, standards of living, and all other relevant circumstances of the conservatee and those legally entitled to support, maintenance, and education from the conservatee.

CAL. PROB. CODE § 2582 (West 1990).

The court is required to consider an expansive list of circumstances when deciding whether to approve a particular substituted judgment proposed action:

In determining whether to authorize or require a proposed action under this article, the court shall take into consideration all the relevant circumstances, which may include, but are not limited to, the following:

- (a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.
- (b) The past donative declarations, practices, and conduct of the conservatee.
- (c) The traits of the conservatee.
- (d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.
- (e) The wishes of the conservatee.

- (f) Any known estate plan of the conservatee (including, but not limited to, the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated).
- (g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.
- (h) The value, liquidity, and productiveness of the estate.
- (i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.
- (j) Changes of tax laws and other laws which would likely have motivated the conservatee to alter the conservatee's estate plan.
- (k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so.
- (l) Whether any beneficiary is the spouse or domestic partner of the conservatee.
- (m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.

CAL. PROB. CODE § 2583.

Thus, the broad circumstances for the court to consider in deciding whether to authorize a particular transaction, contemplates wide-ranging discretion for the court:

A given set of facts may permit more than one rational substituted-judgment decision. [¶] The superior court will (as the conservatee would) obtain information, and hear applications and suggestions, from various sources, and will or should obtain a sense of the situation more or less analogous to that the conservatee might have had and inevitably more enlightened than any reviewing court could hope to obtain. In sum the superior court, when called upon to substitute its judgment for that of the conservatee, will be 'a presumptively more capable decisionmaker' and should be given broad latitude."

Murphy, 164 Cal. App. 4th at 397 (citing *Conservatorship of Hart*, 228 Cal. App. 3d 1244, 1254 (Cal Ct. App.1991)).

Ultimately, the court should only grant the substituted judgment petition if the court is satisfied, “by a competent showing of all relevant circumstances, that in the last analysis the proposed action is what a reasonably prudent person in the conservatee’s position would have done.” *Hart*, 228 Cal. App. 3d at 1264.

4. What Is the Effect Of A Substituted Judgment Order?

The question of what is the binding effect of a substituted judgment proceeding is important for the attorney to consider in deciding whether to use it as a tool in the litigation context. Does the proceeding have collateral estoppel effect so as to successfully block a contest of an estate plan executed pursuant to a proceeding, after the death of the impaired person? Cases in California and Illinois demonstrate that the answer is not universal.

In the California case of *Murphy v. Murphy*, the Court found that a properly noticed substituted judgment petition to ratify an estate plan effectively barred a challenge to the plan initiated after the grantor’s death under the doctrine of collateral estoppel.

Murphy involved a protracted dispute between a brother and sister over their father’s control and estate while he was alive, which continued until well past his death. The case involved allegations and counter allegations between the brother and sister, each accusing the other of abusing their elderly father, a retired trust and estates attorney. The brother accused the sister of unduly influencing their father, with whom she lived. As a result, he sought the appointment of a neutral conservator, who was duly appointed by the court. During the pendency of the conservatorship, the father sought to terminate the conservatorship, and later added a petition for substituted judgment to ratify an estate plan that he created, including a trust and a pour-over will that disinherited the son (except for a \$1 gift) in favor of the sister. The brother was given notice of the substituted judgment petition, and did not oppose it. After the plan was approved in the substituted judgment petition, the conservatorship was terminated, since the father’s assets could be effectively managed through the substituted judgment trust.

After the father died, the son sued his sister in a civil action, alleging undue influence and fraud, contending that his sister had caused their father to breach an oral agreement that the father had made with their mother that the survivor of them would leave their estate assets to the two children equally. The sister responded, among other things, that the probate court had exclusive jurisdiction over the matter, and further argued that each of the brother’s causes of action were barred by collateral estoppel because the father’s estate plan had been approved through the substituted judgment proceeding, of which her brother had notice but to which he had failed to object.

The trial court in the civil case found in favor of the brother’s contentions. It found that the brother’s action was not barred by the doctrine of collateral estoppel because the issue of undue influence had not been tried previously, and further the parties in the substituted judgment action were distinct from the parties in the brother’s action for fraud, undue influence and inducement to breach the parents’ agreement to make a will. In addition, the trial court found that the son proved the breach of the agreement between the parents, and that the brother suffered damages as result. It also found, by clear and convincing evidence, that the trust and will favoring the sister were in

fact the product of undue influence. Finally, it found that the sister's misrepresentations to her father had caused him to breach his agreement to divide the estate equally between his children.

Despite the damning facts, the Court of Appeal overruled the trial court, finding that collateral estoppel did bar the son's action. It found that the son could have raised the parents' prior estate planning and his claim of breach of the parents' agreement during the substitute judgment proceedings to ratify the trust. The court observed that because under the substitute judgment statute, the court was charged with broadly considering the many factual circumstances at play, that the brother should have specifically raised the parents' prior estate plan. Having failed to do so, the substituted judgment action was given collateral estoppel effect to bar his post-death challenge against his sister. Similarly, the Court of Appeal found that the brother could have raised undue influence and fraud as issues when the plan was first considered by the Probate Court.

The collateral estoppel effect resulting from a pre-death challenge to an estate-planning document was addressed and disposed of differently in an Illinois case which effectively held there would be no collateral estoppel effect because a court-created substituted judgment will could only be subject to challenge after the death of the testator. In *Estate of Richard Henry* (2009), JP Morgan was granted authority as guardian of a disabled person's estate, to execute a codicil, will and trust on behalf of elderly ward Henry in order to change a 2004 will alleged to have been procured through the undue influence of his caretaker *In re Estate of Henry*, 919 N.E.2d 33 (Ill. App. Ct. 2009), *reh'g denied* (Dec. 8, 2009). In *Henry*, the testator, an 89 year old, purportedly executed a will in 2004 giving a substantial portion of his estate to his caretaker, Mick.

Henry was subsequently adjudicated as a disabled adult due to cognitive decline, and JP Morgan Chase was appointed as the guardian of his estate. In 2008, JP Morgan filed a petition alleging that the 2004 plan benefitting the caretaker was invalid due to undue influence and lack of capacity. JP Morgan's petition was brought pursuant to an Illinois' statute that effectively permits substituted judgment actions: Section 11 a-i 8(a-5) of the Illinois Probate Act of 1975 provides that the probate court "may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability."

The caretaker and the named executor, who also benefitted under the 2004 Will, who were both given notice of JP Morgan's petition objected to it, arguing that the 2004 Will was not the product of undue influence, and that Henry did have sufficient testamentary capacity. Over the objections, the trial court granted JP Morgan's petition, invalidating the 2004 Will.

Notably, prior to granting JP Morgan's petition, the Trial Court had already found that the caretaker had abused his position as a caretaker to misappropriate \$1.4 million of Henry's funds, and the Court had ordered those funds returned to Henry's estate since the transfers to the caretaker, a fiduciary, were presumptively invalid, and the caretaker failed to overcome the presumption.

Thus, in granting JP Morgan's petition to create the new will, the Trial Court found, among other things, that the 2004 documents favoring the caretaker were the product of undue influence, and that all persons interested in Henry's estate would have the opportunity to file a will contest, *after Henry's death*.

The caretaker and the executor appealed the Trial Court's ruling. On appeal, JP Morgan argued, and the Court of Appeal agreed, that the caretaker and the executor lacked standing to even bring the appeal because they had no interest in the estate, as any rights created under the 2004 estate plan would not have vested until Henry's death, at which point the caretaker could contest the will.

The Court of Appeal, citing Illinois authorities stated that the caretaker's procured will would have no legal effect until Henry's death. *Henry*, at 518. Thus, the caretaker had no standing based on the 2004 will to challenge the JP Morgan will: "Just as appellants would lack standing to bring a judicial challenge during Henry's life if Henry had regained his mental faculties and executed a new will overriding the 2004 will and eliminating their shares in his legacy, so too do they lack standing to appeal the order at issue in the instant case." *Id.* at 41.

The Court of Appeal rejected tortious interference with inheritance expectancy as a valid ground for the caretaker's appeal, again finding that a tortious interference claim would only vest at the death of the testator - prior to that the caretaker would have a mere expectancy, not a vested right.

Interestingly, the caretaker and executor's entitlement to receive notice of the substituted judgment petition did not establish that they had a present vested interest in the assets. Rather, they had merely an expectancy interest, which was insufficient to confer on them standing to appeal.⁶ The only remedy the caretaker had, the court found, was a post-death will contest.

In support of their appeal, the caretaker and executor cited the collateral estoppel effect that barred the post-death challenge by the son in the California *Murphy* case. While the Illinois appellate court acknowledged the reasoning of *Murphy*, it found that because the Illinois law limits contest claims to post death challenges, the caretaker didn't have to worry that collateral estoppel could be used to bar an otherwise proper post death will contest. *Id.* at 43.

B. Multi-Jurisdictional Disputes

1. States That Have Adopted The Uniform Adult Guardianship And Protective Proceedings Jurisdiction Act ("Uniform Act")

- In 2008, five states adopted the Uniform Act: Alaska, Colorado, Delaware, Utah and the District of Columbia.
- In 2009, eight states adopted the Uniform Act: Illinois, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington, and West Virginia.
- In 2010, seven states adopted the Uniform Act: Alabama, Arizona, Iowa, Maryland, Oklahoma, South Carolina and Tennessee.

⁶The Illinois statute provided that "The probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise any and all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability." (Emphasis added) 755 ILCS 5/11-18 (a-5) (West 2006),

- In 2011, ten states adopted the Uniform Act: Arkansas, Idaho, Indiana, Kentucky, Missouri, Nebraska, New Mexico, South Dakota, Vermont and Virginia.
- In 2012, six states adopted the Uniform Act: Connecticut, Hawaii, Maine, New Jersey, Ohio and Pennsylvania.
- In 2013, two additional states adopted the Uniform Act: Wyoming and New York.
- In 2014, three states passed the Uniform Act: Mississippi, Massachusetts, and California, plus the District of Columbia and Puerto Rico.

2. A Closer Look At The New Jersey Adult Guardianship And Protective Proceedings Jurisdiction Act

In 2012, New Jersey enacted the New Jersey Adult Guardianship and Protective Proceedings Jurisdiction Act (the “Act”), which governs the exercise of jurisdiction over guardianship or protective orders when there are interstate conflicts of uncertainty regarding whether a court of New Jersey or a court of another state should act. The Act is based on the Uniform Act known as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Essentially, the law was enacted to eliminate jurisdictional issues when families in different states feud over guardianship. It has become more common for family members engaged in disputes over relatives with diminished capacity to move those relatives across state lines. This has been referred to as “granny snatching.” The Act addresses jurisdiction only and does not alter substantive law pertaining to guardianship, conservatorship and protective proceedings.

The Act creates a process for determining which state will have jurisdiction to appoint a guardian or conservator if there is a conflict by designating that the individual’s “home state” has primary jurisdiction, followed by a state in which the individual has a “significant connection.” First, N.J.S.A. § 3B:12B-3(h), defines “home state” as the state in which the person with diminished capacity was physically present for at least six consecutive months immediately before the filing of a petition for the appointment of a guardian or protective order. If the person has no home state or if the home state has refused jurisdiction in favor of New Jersey, then New Jersey may have jurisdiction as a significant-connection state. N.J.S.A. § 3B:12B-10 sets forth factors in determining whether an individual has a significant-connection:

- “a. the location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding;
- b. the length of time the respondent at any time was physically present in the state and the duration of any absence;
- c. the location of the respondent’s property; and
- d. the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle

registration, driver's license, social relationship, and receipt of services.”

Additionally, New Jersey may have jurisdiction under the Act if it is an appropriate forum. N.J.S.A. § 3B:12B-13, provides factors to apply in determining whether the state is an appropriate forum, which include, among others, whether abuse, neglect or exploitation of the person occurred; the length of time the person was physically present in or was a legal resident of New Jersey or another state; the distance of the person from the court of each state; and the financial circumstances of the person's estate. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present evidence is also a factor. Moreover, the Act also recognizes that emergency situations arise and in those instances, New Jersey has emergency jurisdiction to: (1) appoint a guardian or issue a protective order under N.J.S.A. § 3B:12-24.1(c).

However, since forum shopping occurs, the Act provides a mechanism for a court to decline jurisdiction if jurisdiction was acquired by reason of “unjustifiable conduct.” N.J.S.A. § 3B:12B-14.

The Act even permits New Jersey courts to communicate with another state court regarding the proceeding. N.J.S.A. § 3B:12B-6. Along the same line, the Act requires cooperation between courts. New Jersey may request the appropriate court of another state to, among others, hold an evidence hearing or order an evaluation or assessment of the person.

Furthermore, this Act provides a mechanism to register guardianship orders from other states. N.J.S.A. § 3B:12B-19. The effect of the registration is that an out-of-state guardian may exercise in New Jersey all powers authorized in the order of the appointment, except those prohibited by New Jersey law.

VI. WRITINGS INTENDED AS WILLS

In recent years, the definition of the term “will” has changed dramatically. The type of writing necessary to create a valid will is evolving, and courts are moving away from adherence to strict compliance. This trend away from strict formalities has developed in large part by the adoption of § 2-503 of the Uniform Probate Code (hereinafter “the UPC”) in 1990. The UPC was originally promulgated in 1969 (last amended and revised in 2010). *See* Unif. Probate Code, Prefatory Note at 24 (amended 2010). Historically, the execution of a valid will required strict compliance with certain statutory formalities. However, with the adoption of § 2-503 of the UPC, there is now a statutorily-created exception for writings that contain harmless execution errors or mistaken terms. Roger W. Andersen, *Understand Trusts & Estates*, 56-57 (LexisNexis, 4th ed. 2009).

Even before the emergence of the harmless error doctrine, there has been a gradual liberalization of strict formalities. The doctrine of substantial compliance, unlike the harmless error doctrine, does not completely abandon formalities. *See generally* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 513-14 (1975). Under the doctrine, so long as the document reflects the testator's intent, a technical defect in the formal execution of the document will not invalidate it. Although in most states, the doctrine of

substantial compliance is non-statutory, for years courts have invoked the doctrine in certain circumstances where not all formalities have been met.

Unlike substantial compliance -- which proposes that a document meets some, but not all, statutory elements and is therefore *close enough* to pass as a valid will -- the doctrine of harmless error ignores the traditional statutory elements and focuses entirely on whether the testator *intended* the document to be effective as his last will and testament. UPC § 2-503, adopted in several states, treats a non-complying will

as if it had been executed in compliance with [UPC § 2-502] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (1) the decedent's will,
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

UPC § 2-503 (amended 2010).

The majority of states have rejected the UPC § 2-503 harmless error doctrine in favor of strict compliance with the statutory requirements to create a valid will. However, at least six states have adopted the UPC's harmless error doctrine in full. These states include Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah.

<u>States that Have Adopted the UPC § 2-503 Harmless Error Doctrine in Full</u>	
Hawaii	Haw. Rev. Stat. Ann. § 560:2-503 (LexisNexis 1996)
Michigan	Mich. Comp. Laws Serv. § 700.2503 (LexisNexis 2000)
Montana	Mont. Code Ann. § 72-2-523 (1993)
New Jersey	N.J. Stat. Ann. § 3B:3-3 (West 2005)
South Dakota	S.D. Codified Laws § 29A-2-503 (1995)
Utah	Utah Code Ann. § 75-2-503 (LexisNexis 1998)

Four other states have adopted a variation of the harmless error doctrine. These states are California, Colorado, Ohio, and Virginia.

<u>States that Have Adopted a Variation of the UPC § 2-503 Harmless Error Doctrine</u>		
California	Cal. Prob. Code § 6110(c)(2) (Deering 2009)	Deviates from the UPC by omitting UPC § 2-503(2), (3) and (4), meaning that California's harmless error doctrine will not cure defective revocations, alterations or revivals.
Colorado	Colo. Rev. Stat. § 15-11-503 (2010)	Adopts the language of UPC § 2-503 but adds that this remedy "shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse."
Ohio	Ohio Rev. Code Ann. § 2107.24 (LexisNexis 2008)	Deviates from the UPC by altering the language so that a defective will can only be cured if a probate court, after holding a hearing, finds clear and convincing evidence of all three of the following: (1) The decedent prepared the document or caused the document to be prepared; (2) The decedent signed the document and intended the document to constitute the decedent's will; and (3) The decedent signed the document in the conscious presence of two or more witnesses.
Virginia	Va. Code Ann. § 64.2-404 (2012)	Adopts the language of UPC § 2-503 but adds that this remedy "may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and [also adds that this remedy] is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the

		decedent's date of death and in which all interested persons are made parties.”
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A. Michigan

In Michigan, a testator executed a valid will but later decided to alter the disposition of her property by giving her residence and 160 acres of property to a family friend, Charles Russell. *In re Estate of Southworth*, No. 297460, 2011 Mich. App. LEXIS 1245, at *2 (Mich. Ct. App. 2011). The testator consulted an attorney for estate planning advice and told her attorney that she already had a will but that she wished to slightly change the disposition of her property, i.e., she wanted Russell to receive her residence and 160 acres of land after she passed. *Id.* Her attorney created a quitclaim deed in accordance with the testator's wishes and witnessed her sign the deed. *Id.* at *2-3. The testator stored both the deed and the will in her safe. *Id.* at *7.

Although the deed was an invalid amendment to her preexisting will because it was never delivered or executed, the Michigan Court of Appeals upheld the deed as an amendment under its own statutory version of the harmless error doctrine. *Id.* at *8. Under this standard, the court found clear and convincing evidence of the testator's intent to grant Russell her home and acres of land upon her death notwithstanding her failure to execute a valid amendment: the testator had consulted her attorney for estate planning advice; she informed the attorney that she had a will but wished to give Russell some of her property in a quitclaim deed; she signed the deed in front of her attorney; and she stored the deed with the will in her safe. *Id.* at *7-8. Additionally, she never altered or destroyed either document despite offers by another attorney to help in estate planning. *Id.* at *8-9. Based on this evidence, the appellate court upheld the will and affirmed judgment in favor of Russell. *Id.* at *9.

B. California

In California, a testator attempted to create a new will to replace his previous one. *Estate of Stoker*, 122 Cal. Rptr. 3d 529 (Cal. Ct. App. 2011), *review denied*, 2011 Cal. LEXIS 5337 (2011). The testator lacked the requisite two witnesses' signatures, and therefore, the new will was deemed defective. *Id.* at 531. The California Court of Appeals nevertheless upheld the new will under California's harmless error doctrine and affirmed the trial court's finding that there was clear and convincing evidence that the testator intended the document to be his will. *Id.* Though he lacked two witnesses' signatures, there were two witnesses present when he executed his will. *Id.* at 533. Both witnesses saw him sign the will and verified that the will was genuine. *Id.* One of the witnesses testified that at the time the decedent was discussing his estate plan, he asked her to get pen and paper so he could dictate the terms of his new will. *Id.* at 532. She wrote the document "word for word" from his dictation. He then looked at it, signed it in front of both witnesses, and stated that this was his last will and testament. The two witnesses also saw him urinate on his previous will and then burn it. *Id.* Both the appellate and the trial court found that these facts established clear and convincing evidence that the testator intended the document to be his last will despite his failure to obtain two witnesses' signatures. *Id.* at 534. In addition, the court rejected the appellants' argument that the harmless error doctrine does not apply to handwritten non-holographic wills because there was no statutory language that justified such a limitation. *Id.*

C. Ohio

An Ohio court recently addressed a case of first impression concerning the creation of an electronic will, specifically a will written on a Samsung Galaxy tablet computer because no paper or writing instrument was available. *In re Estate of Javier Castro, Deceased*, Ohio Com. Pleas (Probate Division, Lorain County), Slip Op., Journal 331, No. 3871 (June 19, 2013). In *Castro*, the testator was informed that he needed a blood transfusion, but declined for religious reasons. He discussed with two of his brothers about preparing a will. Because they did not have any paper or writing instrument, one of his brothers suggested that the will be written on his Samsung Galaxy tablet. The other brother wrote on the tablet what the testator wanted in the will, and each section was read back to the testator. The testator was later transported to another hospital and signed the will on the tablet later that day in front of his two brothers. A third witness, a cousin, arrived shortly thereafter, at which time the testator acknowledged in his presence that he had signed the will on the tablet.

The Ohio Court of Common Pleas found that the document prepared on the tablet constituted a “writing,” and that it was “signed” as defined by Ohio law. Specifically, the court found that all three requirements of Ohio Rev. Code Ann. § 2107.24 were proven by clear and convincing evidence: the decedent signed the will; he intended the document to be his last will and testament; and he signed the will in the presence of two or more witnesses. The court admitted the electronic will to probate.

D. Australia

The debate over writings intended as wills is not limited to the United States.

Recently, on October 9, 2017, in Australia, the Supreme Court of Queensland found an unsent text message on the mobile phone of Mark Nichol, the deceased, is to be treated as a will pursuant to s 18 of the Succession Act 1981 (Qld). The Court found the following circumstances satisfied the requisite standard that the deceased did intend the text message, without more, to operate as his final will on his death at the time he completed it on or about October 10, 2016:

- The fact that the text message was created on or about the time that the deceased was contemplating death such that he even indicated where he wanted his ashes to be placed;
- That the deceased’s mobile phone was with him in the shed where he died;
- That the deceased addressed how he wished to dispose of his assets and expressly provided that he did not wish to leave the applicant anything;
- The level of detail in the message including the direction as to where there was cash to be found, that there was money in the bank and the card pin number, as well as the deceased’s initials with his date of birth and ending the document with the words “my will”; and,

- He had not expressed any contrary wishes or intentions in relation to his estate and its disposition from that contained in the text message.

Further, although the text message was a draft and not sent, the Court determined that decedent having the mobile phone with him at the place he took his life so it was found with him was consistent with the fact that he did not want to alert his brother that he was about to commit suicide, but did intend the text message to be discovered when he was found. Thus, under all of the circumstances, the Court found the text message was intended by the deceased to operate as his will upon his death.

Moreover, in 2013, in Australia, the Supreme Court of Queensland recently needed to address whether a purported will created on an iPhone should be admitted to probate. *In re Yu*, 2013 WL 6175174 (S. Ct. Queensland 2013).

Karter Yu died in September 2011, after taking his own life. Shortly before he died, he created a series of documents on his iPhone, most of them final farewells. One of these documents was expressed to be his last will and testament. Australia has statutory requirements for the execution of a valid will. However, section 18 of the Succession Act of 1981 provides that a court may recognize a document as a valid will if the court is satisfied that the decedent intended the document to form the person's will.

In order to demonstrate this intent, section 18 requires that three conditions are met. First, a document must in fact exist. A document is statutorily defined to include any disc, tape, or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device.

The second condition is whether the document purports to state the testamentary intentions of the decedent. The *Yu* court found it "absolutely plain" that the document set forth the decedent's testamentary intentions, as it dealt with the disposition of his whole estate at a time when he was contemplating his imminent death. Specifically, the document demonstrated an intention to appoint an executor and nominate an alternate and authorized the executor to deal with the decedent's affairs upon his death.

The third condition requires that the decedent intended the document to form his will. The *Yu* court noted that it is not sufficient that a document state a decedent's testamentary wishes; it must also be intended to be legally operative so as to dispose of the person's property at death. The court found that this condition was also met. The document began with the words, "This is the last Will and Testament," proceeded to identify an executor and dispose of all of his property, and concluded with the decedent's name and address and the date typed at the end of the document in a place where on paper a signature would appear. In the *Yu* court's view, these circumstances demonstrated an intention that the document be operative.

With all three of the factors met, the iPhone will was admitted to probate.

E. New Jersey

Perhaps the most liberal application of the harmless error doctrine to date has been invoked by the New Jersey Appellate Division in *In re Estate of Ehrlich*, 427 N.J. Super. 64, 47 A.3d 12

(App. Div. 2012), *appeal dismissed*, 213 N.J. 496 (2013). (Although the *Ehrlich* decision was appealed to the New Jersey Supreme Court as of right based on the dissent, it was dismissed by stipulation of the parties on April 26, 2013.) The Appellate Division upheld the probate of a copy of an unsigned document as a valid writing intended as a will.

Decedent Richard Ehrlich was a trust and estate attorney who practiced in New Jersey for over 50 years. At his death, his only heirs or next of kin were his deceased brother's three adult children -- Todd and Jonathan Ehrlich, and Pamela Venuto.

The material facts were undisputed. The decedent had not seen or had any contact with Todd or Pamela in over 20 years, but he did maintain a relationship with Jonathan. In fact, the decedent told his closest friends that Jonathan was the person to contact if he became ill or died and that Jonathan was the person to whom the decedent would leave his estate.

Jonathan learned of his uncle's death nearly two months after the passing. He then located a copy of a purported will in a drawer near the rear entrance of the decedent's home. He filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, objected.

The document proffered by Jonathan was described by the Appellate Division as follows:

[It] is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, however, include, in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H. W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.

Id. at 68.

The purported will provided \$50,000 to Pamela; \$75,000 to Todd; 25% of the residue to a trust for the benefit of a friend, Kathryn Harris; and 75% of the residue to Jonathan.

It was "undisputed that the document was prepared by the decedent and just before he was to undergo life-threatening surgery." *Id.* at 68. On the same date as the proffered will -- May 20, 2000 -- the decedent also executed a Power of Attorney and living will, which were both witnessed by the same individual. As with the purported will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. *Id.* at 69.

The evidence established that, years after drafting these documents, the decedent acknowledged to others that he had a will and wished to delete the bequest to his former friend, Kathryn Harris. Nevertheless, no later will was ever found.

After discovery, the parties filed cross-motions for summary judgment. The trial court granted Jonathan's motion and admitted the document to probate. The court reasoned:

First, since Mr. [Richard] Ehrlich prepared the document, there can be no doubt that he viewed it. Secondly, while he did not formally execute the copy, his hand written notations at the top of the first page, effectively demonstrating that the original was mailed to his executor on the same day that he executed his power of attorney and his health directive is clear and convincing evidence of his "final assent" that he intended the original document to constitute his last will and testament as required both by *N.J.S.A. 3B:3-3* and [*In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 310 (App. Div. 2010)].

Id. at 69.

On appeal, the Appellate Division articulated the issue as "whether the unexecuted copy of a purportedly executed original document sufficiently represent[ed] decedent's final testamentary intent to be admitted into probate." *Id.* at 69-70.

Citing to the legislative history of *N.J.S.A. § 3B:3-3* and *Macool, supra*, at 311, the Appellate Division continued:

Thus, *N.J.S.A. 3B:3-3*, in addressing a form of testamentary document not executed in compliance with *N.J.S.A. 3B:3-2*, represents a relaxation of the rules regarding formal execution of Wills so as to effectuate the intent of the testator. This legislative leeway happens to be consonant with "a court's duty in probate matters . . . 'to ascertain and give effect to the probable intention of the testator.'" As such, Section 3 dispenses with the requirement that the proposed document be executed or otherwise signed in some fashion by the testator.

Id. at 72 (citations omitted).

The court explained that *N.J.S.A. § 3B:3-3* "places on the proponent of the defective instrument the burden of proving by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent, and was thereafter assented to by the testator." *Id.* at 74.

The Appellate Division then noted that the decedent undeniably prepared and reviewed the challenged document. In disposing of his entire estate and making specific bequests, the purported will contained both a level of formality and expressed sufficient testamentary intent. As the motion judge noted, in its form, the document "[was] clearly a professionally prepared will and complete

in every respect except for a date and its execution.” Moreover, as the only living relative with whom decedent had any meaningful relationship, Jonathan, who was to receive the bulk of his uncle’s estate under the purported will, was the natural object of decedent’s bounty. *Id.* at 74.

The court then turned to whether the decedent “gave his final assent” to the document:

Clearly, decedent’s handwritten notation on its cover page evidencing that the original was sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates -- the “Last Will and Testament” of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, “[e]ven if the original for some reason was not signed by him, through some oversight or negligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament.”

Id. at 74.

The appellate court also noted that, as late as 2008, the decedent “repeatedly orally acknowledged and confirmed the dispositive contents therein to those closest to him in life.” *Id.* at 74-75.

The court further concluded that the fact that the document was only a copy of the original sent to the decedent’s executor was not dispositive, since *N.J.S.A.* § 3B:3-3 does not require that the document be an original. The court determined that the evidence was compelling as to the testamentary sufficiency of the document, so as to rebut any presumption of revocation or destruction due to the absence of the original. *Id.* at 76.

One of the most intriguing aspects of the *Ehrlich* decision is the dissent by the Honorable Stephen Skillman, J.A.D. (retired and temporarily assigned on recall). He concluded, “I do not believe that *N.J.S.A.* § 3B:3-3 can be reasonably construed to authorize the admission to probate of an unexecuted will.” *Id.* at 78. In other words, Judge Skillman found that the statute authorized the admission to probate of a defective yet executed will, but not an *unexecuted* will. Interestingly, Judge Skillman was also on the three-judge panel that decided the appeal in *Macool* just two years earlier – and reached a different conclusion in *dictum*.

In *Ehrlich*, Judge Skillman relied on the legislative history of *N.J.S.A.* § 3B:3-3 and the national standards under the UPC. He explained, “[a]lthough I was on the panel that decided *Macool*, upon further reflection I have concluded that that opinion gives too expansive an interpretation to *N.J.S.A.* § 3B:3-3; specifically, I disagree with the dictum that seems to indicate a draft will that has not been either signed by the decedent or attested to by any witnesses can be admitted to probate, provided the putative testator gave his or her ‘final assent’ to the proposed will.” *Id.* at 81.

Judge Skillman stated that the proper standards for the case at bar were those dealing with lost wills and that he would have remanded the matter for proceedings under those standards. *Id.* at 83-84.

Meanwhile, the majority opinion addressed Judge Skillman's dissent as follows:

Our dissenting colleague, who participated in *Macool*, retreats from its holding and now discerns a specific requirement in Section 3 that the document be signed and acknowledged before a court may even move to the next step and decide whether there is clear and convincing evidence that the decedent intended the document to be his Will, and therefore excuse any deficiencies therein. We find no basis for such a constrictive construction in the plain language of the provision, which in clear contrast to Section 2, expressly contemplates an unexecuted Will within its scope. Otherwise what is the point of the exception?

Id. at 72.

F. Pennsylvania

The Pennsylvania Supreme Court addressed the two-witness rule in the case of *In the Matter of the Estate of Wilner, Deceased*, 142 A.3d 796 (Pa. 2016). On July 19, 2016, the Supreme Court of Pennsylvania reversed the Superior Court's finding that it was bound by the two-witness rule as articulated in the case of *Hodgson's Estate*, 270 Pa. 210, 112 A. 778 (1921). The Court held that while the two-witness rule applies to lost wills, it only governs proving of a will in the narrow, technical sense of proving its validity as a testamentary document and not to proving its contents. Thus, the court reversed *Hodgson's Estate*.

The decedent, Isabel Wilner, had drafted a will leaving almost her entire estate to charity. In June 2007, Isabel executed the will with two subscribing witnesses present, "Attorney A" and "Attorney B," where "Attorney B" notarized the signatures.

Attorney W made two conformed copies of the will. He kept one copy for his files, and gave the other copy and the original will to his client. At Isabel's request, her caregiver placed the original will in an unlocked metal box downstairs and the conformed copy in a locked safe in an upstairs bedroom.

In April 2010, Isabel's attorney prepared two additional documents: (1) a codicil that specifically referenced the June 2007 will and changed the executrix; and (2) a deed transferring ownership of her home to the Pennsylvania church while retaining a life estate. Again, her attorney made conformed copies of the codicil, kept one copy for his files, and gave the original and a conformed copy to Isabel. As with the June 2007 will, Isabel's caregiver placed the executed codicil in the downstairs metal box and conformed copy in the upstairs safe.

Shortly after Isabel's death on March 16, 2011, her caregiver discovered that the will had been removed from the downstairs metal box, although other items – including the two original

codicils and the envelope that had contained the will – were still there. Additionally, all papers were removed from the upstairs safe, including the conformed copy of the will.

The caregiver sought to have the conformed copy of the will, along with the original codicils, entered into probate. Isabel’s niece, Dana Wilner, objected.

The Orphans’ Court granted the caregiver’s petition directing that the confirmed copy of the will and original codicils be admitted to probate. Although only one witness – Isabel’s attorney – was able to testify as to the contents of the original will, the court nonetheless determined that such testimony was sufficient under the “unique” circumstances of the case.

The Superior Court reversed the Orphans’ Court ruling and concluded that the two-witness rule required proof by two witnesses of due execution and *of the contents*. Despite this holding, the intermediate court noted the apparent inequity of the result and suggested that the two-witness rule ran counter to its original purpose of honoring the decedent’s wishes and preventing fraud.

The Supreme Court of Pennsylvania reversed the Superior Court’s ruling on the basis that Pennsylvania Code Section 3132 only required two witnesses to prove validity, but not to prove content. Specifically, the Court interpreted the language of Pennsylvania Code §3132 that requires “[a]ll wills shall be *proved* by the oaths or affirmations of two competent witnesses” (emphasis added). In doing so, the Court overturned the case of *Hodgson’s Estate*, finding 20 Pa. C.S. §3132 only concerns proving a will’s validity as a testamentary document, and not proving its contents.

Notably, the Court reasoned that requiring the testimony of two witnesses relative to the terms of a lost will can unnecessarily frustrate the decedent’s wishes where a photocopy or a conformed copy is available. Thus, the Supreme Court of Pennsylvania found there was sufficient proof to admit the conformed copy of Isabel’s lost will to probate.

VII. CLAIMS STEMMING FROM EVOLVING TECHNOLOGY

A. E-mail

In 1997, the Pennsylvania Committee on Legal Ethics and Professional Responsibility issued an informal opinion concerning use of email (stating that a lawyer may use e-mail to communicate with or about a client without encryption).⁷ The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion No. 99-413, confirming that encryption of privileged emails exchanged between lawyer and client is not required.⁸

ABA Formal Opinion 11-459⁹ recognizes that confidentiality may be jeopardized in email and electronic communications such as text messaging. Rule 1.6(a), which requires a lawyer to

⁷Available here: <http://www.americanbar.org/publications/youraba/2015/july-2015/encryption-conniption.html>

⁸Opinion available for free download here:
<http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=219976>

⁹Available here: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/11_459_nm_formal_opinion.authcheckdam.pdf

refrain from revealing information regarding representation unless there is client consent, may impose a duty on the lawyer to consult with a client and to follow client instructions to guard against disclosure of highly sensitive matters with respect to electronic communications.

An example of a situation in which confidentiality may be jeopardized is use by a client of an employer-provided or employer-owned computer or email account to communicate with the lawyer about a personal legal matter. Depending on the email use policies and practices of the client's employer, the attorney-client privilege may not attach to emails sent through a work email account. Decisions from around the country generally turn on whether the employee had a reasonable expectation of privacy when using an employer's email system for confidential communications.

In *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010), the Court found that an employee had a reasonable expectation of privacy as to emails sent and received on work a computer where the employee utilized a personal, web-based, password-protected email account and did not save the password on her computer, and where the employer's policies created ambiguity regarding an employee's use and ownership of personal emails stored on the employer's system.

In *Curto v. Med. World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006), the District court affirmed a magistrate judge's decision finding no privilege waiver had occurred as to personal files originally stored on employer-provided laptops but later deleted by employee before laptops were returned to employer (which were subsequently recovered by employer through forensic means and produced); in addition to the usual factors, the magistrate judge considered whether or not there was enforcement of any computer use policy and found that lack of enforcement had created a "false sense of security" which "lull[ed]" employees into believing that the policy would not be enforced.

ABA Formal Op. 11-459 identifies other situations or settings in which confidentiality may be jeopardized: public computers, such as a in a library or hotel, or a borrowed computer or device available to others. It concludes that the ethical obligations under Rules 1.1 and 1.6 to provide advice regarding maintaining confidentiality will depend on the circumstances. The following considerations tending to establish an ethical duty are that: (1) the client has engaged in, or has indicated an intent to engage in, email communications with counsel; (2) the client is employed in a position that would provide access to a workplace device or system; (3) given the circumstances, the employer or a third party has the ability to access the e-mail communications, and (4) as far as the lawyer knows, the employer's internal policy and the jurisdiction's laws do not clearly protect the privacy of the employee's personal e-mail communications via a business device or system.

Individual states may have ethics opinions regarding the attorney's obligation to maintain confidentiality when using electronic means to communicate with clients. For instance, California's Standing Committee on Professional Responsibility and Conduct has issued Formal Opinion No. 2010-179, which addresses duties of confidentiality and competence and concludes that because of the evolving nature of technology and differences in available security features, an attorney must ensure that steps taken to assure confidentiality are sufficient for each form of

technology being used and must continue to monitor the efficacy of such steps.¹⁰ The Washington State Bar Association Advisory Opinion 2217 (2012)¹¹ has advised that a lawyer receiving or sending substantive communications with a client via email or other electronic means must warn the client about the risk of disclosure to the employer or other third party for any communications using a public, or employer-provided computer or other workplace device or system, once the lawyer believes there is a significant risk that a third party will access the communications. The lawyer must take reasonable care to protect the confidentiality of these communications by giving appropriately tailored advice to the client.

Two common problems as to email epitomize the problems. The first is the hazard of “autofill,” a function in some email systems which fills in a recipient’s name automatically. This auto-complete or word completion function operates so that when the writer types in the first letter or letters of a word, the program predicts one or more possible words as choices. For example, if the word he intends to write is included in the list, he can select it by using the number keys. If the word that the user wants is not predicted, the writer must enter the next letter of the word.

In *Multiquip, Inc. v. Water Mgmt. Sys., LLC*, 2009 WL 4261214 (D. Idaho Nov. 23, 2009), as a result of the autofill function in email, defendant mistakenly sent a privileged communication to a third party which was thereafter forwarded to opposing counsel in the litigation. The court undertook a waiver analysis pursuant to ER 502 and found that privilege was not waived where defendant disclosed the communication inadvertently, where defendant’s reliance on “a system that had worked in particular way in the past” was reasonable to prevent disclosure, and where defendant’s counsel took immediate steps to rectify the error upon learning of the disclosure. Defendant’s actions though “hasty and imperfect” were not unreasonable as the autofill function had not previously resulted in sending an email to the wrong person.

The second common problem is the use of the “reply to all” feature. In *Charm v. Kohn*, 27 Mass.L. Rptr. 421, 2010 WL 3816716 (Mass. Super. Ct. Sept. 2010), defendant’s attorney sent an email to opposing counsel, with a blind copy (“bcc”) to the client-defendant. The defendant responded, inadvertently sending the privileged communication to opposing counsel using the “reply all” function. Later in the case, opposing counsel attached the email to a brief in opposition to summary judgment. The court, “with some indulgence for human fallibility,” granted defendant’s motion to strike upon finding that defendant and counsel had taken reasonable steps to maintain confidentiality because the transmission was inadvertent, the mistake “was of a type that is common and easy to make,” and because counsel immediately noticed the error and demanded the email’s deletion. The court warned that further carelessness would compel a finding of waiver.

B. Social Media

Social media are computer-mediated tools that allow people to create, share or exchange information, ideas, pictures, and videos in virtual communities and networks. Facebook is the most popular social networking site. Others include LinkedIn, YouTube, and Twitter.

¹⁰Available here: <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=836>

¹¹Available here: <http://mcle.mywsba.org/IO/print.aspx?ID=1668>

If the competency standard requires attorneys to be at least familiar with social media, the duty of diligence may require a more hands-on understanding of the specific social-media applications. Comment 1 to Pennsylvania Rule of Professional Conduct 1.3 provides that a lawyer should act “with zeal in advocacy upon the client’s behalf.” If the diligent attorney must be zealous in pursuing a matter on his client’s behalf, it seems possible that more than familiarity may be required -- actual use of social media may be necessary.

In turn, some bar associations have published social media guidelines for lawyers. *See, e.g.,* Pennsylvania Bar Association Formal Opinion 2014-300, *Ethical Obligations for Attorneys Using Social Media*, Op. PBA No. 2014-300 (2014)¹², New York County Lawyers Association Professional Ethics Committee Formal Opinion (March 10, 2015)¹³, California Standing Committee on Professional Responsibility and Conduct, No. 12-00006 (December 2014).

Lawyers may use social media to communicate and network with clients and colleagues, attract new clients, and promote their services. Lawyer and law firm pages appearing on social networking sites that are used to promote the lawyer or law firm’s practice are subject to professional responsibility rules and standards governing lawyer advertising. ABA Model Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve.

A “profile” may be created for a lawyer or law firm when registering to use a social media site. Care should be exercised in describing a lawyer’s practice. The fact that a lawyer does or does not practice in particular fields of law can be described. ABA Model Rule 7.4(a). But a lawyer cannot state or imply that certification as a “specialist” in a particular field of law, unless actually certified as a specialist by an organization that has been approved by an appropriate state authority or accredited by the ABA, and the name of the certifying organization is clearly identified. ABA Model Rule 7.4(d).

A number of state bar associations have issued ethics opinions addressing this issue of creating a profile. The Professional Guidance Committee of the Philadelphia Bar Association has advised that an attorney may ethically list her areas of practice in the “Skills and Expertise” section of LinkedIn, but may not categorize herself as an “expert” or “experienced” outside of the parameters of Rule 7.4. Philadelphia Bar Association.¹⁴ In 2013, the Florida Bar was asked to issue an advisory advertising opinion regarding whether a lawyer may list his areas of practice under the LinkedIn header “Skills and Expertise” when the lawyer was not board certified. The Florida Bar responded by letter¹⁵ indicating that it was the staff’s position that the attorney could not list his areas of practice under the header “Skills and Expertise” if he was not board certified, and that adding a disclaimer that the lawyer was not board certified and not an expert would not

¹²Available at [http://www.danieljsiegel.com/Formal 2014-300.pdf](http://www.danieljsiegel.com/Formal%202014-300.pdf)

¹³Available at https://www.nycla.org/siteFiles/Publications/Publications1748_0.pdf

¹⁴Professional Guidance Committee, Opinion PBA No. 2012-8 (November 2012) *available at* <http://www.philadelphiabar.org/WebObjects/PBARreaOnly.woa/Contents/WebServerResources/CMSResources/Opinion2012-8Final.pdf>.

¹⁵Available here: <http://it-lex.org/wp-content/uploads/2013/09/Florida-Bar-Opinion-re-LinkedIn-Redacted.pdf>.

remedy the issue. Ultimately, the Florida Bar did not issue an advisory opinion because LinkedIn had agreed to change profile headings that conflicted with Florida's attorney advertising rules.¹⁶

1. Online Reviews or Comments by Clients

It is easier than ever for a disappointed or dissatisfied client to voice complaints about his lawyer publicly, and potentially tarnish the lawyer's professional reputation in the process. Numerous consumer-oriented websites allow people to post negative reviews of professionals. That is not the only option. An unhappy client may post criticism of his lawyer on his own Facebook page, or that of the attorney or law firm. Even if the negative reviewer is a former client, the duty to maintain confidences continues. *See* ABA Model Rule 1.9(c) (duties to former clients).

The Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee has addressed whether the Pennsylvania Rules of Professional Conduct impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concluded that the lawyer's responsibilities to keep confidential all the information relating to the representation of a client, constrains the lawyer. Therefore, a lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.¹⁷

The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO¹⁸. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

2. Client's Social Media Accounts

Lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account.

Pennsylvania Rule of Professional Conduct 1.1 sets a standard for fairness to opposing parties and counsel. Similar to Pennsylvania, Rule 3.4(a) of the Delaware Rules of Professional

¹⁶The Florida Bar News, *LinkedIn Concerns Resolved* (April 1, 2014), available here: http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/98333b3a25befaca85257ca50044bd3f!OpenDocument&Highlight=0,LinkedIn*

¹⁷Available here: http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/pa_formal_op_2014_200.authcheckdam.pdf

¹⁸*In Re Tsamis*, Comm. File No. 2013PR0095 (Ill. 2013).

Conduct prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so.¹⁹ In *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006), the Supreme Court of Delaware found “an affirmative duty to preserve evidence attaches upon discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should be expected.” Thus, the duty to preserve evidence “may arise before any litigation has been commenced.”²⁰ A lawyer has the affirmative duty to ensure that his client’s social media account is preserved and instruct a client to not delete or remove content from the social media account.²¹ In Delaware, an adverse inference may be drawn if the court determines that a party acted “intentionally or recklessly in failing to preserve the evidence.”²²

North Carolina State Bar, 2014 Formal Ethics Opinion 5 (July 25, 2014), *Advising a Civil Litigation Client about Social Media*²³ addressed whether a lawyer may give a client advice about the legal implications of social media postings and coach the client about what should and should not be on social media. Referencing Rules 1.1 and 1.3 (competent representation), the Ethics Opinion advises that, to the extent relevant and material to a client’s legal matter, competent representation includes knowledge of social media and an understanding of how it will impact the client’s case including the client’s credibility. A lawyer should counsel his client before and after a lawsuit is filed regarding the legal ramifications of existing postings, future postings, and third party comments. If the lawyer advises the client to take down postings on social media, where there is a potential that destruction of the postings would constitute spoliation, the lawyer must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video. The lawyer may also take possession of the material for purposes of preserving the same.

For example, in a Miami, Florida case, a man received an \$80,000.00 confidential settlement payment for his age discrimination claim against his former employer.²⁴ However, he forfeited that settlement after his daughter posted on her Facebook page. The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff \$80,000.00.

¹⁹Del. Prof. Cond. R. 3.4(a) (“A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”).

²⁰*Trinton Construction Co., Inc v. E. Shore Elec. Sevs., Inc.*, C.A. Ni. 3290-VCP, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009) *aff’d*, 988 A.2d 938 (Del. 2010).

²¹Ethical Risks Arising from Lawyers’ Use of (And Refusal to Use) Social Media by Margaret M. DiBianca – Delaware Law Review (pg. 185).

²²*See Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. Jan. 9, 2009) (imposing harsh penalties against a defendant, who destroyed relevant documents after litigation had become reasonably foreseeable but before litigation commenced).

²³Available here: <http://www.ncbar.com/ethics/ethics.asp?page=528>

²⁴“Girl costs father \$80,000 with ‘SUCK IT’ Facebook Post, March 4, 2014: <http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/>

The Virginia State Bar Disciplinary Board²⁵ suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed \$722,000 in sanctions (\$542,000 upon the lawyer and \$180,000 upon his client) to compensate opposing counsel for their legal fees.

In July 2014, the Professional Guidance Committee of the Philadelphia Bar Association issued Opinion 2014-5 in response to a member's inquiry concerning a client's Facebook account. The opinion noted that, although the inquiry focused on Facebook, the response applied to all social media or other websites on which individuals or businesses post or otherwise disseminate information to friends, the public and others. Opinion 2014-5 observed that Pennsylvania's competency requirement included a duty to keep abreast of the benefits and risks associated with relevant technology, and opined that "a lawyer should have a basic knowledge of how social media websites work, and advise clients about the issues that may arise as a result of their use of these websites." Opinion 2014-5 concluded, among other things, that a lawyer may ethically advise a client to change the privacy settings on the client's Facebook page since such a change simply restricts access to the client's social media information.

3. Social Media as Advertising

Social media profiles and posts may be considered legal advertisements. No longer are advertisements limited to brochures, billboards, bus benches, commercials, and phonebook. In many jurisdictions, lawyer and law firm websites are deemed to be advertisements.²⁶ Social media sites (Facebook, Twitter, LinkedIn, etc.) are by their nature websites, which may constitute as advertisements.

Rule 7.1 of the Pennsylvania Rules of Professional Conduct provides the rules in Pennsylvania for attorney advertising and how it impacts an attorney's website, blog, or social media postings.

Rule 7.1 for communications concerning a lawyer's services states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment 2 to Rule 7.1 states:

²⁵3 *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

²⁶Available here: http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

In another example, the Florida Supreme Court overhauled that state's advertising rules to make clear that lawyer and law firm websites (including social media websites) are subject to restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186,²⁷ concluded that lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

C. Testimonials, Endorsements, and Ratings

In some cases, an appropriate disclaimer may be required to keep the content of a post (however truthful) from being misleading. For example, client testimonials are generally acceptable as long as they comply with Rule 7.1 and contain an appropriate disclaimer that reasonably allows the reader to understand that past performance does not guarantee future performance.²⁸ This is generally true even when the testimonial specifically mentions the dollar figure of settlement or awards.²⁹

Many social media platforms like LinkedIn and AVVO promote the use of testimonials, endorsements, and ratings (by fellow lawyers and former or current clients). The features provided by these types of websites do not always conform to the individual variations of state ethical rules.³⁰ Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers.³¹

For example, South Carolina Ethics Opinion 09-10 (3/22/2010) provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations.³² The opinion notes that lawyers with social media websites like LinkedIn and AVVO (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethic rules.³³ *See also*

²⁷Available here: http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

²⁸Washington State Bar Association Advisory Opinion 1924 (2000), available here: <http://mcle.mywsba.org/IO/print.aspx?ID=1164>

²⁹Washington State Bar Association Advisory Opinion 2206 (2010), available here: <http://mcle.mywsba.org/IO/print.aspx?ID=1651>

³⁰Available here: http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

³¹Available here: http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

³²Available here: <http://www.scbars.org/News/News-Details/ArticleId/107/Ethics-Advisory-Opinion-09-10>

³³Available here: http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

Washington State Bar Association Informal Opinion 2206 (2010),³⁴ citing prior Informal Opinions 1182 (1988) and 802 (1997).

While subjective puffery is not allowed, a lawyer may ethically describe professional awards or recognition he or she has received. Publication on a website of ratings such as “Super Lawyers” is not impermissible advertising under Rule 7.1. Michigan Ethics Opinion RI-341 (June 8, 2007),³⁵ Delaware Opinion 2008-2 (February 29, 2008),³⁶ New York Ethics Opinion 877 (9/12/2011) (website may quote bona fide professional ratings if factually supportable when published).³⁷

Some attorneys may “tweet” or post status updates on social media relating to the legal work they do. In its Formal Opinion No. 2012-186,³⁸ the State Bar of California describes five illustrative social media posts by a lawyer, then helpfully parses the remarks to evaluate whether and what professional responsibility rules and standards governing attorney advertising apply.

D. Digital Assets

This area is quite volatile and unsettled. There is not even a universal definition of a “digital asset.” However, it is generally agreed that it includes information that is electronically stored or accessed on a computer, smartphone, tablet, server, etc.

The Uniform Fiduciary Access to Digital Assets Act seeks to define and address this area, but the Act has been enacted thus far in very few states. The model Act was completed by the Uniform Law Commission in 2014, and revised in 2015. The Commission explains:

The Uniform Fiduciary Access to Digital Assets Act is an important update for the Internet age. A generation ago, files were stored in cabinets, photos were stored in albums, and mail was delivered by a human being. Today, we are more likely to use the Internet to communicate and store our information. This act ensures account-holders retain control of their digital property and can plan for its ultimate disposition after their death. Unless the account-holder instructs otherwise, legally appointed fiduciaries will have the same access to digital assets as they have always had to tangible assets, and the same duty to comply with the account-holder’s instructions.

On January 1, 2015, Delaware enacted the “Fiduciary Access to Digital Assets and Accounts Act.” It authorizes executors, trustees, agents, and guardians to access digital assets without a court order. It also authorizes fiduciaries to access and control digital assets and accounts

³⁴Available here: <http://mcle.mywsba.org/IO/print.aspx?ID=1651>

³⁵Available here: http://www.michbar.org/opinions/ethics/numbered_opinions/RI-341.cfm

³⁶Available here: <http://media.dsba.org/ethics/pdfs/2008-2.pdf>

³⁷Available here: <http://www.nysba.org/CustomTemplates/Content.aspx?id=5135>

³⁸Available here: <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812-21-12%29.pdf>

of certain types of persons. In 2015, Pennsylvania lawmakers proposed adopting the “Fiduciary Access to Digital Assets Act”; however, they have yet to enact it.

E. Service of Process Through Social Media

In the case of *K.A. v. J.L.*, 450 N.J. Super. 247 (Ch. Div. 2016), the New Jersey Superior Court held that service of process through the social media platform Facebook was permissible after service through certified mail was ineffective. The adoptive parents instituted this action to enjoin the biological father from holding himself out as the father of their son, Z.A., and to compel the biological father to remove information pertaining to Z.A. that he has allegedly published online. *Id.* at 250.

The issue before the Court was whether the personal jurisdiction could be asserted over the biological parent by virtue of the service of the order to show cause and complaint by Facebook. The addresses the adoptive parents had for the biological father are out of state. The court noted that “a court cannot assert jurisdiction over an out-of-state defendant unless such defendant has engaged in contact with the forum state.” *Id.* at 251 (citing *Waste Mgmt. v. Admiral Ins. Co.*, 138 N.J. 106 (1994)).

Here, the holder of the social media accounts knowingly reached out to various members of the adoptive parents’ family, who are New Jersey residents. *Id.* As it was clear that any resultant harm would be concentrated in New Jersey, the court found that such conduct confers personal jurisdiction on the New Jersey courts over the actor. *Id.* Although the biological father’s only contacts with New Jersey were through activities on social media outlets, the court found the activities sufficient to justify specific jurisdiction over related causes of action. *Id.* at 252. As the activities were the subject of the adoptive parents’ complaint, the court found that it could properly exercise jurisdiction over the account holder for the purpose of addressing the adoptive parents’ claims. *Id.*

However, the court noted that one additional requirement that must be satisfied to obtain personal jurisdiction – service of process must be effectuated on the biological father. *Id.* Pursuant to New Jersey Court Rule 4:4-4(a), a plaintiff must serve the complaint and summons on the defendant personally. If, however, a plaintiff’s reasonable, good-faith attempt to effectuate personal service proves unsuccessful, the plaintiff may then attempt to effectuate service using the secondary methods prescribed in R. 4:4-3(b).

Service of process via Facebook can, in certain circumstances, satisfy the test set forth in *O’Connor v. Altus*, 67 N.J. 106, 126 (1975) (“constitutional requirements of service of process” are “notice 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”).

Here, the court was satisfied that the only method of service available to the adoptive parents was Facebook. *Id.* at 253. The only address that they could locate was not a good address. Therefore, service could not be accomplished personally or by mail. The court noted that Facebook is reasonably calculated to apprise the account holder of the pendency of the action and afford him the opportunity to defend himself against the claims. *Id.* Moreover, the only communication received from the biological father had been through the Facebook account.

In sum, the court was satisfied that service by Facebook in this case was permissible. After diligent efforts, personal service could not be accomplished and service by publication would not be efficient given the nature of the relief sought, an injunction. Further, the court was satisfied that the Facebook account was the biological father's account and he acknowledged receipt of the summons and complaint. Thus, service was deemed successful.

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