TOP THIRTY CASES UNDER THE UNIFORM TRUST CODE

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Introduction

The Uniform Trust Code ("UTC") was approved by the Uniform Law Commissioners in 2000 as the first national effort to provide the states with a comprehensive model for codifying their law on trusts. A copy of the UTC, together with over 100 pages of official comments, can be accessed through the Commissioners' website, http://www.uniformlaws.org. For a detailed analysis of the UTC, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002).

Through August 1, 2020, the UTC has been enacted in the District of Columbia and in thirty-four states. The list of enacting jurisdictions is available at http://www.uniformlaws.org. With close to tweny years having now passed since the first wave of UTC enactments, a significant body of case law interpreting particular UTC provisions has developed. This compilation categorizes the more interesting cases based on the primary UTC section discussed or affected.

Not surprisingly there are more cases on certain topics than others. A large number of cases have developed under UTC Sections 410 to 417 regarding the judicial modification and termination of trusts, UTC Article 5 dealing with creditor's rights in trust assets, UTC 706 regarding Trustee removal, selected provisions of Article 8 on the fiduciary duties of a trustee, and Section 1004 regarding attorney fees.

The 30 cases discussed in this paper are extracted from a much longer summary of UTC case law, a document that is now several hundred pages in length. In addition to this author, numerous individuals have contributed to the writing of these case summaries over the years. A particular debt is owed to St. Louis practitioner Scot Boulton, and to Dana Fitzsimons of Bessemer Trust. Assistance has also been provided over the years by the following students at the University of Missouri School of law - J. Ellen Bennett, Blair A. Bopp, Rachel M. Hirshberg, Sara L. Kelly, Amber J. Lampe, Stephanie M. Liu, and Jessica M. Rooks - all of whom have long since graduated, and by Joseph N. Blumberg, Jeffrey Glogower, and Katherine R. Jones, who are current or former attorneys at Polsinelli PC.

David English
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CASE SUMMARIES

ARTICLE 1: GENERAL PROVISIONS AND DEFINITIONS

SECTION 102 (SCOPE)

Hardt v. Vitae Foundation, Inc., 302 S.W.3d 133 (Mo. Ct. App. 2009).

Holding: Donor lacked standing to enforce gift made to charitable corporation.

Facts and rationale: Executors exercised a discretionary power of distribution over the assets of an estate in favor of a charity that was organized as a Missouri charitable corporation. The gift was accompanied by a written agreement whereby the organization would use the gifted funds to create and execute media campaigns regarding pro-life causes. The gifts were to be used as matching gifts enabling the charity to raise additional funds.

Approximately a year later the donors, through their counsel, were informed that the funds were being used to hire additional staff and for other administrative purposes, that matching funds were not being raised, and that the promised media campaigns would not happen. Donors subsequently brought an action against the charity (1) to obtain an accounting of the expenditures of the gift, (2) for restoration of part of the gift that was not spent in accordance with the agreement, and (3) for a permanent injunction to prevent future expenditures in contravention of conditions in the gift agreement. The charity's motion to dismiss was granted and donors then appealed.

The Court of Appeals found that the trial court's grant of the charity's motion to dismiss was proper. Missouri common law holds that a donor of a charitable gift does not have standing to enforce the gift, *Voelker v. Saint Louis Mercantile Library Ass'n*, 359 S.W.2d 689, 695 (Mo. 1962). R.S.Mo. § 456.4-405.3 changed the common law to grant a donor standing to enforce a charitable trust of which that donor is the settlor. But in this case the donors did not contend that their gifts made to the charity were in the form of a trust. Rather, they contended that R.S.Mo. § 456.4-405.3 applies to gift to charitable corporations as well as to charitable trusts. The court noted that a charitable trust is a trust created for charitable purposes and that a settlor is a person who contributes property to such a trust. The donors in this instance were not settlors and did not create a trust. Therefore, the donors did not have standing to enforce the charitable agreement.

CHOICE OF LAW (SECTION 107)

Hudson v. UMB Bank, N.A., 447 S.W.3d 714 (Mo. Ct. App. 2014).

Holding: Provision in trust granting trustee powers under Kansas law prevailed over claim that Missouri law applied even though Missouri was the principal place of administration.

Facts and rationale: A. B. Hudson died in Kansas in 2008 shortly after executing his will. Under his will, he established separate charitable remainder trusts for each of his grandchildren and funded each with $1.5 million. He named UMB Bank, N.A. "with an office and place of business in Topeka, Kansas" as trustee and granted the trustee the powers under the Kansas Uniform Trustees' Powers Act (which had been repealed and replaced by the UTC at the time). His will was probated in Kansas and the trusts were initially managed in the trustee's Kansas office. Eventually for the convenience of the beneficiaries, the trustee assigned managers in its Colorado office to handle the trusts. The trust account statements sent to the beneficiaries listed the trustee's address in Missouri. The grandchildren asked the trustee to resign because the trustee refused to adopt their investment requests, and the trustee refused. The grandchildren then petitioned the court in Missouri, naming the charitable remainder beneficiary as an additional plaintiff, seeking to modify the trusts to grant the beneficiaries the power to remove and replace trustees without cause. The beneficiaries, who contended that the trusts were governed by Missouri law, also sought removal and replacement of the trustee and denial of the trustee's attorneys' fees. Because Missouri law allows a court to remove a trustee upon the unanimous request of the qualified beneficiaries and Kansas does not, the beneficiaries had a greater chance of success had Missouri law applied. However, the trial court found that Kansas law applied to administrative matters such as the removal of a trustee and granted summary judgment for the trustee on all counts. The grandchildren appealed.

On appeal, the Missouri Court of Appeals affirmed. By naming the trustee with reference to its location in Kansas, and by referencing the Kansas Trustee Powers Act (even though then repealed), the settlor unambiguously expressed his intent that the trusts be administered under Kansas law. The settlor's designation of controlling law must be respected where, as is the case here, all or any part of the administration occurs in Kansas. Here the trusts were formed and funded in Kansas, were initially managed in Kansas, and continue to be managed in part in Kansas. But for the settlor's controlling designation of Kansas law, the trusts would be "principally administered" in Missouri and Missouri law would have applied.

NON-JUDICIAL SETTLEMENT AGREEMENTS (Section 111)

Gibbons v. Anderson, 575 S.W.3d 144 (Ark. Ct. App. 2019).

Holding: A trust arbitration provision, if enforceable at all, cannot be enforced to preclude court from addressing validity of trust instrument.

Facts and rationale: In 2014, Woodrow executed a revocable trust agreement. The trust provided after his death that the trust assets would be used to provide college tuition, a car, and a monthly distribution to each of his grandchildren. The trust provided that any dispute under the agreement would be resolved by arbitration, rather than in court. Seven months later, while he was in his final illness and under heavy narcotics, Woodrow signed an amendment to the trust that: (1) made the college tuition payments discretionary rather than mandatory; and (2) expanded the arbitration provision to purportedly cover all disputes and be binding on all trustees and beneficiaries. Woodrow died seventeen days later.

Woodrow's children become co-trustees. Three years later, the grandchildren sued the trustees alleging that: (1) the amendment was the product of undue influence; (2) the trustees breached their duties by withholding tuition payments and saying that she would only pay tuition for people who respect her; and (3) the trustees failed to provide for the car and monthly payments required under the trust terms. The trustees moved to enforce the trust arbitration clause, and the trial court rejected their motion. The trustees appealed.

On appeal, the Arkansas Court of Appeals affirmed the trial court on the following grounds:

(1) this dispute concerns the validity of the trust amendment itself, and the validity of the instrument is not to be determined by arbitration. The court makes no comment on the enforceability

of an arbitration clause in a trust to resolve claims against a trustee. The validity of the trust amendment is within the province of the court regardless of any arbitration provision contained in the instrument.

(2) a trust agreement is not a contract and has no meeting of the minds. Contract law cannot, therefore, be applied carte blanche to the issue. Only a couple states have enacted legislation to address the issues (i.e. Florida and Arizona), and even those states exclude from arbitration the determination of the validity of the instrument containing the arbitration provision. There is no Arkansas statute that requires a trust beneficiary to submit to arbitration. None of the few states that allow arbitration provisions in trusts require arbitration of the validity of the trust itself.

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

Holding: Arbitration provision in investment advisory contract signed by trustee and investment firm is binding on non-signing beneficiary.

Facts and rationale: Alexis was hospitalized when she was eight months old, and due to complications endured several amputations and was significantly disabled. Her parents divorced shortly thereafter, her mother Shauna sued various medical providers, and eventually settlement proceeds of $2.6 million were placed in trust for Alexis's lifetime benefit with a corporate trustee. Shauna successfully petitioned to remove the initial and successor corporate trustees, and eventually obtained the appointment of a third corporate trustee. All of the corporate trustees, at Shauna's urging, retained Albert and his firm, Wunderlich Securities, as investment advisor for the trust. The trustee entered into an investment advisory agreement with Albert and Wunderlich that included a broad pre-dispute arbitration provision.

Alexis's grandfather was appointed as her guardian, and on her behalf he sued Albert and Wunderlich (he also sued the corporate trustee but that suit is not at issue in the case), alleging that: (1) Albert had entered into an inappropriate relationship with Shauna, and assisted her in raiding the trust for her own benefit; (2) the trust had been depleted from $2.6 million to just $200,000 and used for Shauna rather than Alexis, including building Shauna a five-bedroom house on seven acres of land; and (3) funds were not provided for Alexis's care (other than a single $1,500 payment) which harmed Alexis, including by causing her handicap-accessible van to be repossessed. Alexis died in 2013 at age 16 and her grandfather was substituted as plaintiff, presumably as administrator of her estate.

Albert and Wunderlich moved to compel arbitration. The trial court granted the motion, the court of appeals reversed, and the case was appealed to the Tennessee Supreme Court. The Tennessee Supreme Court reversed the court of appeals and remanded the case to the trial court on the following grounds:

(1) Under the Tennessee UTC, a trustee has broad default powers unless limited in the trust agreement. Those broad default powers, while not expressly addressing entering into a pre-dispute arbitration agreement, are broad enough to grant a trustee power to enter into the agreement. The UTC favors arbitration by allowing for nonjudicial settlement agreement, the comments to the UTC encourage the use of resolution of disputes by nonjudicial means, and (based on the history of trust law and the purposes of the UTC) the legislature must have intended for the UTC to give the trustee the power to enter into pre-dispute arbitration agreements.

(2) The trust terms do not override the broad default powers under the UTC because: (a) the trust terms grant the trustee all of the powers granted under state law; (b) the trust terms that allow

the trustee to settle by arbitration “any and all claims” authorize the trustee to enter into pre-dispute arbitration agreements, and is not limited to existing claims and does not include a temporal limitation; and (c) the trust terms evidence an overall intent to give the trustee wide-ranging authority to do anything not prohibited under the UTC, including the authority to enter into brokerage agreements for the purposes of investment of trust assets. Nothing in the trust agreement expressly prohibits or limits the trustee from agreeing to settle future claims by arbitration. The trust terms and the UTC permit this.

(3) In modern times, engaging the services of banking and brokerage institutions almost necessarily requires a trustee to enter into pre-dispute arbitration agreements. The trustee did not breach its fiduciary duty of good faith as a matter of law by agreeing to pre-dispute arbitration. Finding a breach of duty would contradict the investment standards under the Uniform Prudent Investor Act. Account agreements with pre-dispute arbitration provisions are ubiquitous among financial services institutions. Most prudent investors are subject to them, and even if beneficiaries object to them, the chances are remote that the trustee would be able to find another quality firm that does not include a pre-dispute arbitration provision in its account agreement. Discouraging a trustee from signing such an agreement would have the undesirable result of encouraging the trustee to proceed on his or her own, without the benefit of a brokerage firm or an investment advisor. Also, strong federal policy under the Federal Arbitration Act and U.S. Supreme Court precedent undermines any argument that signing the agreement was a breach of trust.

(4) Alexis, as a non-signatory trust beneficiary, is subject to the arbitration agreement to the extent her claims arise under the investment advisor agreement. While the trustee did not bind her to the agreement as her agent, under Tennessee Supreme Court precedent a non-signatory third-party beneficiary is bound to an arbitration provision in a contract to the extent that the beneficiary’s claims seek to enforce the contract. Before a beneficiary may accept the benefits of the contract, the beneficiary must accept the burdens of the contract. To the extent the claims do not seek to enforce the investment advisor agreement, the claims are not subject to arbitration and Alexis’s estate is entitled to judicial resolution of the claims. On remand, the trial court must determine which of the claims are subject to arbitration. State law on the voidability of contracts entered into by minors does not change the result because this was not a contract entered into by a minor. A 1932 state statute that forbids arbitration where a party is a minor does not apply because it is preempted by the Federal Arbitration Act.

RULES OF CONSTRUCTION (Section 112)

***In re* Trust under Deed of Kulig, 175 A.3d 222 (Pa. 2017).**

Holding: Pretermitted spouse statute under probate code does not apply by extension to revocable trust.

Facts and rationale: David executed and funded a revocable trust while married to his first wife. After her death, David married Mary Jo, and then died one month later. He had not amended his revocable trust to include Mary Jo before his death. Under the trust terms, the trust assets passed to his children. The Pennsylvania pretermitted spouse statute would grant Mary Jo one-half the probate estate (valued at $2.1 million not including the trust assets), and she also received David’s ERISA assets valued at $1.5 million. The trust assets were valued at $3.2 million. While the elective share statute would specifically include the trust assets, but subject them to only a one-third share claim with certain offsets, the pretermitted spouse statute did not expressly mention revocable trusts.

The children petitioned to declare that the trust assets should be excluded from the pretermitted spousal share as assets that were "effectively disposed of by will or otherwise" under the statute, and not part of the intestate estate subject to the pretermitted spouse share claim. The Orphans' Court and Superior Court found in Mary Jo's favor and held that the trust assets were subject to the claim as a result of the 2006 enactment of a trust code statute providing that "the rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts", and the 2005 Joint State Government Committee Comments to this section that made reference to the pretermitted heir statute in a list of sections with rules of construction, but without additional comments about any legislative intent to change the scope of the pretermitted spouse claim. The children appealed.

On appeal, the Pennsylvania Supreme Court, over one dissent, revised the lower courts and held that the new trust code provision on applying rules of construction did not bring revocable trust assets within the pretermitted spouse claim, on the following grounds:

(1) The other courts erred in finding that the statute was unambiguous. The pretermitted spouse statute is a rule of construction that imputes a will modification based on presumed intent not to disinherit. Viewing the new rule of construction statute in its full context, including the express reference to revocable trusts in the elective share statutes but not the pretermitted spouse statute, there are competing reasonable readings of the intent and content of the new statute, and it is therefore ambiguous.

(2) The pretermitted spouse and elective share statutes cannot be read in isolation. Neither the new construction statute, nor its commentary, express any specific legislative intent to change the pre-2006 framework for applying the spousal protection statutes. Elsewhere in the UTC, the comments specifically mention where the existing law is being changed, rather than codified.

(3) The new statute is consistent with common law precedent, which also suggests that it is a codification rather than a change in the law. However, the bare reference to the pretermitted spouse statute in the Joint State Government Committee comments, and the acknowledgment that revocable trusts are used as probate substitutes, are not sufficient evidence of intent to change the law. In addition, there is no compelling policy rationale, and it would be absurd, to treat one financial device (a revocable trust) differently than another (such as POD and TOD accounts, which are clearly outside the spousal claim). Mary Jo's position would also place heretofore sacrosanct irrevocable trusts at risk.

(4) The legislature has determined that the contours of the presumed intent to include a pretermitted spouse are those that define the intestate estate. It cannot be reasonably inferred from the enactment of the new rule of construction statute that General Assembly intended to substantially revise this long-standing distributive scheme, absent clear indication to that effect.

ARTICLE 2
JUDICIAL PROCEEDINGS

VENUE (Section 204)

Betts v. Gunlikson, 445 P.3d 1223 (Mont. 2019).

Holding: Venue provision under trust code prevailed over broader general venue statute.

Facts and rationale: David created a revocable trust. When his health declined, he resigned and appointed his accountant as trustee. Six years later, David's children removed the trustee and appointed the Western Montana Chapter for the Prevention of Elder Abuse, a nonprofit, as trustee. The children were appointed as co-trustees for the limited purpose of pursuing claims against the former trustee. The successor trustee sued the former trustee in Missoula County District Court but the former trustee moved to change the venue to Flathead County, where he was located. The district court denied the motion to transfer venue, and the former trustee appealed.

On appeal, the Montana Supreme Court affirmed on the following grounds: (1) venue is usually determined under the general state venue statutes; (2) however, when a general statute and specific statute conflict, the specific statute governs; (3) while the general statute would place venue in Flathead county as the place where the former trustee resides, the Montana UTC has a specific venue statute that prevails; and (4) under the UTC, venue is proper in Missoula as the principal place of trust administration because the trust is integral to the claims, the claims rely on the UTC, and the bulk of the allegations related to an alleged failure to manage the trust responsibly.

ARTICLE 4: CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

CREATION OF TRUSTS (Sections 401 and 402)

Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711 (Or. 2012).

Holding: Amended bylaws, articles of incorporation, and the actions taken by the congregation, supplied ample evidence of local church's intent to hold its property in trust for national denomination.

Facts and rationale: A property dispute arose after a local church (Hope Presbyterian) sought to separate from the national church (PCUSA). Hope Presbyterian's property had been transferred to the local church by warranty deed and no reference was made to the national church in the deed. However, the constitution of the national church indicated that any property used by a local church was held in trust for the benefit of the national church. The bylaws and articles of incorporation of the local church had been amended prior to the property transfer and stated that it held all its property as trustee for the national church. Because the dispute involved religious institutions and raised First Amendment concerns, the circuit court did not consider the constitution of the national church, or the bylaws and articles of incorporation of the local church, but only considered the warranty deed. As such, the circuit court held that the local church was not holding the property in trust for the national church. PCUSA appealed. The court of appeals reversed the circuit court, and Hope Presbyterian appealed to the Oregon Supreme Court.

The Supreme Court of Oregon affirmed the court of appeal's reversal, applying the "neutral principles" approach described by the United State Supreme Court in *Jones v. Wolf*, 443 U.S. 595, 604 (1979). Under this approach, courts may resolve church property disputes by examining "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property," in the context of generally applicable neutral principles of law, such as trust law. The court adopted the neutral principles approach to deciding church property disputes and explained that, under this approach, it was permitted to review a hierarchical church's constitution and a local church's bylaws, in light of Oregon trust law. Thus, in deciding whether a valid express trust was created in favor of PCUSA under the terms of its constitution, and adopted by Hope Presbyterian, the court looked to Oregon trust law.

The court explained that, while Hope Presbyterian held legal title to the property at issue, "[a] trust may be created . . . [b]y a declaration by the owner of property that the owner holds identifiable property as trustee." OR. REV. STAT. § 130.150 (UTC § 401). The court further explained that, while the transfer of title is not required to create a trust by declaration, the statutory requirements for creating a trust must be satisfied: "(1) the settlor must have capacity to create a trust; (2) the settlor must indicate an intention to create the trust; (3) the trust must have a definite beneficiary; (4) the trustee must have duties to perform; and (5) the same person cannot be the sole trustee and sole beneficiary." OR. REV. STAT. § 130.155 (UTC § 402).

The court found that Hope Presbyterian's amended bylaws, articles of incorporation, and the actions taken by the congregation, supplied ample evidence of Hope Presbyterian's intent that its property be held in trust for PCUSA. The court noted that although § 130.180 of the Oregon Uniform Trust Code does not require that a trust be evidenced by a written instrument, it acknowledges that a trust instrument may be required by other statutes, including the Statute of Frauds. However, the court found that Hope Presbyterian's Articles of Amendment clearly proclaimed that it held all property in trust for the benefit of PCUSA, and was signed by the necessary parties. As such, the requirements of Oregon's statute of frauds, OR. REV. STAT. § 93.020(1), were satisfied.

Next, Hope Presbyterian relied on OR. REV. STAT. § 130.505(1), arguing that even if a trust was created, Hope Presbyterian was free to revoke, and had revoked, the trust. OR. REV. STAT. § 130.505(1) was adopted from the Uniform Trust Code, and creates a presumption of revocability by the settlor. The court dismissed this argument, explaining that OR. REV. STAT. § 130.505(1) was adopted after the trust at issue was created, and did not apply retroactively to trusts already in existence. As such, Oregon's common law presumption of irrevocability governed the trust, making it irrevocable. The court concluded by noting that, while OR. REV. STAT. § 130.200(1) allows for modification or termination of an irrevocable trust with court approval and the consent of the settlor and all beneficiaries, the necessary approval was lacking here, as PCUSA, a beneficiary of the trust, did not consent to its revocation. Thus, the court held that the intent to create a trust under OR. REV. STAT. § 130.155(1) was demonstrated by the language in Hope Presbyterian's bylaws, and that under the neutral principles approach to resolving church property disputes, Hope Presbyterian held its property in trust for the benefit of PCUSA.

CHARITABLE TRUSTS (Section 405, 413)

LeGassick v. University of Michigan Regents, 2019 Mich. App. LEXIS 7245, 2019 WL 6138539 (Mich. Ct. App. 2019).

Holding: Trustee had standing to enforce terms of restrictive gift made from trust.

Facts and rationale: James Bellamy was a recognized expert in classical Arabic literature and a professor at the University of Michigan. He was called upon to decipher the Paris Louvre Namara inscription of 328 A.D. and interpret passages of the Qur'an and mysterious letters that preceded some of the chapters. Under his revocable trust, he directed his trustee upon his death to distribute to the University the amount necessary to endow a full professorship in the field of medieval classical Arabic literature, as set forth in a gift agreement between James and the University, and to provide additional amounts to fund fellowship support for graduate students studying with the professor. With counsel, James negotiated and entered into a gift agreement with the University under which the University agreed that funds received would be used for a medieval classical Arabic literature professorship, and that the University would hire an outside applicant if there was no one qualified at the University.

James died in 2015 and his colleague and friend become successor trustee and personal representative. The trustee distributed $2.5 million to the University under the gift agreement and an additional $1 million for graduate fellowship support. When the University initially posted the position, it did not adhere to the gift agreement and merely sought an associate professor in pre-modern Arabic culture. The trustee objected and the posting was withdrawn. The next year, the University announced that a professor would be appointed to the endowed position who was an associate professor (not a full professor) and who specialized in late medieval Arabic literature, a period starkly different from the classical specialty taught by James. The trustee alleged that the department chair stated that the professor was appointed to receive the funding to relieve pressure on the department budget, other professors at the University agreed that the appointee was not qualified, and the University sought to move away from teaching classical Arabic literature.

The trustee sued to enforce the gift agreement. The University moved for summary dismissal, alleging that the trustee lacked standing to sue. The trial court granted the motion and dismissed the claims. The trustee appealed. On appeal, the Michigan Court of Appeals reversed on the following grounds:

(1) The Michigan UTC is to be construed and applied to promote its underlying purposes and policies, including "to foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." The trustee has broad general powers under the UTC, together with the specific power to satisfy a settlor's written charitable pledges and to bring claims on behalf of the trust. These provisions of the UTC give the trustee standing to challenge the charitable distribution to the University when the University purportedly failed to satisfy the terms and purposes of the trust and the gift agreement.

(2) The trustee had obligations to address in good faith and had the right and obligation to file suit where the distribution did not execute the settlor's intent. The trustee learned of an injury and the trust distribution detrimentally affected the trust and its beneficiaries in a manner different from the citizenry at large. Therefore, general standing principles support the standing of the trustee.

(3) Section 405(c) of the Michigan UTC provides that "the settlor, a named beneficiary, or the attorney general, *among others*, may maintain a proceeding to enforce a charitable trust," excluding the settlor's heirs, the settlor's fiduciary (other than the trustee of the charitable trust sought to be enforced), and the settlor's agent. However, the UTC does not define "among others" and that provision has not been construed by the Michigan Court of Appeals. Giving effect to the plain words of the statute, it is clear that persons other than the settlor or Attorney General can sue to enforce the gift. The statutes provide no additional guidance on who fits into the category. Interpreting this language in view of the purposes of the UTC, the powers of trustee, and the trustee's duty to carry out the settlor's intentions, it is clear that the trustee has the authority to maintain a suit to enforce the charitable gift to ensure it carries out the settlor's wishes. The trustee has a special interest in the trust, and is not a general member of the public. In light of the extraordinary amount of the transfer, the allegation that the University made little to no effort to ensure compliance with the settlor's wishes, and the intended field of study was deprived of a benefit, an action may be maintained by the trustee.

(4) A settlor would have little incentive to create and distribute to a charitable trust with specific instructions where no enforcement mechanism was available to protect the settlor's intent. The limitations on enforcement under the UTC cannot preclude this litigation, particularly where plaintiff has a specific interest and falls within the category of "among others" that may challenge the trust**.**

TRUST CONTESTS (Section 406)

***In re* Mardigian Estate, 879 N.W.2d 313 (Mich. Ct. App. 2015), *affirmed*, 917 N.W.2d 325 (Mich. 2018).**

Holding: Beneficial provision made to drafting attorney and to attorney's family gives rise to presumption of undue influence.

Facts and rationale: In August of 2010, Robert Mardigian executed a revocable trust that at his death passed the bulk of his estate to his long-time friend who was also the attorney that drafted the trust and to the attorney's children. In 2011, Robert signed a will with similar provisions, and then died in 2012. The attorney sought to probate and qualify under the will, and Robert's brother, nieces, nephews, and girlfriend objected. The trial court granted summary judgment voiding all of the gifts to the attorney and the attorney's children as a matter of public policy because the attorney's conduct violated Model Rule of Professional Conduct 1.8(C)(prohibiting preparing a testamentary gift instrument in favor of the drafting attorney in the absence of a family relationship). The attorney, acting as executor under the will, appealed.

On appeal, a divided Michigan Court of Appeals reversed and remanded on the following grounds:

(1) In a 1965 decision that predated the enactment of the MRPC, the state supreme court held that a will favoring the drafting attorney is not necessarily invalid, but undue influence is rebuttably presumed to have been exerted;

(2) Rules of professional conduct may also constitute a definitive indicator of public policy, but not always;

(3) While the MRPC violation was clearly unethical, it was not clearly against public policy;

(4) The contracts addressed in a prior 1969 decision are different than wills which are not contracts, and the same rules are applied to construe revocable trusts as are applied to wills;

(5) The devises to the attorney and his children are not definitively against public policy, and the intent to gift to the attorney is not per se unlawful. Rather, the letter and spirit of the professional rules rather raises a suspicion of undue influence;

(6) Despite the later enactment of the MRPC, there are valid policy reasons why the state supreme court could continue to embrace its 1965 decision, and treat a will or revocable trust drafted in violation of the MRPC as different than a contract in violation of the MRPC. Among these reasons are a rule rendering the gifts void as a matter of public policy could defeat the intent of the settlor; and

(7) The proper remedy for a rule violation of this type is to apply a rebuttable presumption of undue influence, rather than to declare the gifts void on their face.

On further appeal, an equally divided Michigan Supreme Court affirmed, those for affirmance stating:

> At issue is whether the rebuttable presumption of undue influence is applicable when the decedent's attorney breaches Michigan Rule of Professional Conduct (MRPC) 1.8(c), which generally prohibits an attorney from preparing an instrument giving the attorney or his or her close family a substantial gift. Appellants argue that a breach of MRPC 1.8(c) automatically renders an instrument void, while the appellee attorney argues that, rather than an invalidation of the instrument, a rebuttable presumption of undue influence arises in these circumstances. After considering the applicable provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., and the underlying principles of probate law, it becomes clear to us that a rebuttable presumption applies to these circumstances. And, as we will explain, creating a new per se rule as appellants advocate would not only be contrary to the fundamental principles of probate law and longstanding precedents of this state but would also run afoul of EPIC. Moreover, the adoption of MRPC 1.8(c) has no effect on this conclusion because a breach of this rule, like breaches of other professional conduct rules, only triggers the invocation of the attorney disciplinary process; it does not breach the statutory law of EPIC. For these reasons, we conclude the Court of Appeals correctly held that, in the instant circumstances, existing statutes and case law give rise only to a rebuttable presumption of undue influence.

Dissenting judges in both the Court of Appeals and Supreme Court advocated for a per se rule that would void the will and revocable trust as a violation of MRPC 1.8(c).

***In re* Passarelli Family Trust, 206 A.3d 1188 (Pa. Super. 2019).**

Holding: High standard of proof required to invalidate irrevocable trust on account of fraud.

Facts and rationale: In 2015, Margaret was diagnosed with breast cancer, and that same year agreed with her husband, John, to meet with an attorney to discuss estate planning. She did not know her husband had already met with the lawyer, and only learned of this shortly before a subsequent meeting to sign documents, including an irrevocable trust drafted by the attorney. In May 2015, John and the attorney presented the trust to her, which was to be funded with all of the marital assets totaling $13.9 million, including two family business entities holding marital property with a combined value of $4.2 million. Margaret did not ask about the inventory of assets to be placed into the trust and did not read the trust. She asked what happened to the trust in the event of divorce, and was advised by the attorney that the trust would survive divorce. Margaret signed the trust, naming her husband as trustee. The trust provided for discretionary income to her, her husband, and their two children, with the children as remainder beneficiaries after their deaths.

Margaret then learned that John had purchased two Florida properties through the family business entities without her knowledge, was having an extramarital affair, and that John's girlfriend was living in one of the Florida properties. Margaret filed for divorce and petitioned to terminate the trust on the basis that John purchased the Florida properties with marital assets, and failed to disclose this at the time the trust was executed. The trial court dissolved the trust on the grounds of fraud because John did not disclose the property addresses in the trust schedule of assets, and John appealed.

On appeal, the Pennsylvania Superior Court reversed the trial court and preserved the trust on the following grounds:

(1) Evidence to support trust rescission for fraud must be clear, precise, and convincing. Unsubstantiated testimony of an alleged mistake is insufficient. Voiding a donative transfer for fraud requires a showing that the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not have otherwise made.

(2) Irrevocable trusts are intended to be irrevocable, and are not easily rescinded so as to provide stability and security and to ensure property will be available to the beneficiaries. Margaret testified that she wanted the money to stay in the family.

(3) The omission of the addresses of the Florida property from the schedule of trust assets is not adequate to establish that John committed fraud in the execution of the trust.

TERMINATION OF TRUST BY ITS TERMS (Section 410)

Horgan v. Cosden, 249 So. 2d 683 (Fla. Dist. Ct. App. 2018).

Holding: Beneficiaries cannot terminate charitable remainder trust over co-trustee's objection without evidence of failure of material purpose.

Facts and rationale: Under her revocable trust, Yvonne created a trust at her death that provided for net income distributions to her son for his lifetime, with the remainder passing to three colleges at the son's death. She named her son and her personal assistant as co-trustees. The trust was funded with approximately $3 million. In 2015, the beneficiaries entered into an agreement to commute the trust and distribute $2 million to the son outright and $1 million to the colleges. The co-trustee objected to the commutation. The son petitioned the court to approve the agreement, the co-trustee objected, and the trial court granted summary judgment approving the commutation. The co-trustee appealed.

On appeal, the court of appeals reversed, and awarded summary judgment rejecting the commutation, on the following grounds:

(1) The plain trust terms reflect the settlor's intent to provide the son with only incremental income distributions for life, and then give the principal to the colleges after his death. Terminating the trust would frustrate that intent and the trust purposes. The settlor could have given her son a lump sum (as she did for her personal assistant) but chose not to do so. She also included a spendthrift provision to protect the interests in the trust.

(2) There has not been any waste of trust assets, proof that the trust purposes have been fulfilled, or proof that termination is in the best interests of the beneficiaries when considered in light of the settlor's intent. Trustee fees are customary, administration expenses were not unusual, and there has been no invasion of principal. Market fluctuations do not create a real risk that the settlor's intent will be thwarted. The beneficiaries simply prefer a different course than the one chosen by the settlor and want their money now. But the desire to have money now would violate the settlor's intent that the income beneficiary receive incremental distributions of income and not principal lump sum distributions.

(3) The fact that the trust does not expressly prohibit early termination does not mean that the settlor did not express her intent. Many settlors decline to provide for lump sum distributions and may not want to spell out the reasons. The trial court's erroneous ruling would mean that beneficiaries could have trusts terminated simply by stating they don't want to pay trustee fees, administrative expenses, or be concerned with market fluctuations. Nothing suggests the settlor was unaware that markets fluctuate.

TERMINATION OF TRUST BY CONSENT (Section 411)

***In re* Estate of Somers, 89 P.3d 898 (Kan. 2004)**.

Holding: Court could partially terminate a trust that had assets well in excess of that needed to fund small annuities required to be paid to the grandchildren.

Facts and rationale: Grandmother established a trust under her will that provided for small annuities to be paid to her grandchildren for their lives. Upon their deaths, the remainder was to be distributed to Shriners Hospital. At the time of her death in 1956, the trust was valued at $120,000, but had over time grown to be worth over $3,000,000. The grandchildren and Shriners sought court action to terminate the trust by agreement on the grounds that the trust principal had appreciated in value way beyond what was needed to generate the annuity payments. The court concluded that the trust could not be terminated by consent of all the beneficiaries under K.S.A. § 58a-411 because (1) the trust instrument had a spendthrift provision, which the court, in the absence of evidence to the contrary, concluded constituted a material purpose of the settlor in establishing the Trust, and (2) that the statute by its terms only applies to a noncharitable trust and the trust at issue was clearly a charitable trust under K.S.A. § 58a-405.

The court, however, held that the trust could be modified under K.S.A. § 58a-412 because of circumstances not anticipated by the settlor so long as the modification would further the purposes of the trust. Because the principal of the trust had grown dramatically, the court found that the circumstances were unique and unusual enough to justify modification of the trust under the Kansas Uniform Trust Code. Therefore, the court upheld the lower court's order distributing most of the assets in the trust to Shriners and retaining only that amount necessary to generate the annuities payable to the grandchildren.

TRUST REFORMATION (Section 415)

Frakes v. Nay, 273 P.3d 137 (Or. Ct. App. 2011).

Holding: A married couple's combined estate plan, the literal terms of which provided for three $500,000 payments to a beneficiary could be reformed to limit the beneficiary to the two $500,000 payments originally intended.

Facts and rationale: Carol and Velma Saling created a joint revocable trust in 1990. Upon the death of the first of the Salings, trust assets were to be divided into a survivor's trust that was completely within the control of the survivor of the Salings, and into an irrevocable marital trust and a credit shelter trust. However, before funding of the marital trust and the credit shelter trust there was a specific distribution of $500,000 of trust assets to Frakes, the nephew of Velma.

Upon Velma's subsequent death, the survivor's trust also directed a $500,000 distribution to Frakes. The residuary beneficiary under the trust was the Saling Foundation. Mr. Frakes also believed because of an unambiguous reference in the marital trust to an additional $500,000 specific distribution, that he was to receive a third $500,000 distribution on termination of the marital trust. The Trustee refused to make that distribution and Frakes brought an action to force the Trustee to do so. The Saling Foundation as the residuary beneficiary filed a counterclaim against Mr. Frakes to reform the Saling Trust under ORS § 130.220 (UTC § 415) and ORS § 130.225 (UTC 416).

The Foundation contended that although the provisions of the document regarding the specific distribution from the marital trust to Frakes were unambiguous, that provision was the result of a scrivener's error and the Salings did not intend for Frakes to receive three $500,000 distributions. Based on extrinsic evidence, the trial court found that the Salings' intent was not appropriately expressed in their joint revocable trust, that there had been a scrivener's error with respect to the reference in the marital trust, and that Frakes was not entitled to the third $500,000 distribution. Frakes then appealed.

The Court of Appeals affirmed the lower court's decision. Relying in part on the summary letters that had been sent by the attorney to the Saling's at the time their documents were drafted and signed and a handwritten chart by Carol Saling attempting to diagram out what he understood the documents to say, the Court of Appeals found that there was clear and convincing evidence of the Salings' intent for Frakes not to receive the third $500,000 distribution.

Millstein v. Millstein, 110 N.E.3d 674 (Ohio Ct. App. 2018).

Holding: (1) Settlor of a grantor trust on which the settlor paid the income tax but was not otherwise a beneficiary was entitled to only such information as specified in the trust instrument, not to the full information accorded to the trust's beneficiaries; (2) Settlor was not entitled to reimbursement for income tax payments, a change that would require an action to reform the trust, for which only a trustee or beneficiary has standing.

Facts and rationale: In 1987 and 1988, Norman Millstein established two irrevocable trusts for the benefit of his children and their descendants, with himself as initial trustee. He resigned in 1997 and named his son, Kevan, as sole successor trustee. The trusts were grantor trusts for federal income tax purposes with Norman as the grantor, but did not provide for reimbursement of Norman's taxes. Norman signed a 1988 letter separate from the trusts themselves, which included a statement of intent that referred to the prospect of offsetting the income attributable to Norman. The trust terms provided that the trustee must provide Norman annually with "a full financial report of the trust assets."

In 2010, Norman requested reimbursement of the taxes he paid on behalf of the trusts. Kevan declined, but agreed to use assets of another unrelated trust to defray Norman's tax expenses.

In 2013, Kevan informed his father that the other trust no longer had liquidity to offset Norman's taxes. Kevan took steps so that the trust for his own benefit would no longer be a grantor trust for federal income tax purposes, but did not take such steps for the trust for Norman's other child. Norman paid income taxes for the trusts of $6.5 million for tax years 2013-15, and remained responsible for future taxes for the trust for Kevan's sibling.

Norman sued the trustee to compel the trustee to provide him with a "fiduciary accounting." The trustee moved for summary judgment dismissing the claim, which the trial court granted. On appeal, the Court of Appeals affirmed the trial court's dismissal of the claim on the following grounds:

(1) The trust terms do not require the trustee to provide the grantor with a full accounting, and a "full financial report of the trust assets" is not the same as a complete fiduciary accounting as demanded by the grantor. The Uniform Trust Code requires a report to the beneficiaries, and not to the grantor, and requires a "report" and not an accounting, and does not require the full formality of a fiduciary accounting.

(2) In exchange for certain cash payments, a monthly salary for life, health insurance, and use of properties in Florida and Las Vegas, Norman signed an agreement in 2005 to waive any right to sue Kevan, including as trustee of the trusts.

(3) Federal tax laws only require that the trustee provide the grantor with an annual grantor tax letter. The tax laws do not impose any requirement that the trustee provide the grantor with additional information so that the grantor can verify the accuracy of the annual tax information provided by the trustee. If the grantor believes the trustee has not furnished the grantor with proper tax information, the grantor should contact the IRS.

Norman also sued the trustee for reimbursement of taxes, which the trial court dismissed. On appeal, the Court of Appeals affirmed the dismissal of the claims on the following grounds:

(1) The trust terms do not authorize the tax reimbursement. The Uniform Trust Code allows for reformation of a trust to accomplish the grantor's tax objectives. However, under the Uniform Trust Code only a trustee or a beneficiary may petition the court to reform a trust. The court may not apply equitable principles to circumvent valid legislative enactments.

(2) Equity will not aid a volunteer, and Norman admitted that he intentionally set up the trusts as grantor trusts, and did not allege that Kevan or any other parties took any actions that were inconsistent with the terms of the trusts that Norman created. Norman voluntarily created the situation that he now claims is inequitable.

TRUST DIVISION AND COMBINATION (Section 417)

Keybank N.A. v. Thalman, 2016 Ohio App. LEXIS 1715, 2016 WL 2587143, 2018 Ohio App. LEXIS 3639, 2018 WL 4043525.

Holding: Assuming that a division of a trust into two was proper, upon the death of the final life beneficiary, each set of beneficiaries was entitled to the full value of their respective trust, and not to one-half of the combined value as if the original trust had never been divided.

Facts and rationale: Howard Couse was an attorney who authored several law textbooks. He created a trust for his children and grandchildren from the proceeds of the sales of the textbooks. The trust income beneficiaries were his granddaughter, Jeanne Clough, and his grandson, Dr. Howard Schlitt. From 1957 until 2006, the trust was administered without incident. In 2006, Schlitt wrote to the trustee calling the income "pathetic and totally inadequate" and threatening to change trustee. Clough did not want the trust administration modified or a trustee change, and was focused on long-term asset growth.

In response, the trustee proposed a division of the trust into Clough and Schlitt shares. The trust division was completed 2 years later, and 5 weeks after Clough's death. The trustee informed the beneficiaries (now including Clough's children) about the division, the assets were divided, and from that point forward the trusts were separately administered for all purposes (including access to information). Several letters from the trustee confirmed the separation. The trustee informed the Clough remainder heirs that upon Schlitt's death they would receive the assets in the Clough trust, and the Schlitt remainder heirs that upon Schlitt's death they would receive the assets in the Schlitt trust.

Three days after Schlitt's death, the trustee informed the Clough heirs that they were preparing to distribute the Clough trust to them. The trustee informed the Schlitt heirs that they would receive the Schlitt trust assets, but the Schlitt heirs threatened to report the trustee to the FINRA and the SEC. The trustee then changed the final distribution, and informed all of the heirs that the two trusts would be combined and then re-divided before distribution, with the result being that the Clough trust heirs would receive $237,000 less. The Clough heirs objected, the trustee sued for instructions and the Clough heirs counterclaimed for damages, and the trial court summarily dismissed all of their claims and ordered equal division of the combined assets. The Clough heirs appealed.

On appeal, the court of appeals reversed and remanded the case back to the trial court. The UTC allows division of the trust that does not substantially impair the rights of the beneficiaries or materially adversely affect the trust purposes. Splitting the trust did not materially impair Clough or Schlitt. Both wanted to use the trust for different purposes, one wanting to benefit the remainder beneficiaries, and the other to finance his living expenses. As noted in the UTC comments, division of trusts is often beneficial and is almost routine. Although splitting the trusts was not detrimental, combining them was, and the result substantially impaired the Clough heirs. Although there is a material fact issue concerning the trustee's argument that the trust was not actually divided, and whether the trustee breached its duty by communicating that it was divided, the court otherwise found that the division was appropriate.

On remand, the trial court seemingly disregarded the holdings of the court of appeals, proceeded to trial (over the objections of the Clough heirs), and held that: (1) the trustee did not have the power to divide the trust under the trust terms and the trust was never actually divided into separate trusts, but rather only into sub-accounts of one trust; (2) the creation of mere sub-accounts was not a breach of trust; (3) the trustee did not breach its duties by making additional distributions to Schlitt for his "ease"; and (4) the Clough heirs failed to prove they suffered any damages from the division or the unclear correspondence sent by the trustee.

Following another appeal, the court of appeals again reversed the trial court on the following grounds:

(1) The prior decision of the court of appeals, which was not appealed to the Ohio Supreme Court, is the law of the case, and the trial court cannot disregard the decision of the court of appeals that the trustee had actually divided the trust into separate trusts. The conclusions of the court of appeals were final and binding on the trial court. There was no room for the trial court to disagree with the decision of the court of appeals, and it was reversible error to do so.

(2) Upon division of the trust, only the Clough heirs were entitled to the assets in the Clough trust. Trial on remand was not necessary or required, and resolution of the Clough heirs' claims for the assets of the Clough trust should have been perfunctory. The trustee is required to disburse the funds in the Clough trust to the Clough heirs only, and to distribute the Schlitt trust assets to the Schlitt heirs.

ARTICLE 5: CREDITORS CLAIMS – SPENDTHRIFT AND DISCRETIONARY TRUSTS

Pfannenstiehl v. Pfannenstiehl, 37 N.E.3d 15 (Mass. Ct. App. 2015), *reversed*, 55 N.E.3d 933 (Mass. 2016).

Holding: Beneficial interest in discretionary trust is not part of the marital property subject to division upon the beneficiary's divorce but the beneficial interest may be taken into account in determining the division of other property.

Facts and rationale: Husband and wife married in 2000 and had two children, one with dyslexia and ADD and the other with Down syndrome. Husband's father created an irrevocable spendthrift trust in 2004 for the benefit of husband and 10 other beneficiaries. The trust was funded (through an apparent sale transaction) with interests in family-controlled corporations that own and operate for-profit colleges, along with life insurance policies on the father's life. The trustees of the trust were husband's twin brother and the father's long-time attorney (although the attorney was not actively involved in the trust administration). The trust terms provided for discretionary distributions in the trustees' "sole discretion" among the class of beneficiaries by an ascertainable standard. Husband and wife were largely supported by the 2004 trust. Husband received an inflated salary as assistant manager of a family run bookstore (and was also allowed 4 years of paid leave to pursue woodworking), and wife worked one day per week in addition to being primary caretaker for the children and their special needs. Wife had left a career as an Army Reserve officer just before obtaining her 20-year pension, under pressure from the husband's family to care for the children. On the eve of the husband filing for divorce, the trustees ceased trust distributions to him but continued distributions to the other beneficiaries.

The probate court included the husband's interest in the 2004 trust in the marital estate, and assigned $1.3 million of the value of that interest (approximately 60%) to the wife and required the husband to pay the wife $49,000 monthly for 24 months to effectuate the assignment. On appeal, the Massachusetts Court of Appeals affirmed on the following grounds:

(1) the trust regularly distributed to husband until 1 month before his divorce filing, continued distributions to other beneficiaries, and its spendthrift clause was being invoked as subterfuge to mask the husband's income stream and thwart the division of the marital estate;

(2) husband's brother as co-trustee, and brother and father as officers and directors of the family business, controlled trust distributions, and the lawyer co-trustee represented the family and its businesses since 1972, was not involved in the trust administration, and did not demonstrate independence;

(3) the trust spigot was only turned off for husband to manipulate the divorce proceedings, and husband would likely return to receiving distributions immediately after those proceedings;

(4) the spendthrift provision alone does not preclude inclusion in the marital estate where someone neglects to provide for those he is legally required to support;

(5) the ascertainable standard gave the husband a present and enforceable right to trust distributions, it was likely he would receive distributions after the divorce, and as a result of the standard the trust was not wholly discretionary;

(6) the trust distributions were woven into the fabric of the marriage;

(7) the husband also has a vested outright remainder interest in the trust;

(8) once included in the marital estate, the trial court could order the division of the interest among the husband and wife; and

(9) the award of $175,000 in attorneys' fees to the wife was also proper. One dissenting judge found the husband's interest in the trust to be too remote, speculative, dependent on trustee discretion, and elusive of valuation to be included in the marital estate.

On appeal, the Massachusetts Supreme Court reversed the Court of Appeals and remanded the cases, on the following grounds:

(1) Interests in discretionary trusts are generally treated as expectancies that are too remote for inclusion in the marital estate, because the trust interest is not present and enforceable, and the beneficiary must rely on the trustee's discretion and cannot compel distributions.

(2) The presence of the ascertainable standard on distributions does not require a different result in this case because: (a) the trustee is required by the standard to engage in a detailed inquiry into each beneficiary's needs and finances and the trust terms; (b) Husband is one of 11 beneficiaries among an open class of beneficiaries; (c) the trustees are required to consider the long-term needs of the trust, its assets, and its 11 current and any future beneficiaries; and (d) the husband's right to distributions is speculative because the trust permits unequal distributions among an open class that already includes numerous other beneficiaries, and because his rights are subject to the condition precedent of the trustee's exercise of discretion in determining the needs of an unknown number of beneficiaries.

(3) The husband's share of the trust is subject to reduction to benefit the other current and future beneficiaries. Past distributions had not been equal, and in some years the husband received no distributions.

(4) As a result of the spendthrift clause, an order dividing the trust for the wife's benefit cannot create a right in the husband to compel distributions in her favor, where he does not otherwise have that right.

(5) The husband's remainder interest in the trust is equally speculative because: (a) the trust benefits future generations and the trustees are unlikely to terminate the trust and distribute the remainder during the husband's lifetime; and (b) the husband cannot compel the trustees to sell unique assets, and termination would not be considered by the trustees until those assets were sold, making the possibility of termination remote.

(6) The ascertainable standard does not render the husband's future acquisition of trust assets sufficiently certain to include the trust assets in the marital estate subject to division by the court.

Although the court held that the trust was not subject to division, the court stated that upon remand the trust could be considered in determining the division of the other assets.

***In re* Tait, 2008 Bankr. LEXIS 2489, 2008 WL 4183341 (Bkrtcy. S.D. Ala. Sept. 10, 2008).**

Holding: Debtor treated as a settlor of parents' trust to the extent of the debtor's contribution. Consequently, the share of the trust of which the debtor was deemed the settlor was subject to the claims of the debtor's personal creditors.

Facts and rationale: A debtor was named as sole trustee of irrevocable trust created by his parents. It held various properties, including an historic plantation that had been in his family for generations. There was also approximately $500,000 of cash and other investments. Debtor renovated the plantation, spending in excess of $4,000,000, a substantial portion of which were the debtor's own assets. Debtor was terminated as the CEO of an insurance company and an action was filed against him for withdrawing approximately $4,000,000 from a company trust account for his own purposes. That action was settled and debtor gave a promissory note to the company for $980,000 secured by the plantation and signed by him individually, his wife, and him as trustee of the trust. Foreclosure proceedings were commenced against the plantation. Debtor filed bankruptcy and resigned as trustee. The successor trustee brought an action against the bankruptcy estate to declare the promissory note unenforceable against the trust and the plantation.

The court held that the promissory note was not enforceable against the trust and the security interest in the plantation was void. A trustee acts as a fiduciary and must act in the best interest of the beneficiaries of the trust, Ala. Code § 19-3B-801. The trustee must act as a reasonable, prudent person in investing trust assets, Ala. Code § 19-3B-901(b). Using trust assets for personal reasons of the trustee is self-dealing and a violation of the trustees duty of loyalty, Ala. Code § 19-3B-802. Although the trust granted broad discretion to the debtor as trustee, it did not abrogate the debtor's fiduciary duties as trustee. Thus, the mortgage against the plantation was void.

However, the evidence showed that the debtor expended vast sums of his personal assets on the plantation owned by the trust. A settlor includes a person that contributes assets to a trust, Ala. Code § 19-3B-103(16) (UTC § 103(15)). While the trust included a spendthrift clause, state law provides that a spendthrift clause will not prevent a settlor's creditors from attaching trust assets, Ala. Code § 19-3B-501 and 505 (UTC §§ 501 & 503). Thus, the creditor had an equitable lien on the self-settled remainder interest of debtor in the trust.

ARTICLE 6: REVOCABLE TRUSTS

REVOCATION OR AMENDMENT OF REVOCABLE TRUST (Section 602)

Glass v. SunTrust Bank, 523 S.W. 3d 62 (Tenn. Ct. App. 2016).

Holding: Trustee, which also held the settlor's power of attorney, did not have a duty as agent to fund settlor's trust in order to avoid probate.

Facts and rationale: In 1994, Ann created a revocable trust with herself as trustee and a bank as successor trustee, a durable power of attorney with the bank as agent, and a will (that included both pre-residuary gifts of cash and tangibles, with the residue pouring over to the revocable trust) with the bank as executor. In 2004, Ann lost capacity and the bank become agent and successor trustee and handled Ann's affairs for several years. Ann died in 2007 and the bank qualified as the executor. At the time of Ann's death, the trust owned stock in three banks (including stock in the bank serving as fiduciary) and a large farm in Dyer County, with a total value of $2.5 million, and which had been obtained by Ann or her husband and were in the trust for years. Ann's probate estate, totaling $27,000, included a checking account and tangible personal property.

After all assets were distributed, one of Ann's sons sued the bank alleging breach of various fiduciary duties. The bank counterclaimed for payment of its attorneys' fees and expenses. Among other things, the son claimed that the bank was negligent as trustee in failing to exercise the power of attorney to fund the revocable trust and eliminate the need to open a probate estate and incur $46,000 in related costs.

After several years of litigation, the court found in favor of the bank. The son appealed.

The Court of Appeals affirmed the judgment in favor of the bank. By naming specific gifts of tangibles and cash under her will, Ann contemplated probate administration of her will, and her trust provided for honoring the pecuniary gifts if the probate estate was inadequate, but not the gifts of tangibles. While a revocable trust can be used to avoid probate, there is no evidence that Ann intended this since the will and trust terms differed. The duty to act in the interests of the beneficiaries under the UTC applies only to the beneficial interests under the trust itself, and there is no evidence that by not eliminating a probate estate (even if that were possible) the trust interests themselves were not properly administered. Finally, while the bank had the power to fund Ann's revocable trust during her lifetime under the power of attorney, there is no evidence that the bank as trustee had a duty to do so to avoid probate; no provision of the will, the trust, or any statute gives rise to a duty to convey all of Ann's assets to the trust during her lifetime. It is one thing to suggest that avoiding probate would have been a wise move but quite another to say that the bank should be held liable for damages for failing to avoid probate in the absence of any instruction from a decedent, when doing so would have defeated the testator's intent.

***In re* Hoisington Living Trust, 2017 Tenn. App. LEXIS 700, 2017 WL 4750644.**

Holding: Undated and unsigned handwritten notation on trust instrument did not satisfy requirements specified in trust instrument for amending trust.

Facts and rationale: In 2001, Elizabeth executed a revocable trust with herself as trustee, and with Carol as successor trustee. The trust terms provided that Elizabeth could amend the trust by "an instrument in writing signed by the Grantor and delivered to the trustee during the Grantor's lifetime." At some unknown date, Elizabeth made undated and unsigned handwritten notations on the trust agreement.

Elizabeth died in 2015, and her daughter provided the named successor trustee with the trust agreement with the notations for the first time. One daughter petitioned to uphold the notations as a trust amendment, and another daughter opposed. The parties agreed that the notations were in Elizabeth's handwriting and challenges to capacity were reserved. At some point before her death, Elizabeth ceased serving as trustee and Carol commenced serving. The trial court held that the notations were not a valid trust amendment and ordered distribution of the trust assets under the original trust terms, and one daughter appealed.

On appeal, the court of appeals affirmed the trial court on the following grounds:

(1) Even assuming that the annotated agreement could be an "instrument" (as opposed to construing the trust to require a separate writing) and that the signature to the original trust agreement could also be the signature to the amendment, there is insufficient proof of delivery to the trustee because: (a) the handwritten notations are not dated; and (b) there is no proof whether they were made before or after the successor trustee commenced serving, and (c) the successor trustee did not receive the handwritten notations until after Elizabeth's death. Where the evidence is scarce and conflicting, the burden of proof of delivery is not met.

(2) It could not be shown by clear and convincing evidence that the settlor manifested the intent to amend the trust. The settlor did not make the changes in separate instrument; she did not sign or initial her changes; she did not communicate her changes to anyone or deliver a copy to any other person; and she did not perform any other action to evince an intent to change the trust terms other than to make markings on the trust. The handwritten markings themselves are not enough to meet the proof standard under the UTC.

SETTLOR AS SOLE BENEFICIARY OF REVOCABLE TRUST (Section 603)

***Ex parte* Synovus Trust Company, N.A., 41 So. 3d 70 (Ala. 2009).**

Holding: During settlor's lifetime, remainder beneficiaries lacked standing to contest actions of trustee.

Facts and rationale: The settlors were approached by trust company representatives selling investment services who allegedly promising 20% returns on investments. Settlors each created a revocable trust with a settlor and the trust company as trustees for the benefit of themselves, and their children. The trust company resigned and an action was brought against the trust company for breach of trust and fraud by the settlors and their children, as beneficiaries of the revocable trusts. The trust company moved to dismiss the claims brought by the children on the ground that the children lacked standing to bring the action. A motion to dismiss was denied and defendants applied for mandamus directed at the court to dismiss the claims.

Mandamus granted. Standing to bring a lawsuit depends on whether there has been an injury to a legally protected right of the plaintiff. While a trust is revocable, the rights of all beneficiaries other than the settlor are subject to the control of, and the duties of the trustee are owed exclusively to, the trust's settlor, Ala. Code § 19-3B-602(a) (UTC § 602(a)). Thus, regardless of whether the beneficiaries have suffered injury to their rights as a result of the trust company's conduct, those rights were subject to the control of settlors while the trusts were revocable. Thus, the children, as beneficiaries of the trusts, did not have standing to bring an action against the trust company for breach of fiduciary duties.

ARTICLE 7
OFFICE OF TRUSTEE

TRUSTEE ACCEPTANCE (Section 701)

***In re* Hamilton Living Trust, 471 S.W.3d 203 (Ark. 2015).**

Holding: Nominated trustee's actions were sufficient to constitute an acceptance of the trust.

Facts and rationale: Frank and Margaret created a revocable trust and named a bank as successor trustee, with son and daughter as remainder beneficiaries. The bank was custodian for the securities held in the trust during the settlors' lives. After their deaths, the bank sent the son six letters, in each declining the appointment as successor trustee and asking the beneficiaries to find a successor trustee. Although the bank's letters were addressed to the son as personal representative of his mother's estate, no estate was actually opened. The bank reimbursed the son out of trust assets held in custody for expenses he incurred in the administration of his mother's estate, such as funeral expenses, expenses for a car that was not held in the trust, and utility payments for a home not held in the trust. The bank also liquidated securities at the son's direction. The daughter sued the bank for an accounting as trustee, which the bank opposed citing its repeated letters declining the trusteeship. The trial court ordered the accounting and surcharged the bank for the daughter's attorneys' fees. The bank appealed.

On appeal, the Arkansas Supreme Court affirmed on the grounds that:

(1) Under the Uniform Trust Code, the bank could decline the trusteeship but still act to preserve the trust property, or could accept the trusteeship by exercising powers or performing duties as trustee;

(2) The distributions for the car and home were not for the preservation of trust assets;

(3) Distributions for estate expenses and liquidation of assets went beyond mere preservation of trust assets, and were outside the UTC safe harbor;

(4) Rather, the bank exercised the powers of the trustee and therefore accepted the trusteeship;

(5) The UTC allows the award of attorneys' fees as justice and equity may require, and the award was appropriate because the fees were only incurred because the bank refused to render an accounting.

TRUSTEE REMOVAL (Section 706)

Davis v. U.S. Bank, N.A., 243 S.W.3d 425 (Mo. Ct. App. 2007).

Holding: Court's replacement of one bank trustee with another upon the request of the qualified beneficiaries upheld as in the best interests of the beneficiaries.

Facts and rationale: U.S. Bank was trustee of an irrevocable trust for the benefit of Harold Davis. Davis had two minor children. The trust agreement provided that upon Davis' death, if he was not survived by descendants, that the assets would be distributed to a charitable institution. Davis requested U.S. Bank to resign, but that request was denied. Davis filed an action against U.S. Bank for its removal and requested the appointment of U.S. Trust Company in Delaware as successor trustee, which was located closer to the beneficiaries and also charged lower fees. U.S. Bank challenged the removal on the ground that the court lacked subject matter jurisdiction over the action because Davis had failed to join necessary and indispensable parties (e.g. the charitable institution) and that Davis had failed to state a claim because he could not virtually represent his two minor children because his interests conflicted with theirs. The lower court removed U.S. Bank and appointed the successor as requested in the petition. U.S Bank appealed but the Court of Appeals affirmed.

Davis's petition for removal of U.S. Bank was based on R.S.Mo. § 456.7-706.2(4). That section provides that a court may remove a trustee if removal is requested by all the qualified beneficiaries and the parties seeking removal established to the court that removal of the trustee best serves the interest of all beneficiaries of the trust and that there is a suitable successor trustee willing and able to be appointed. U.S. Bank alleged that even though the statute required that the request for removal originated from all "qualified beneficiaries"(a subset of all beneficiaries of the trust), that the court also has to find that the removal will benefit all beneficiaries of the trust (including qualified beneficiaries). Thus all potential beneficiaries, including the contingent remainder charity, had to be joined to the action as necessary parties. The Court of Appeals found that because the statute only required the consent of all qualified beneficiaries that only those qualified beneficiaries were necessary parties to the removal action. U.S. Bank also alleged that Davis had a conflict of interest with respect to representing his minor children. R.S.Mo. § 456.3-303(4) allows a parent to represent his or her minor children unless there is a conflict of interest. The Court of Appeals found that there was no conflict regarding removing the Bank as trustee as U.S. Trust was clearly the better choice.

***In re* Fenske, 930 N.W.2d 43 (Neb. 2019).**

Holding: Settlor's close relationship with financial institution trustee was a material purpose sufficient to negate qualified beneficiaries' request to replace trustee.

Facts and rationale: Under his will, Jack left his property in trust for his great-nieces. The trust terms provided for income to the great-nieces for their lifetimes along with principal for educational costs only. Jack named a bank as trustee. The trust assets consisted of liquid assets and agricultural land. In addition to income distributions, the trust principal was used to provide one beneficiary with an MBA and a law degree, and the education pursuits of the other beneficiary. The trustee fees slightly exceeded the income distributions. The beneficiaries admitted that the bank had not committed any wrongdoing in administering the trust, but wanted to change trustees because one of their husbands, an attorney, agreed to serve without compensation and removing the bank was part of a plan to terminate the trust and liquidate and distribute the trust assets.

The husband asked the bank to resign and the bank refused. The great-nieces petitioned to remove and replace the bank as trustee under the Nebraska version of UTC Section 706, which provided for "no-fault" removal of a trustee where there has been a substantial change in circumstances or removal is requested by all of the qualified beneficiaries, and the court finds that removal best serves the interests of all beneficiaries, is not inconsistent with a material trust purpose, and a suitable successor is available. Jack's estate planning attorney testified that Jack was an old-school farmer, valued farm work over education, viewed holding land as paramount as a sign of success, and wanted his land retained intact for as long as possible without being squandered. The attorney also testified that Jack wanted the trustee to be independent, had a history with the bank that operated the only full-time trust department in the area and knew the bank's president, and that Jack wanted to get away from his relatives being in charge of his assets.

The trial court denied the petition and the great-nieces appealed. On appeal, the Nebraska Supreme Court affirmed on the following grounds:

(1) The Nebraska no-fault removal statute is identical to UTC Section 706. On appeal, the only issue was whether removal of the trustee would be inconsistent with a material purpose of the trust.

(2) The question depends on the significance to the settlor of the initial choice of trustee. In some cases, there is no indication that the particular trustee or the qualities brought by that trustee are important considerations for the settlor, and in those cases removal would not be inconsistent with a material purpose. On the other hand, in some cases the particular named trustee or the trustee's qualities are important to the settlor. In those circumstances, replacement of the selected trustee with another person or entity or a person or entity that lacked the desired qualities would be inconsistent with a material purpose.

(3) Here, removal of the bank would be inconsistent with a material purpose of the trust. There was direct evidence that Jack had a relationship with the bank and its president and wanted an independent non-family trustee. The selection of the bank was more than an incidental means to an end, and that independence from his family was an important quality in a trustee. Replacing the bank with the husband would materially undermine the office of trustee as Jack intended.

***In re* McKinney, 67 A.3d 834 (Pa. Super. Ct. 2013).**

Holding: Movement of family to a different state, coupled with the trustee having gone through six corporate mergers, constituted a "substantial change of circumstances" justifying removal of the trustee.

Facts and rationale: Trust settlors established a testamentary trust and a descendant's trust, both of which lacked portability clauses. The trust beneficiaries petitioned for removal of the trustee, and for appointment of a successor trustee. The trial court denied the request, and granted the former trustee's request for legal fees associated with contesting the removal. The beneficiaries appealed.

On appeal, the Pennsylvania Superior Court considered "whether a family's movement over time from northwestern Pennsylvania to the Tidewater region of Virginia, coupled with the fact that the original trustee institution ha[d] gone through . . . six corporate mergers leading to entirely different bank officers involved in administering the trusts, represents a change of circumstances substantial enough to come within the no-fault statutory provisions" of 20 PA. C. S. § 7766(b)(4) of the Pennsylvania Probate, Estates and Fiduciaries Code. Section 7766(b)(4)'s no-fault provision allows a trustee to be changed due to "substantial change of circumstances."

In re McKinney presented the first instance in which the Pennsylvania Superior Court was asked to interpret and apply § 7766(b)(4). The court conducted a thorough analysis of § 7766(b)(4), explaining that "a person seeking trustee removal pursuant to § 7766(b)(4) must show by clear and convincing evidence that: (1) the removal serves the beneficiaries' best interests; (2) the removal is not inconsistent with a material purpose of the trust; (3) a suitable successor trustee is available; and (4) a substantial change in circumstances has occurred." Only if all four requirements are met may a court, in its discretion, remove a trustee.

Noting that the Pennsylvania statute does not define how to determine the "best interests of the beneficiaries," the court relied on the commentary for UTC Section 706, upon which the Pennsylvania statute was based. According to the UTC, "[t]he term 'interests of the beneficiaries' means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries." The court interpreted this to mean that the settlor's intent is paramount in this analysis. Citing the opinions of courts of three states that have adopted the UTC, Missouri (Davis v. U.S. Bank, N.A., 243 S.W.3d 425 (Mo. Ct. App. 2007)), Connecticut (In re Fleet Nat'l Bank, 837 A.2d 785 (Conn. 2004)), and Utah (Repela v. Green, 289 P.3d 428 (Utah 2012)), that had previously developed a definition for the beneficiaries' best interest in the context of no-fault trustee removal, the court determined that "implicit in the best interests analysis is a comparison between the current and the proposed successor trustee." The court outlined a series of non-exclusive factors that courts should consider when determining whether a current trustee or a proposed successor trustee best serves the interests of the beneficiaries.

The court concluded hat a string of mergers over several years, resulting in loss of trusted bank personnel, coupled with the movement of the family from Pennsylvania to Virginia, constituted a substantial change of circumstances. The court found that removal of the current trustee was not inconsistent with a material purpose of the trust, and that a suitable successor trustee was available. Because the court found that clear and convincing evidence established that a substantial change of circumstances had occurred, it held that the trial court's finding was erroneous. The Pennsylvania

Superior Court reversed the decree of the trial court and remanded the case for further consideration of whether the proposed successor trustee was suitable.

REASONABLE COMPENSATION (Section 708)

***In re* William Dankworth Trust, 2014 Ohio App. LEXIS 5641, 2014 WL 7475202.**

Holding: Settlement agreement with resigning trustee failed to reserve right to termination fees.

Facts and rationale: In 2005, William Dankworth created a trust with individual and corporate co-trustees. Eight years later, William sought to remove and replace the corporate trustee. William's attorney filed an application for an appointment of successor trustee with the court, and attached as an exhibit to the application a prior settlement agreement that set forth the terms as to how the resigning trustee would resign and the successor trustee would be appointed. In that private settlement agreement, there was no discussion of waiver of termination fees, and the trust document provided for a corporate trustee's ordinary and reasonable fees. Each page of the settlement agreement was time stamped and the resigning corporate trustee was required to sign the settlement agreement in two places.

The court issued an order stating that no termination fees or other fees were due or payable to the resigning corporate trustee. After the court appearance, William's attorney sent the resigning corporate trustee a copy of the application and order approving the resignation and appointment. The corporate trustee did not timely file an appeal, and instead filed a motion for relief from judgment and a motion for reconsideration. The probate court issued an order denying the motion to vacate. After the motion to vacate was denied, the corporate trustee filed an appeal listing the two judgments against them, the September 19th order with no termination fees and the denial of the motion to vacate and the trustee appealed.

The appeals court was unsympathetic to the corporate trustee's argument that (1) it did not have an opportunity to read the documents before they were filed, (2) did not know what was in the documents, and (3) would never have waived termination fees had it known about it.

The Appellate Court affirmed the trial court's decision on a variety of grounds, including:

(1) The time stamping of the petition and the agreement indicated that the corporate trustee representative had an opportunity to read the documents;

(2) Nothing in the documents indicated William had committed fraud or misrepresentation or misconduct to the court or to the resigning corporate trustee and nothing in the record indicated that the corporate trustee had voluntarily waived these fees or had agreed to waive termination fees;

(3) The matter of termination fees was presented during the initial court proceeding and the order was issued with no termination fees; and

(4) Because the record was void of any fraud or misrepresentation, the corporate trustee did not have grounds to bring a motion to vacate.

ARTICLE 8: DUTIES AND POWERS OF TRUSTEE

DUTY TO ADMINITER TRUST (Section 801)

Betty G. Weldon Revocable Trust *ex rel.* Vivion v. Weldon *ex rel.* Weldon, 231 S.W.3d 158 (Mo. Ct. App. 2007).

Holding: Trustees who were also corporate directors of company, 100% of the voting stock of which was owned by the trust, were subject to trustee standard when making decisions as opposed to business judgment rule.

Facts and rationale: Settlor created a revocable trust. The trust owned all of the voting stock of an S-Corporation, which in turn owned various subsidiaries, one of which was a money-losing horse breeding and training farm on which the settlor resided. The settlor became incapacitated. Two of the three successor trustees sought to sell the horse farm by an action of the board of directors of the S-Corporation, arguing that it was consistent with their obligation to preserve trust assets. The remaining trustee and the settlor, through a next friend, brought an action to enjoin sale of the farm and to remove the other two trustees. The lower court held that the two trustees violated their duty of loyalty and their duty to administer the trust in accordance with its terms and of its own accord removed the two trustees. The two trustees appealed.

The Court of Appeals affirmed the lower court ruling. The court found that the trustees' conduct should be judged under a fiduciary trust standard and not by the corporate law business judgment rule. The court held that a trust law standard applied, noting that R.S.Mo. § 456.8-802(g) requires that a trustee, in voting shares of stock or in exercising powers of control over an entity, must act in the best interests of the beneficiaries. Because the trust terms required that the farm be retained in the trust, the court concluded that the trustee's efforts to sell the farm violated their duty to administer the trust in accordance with the trust's terms as required by R.S.Mo. § 456.8-801.

DUTY TO INFORM (Sections 105, 813)

Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010).

Holding: Despite provision in trust instrument dispensing with reporting to beneficiaries, the beneficiaries are always entitled to such information as is reasonably necessary to enable them to enforce their rights under the trust or to prevent or redress a breach of the trust.

Facts and rationale: Irrevocable trust beneficiaries brought suit against the trustee for breach of fiduciary duty. The beneficiaries requested that the trustee provide an accounting of the trusts, alleging that the trustee allowed the settlor to take control of the trusts and invest the assets in his personal speculative business ventures. Beneficiaries also alleged that the trustee breached his fiduciary duty by failing to distribute income to the beneficiaries. The trustee, in response to the request for an accounting, claimed that pursuant to the terms of the trust, information in the nature of inventories, appraisals, reports or accounts was not required to be provided to any court or any beneficiary. The trustee then filed a motion for a protective order. The trial court granted the trustee's motion, citing § 36C-1-105 (UTC § 105) and holding that no aspect of a trustee's duty to inform beneficiaries is mandatory. Plaintiff appealed, claiming the trial court misinterpreted the North Carolina UTC.

The Court of Appeals overruled the trial court, concluding that the information sought by the beneficiaries was reasonably necessary to enforce their rights under the trust, and therefore could not be withheld. The court reasoned that although the North Carolina UTC does not include portions of the UTC § 105 requiring trustees to keep beneficiaries reasonably informed about the trust's administration, the North Carolina UTC does impose a duty on a trustee to act in good faith. Under the Restatement (Second) of Trusts Section 173, "the beneficiary is entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of the trust." The court noted that "[a]ny other conclusion renders the trust unenforceable by those it was meant to benefit." The court determined that the information sought by the beneficiaries was reasonably necessary to enable them to enforce their rights under the trust. Finally, the court explained that even if the settlor provides in the trust instrument that an accounting is not required to be provided to any court or beneficiary, the trustee will be required in a suit for an accounting to show that he faithfully performed this duty.

ARTICLE 10: LIABILITY OF TRUSTEES AND RIGHTS OF PERSON DEALING WITH TRUSTEE

ATTORNEY FEES (Section 1004)

***In re* Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. 2009).**

Holding: Award of fees to plaintiff beneficiary to be paid from the trust was an appropriate exercise of discretion where plaintiff brought action in good faith raising issues that could be settled only by a judicial determination.

Facts and rationale: Settlor created a revocable trust and amended it multiple times. Those amendments created various versions of testamentary charitable remainder annuity trusts (CRATs) for the benefit of two colleges. The next to last amendment created one CRAT for plaintiff college. The last amendment reinstated a previous plan splitting trust assets into two CRATs, one for plaintiff college and one for defendant college. Plaintiff college filed a petition challenging the validity of the last amendment on the grounds that the settlor lacked mental capacity. The trial court found that amendment was valid but awarded plaintiff college its attorney's fees to be paid from the trust assets prior to being equally distributed into the two CRATs. Both colleges appealed.

The court concluded that the settlor had the mental capacity to execute the last trust amendment. The capacity required to create, amend, revoke, or add property to a revocable trust is the same as that required to make a will, Mo. Rev. Stat. § 456.6-601. Under common law, testamentary capacity requires a testator to (1) understand the ordinary affairs of his or her life, (2) understand the nature and extent of his or her property, (3) know the persons who were the natural objects of his or her bounty, and (4) intelligently weigh and appreciate his or her natural obligations to those persons and know that he or she is giving his or her property to the persons mentioned in the document. Evidence on the record supported that all of these elements were met.

The Court of Appeals found that the award of attorney fees from the residue of the trust prior to distributions was also proper. A court may, within its discretion, award attorneys' fees to any party regardless of whether that party prevailed in the lawsuit, Mo. Rev. Stat. §456.10-1004. In this case, plaintiff college brought the action in good faith and raised issues which only could be settled by way of a judicial determination. Thus, the court's award of attorneys' fees was not an abuse of discretion. Further, whether the attorneys' fees should be paid out of the trust before or after distribution is a determination for the court to make in its sound discretion, Mo. Rev. Stat. § 456.10.1004 (UTC § 1004).

***In re* Trust of Trimble, 826 N.W.2d 474 (Iowa 2013).**

Holding: Factors provided for determining awards of attorneys' fees.

Facts and rationale: Beneficiary, Marylynn Miller, sought an accounting of trust assets for the period of time before the settlor's death, when the trust was still revocable, and for the trustee to personally pay the beneficiary's legal fees, pursuant to Iowa Code § 663A.4507 (2009). While Iowa has not adopted the Uniform Trust Code (UTC), a footnote in the Trimble opinion explains that section § 633A.4507 is based on section 1004 of the UTC, and contains "nearly identical language to that found in section 633A.4507." Section 633A.4507 provides that, "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by anther party or from the trust . . ."

This case presented the first opportunity for the Iowa Supreme Court to provide guidance on fee allocation under this statute. As such, the supreme court looked to the decisions of other jurisdictions whose equivalent statute was also derived from UTC § 1004, to interpret the "justice and equity" standard set forth in section 633A.4507. After reviewing the Oklahoma case, *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. Civ. App. 2001), the Iowa Supreme Court adopted the following non-exclusive *Atwood* factors to be used in determining whether "justice and equity" under section 633A.4507 require a party to be personally responsible for payment of attorney's fees: (1) reasonableness of the parties' claims, contentions, or defenses; (2) unnecessarily prolonging litigation; (3) relative ability to bear the financial burden; (4) result obtained by the litigation and prevailing party concepts; and (5) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.

LIMITATIONS (Section 1005)

Meyers v. First Tennessee Bank, N.A., 503 S.W. 3d 365 (Tenn. Ct. App. 2016).

Holding: Disclosure by trustee did not constitute an adequate "report" to start one-year limitation period for filing an action for breach of trust relating to condition of real property held in the trust.

Facts and rationale: Upon his death in 1980, Ray Haney created a trust for the benefit of Robin and her adult daughters, with a bank as trustee. The trust assets consisted of two warehouses. Robin's husband, Emil, was involved in the management of, and communications regarding, the warehouses.

In a November 15, 2005 letter, the trustee gave notice of its resignation. No successor was appointed because the beneficiaries instead were pursing termination of the trust. The termination was not completed because the beneficiaries would not agree to release the trustee. They sued to compel the termination, which was ordered by the court on May 16, 2007. The trust assets were fully distributed by the following November. On May 13, 2010, the beneficiaries sued the trustee for breach of trust for not performing its duties with respect to the warehouses and the damages caused by failure to collect rents and warehouse damages.

The trustee moved repeatedly for summary judgment that the claims were barred by either (1) the short 1-year limitations person under the UTC after providing a report to the beneficiaries or (2) the 3-year limitation period under the UTC. The trial court denied the motions and the trustee filed a permitted interlocutory appeal.

On appeal, the court of appeals affirmed the trial court on the following grounds:

(1) The 1-year limitations period runs on the sending of an adequate "report" to the beneficiary or the beneficiary's representative. "Actual knowledge" by the beneficiaries, which might have run limitations periods under pre-UTC law, does not apply to start the shorter limitations period relied on by the trustee here. Similarly, the statute does not run by the beneficiary being "put on notice" through any other means, and the court is not required to extend a statute beyond its natural and ordinary meaning. Applying the general discovery rule under pre-UTC law to commence the UTC statute would override the express statutory requirements.

(2) With respect to phone calls, faxes, letters, emails, and meetings, a "report" may be adequate, regardless of form, so long as it provides a level of information sufficient under the statute. Summaries of real estate activities prepared by Emil may not be considered on summary judgment because the trustee stated that they are pure hearsay and would be objected to at trial. Vague interrogatory responses by the beneficiaries acknowledging the exchange of volumes of paperwork, emails, letters, and exhibits are too vague to establish an adequate report on summary judgment. Letters sent by a beneficiary are not adequate to establish a report furnished by the trustee to the beneficiary. Emails that were not delivered to all beneficiaries cannot be a report to beneficiaries who did not receive them, and there was no allegation of the application of virtual representation. A 2008 rebuttal letter from the bank that provides details with respect to the warehouse may not run the limitations period because: (a) it could be seen as conveying assurances to the beneficiaries that no breach occurred, and a letter from a trustee assuring that no breach occurred is unconvincing as a report that adequately discloses facts indicating the existence of a potential claim for breach of trust; and (b) the trust had terminated and had been fully distributed at the time the letter was sent, and the recipient was no longer a trust beneficiary in 2008.

(3) The trustee failed to meet its burden to establish the running of the 1-year limitations period, there is much material in the record for the court to "chew on," and this is not the kind of case with clear facts and undisputed conclusions to be drawn from those facts that would warrant summary judgment.

(4) The trustee's resignation letter did not commence the 3-year limitations period because, where there is no co-trustee, the trustee's duties and powers continued until delivery of the property and the trustee exercised those powers and acted as trustee after the delivery of the letter. *Ladd v. 87 Stockham,* 209 So.3d 457 (Ala. 2016). The UTC statute of limitations on trustee breach claims is not tolled where the beneficiary received information related to claims directly from company and other sources.