2019 MINNESOTA CASE LAW UPDATE

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United States Supreme Court Reverses Eighth Circuit, Holds Minnesota's Revocation-on-Divorce Statute is Constitutional in *Sveen v. Melin:* 138 S.Ct. 1815 (2018). By: Karin Ciano, Mason & Helmers [Edited].

In December 1997, a Minnesota couple, Kaye Melin and Mark Sveen, got married. Sveen bought a life insurance policy naming Melin as beneficiary, with his adult children from a former marriage as contingent beneficiaries. Then the Minnesota legislature amended the probate code, providing that a divorce decree automatically revoked the beneficiary status of the former spouse, unless (among other exceptions) the parties' divorce decree provided otherwise. See Minn. Stat. § 524.2-804.

In 2007, Sveen and Melin divorced; their divorce decree said nothing about the insurance policy. When Sveen died in 2011, Melin was still named as beneficiary. An insurance interpleader action followed. Melin and Sveen's children each claimed the insurance proceeds. Sveen's children argued that Minnesota's automatic-revocation-on-divorce statute applied to bar Melin's claim; Melin argued that she and her ex-husband had orally agreed to maintain the beneficiary designation, and so the statute unconstitutionally impaired her rights in the policy.

In early 2016, the Honorable Paul A. Magnuson granted summary judgment for the Sveen children, holding that Minnesota Statute § 524.2-804 was constitutional because there was no substantial impairment of Melin's contractual rights. Melin appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed, following circuit precedent in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1324 (8th Cir. 1991), on the theory that it was Mark Sveen's contractual rights that had been impaired when the Minnesota legislature changed the law, and that the law could not apply retroactively. The Sveen children appealed to the United States Supreme Court.

In June 2018, the Supreme Court reversed 8-1. Justice Kagan, writing for the majority, framed Minnesota's statute as a default rule used "to resolve estate litigation in a way that conforms to decedents' presumed intent." *Sveen v. Melin*, 138 S. Ct. 1815, 1818 (2018). The majority noted that as divorce rates increased, almost all states adopted revocation-on-divorce statutes, presuming "that the average Joe does not want his ex inheriting what he leaves behind." *Id*. at 1819.

Turning to the constitutional challenge, the majority acknowledged that the "threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship"—that is, "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id*. at 1821-22.

As had the district court, the Supreme Court majority concluded that Melin's constitutional challenge failed because (1) the statute was designed to reflect, not thwart, a policyholder's presumed intent; (2) given divorce courts' power to change beneficiary designations, a policyholder could not reasonably expect a beneficiary designation to survive divorce; and (3) if the policyholder didn't like it, he could have it addressed in the divorce decree or by submitting a post-divorce change-of-beneficiary form. In Justice Kagan's words, "the statute this reduces to a paperwork requirement (and a fairly painless one, at that): File a form and the statutory default rule gives way to the original beneficiary designation." Justice Gorsuch, in his first solo dissent, would have held that the statute "substantially impairs contracts by displacing the term that is the 'whole point' of the contract"—the beneficiary designation. *Id*. at 1829-30.

Takeaways: the Supreme Court doesn't consider a "minimal paperwork burden[]" such as filing a fresh beneficiary designation form to be a "substantial impairment" of contract. If a divorcing couple can be bothered to mention the snowmobiles in their divorce decree, but not the life insurance, that's on them. And lawyers in Minnesota can go back to advising our divorced and divorcing clients to check their insurance paperwork and be sure it does what they want it to.

<u>Trustee Attorney Fees are Properly Payable from a Trust under Minn. Stat. § 501C.0709/1004; Proof of Breach of Fiduciary Duty Requires Proof of All Elements to Breach; Removal of Trustee under Minn. Stat. § 501C.0704 is Reviewed</u>. *Lund v. Lund*; 924 N.W.2d 274 (Minn. App. 2019) *review denied* (Mar. 27, 2019). Several issues were reviewed in this case but only 3 issues are summarized below. **Issue 1: The right of a trustee to have its attorney fees paid from the trust.** The district court found that Minn. Stat. § 501C.1004 supersedes common law and denied the trustee attorney fees but the court of appeals reversed. The common law provides that "a trustee is entitled to reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending his administration of the trust." *In re Freeman's Tr.*, 75 N.W.2d 906, 907 (Minn. 1956). The court of appeals found that Minn. Stat. § 501C.0709 authorizing a trustee to pay attorney fees from the trust leaves the common law on this point undisturbed. The ability to pay attorney fees to "any party" under Minn. Stat. § 501C.1004 did not alter the common law or Minn. Stat. § 501C.0709. Under the common law and Minn. Stat. § 501C.0709, trustees can still pay attorney fees from the trust if they were incurred in good faith. "Any party" may also have fees paid from the trust under Minn. Stat. § 501C.1004. **Issue 2: Proving a breach of fiduciary duty**. The person asserting a breach must prove duty, breach, causation and damages. In this case the party asserting the breach of fiduciary duty failed to prove damages in their principal brief. Apparently they tried to argue damages in the response brief but "issues not raised or argued in a principal brief cannot be raised in a reply brief." Because one of the elements of breach of duty was not proven, the claim failed. **Issue 3: Removal of trustees.** A court **may** remove a trustee under Minn. Stat. § 501C.0706(b)(4) because of (1) a substantial change in circumstances **or** (2) such trustee's removal is requested by all qualified beneficiaries, served the beneficiaries best interests and was not inconsistent with the material purpose of the trust. A separate trustee was not removed because the trial court found no substantial change in circumstances and determined that removal was not in the best interest of the beneficiaries.

<u>Minn. Stat. § 290.01 Subd. 7b(a)(2) Resident Trust income tax statute is unconstitutional</u>. *Fielding v. Comm'r of Revenue*, 916 N.W.2d 323 (Minn. 2018). The Minnesota Supreme Court found the Minnesota Resident Trust income tax statute Minn. Stat. § 290.01 Subd. 7b(a)(2) unconstitutional as applied under the Due Process Clause of the United States and Minnesota Constitutions. In this case, the grantor created an irrevocable trust that was a grantor trust. For the first 30 months, the Trust remained a grantor trust subjecting the grantor to tax on all trust income. However, on December 31, 2011 the grantor terminated grantor trust status. The Trust owned S-Corporation stock of a Minnesota based company. In 2014 the Trust sold the company stock and incurred more than $250,000 in income taxes and invested the sale proceeds at an institution outside of Minnesota. The Trust filed the 2014 income tax return under protest and filed for a refund. The Tax Court found the Minnesota tax unconstitutional as applied and the matter was appealed to the Minnesota Supreme Court.

Minn. Stat. § 290.01 Subd. 7b(a) defines a resident trust as "a trust, except a grantor type trust, which …is an irrevocable trust, the grantor of which was domiciled in this state at the time the trust became irrevocable." An initial issue for the Court's constitutional analysis is whether the Court should consider all facts and circumstances regarding the trust or whether the only issue is the grantor's domicile when the trust became irrevocable. While the statutory definition looks to the grantor's domicile, the constitutional analysis requires the Court to examine all the facts and circumstances surrounding the Trust. The facts and circumstances approach is consistent with prior cases examining the constitutionality of a tax statute.

When turning to the facts and circumstances, due process is satisfied if (1) there is a "minimum connection" between the state and the person, property, or transaction subject to the tax, and (2) the income subject to the tax is rationally related to the benefits conferred on the taxpayer by the State. There is no argument that the State can tax Minnesota sourced income. That is not disputed. The question is whether Minnesota can tax *all* income. The State points to the following facts to justify the tax: the grantor was a Minnesota resident and domiciled here when the trust was created and became irrevocable, the trust owned stock in a Minnesota company, the trust was created by a Minnesota law firm and the original documents were held by the Minnesota law firm, the trust provides that Minnesota law controls the trust and one beneficiary was a Minnesota resident. The taxpayer points to the following facts opposing the residency status: No Trustee has been a Minnesota resident, the Trust is not administered in Minnesota, the records are maintained outside of Minnesota, other Trust income is derived outside of Minnesota, and 3 of 4 beneficiaries live outside of Minnesota. The Court found that the State's arguments are either irrelevant or too attenuated to satisfy the due process arguments. The State arguments do not look to the party paying the tax. The Trust is paying the tax, not the grantor. The fact that the stock owned by the Trust was in a Minnesota company is irrelevant to the fact that the stock is an intangible asset located outside of Minnesota and there is no connection to the grantor. The Trust owns the stock not the grantor. While a Minnesota law firm created the Trust, the law firm did not represent the Trustees and storing an original document by the Minnesota firm was a convenience to the grantor not the trust. Also pre-2014 facts that show a connection to Minnesota are irrelevant to the analysis because the Trust is the taxpayer and what is relevant is the facts in 2014 and thereafter. "The direct link between the activities that generated the income in the year at issue and the protections provided by the State in that same year establishes the necessary rational relationship that justifies the tax." Historical contacts unrelated to the tax year is not reasonable.

The Court noted that testamentary trusts created by a will probated in Minnesota under the statute may be handled differently and cited to *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539, 544 (D.C. 1997)(finding it constitutional to tax a trust from a will probated in that state), and *In re Swift*, 727 S.W.2d 880, 882 (Mo. 1987)(probating the will in Missouri was not a sufficient nexus to tax the trusts). Thus it seems the issue of a testamentary trust from a will probated in Minnesota is still an open issue.

<u>Significant Malpractice Case for Estate Planning Attorneys</u>. *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly, Lindgren Ltd.*, 916 N.W.2d 491 (Minn. 2018) *reh'g denied* (Aug. 21, 2018). I reported this case when it was in the Court of Appeals. This Minnesota Supreme Court reversed the Court of Appeals. The facts are simple. The client/testator had the attorney draft a revocable trust. The trust devised about 45% of the trust property to a person more than 37.5 years younger than the client thereby triggering a generation-skipping transfer tax (GSTT) of about $1.645 million. The allegation is that the attorney never advised the client about the tax or options to reduce the tax. The holding of the Supreme Court is simple but the analysis is significant. The Supreme Court held that a personal representative does not have standing to bring a malpractice claim that did not exist *before the testator died* but would have standing if the claim existed before death. The Court also held that the trustee of the decedent's revocable trust did not have standing to bring a malpractice claim because a trust is not a person and therefore not an intended third-party beneficiary of the attorney-client relationship. There is a great to deal unpack in this case.

Standing of a personal representative or trustee. Standing is a central issue. Under Minnesota law, a malpractice case survives a testator's death (if it accrues before death). Minn. Stat. § 573.01. If damages accrue before the testator dies thereby creating a tort claim then the personal representative has standing to bring the tort claim. Minn. Stat. § 524.3-703(c). Note that contract claims can also be brought but they are subject to the non-claim statute of the probate code, Minn. Stat. § 524.3-803(a), while tort claims are not included in the definition of "claims" in probate, Minn. Stat. § 524.1-201(8), and are not subject to the non-claim statute. With regard to trustees, this Court found that the trustee is not a third party intended beneficiary of the attorney-client relationship. The Court said: "[a] trust, then, is not itself a 'thing' or a person under the law." Therefore it could not be the intended beneficiary of the attorney-client relationship. While the Court did leave the possibility open that a trust might be such a beneficiary in certain cases, such was not the case here.

What are the elements to a claim? First, each element of a claim must exist. In transactions such as estate planning, the elements to a claim include (1) the existence of the attorney-client relationship, (2) acts constituting negligence or breach of contract, (3) that such acts were the proximate cause of plaintiff's damages, and (4) that but for the attorney's conduct the plaintiff would have obtained a more favorable result in the relevant matter. In estate planning cases where a third party argues that he or she is a direct and intended beneficiary of the lawyer's services, further analysis is needed. To be a direct and intended beneficiary, the party must be "a direct beneficiary of a transaction if the transaction has[,] as a central purpose[,] an effect on the third party and the effect is intended as a purpose of the transaction." If that is proven then the court must then apply the *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) factors to determine whether the lawyer is liable to a third party. These factors include: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of connection between the defendant's conduct and the injury, and (5) the policy of preventing future harm. This Court found that a personal representative stands in the decedent's shoes and therefore satisfies the first element of the test. The alleged facts, taken as plead, may satisfy the remaining elements of a claim in this case.

When does the claim accrue? When some damage accrues. If the personal representative (or trustee) has standing and a claim can be proven, the next big questions is:

When does the claim accrue? The answer is when “some damage” accrues. If you can prove some damage occurred as the result of professional negligence then the claim has accrued. The term “some damage” is to be interpreted broadly and does not require that the majority or substantial portion of the possible damages has taken place. However, the Court held that “some damage” included a “concrete harm created either by financial liability or the loss of a legal right” and goes on to say that in this case the decedent suffered no “material injury” to accrue damages before death. The Court found that mere reliance on bad advice is not some damage that results in an accrued claim. While it seems we only need “some damage” the Court seemed to still require some type of material injury to make a claim accrue. So in the estate planning context, some damage can accrue while the client is alive and some damage can accrue after the client dies. If the damage accrues when the client is alive then the client can sue for malpractice while alive and the personal representative can sue for malpractice after death for the decedent. But if some damage accrues after death, it seems only the intended third party beneficiary can sue for malpractice.

Under Minn. Stat. § 524.3-101 real property devolves at death of testator to devisee even if through a residuary clause and not a specific devise. *Laymon v. Minn. Premier Props., LLC*, 913 N.W.2d 449, (Minn. 2018) upholding 903 N.W.2d 6, (Minn. App. 2017). The Minnesota Supreme Court upheld the Court of Appeals decision in most respects, but did not uphold all the reasoning of the Court of Appeals. The facts in this case are quite cumbersome related to the transfer of title between subsequent parties with multiple names. Dad bought the property with a mortgage. Dad died. Before the estate was probated foreclosure action was started. The will devised everything in equal shares to the kids. Before the probate was started, one of the kids deeded his interest in the property to a third party for $10,000 (and the deeded interest changed hands in various ways after that). The sister then started a probate. The sister sought a quiet title/slander of title claim against the 3rd parties. The general argument was that the brother could not deed his interest in the land to the third parties because the real estate was still “subject to administration.” The court did a nice job of slowly going through the points of law. First, Minnesota law is quite clear that title to real estate vest at death. *In re Beachside I Homeowners Ass’n*, 802 N.W.2d, 771 (Minn. App. 2011)(a decree is not needed before title vests); *Bengtson v. Setterberg*, 35 N.W.2d 623 (Minn. 1949); now codified in Minn. Stat. § 524.3-101. That code provision states that: “Upon death, a person’s real and personal property devolves to the persons to whom it is devised by last will….” The Supreme Court held that the persons to whom the property devolves includes the residuary beneficiaries of an estate. But the argument was made that since the Personal Representative has the power of administration that the devisee under the will cannot convey title. The court of appeals found that the personal representative has “power over the property” not title over the property. Hence, title is encumbered during administration (which can result in divestment of title by sale for example) but the devisee has title and the PR has power over title. Title vests at death and the PR’s right to administration does not prevent the vesting of title. But the Supreme Court ruled that it did not have to answer that question because the personal representative never exercised any powers of administration over the property inconsistent with the respondent’s interests, so the issue is not before the court. The statute does not create exceptions for residuary beneficiaries that result in a lapse of title or loss of title. The district court summary judgment was reversed in part to reflect the effect of this holding and remanded for further proceedings.

Minn. Stat. § 524.2-804 Subd. 1 disinheriting spouse as beneficiary of a life insurance contract can apply retroactively without violating the contracts clause of the U.S. Constitution. *Sveen v. Melin* 138 S.Ct. 1815 (2018). Husband and wife were married in 1997. In 1998 husband purchased life insurance and named his wife as beneficiary and kids of a prior relationship as contingent beneficiaries. In 2002 Minnesota adopted Minn. Stat. § 524.2-804 which disinherits spouses from beneficiary designations upon divorce. It provides "the dissolution or annulment of a marriage revokes any revocable…beneficiary designation…made by the individual to the individual's former spouse." In 2011 the couple divorced. The beneficiary designation was not changed and the divorce decree made no mention of the insurance policy. At issue is whether a divorce under state law disinherits a spouse by retroactively applying the statute. The related question is whether the statute violates the Contracts Clause of the United States Constitution, Art. I, §10, Cl. 1. The Contracts Clause does not prohibit all laws affecting contracts, *El Paso v. Simmons*, 379 U.S. 497, 506-507. There is a two-step analysis to determine if the contract clause is violated. First, we examine whether the state law "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244. To analyze the first test, the court examines (1) the extent that the law interferes with a party's reasonable expectations, (2) undermines the contractual bargain, and (3) prevents a party from safeguarding or reinstating their rights. If there is a substantial impairment to the contract, then step two examines whether the law is an appropriate and reasonable method to advance a significant and legitimate public purpose. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412. In general the argument for the ex-wife is that the statute voids the ex-wife as beneficiary even if he wanted ex-wife to remain as beneficiary and that if the husband wanted the ex-wife to get the insurance after a divorce, then he has to fill out a new beneficiary designation form and that is too burdensome and therefore unconstitutional. The kids argue, and the Court agrees, that the statute is actually intended to protect the probable intent of the decedent and that in most cases the preference is to revoke the beneficiary designation of the ex-spouse. In this case, a default rule such as revoking a spousal designation does not unduly interfere with the contract and works to protect the contract. The law can be applied retroactively.

Minn. Stat. § 519.11 subd. 1 safe-harbor applies to nonmarital property in antenuptial agreements while the common law applies to marital property in antenuptial agreements. *Kremer v. Kremer,* 912 N.W.2d 617 (Minn. 2018). Minn. Stat. § 519.11 subd. 1 provides that if there is (1) full and fair disclosure of the earnings and property of each party, and (2) the parties have had an opportunity to consult with legal counsel of their own choice, then the agreement satisfies the due process safe harbor as it applies to nonmarital property in the antenuptial agreement. If the safe harbor is not satisfied, the agreement as it applies to nonmarital property might still be valid under a common law analysis. But with regard to marital property, only the common law applies. The case *of McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989) requires procedural fairness (equitably and fairly made which is the same as Minn. Stat. § 519.11 subd. 1 requirements) and substantive fairness (whether the agreement is unconscionable or oppressive). Also see *In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007) which modified *McKee-Johnson* procedural fairness by applying the following 4 factor test: (1) whether there was fair and full disclosure of the parties' assets; (2) whether the agreement was supported by adequate consideration; (3) whether both parties had knowledge of the material particulars of the agreement and how those provisions impacted the parties' rights in the absence of the agreement;

and (4) whether the agreement was procured by an abuse of fiduciary relations, undue influence, or duress. The ability to consult with independent counsel remains a relevant factor but is not determinative of fairness. The court specifically found that this common law test is NOT substantially similar to the Minn. Stat. § 519.11 subd. 1 procedural tests. Adequate consideration is determined by examining the circumstances surrounding execution and enforcement of the antenuptial agreement to determine whether they were fair and equitable. The court has found in prior precedent that the agreement must provide for the financially disadvantaged spouse. *Estate of Serbus*, 324 N.W.2d 381 (Minn. 1982). The agreement must also be free from duress. The facts in this case show that the agreement did not satisfy the common law tests.

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Court Applies 501C.0709, 501C.1004 and Common Law (501C.0106) Attorney Analysis After *Lund* Case. *In re the Trust of Schauer* , A18-0969, 2019 WL 1510698 (Minn. App. April 8, 2019). In this case the primary issue was establishing a fair market value for stock to be sold under a buy-sell agreement from the trust to the testator's son as the sole shareholder of a family company. After a stock price was established the testator's daughter appealed arguing the price was not proper for various reasons but basically because the trustee was not acting impartially. Unlike the *Lund* case, the court upheld the district court discounts for lack of control and marketability and a discount for taxes due to liquidation and cited cases supporting the discount. The court found both experts in the case addressed these issues and discounts, and the determined the decision of the lower court was proper and the trustee acted properly. The court then addressed attorney fees after the *Lund* case. The court first noted that the new Trust Code is supplemented by the common law (501C.0106) and then turned to the *In re Atwood's Trust*, 35 N.W.2d 736 (Minn. 1949) case when applying the common law particularly when the beneficiary wants attorney fees paid. The court discussed section 501C.1004 and the common law requirements to award attorney fees to a beneficiary. The court found that some fees related to the negotiation of the stock price were improperly awarded because they were incurred to assist the son as a shareholder rather than being incurred solely on the basis of the son's status as a beneficiary of the trust. The district court findings were also not adequate to determine whether attorney fees were properly awarded as the reasoning for awarding fees was not clear. Some fees were denied but the reasons for denial were not clear. The award of attorney fees was reversed and remanded for new findings and to apply the common law in association with 501C.1004.

Charging orders allowed against a Minnesota LLC. *Benzick v. Palm Props. LLC*, A18-0956 2019 WL 1320617 (Minn. App. March 25, 2019). Just as an FYI, this case involves the court determining the scope of a charging order against LLC's under Minn. Stat. § 322C.0503 Subd. 1 and Subd. 2. LLC's have been used by some people in the past as a means to shield assets from creditor collections. Under Minnesota's new LLC laws, charging orders are allowed. A court can order that distributions from an LLC must be paid to the creditor and not the LLC member. This case examined how broad that order can get. While not an estate planning case per se, if you assume LLC's offer creditor protection you may want to review this case.

Summary judgment upheld on procedural grounds. *In re Estate of Batinich*, A18-1226 2019 WL 1320632, (Minn. App. March 25, 2019). This case has been subject to litigation for many years in two states. It involved members of an LLC suing each other. The decedent (while alive) got a judgment against two other LLC members. After he died, the members with a judgment against them filed a claim against the deceased member's estate. The nature of the claim was not clear. The claim was denied and they sued to enforce the claim. The district court upheld denial of the claim and the court of appeals agreed. The appellants argued that they were entitled to an accounting from the LLC that they were members of, that they were deprived of an opportunity to oppose summary judgment, and that there were genuine issues of material fact. The first problem is that the LLC was not a party to the probate action. Since it was not a party to the probate action the court could not compel an accounting from the LLC. Next the appellants argue they could not oppose an affidavit submitted after the time to file documents and after they could be challenged. The appeals court found that the facts at issue were known to the appellants and they could have opposed the factual allegations on SJ and that the discretion to allow the affidavit into the record was just that, discretionary, and appropriate. Appellants also argued that SJ was not proper before discovery closed. But the court found that the matter had been open nearly a year and that they failed to explain why they only pursued discovery after the SJ motion was filed. In the end, the appellate court found this to be a discretionary matter for the district court and that the SJ could be pursued with open discovery. Finally the appellants argued that there were issues of material fact but the courts disagreed.

Damages claim from sexual abuse upheld. *W.J.A. v. Estate of Johnson*, A18-0613, 2019 WL 1233534 (Minn. App. March 18, 2019). The plaintiff brought a sexual abuse claim against a decedent's estate. There was no actual probate issue addressed, just the procedural issues of a civil suit.

Motion opposing partial distribution denied. *In re the Estate of Rutt*, A18-0749, 2019 WL 1104819 (Minn. App. March 11, 2019). This is the third appeal for this estate. The PR petitioned for partial distribution of the estate. Appellant opposed the partial distribution and requested other relief. The petition was denied and the denial was upheld on appeal. The petitioner wanted the estate to hire a CPA to determine whether or not the estate was compliant with its tax obligations. That relief was denied. The district court denied payment of appellant's attorney fees and the court found that the estate payment of fees was reasonable. Appellants objections to a prior account were also denied. The court found the appellant's arguments without merit or support. Appellant was also denied personal property that he bid on from the estate but failed to pay for. Appellant argued his garnished wages due to judgment should be applied to his higher interest debts before being applied to his lower interest debt but he had no legal support for his argument. Appellant's arguments all failed. The estate only had about $13,000 left after partial distribution.

Excluded spouse under slayer statute can still have standing in probate, 524.1-201(33), 524.2-803. *In re Estate of Sandland*, A17-2016, 2018 WL 6442171, (Minn. App. Dec. 10, 2018). In this case the husband killed his wife. Under the Minnesota slayer statute (Minn. Stat. § 524.2-803) the husband is no longer an heir of the estate. When a joint tenant owner kills the other owner, the joint tenancy is severed and becomes a tenant in common interest. *Johnson v. Gray*, 533 N.W.2d 57 (Minn. App. 1995). A tenant in common owner cannot exclude a cotenant. *Petraborg v. Zontelli*, 15 N.W.2d 174 (Minn. 1944). The husband was in prison and created a power of attorney to have a person act on his behalf. The POA wanted access to the house but the special administrator of the estate denied access arguing lack of standing for the POA. At issue is whether the POA has the right to enforce property interests for the surviving spouse when that surviving spouse was removed as an heir due to the slayer statute. In this case the court of appeals found that although the husband was removed as an heir, he still had an interest in the estate because he was a tenant in common owner of the real estate and could sue the estate to protect his own personal rights of his property. The court also looked to Minn. Stat. § 524.1-201(33) to find that the husband remained an interested person in the estate because he is still a "spouse" under the statute and was included among "any others having a property right." The POA is allowed to inspect the property and obtain the husband's property.

Appointment of guardian and conservator is reversed for insufficient findings of fact. *In re Guardianship of Struhs*, A18-0452, 2018 WL 6273101, (Minn. App. Dec. 3, 2018). In a rare case, the court of appeals reversed the appointment of a guardian and conservator because the findings were insufficient to support the appointment. The petitioner was a long-time friend of the respondent. The respondent was seen in town with urinary stains on his pants and seemed confused. He was dribbling all over his clothes. His driver's license was taken in 2017. His living conditions were dilapidated and unlivable. It was claimed his furnace needed work. It was claimed that he ate mainly bread and sweets but he changed that after being confronted about his diet and he bought better foods. He was renting his farm at below market rents. No medical records were introduced. The problem is that evidence was not introduced to show that the respondent was acting with diminished capacity. For example, they alleged the respondent was confused about trips he had taken but did not offer proof showing the actual days of the trips. They did not introduce evidence that the furnace actually needed repair. They did not produce evidence that finances were in fact being wasted. There was no testimony regarding alternatives. It seems the testimony was thought to be self-evident without additional facts or evidence. The court of appeals found that the evidence did not meet the statutory burden.

A guardian with all general powers has standing to bring a Harassment Restraining Order (HRO) for a Ward. *Thompson v. Thompson*, A18-0309, 2018 WL 6165250 (Minn. App. Nov. 26, 2018). In this case the guardian for a ward sought a harassment restraining order on behalf of the ward against the former step-parent/former co-guardian. The court granted a 2 year order. One of the issues raised on appeal was standing. Appellant challenged the guardian's ability to seek an HRO for a ward. The court noted that guardians have broad powers under Minn. Stat. § 524.5-313(c) and cited *State v. Nodes*, 538 N.W.2d 158, 161 (Minn. App. 1995) to find that guardian powers include the power to bring an HRO. In this case the district court had given the guardian all powers under Minn. Stat. § 524.5-313(c) and therefore the court held that the guardian had power to bring the HRO. The court of appeals upheld the guardian's standing to bring an HRO.

In the case of a revocable trust, undue influence and lack of capacity elements are the same for a will as for a revocable trust; Minn. Stat. § 501C.0601. *In re Tr. Created by Kasell*, A18-0340, 2018 WL 5915434, (Minn. App. Nov. 13, 2018). The mother created a revocable trust. The mother entered into an agreement that the trust would not be amended without a court order but it seems it was amended on August 11, 2017 without a court order. That amendment disinherited one of two sons. When the trust was before the court on an unrelated issue the amendment was brought up and in September she sought approval of the amendment. The disinherited son objected. The disinherited son, however, did not produce evidence showing incapacity or undue influence. He expressed opinions but he did not present facts and did not have medical facts. The court found that the standards for capacity and undue influence for a will were the same as for the revocable trust citing Minn. Stat. § 501C.0601 and *Norwest Bank Minn. NA v. Beckler*, 663 N.W.2d 571, 579 (Minn. App. 2003).

<u>Deed clarified title and was not a deed to a dead person.</u> *In re Estate of Farnes*, A18-0036, 2018 WL 4397449, (Minn. App. Sept, 17, 2018). Apparently, in 1973 father deeded title to the farm to daughter to avoid losing the farm in a divorce. It appears the father and daughter intended to give title back to dad but this was not done or not done correctly. The decision does not give us the facts on the actual title and deed matters. At issue was whether the daughter's deed to dad signed after dad died was valid. Normally you can't deed property to a dead person. *In re Estate of Savich*, 671 N.W.2d 746, 750 (Minn. App. 2003). But in this case, the deed was corrective or clarifying so that it was valid to clear a defect in title. Again, the decision does not have more facts so I would like to have more to clarify the title sequence and issues, but the court of appeals found that the district probate court correctly found that title was just clarified and that this was not a new vesting of title. Therefore the farm was in the father's estate and is properly probated under the father's probate proceeding.

<u>Trustee did not breach duties</u>. *In re Weitzel 2007 Irrevocable Tr.*, A17-1698, 2018 WL 4201181, (Minn. App. Sept. 4, 2018). The parents created an irrevocable trust. The trust apparently helped one minor beneficiary pay for his education. The father of the minor beneficiary brought a pro se action against the trustees when the settlors stopped funding the trust. The pro se litigant brought multiple claims that were all denied and the litigant was denied the right to amend the complaint to include RICO claims. The case does include basic references and elements to breach of fiduciary duty claims, fraud, intentional infliction of emotional distress, accounting requirements, the duty to inform principles, and standards to deny amendment of a complaint.

<u>Attorney fees denied Minn. Stat. § 524.3-720; interest is payable on judgment in excess of $50,000 at 10%; Minn. Stat. § 549.09 Subd. 1(c)(2)</u>. *In re Estate of Anderson*, A18-0365, 2018 WL 4057252 (Minn. App. Aug. 27, 2018). This is the second time this case is on appeal. Property was rented to the grandson before death and per the will was allowed to be rented on the same terms after death. The property was rented at a substantial discount. The renter also had a first right of refusal if the land was sold. The estate was held open for an extended period of time costing the estate. The land was eventually sold to the grandchild for $1.6 million when the property was worth over $3 million. The sale was voided. The estate got the land back but had to repay the grandson. The grandson wanted his attorney fees paid and interest on his judgment. The attorney fees were denied because the estate did not benefit from his below market rent even though it was allowed per the will. But he was entitled to statutory interest of 10% for his judgment because the judgment was greater than $50,000. The matter was referred back for interest calculations.

<u>Settlement Agreement and Memorandum of Understanding is an Enforceable Agreement, Minn. Stat. § 572.35 Subd. (1)1, and PR could settle the claim under Minn. Stat. § 524.3-715(27) without satisfying Minn. Stat. § 524.3-912 even when settlement altered</u>

distributions of estate. *In re Estate of Kukowski*, A18-0217, 2018 WL 4056590 (Minn. App. Aug. 27, 2018). Mom died and her estate was opened. After mom died, her son, Steven died. Mom's estate sought to recover about $200,000 from Steven's estate. It alleges Steven took many guns, a boat, motor, diamond ring, Indian Artifacts and other items from their mother before she died. The mother's estate and Steven's estate entered into a mediated settlement agreement. The agreement explicitly laid out several binding points in the memo of understanding and specifically said the agreement was binding although it did acknowledge that other details would be finalized in a separate agreement. The parties could not get to a final separate agreement. Steven's estate returned much of the property but did not complete all terms of the contract. Steven's estate sued to enforce the agreement. First, the court noted that this is a valid agreement under Minn. Stat. § 572.35 Subd. (1)1. The terms of the memorandum of understanding were sufficient enough to be enforceable. One of the heirs to the mother's estate continued to object arguing that she was not a party to the settlement agreement so it is not enforceable under Minn. Stat. § 524.3-912. The court noted that this was an agreement between the two estates and not an agreement between the heirs. The personal representative had authority to "settle matters for the estate and its heirs" under 3-715(27) and whether that settlement affects the ultimate distribution of the mother's estate is not before the court at this time. If the heirs try to settle the estate that is governed by 3-912, but when a PR settles a claim that is governed by 3-715 even if part of the settlement alters distribution of the estate.

Trustee not removed for refusing to invest in tangible assets as opposed to intangible assets. *In re Tr. of Jones,* A18-0021, 2018 WL 3826331, (Minn. App. Aug. 13, 2018). Trust beneficiary tried to remove corporate trustee because the corporate trustee would not follow the beneficiary's investment instructions. Specifically, the beneficiary "fully expect[s] in [his] lifetime a currency crash of the United States dollar that shall affect all investments in dollars". So he wanted the trust invested in physical assets. But the court rejected the beneficiary's arguments for removal. First, the beneficiary failed to explain how the trustee put its interests before the beneficiary by investing in intangible assets. Second, the corporate trustee had no duty to abdicate its investment authority to the beneficiary. Third, the beneficiary failed to show how the investments by the trustee were not in his best interests. Fourth, the trustee communicated with the beneficiary contrary to his allegations and the communications did not merit any removal from office. The petition for removal was denied.

Will voided for lack of capacity and undue influence; attorney fees for nominated PR denied. *In re the Estate of Anderson-Stewart,* A17-1845, 2018 WL 3520835, (Minn. App. July 23, 2018). Another will contest case. The wife in a second marriage had a will devising everything to spouse and after both deaths the wills divided the estate among both families. After dementia set in the mother changed her will to favor just certain children of hers and by a POA a beneficiary designation on a financial account was changed. The will was challenged and the court found that it was invalid for undue influence and lack of capacity. The court of appeals found sufficient evidence to support lack of capacity so it did not review the undue influence claim. The nominated PR was denied attorney fees because that relief was not specifically sought in the district court.

Statute of limitations Minn. Stat. §541.05, Subd. 1, ran on breach of fiduciary duty claim-be mindful of tolling by fiduciaries. *Hansen v. U.S. Bank Nat. Ass'n* , A17-1608, 2018 WL

3213105, (Minn. App. July 2, 2018). Seller (and his brother) was to sell property to the City in 2009. The City was to provide Seller a 5 year forecast (compiled by a CPA or other independent financial consultant) projecting revenue that will be able to pay the City's debt service to purchase the property. Seller died November, 2009 and the Court appointed U.S. Bank (and an individual) as special administrator of the estate. The purchase agreement was amended in April, 2010. No projections were presented to the seller and the closing on the sale took place in April, 2010. The special administration was closed and the estate opened. The City financing went under and by August, 2012, payments on the note to seller stopped. The heirs sued the bank in January, 2017 alleging breach of fiduciary duty. At issue is when the statute of limitations started to run. The Court found, applying the *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006) case, that "some damage" accrued when the sale closed in 2010 because they lost their right to the projections or to re-negotiate the contract. At that point the requirement of the City to give projections ended and the sale was complete. The contract became fixed. The suit against the bank was initiated more than 6 years after the close on the sale so the statute of limitations under Minn. Stat. §541.05, Subd. 1 had run on the case. In common law, a fiduciary can toll the SOL "for fraudulent misrepresentation by silence even though there was no evidence of fraudulent statements or intentional concealment." *Toombs v. Daniels*, 361 N.W.2d 801 (Minn. 1985). But the record is void of any concealment even by silence. So the tolling argument is lost.

Settlement agreement was upheld. *In re Johnson*, A17-1765, 2018 WL 2770527 (Minn. App. June 11, 2018). The trust estate has been subject to years of litigation. As a settlement, one trustee resigned as co-trustee in exchange for money and all claims were waived. The court held a hearing the next day to affirm the settlement. The trustee that resigned then tried to get out of the settlement. He lost. I won't waste any more time than that on this.

Election against the will was late and waived by agreement. *In re Estate of Houle DeHaven*, A17-1762, 2018 WL 2770406 (Minn. App. June 11, 2018.). The wife died in 2015. The husband had signed a consent and waiver of the elective share 6 years before the decedent died. On January 10, 2017 the husband tried to file to elect against the will. The election was not filed within 6 months of the date the will was probated. Under Minn. Stat. §524.2-211(a) the election was late because it was not filed within 6 months of probating the will. While a court can extend this time limit (*In re Estate of Kruegel*, 551 N.W.2d 718) the court did not abuse its discretion to deny the extension.

Trust is not ambiguous. *In re Rutherford D. Brosious Tr. Agreement*, A17-1409, 2018 WL 2186991 (Minn. App. May 14 2018). This is a dispute over the interpretation of a trust. The trust provided for the administration of a trust for 5 years then distribution to living children (and subsequently to charity). One of the children predeceased the 5 year trust. So his estate argued the trust was ambiguous and should receive part of the trust estate. The district court and court of appeals disagreed. The trust was not ambiguous. The deceased child needed to survive to receive a share. The trust was clear. The child did not survive so the estate does not collect a share.

Petition for restoration to capacity is denied. *In re Guardianship of Johnson*, A17-1193, 2018 WL 2090407, (Minn. App. May 7, 2018). The ward has been under guardianship since he was 18 years old. He is now 33. The record provides detailed information why he was placed under guardianship. The ward sought to terminate the guardianship or at least restore some guardian powers. The court terminated the mother's appointment as guardian and appointed an independent guardian. The ward appealed. The court found that while the ward has exhibited some independence skills, it found that the guardianship is still in the best interests of the ward. The ward still exhibits the need for supervision and lacks impulse control and the history of violence has persisted. The court gave great deference to the ward's mother and her testimony which supports the court's decision. The decision to keep the guardianship was upheld.

OTHER JURISDICTIONS:

Attorney-in-fact does not have power to appeal pro se. *In re Estate of Aquilla Wheeler*, 824 S.E.2d 715 (Ga. App. 2019). Administrator of estate appointed an AIF. AIF sought to have deeds declared invalid and title to real property in the estate. The matter was dismissed and AIF appealed. A POA does not grant an AIF standing or power to pursue a matter pro se. Being an AIF is not a grant of a license to practice law.

Attorney-in-fact was awarded attorney fees incurred to defend himself from principal's objection but the award was based on common law and not statute. *Cottini v. Berggren*, 420 P.3d 1255 (AK 2018). The principal challenged the work done by the attorney-in-fact. The AIF incurred over $71,000 in fees defending himself. The court found that the AIF was entitled to fees, but interestingly, the court found that the fees are not awarded on the statutory provision that allows an AIF to hire lawyers (because the statute does not clearly distinguish between fees to act as the AIF for the principal v. fees to defend actions against the AIF), but under the common law rules of principal – agent relationship the fees may be shifted to pay the agent's fees.

POA did not specifically allow for changing retirement account to name AIF (girlfriend). *Collins v. Noltenseier*, 103 N.E.3d 495 (Ill. App. 2018). AIF changed retirement account beneficiary from brother to herself. AIF was decedent's girlfriend. The POA had the standard power to make gifts and change beneficiary designations. But the issue is the self-dealing. The court found that the POA must specifically allow for the self-dealing. This conclusion can be rebutted with other evidence but in this case they relied on the POA with no additional evidence to rebut the self-dealing.

Vanguard is allowed to refuse Statutory POA. *Knox v. Vanguard Grp., Inc.*, 2018 WL 315157 (Mass. 2018 Not Reported in Supplement). Son had POA for Mom. Son tried to use POA for Mom at Vanguard for changing IRA account information. Vanguard required that son use their form. After back and forth son tried to move account to Fidelity. Son claimed damages (taxes) due to Vanguard refusing his POA. But the Vanguard agreement provides that the client must use forms acceptable to Vanguard. The POA was not acceptable. Vanguard wins.

The elective share was denied with a general waiver of rights. *In re Estate of Sharpe*, 814 S.E.2d 595 (NC App. 2018). The husband and wife entered into a pre-nup with a general waiver of the right to each other's property. The waiver did not specifically mention the elective share. The surviving spouse's son, via POA, tried to elect against husband's estate. The court found the agreement's general waiver was sufficient to waive the elective share.

<u>Failure to name personal representative in action to recover the elective share results in a loss of the elective share</u>. *Ray v. Ready,* 822 N.E.2d 181 (Va. 2018). All actions must be brought against a living party individually or in a representative capacity. In this case the elective share was brought against the estate. By the time the pleadings were amended to plead the personal representative the deadline for the election had passed.

<u>In an elective share calculation, spouse gets life estate in real property and not fee interest</u>. *Ciani v. MacGrath*, 114 N.E.3d 52, 481 Mass. 174 (MA 2019). The underlying dispute relates to a partition action in real estate. But that requires determining spouse's interest under elective share. Spouse gets a life estate in estate in excess over $25,000. The way this statute is written she get personal property in trust and real property vested in her name. But the issue is whether it is an income life estate or a fee. The court concluded it is a life estate.

<u>Husband was not entitled to $50,000 supplemental share of elective share when husband received more than that from other assets</u>. *In re Estate of Cloos*, No. 17CA1065, 2018 WL 5986684 (Colo. App. Nov. 15, 2018). This is a very curious question in the elective share statutes. The supplemental share of the elective share is $50,000. The question is whether the spouse always gets at least $50,000 or is it only when the spouse does not get that much from their own assets. This court found that the spouse/husband get the greater of the augmented estate or the supplemental share. In other words, since husband has $50,000 in the augmented estate he does not need the supplemental share.

<u>Change of IRA was not part of elective share under theory of fraudulent conveyance</u>. *Hayes v. Hayes*, 198 A.3d 1263 (Vt. 2018). Husband (in the middle of divorce proceedings) changed his IRA to his niece and nephew but the will still gave everything to wife. Wife tried to argue that the change of beneficiary designation was a fraudulent transfer. There was no intent to disinherit wife, only to benefit the niece and nephew. It was his intent that was at issue and the intent was not fraud. Wife could not get under the will AND elective share. She could only have one and she chose the will.

<u>Gift to charity that was administratively closed at time of death but re-opened 7 months later, fails</u>. *Sibley v. Estate of Sibley*, No. 3D18-2027, 2019 WL 1461325 (Fl. App. Apr. 3, 2019). The charity in the case was created but never funded. Three months before death the charity was administratively closed and re-opened 7 months after death. The devise was to the charity if it was open at the time of death. It did not exist at death so the gift failed.

<u>Summons that did not contain parties' names in caption but contained the name of the trust was not defective in service of process on beneficiaries</u>. *In the Matter of Hamilton Living Tr.*, 2019 Ark. App. 76 (2019). The caption of a case included the name of the trust and not the name of the beneficiaries. The beneficiaries claim defective service of process. Naming just the trust was sufficient.

<u>Equitable adoption expanded to include person held out as a child.</u> *In re Estate of North Ford*, 200 A.3d 1207 (D.C. App. 2019). The equitable adoption doctrine normally completes what was intended legally but failed for some other purpose, i.e., equity completes what can be done in law. In this case, like a few other jurisdictions, the doctrine of equitable adoption is applied where the person is raised as a minor into a family and takes the family name and is held out as a family member that the person can be equitably adopted even if an adoption was not attempted and there is no other action in paternity and there is no paternity relationship.

<u>Equitable adoption was not allowed to deprive son of inheritance from actual father</u>. *Estate of Castellano*, 196 A.3d 101 (N.J. Super A.D. 2018). A man died intestate. His only heir is a boy whose mother married another man before the son was born, but the new husband was listed as the father on the birth certificate. They divorced a few years later. When the boy was 30 the mother told him who his real father was. There was a minimal relationship between the two after that. Then Castellano was murdered. The decedent's siblings wanted the money, the boy said he was the heir. So the siblings tried to force equitable adoption upon the son. The court disagreed and did not force equitable adoption in these facts.

<u>Estate is distributed intestate even if there is a will when the will is not probated in 4 years after death</u>. *Ferreira v. Butler*, 62 Tex. Sup. Ct. J. 776 (2019). Decedent did not probate the will of his second wife. After decedent died, his first wife, as executor of his estate, tried to probate the second wife's will to inherit the estate for the decedent. The second wife's heirs appealed. The Court found that the estate remains intestate because if the will is not probated within the statutory time deadline the estate is intestate.

<u>Custodian of assets can be sued on consumer protection statute for taking too long to distribute IRA funds after death</u>. *UBS Fin. Serv. v. Aliberti*, 113 N.E.3d 335 (Mass App. 2018). UBS brought action to determine account beneficiaries and beneficiary counter-sued for many claims including violation of consumer protection statute, breach of fiduciary duty and breach of contract. The UBS manager who managed the IRAs, who used to be an in-law of decedent, texted the beneficiary after the beneficiary requested payment of the IRA and said: "How big of a whore are you?; "You are the most worst piece of filth I have ever encountered" and other messages. UBS did not cooperate with the beneficiary and after over a year of delays the beneficiary sued. The claims were allowed to proceed.

<u>Division of assets was based on date of death, and attorney fees were awarded for failure to provide accountings</u>. *In re Estate of Forgey*, 906 N.W. 2d 618 (Neb. 2018). The decedent died in 1993. The estate was to be distributed equally among the kids. 20 years later the estate is still not closed and the trustee brother is still running the ranching business paying no rent like he did before dad died. No accounting were provided. The estate was ordered to be distributed at date of death values but accounting to changes in wealth, and attorney fees are to be awarded to the beneficiaries because they could not challenge the trustee's actions in part due to lack of accountings. Attorney fees needed to be awarded otherwise there is no consequences to the trustee for their failure to account over such an extended period of time.

<u>Oral promise to convey real estate fails under statute of frauds</u>. *Barrett v. Coston*, 820 S.E.2d 573 (N.C. App. 2018). The plaintiff-sister apparently had discussion with testator that she would one day get his house but 5 months before he died he conveyed the house by deed to his sister-in-law. The estate plan would have given the house to plaintiff-sister. But the oral discussions about the house did not satisfy the statute of frauds.

<u>Settlement agreement that waives liability for FUTURE breaches of duty is a void provision; there is no duty to seek a non-judicial settlement before starting litigation</u>. *Frizzell v. DeYoung*, 415 P.3d 341 (Idaho 2018). The beneficiary sued the trustee. A settlement was reached that was ambiguous regarding what conduct was waived. The court ruled that a waiver of future breaches of fiduciary could not be waived as it is against public policy. Also, the beneficiary had no duty to try to enter into a non-judicial settlement before initiating litigation.

<u>Trust protector lack standing to demand an accounting</u>. *Carberry v. Kaltschmid* 2018 WL 2731898 (Cal. 2018). A trust protector was given powers to act in a fiduciary capacity. But the trust protector did not have a specific right to an accounting. The state law (California) gives beneficiaries a right to an accounting but not a trust protector. The trust protector petitioned for an accounting but it was denied. The trust protector, although operating in a fiduciary capacity, does not have an actual right to an accounting, therefore the trust protector lacked standing to seek the relief.

<u>Trust protector role eliminated by merging trust into a new trust</u>. *In re Quintanilla Tr.*, No 04-17-00753-CV, 2018 WL 4903068 (Tex. App. Oct. 10, 2018). A settlor created a trust naming a trust protector. The settlor and trust protector no longer got along and the trust protector wanted to take action that the settlor disagreed with. So the settlor created a new trust substantially identical to the old except it eliminated the trust protector. All trust beneficiaries agreed. The trustee sought court approval and the trust protector objected. The trust protector lost.

<u>Purported common law wife had to bring claims within the non-claim statute as opposed to omitted spouse statute</u>. *Harbin v. Estess*,1170209 2018 WL 3598915 (Ala. July 27, 2018). Purported common law wife sought a portion of decedent's estate. But because the claim is for title over assets as opposed to a claim for the estate, the claim must be brought within the nonclaim statute period of limitations. The claim to determine that the woman is in fact a spouse needed to be determined before the omitted spouse claim could be brought so it was a nonclaim statute matter.

<u>Agreement by beneficiaries to terminate a trust was not sufficient to terminate under law</u>. *Horgan v. Cosden*, 249 So.3d 683 (Fla. Dist. Ct. App. 2018). A trust provided income to beneficiary for life with remainder to charities. All the beneficiaries agreed to an early termination of the trust and the district court agreed. A trustee appealed. The court of appeals found that the plain intent of the trust was an income interest to son for life. Terminating early does not give the some income for life. Therefore the termination violates the settlor intent. The matter is reversed to keep the trust.

<u>Punitive damages cannot be recovered from a surety bond in a conservatorship matter</u>. *In re: Estate of Gladstone*, 814 S.E.2d 1, (Ga. 2018). Husband was conservator for his wife. The court held that husband could not account for $167,000 and ordered punitive damages of $150,000. The issue is whether the bond is chargeable for the punitive damages. The Supreme Court found that where the bonding company did not engage in any bad conduct that charging the bond for punitive damages defeats the purpose of punitive damages. The punitive damages are to punish the wrongdoer and if the bond pays the damages then that defeats its purpose, so the bond does not pay punitive damages.

Challenge to will on argument that witnesses did not see or remember the first pages of will does not void the will. *Canody v. Hamblin*, 816 S.E.2d 286 (Va. 2018). The will was very short. The objector believes the first two pages were removed and replaced by two new pages because they were from a computer and easily changed. The witnesses could not specifically testify to the contents of the first two pages of the will. That was not sufficient to void the will.

Minor's excluded from estate because father violated in terrorem clause. *EGW v. First Fed. Sav. Bank*, 413 P.3d 106 (2018). Trustor had a no contest clause in his trust. Trustor tried to sell some real property from the trust. The son tried to stop it and failed and brought action for minor children that also failed. He then tried to argue that it violated law to exclude the grandchildren under the no contest clause for public policy reasons if not under law, by Wyoming has a deep public policy of control over disposition of assets and preventing interference with distribution of assets. The no contest clause was upheld.

Attempt to probate a codicil does not trigger a no-contest clause. *Estate of Roosa*, No. 2017-CA-01707-COA, 2019 WL 1771915 (MS App. Apr. 23, 2019). Daughter sought to probate a codicil to her mother's will. Mother's will had a no-contest clause. The issue is good faith in seeking probate of the codicil when the codicil is not admitted. If the codicil was offered in good faith it does not trigger a no-contest provision.

In terrorem clause not violated by trustee/beneficiary that breaches duty. *Connell Living Trust*; *Montoya v. Ahern*, 426 P.3d 599 (NV 2018). The trust had a no contest clause. The trustee was also a beneficiary of the trust along with other beneficiaries. The trustee improperly accounted for the trust and improperly managed the trust and was surcharged for her actions. The beneficiaries tried to enforce the no contest clause due to the breaches of fiduciary duty. But the court found that using a breach of fiduciary duty to apply a no contest clause may inhibit a trustee in their duties and the clause did not clearly apply in this circumstance.

Trustee did not breach fiduciary duty, on equitable grounds, by paying costs from trust the life estate owner was supposed to pay. *Orange Catholic Found. v. Arvizu*, 20 Cal. App. 5th 283 (2018). The trust gave a life estate in house to beneficiary (who settlor knew for 60 years). The beneficiary had the duty to pay various house expenses per a life estate. But beneficiary was destitute and elderly and could not pay the costs. The other beneficiary of the trust sued because the trust paid the expenses. While the trustee was in technical breach of trust by paying the house expenses and not charging rent or evicting the beneficiary, the trustee acted in good faith and equity favors the intent of the trust and trustee. The trustee acted reasonably and equity forgives the breach of duty.

Removal of trustees of revocable trust did not remove trustees of sub-trusts. *Wilson v. Wilson*, 915 N.W.2d 50 (Neb. 2018). A standard revocable trust estate plan. The revocable trust created 3 sub-trusts after death. After disputes arose regarding the revocable trust administration and funding of the sub-trusts, the trustees of the revocable trust was removed. The court of appeals said the district court order also removed the trustees of the sub-trusts. The supreme court disagreed. The issues in a case are limited to those issues pleaded. The district court only removed the revocable trust trustees. The court of appeals was not to expand upon that. It was not before the court. The sub-trusts was a different issue.

District court could not refuse to fund a special needs trust because it disagreed for policy reasons. *In re Guardianship of Robbins*, 107 N.E. 1080 (Ind. Ct. App. 2018) The ward was in a bad accident and eventually received a large settlement that was to be placed in an SNT. The district court believed funding the trust was unfair to taxpayers and did not believe the funds should be able to be fully funded into an SNT. The court of appeals disagreed and found the district court must follow the policy of the state and the SNT should be funded.

Wife was allowed to change mirrored trusts; deeds signed without full disclosure are not valid. *Gittings v. Deal*, 109 N.E.3d 964 (Ind. 2018). Second marriage case. Wife changed her revocable trust after husband died and favored her son over husband's kids. That was valid. Husband's daughter signed deeds to trust without knowledge or understanding that she was losing or could lose her inheritance interests. The deeds were not a consent to the disinheritance and were not valid transfer because she was not aware of what she was giving up.

Deed reformation was not subject to nonclaim statute. *Wells Fargo Bank v. Noerring*, 438 P.3d 90 (Utah App. 2018). Mortgagee filed action outside claim statute. The issue was whether the deed reformation was a claim. The court found it was not a claim subject to the claims statute. It did not affect beneficiary rights or modify inheritance.

Trustee held liable for diversification of trust assets against trustor direction and without court approval. *In re Tr. of Ray D. Post*, 2018 WL 3862756 (NJ App. 2018). The trustor had very specific language that he did not want the assets originally added to the trust to be changed. The Trust was created in 1975. Trustor died and administration continued. In 1997 the Prudent Investor Act was passed. Some years later the trustee started to diversify the trust investment contrary to advice of counsel and without court approval or beneficiary consent. The Prudent Investor Act is a default rule, not mandatory when the trust provides otherwise. In this case the trust was specific in its direction to retain trust assets. The failure to follow the trust resulted in damages of about $580,000.

Conservatee could not create Delaware Asset Protection Trust without court approval and Trustee was not a necessary party. *Day v. Seblatnigg*, 199 A.3d 1103 (Conn. App. 2018). Conservatee created the irrevocable Delaware Trust and funded it with $6 million. The co-conservator brought action to reverse the transaction. The court found the conservatee did not have capacity to create and fund the trust. But interestingly, the court found that the trustee of the Delaware Trust did not have standing in this matter. The trustee does not have an interest in the outcome of the litigation and did not have standing to object to the efforts to revoke the transaction.

Trustee was required to turn over unredacted attorney invoices (work product doctrine was not timely raised). *In re Estate of McAleer*, 194 A.3d 587 (Pa. 2018). Beneficiary sued trustee regarding administration expenses and related administration issues. The beneficiary wanted the unredacted attorney fee invoices. Trustee refused. The court ordered the disclosure of unredacted invoices. The court found the order proper because beneficiaries are entitled to information on trust administration and the attorney fees are part of that. The matter was not a final order and therefore not appealable. Also the argument that the invoices are work product was not timely raised.

Former trustee was required to disclose communications with his counsel to the current trustee. *Morgan v. Superior Court of Orange Cty.*, 23 Cal. App. 5th 1026 (Ct. App. 2018) *review denied* (Aug. 29, 2018). Former trustee was settlors son. Litigation began almost immediately after Mom died. Eventually the court removed son as trustee. The successor trustee sought communications former trustee had with his counsel. The trust provided that such information need not be disclosed. The court found the trust provision was not enforceable and held that the trustee receives information from counsel for the benefit of the trust and the communications must be disclosed.

The testamentary exception to attorney-client privilege depends on the state where the decedent dies. *Huber v. Noonan*, No. 3706 EDA 2017, 2018 WL 5262368 (Pa. Super. Oct. 23, 2018). The decedent had an estate plan in Pennsylvania. The decedent then moved to Florida and changed her will. The will contest takes place in Florida. Florida's attorney-client testamentary exception is well established buy Pennsylvania's is not established in case law. At issue is what law controls to get the Pennsylvania files. In this case, the court ruled Florida applies because Florida has an interest in the outcome of the case and Pennsylvania is just tangentially affected by the case.

A trustee can't withhold evidence under the Fifth Amendment. *U.S. v. Fridman*, 337 F. Supp.3d 259 (SDNY 2018). The doctrine of the privilege against self-incrimination is well settled law. It includes testifying against yourself as well as providing evidence against yourself. But in general, that doctrine does not reach documents in a representative capacity like a trustee. In this case the trustee was supposed to turn over trust information but he plead the Fifth. The court found that evidence in a representative capacity are not protected by the Fifth but the trustee can't be ordered to orally provide evidence, but can be forced to produce physical evidence.

Trustee not held liable for failure to diversify concentrated assets. *In re Wellington Trs.*, 165 A.D.3d 809, 85 N.Y.S. 497 (NY App. Div. 2018) The trusts allowed the trustees (a bank and an individual) to hold original trust assets. The trusts appreciated 1,750 percent. A co-Trustee as an individual with significant investment experience, refused requests for diversification and had the ability to remove the corporate trustee. After the individual trustee died the bank is sued for failure to diversify. The bank was held NOT liable as the trusts allowed for retention of assets, the trustee could not diversify on its own, the trusts were invested as part of a family investment strategy and the bank acted within the prudent investor standard.

Evidence concerning capacity to make a will is a question for a jury. *Colley v. Estate of Dees*, 1170042, 2018 WL 2998487 (Ala. June 15, 2018). I pulled this for the simple point that a jury is proper to determine lack of capacity. Many district courts try to make it a bench trial.

Trust can't be modified or continued after it is terminated; beneficiary contract to sell trust assets is not invalid per se. *Barrett v. Barrett*, 1170304, 2018 WL 4657084 (Ala. Sept. 28, 2018). Trust was to terminate when beneficiary turned 35. The beneficiary sold his interest in the stock to a relative. He later got in a car accident suffering head injuries. After his trust terminated the trustees tried to reform the trust to keep the assets in trust. The court granted the motion. The Supreme Court reversed holding that you can't reform a terminated trust. The stock agreement was held not void ab initio but the agreement itself in a situation where the agreement could not be completed under the shareholder agreement terms, could still be addressed.

Settlement is not vacated due to mutual mistake. *Lambrecht v. Lambrecht*, No. 339632, 2018 WL 4574750, (Mich. Ct. App. Sept. 20, 2018). Trustor had a stroke. Original estate gave the estate to two sons. An unsigned amendment gave it all to one son. The alleged disinherited son had died and his 2 kids stepped in. The matter was eventually settled dividing the estate 52/48%. The signed trust amendment was later found. One party tried to get out of the settlement due to mutual mistake. But the parties knew the possibility the original might be found, the court favors finality, there were other reasons to settle the dispute.

An agreement to contest a will does not grant standing. *Estate of Lee*,551 S.W.3d 802 (Tex. App. 2018). Decedent wrote a will with assets in trust to son then to grandsons. First codicil eliminated gift to grandsons in favor of niece. Second codicil gave the estate outright to son. Grandson made contract with niece for him to contest the second codicil in exchange for a percentage of niece's share. This contract did not grant grandson standing. He did not have an interest in the estate as an interested person because he did not challenge both codicils.

Grantor of grantor trust did not have a right to an accounting or to reimbursement for taxes. *Millenstein v. Millenstein*, 2018 Ohio 1204, 110 N.E.3d 674 (2018). Grantor created a grantor trust. Thus, grantor paid income taxes on trust income. The grantor wanted to be reimbursed for the taxes he was paying. The trustee (grantor's son) helped his dad pay taxes from other trusts but when that liquidity ran out he stopped helping dad. Dad wanted an accounting. Son refused. Grantor is only entitled to the tax letter each year and a summary of the trust but not a full accounting. The trust did not provide for reimbursement for taxes so dad could not compel reimbursement.

Useful case for accessing digital data from Apple by a decedent; information denied as not necessary for probate administration. *Estate of Ryan Mathew Coleman*, 2017-152/A, 2019 WL 1179713 (NY Surrogate Court Mar. 11, 2019). Ryan dies in his sleep at 24. The parents sought information from his cell phone. They worked with Apple on how to get information. They petitioned for information under the state Digital assets law. The court had to balance privacy and the need to probate the estate and some information was denied. This is a helpful case to start work on getting digital assets after death.

A Trust beneficiary's share of trust distributions can be used to offset that breaching trustee-beneficiary's surcharge liability without violating the spendthrift law. *In re Testamentary Tr. Created Under Will of King*, 2018 Ore. App. 176, 434 P.3d 502 (2018). Wife was income beneficiary and trustee of the trust. She abused the trustee position and was surcharged over $900,000 and removed. At issue is whether the income distributions to her can be used to pay the surcharge without violating the spendthrift laws. The court, applying Nevada law, said the income can be used to pay the surcharge. The trust administration is separate from the rights of external creditors under spendthrift law and the trust can withhold funds to pay the surcharge against a trustee.

<u>District court can order DNA testing to determine heirship</u>. *In re Estate of Fechner*, 432 P.3d 93 (Kan. App. 2018). Maternal aunt sought intestate ruling that she is the sole heir. A purported uncle also sought to be made an heir. In a case of first impression, the court ruled that the uncle can be forced to take a DNA test to determine heirship. A good analysis of the interplay with the parentage act even where the parties otherwise lack standing under the parentage act.

<u>Assets used to repay a trust loan are subject to creditor claims and not protected by spendthrift law</u>. *Lvb-Ogden Mktg., LLC v. Bingham*, 2:18-cv-00243-TSZ, 2018 WL 6830319 (W.D. Wash. Dec. 28, 2018). Trust was set up by parent for beneficiary-daughter. Daughter defaulted on massive loans. Daughter borrowed money from the trust and the trust took secured interests in her property. Daughter defaulted and paid the trust with the secured assets. Daughter's creditors sought payment from the trust for the assets she paid to the trust. The assets were self-settled assets and lost creditor protection is daughter's hands. The trust had to pay.

<u>Creditor can reach entire trust of self-settled trust regardless of how much settlor contributed to the trust</u>. *Calhoun v. Rawlins*, 106 N.E.3d 684 (MA App. 2018). After a PI case from a traffic accident, creditor sought payment from self-settled spendthrift trust. The beneficiary contributed some funds to the trust. The court allowed all the assets to be available to pay the creditor. The court reasoned that the issue is not how much the settlor contributed but how much the settlor is entitled to the trust. If the settlor is entitled to all the trust then the spendthrift laws do not apply to the whole trust.

<u>Alaska State Court does not have exclusive jurisdiction over Alaska self-settled assets protection trusts</u>. *Toni 1 Tr. v. Wacker*, 413 P.3d 1199 (Ala. 2018). Debtor created an Alaska asset protection trust after failed litigation. A Montana court entered a fraudulent conveyance judgment. A bankruptcy court got involved when one party declared bankruptcy. Alaska has a statute (AS 34.40.110) that tries to give exclusive jurisdiction over the trust matters to Alaska. But the court found that a state can't limit the jurisdiction of another state over its claims, judgments and jurisdiction. Alaska does not have exclusive jurisdiction over its trusts.

<u>Probate court (conservatorship) did not have jurisdiction over IDGT without due process</u>. *Wellin v. Wellin*, 2016-001141, 2019 WL 98263 (S.C. App. Jan. 4, 2019). Mr. Wellin created intentionally defective grantor trust with $50 million in partnership holding Berkshire Hathaway stock. The IDGT owed father $50 million under a promissory note. Father wanted to swap his promissory note back to the trust for a 58% stake in the partnership but the trustees refused the sawp and tried to pay the $50 million note but father refused payment. A conservator brought suit for father. The probate court tried to issue an order over the IDGT but the trustees appealed. The probate court did not have jurisdiction over the trust because it was not part of the proceedings so the order was invalid.

<u>Medical assistance, the institutionalized spouse's income shall be paid to the other spouse, but only after considering the needs of the institutionalized spouse (including Medicaid costs)</u>. *In re Estate of Vanszch*, 922 N.W.2d 136 (Mich. App. 2018). The court consolidated 2 cases and found that the non-institutionalized spouse was entitled to all of their spouse's income. But the court found that the probate court can't issue a blanket order like that. The court must consider the needs of the institutionalized spouse before determining the amount the other spouse gets.

Following *Sveen v. Melin*, Alabama revocation of divorce statute applies even when statute is passed after policy is acquired. *Blalock v. Sutphin*, 1170879 2018 WL 5306884 (Ala. Oct. 26, 2018). Life insurance was purchased. Wife is named as beneficiary. Statute is enacted to revoke beneficiary in the event of a divorce. Couple divorces. Husband dies. The policy names wife but the statute revokes that and daughter becomes heir to policy.

Revocation on divorce does not apply to a will written before marriage. *Gordon v. Fishman*, 253 So. 3d 1218 (Fla.Dist. App. 2018). A will was written to benefit girlfriend and then her daughters. He married her a few years later. They divorced 6 years after that. Then he died. The daughters wanted the money arguing the revocation on divorce statute. But the statute says it applies to any will written by a "married" person. He was not married when it was written so it is still valid. Ex-wife gets the money.

Will written on cell phone admitted to probate. *In re Estate of Horton*, 925 N.W.2d 207 (Mich. App. 2018). A Michigan statute provides that a document not written with the requisite formalities and not a holographic will can be admitted to probate by clear and convincing evidence. A young man wrote his will on his phone before killing himself. He had given written instructions how to get into the phone so that his will could be followed. It was a will you would expect written by a layperson. The evidence was clear and convincing.

Will not valid when testator only signed his first name on will. *Bitetzakis v. Bitetzakis*, 264 So. 3d 297 (Fl. App. 2019). The testator signed only his first name to his will. His normal signature on documents was his full name. This was not a case where the testator signed his "mark" on the will. He simply did not sign his full name thereby failing to sign the will at the end thereof in satisfaction of the statute. The will failed.

Will written in blood admitted to probate. *Matter of Will of Bradway*, No. A-4535-16T3, 2018 WL 3097060 (N. J. Super. Ct. App. Div. June 25, 2018). It was an unsigned codicil (signature at the end was contested) but since it was written in decedent's blood was still a valid will as a clear intent of decedent to make his will.

Where testator thought she revoked will but assistant destroyed a different document, will can be revoked. *Estate of Starkey*, 556 S.W.3d 811 (Tenn. App. 2018) . Apparently, the testator asked a person to revoke her will for her. The person revoked a separate document that was not her will, leaving the testator with the understanding that her will was revoked. At issue is whether this is enough, as a matter of law, to revoke a will. (Minnesota has a case where a person threw the will in a stove to be burned but a party took it out unbeknownst to testator). The case could proceed as a revocation matter.

Will that was burned in fire was probated. *Cunningham v. Dillard*, 2019 Ark. App. 177 (2019). Two competing wills for probate. The last in time will was burned up a fire. The other will was written 4 years earlier than the lost will. The court held that the will did not have to exist at the time of death. It just must not have been intentionally revoked and the fire was not an intentional destruction of the will (the whole house burned).

Sufficient evidence presented to disinter remains contrary to intent expressed in will (Arch Bishop Sheen case). *Cunningham v. Trustee's of St. Patrick's Cathedral*, 170 A.D.3d 402, 94 N.Y.S. 3d 71 (N.Y. App. Div. 2019), *appeal dismissed*, 2019 WL 1950244 (N.Y. May 2, 2019). .Arch Bishop Sheen was a popular TV and media personality who is being considered for sainthood. His will, written 6 days before death in 1979, directed his burial in St. Patrick's Cathedral in New York. His relatives now want his remains moved to Illinois to be buried at a shrine they are creating there. The court ordered the remains be removed finding that if he was alive today he would approve of this move.

The request to move decedent's remains a second time is denied. *Estate of Eisaman*, 110 N.E.3d 96 (OH App. 2018). This seems to be from an old movie but I can't place it. The Court went over the legal factors to exhume and disinter a body. Decedent died. Sister sent decedent's wife a letter telling her she can't be buried next to her husband at the family plot because of the trust terms. The decedent is moved to a new burial place where his wife can be buried next to him. Sister then petitions again to move the decedent back apparently claiming the issues are resolved and wife can be buried next to her husband. It seems the court found this to be disingenuous and that there is no good cause to move the decedent and sister's reasons are not compelling or particularly believable.