2016 SUPPLEMENT

FUNDAMENTALS OF TRUSTS AND ESTATES

FOURTH EDITION

Prepared by

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Preface

This Supplement primarily updates case and statutory developments since the manuscript for the Fourth Edition was submitted in the fall of 2011. Two United States Supreme Court cases are noted in Chapter 2: *Obergefell v. Hodges* (requiring states to recognize same-sex marriages) and *Astrue v. Capato* (involving the status of posthumously-conceived children) and one in Chapter 6: *Hillman v. Maretta* (involving federal preemption).

On the legislative side, the most important state-level developments involved uniform laws: the enactment of the Uniform Trust Code by several more states and the approval of the Uniform Powers of Appointment Act (2013) and the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) (2015). The Appendix includes materials on RUFADA.

On the federal level, the American Taxpayer Relief Act of 2012 made important changes in the wealth transfer tax area; these changes as well as inflation adjustments for 2016 are included in Chapter 1, along with discussion of the United States Supreme Court case of *Windsor v. United States* (allowing same-sex married couples to obtain federal tax and other benefits)

I express my appreciation to Theresa Colbert, legal assistant at Albany Law School, and Bryan Bessette, Albany Law School, Class of 2017, for their help in preparing this Supplement.

Ira Mark Bloom

August, 2016

Chapter 1: LAWYERS, ESTATES, AND TRUSTS

§ 1.02 AN OVERVIEW OF INTER-GENERATIONAL WEALTH TRANSFER

A. Probate

1. The Process

Page 11. Insert before the paragraph beginning "Next, Jeremy will open a bank account….":

Digital assets can pose challenges as the law inevitably lags behind both some technological and social changes. A wide variety of property once held in physical form – books, music, family photos, vacation videos, diaries – now appear in computerized storage, often in remote locations. Identifying a decedent's assets can be difficult; looking through a desk drawer for account statements no longer helps much. Moreover, questions arise as to whether the decedent or some other entity owns the content, where (for jurisdictional purposes) an asset is located, and whether an estate planning document like a will controls an asset's disposition. Fiduciary access to digital assets is discussed below.

Page 13. Add to Selected References:

James E. Pfander and Michael J.T. Downey, *In Search of the Probate Exception*, 67 Vand. L. Rev. 1533 (2014).

D. The Uniform Codes and the Restatements

Page 18. After the sentence in the 1st paragraph ending "influence court decisions)," add the following footnote:

Comments to uniform statutes provide a rich source of legislative history. Courts that have enacted a uniform statute may rely on a uniform law comment to resolve an issue. *See, e.g.*, *In re Trust under Deed of Kulig*, 131 A.3d 494 (Pa. Super. Ct. 2015).

After the last sentence in the 1st paragraph, add as follows:

Courts heavily rely on Restatements. *See, e.g., Noveletsky v. Metropolitan Life Insurance Company*, 49 F.Supp.3d 123, 139 (D. Me. 2014) ("The common law applicable to Maine trusts can be found in the decisions of Maine's Law Court, which often rely on the Restatements pertaining to trusts").

In Note 7 after "Wyoming.", add as follows:

Since 2011, the UTC has been enacted in Kentucky, Maryland, Massachusetts, Mississippi, Minnesota, Montana, New Jersey, Ohio and Wisconsin.

Replace the last sentence of Note 7 with the following:

For current adoption information of uniform acts, *see* www.uniformlaws.org .

Uniform Fiduciary Access to Digital Assets, Revised

Although a few states had enacted some type of legislation on access by fiduciaries to digital assets, the Uniform Fiduciary Access to Digital Assets Act, which was approved in July of 2014 by the Uniform Law Commission, comprehensively provided for access by fiduciaries to digital assets by personal representatives, trustees, conservators (guardians) and agents under powers of attorney to digital assets.

Although well intended, the UFADAA was vigorously opposed by many service providers, including Yahoo, Google and Facebook, which promoted alternative and much more restrictive legislation: the Privacy Expectations Afterlife Choices Act (PEAC Act). See Karin Prangley, War and Peace in Digital Assets: The Providers' PEAC Act Wages War with UFADAA, 29 PROB. & PROP. J. 40 (July/August 2015). In response to opposition by the service providers, in 2015 the Uniform Law Commission approved a revised UFADAA (RUFADAA). See generally Suzanne Brown Walsh, et al., You Can't Always Get What You Want: Understanding the revised Uniform Fiduciary Access to Digital Assets Act, TRUSTS & ESTATES, Nov. 2015, at 25. RUFADAA has met with the approval by some service providers, including Google and Facebook, as well as approval from privacy organizations. Widespread enactment of RUFADAA has begun.[1]

RUFADAA is briefly considered in Chapters 7 and 10. In addition, the Appendix includes materials on RUFADA.

RUFADAA can be accessed at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/revised%202015/2015_RUFADAA_Final%20Act_2015dec11.pdf

§ 1.03 FEDERAL WEALTH TRANSFER TAXES

Page 20. Add as new paragraph before paragraph beginning "The transfer taxes":

Congress did act to make the estate, gift and generation-skipping transfer (GST) tax systems "permanent," that is, there was no sunset provision as under the 2001 and 2010 Acts. Specifically, Congress enacted the American Taxpayer Relief Act of 2012, effective beginning in 2013. Pursuant to the Act, a new estate rate schedule, which was also applicable to gifts, was enacted with a top rate of 40%. IRC § 2001(c).[2] In addition, the estate, gift and GST exemption

[1] The following states have enacted RUFADAA: Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming. RUFADAA, which has been approved by the New York legislature, awaits the Governor's signature for enactment.

[2] The maximum GST tax rate is also 40%. *See* IRC § 2641(a)(1).

level was set at $5 Million as adjusted annually for inflation. IRC §§ 2010 and 2505.[3] For 2016, the exemption level is $5,450,000.

A. Unified System

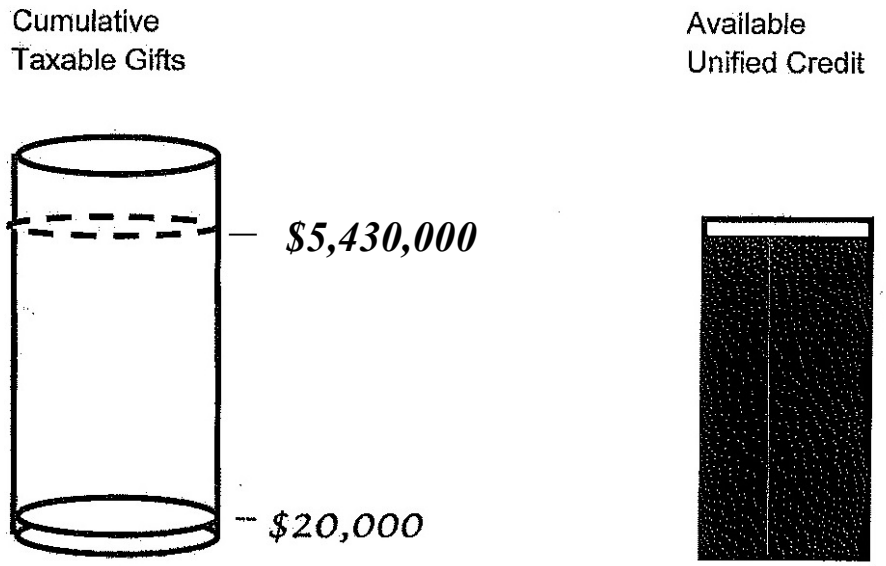
Page 21. Delete the first two full paragraphs and as a new paragraph:

Beginning in 2013, the estate, gift and GST exemption was set at $5 Million, as adjusted for inflation since 2011, to the nearest multiple of $10,000. For 2016, the exemption level is $5,450,000.

Pages 21-22. Delete the text beginning with the third paragraph ("To see how") through the text ending with the third paragraph on page 22 ("With the basic") and add the following:

To see how the unified credit works, imagine Marc, who has incurred no prior transfer tax liability. Because his son, Ben, needs a down payment for his first house, in 2015 Marc gives Ben $34,000, $14,000 of which is exempt from taxation under an annual exclusion designed to reduce the gift tax consequences of lifetime transfers. The other $20,000 is subject to gift tax. *See* IRC § 2501. Rather than actually paying any tax, however, Marc uses up a small piece of his unified credit. Figure 1-2 on the next page illustrates Marc's situation after making the gift.

Figure 1-2 Marc's First Gift in 2015

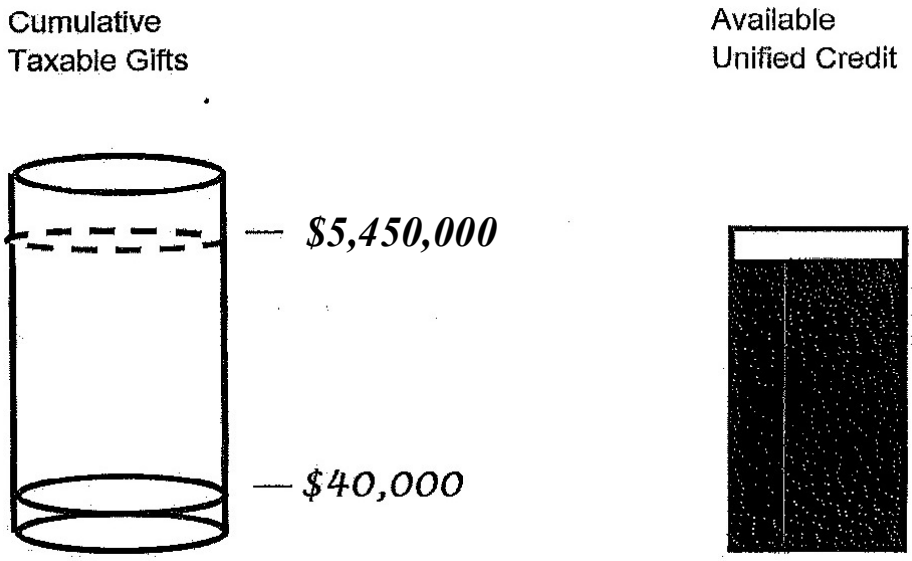


Suppose further that in early 2016, Ben's house is damaged in a storm, so Marc gives him another $34,000 for repairs. Again, the annual exclusion shelters $14,000 and the other $20,000 is subject to tax. This second gift however, is taxed at a higher rate, because it comes on top of

[3] Congress also continued the 2010 Act's introduction of an increased exemption for a surviving spouse, which is known as portability. *See* IRC §§ 2010(c)(2) and 2505(a)(1).

Marc's earlier gift. To achieve that result as an accounting matter, we add in the prior gift for the purpose of figuring the tax on the new gift. Marc is not taxed twice on the first gift. The earlier gift only serves to push the second gift into a higher bracket. Marc still uses his unified credit and pays no tax. See Figure 1-3.

Figure 1-3 Marc's Second Gift in 2016



Other taxable gifts will be treated the same way. Suppose that Marc dies at the end of 2016 having given away $100,000 in taxable gifts. Now the value of his taxable estate will be added in just like the gifts. If the taxable estate is $5,350,000 or less, the rest of his unified credit can cover the tax.[4] If the taxable estate pushes his lifetime-plus-death total over $5,450,000, his estate will be able to use the rest of his available credit to offset some of the tax, but his estate will be liable for the excess over $5,450,000, all of which will be taxed at a 40% rate.

Rather than using up their unified credits in smaller bites throughout their lifetimes, some wealthy taxpayers elect to make lump sum gifts which would use the entire unified credit. By moving the assets out of their estates, they save both income tax on the income the property would generate and estate tax on any value the property would gain between the time of the gift and the donor's death.

With the basic framework in mind, we now turn to identifying taxable gifts and taxable estates.

[4] Although no federal estate tax will be payable if the combined lifetime transfers and the taxable estate is $5,450,000 or less, state death taxes may be payable in about 15 states which set the exemption or threshold level lower. For example, in Massachusetts estates up to $1 million are exempt from estate taxation.

B. The Gift Tax

Page 22. Replace $13,000 with $14,000.

Page 23. Replace the sentence beginning with "In 2011" with the following sentence:

In 2016, the exclusion was $14,000. *See* Rev. Proc. 2015-53.

C. The Estate Tax

2. The Marital Deduction

Page 25. Add as the first sentence of footnote 16 the following:

In *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Supreme Court effectively held that for federal tax purposes same-sex marriages must be constitutionally recognized. *See* Rev. Rul. 2003-17 (implementing *United States v. Windsor* for federal tax purposes.)

In the second paragraph of the boxed text, replace 2011 with 2016 and replace $1 million with $1,450,000.

§ 1.04 DUTIES LAWYERS OWE CLIENTS (AND OTHERS)

PAGE 31. Delete the case of *Robinson v. Benton* and insert the following case:

FABIAN v. LINDSAY

765 S.E.2d 132 (So.Car. 2014)

BEATTY, JUSTICE.

Erika Fabian (Appellant) brought this action for legal malpractice and breach of contract by a third-party beneficiary, alleging attorney Ross M. Lindsay, III and his law firm Lindsay & Lindsay (collectively, Respondents) made a drafting error in preparing a trust instrument for her late uncle and, as a result, she was effectively disinherited. Appellant appeals from a circuit court order dismissing her action . . .for failure to state a claim and contends South Carolina should recognize a cause of action, in tort and in contract, by a third-party beneficiary of a will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. We agree, and we reverse and remand for further proceedings.

I. FACTS

[As written, a trust agreement unambiguously provided that the appellant would receive trust property only if another beneficiary predeceased the trust creator. The appellant contended that the trust creator intended that she receive trust property if the other beneficiary also failed to the trust creator's spouse, which was the case. . . . The circuit court granted the [Respondents']

motion to dismiss, finding Appellant could not assert a claim for legal malpractice because South Carolina law recognizes no duty in the absence of an attorney-client relationship. In addition, the court stated no South Carolina court had ever recognized a breach of contract action by an intended beneficiary of estate planning documents. . . .]

. . . .

III. LAW/ANALYSIS

A. Privity Under Existing Law

In dismissing Appellant's claims, the circuit court essentially found Appellant was not in privity with Respondents and therefore failed to establish a viable cause of action. "'Privity' denotes [a] mutual or successive relationship to the same rights of property." *Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests"). South Carolina courts have equated privity with standing. [Citation omitted]. . . .

Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship. *See generally Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) (stating "existing law imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina"). "A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012).

Appellant contends the current appeal presents an opportunity not available in prior cases for South Carolina to join the vast majority of states allowing intended third-party beneficiaries to bring claims against the lawyer who prepared the defective will or estate planning document. *See Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) (stating whether a duty exists in regard to an alleged wrong is a question of law for the court). Appellant argues a lawyer's negligence in preparing an estate or testamentary document impacts three potential classes of plaintiffs: (1) the client, (2) the decedent's estate, and (3) the intended beneficiaries. As she aptly states:

> [O]f the three possible plaintiffs, only the beneficiaries have the motivation and sufficient damages to bring a malpractice claim. The client is deceased and the estate lacks a cause of action or damages or both. Indeed, because the beneficiaries were supposed to be the beneficial owners of estate assets, only the beneficiaries suffer directly due to the lawyer's negligence. If no cause of action is available to the beneficiaries, the negligent drafting lawyer is effectively immune from liability. Therefore, only the beneficiaries suffer the loss caused by the lawyer's negligence.

In the 1950s, after observing the problems created by the traditional privity requirement, jurisdictions in the United States began abandoning strict privity as an absolute bar to claims for legal malpractice. A majority of jurisdictions now recognize a cause of action by a third-party beneficiary of a will or estate planning document against the lawyer whose drafting error defeats or diminishes the client's intent, although they have done so using a variety of tests and formulations, whether in tort, contract, or both. [Citations omitted].

"The jurisdictions that have eased the strict privity requirement typically use one of the following three approaches to determine whether the intended beneficiary of a will has standing to bring an action for legal malpractice: (1) the balancing of factors test, which originated in California; (2) 'the Florida-Iowa rule['']; and (3) breach of contract based on a third-party beneficiary contract theory." [Citation omitted].

B. Theories for Imposing Liability in Tort or Contract

(1) Balancing of Factors Test

In an influential decision emanating from California in 1958, the rule on privity in legal malpractice actions began to evolve throughout the United States. In *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (Cal. 1958), the court held that where the defendant negligently prepared an invalid will, the beneficiary could recover for her loss in tort even though she was not in privity with the defendant. Although the defendant in that case was a notary public and not an attorney, the court also overruled prior cases involving attorneys.

The holding in *Biakanja* was formally extended to attorneys a few years later in *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (Cal. 1961). In *Lucas*, the court allowed recovery both in tort and as a third-party beneficiary to a contract. In discussing whether to impose tort liability, the Lucas court reiterated all but one of the factors it originally delineated in *Biakanja* and stated, "[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." *Id*. at 687 (citing *Biakanja*, 320 P.2d at 19).

Applying these factors, the court reasoned that "one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of prevent[ing] future harm would be impaired." *Id*. at 688.

The court then noted since the defendant in this case was an attorney, it "must consider an additional factor not present in *Biakanja*, namely, whether the recognition of liability to

beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." *Id*. The court found although in some situations liability could be large and unpredictable, this was also true for any attorney's liability to his client, and the extension of liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when taking into consideration that the opposite conclusion would cause the innocent beneficiary to bear the entire loss of the attorney's professional negligence. *Id*.

Other jurisdictions have engaged in a similar or modified "balancing of factors" analysis to generally determine whether an attorney should be liable to a third party in the absence of strict privity. [Citing cases from Arizona, Kansas and Florida].

(2) The Florida-Iowa Rule

In the event this Court joins the majority of jurisdictions allowing a third party beneficiary to seek recovery for the improper drafting of a will or estate planning document, Respondents and the amicus urge this Court to adopt an alternative theory of recovery known as the "Florida-Iowa Rule." It provides:

> An attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (third-party beneficiaries). However, liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence.

DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (citations omitted). . . .

Respondents' desire, in the absence of this Court's retention of strict privity, is to promote the Florida-Iowa Rule because its essential feature, the imposition of a ban on all extrinsic evidence, obviously makes it more difficult for a plaintiff to establish a claim. [Citation omitted].

Appellant understandably opposes this theory [and the court agreed.]. As she correctly asserts: "The fundamental flaw in the Florida-Iowa [R]ule is that it focuses on the testamentary documents prepared by the lawyer rather than the source of the beneficiary's claim, which is not the allegedly defective will or trust document, but instead is the client-lawyer agreement that was intended to satisfy the client's testamentary intent. The proper approach in cases like this one where latent ambiguities exist in the will, trust agreement, or estate plan would be to allow the admission of extrinsic evidence to establish the client's intent as is generally allowed in a typical will contest." . . . .

(3) Third-Party Beneficiary of Contract Theory

Another theory recognized for recovery is based on a third-party beneficiary approach. South Carolina law already generally recognizes a breach of contract claim for a third-party beneficiary of a contract and we find this principle is appropriate here.

"Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n v. Allied Signal, Inc*., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citation omitted). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Id*. (citation omitted).

Courts in other jurisdictions have expressly extended this principle to frustrated third-party beneficiaries of estate instruments, although some have done so as a breach of contract action while others have used the "third-party beneficiary" principle as a basis to allow recovery in negligence. Some jurisdictions have recognized that a plaintiff may choose to proceed in contract, tort, or both. *See, e.g., Lucas*, 364 P.2d at 689 & n.2; *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81, 84 (Conn. 1981); *Blair v. Ing*, 95 Haw. 247, 21 P.3d 452, 464 (Haw. 2001).

In *Lucas*, in addition to allowing tort recovery, the California court found "that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries." 364 P.2d at 689. The court stated, "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold . . . that the testator intended only 'remotely' to benefit those persons." *Id*. at 688. The court found this main purpose and "intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, [so] we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries." *Id*. at 689. Moreover, the court noted the general rule is "where a case sounds in both tort and contract, the plaintiff will ordinarily have freedom of election between the two actions." *Id*. at 689 n.2.

We find this reasoning sound and adopt it here. . . .

Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney. It is the breach of the attorney's duty to the client that is the actionable conduct in these cases. . . .

In these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence. Joining the majority of states that have recognized causes of action is the just result. This does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas.

In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. The focus of a will or estate document is, inherently, on third-party beneficiaries. That being the case, the action typically does not arise until the client is deceased. . . .

IV. CONCLUSION

We recognize a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. Recovery under either cause of action is limited to persons who are named in the estate planning document or otherwise identified in the instrument by their status. Where the claim sounds in both tort and contract, the plaintiff may elect a recovery. We apply this holding in the instant appeal and to cases pending on appeal as of the date of this opinion. As a result, we reverse the order dismissing Appellant's complaint and remand the matter to the circuit court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.[5]

Page 33. Delete Questions 1-3 and substitute new Questions 1 and 2:

1. States that require privity are concerned about the threat of suit from third parties will compromise an attorney's representation of his or her client. *See, e.g.*, *Baker v. Wood, Ris & Hames, PC,* 364 P.3d 872 (Colo. 2016). In what way might the threat of suit compromise the representation?

2. Courts that require privity because otherwise attorneys may be subject to "almost unlimited liability." *See, e.g.*, *Baker*, 364 P.3d 872 (Colo. 2016). Can a balance be achieved between policing lawyer behavior via the threat of malpractice liability while protecting against "almost unlimited liability?" *See generally* Gerry W. Beyer, *Avoid Being a Defendant: Estate Planning Malpractice and Ethical Concerns*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 224 (2015).

[5] Concurring and dissenting opinions omitted.

Chapter 2: INTESTACY

§ 2.01 OVERVIEW

Page 46. Add to Selected References:

Rebecca Friedman, *Intestate Intent: Presumed Will Theory, Duty Theory, and the Flaw of Relying on Average Decedent Intent*, 49 REAL PROP., TR. & EST. L.J. 565 (2015).

Page 47. Add as new Selected Reference:

Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*. 25 Cornell J.L. & Pub. Pol'y 1 (2015).

§ 2.02 QUALIFYING TO TAKE

A. Spouses and Partners

Page 48. Delete the material in this sub-section and insert the following:

Traditionally, a "spouse" means someone who is legally married. *But see, e.g.,* 15 Vt. Stat. Ann. § 1204(b) ("spouse" includes parties to a civil union). Because most Family Law courses examine in some detail questions about how a marital relationship is established, this discussion only highlights a few issues that impact inheritance. As with intestacy rights, statutes dominate this field. Except where the decedent dies while the parties are in the process of legalizing their relationship, courts generally require compliance with statutory formalities. *See, e.g., In re Estate of Biewald,* 468 N.E.2d 1321 (Ill. Ct. App. 1984) (Mary and Clarence were divorced in 1959, but continued to live together until Mary's death in 1982. Held: Clarence was not a "surviving spouse"). Some states recognize "common law marriages" based on the behavior of the couple, rather than a formal ceremony. Of course, a valid divorce or annulment precludes someone from claiming as a surviving spouse. *See* UPC § 2-802. Jurisdictions disagree over the question of how a separation decree affects the status of a surviving spouse. *Compare* N.Y. Est. Powers & Trusts Law § 5-1.2 (not surviving spouse) *with* UPC § 2-802 (still surviving spouse).

Bigamous marriages pose special problems. Because a married person lacks the capacity to remarry without divorce, subsequent "spouses" have void relationships with the bigamist. Upon the bigamist's death, theoretically (and in most jurisdictions, practically) only the first spouse qualifies to inherit, even if long deserted by the decedent. Using the concept of "putative spouse," a few states recognize the intestate claims of innocent later consorts. Section 209 of the Uniform Marriage and Divorce Act provides: "Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse. ... If there is a legal spouse or other putative spouses, ... the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice."

In *Obergefell v. Hodges,* 2015 U.S. LEXIS 4250 (2015), the U.S. Supreme Court resolved many of the questions that had revolved around the marital rights of persons of the same

sex.[6] The court held that under the due process and equal protection clauses of the 14th Amendment couples of the same sex may not be deprived of the right to marry and that states must recognize lawful same-sex marriages performed in other states.

Obergefell will also affect a broader range of marriage and inheritance issues. Because a person's gender no longer affects the right to marry, persons who have been identified as one sex at birth and later identified themselves as the other sex will no longer face challenges to the validity of their marriages (and accompanying inheritance rights).[7] Same-sex couples who have been living together may be surprised by "common law marriage" rules applying to them. It remains to be seen the extent to which states will modify various approaches to "domestic partnerships." Often domestic partnership rules arose as a way to grant some of the benefits of marriage to same-sex couples prohibited from marrying. Now that marriage is available, domestic partnerships may be redefined or disappear.

B. Descendants

1. Nonmarital

Page 55. Before *Phillips*, add:

Estate of Breitel v. Breitel, 186 Cal. Rptr. 3d 321 (Ct. App. 2015).

2. Adopted Persons

Page 57. In the equitable adoption discussion, after *Hodge* and *O'Neal* cites, insert:

However, equitable adoption will be recognized if a person had the authority to contract to adopt. *See Sanders v. Riley*, 770 S.E.2d 570 (Ga. 2015). *See also DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013) (in addition to the contract-to-adopt theory, equitable adoption offers an independent way to prove parent-child relationship). *But see Estate of Scherer,* 336 P.3d 129 (Wyo. 2014) (Wyoming will not recognize doctrine of equitable adoption).

3. Children of Assisted Reproduction

Page 64. In Note 2, add before *Woodward:*

CAL. PROB. CODE § 249.5 (recognized); New York EST. POWERS AND TRUSTS LAW § 4-1.3 (recognized); b*ut cf.* TEX. PROB. CODE. § 201.056 (2015) (requiring posthumous heirs to be in gestation at the time of the intestate's death in order to inherit).

In Notes and Question following *Finley* insert new Note 2A:

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[6] Earlier, the Supreme Court effectively held that federal tax and other benefits could not be denied to same-sex married couples. *See United States v. Windsor*, 133 S.Ct. 2675 (2013).

[7] In *Estate of Gardiner*, 42 (.3d 120 (Kan. 2002), a "marriage" between a man and a post-operative male-to-female was held void so that the survivor had no intestate rights as a surviving spouse.

2A. In *Astrue v. Capato*, 132 S. Ct. 2021 (2012), the U.S. Supreme Court held that the provisions of the Social Security Act governing the status of posthumously-conceived children is constitutional under rational-basis review. *See generally* Catherin Kim, *Posthumously Conceived Children and their Social Security Benefits Based on State Intestacy Law: How Astrue v. Capato Changes Future Social Security Benefits as Technology Advances*, 46 LOY. L.A. L. REV. 1141 (2013).

Page 68. The last sentence in the Problem ending this section should read:

In a UPC jurisdiction, what evidence would you gather to establish Phylicia's right to inherit from Leslie's father?

Chapter 3: WILLS

§ 3.02 CREATION OF WILLS

B. The Mental Element

1. Intention

Page 89. Add to note 2:

See also In re Succession of Cannon, 2015 WL 1361128 (La.App. 2015) (handwritten notes in outline form with inconsistent totals and question marks do not reflect testamentary intent).

2. Testamentary Capacity

Page 96: Add to Selected References:

Mark Glover, *Rethinking the Testamentary Capacity of Minors,* 79 Mo. L. Rev. 69 (2014).

3. Undue Influence

Page 98. Insert before *Estate of Saucier*:

California recently tried to clarify the meaning of "undue influence."

California Probate Code

Section 86

"Undue influence" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code. It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.

California Welfare and Institutions Code

Section 15610.76

(a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting *by overcoming that person's free will* and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

Page 101. In Note 1, delete the second and third sentences and add as follows:

As *Saucier* illustrates, the burden of proof typically shifts to the proponent when a contestant demonstrates the existence of a confidential relationship and suspicious circumstances. *But see Clinger v. Clinger*, 872 N.W.2d 37 (Neb. 2015) (rejecting will contestants' proposed jury instruction that the demonstration of a confidential relationship coupled with other suspicious circumstances gives rise to a presumption of undue influence, which shifts the burden of proof to the will's proponents, holding instead that such proof gives rise only to a "probable inference" and that the ultimate burden of proof remains on the contestants at all times).

Page 102. Add to Note 2:

In re Estate of Kremer, 845 N.W.2d 70 (Iowa Ct. App. 2014) (three of five beneficiaries exercised undue influence and lost their gifts, but gifts to the other two could stand because they could remain without violating the testator's general intent.)

Insert at the end of Note 5:

Another solution is to invalidate gifts to lawyers or their relatives if the lawyer was involved in the will's drafting or execution, unless the lawyer or relative is also related to the testator. *See, e.g.,* Fla. Stat. 732.806.

4. Tortious Interference with Expectancy

Page. 113. Delete text of Note 3 and add as new Note 3:

3. In *Bjork v. O'Meara*, 986 N.E.2d 626 (Ill. 2013), the Supreme Court of Illinois held that the 6-year statute of limitations for tortuous interference applies if the tort claim does not seek or require an invalidation of the decedent's will.

Add as new Note 4:

4. Several states refuse to recognize the tort of intentional interference with inheritance. *See, e.g.*, *Vogt v. Witmeyer,* 87 N.Y.2d 998 (N.Y. 1996) (holding that New York does not recognize a right of action for tortious interference with prospective inheritance); *and Anderson v. Archer,* No. 03-13-00790-CV, 2016 Tex. App. LEXIS 2165 (Tex. Civ. App. Mar. 2, 2016) (expressly rejecting a cause of action for tortious interference with inheritance in Texas).

C. Will Execution

2. A Typical "Statute of Wills"

Page 116. Delete the introductory paragraphs to this sub-section and insert:

The modern will has its roots in both Roman law and the English testament, the ecclesiastically-supervised deathbed directions for distributing personal property. The ability to transfer land at death, however, came in the Statute of Wills of 1540, 32 Hen. 8, c. 1, which required "some memorandum" of the decedent's will. To protect against perjury, in 1677 Parliament passed the Statute of Frauds, which included formal requirements, like a writing, signed by the testator before witnesses. 29 Car. 2, c. 3, § 5. The Wills Act of 1837 unified the rules for wills covering real or personal property. 7 Will. 4 & 1 Vict., c. 26, § 9.

Because many states still require a variety of elements derived from English law, we reproduce Ohio's traditional statute as an example. You ought to compare it to the statute in your own state. As you will discover in the material below, almost every word is "loaded," filled with potential for litigation.

———————

Ohio Rev. Code

§ 2107.03. Method of making will

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

In part to cut down on litigation, the UPC has eliminated many of these technical requirements. Further, it has added notarization as alternative to the 2-witness requirement. *But see* Anne-Marie Rhodes, *Notarized Wills*, 27 Quinnipiac Prob. L. J. 419 (2014) (raising concerns about the notarized will option; only Colorado and North Dakota have enacted).

Uniform Probate Code

Section 2-502. Execution; Witnessed Wills; Holographic Wills

(a) Except as provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will must be:

(1) in writing;

(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(3) either:

(A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will; or

(B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.

d. By Competent Witnesses

Page 126. Add new Note:

9. Recall that UPC § 2-502(a)(3)(B) allows a testator's notarized acknowledgement to validate a will without additional witnesses.

e. Some Other Rules

Page 126. Add as new paragraph after sentence ending "testators sign first."

Wills having a relationship to other jurisdictions. Suppose a testator validly executes a will in State A but dies a domiciliary of State B where the execution requirements were not met. Will the will be admitted to probate in State B? Clearly, the answer in this and other situations is yes in a UPC jurisdiction:

> **SECTION 2-506. CHOICE OF LAW AS TO EXECUTION.** A written will is valid. . .if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

A similar result will likely obtain in non-UPC jurisdiction, *See, e.g.,* NY EPTL 3-5.1(c).

f. Attestation Clauses and Self-Proving Affidavits

Pages 129-130. Delete the text at end of Page 129 and the text in the first 5 lines on page 130 and insert:

Like all parts of the will execution ceremony, self-proving affidavits should be handled with particular care. For example, several cases have held that signatures that appear in the affidavit, but not earlier, are insufficient to validate the will. *See*, *e.g., Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985) (testator); *Estate of Ricketts*, 773 P.2d 93 (Wash. Ct. App. 1989) (witnesses); *but see Estate of Dellinger v. 1st Service Bank*, 793 N.E.2d 1041 (Ind. 2003) (will valid where witnesses only signed self-proved affidavit). UPC § 2-504(c) seeks to avoid that problem. Moreover, UPC § 2-502(a)(3)(B) allows a testator's notarized acknowledgement to validate a will without additional witnesses.

So long as the execution itself was good, a botched self-proving affidavit should not invalidate the will. *See Cutler v. Ament*, 726 S.W.2d 605 (Tex. Ct. App. 1987).

4. Mistake in Execution

Page 142. Delete Note 3 and insert new Note 3 as follows:

3. Compare the UPC's broader language with Colorado's insistence that the testator either sign or acknowledge the document as a will. In New Jersey, which tracks the UPC language, an

unexecuted copy of a will could be admitted to probate where there was clear and convincing evidence that the document reflected the testator's intent. In re *Estate of Ehrlich,* 427 N.J. Super. 64 (App. Div. 2012), appeal dismissed by the parties, 64 A.3d (N.J. 2013).

Signatures also may be especially important if a court is applying the substantial compliance doctrine. The testator in *Estate of Kuhn*, 612 N.W.2d 385 (Wis. App. 2000), failed to follow the requirements of a statutory form will when he only placed his signature after the name of three (of four) beneficiaries. The gift to the fourth beneficiary failed. *See also Brown v. Fluharty,* 748 S.E.2d 809 (W.Va. 2013) (Substantial compliance doctrine does not validate will that physically disabled testator did not sign.)

Page 143. Add New ***Selected Reference:***

Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597 (2014).

D. Protective Planning

1. Who Might Challenge

Page 144. Insert after cites to *Luongo* and *Burger*:

See also Gordon v. Kleinman, 120 So.3d 120 (Fla..App.2013) (beneficiary of 1983 will had standing by challenging validity of all four later wills from 1992-2009).

2. Structural Elements

Page 145. At the end of the last paragraph before the box, add:

See, e.g., Hamel v. Hamel, 299 P.3d 278 (Kan. 2013). A no-contest provision in a will that voided a disposition even if based on probable cause was unenforceable as violative of Mississippi public policy. *Parker v. Benoist*, 160 So.3d 198 (Miss. 2015).

Page 149. Add as new Selected Reference:

Susan G. Thatch, Ante-*Mortem Probate in New Jersey--An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331 (2015).

3. Conduct

Page 149. Delete problem 1 and replace with the following:

1. Violet Quirin's first two wills had divided her property equally between her two daughters. However, her final will, in 2010, acknowledged her "love and respect" for her daughters, but explicitly made "no provision for them in this will." Instead, it gave her estate to friends and charities. The unhappy daughters challenged the will. In

affirming a decision finding testamentary capacity, the court in *Estate of Quirin,* 2015 WL 2405484 (Mont. 2015), described the setting:

> The 2010 will was the product of Quirin's interactions with attorney Nancy Moe. Quirin contacted Moe on June 2, 2010, and asked her to draft a new will for Quirin. Moe met with Quirin for around an hour and a half on June 4, 2010. Quirin told Moe that her daughters were the current beneficiaries of her will and that she no longer wished for them to benefit from her estate. She told Moe that she would like to change her will to benefit organizations and individuals with whom she had long, trusting relationships. Moe advised Quirin that a will contest might result from such a change, but Quirin persisted, stating that she and her daughters were "not close." . . .
>
> Moe concluded that Quirin intended to make a new will, understood that she was making a new will, understood her assets, and otherwise understood the consequences of what she was doing. Moe, therefore, drafted a will based on her June 4 discussion with Quirin. . . . Moe, accompanied by two paralegals from her office, visited Quirin's home. Moe and the paralegals observed that Quirin was dressed and articulate and that there was nothing to suggest that Quirin did not have testamentary capacity. Quirin and Moe spoke about the will and their June 4 conversation. Quirin signed the will prepared by Moe during this visit. The paralegals signed the will as witnesses.

What additional techniques might have saved Quirin's estate the costs of a trial and an appeal?

§ 3.04 INTERPRETRING WILLS: EXTRINSIC EVIDENCE

B. Interpretation or Reformation?

Page 160. After sentence ending with "change in some places" add: "including California and Texas. *See Estate of Duke v. Jewish National Fund*, 352 P.3d 863 (Cal. 2015); TEX. PROB. CODE. § 201.056 (2015).

Page 165. Insert as new Note 1A:

1A. *In re O'Donnell***,** 815 N.W.2d 640 (Neb.App. 2012), involved a testator who wrote her own will, but failed to specify what was to happen to money left in testamentary trusts if the beneficiaries died before exhausting the trust funds. Based upon a draft will, and other provisions of the executed will, the court reformed the will to give the property to a cousin, rather than the will's residuary beneficiary.

Add to Note 3:

Because Rest. 3d Prop. § 12.1 refers to "a donative document," it covers more than wills and trusts. *See, e.g., Estate of Irvine v. Oaas,* 309 P.3d 986 (Mont. 2013) (beneficiary

designations in investment contracts); *Pullum v. Pullum,* 58 So.3d 752 (Ala. 2010) (land description in deed).

Page 166. Add to Selected References:

Mark Glover, *Minimizing Probate-Error Risk*, 49 U. Mich. J.L. Reform 335 (2016).

David Hasan, *Unwinding Unwinding*, 57 Emory L. Rev. 871 (2008).

§ 3.05 REVOCATION

A. By a Writing or Physical Act

Page 172. Delete Note 1 and replace with the following:

1. (a) In *Gushwa,* why doesn't the "Revocation of Missing Will(s)" document meet the part of the UPC definition of a "will" that refers to a "testamentary instrument that … revokes … another will …."? *See* UPC § 1-201(56), set forth on Page 85 of the text.

(b) Would it have been effective to revoke the will in a jurisdiction following UPC § 2-503's harmless error rule?

§ 3.07 DEPENDENT RELATIVE REVOCATION

Page 179. Add new Note 3A:

Other courts have followed *Patten's* insistence that the testator must have intended to revoke a prior will on the condition that a later will was effective. *See, e.g., Estate of Sharp*, 889 N.Y.S.2d 323 (N.Y. App. Div. 2009). Comment c to § 4.3 of the Restatement (Third) of Property views this requirement as "misguided":

> *Revocation intending to make a replacement will*. A revocation is presumptively ineffective if a testator, failing in an attempt to replace one will (the first will) with another will (the replacement will), revokes the first will by revocatory act. In such a case, the failed dispositive objective that the testator intended to achieve in connection with revoking the first will is the pattern of distribution contained in the replacement will. If the testator initiated steps toward executing a replacement will that are sufficient to make the dispositive plan that he or she wanted to achieve provable, it is presumed that the testator's revocation of the first will was made in connection with an intent to replace it with the replacement will. After death, the only evidence available may be the ineffectively executed replacement will, and sometimes but not necessarily the revoked first will. Consequently, the doctrine of ineffective revocation would be too restricted if it required evidence of the time of revocation and of a contemporaneous intent to make a replacement will. There need not be affirmative proof of the time of revocation or that, at the time of revocation, the testator intended to replace the first will with a replacement will.

Page 180. Add to Selected References:

Richard F. Storrow, *Dependent Relative Revocation: Presumption or Probability?,* 48 Real Prop. Tr. & Est. L.J. 497 (2014).

§ 3.09 CONTRACTS REGARDING WILLS

Page 187. Delete Note 1 and replace with the following:

1. Professor Alice Noble-Allgire of Southern Illinois University has noted that *Ernest v. Chumley* may have muddied the water inadvertently about whether Illinois law implies a contract from the use of mutual and reciprocal wills (as opposed to a joint will). The case illustrates the importance of precision when quoting other material.

The problem arises in the court's background information in section II A of the *Ernest* opinion. See top of page 185. Quoting *Aimone*, which in turn quoted *Kritsch*, the *Ernest* court says: "In the case of mutual and reciprocal wills, "'a judicial presumption arises in favor of the existence of the contract….'" However, the quoted language actually reads: " … in the case of *such* mutual and reciprocal wills …." (emphasis added). The "mutual and reciprocal" wills in *Kritsch*, like those in *Ernest,* actually included specific language making each survivor's will irrevocable. In Illinois, "such" wills – not just *any* mutual and reciprocal wills – appear to be the ones that give rise to the presumption of a contract.

On the revocability question, many states treat joint wills differently from mutual/reciprocal wills. *See, e.g., Curry v. Cotton,* 191 N.E. 307 (Ill. 1934) (a joint will becomes irrevocable after the death of one of the makers if the survivor accepts any of the benefits made for him by such will); *Oursler v. Armstrong,* 179 N.E.2d 489 (N.Y. 1961) (mutually reciprocal wills may have created a moral obligation for the survivor not to revoke the will, but not a contractual one.)

Cases like *Ernest* illustrate that whatever the case law says, even reciprocal wills pose a litigation risk if the survivor changes his or her will. Unless the local law is very specific, see Note 3, *below*, couples signing mirror-image wills while also wanting to preserve flexibility for their survivor should consider including specific language saying no contract is intended.

Chapter 4: LIFETIME ALTERNATIVES TO WILLS

Page 195. Add as Question

Do you think a provision in an LLC agreement that disposes of a decedent's LLC interest should control or should the interest pass by probate? *See Blechman v. Estate of Blechman*, 160 So.3d 152 (Fla. Dist. Ct. App. 2015) (LLC interest passes pursuant to LLC agreement).

Add to Selected References:

Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 Wash. L. Rev. 799 (1999).

David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 Geo. L.J. 605 (2015).

Melanie B. Leslie and Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. Rev. 61 (2015).

§ 4.01 LIFETIME GIFTS

Page 199. Add as new Note 4:

4. Should the presumption that a transfer to a close family member was a gift apply to a transfer to an in-law of the donor? *See Cohen v. Raymond*, 128 A.3d 1072 (N.H. 2015) (no).

Page 200. Insert at end of Note on Gifts to Minors:

A custodian under the UMGA owes fiduciary duties to the minor. In *Belk v. Belk*, 728 S.E.2d 356 (N.C. App. 2012), a father who had misappropriated funds from his daughter's account was ordered to repay the funds with interest, and to pay attorney's fees. We cover fiduciary duties in Chapter 10.

Page 204. Update footnote 5: As of 2016, Alaska, District of Columbia, Hawaii, Illinois, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Virginia, Washington, and West Virginia have adopted the Act. Over 10 other states have enacted non-uniform transfer on death deed legislation. *See* CAL. PROB. CODE §§ 5620-5628 (2016); OKLA. STAT. tit. 58, § 1252 (2015).

Add as Question and Note:

1. If real property is transferred by a transfer on death deed, might the decedent's estate be liable for the mortgage on the real property? *See In re Estate of Carlson*, 367 P.3d 486 (Okla. 2016) (yes).

2. Some states have enacted transfer on death legislation for certain personal property. See e.g., COLO. REV. STAT. § 42-6-110.5 (2016) (vehicles); MINN. REV. STAT. § 86B.841 (Transfer-On-Death Title to Watercraft) and § 168A.125 (Transfer-On-Death Title to Motor Vehicle).

§ 4.05 LIFETIME TRUSTS

A. Validity of Revocable Trusts

Page 210. Add new paragraph to Note 1 as follows:

Beneficiaries of a revocable trust during the settlors lifetime are neither entitled to an accounting, *see e.g. State v. Thompson* 836 N.W.2d 470, 474 (Iowa. 2013), nor able to sue a trustee who commits a breach of a revocable trust during the settlor's lifetime. S*ee e.g. In re Estate of Giraldin,* 290 P.3d 199 (Cal. 2012). In effect, and as provided by UTC 603(a), the trustee of a revocable trust owes no fiduciary duty to remainder beneficiaries since their rights are subject to the settlor's right to revoke. *See Fulp v. Gilliland*, 998 N.E.2d 204 (Ind. 2013). However, trust beneficiaries who were adversely affected by the breach of duty owed to the settlor may be able to sue the trustee for such breach after the settlor dies. *See In re Estate of Giraldin,* 290 P.3d 199 (Cal. 2012). *Contra In re Trust of Trimble,* 826 N.W.2d 474 (Iowa 2013).

Page 211. In Note 5, before the sentence beginning "The UTC", add the following:

See also McCarthy v. Taylor, 17 N.E.3d 807 (Ill. App. Ct. 2014) (settlor's handwritten modifications to revocable trust instrument were valid and complied with the trust agreement's requirement that all amendments be "in writing" which, as a matter of law, does not require that the writing be a formal legal document).

Page 212. Add at end of Note 5:

California recently amended its statutes to allow a provision in a jointly created trust that the surviving spouse (or any other person) can revoke the portion contributed by the deceased settlor. *See* Cal. Prob. Code §§ 15401 and 15410.

Page 217. Add new Note 1:

1. Creditors are typically barred from reaching the proceeds of life insurance.

Change Note 1 to Note 2 and add at end:

Although the creation of a 529 plan constitutes a completed gift for gift tax purposes, creditors of the account owner can reach the account. See *In re Addison,* 540 F.3d 805, 819–20 (8th Cir.2008)

Chapter 5: CHANGED CIRCUMSTANCES

§ 5.01 ACTS OF THE PROPERTY HOLDER

C. Divorce

Page 243. Add to Note 1:

Nichols v. Suiter, 78 A.3d 344 (Md. 2013), involved the "unless otherwise provided in the will or decree" exception of Maryland's statute. Jessie and Virginia's 1996 separation agreement both waived each party's rights in the other's estate and provided that either party could give all or part of their estate to the other. Jessie died soon after they divorced in 2006, leaving a 2003 will giving his residuary estate to Virginia without mentioning their relationship. Held: the statute applied to invalidate the gift to Virginia.

Add to Note 2:

In *Hillman v. Maretta*, 133 S.Ct. 1943 (2013), the Supreme Court forbade a court from ordering a former spouse, whose rights would have ended under state law, to restore life insurance benefits subject to federal law. *See generally,* Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law,* 64 Vand. L. Rev. 1635 (2014).

Page 244. Add as a new Selected Reference:

John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff,* 67 Vand. L. Rev. 1665 (2014).

§ 5.02 ACTS OF BENEFICIARIES

A. Disclaimers

Page 249. Before *Nielsen v Cass* in Note 3*,* add:

compare

After "(Medicaid benefits)" at the end of Note 3, add:

with Schell v. Pa. Dep't of Pub. Welfare, 80 A.3d 844 (Pa. Comm. 2013) and *Molloy v. Bane*, 631 N.Y.S.2d 910 (N.Y. App. Div. 1995) (disclaimer not effective for Medicaid purposes).

C. Misconduct

Page 253. Add to footnote 13:

Cal. Prob. Code § 6452(a)(3) (parent who abandons child cannot inherit from the child).

Page 260.

Insert in 5th line before "In contrast":

But see Estate of Armstrong v. Armstrong, 170 So. 3d 510 (Miss. 2015) (slayer who was insane at time of killing did not "willfully" cause death under Mississippi statute).

Insert new Note 4A:

4A. Brandon pled guilty to first degree manslaughter for killing his mother-in-law, Dianne, who died leaving Brandon's wife, Deanna, as the sole beneficiary of her will. Before Dianne's estate was distributed, Deanna died intestate, with Brandon as her sole heir and owning only the property acquired from her mother. To prevent Brandon from benefiting from the wrong, the court barred Brandon from collecting from his wife's estate. *Matter of Edwards,* 991 N.Y.S.2d 431 (N.Y. App. Div. 2014).

§ 5.03 CHANGES IN PROPERTY

C. Ademption

Page 267. Add before *In re Estate of Bauer* in Note 2:

Matter of Braunstein, 4 N.Y.S.3d 63 (N.Y. App Div. 2015) (real estate adeemed by its transfer to limited partnership as decedent-partner had no interest in specific partnership assets);

Add at the end of the first paragraph of Note 3:

Where a guardian has sold specifically devised property to pay the ward's expenses, but some of the proceeds of the sale are left over, courts have allowed tracing to the extent of the remaining funds. *See, e.g., Rodgers v. Rodgers*, 406 S.W.3d 422 (Ark. 2012) (timber rights); *In re Estate of Honse*, 392 S.W.3d 511 (Mo. Ct. App. 2013) (farm and associated property).

D. Abatement and Exoneration

Page 270. Add as new paragraph:

Boilerplate clauses can cause trouble when lawyers insert them without thinking about their possible applications. One common clause – a general direction to pay one's debts – is not only unnecessary, but often unwise. As you learned in Chapter 1, debts will be paid. Such a clause can also prompt litigation about whether the exoneration doctrine should apply. For example, in *Estate of Fussell v. Fortney*, 730 S.E.2d 405 (W.Va. 2012), a general direction to pay "just debts" meant that two specific devises of land subject to mortgages should pass free of the mortgages. Most likely, neither the lawyer nor the testator thought about whether the residuary beneficiary or the specific devisees should bear the burden of any mortgages.

Chapter 6: PROTECTING THE FAMILY

Page 281. At the end of the second paragraph, insert new footnote:

For a thoughtful discussion of several topics in this chapter, see Adam J. Hirsch, *Freedom of Testation / Freedom of Contract,* 95 Minn. L. Rev. 2180 (2011).

§ 6.01 DISINHERITED SPOUSES

Page 281.

Delete the last sentence in Footnote 1 and substitute the following:

In contrast, Alaska, allows its couples to choose to hold assets as community property; Arkansas, South Dakota and Tennessee allow its couples to create community property trusts. The purpose for these statutes is to facilitate favorable income tax treatment for the surviving spouse by obtaining a step-up in basis under IRC § 1014(b)(6). The Service has not ruled on whether this tax advantage will be allowed.

A. Community Property

Page 294. Delete "Th" after "dissenting" and change "e" on next line to "The."

C. The Right to Elect

1. The Basics

Page 298. At the end of the second line, add:

See also In re Estate of Shipman, 832 N.W.2d 335 (S.D. 2013) (invalidating purported "disclaimer" of right to elect by incompetent spouse's son acting under power of attorney).

2. Exceptions

Page 299. Add as footnote after sentence in 2d paragraph ending "particular instances."

Although Kentucky employs the fraudulent transfer approach with respect to property transferred by a deceased spouse, life insurance is not considered such an asset. *See Bays v. Kiphart*, 486 S.W.3d 283 (Ky. 2016)

Page 300. At the end of the first paragraph, add:

See also In re Estate of Thompson, 434 S.W.3d 877 (Ark., 2014) (following *Karsenty*).

Page 312. In Note 3, insert following the *Dowling v. Rowan* citation:

Compare Pestrikoff v. Hoff, 278 P.3d 281 (Alaska 2012) (principles of equitable distribution of marital property in divorce do not apply in probate of intestate's estate.)

Add to Selected References:

Martin D. Begleiter, *Grim Fairy Tails: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521 (2015).

§ 6.02 FORGOTTEN SPOUSES AND CHILDREN

Page 332. After the word "overlooked." in the fifth line, delete the reminder of the paragraph and add the following:

Many states provide protection to spouses who were not included in premarital wills. *See, e.g.,* UPC § 2-301. Virtually all states have statutes that provide some protection to children who have been omitted from wills. *See* 2d Rest. Prop. § 34.2, Statutory Note. Because the statutes vary in detail, but pose similar problems, it can be helpful to have a serious of questions you can ask about whichever statute you face.

Page 335. In Note 2, add before "Fourth"

But see In re Trust Under Deed of Kulig, 131 A.3d 494 (Pa. Super. Ct. 2015) (applying Pennsylvania's version of UTC §112, reproduced on Page 227, to allow spouse rights when decedent's revocable trust omitted spouse.)

Add new Notes 5-7 as follows:

5. Pretermitted heir statutes often protect children "born or adopted" after the will's execution. What about unknown children "discovered" later? *Compare In re Gilmore,* 925 N.Y.S.2d 567 (N.Y. App. 2011) (in the absence of specific statutory language "after-known" children not covered), *with* Cal. Prob. Code, § 21622 (child covered if decedent was "unaware" of the child).

6. Pretermitted heir statutes typically apply to children who are adopted after will execution. Should these statutes apply to children who were not actually adopted but would take under intestate statutes based on equitable adoption or virtual adoption? *See Johnson v. Rogers*, 774 S.E.2d 647 (Ga. 2015) (no).

7. UPC § 2-302(b)(2) allows transfers *outside* the will to trump the protections of § 2-302(a) if the intention that the transfers were intended to be in lieu of a testamentary provision "is reasonably inferred from the amount of the transfer or other evidence." What sort evidence would you need? *Cf. Ferguson v. Critopoulos,* 2014 WL 4666935 (Ala., 2014) (providing guidelines to cover similar language in a pretermitted spouse case).

P. 338. Add to Selected References:

Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAP PROP. TR. & EST. L. J. 175 (2015).

P. 348. Add to Selected References:

Meeland Hanna, *Discriminatory Strings Attached: Reining in the Testator's Intent in Conditioning Will and Trust Bequests*, 25 U. FLA. J. L. & PUB. POL'Y 331 (2014).

Emalee G. Popoff, *Testamentary Conditions in Restraint of the Marriage of Homosexual Donees*, 7 DREXEL L. REV. 163 (2014).

Chapter 7: PLANNING FOR INCAPACITY

Page 351. At the end of the second sentence, insert new footnote:

See generally Katherine C. Pearson, *Capacity, Conflict, and Change: Elder Law and Estate Planning Themes in an Aging World*, 117 PENN ST. L. REV. 979 (2013).

At the end of the first paragraph, insert:

Both lawyers and their clients need to fight the temptation to think that only elderly people need these tools. Disability can strike at any time.

§ 7.01 PROPERTY MANAGEMENT AND PRESERVATION

Add as new footnote after "guardianship" in the second line:

Subject to court approval, a guardian may have access to a protected person's digital assets (electronic records). *See* Uniform Fiduciary Access to Digital Assets Act §§ 4 and 7.

A. Durable Powers of Attorney

Page 364. In Note 4, insert the following between the cites to *Kurrelmeyer* and *Dentler*:

Perosi v. LiGreci, 948 N.Y.S.2d 629 (N.Y. App. 2012) (attorney-in-fact can amend trust without specific authorization to do so in trust instrument or in power of attorney);

Add as new Note 4A:

4A. Sections 9 and 10 of the Revised Uniform Fiduciary Access to Digital Assets Act provide rules for an agent acting under a power of attorney to access digital assets (electronic records) of the principal.[8] Generally, access by the agent will need to have been authorized by the principal. *See* Appendix for more details.

§ 7.02 HEALTH CARE DECISIONMAKING

Page 369. Insert before the last sentence in the first paragraph:

Preparation requires facing questions most of us do not like to consider. Helpful sources for starting the conversation include http://med.stanford.edu/letter.html and Paula Span, When the Time Comes (2009).

Page 376. Add new Note 4 followed by a box:

---

[8] Section 14 of RUFADAA provides rules for conservators (guardians) to access digital assets of a protected person. Generally, court authorization will be necessary for the conservator (guardian) to obtain access to the digital assets of a ward. *See* Appendix for more details.

4. Persons suffering from Alzheimer's Disease and other forms of dementia fall between those being kept alive on ventilators, on one hand, and competent people who can consent to assisted suicide, on the other. There is no "plug" to pull, and incompetence precludes legal assisted suicide. Nonetheless, many do not want to continue to live if they are no longer functioning at a certain level.

Key questions include both how to end life and how to decide on the timing. Some commentators advocate directives to voluntarily stop eating and drinking (VSED), phased-in over a few weeks to avoid a traumatic instead of peaceful end. For guidance in developing a standard for when life is worth living, consider the following:

When Is It Time to Go?

Jerome Medalie, a retired lawyer who has long been involved with end-of-life issues, developed the following list of factors for his own advanced directive. [To see the full document, go to https://sites.google.com/site/jeromemedalie/jm-files.]

> More specifically, with respect to the deterioration or erosion of my cognitive capacity, I do not want it to progress to the point when, as examples:
>
> (1) I cannot recognize my loved ones;
>
> (2) I cannot remember the names of my wife/husband or one or more of my children;
>
> (3) I cannot articulate coherent thoughts and sentences;
>
> (4) I cannot read books with understanding and enjoyment;
>
> (5) I cannot watch or listen to television or other media with understanding and enjoyment;
>
> (6) I cannot intelligently discuss an issue with intellectual proportions;
>
> (7) I have forgotten when or how to eat or drink without assistance;
>
> (8) I have forgotten when or how to perform personal hygiene on a regular basis without assistance;
>
> (9) I remain uncommunicative for long periods of time;
>
> (10) I babble incoherently or curse erratically or without apparent provocation exhibit anger, antisocial or other bizarre behavior.
>
> I want "out" long before any modest combination of these instances or events occurs repeatedly or continuously. As a guide, I suggest that whenever any three of these events have occurred and have been repeated or persist over the course of several weeks the time for the withdrawal of life support has arrived.

Page 376. Add as Note 5

Four states allow physician assisted suicide by statute. *See* CAL. HEALTH & SAFETY CODE §443.2 (2016); OR. REV. STAT. § 127.805 (1999); VT. STAT. ANN. tit. 18, § 5283 (2013); WASH. REV. CODE § 70.245.020 (2009). Montana allows physician assisted suicide based on the Montana Supreme Court decision in *Baxter v. State*, 224 P.3d 1211 (Mont. 2009).

Page 380. Add to Selected References:

Robert B. Wolf et al., *The Physician Orders for Life-Sustaining Treatment (POLST) Coming Soon to a Health Care Community Near You*, 40 ACTEC L.J. 57 (2014).

Page 380. Add after last line:

§ 7.03 UNIFORM LAW DEVELOPMENTS; ABLE ACCOUNTS

A. Uniform Laws

Uniform Recognition of Substitute Decision-Making Documents Act (URSDMDA). Currently only enacted in Idaho, the focus of this Act is to protect individual's substitute decision-making documents, which allow an individual to designate authority over their property, health, or personal care to another, such as a power of attorney or healthcare proxy. By complying with the Act's provisions, an individual's substitute decision-making document is given "portability," meaning that the document will be recognized regardless of whether or not it was created in the jurisdiction in which it becomes applicable. Moreover, the Act seeks to provide protection to substitute decision-making documents created in good faith within a jurisdiction thereby protecting and effectuating the creator's intent and potentially avoiding more paternalistic approaches, such as guardianship. *See* Unif. Recognition of Substitute Decision-Making Documents Act (Unif. Law Comm'n 2014).

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). Guardianship and protective proceedings are not accepted under the Full Faith and Credit doctrine of the U.S. Constitution, meaning that states may refuse to recognize a guardianship or protective order issued in another state. This often requires recommencement of guardianship proceedings where an incapacitated adult is moved from one state to another. The UAGPPJA is designed to provide procedures for resolving multi-jurisdictional disputes for adult guardianship procedures, in part, by allowing registration of a guardianship or protective order in a second state as a foreign judgment. The registration allows a guardian or conservator to exercise all of the powers afforded to them pursuant to the order of appointment issued in a different state, subject only to applicable legal limitations of the new state. *See* Unif. Adult Guardianship and Protective Proceedings Jurisdiction Act (Unif. Law Comm'n 2007), which has been enacted in over 40 states. Revisions to the Act are underway and are expected to be approved in 2017.

B. ABLE ACCOUNTS

Achieving a Better Life Experience Act of 2014 (ABLE). With the stated purpose of encouraging and assisting families and individuals to save private funds for the maintenance of health, quality of life and independence, IRC § 529A, enacted in late 2014, allows for the creation of tax-advantaged free savings accounts for disability-related expenses for a designated beneficiary pursuant to a state's qualified ABLE program. *See generally,* Stephanie R, Hoffer, *Making the Law More ABLE: reforming Medicaid for* Disability, 76 Ohio St. L. J. 1255 (2015) Extensive proposed tax regulations were issued on June 22, 2015. *See* REG 102837-15, 80 F.R. 35602.

An ABLE account is an account created by or on behalf of a designated beneficiary that meets all of the requirements of § 529A. In turn, a designated beneficiary must be an eligible individual, that is a person who is blind or otherwise disabled based on various criteria but only if the disabling condition began before the individual was 26 years old.

Significantly, the Protecting Americans from Tax Hikes Act of 2015 (PATH) amended IRC § 529A to remove the restriction that allowed an ABLE account to be established only in the state of residence of the account owner. This amendment will provides flexibility for individuals seeking to create ABLE accounts. Many states have enacted required conforming ABLE legislation. *See* http://www.thearc.org/what-we-do/public-policy/policy-issues/able-legislation-by-state.

Chapter 8: TRUSTS

§ 8.01 AN OVERVIEW

B. Modern Trust Law

Page 383. Add to Note 3 at end:

Since 2011, the UTC has been enacted in the following additional states: Kentucky, Maryland, Massachusetts, Mississippi, Minnesota, Montana, New Jersey, Ohio and Wisconsin.

Page 388. Add to Selected References:

Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L.REV. 497 (2015).

Lee-Ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars,* 108 Nw. U.L.Rev. 743 (2104).

§ 8.02 CREATION

A. Intent

Page 394. In Note $, add after 2d sentence ending in "undue influence.":

See also In re Estate of Stan, 839 N.W.2d 498 (Mich. Ct. App. 2013) (although challenging the appointment of a personal representative violated a no-contest clause in a revocable trust, forfeiture would not result because probable cause existed for the challenge).

In Note 4 replace *Keener* case with:

Rafalko v. Georgiadis, 777 S.E.2d 870 (Va. 2015)

Page 396. Add to Selected References:

Deborah S. Gordon, *Forfeiting Trust*. 57 Wm. & Mary L. Rev. 455 (2015).

B. Trust Property

Page 398. Add as new question:

4. Can property acquired after a trust has been created be treated as trust property by a recitation that after-acquired property be part of the trust? *Rose v. Waldrip*, 730 S.E.2d 529 (Ga. App., 2012), correctly decided, following 2d Rest. Trusts 86 and 3d Rest, Trusts 41, that an interest that is not in existence on trust creation cannot be held in trust. Of course, once the property comes into existence, it may become part of the trust by transfer or even by declaration in almost all states. See Note 4 on Page 400.

Page 400. Before *Hatch* cite in Note 4 add:

Rose v. Waldrip, 730 S.E.2d 529 (Ga. App. 2012).

§ 8.03 THE NATURE OF A BENEFICIARY'S INTEREST

B. Discretionary and Support Trusts

Page 419. In Note 1 replace the first sentence as follows:

1. Abuse of discretion giving rise to court control of a trustee may arise from acts of bad faith, from improper motive (including the exercise of judgment that is contrary to the terms and purposes of the trust) or from the exercise of judgment that is contrary to a trustee's fiduciaries duties. *See, e.g., Rafalko v. Georgiadis*, 777 S.E.2d 870 (Va. 2015) and *In re G.B. Van Dusen Marital Trust,* 834 N.W.2d 514 (Minn. 2013). *See generally* 3d Rest. Trusts § 87 and comments thereto.

Page 420. Add to Selected References:

Ivan Taback, *When the Rubber Meets the Road: A Discussion Regarding a Trustee's Exercise of Discretion*, 49 REAL PROP. TR. & EST. L.J. 491 (2015).

C. Transfers of Beneficial Interests in Trust

2. Spendthrift Provisions and Other Restraints on Alienation

Page 426. Before sentence starting with "As Professor Hirsch notes," add to Note 1:

See, *e.g. Fannie Mae v. Heather Apartments Ltd. Partnership,* 811 N.W.2d 596 (Minn. 2012).

Page 434. Add in second full paragraph after N.Y. EPTL § 7-3.1(a):

and *Rush University Medical Center v. Sessions,* 980 N.E.2d 45 (Ill. 2012).

Add at end of third full paragraph:

Mississippi, Ohio, Virginia and West Virginia have joined the ranks of asset protection trust jurisdictions.

Add at end of page:

A Washington resident created a trust for which Alaska's asset protection laws was to apply. Because Alaska had no substantial relation to the trust property, the bankruptcy court held that Washington law applied. *In re Huber,* 493 B.R. 798 (W.D. Wash., 2013). In addition, the *Huber* court held that the trust transfers were fraudulent under Bankruptcy Law § 548(e) and thus void. *Accord In re Mortensen*, 2011 Bank Lexis 5004 (D. Alaska 2011).

See generally Uniform Voidable Transactions Act (Formerly Uniform Fraudulent Transfer Act) (as amended in 2014.)

Page 443. Add as new Selected Reference:

Jay Soled and Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L.REV. 257 (2015).

Page 435. Add to Selected References:

Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741 (2014).

4. Medicaid Eligibility

Pages 440-441. Delete the sentence in Note 2 beginning "For example," and replace it with the following sentence:

Although a trust beneficiary's right to income will not be counted as an available resource to qualify for Medicaid eligibility and the furnishing of nursing home care, the income received by the beneficiary must be used to pay for the beneficiary's nursing home care with Medicaid picking up any balance.

§ 8.04 REFORMATION, MODIFICATION, AND TERMINATION

A. Reformation and Modification Based on Ambiguity and Mistake

Page 444. At the end of sentence discussing UTC § 415, add:

provided the mistake was proved by clear and convincing evidence. *See In re Matthew Larson Trust Agreement*, 831 N.W.2d 388 (ND. 2013) (applying UTC § 415 to allow reformation). *See also In re Irrevocable Trust Agreement of 1979,* 331 P.3d 881(Nev. 2014) (rescission also possible).

Delete the sentence beginning "The more traditional" and insert as follows:

The more traditional jurisprudence would allow for the correction of mistakes, *see, e.g.*, *In re Irrevocable Trust Agreement of 1979*, 331 P.3d 881 (Nev. 2014) (irrevocable lifetime trust can be reformed or rescinded if the settlor can prove unilateral mistake by clear and convincing evidence), even though the correction was made after the settlor died.) *Popp v.* Rex, 916 So.2d 954 (Fla. Dist. Ct. App. 2005) (pre-UTC § 415 case).

Page 444. Add to Selected References:

Fred Franke and Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1 (2014).

B. Termination and Modification Prescribed by Settlor

Page 445. Add to Note on Decanting after cite to Florida case:

, and most recently in *Morse v. Kraft,* 992 N.E.2d 1021 (Mass. 2013).

Delete sentence in Footnote 12 and replace it with the following:

In the summer of 2015, the Uniform Law Commission approved a Uniform Trust Decanting Act. The Act has been enacted by Colorado and New Mexico. *See generally* Kristin T. Abati & REnat V. Lumpac, *The Uniform Trust Decanting Act*, Trusts & Estates at 15 (Feb. 2016).

C. Termination and Modification by the Trust Beneficiaries

1. The Claflin Doctrine

Page 448. In Note 1(b), the citation to *Estate of Bonardi* should read N.J. not N.Y. In fact, no New York case has ever cited the *Claflin* case:

After citation to *White v, Fleet Bank* in Note 1, add:

But see In re Pike Family Trusts, 38 A.3d 329 (Me. 2012) (applying UTC § 411(c) that spendthrift provision is not presumed to be a material purpose).

In last line on page, add the following after "behavior.":

*See also In re Trust Under Will of Flint***,** 118 A.3d 182 (Del. Ch. Ct. 2015)

Page 449. Add as new Selected Reference:

Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237 (2015).

D. Judicial Modification or Termination

Page 455. In Note 1, insert following the *Toledo Trust Co. v. Toledo Hospital* citation:

; *In re Trust Under Will of Flint*, 118 A.3d 182 (Del. Ch. 2015) (refusing to allow a directed trust even though all trust beneficiaries requested); *In re Mary R. Latimer Trust*, 78 A.3d 875 (Del. Ch. 2013) (refusing to deviate from terms of a private trust to maintain specific burial plots by allowing for general cemetery maintenance despite anticipated financial deterioration of the cemetery).

Add at end of Note 2:

See also Kristoff v. Centier Bank, 985 N.E.2d 20 (In. 2013) (modification denied because there were no unanticipated circumstances).

§ 8.05 CHARITABLE TRUSTS

Page 457. Add after the first paragraph, the following new paragraph:

As Professor Ascher has explained in his extensive article, "Congress and the federal courts [have] federalized the law of charity." Mark L. Ascher, *Federalization of the Law of Charity*, 67 VAND. L. REV. 1581 (2014).

A. Creation and Enforcement of Charitable Trusts

Page 464. Add to end of Note 4:

But see Lucker v. Bayside Cemetery, 979 N.Y.S.2d 8 (N.Y. App. Div. 2013) (denying "special interest" status to family members of deceased individuals who purchased perpetual care contracts because as a group they were neither "sharply defined" or "limited in number.").

In Note 5, insert following the *Russell v. Yale Univ.* citation:

See also Courtenay C. & Lucy Patten Davis Found. v. Colo. State Univ. Research Found., 320 P.3d 1115 (Wyo. 2014) (denying standing to donor to enforce the terms of the gift not in trust).

Page 479. Delete the last sentence in Note 6 and substitute the following:

The court excised the racial restriction and, by applying the *cy pres* doctrine, allowed the private hospital to keep the $28 Million bequest.

C. Modification

Page 481. Add to Selected References:

Katie Magallanes, *Beyond Donor Intent: Leveraging Cy Pres to Remedy Unintended Burdens Caused by Charitable Gifts*, 40 ACTEC L.J. 407 (2014).

Allison Anna Tait, *The Secret of Charitable Giving*, 95 B.U. L.REV. 1663 (2015).

Chapter 9: PLANNING FOR THE FUTURE: SUCCESSIVE TRUST INTERESTS

§ 9.02 Interpretation Questions

Page 503. After *Compare* in Note 3, add:

Tait v. Community First Trust Co., 425 S.W.3d 684 (Ark. 2012).

Page 504. Add as new Note 7:

7. Even if a remainder beneficiary is required to survive until distribution by the trustee, the interest may become vested if the beneficiary dies before distribution and the distribution was unreasonably delayed by the trustee. *See In re Cornell*, 367 P.3d 173 (Idaho 2016).

B. Class Gifts

1 Status Questions

Page 520. In second paragraph of Note 3 delete "Accord *Watson v. Baker*, 829 N.E.2d 648 (Mass. 2005)" and add:

But see Bird Anderson v. BNY Mellon, N.A., 974 N.E.2d 21 (Mass. 2012) (retroactive application of adoption statute by 2009 amendment to 1942 trust was unreasonable and violated substantive due process rights);

Delete "But see" before *Whirlpool.*

Page 521. Add after first sentence in Note 2:

See, e.g. Otto v. Gore, 45 A.3d 120 (De. 2012) (adoption by former spouse of 65 year old ex-husband was not intended by settlor to be a grandchild of trust).

Add after last sentence in Note 3, the following:

Cf. Sanders v. Yanez, 190 Cal. Rptr. 3d 495 (Cal. Ct. App. 2015) (adult adoption in Texas recognized in California trust employing term "issue" because parent-child relationship created under Texas law).

§ 9.03 Powers of Appointment

Page 538. Add as new paragraph:

In 2013, the Uniform Law Commission approved the Uniform Powers of Appointment Act (UPOAA), which generally translates the Restatement (Third) of Property's Division on Powers of Appointment into legislation.[9] Colorado, Missouri, Montana, New Mexico, North Carolina and Virginia have enacted a version of the UPOAA, with other enactments likely.

A. The Basics

4. Who Owns the Property

Page 541. Delete the last sentence in the second paragraph and add:

The Restatement (Third) of Property takes the position that on the death of the donee of testamentary general power of appointment the property subject to the power is reachable by creditors and available to pay expenses to the extent probate assets are insufficient whether or not the power is exercised. *See* 3d Rest. Property § 22.3.

B. Creation and Exercise

Page 547. In Note 5, insert following the *Catch v. Phillips* citation:

; Cessac v. Stevens, 127 So. 3d 675 (Fla. Dist. Ct. App. 2013) (power not validly exercised when instrument creating power required specific reference to power on exercise and donee only evidenced a general intent to exercise the power in his will).

§ 9.04 The Rule Against Perpetuities

Page 579. After the first sentence, add the following footnote:

North Carolina, which has repealed the Rule, and four states (Arizona, Nevada, Utah and Wyoming), which allow trusts to last for multiple centuries, have constitutional prohibitions on perpetuities. The question is whether the constitutional prohibition effectively prevents such states from allowing perpetual or near-perpetual trusts. *See generally*, Robert H. Sitkoff and Steven J. Horowitz, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769 (2014). *Cf. Bullion Monarch Mining, Inc., Vs. Barrick Gold Strike Mines, Inc.,* 345 P.2d 1040 (suggesting that Nevada's original constitutional provision is not "static").

Page 582. Add to Selected References:

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[9] There are some exceptions. For example, contrary to the Restatement position, *see* Note 22 on page 538 of the text, UPOAA § 103(13) excludes fiduciary powers as powers of appointment.

Reid Kress Weisbord, *Trust Term Extension*, 67 Fla. L. Rev. 73 (2015).

Chapter 10: PROBLEMS IN ADMINISTRATION

§ 10.01 An Overview

Page 586. Add at end of second paragraph:

See In re Peierls Family Inter Vivos Trusts, 77 A.3d 249 (Del. 2013) (illustrating complexities involved in changing the law governing trust administration).

§ 10.02 Duty of Loyalty

Page 592. Add as new paragraph before the paragraph beginning "The litigated cases", the following:

The duty of loyalty is a default duty, rather than a mandatory duty. *See* UTC § 105. *See generally* Mark L. Ascher, 3 Scott & Ascher on Trusts § 16.1 (5th ed. 2007). As a result, a settlor may relieve a trustee from the duty of loyalty. *See, e.g., Noveletsky v. Metropolitan Life Insurance Company*, 49 F.Supp.3d 123 (D. Me. 2014).

Page 593. Add before *Zim* cite near bottom of page, the following:

Estate of Greenblatt, 86 A.3d 1215 (Me. 2013) (personal representative did not violate the duty of impartiality);

Page 594. Add as Problem 3:

3. If a trustee holds a minority interest in a corporation and the trustee is also a director of the corporation, should the trustee vis-à-vis his corporate duties be held to the higher trustee-level standard rather than the lower corporate-level standard? *Rollins v. Rollins*, 755 S.E.2d 727 (Ga. 2014) (no; lower corporate-level standard applies); *Rollins v. Rollins*, 780 S.E.2d 328, 344 (Ga. 2015) (same).

Page 596. Add after 1st sentence in Note 1:

See Audette v. Poulin, 127 A.3d 908 (R.I. 2015) (no duty of care owed to trust beneficiaries by attorney for trust; hence malpractice claim failed) *and Trask v. Butler*, 844, 872 P.2d 1080, 1085 (1994) (holding that estate attorney is not liable to beneficiaries for legal malpractice, and explaining that beneficiaries have adequate alternative remedies against the personal representative).

Page 597. Add in Note 3 following *Wells Fargo Bank v. Superior Court* citation:

Restatement (Third) of Trusts §82, cmt f, approves the fiduciary exception:

> [L]egal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust . . . are subject to

> the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust.

The fiduciary exception to the attorney-client privilege may also allow for a successor trustee to receive otherwise privileged information from a predecessor trustee on matters relevant to trust administration. *See Hammerman v. Northern Trust Co.*, 329 P.3d 1055 (Ariz. Ct. App. 2014) (reasoning that allowing predecessor trustee to assert attorney-client privilege against successor trustee would impede successor trustee's duty to keep beneficiaries reasonably informed).

§ 10.03 Managerial Issues

C. Duties and Powers

Page 603. Add as new Note 4:

Sections 7 and 8 of the Revised Uniform Fiduciary Access to Digital Assets Act provide rules that authorize a personal representative to access digital assets (electronic records) of a decedent. Section 11-13 provide rules that authorize trustees to access digital assets held as trust property. Generally, access will need to have been authorized by the testator or settlor. *See* Appendix for more details.

D. Investments

Page 618. Add to Selected References:

Trent S. Kiziah et al., *The Persistent Preference for Inception Assets*, 40 ACTEC L.J. 151 (2014).

William Sanders, *Resolving the Conflict Between Fiduciary Duties and Socially Responsible Investing*, 35 PACE L.REV. 535 (2014).

Add at end of Note 2:

Section 1(b) of the Act allows a settlor to eliminate, or otherwise override duties under the prudent investor act. *See e.g*. *Carter v. Carter*, 985 N.E.2d 1146 (Il. App. 2012) (duty to diversify eliminated so investment in only tax free municipals permitted).

Add at end of Note 4:

Trustee investment decisions with regards to charitable trusts must take into consideration the fact that the trust is designed to support an income beneficiary in perpetuity. Therefore, the trustee must balance the generation of income with the need to maintain the principal to provide income for the beneficiary indefinitely. *See Woodward School for Girls v. City of Quincy*, 13

N.E.3d 579 (Mass. 2014) (trustee of charitable trust breached duty of prudence by failing to take inflation into account to preserve principal and thereby assure benefits for income beneficiary).

A. Remedies in General

3. Delegation and Direction

b. Direction

Page 623.

Footnote 3, change UPC §8 to UTC §8.

Add at end of Note 3:

On remand of *McLean*, the judge granted a directed verdict in favor of the trust protector, which was upheld on appeal because no damages resulted from any breach. *Robert T. McLean Irrevocable Trust,* 418 S.W.3d 482 (Mo. App. 2014).

Add new Note 3A:

3A. In *Minassian v. Rachins*, 152 So. 3d 719 (Fla. Dist. Ct. App. 2014), the court upheld the validity of the trust provision granting the trust protector "sole and absolute discretion" to modify the terms of the trust to either benefit the beneficiaries *or* to further the settlor's intent. Pursuant to its power the trust protector amended an ambiguous trust provision to conform to settlor's intent, which was upheld by the court as a valid exercise of power, even though it had the effect of disadvantaging beneficiaries currently in midst of litigation. *Id.* at 727 ("It was the settlor's intent that, where his trust was ambiguous or imperfectly drafted, the use of a trust protector would be his preferred method of resolving those issues . . . assigning it to a court violates the intent of the settlor.").

Page 623. Add to Selected References:

Lawrence A. Frolik, *The Next Big Thing*, 50 REAL PROP. TR. & EST. L.J. 267 (2015).

Add as new Note 5:

5. The Uniform Law Commission is working on a Uniform Directed Trust Act, which should be approved in the summer of 2017. The Act will deal with trust advisors and trust protectors as well as co-trustees subject to direction by other co-trustees.

D. Other Fiduciary Duties

Page 660. Delete the last sentence in Note 2 and substitute the following sentence:

The UTC, which Maryland has now enacted, addresses both issues.

Page 661. Delete the first sentence in paragraph 2 beginning with "As a general matter," and replace it with the following:

The trustee's duty to provide certain information, including the duty to notify qualified beneficiaries of the existence of an irrevocable trust, was made mandatory under the original UTC. *See* UTC § 105(b)(8), as was the duty to responds to requests for reports and other information. *See* UTC § 105(b)(9).

Add new paragraph to the end of Note 2:

Non-UTC states vary in their approaches to the trustee's duty to furnish information to beneficiaries. For example, Georgia makes the trustee's duty mandatory whereas Alaska, Delaware, and South Dakota allow settlors to keep trusts secret.

Page 662.

Add new paragraph to Note 3 before paragraph beginning "Restatement (Third) Trusts § 82":

Since 2011 several states have enacted the UTC with differing approaches to the secret trust issue. Minnesota, Mississippi and Wisconsin permit secret trusts; Kentucky employs the surrogate approach (as does Florida) while Maryland has enacted the mandatory provisions of UTC § 105(b)(8) and (9).[10]

§ 10.04 Remedies for Breach of Fiduciary Duties

Page 665. Add as new paragraph:

Recent cases have reached opposite conclusions. *Compare Rachel v. Reitz,* 403 S.W.3d 840 (Tex. 2013) (provision binding) *with McArthur v. McArthur,* 168 Cal. Rptr.3d 785 (Cal. App. 2014) (not binding).

A. Remedies in General

Page 670. Add as new Notes 2A and 2B as follows:

Note 2A. When calculating damages caused by the trustee's improper discretionary distributions to an income beneficiary, the trustee may be liable to remainder beneficiaries for the total amount of improper distributions with interest accruing from the date of the life income beneficiary's death. *See Reliance Trust Co. v. Candler*, 751 S.E.2d 47 (Ga. 2013) (reversing a jury award which calculated prejudgment interest running from the date of each encroachment

[10] Nebraska has not only enacted the mandatory duty of UTC § 105(b) (9) to respond to requests but also makes mandatory the trustee's duty to keep qualified beneficiaries reasonably informed about the trust and material facts necessary to protect their interests. *See Rafert v. Meyer*, 859 N.W.2d 332 (Neb. 2015) (holding ineffective a trust provision waiving trustee's duty to notify beneficiaries about material facts).

reasoning that any interest accruing on trust corpus would have been distributed to the income beneficiary).

Note 2B. Where a trustee causes loss to the trust by breaching the duty of care and simultaneously breaches the duty of loyalty by engaging in self-dealing, whereby the trustee profits from loss to the trust, the trustee may be liable for both restoration damages and for disgorgement of profits that were the result of the wrongdoing. These remedies may not be mutually exclusive, meaning that a beneficiary's recovery will not be limited to restoration damages if restoration damages will ensure that both remedial goals are fulfilled. *See Miller v. Bank of Am., N.A.*, 352 P.3d 1162 (N.M. 2015) (remanding the case back to the trial court on the issue of damages where the record was unclear as to whether both restoration and disgorgement were accomplished).

Page 672. Add after 1st sentence in Note 8:

But see UTC § 1004 (allowing court to award attorney fees "as justice and equity may require"), which was applied in *Shelton v. Tamposi,* 62 A.3d 741(N.H. 2013) (award justified by trustee's bad faith). *Cf. In re Trust No. T-1 of Trimble,* 826 N.W.2d 474 (Iowa 2013) (no compelling reasons to require trustee to pay attorney's fees).

Add following the *McNeil v. McNeil* citation:

; *Regions Bank v. Lowrey*, 154 So. 3d 101 (Ala. 2014) (allowing attorney fees payable from trust assets when trustee successfully defended against a $13 million claim for breach of fiduciary duty brought by beneficiaries).

B. Bars to Relief

Page 677. Add to Note 2:

But see Rafert v. Meyer, 859 N.W.2d 332 (Neb. 2015) (based on UTC § 1008(b), court refused to recognize exculpatory clause because exculpatory term, which was drafted by trustee, was neither fair nor was its existence communicated to the settlor).

In Note 3, insert following the parenthetical discussion of *In re Scheidmantel:*

But see, *Newcomer v. Nat'l City Bank*, 19 N.E.3d 492 (Ohio Ct. App. 2014) (rejecting beneficiaries' argument that in determining whether trustee acted with reckless indifference to purpose of trust the court should consider the cumulative effects of each individual act of negligence or poor judgment).

Add at end of Note 5:

States vary whether a trustee may condition payment on trust beneficiaries releasing trustee from liability. *Compare* Cal. Prob. Code § 16004.5 (a) (prohibiting), w*ith Hastings v. PNC Bank, NA,* 54 A.3d 714 (Md. 2012) (allowing).

Add at end of Note 6:

See In re Theresa Houlahan Trust, 101 A.3d 599 (N.H. 2014) (when trustee allegedly wrongfully transferred the sole asset of trust property, the beneficiary's claim for breach of fiduciary duty became property of the trust; thus, the trust was not terminated and he statute of limitations did not start running until the trustee's death).

Page 680. Add to Selected References:

Alan Newman, *You Don't Know What You've Got Till It's Gone: Time-Barred Claims under the Uniform Trust Code,* 48 Real Prop. Tr. & Est. L.J. 459 (2014).

APPENDIX

The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA) of 2015 can be accessed at the Uniform Law Commission's website as follows:

http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf

The following is the Prefatory Note to RUFADA.

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)

PREFATORY NOTE

The purpose of the Revised Fiduciary Access to Digital Assets Act (Revised UFADAA) is twofold. First, it gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible. Second, it gives custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications. The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user. It adheres to the traditional approach of trusts and estates law, which respects the intent of an account holder and promotes the fiduciary's ability to administer the account holder's property in accord with legally-binding fiduciary duties. The act removes barriers to a fiduciary's access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law. Existing law prohibits any fiduciary from violating fiduciary responsibilities by divulging or publicizing any information the fiduciary obtains while carrying out his or her fiduciary duties.

Revised UFADAA addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees. It distinguishes the authority of fiduciaries, which exercise authority subject to this act only on behalf of the user, from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

Digital assets are electronic records in which individuals have a right or interest. As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. These assets, ranging from online gaming items to photos, to digital music, to client lists, can have real economic or sentimental value. Yet few laws exist on the rights of fiduciaries over digital assets. Holders of digital assets may not consider the fate of their online presences once they are no longer able to manage their assets, and may not expressly provide for the disposition of their digital assets or electronic communications in the event of their death or incapacity.

Even when they do, their instructions may come into conflict with custodians' terms-of-service agreements. Some Internet service providers have explicit policies on what will happen when an individual dies, while others do not, and even where these policies are included in the terms-of-service agreement, consumers may not be fully aware of the implications of these provisions in the event of death or incapacity or how courts might resolve a conflict between such policies and a will, trust instrument, or power of attorney.

The situation regarding fiduciaries' access to digital assets is less than clear, and is subject to federal and state privacy and computer "hacking" laws as well as state probate law. A minority of states has enacted legislation on fiduciary access to digital assets, and numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered. A uniform approach among states will provide certainty and predictability for courts, users of Internet services, fiduciaries, and Internet service providers. Revised UFADAA gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent, protected person, principal, or a trust.

With regard to the general scope of the act, the act's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records in which an individual has a property right or interest, which do not include the underlying asset or liability unless it is itself an electronic record.

The act is divided into 21 sections. Section 2 contains definitions of terms used throughout the act.

Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who have access to digital assets under Revised UFADAA, and carves out an exception for digital assets of an employer used by an employee during the ordinary course of business.

Section 4 provides ways for users to direct the disposition or deletion of their digital assets at their death or incapacity, and establishes a priority system in case of conflicting instructions.

Section 5 establishes that the terms-of-service governing an online account apply to fiduciaries as well as to users, and clarify that a fiduciary cannot take any action that the user could not have legally taken.

Section 6 gives the custodians of digital assets a choice for disclosing those assets to fiduciaries. A custodian may, but need not, comply with a request for access by allowing the fiduciary to reset the password and access the user's account. In many cases that will be the simplest method of compliance. However, a custodian may also comply without giving access to a user's account by simply giving a copy of all the user's digital assets to the fiduciary. That method may be preferred for a social media account when a fiduciary has no need for full access and control.

Sections 7-14 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications protected under federal privacy laws and for other types of digital assets. Generally, a fiduciary will have access to a catalogue of the user's communications, but not the content, unless the user consented to the disclosure of the content.

Section 15 contains general provisions relating to the rights and responsibilities of the fiduciary. Section 16 addresses compliance by custodians and grants immunity for any acts taken in order to comply with a fiduciary's request under this act. Sections 17-21 address miscellaneous topics, including retroactivity, the effective date of the act, and similar issues.

The New York legislature enacted RUFADAA which, as of this writing in early August 2016, is awaiting the Governor's signature. The legislative memorandum in support explained as follows:

> The wide use of digital assets has created an urgent need for legislation dealing with the administration of these assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick and mortar building. This measure would amend the EPTL to restore control of the disposition of digital assets back to the individual and removes such power from the service provider.
>
> This measure gives fiduciaries authority to gain access to, manage, distribute and copy or delete digital assets. It addresses four types of fiduciaries, namely: a personal representative (executor or administrator) of a decedent's estate; a guardian of a ward or protected person; an agent acting pursuant to a power of attorney; and a trustee.

In the past, where property was mostly in tangible form, there was little doubt of its ownership and control. Indeed, the law recognizes that when a property owner dies or becomes unable to manage his or her property, such owner may appoint a fiduciary to manage the property. The role of a fiduciary subsumes the duty of loyalty, care and confidentiality. The system has worked well throughout our history. This measure does not break new legal ground, but merely applies the laws governing fiduciaries to a new type of property.

Service providers protect themselves by requiring a user to agree to a Terms of Service ("TOS") agreement prior to creating an online account. In the absence of state laws dealing with the disposition of digital assets, individuals will likely be subject to the service provider's TOS if it has a policy regarding the transfer or disposal of the account and its content. Some service providers have a policy that indicates what will happen upon the death of a user, but most have no explicit policy.

In addition, there are federal laws that criminalize, or penalize; the unauthorized access of computers and digital accounts and prohibit most service providers from disclosing account information to anyone without the user's consent. These laws include the Electronic Computer Privacy Act (the "ECPA"); the Stored Communications Act (the "SCA"), which is part of the ECPA, and the Computer Fraud and Abuse Act ("CFAA"). The CFAA prohibits unauthorized access to computers and protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." The SCA contains two relevant prohibitions. First, the SCA makes it a crime for anyone to "intentionally access without authorization a facility through which an electronic communication service is provided" as well as to "intentionally exceed an authorization to access that facility." Second, the SCA prohibits an electronic communications service from knowingly divulging the contents of a communication that is stored by or maintained on that service unless disclosure is made "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "with the lawful consent of the originator or an addressee or intended recipient of such communication."

The SCA is often the basis on which service providers refuse to release the contents of a deceased user's account. In addition to federal privacy laws, there are state privacy laws. All fifty states, including New York, have enacted criminal laws penalizing unauthorized access to computer systems. Consequently, without legislation, many service providers will likely continue to refuse to provide access or to release content upon the death or incapacity of a user on the basis of privacy concerns or for fear of facing certain liability.

This measure is based largely on a proposal from the Uniform Law Commission namely RUFADAA (Revised Uniform Fiduciary Access to Digital Assets Act) which is a compromise designed to address the serious problems outlined above and, as well, the concerns of the service providers and civil libertarians. The only changes from such act are those necessary to conform it to existing New York law.

The following are excerpts from a legislative memorandum prepared by the Trusts and Estates Law Section of the New York State Bar Association, which recommended enactment of RUFADAA in New York:

To put some context around the need for legislation dealing with digital assets, consider the following[11]: the number of active Facebook users is 1.28 billion; YouTube users total 1 billion (4 billion views per day); active Twitter users total 255 million; LinkedIn users total 300 million; Flickr users total 92 million, Gmail users total 425 million and Yahoo! Mail users total 273 million.[12] In addition to these online services, the use of bitcoins (digital or virtual currency)[13], online gambling sites, and the creation of blogs and website domain names are becoming more common place. The statistics prove what we intuitively already know: that the use of digital assets is substantial and will only continue to grow. Despite this change in the way we live, existing New York State probate laws fail to address digital assets.

Without new legislation to provide guidance and structure for dealing with such assets, individuals face potentially disastrous consequences. Some past examples include: the family of a soldier who was killed by a bomb while stationed in Fallujah wanted copies of email correspondence from his Yahoo! email account and Yahoo! refused;[14] the family of a 15-year old who committed suicide wanted access to their son's Facebook account to search for answers;[15] the blogger who died suddenly of a heart attack during the night whose Flickr account, full of photos, was closed and unavailable to the family after his death;[16] and the family who wanted access to the deceased's Facebook account to help convince authorities that her death was not a suicide.[17]

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[11] This list is merely representative and not meant to be exhaustive.

[12] Craig Smith, *How Many People Use 416 of the Top Social Media, Apps and Tools?* April 2, 2014, DIGITAL MARKETING RAMBLINGS, available at http://expandedramblings.com/index.php/resource-how-many-peopleuse-the-top-social-media/ (website last checked May 6, 2014).

[13] *See* Russell Goldman, *What are Bitcoins? Virtual Currency Explained (Like You're an Idiot),* abcnews.com, Nov. 18, 2013, available at http://abcnews.go.com/Technology/bitcoins-virtual-currency-explained-idiot/story?id=20926230.

[14] *See In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005). The Michigan probate court appointed the father as personal representative of the estate and obtained a court order directing Yahoo! to turn over the emails. (*N.B*. Yahoo! was made a party to the proceeding.) Yahoo! ultimately provided a C.D. with photographs and emails—but only the emails the deceased received because he set up the account not to save sent messages.

[15] Tracy Sears, *Family, lawmakers push for Facebook changes following son's suicide*, available at http://wtvr.com, January 8, 2013.

[16] *See* Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, COMMON LAW CONSPECTUS, p. 197, Vol. 21 (2012).

[17] *See In re Facebook, Inc*., 2012 U.S. Dist. LEXIS 134977 (N.D. Cal. Sept. 20, 2012) (where Facebook was granted a motion to quash a subpoena to release content of the deceased's Facebook account to her family to assist in determining whether her death was a suicide).