

FUNDAMENTALS OF TRUSTS AND ESTATES

FIFTH EDITION

2019 SUPPLEMENT

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Preface

This Supplement primarily updates case and statutory developments since the manuscript for the Fifth Edition was submitted in the spring of 2017.

On the legislative side, the most important state-level development involved two new uniform laws: the Uniform Fiduciary Income and Principal Act, approved in July 2018, and the Uniform Electronic Wills Act, approved in July 2019. Widespread enactment of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) (2015) continues.

On the federal level, the Tax Cuts and Jobs Act of 2017 made a most significant change in the federal wealth transfer area; the exemption amount was raised from \$5 Million, as adjusted annually for inflation, to \$10 Million, as adjusted annually for inflation for the years 2018-2025. As a result, very few individuals will be required to pay federal estate, gift and generation-skipping transfer taxes during this period. Several states, including New York and Massachusetts, however impose death taxes with significantly lower exemption amounts.

I express my appreciation to my legal assistant, Theresa Colbert, and my research assistant, Kelly Vidur, Albany Law School, Class of 2019, for their help in preparing this Supplement.

Ira Mark Bloom

August, 2019

Chapter 1: LAWYERS, ESTATES, AND TRUSTS

§ 1.02 AN OVERVIEW OF INTER-GENERATIONAL WEALTH TRANSFER

D. The Uniform Codes and the Restatements

Page 16. Delete reference to *Kulig* case in footnote 10 and substitute *Hodges v. Johnson*, 170 N.H. 470 (New Hamp. 2017) and *Harvey ex rel. Gladden v. Cumberland Tr. & Investment*, 532 S.W.3d 243 (Tenn. 2017).

§ 1.03 FEDERAL WEALTH TRANSFER TAXES

Pages 18-19. Replace the last 2 lines on Page 18 and the 1st 2 lines on Page 19 with the following:

In 2017, Congress enacted the Tax Cuts and Jobs Act, which is generally effective for tax years beginning in 2018. The Act made a most significant change in the federal wealth transfer area; the exemption amount was raised from \$5 Million, as adjusted annually for inflation, to \$10 Million, as adjusted annually for inflation for the years 2018-2025. As a result, very few individuals will be required to pay federal estate, gift and generation-skipping transfer taxes during this period. Several states, including New York and Massachusetts, however impose death taxes with significantly lower exemption amounts.

Page 19. Change footnote 19 to read as follows:

The Tax Cuts and Jobs Act of 2017 made numerous changes to the federal income tax system, including the permanent lowering of rates, the suspension of the personal exemption deduction while increasing the standard deduction, and restrictions on various deductions. Most changes, other than rate changes, only apply for the years 2018-2025.

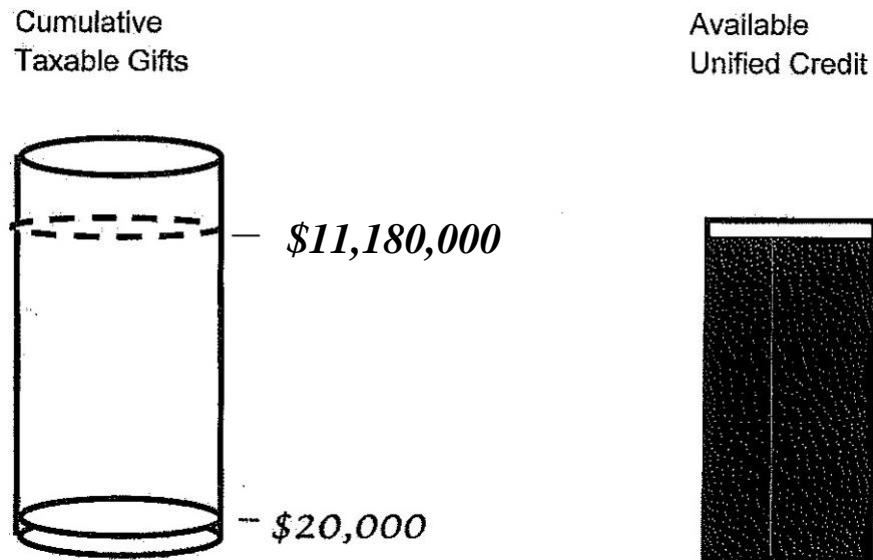
A. Unified System

Page 20. Add as new 2d paragraph:

The Tax Cuts and Jobs Act of 2017 made a most significant change in the federal wealth transfer area; for the years 2018-2025 the exemption amount was raised from \$5 Million, as adjusted annually for inflation, to \$10 Million, as adjusted annually for inflation. For 2019, the exemption amount is \$11,400,000.

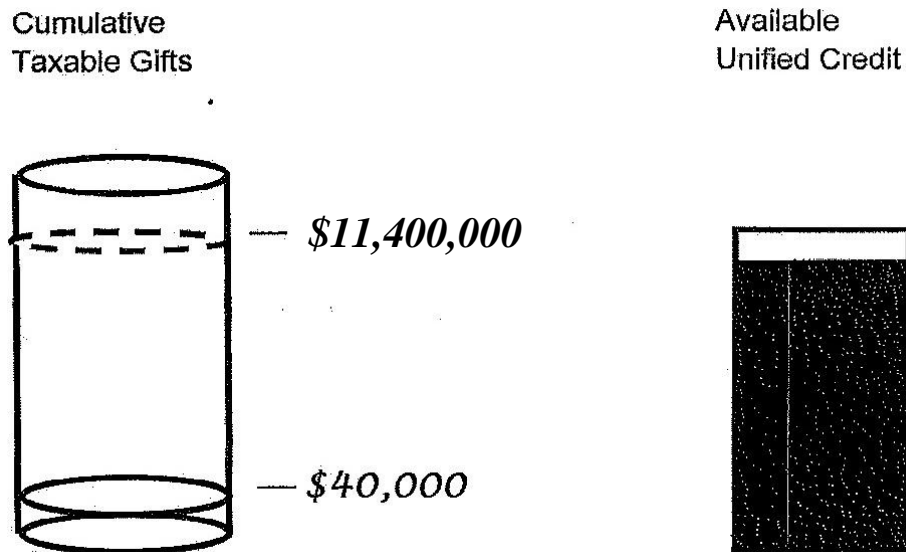
To see how the unified credit works, imagine Marc, who has incurred no prior transfer tax liability. Because his son, Ben, needed a down payment for his first house, in 2018 Marc gave Ben \$35,000, \$15,000 of which was exempt from taxation under an annual exclusion designed to reduce the gift tax consequences of lifetime transfers. The other \$20,000 was subject to gift tax. *See* IRC § 2501. Rather than actually paying any tax, however, Marc used 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 2018



Suppose further that in early 2019, Ben's house was seriously damaged in a storm, so Marc gave him \$35,000 for repairs, \$15,000 of which was exempt from taxation under an annual exclusion designed to reduce the gift tax consequences of lifetime transfers. The other \$20,000 is subject to tax. This second gift however, was taxed at a higher rate, because it comes on top of 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 served to push the second gift into a higher bracket. Marc still used his unified credit and pays no tax. See Figure 1-3.

Figure 1-3 Marc's Second Gift in 2019



Other taxable gifts will be treated the same way. Suppose that Marc died at the end of 2019 having given away a combined total of \$100,000 in taxable gifts. Now the value of his taxable estate will be added in just like the gifts. If the taxable estate was \$11,300,000 or less, the rest of his unified credit could cover the tax.¹ If the taxable estate pushed his lifetime-plus-death total over \$11,400, 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 \$11,400, 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.

B. The Gift Tax

Page 21. Replace \$14,000 with \$15,000.

¹ Although no federal estate tax will be payable if the combined lifetime transfers and the taxable estate is \$11,400,000 or less, state death taxes may be payable in over 10 states which set the exemption or threshold level lower. For example, in Massachusetts only estates up to \$1 million are exempt from estate taxation.

Page 22. After 2d sentence in paragraph 3, add the following:

In 2018, the gift tax annual exclusion was raised to \$15,000, which amount also applies in 2019.

C. The Estate Tax

2. The Marital Deduction

Page 25. In the second paragraph of the boxed text, replace 2016 with 2019 and replace \$4,450,000 with \$10,400,000.

Problems

Page 27. Change \$10,000,000 to \$20,000,000.

Chapter 2: INTESTACY

§ 2.01 OVERVIEW

E. The Structure of Intestate Schemes

Page 47. Add after 1st text sentence:

See, e.g., Hall v. Hall, 818 S.E.2d 838 (W. Va. 2018) (contrary to UPC 2-114(a)(1) child not entitled to inherit from birth parent if parental rights terminated).

§ 2.02 QUALIFYING TO TAKE

B. Descendants

1. Adopted Persons

Page 57. Before “Equitable adoption” in 6th line, add:

See also In re Estate of North Ford, 200 A.3d 1207,1214 (D.C. 2019) (putative child must prove by clear and convincing evidence that the decedent from whom inheritance is sought “objectively and subjectively stood in the shoes of child’s parent.” *Accord Wheeling Dollar Sav. & Tr. Co. v. Singer*, 250 S.E.2d 369, 373 (W. Va. 1978) (proof by clear and convincing evidence that “child has stood from an age of tender years in a position exactly equivalent to a formally adopted child.”)

Page 59 Add as Note 3A:

If a child was equitably adopted that child’s right to inherit from a genetic parent may not be destroyed. *See Estate of Castellano*, 196 A.3d 101 (N.J. Super. Ct. App. Div. 2018).

§ 2.03 ALLOCATING SHARES

B. Descendants and Collaterals

Page 76. Add as last paragraph to Native American Inheritance box:

The Uniform Law Commission is working on a Model Tribal Probate Code. *See* http://www.uniformlaws.org/shared/docs/tribal%20probate/2017AM_MTPC_Draft.pdf Cf. Daniel McGrath, *The Model Tribal Probate Code: An Opportunity to Correct the Problems of Fractionation and the Legacy of the Dawes Act*, 20 J. Gender Race & Just. 403 (2017) (suggesting changes to Model Code).

Chapter 3: WILLS

§ 3.02 CREATION OF WILLS

A. What's A Will?

Page 86. After “by cremation” in the last line, add FN

FN Washington has enacted the first-ever statute which allows for recomposition, which means “the contained, accelerated conversion of human remains to soil.” *See* Wash Rev. Stat. § 68.04.10. In effect, human remains would be reduced to soil by composting. Along with about 15 other states, Washington also allows water cremation (alkaline hydrolysis) where human remains are dissolved in water and lye.

Page 87. At the end of the 2d line, add:

See generally, Shawn Irwin Walker, *Over My Dead Body: Preventing and Resolving Disputes Regarding the Disposition of the Dead*, 43 ACTEC L. J. 385 (2018).

B. The Mental Element

1. Testamentary Capacity

Page 97. Add to Selected References:

Kevin Bennardo, *The Madness of Insane Delusions*, 60 Ariz. L. Rev. 601 (2018).

Page 105. Add at end of last paragraph in Note 5:

See Hodnett v. Hodnett, 2018 Miss. App. LEXIS 189 (Miss. Ct. App., 2018), *cert. denied*, 258 So. 3d 287 (Miss. 2018) (gift must be reasonable under the circumstances).

Page 110. Add as New Selected Reference:

Dominic J. Campisi, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L.J. 359 (2018).

5. Tortious Interference with Expectancy

Page 117. In Note 4, delete cite to *Andersen v. Archer* and replace with:

556 S.W.3d 228 (Tex. 2018). *Accord Matter of Certification of Question of Law*, ___ N.W.2d ___, 2019 WL 2847141 (S.D. 2019).

C. Will Execution

2. A Typical “Statute of Wills”

Page 121. Delete last sentence and replace with the following:

As of the summer of 2019, four states have enacted recent electronic wills legislation: Arizona, Florida (effective 1/1/20), Indiana and Nevada.² In addition, in July of 2019 the Uniform Law Commission approved a Uniform Electronic Wills Act. The features of an electronic will include a will that is created as an electronic record³ bearing the electronic signatures of the testator and witnesses. One of the biggest issues with electronic wills is whether witnesses need to be physically present at the time the testator electronically signs the will. Arizona and Indiana require physical presence while Florida and Nevada allow for electronic (remote) witnessing if the witnesses were in audio and visual contact, such as by Skype or Facetime. The Uniform Act allows a state to choose either to require that witnesses be physically present or also allow electronic (remote) witnessing.

It will be interesting to see what reception electronic wills receive in the enacting states. Clearly, companies that provide online wills will actively promote the use of electronic wills albeit at the expense of foregoing individual legal advice.

Page 122. Delete the Nevada Statute, which was enacted in 2001, and significantly changed in 2017.

Page 123. Add as last sentence to 1st paragraph:

See Matter of the Will of Bradway, 2018 WL 3097060 (N.J. Sup. Ct. App. Div., 2018) (codicil signed using testator’s blood).

After 1st sentence in last paragraph, add:

See In re Estate of Luce, 2018 WL 5993577 (Tex. Ct. App. Dec. 31, 2018) (authorization by blinking by quadriplegic).

Page 130. Add as last sentence on page:

² Nevada had enacted unworkable electronic wills legislation in 2001 which it modernized in 2017. The District of Columbia, New Hampshire and Virginia have pending electronic wills legislation.

³ Some electronic state legislation requires that that an electronic will also be maintained as an electronic record, which is a requirement absent in the Uniform Electronic Wills Act.

Choice of law issues will arise in connection with electronic wills. *See, e.g.*, Uniform Electronic Wills Act § 4.

Page 131. Add as new last text sentence:

Electronic wills may also be self-proved. *See, e.g.*, Uniform Electronic Wills Act § 6.

Page 133. Add after cite to *Cutler* in 2d paragraph:

Courts may also treat a notary as a witness when necessary. *See, e.g., Pickens v. Estate of Fenn*, 251 So. 3d 34 (Ala. 2017).

3. Holographic Wills

Page 134. After first sentence in 2d paragraph:

The official cite to *Matter of Estate of Baker* is 386 P.3d 1228 (Ala. 2016).

Add at the end of the 2d paragraph:

In *Irving v. Divito*, 807 S.E.2d 741(Va. 2017), the Virginia Supreme Court held, based on extrinsic evidence, that the testator did not intend a handwritten writing which he initialed to be a holographic codicil.

Page 135. Add as Problem 4:

4. Can handwritten words followed by a signature on an attested will constitute a holographic codicil? *See In re Will of Allen*, 821 S.E.2d 396 (N.C. 2018) (yes).

4. Mistake in Execution

Page 146. In Note 3:

The official cite to *Estate of Attia* is 317 Mich. App. 705 (Mich. Ct. App. 2016). *See also In re Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018) (unsigned electronic document admitted under Michigan's harmless error rule as decedent's will)

Page 146. Add as last sentence to 1st paragraph in Note 3:

Although the testator initialed a handwritten writing, the harmless error rule did not apply because there was no showing by clear and convincing evidence that the writing was intended as a codicil. *See Irving v. Divito*, 807 S.E.2d 741(Va. 2017). *But cf.*

Page 146. Add New *Selected Reference*:

Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?* 95 Or. L. Rev. 337 (2017).

D. Protective Planning

2. Structural Elements

Page 154. Add as new *Selected Reference*:

Jacob Arthur Bradley *Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 Miss. L.J. 1431 (2017).

§ 3.04 INTERPRETING WILLS: EXTRINSIC EVIDENCE

B. Interpretation or Reformation?

Page 166. Change **Note to Notes** and change existing Note to Note 1.

Add Note 2:

2. Although will disposition to former spouse was revoked on divorce, ex-spouse has standing to have will reformed to correct a mistake by decedent. *See In re Estate of Little*, 433 P.3d 172 (Colo. Ct. App. 2018).

Page 170. In Note 1, delete “21.”

In Note 2, after 1st sentence, add:

Accord UTC § 416.

Page 171. Add to *Selected References*:

Doris Goodwin, *Access to Justice: What to do about the Law of Wills*, 2016 Wis. L. Rev. 947.

§ 3.05 REVOCATION

A. By a Writing or Physical Act

Page 178. Add new paragraph to Note 4 on Pages 177-178:

Assuming the original will was not revoked, states generally allow admission if the original will was shown to have been duly executed and the contents of the will can be proved, particularly

by a copy of the original will. *See, e.g.*, N.Y. Sur. Ct. Proc. Act § 1407(2). *In re Estate of Winter*, 142 A.3d 796 (Pa. 2016), which does not have a statute on lost or destroyed wills, held that a lost or destroyed will can be admitted if the contents of the original will can be proved by clear and convincing evidence. Other states with such a statute allow proof of the will contents by clear and convincing evidence. *See, e.g.*, Ohio Rev. Code § 2107.26.

Chapter 4: LIFETIME ALTERNATIVES TO WILLS

§ 4.02 JOINT INTERESTS

Page 207. Note 3:

The official cite to *Ex Parte Arvest Bank* is 219 So. 3d 620 (Ala. 2016).

§ 4.04 TRANSFER ON DEATH DEEDS

Page 209. Add to Note 5: Maine, Montana and Utah

§ 4.05 LIFETIME TRUSTS

A. Validity of Revocable Trusts

Page 217. Add after first sentence in 2d paragraph of Note 5:

UTC § 602(c)(1) allows for revocation of modification by substantial compliance with a specified method. *See also Gelber v. Glock*, 800 S.E.2d 800 (Va. 2017) (substantial compliance statute satisfied when settlor-trustee executed bill of sale).

Add as new Note 6:

6. UTC § 604(a) provides statute of limitations rules for contesting the validity of a revocable trust. The default rule is 3 years after the settlor's death but the time may be shortened to 120 days after proper notice after the settlor's death is given to beneficiaries. South Dakota, which has not adopted the UTC, provides that the default period to contest the validity of a revocable trust is one year after the settlor's death or 60 days after proper notice after the settlor's death has been given to beneficiaries. *See In re Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465 (S.D. 2017) (statute applies to contesting capacity and undue influence not general 6 year statute).

Chapter 5: CHANGED CIRCUMSTANCES

§ 5.01 ACTS OF THE PROPERTY HOLDER

C. Divorce

Page 250. Add as new Notes 2A:

2A. Minnesota, along with 25 other states, have enacted a statute to the effect that divorce revokes revocable designations in instruments such as life insurance policies; the legislation applies retroactively, *i.e.* to designations made before the legislation was enacted. In *Sveen v. Melin*, 138 S. Ct. 1815 (2018), the Supreme Court held that the retroactive application of the Minnesota statute (Minn. Stat. §524.2-804, subd. 1.) did not violate the U.S. Constitution's contracts clause. This result is consistent with the position of Joint Editorial Board (JEB) regarding the constitutionality of changes in default rules as applied to pre-existing documents. See General Comment to Part 7, Article II of the UPC.

Add as new Question 2B:

Should a revocation-on-divorce statute apply if the will was made in favor of an individual who later becomes the testator's spouse and by divorce, the testator's former spouse? See *Cordon v. Fishman*, 253 So. 3d 1218 (Fla. Dist. Ct. App. 2018) (yes, but based on unique language of Florida statute).

§ 5.02 ACTS OF BENEFICIARIES

A. Disclaimers

Page 259. Add before *Problem*:

Question

Should a parent be allowed to disclaim an interest of a minor child? See *In re Friedman*, 7 N.Y.S.3d 845 (Sur. Ct. 2015) (no.). But see Kathleen R. Guzman, *Dependent Disclaimers*, 42 ACTEC L.J. 159 (2016) (arguing in favor of dependent disclaimers).

B. Misconduct

Page 267. In Note 4, add at the end of the 1st paragraph:

But see *Hodge ex rel. Welch v. Waggoner*, 425 P.3d 1232 (Idaho 2018) (slayer who was joint tenant deemed to predecease slain joint tenant so slayer receives nothing).

Page 268. Add as new Note 7:

7. Does ERISA preempt a state's slayer statute? *Laborers' Pension Fund v. Miscevic*, 880 F.3d 927 (7th Cir. 2018) (no).

Page 269. Add to Selected References:

Michelle E. Loakes, *Till Death Do Us Part But What About Our Property? Giving Abused Spouses Their Inheritance Rights Back*, 52 Real Prop., Tr. & Est. Law J. 291 (2017).

§ 5.03 CHANGES IN PROPERTY

A. Classification of gifts

Page 270. Add as new last paragraph:

Distinguishing between specific, general, demonstrative and residuary bequests may also be important to determine who is entitled to income earned during estate administration. Specific beneficiaries will be entitled to income earned on specific bequests during estate administration while residuary beneficiaries will be entitled to all other income earned during estate administration. On the other hand, beneficiaries of general and demonstrative bequests may only be entitled to interest on bequests not timely distributed.

On the other hand, the classification of a will disposition may not be important regarding the rights of a will beneficiary to transfer property on the death of the testator. *See Laymon v. Minnesota Premier Properties, LLC*, 913 N.W.2d 449 (Minn. 2018) (based on UPC § 3-101 provision property in residuary devolves on death to residuary beneficiary so that a beneficiary's interest in such property can be transferred before distribution). UPC § 3-101 provides in part that "[u]pon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will . . ."

C. Ademption

Page 275. Add as last sentence in Note 2:

Based on identity theory, real property in a revocable trust which was to be distributed adeemed when the specific property was exchanged in a like-kind exchange. *See In re Steinberg Family Living Trust*, 894 N.W.2d 463 (Iowa 2017).

Add as new last sentence to 1st paragraph in Note 3:

A state may also take a modified-intention approach beyond transfers by guardians. For example, Iowa only requires ademption when an asset was voluntarily transferred as distinct from an involuntary transfer such as when an asset was lost or destroyed. *See In re Steinberg Family Living Trust*, 894 N.W.2d 463 (Iowa 2017) (discussing Iowa's modified intention approach).

Add after discussion of *Johnston* in the 2d paragraph in Note 3:

In re Estate of Foertsch, 88 N.E.3d 785 (Ind. Ct. App. 2017) (no ademption based on change of form exception where specific bequest of funds stock in named brokerage account transferred to a different brokerage account).

Chapter 6: PROTECTING THE FAMILY

§ 6.01 DISINHERITED SPOUSES

B. The Right to Elect

1. The Basics

Page 302. Add at end of Note 1:

Compare Estate of Erwin v. Nash, 921 N.W.2d 308 (Mich. 2018) (Although a spouse willfully absent from the decedent spouse for more than a year precludes elective share rights, physical absent alone may not constitute “willfully absent.”)

2. Exceptions

Page 303. Add as footnote 6A after “probate estate” in first line of text:

6A. As compiled by Angela M. Vallario, *The Elective Share Has No Friends: Creditors Trump Spouse in the Battle over the Revocable Trust*, 45 Cap. U. L. Rev. 333, 335 n. 18 (2017), 16 states statutorily allow a right of election only against the probate estate:

Alabama, ALA. CODE § 43-8-70 (2010); Arkansas, ARK. CODE ANN. § 28-39-401 (Supp. 2015); Connecticut, CONN. GEN. STAT. § 45a-436 (2013); District of Columbia, D.C. CODE § 19-113 (2015); Illinois, 755 ILL. COMP. STAT. 5/2-8 (2015); Indiana, IND. CODE § 29-1-3-1 (2010); Kentucky, KY. REV. STAT. ANN. § 392.080 (LexisNexis 2010); Maryland, MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 2011); Mississippi, MISS. CODE ANN. § 91-5-25 (West 2010); New Hampshire, N.H. REV. STAT. ANN. § 560:10 (2014); Ohio, OHIO REV. CODE ANN. § 2106.01 (West 2014); Oklahoma, OKLA. STAT. ANN. tit. 84, § 44 (West 2010); Rhode Island, 33 R.I. GEN. LAWS § 33-25-2 (2011); Tennessee, TENN. CODE ANN. § 31-4-101 (2015); Vermont, VT. STAT. ANN. tit. 14, § 311 (2010); and Wyoming, WYO. STAT. ANN. § 2-5-101 (2015).

§ 6.02 FORGOTTEN SPOUSES AND CHILDREN

Page 341. In Note 4, add the following:

In *In re Trust under Deed of Kulig*, 175 A.3d 222 (Pa. 2017), the Pennsylvania Supreme Court rejected application of Pennsylvania’s version of UTC §112, reproduced on Page 233, as applied to its omitted spouse statute with the result that a revocable trust was not included in the intestate estate to calculate the omitted spouse’s entitlement). *Accord In re Craig*, 194 A.3d 967 (2018) (N.H. 2018) (New Hampshire’s pretermitted will’s statute is a rule of law not a rule of construction so UTC §112, which extends rule of construction to trusts, not applicable.)

§6.04 PUBLIC POLICY LIMITS

Page 344. Add as FN 20A after first sentence:

20A. As recently explained in *EGW v. First Fed. Sav. Bank*, 413 P.3d 106, 110 (Wyo. 2018):

When the constitution and statutes have not spoken on a subject, public policy refers to a principle of law that holds no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

Page 348. Add as new Note 4A:

4A. To what extent should artists be able to control their works after death? *See generally* Eva E. Subotnik, *Artistic Control after Death*, 92 Wash. L. Rev. 253 (2017).

Chapter 7: PLANNING FOR INCAPACITY

§ 7.01 PROPERTY MANAGEMENT AND PRESERVATION

A. Durable Powers of Attorney

Page 371. Add new Note 3A:

3A. A successor agent is not liable for actions taken before successor agent becomes the new agent. *See In re Estate of Shelton*, 89 N.E.3d 391 (Ill. 2017).

Add new Note 4A:

4A. Even if an individual is an agent under a power of attorney which does not authorize self-dealing, the individual may not be acting as an agent when he or she signs the principal's name to a deed that transfers ownership to the agent if the agent is acting as an amanuensis. *See Estate of Bronson*, 892 N.W.2d 604 (S.D. 2017)

Note 7 should read:

Should a power of attorney that was executed in one state be recognized in another state? Section 5B-106(c) of the Uniform Power of Attorney Act as does § 3 of the Uniform Recognition of Substitute Decision-Making Documents Act, which has been enacted in only 3 states. *Accord* N.Y. Gen. Oblig. Law § 5-1512.

Page 373. Add to Selected References:

F. Philip Mans, Jr., *Powers of Attorney Under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151 (2018).

§ 7.02 HEALTH CARE DECISIONMAKING

Page 386. In Note 1, after “enacted in”, add:

Arkansas, Connecticut and

In Note 1, delete cite to Idaho statute and add:

However, state statutes may provide for recognition. *See, e.g.*, N.Y. Pub. Health Law § 2990.

Chapter 8: TRUSTS

§ 8.01 AN OVERVIEW

B. Modern Trust Law

Page 393. Add the following states to Note 3:

Colorado, Connecticut and Montana. The District of Columbia has also enacted the UTC.

Express, Resulting and Constructive Trusts

Page 394. After 2d to last sentence, add:

Compare Darty v. Grauman, 419 P.3d 116 (Mont. 2018) (no constructive trust imposed on TOD beneficiaries because beneficiaries were not unjustly enriched) *with Brown v. Poole*, 261 So.3d 708 (Fla.Ct.App. 2018) (constructive imposed because life insurance beneficiary was unjustly enriched).

Page 398. Add to Selected References:

Thomas P. Gallanis, *The Use and Abuse of Governing-Law Clauses in Trusts: What Should the New Restatement Say?*, 103 Iowa L. Rev. 1711 (2018).

§ 8.02 CREATION

A. Intent

Page 405. In Note 4, add before *Rafalko*:

Sandstead-Corona v. Sandstead, 415 P.3d 310 (Co. 2018) (although revocable trust barred a contest, contest of will which both poured over residue into the trust and which incorporated the trust into the will did not result in forfeiture based on Colorado's policy to strictly construe forfeiture provisions).

Add new paragraph after 3d line:

As in the case of no contest clauses in wills, states vary whether probable cause should bar forfeiture under a trust instrument. *Compare In re Estate of Stan*, 839 N.W.2d 498 (Mich. Ct. App. 2013) (no forfeiture) *with Duncan v. Rawls*, 812 S.E.2d 647 (Ga. Ct. App. 2018) and *EGW v. First Federal Savings Bk. of Sheridan*, 413 P.3d 106 (Wyo. 2018) (forfeiture). Indeed, in the *EGW* case, a parent's contest resulted in the forfeiture of minor beneficiaries' trust interests.

Add at end of Note 4:

But cf. Deborah S. Gordon, *Forfeiting Trust*, 57 Wm. & Mary L. Rev. 455 (2015) (suggesting a more nuanced approach than completely barring forfeiture in the context of enforcement and administration of trust).

C. Trustee

Page 411. Before Goodwin article in last paragraph, add:

Christopher C. Weeg, *The Private Trust Company: A DIY for the Über Wealthy*, 52 Real Prop. Tr. & Est. L.J. 121 (2017).

Page 412. In the Note, delete *Trott v. Jones* and add:

In re Estate of Plance, 175 A.3d 249 (Pa. 2017) (no delivery of acknowledged but unrecorded deed to trustee based on finding of no intent to effectuate delivery).

E. Purposes

Page 420. Add to Selected References:

J. Sam Rodgers, *Do You Trust Your Children: A Parent's Final Dilemma*, 28 Cornell J.L. & Pub. Pol'y 93 (2018).

§ 8.03 THE NATURE OF A BENEFICIARY'S INTEREST

B. Discretionary and Support Trusts

Page 432. Add to Selected References:

Richard C. Ausness, *Discretionary Trusts: An Update*, 43 ACTEC L.J. 231 (2018).

Christian S. Kelso, *But What's an Ascertainable Standard? Clarifying HEMS Distribution Standards and Other Fiduciary Considerations for Trustees*, 10 Est. Plan. & Comm. Prop. L.J. 1 (2017)

C. Transfers of Beneficial Interests in Trust

2. Spendthrift Provisions and Other Restraints on Alienation

Page 438. Add after Cal. Probate Code cites:

The California Supreme Court allows a trustee in bankruptcy to reach not only the principal amount currently due a beneficiary but also 25% of future principal payments despite the spendthrift of the principal interest. *Carmack v. Reynolds*, 391 P.3d 625 (2017).

Page 446. Add to Selected References:

Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311 (2017).

3. Asset Protection Trusts

Page 447. In 2d paragraph:

Add Michigan and Virginia to ranks of DAPT states. Some commentators also believe that Colorado provides creditor protection.

Add new 3d paragraph:

DAPT states are not monolithic in their treatment of various issues. For example, some states bar former spouse and child support creditors from reaching trust assets in a self-settled trust. *See, e.g., Klabacka v. Nelson*, (Nev. 2017) (construing Nevada statutes). Steve Oshins annually ranks DAPT states based on various factors. *See* <https://www.oshins.com/state-rankings-charts>

Add as new last sentence to page:

In *Toni I Trust v. Wacker*, 413 P.3d 1199 (Alaska 2018), the Alaska Supreme Court held that an Alaska statute, which conferred Alaska courts exclusive jurisdiction over fraudulent transactions with respect to a self-settled trust, could not validly prevent other state courts and the federal bankruptcy court from adjudicating the issue.

§ 8.04 REFORMATION, MODIFICATION, AND TERMINATION

B. Termination and Modification Prescribed by Settlor

Page 458. Add after “UTC § 410(a)”:

See, e.g., Guardianship of Novotny, 904 N.W.2d 346 (S.D. 2017) (trust terminated when beneficiary located since purpose for trust then accomplished).

The P.3d cite to the *Frei* case is 390 P.3d 646.

In Note on Decanting, add after “recent years,” in last sentence:

see also Ferri v. Powell-Ferri, 72 N.E.3d 541 (Mass. 2017),

Page 459. Alabama, California, Illinois, Massachusetts and North Carolina have also enacted the Uniform Act.

Add as new last paragraph to Note on Decanting:

Litigation and concerns have begun on the effect of decanting statutes. In *Hodges v. Johnson*, 170 N.H. 470 (New Hamp. 2017), the New Hampshire Supreme Court held that a trustee

violated the duty of impartiality when by decanting the new trust eliminated beneficiaries from the original trust without considering the adverse effect on such excluded beneficiaries. *See generally* Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 Cardozo L. Rev. 1993 (2017). In *Matter of Fund for Encouragement of Self Reliance*, 440 P.3d 30 (Nev. 2019), decanting was not allowed because not all trustees consented to the decanting.

Add as Selected Reference:

Stephanie Vara, *Two Cheers For Decanting: A Partial Defense of Decanting Statutes as a Tool For Implementing Freedom Of Disposition*, 32 Quinnipiac Prob. L.J. 23 (2018).

C. Termination and Modification by the Trust Beneficiaries

1. The Claflin Doctrine

Page 461. Add at end of page:

See Shire v. Unknown Heirs, 907 N.W.2d 263 (Neb. 2018) (no modification allowed because all beneficiaries did not give consent). *See also* [Horgan v. Cosden](#), 249 So.3d 683 (Fla. Dist. Ct. App. May 25, 2018) (termination denied because contrary to settlor's intent to keep trust intact).

C. Judicial Modification or Termination

Page 470. In Note 2 add before *In re Somers*:

Matter of MacMackin Nominee Real Estate Trust, 122 N.E.3d 1 (Mass App. Ct., 2019) (based on unanticipated circumstances trust termination will further the purposes of the trust) and

§ 8.05 CHARITABLE TRUSTS

A. Creation and Enforcement of Charitable Trusts

Page 482. Add to Selected References:

Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 Alb. L. Rev. 565 (2017-8).

William P. Sullivan, *The Restricted Charitable Gift as Third-Party-Beneficiary Contract*, 52 Real Prop. Tr. & Est. L.J. 79 (2017).

C. Modification

Page 502. Add to Selected References:

Allison Anna Tait, *Keeping Promises and Meeting Needs: Public Charities at Crossroads*, 102 Minn. L. Rev. 1789 (2018).

Chapter 9: PLANNING FOR THE FUTURE: SUCCESSIVE TRUST INTERESTS

§ 9.01 Fundamentals

Page 506. In FN 3, add before *Anderson* case the following

Feeney v. Feeney, 811 S.E.2d 830 (Va. 2018) and

§ 9.02 Interpretation Questions

B. Class Gifts

Page 529. In second paragraph:

Luke v. Stevenson should be italicized.

After discussion of *Luke* case add:

See also Roll v. Newhall, 888 N.W.2d 422 (Iowa 2016) (residuary bequest to children who were also individually named is a gift to individuals so that adoption of a named child does not bar receipt by that child)

1. Status Questions

Page 535. In the 2d paragraph of Note 3, add a period after (due process rights) and delete the remaining part of the paragraph.

Page 542. Add to Selected references:

Kristine S. Knaplund, ‘Adoptions Shall Not Be Recognized’: *The Unintended Consequences for Dynasty Trusts*, 7 U.C. Irvine L. Rev. 545 (2017).

3. Class Gifts Involving Multiple Generations

a. Gifts to Descendants

Page 540. In last line of text, add:

Accord Schwerin, Jr., v. Bessemer Trust Company, 2017 WL 1017792 (Conn. Sup. Ct. 2017).

§ 9.03 Powers of Appointment

Page 553. Illinois and Nevada have also enacted UPOAA.

A. The Basics

4. Who Owns the Property

Page 563

In Note 5, add before “If a power” in line 7:
. *But see Estate of O'Connor*, 237 Cal. Rptr. 3d 519 (Ct. App. 2018) (specific reference to trust creating power not required under the circumstances).

In Note 5, add the following new paragraph before the last paragraph:

The powerholder’s exercise of a power, which was limited to certain objects, in favor of the powerholder’s revocable trust was invalid because it effectively was an exercise in favor of the powerholder who was not a permissible recipient even though the revocable trust was for permitted objects. *See Hornung v. Stockall (In re McDowell Revocable Trust)*, 894 N.W.2d 810 (Neb. 2017). *See also Jaffe v. Pournaras*, 178 A.3d 978 (R.I. 2018) (exercise of power in favor of settlor’s residuary estate invalid because power barred exercise in favor of settlor).

Page 565. Add to Selected References:

Kenneth W. Kingma, *Using Equity to Aid the Exercise of a Power of Appointment That Fails to Specifically Refer to the Power*, 51 Real Prop. Tr. & Est. L.J. 457 (2017).

§ 9.04 The Rule Against Perpetuities

G. Perpetuities Repeal Movement

Page 595. Arkansas now allows “qualified” trusts to be perpetual. As explained in enacting the Dynasty Trust Act:

It is the intent of the General Assembly to:

- (1) Join the majority of states that allow the creation of perpetual trusts also commonly known as dynasty trusts;
- (2) Benefit successive generations of beneficiaries by protecting trust assets from federal taxes and the creditors of a beneficiary;
- (3) Amend the current rule against perpetuities so that perpetual trusts may be created in the State of Arkansas, increasing trust business within the state, instead of having a trust grantor create a trust in a foreign state for the sole purpose of ensuring the life of the trust beyond the short period of time granted by Arkansas's rule against perpetuities . . .

Page 599. Add to Selected References:

Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. Rev. 145 (2019).

Chapter 10: PROBLEMS IN ADMINISTRATION

§ 10.01 An Overview

Page 604. Add before boxed text:

Finally, diversity jurisdiction in donative trusts will depend on the citizenship of the trustee not the beneficiaries. *See Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016),

§ 10.02 Duty of Loyalty

Page 613. Add before *McNeil* case:

In re Abbot, 890 N.W.2d 469 (2017) (trustee's personal favoritism or animosity toward individual beneficiaries constituted breach of duty of impartiality); *In re Estate of Forgey*, 906 N.W.2d 618 (Neb. 2018) (trustee's failure to collect rents constituted breach of duty of impartiality when trustee used property) and

Page 617. Add at end of 3d line:

Accord Morgan v. Superior Court of Orange County, 23 Cal. Rptr. 3d 647 (Cal. App. 2018).

Page 618. Add to Selected References:

Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. Cal. L. Rev. 69 (2018).

§ 10.03 Managerial Issues

A. Duties and Powers

1. In General

Page 623. Add as Note 4:

4. Although not enumerated in UTC § 816, do you think that a trustee has the power to hire agents and professionals to assist the trustee in carrying out the trust? Connecticut specifically empowers a trustee to so act. *See Heisinger v. Cleary*, 150 A.3d 1136 (2016) (discussing Connecticut statute which also absolves a trustee from liability who relies on valuation by an appraiser).

2. Fiduciary Access to Digital Assets

[a] Background

Page 624. Add as 3d paragraph:

In *Ajemian v. Yahoo!, Inc.*, 478 Mass. 169 (Mass. 2017), *cert. denied*, 138 S.Ct. 1327 (2018), the Massachusetts Supreme Judicial Court held that Section 2702 of the Stored Communications Act, which effectively requires lawful consent before a service provider can provide the content of emails, does not require actual consent by the account owner. Rather the personal representative of the deceased owner may provide that consent, albeit even with such consent, the service provider may but is not required to furnish the emails to the personal representative.

Page 625. Replace Footnote 7 with the following:

RUFADAA, which has been enacted in well over 40 states, is likely to be enacted in every state in the near future.

Page 627. After “required.” In the 5th line, add footnote 13A:

13A. A deceased user’s Google calendar is a “catalogue” for which a personal representative may have access even if user has not given consent for access. *See Matter of Serrano*, 54 N.Y.S.3d 564 (N.Y. Sur. Ct. 2017).

Page 628. Add to Selected References:

Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 Cardozo L. Rev. 1099 (2017)

Michael D. Walker, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, 52 Real Prop. Tr. & Est. L.J. 51 (2017).

B. Investments

2. The Prudent Investor

Page 643. Add to Selected References:

Ian Ayres & Edward Fox, *Alpha Duties: The Search for Excess Returns and Appropriate Fiduciary Duties*, 97 Tex. L. Rev. 445 (2019).

3. Delegation and Direction

b. Direction

Page 649. Replace 1st sentence in box on **Uniform Directed Trust Act** with the following:

The Uniform Directed Trust Act was approved by the Uniform Law Commissioners in 2017. As of the summer of 2019, 10 states have enacted the Act: Arkansas, Colorado, Connecticut, Georgia, Indiana, Maine, Michigan, Nebraska, New Mexico, and Utah.

Add to Selected References:

John D. Morley & Robert H. Stikoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3 (2019).

C. Principal and Income Issues

Page 663. Revise Note 6 to read as follows:

6. In July of 2018, the Uniform Law Commission approved a new Fiduciary Income and Principal Act, which should be finalized in the fall of 2018. The new Act replaces the 1997 Uniform Principal and Income Act. Although it takes into account the new investment assets and other recent developments, the Act retains the traditional rules of the 1997 Act. The most significant change involves the power to adjust, which is discussed immediately below.

2. Trustee's Adjustment Power

Page 668. Add as Note 3:

3. In July of 2018, the Uniform Law Commission approved a new Fiduciary Income and Principal Act, which should be finalized in the fall of 2018. Section 203 of the new Act greatly expands the adjustment power in Section 104 of the 1997 Act. As explained in the Prefatory Note:

The basic premise of the current revision is that a trustee that is aware of the current practical environment of trust administration and sensitive to the evolving demands of impartiality should be able to determine standards for adjusting between income and principal that are reasonable in the circumstances, and to update those standards from time to time. Authority to make adjustments between income and principal from year to year, introduced as Section 104 in 1997, is retained, and indeed significantly expanded, as new Section 203. The most important way in which the authority to adjust is expanded is by eliminating the precondition that trust distributions are constricted by the concept of “income” in a way that economic results from year to year could arbitrarily affect. In other words, while the trustee of a more modern trust with greater, if not total, flexibility to make distributions from income and/or principal would actually have been denied the flexibility intended by former Section 104, new Section 203 ensures that designing a trust for greater flexibility will not ironically sacrifice the flexibility of adjustments.

That means that the technical structure of the 2018 Act exhibits a certain amount of apparent redundancy. A trustee that could cope with the constraints of income and principal rules by merely accumulating income or invading principal now is given the alternative of making an adjustment under Section 203 instead, either from year to year, as under former Section 104, or for more than one year, under these expanded rules.

This is how the 2018 Act respects, and permits a trustee to respect, the historical dignity and discipline of the simple notion of “income.” Under Section 203, a trustee of a discretionary trust can make adjustments, taking into account a nonexclusive list of factors provided in Section 201(e), and still achieve the comfortable outcome of “distributing income.” And when the interests of beneficiaries under the terms of the trust are still not appropriately served within the framework of “distributing income” – that is, when no reasonable adjustment would serve those interests, or when non-pro rata distributions are justified – then invasions of principal are still appropriate to the extent consistent with the terms of the trust.

D. Other Fiduciary Duties

See In re Estate of Forgey, 906 N.W.2d 618 (Neb. 2018) (breach by not informing beneficiaries).

and change “*See Rafert*” to *See also Rafert*

§ 10.04 Remedies for Breach of Fiduciary Duties

Page 692. Add the following after the last sentence of the first paragraph:

In Trust under Agreement of Taylor, 164 A.3d 1147 (Pa. 2017), the Pennsylvania Supreme Court held that a court, based on the consent of the trust beneficiaries, could not amend a trust to allow for removal of a trustee because the removal statute provided the sole authority.

Add at end of the page the following new paragraph:

In Harvey ex rel. Gladden v. Cumberland Tr. & Investment, 532 S.W.3d 243 (Tenn. 2017), the Tennessee Supreme Court held that a trustee so authorized could enter into a predispute arbitration agreement which could be binding on trust beneficiaries as third party beneficiaries of the agreement.

A. Remedies in General

Page 699. Add after 2d sentence in Note 10:

See also In re Estate of Forgey, 906 N.W.2d 618 (Neb. 2018) (attorney fees awarded when trustee breached duty to inform beneficiaries because absent award there would be no penalty for the breach) and *Bullard v. Hoffman*, 812 S.E.2d 401 (N.C. Ct. App. 2018) (egregious conduct not required to award attorney fees).

B. Bars to Relief

Page 705. Add as new paragraph to Note 6:

With respect to investments, a trustee has the continuing duty to monitor investments so that a claim will not be barred if a trustee initially breached a duty with respect to an investment but failed to monitor that investment. *See Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) (applying

common law of trusts in ERISA situation). The continuing-duty concept was held inapplicable to the duty to determine beneficiaries. *See In re George Parsons 1907 Trust*, 170 A.3d 215 (Me. 2017) (because the status of an income beneficiary was determined more than 6 years before action commenced, validity of status was barred by Maine's statute of limitations).