2021 SUPPLEMENT

TO

FUNDAMENTALS OF TRUSTS AND ESTATES

FIFTH EDITION

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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 developments 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.

In addition, in October of 2019 the Uniform Laws Commission made numerous changes to the intestate and class gift provisions of the Uniform Probate Code (UPC) primarily to coordinate with changes made by the 2017 Uniform Parentage Act. The 2019 UPC amendments and technical amendments made in 2021 are discussed in this Supplement.

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.

It is too early to know what, if any, tax changes will get enacted during the Biden administration.

I express my appreciation to the following individuals for their help in preparing this Supplement: William Gaskill, Research, Instructions and Scholarly Communications Librarian, Albany Law School; Theresa Colbert, my legal assistant; and Garreth Santosuosso, Albany Law School, Class of 2022.

Ira Mark Bloom

August, 2021

Chapter 1: LAWYERS, ESTATES, AND TRUSTS

§ 1.02 AN OVERVIEW OF INTER-GENERATIONAL WEALTH TRANSFER

A. Probate

1. The process

Page 7. Add before last sentence of 2d full paragraph:

See, e.g., In re Estate of O'Neill, 249 A.3d 850 (N.H. 2020).

Page 10. Add at end of 1st full paragraph:

See also *Murphy v. Richert*, 2021 U.S. Dist. LEXIS 100959 (N.D. Ill., 2021).

Page 11. Add to Selected References:

James N. Rotondo, *Criminal Justice and the Probate World: Why a Conviction Should (or Should Not) Matter in the Appointment of Fiduciaries*, 33 Quinnipiac Prob. L.J. 57 (2019).

2. Is Probate Necessary?

Page 12. In next to last line, change $30,000 to $55,000.

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 H. 2017) and *Harvey ex rel. Gladden v. Cumberland Tr. & Investment*, 532 S.W.3d 243 (Tenn. 2017).

In the 5th line of the 2d paragraph, delete 2008 and replace it with 2019. Follow 2019 with new FN10A

FN10A. In October of 2019 the Uniform Laws Commission made numerous changes to the intestate and class gift provisions of the Uniform Probate Code (UPC) primarily to coordinate with changes made by the 2017 Uniform Parentage Act.[1] The 2019 amendments and technical amendments made in 2021 are discussed in this Supplement.

In lines 5 and 6 of the 2d full paragraph, change 2017 to 2021.

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[1] Interestingly, to date only California, Connecticut, Maine, Rhode Island,Vermont and Washington have enacted the 2017 version of the Uniform Parentage Act and of these states only Maine has enacted the Uniform Probate Code.

§ 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.

With the election of President Joseph R. Biden changes to the federal transfer tax system may result despite a divided Senate. As of this writing in the summer of 2021, the Biden administration has only proposed changes to the federal income tax system. Senator Sanders has proposed legislation—FOR THE 99.5% ACT—that would radically increase federal transfer taxes on the wealthiest Americans.

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.

Delete FN 21.

In the 3d line of the last full paragraph, add after "$1,500":

This is known as step-up in basis. FN21A

FN 21A If however the fair market value of the property at death is worth less than its cost basis, there will be a "step-down" in basis under IRC § 1014.

Add as new last paragraph:

The Biden administration has proposed numerous changes to the federal income tax system. The most significant proposal would seriously curtail the benefits of stepping up the basis in property for beneficiaries and others as a result of the decedent's death.

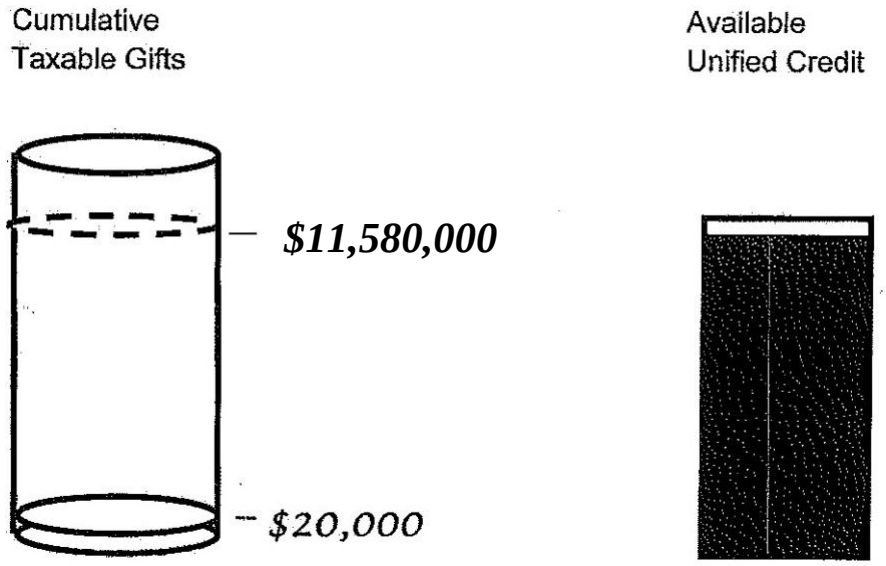
A. A Unified System

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 2021, the exemption amount is $11,700,000.

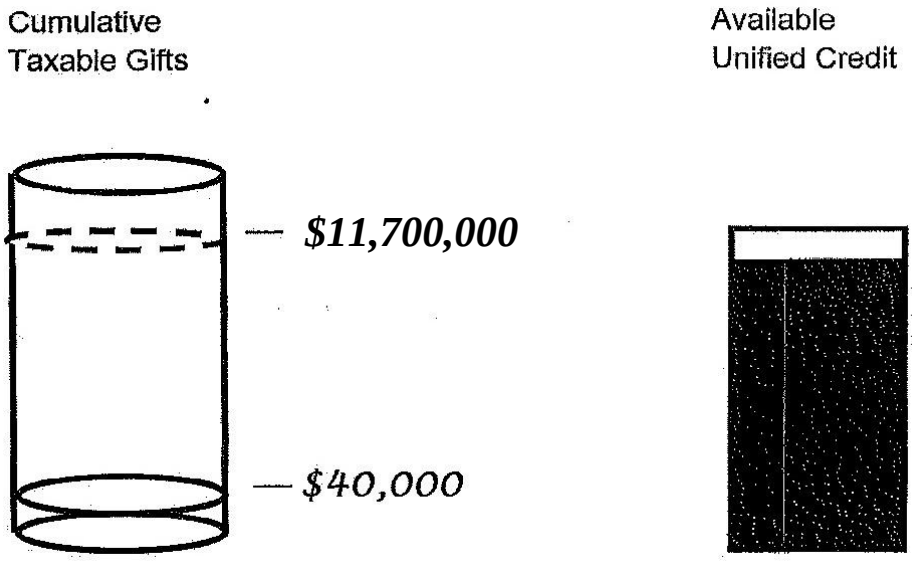
To see how the unified credit works, imagine Marc, who has incurred no prior transfer tax liability. Because his son, Ben, needed a down payment for his first house, in 2020 Marc gave Ben $35,000, $15,000 of which was exempt from taxation under an annual exclusion designed to reduce the gift tax consequences 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 2020



Suppose further that in early 2021, 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 2021



Other taxable gifts will be treated the same way. Suppose that Marc died at the end of 2021 having given away a combined total of $100,000 in taxable gifts none of which were includable as part of his taxable estate. Now the value of his taxable estate will be added in just like the gifts. If the taxable estate was $11,600,000 or less, the rest of his unified credit could cover the tax.[2] If the taxable estate pushed his lifetime-plus-death total over $11,700,000 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 $11,70,000, 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.

[2] Although no federal estate tax will be payable if the combined lifetime transfers and the taxable estate is $11,700,000 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 effectively exempt from estate taxation.

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

In 2018, the gift tax annual exclusion was raised to $15,000, which amount has applied in 2019, 2020 and 2021.

C. The Estate Tax

2. The Marital Deduction

Page 25. In the second paragraph of the boxed text, replace 2016 with 2021 and replace $4,450,000 with $10,700,000.

D. The Generation-Skipping Transfer Tax

Page 27. Add at end of 1st full paragraph:

If, however, Genevieve created the trust in 2021, no GST tax would be payable when Peggy died because the amount transferred into the trust was less than the GST exemption of $11,700,000.

In ***Problems***, change $10,000,000 to $20,000,000.

§ 1.04 DUTIES LAWYERS OWE CLIENTS (AND OTHERS)

Questions and Notes

Page 36. Add as Note 4:

4. A lawyer who serves as a trustee and commits several breaches of trust is not entitled to be reimbursed by his malpractice carrier because those acts are excluded from coverage under the policy which excludes negligent supervision of funds even though the trustee has legal title to the property. *See ALPS Property & Casualty Ins. Co. v. Higgerson*, 805 Fed.Appx. 193 (4th Cir. 2020).

Chapter 2: INTESTACY

§ 2.01 OVERVIEW

Page 39.

Add as last sentence to FN 1:

A later survey shows that 68% of the population do not have wills. *See* https://theconversation.com/68-of-americans-do-not-have-a-will-137686
The latest 2021 Gallup poll is more encouraging: only 54% of the population do not have wills. *See* https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx

B. Survivorship

Page 41. UPC § 2-104 was amended in 2019 to include children born posthumously by artificial reproduction to be treated as a child of a deceased parent if born within either 36 months from utero or 45 months after the decedent and survived for at least 120 hours. *See* UPC 2-104.

E. The Structure of Intestate Schemes

Page 45. Delete the 2d sentence and replace it with the following:

The UPC is constantly being revised. The latest revisions to intestacy provisions, including changes to the statute's official comments, were made in 2019 and are discussed in this Supplement.[3] *See generally* Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L. J. 127 (2021).

Students should realize that the 2019 UPC amendments will likely take years to gain acceptance. As a result, the current UPC statutes contained in Chapter 2 and elsewhere in the Text remain the most authoritative sources.

UPC § 2-103, on Pages 45 and 46, was entirely replaced and significantly revised by the 2019 amendments. As explained in the Comment to UPC § 2-103, four objectives inform the changes to UPC § 2-103:

(1) Blended families are taken into account not only in Section 2-102, as in the 1990 revisions, but also in this section.
(2) The per-capita-at-each-generation system of representation is incorporated throughout this section. This departs from the pre-2019 version of this section. Prior subsection (a)(4) divided the intestate estate into halves when one or more grandparents on each side survived the decedent. In contrast, current subsection (g) divides the intestate estate among the surviving grandparents and the surviving descendants of deceased grandparent s on a per-capita-at-each-

[3] UPC § 2-102 on Page 45 in the Text was unchanged.

generation basis. Similarly, if no grandparent survives, current subsection (i) divides the intestate estate among descendants of grandparents on a per-capita-at-each-generation basis. Subsection (d) follows this approach and divides the intestate estate among the surviving parents and the surviving descendants of deceased parents on a per-capita-at-each-generation basis and does the same in subsection (f) when no parent survives. Subsection (j) does the same by dividing the intestate estate among descendants of deceased spouses on a per-capita-at-each-generation basis.

(3) Outdated terms are removed, such as the references to a decedent's "maternal" and "paternal" grandparents.

(4) This section is reformulated to handle the possibility—recognized by the Uniform Parentage Act (2017)—that a child may have more than two parents, hence more than two sets of grandparents.

Example 3 illustrates the per capita at each generation approach involving a blended family:

Example 3. G, the intestate, had two parents, P1 and P2. P1 also had one other child, A. P2 also had two other children, B and C. G was predeceased by P2 and was survived by P1, A, B, and C. The intestate estate is divided into two equal shares, because there is one surviving parent (P1) and one deceased parent with surviving descendants (P2). One share passes to P1, who inherits 1/2 of G's intestate estate. The balance passes by representation to the surviving descendants of P2: B and C. "By representation" in subsection (d) is defined in Section 2-106(c). The result is that B and C each inherit 1/4 of G's intestate estate.

The result in Example 3 contrasts with the result that would have been reached under the pre-2019 version of this section (UPC 2-103(a)(2) on Text Page 45), which would have given the entire intestate estate to P1. The 2019 revisions respond to blended families not only in Section 2-102 but also in this section. Note that B and C inherit in Example 3 as G's siblings without regard to the fact that they are half-siblings.

Pages 46-47. As explained in the Comments to UPC 2-106:

> This section was rewritten and reorganized in 2019 as part of a package of amendments to the Code in light of the Uniform Parentage Act (2017). The 2019 amendments did not change the substance of the per-capita-at-each-generation system of representation, though the amendments added [a] subsection . . . to clarify that the system applies also to descendants of deceased spouses.

Page 47. The 2019 amendments added (c) to UPC § 2-114 as follows:

(c) Except as otherwise provided in Section 2-119(b) (relating to de facto parents), the termination of a parent's parental rights to a child has no effect on the right of the child or a descendant of the child to inherit from or through the parent.

As explained:

2019 Revisions. Subsection (c) was added in 2019 to reject the holding of *Hall v. Hall*, 818 S.E.2d 838 (W.Va. 2018). That case held that the termination of a parent's rights due to abuse and neglect also terminated the child's right to inherit from the parent's estate.

Page 48. Add Note 7:

7. Although intestate statutes provide for individuals entitled to take property by intestacy and such individuals be so notified, the process of identifying and locating takers may be difficult. A burgeoning business involves heir hunting which may prove expensive and sometimes unnecessary as explained in David Horton and Reid Kress Weisbord, *Heir Hunting*, 169 U. Pa. L. Rev. 383 (2021).

Page 49. Add to Selected References:

Mary Louise Fellows and Gary E. Spitko, *How Should Non-Probate Transfers Matter in Intestacy?*, 53 UC Davis L. Rev. 2207 (2020).

David Horton and Reid Kress Weisbord, *Heir Hunting*, 169 U. Pa. L. Rev. 383 (2021).

§ 2.02 QUALIFYING TO TAKE

Page 50. Add before Selected References:

Note on the Uniform Parentage Act

The Uniform Parentage Act, enacted in 2017, allows for de facto parentage, that is, recognizing an individual as a parent who is not the genetic or adopting parent. In effect, a child may have 3 parents. *In Matter of the Parentage of L.J.M.*, 476 P.3d 636 (Wash. App. 2020), provides an excellent discussion of how de facto parentage may be established.

A. Spouses and Partners

Page 51. In sentence in 1st paragraph on common law marriages beginning "Some states", delete "Some states" and add:

About 10 states, including Colorado,

After the sentence in 1st paragraph on common law marriages, add:

See In re Marriage of Hogsett v. Neale, 478 P.3d 713 (Colo. 2021) (prescribing new rules to establish common law marriage). For a list of states that authorize common law marriages, *see* ncsl.org/research/human-services/common-law-marriage.aspx

B. Descendants

1. Non-marital Children

Page 54. Before New York statute, add:

The 2019 amendments replaced UPC 2-117 with the following:

A parent-child relationship extends equally to every child and parent, regardless of the marital status of the parent.

Comment The pre-2019 version of this section provided: "Except as otherwise provided in Sections 2- 114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status." The section was revised in 2019 to eliminate the exceptions, which are no longer needed, and the reference to "genetic" parents.

Historical Note. This section was revised in 2019 to track Section 202 of the Uniform Parentage Act (2017).[4]

2. 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.")

Before **Uniform Probate Code**, add;

The 2019 amendments to the UPC provisions to determine a parent child relationship were significantly changed, including changes to reflect the 2017 version of the Uniform Parentage Act, which has been enacted in a few states.

[4] As the Comment to UPA § 2-202 states: This provision reaffirms the principle that once a parent-child relationship has been established, that relationship is entitled to substantive equality, regardless of whether the child is a marital or a nonmarital child.

Section 2-115

UPC 2-115 (1) and (2) remain unchanged. Subsections (3)-(9) were replaced by the following:

(3) "De facto parent" means an individual who is adjudicated on the basis of de facto parentage under [cite to Uniform Parentage Act (2017)][cite to state's parentage act][applicable state law] to be a parent of a child.

(4) "Relative" means a grandparent or a descendant of a grandparent.

UPA § 609 provides for the adjudication of de facto parentage. As explained in the UPA Comment:

> To provide greater clarity to the parties and affected child, UPA (2017) addresses this issue [de facto parentage] through an express statutory provision. Under this new section, an individual who has functioned as a child's parent for a significant period such that the individual formed a bonded and dependent parent-child relationship may be recognized as a legal parent. This provision ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage simply because they entered the child's life sometime after the child's birth. Consistent with the case law and the existing statutory provisions in other states, this section does not include a specific time length requirement. Instead, whether the period is significant is left to the determination of the court, based on the circumstances of the case. The length of time required will vary depending on the age of the child[5]

Page 58. Section 2-118 was amended in 2019 to read as follows:

Section 2-118. Parent-Child Relationship Established Through Adoption Or De Facto Parentage.

(a) [Parent-Child Relationship Established Through Adoption.] A parent-child relationship exists between an adoptee and the adoptee's adoptive parent.

(b) [Parent-Child Relationship Established Through De Facto Parentage.] A parent-child relationship exists between an individual and the individual's de facto parent.

Section 2-119 was amended in 2019 to read as follows:

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[5] *See In re Parentage of L.J.M.*, 476 P.3d 636 (Wash. App. 2020) (discussing application of UPA requirements).

Section 2-119. Effect of Adoption; Effect of De Facto Parentage.

(a) [Definitions.] In this section:

(1) "Parent before the adjudication" means an individual who is a parent of a child:

(A) immediately before another individual is adjudicated a de facto parent of the child; or

(B) immediately before dying, or being deemed under this [article] to have died, and before another individual is adjudicated a de facto parent of the child.

(2) "Parent before the adoption" means an individual who is a parent of a child:

(A) immediately before another individual adopts the child; or

(B) immediately before dying, or being deemed under this [article] to have died, and before another individual adopts the child.

(b) [Effect of Adoption on Parent Before the Adoption.] A parent-child relationship does not exist between an adoptee and an individual who was the adoptee's parent before the adoption unless:

(1) otherwise provided by [court order or] law other than this [code]; or

(2) the adoption:

(A) was by the spouse of a parent before the adoption;

(B) was by a relative or the spouse or surviving spouse of a relative of a parent before the adoption; or

(C) occurred after the death of a parent before the adoption.

(c) [Effect of De Facto Parentage on Parent Before the Adjudication.] Except as otherwise provided by a court order [under Uniform Parentage Act (2017) Section 613], an adjudication that an individual is a child of a de facto parent does not affect a parent-child relationship between the child and an individual who was the child's parent before the adjudication.

Observation on UPC § 2-119. The Comment states that this section "was revised in light of the Uniform Parentage Act."[6] By preserving the parent-child relationship in three situations the revised statute would in the step-parent adoption scenario generally allow the parent who did not remarry to inherit from his or her child, for parents to inherit if a child is adopted by a relative or spouse of a relative, and for certain relatives to inherit through one or more deceased parents. Under pre-2019 UPC § 2-119 only the adoptee or the adoptee's descendants can inherit from or through a genetic parent in the similarly-provided situations. Of course, by continuing the parent-child relationship as provided in UPC § 2-119(b)(2), other family members may take by intestacy "through" a deceased parent.

In addition, the 2019 Revision eliminates the necessity that parents before an adoption were the genetic parents. For example, if a couple adopted a child but then divorced and one

[6] The Uniform Parentage Act, which focuses on parent-child relationships, does not deal with the nuances of adoption which are addressed in 2019 UPC § 2-119.

spouse remarried and the child was adopted by the new spouse, there would still be a parent-child relationship between the original adopting parents and the adoptee. Similarly, the 2019 statute could apply to a de facto parent. The 2019 statute obviated the need for pre-2019 UPC § 2-119(e).

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).

3. Children of Assisted Reproduction

Page 64. Delete text in Note 1 and replace with:

The Arkansas legislature responded to the *Finley* decision by enacting legislation, retroactive to December 1, 2009, to give. In a posthumous child to inherit under certain circumstances. *See* Ark. Code § 28–9–221.

Pages 64-68. Article 7 of 2017 UPA provides comprehensive treatment for assisted reproduction. Article 8 of the 2017 UPA provides comprehensive treatment for surrogacy arrangements.

The UPC amendments essentially incorporate these UPA articles as revised UPC §§ 2-120 and 2-121. The definitions under 2-115, included in the text on Pages 64-65, are unnecessary for these sections.

Section 2-120. Individual Conceived by Assisted Reproduction but Not Born to Gestational or Genetic Surrogate. Except as otherwise provided under Section 2-121, parentage of an individual conceived by assisted reproduction is determined under [cite to Uniform Parentage Act (2017) Article 7 other than Section 708(b)(2)][cite to equivalent provisions of state's parentage act][applicable state law].

Legislative Note: The first bracketed option is for states that have enacted the Uniform Parentage Act (2017). The reason for excluding Section 708(b)(2) is given in the Comment, especially Examples 1 and 2. The second bracketed option is for states that have enacted a parentage act, other than the Uniform Parentage Act (2017), governing parent-child relationships created by assisted reproduction. The third bracketed option is for states that do not have a statute governing parent-child relationships created by assisted reproduction. The reference to "applicable state law" includes statutory, regulatory, and case law.

Comment The promulgation of the Uniform Parent age Act (2017) [UPA (2017)] enables this section to incorporate by reference almost all of the provisions of Article 7 of the UPA (2017). The one provision inappropriate to incorporate here is Section 708(b)(2), which denies the existence of a parent-child relationship if an individual born as a result of a posthumous pregnancy fails to satisfy certain time limits [birth within 36 months from when in utero or 45 months after death]. For illustrations of why these time limits on the existence of a

parent-child relationship are inappropriate in the context of intestate succession, consider the following examples. Example 1. S, facing impending death, deposited genetic material in a medical facility. Five years later, S's surviving spouse used the genetic material to give birth to a child, C. Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Section 708(b)(2). After C's birth, S's parent P died intestate, survived only by P's grandchild X and by C. Under this Code, C, who is in being at P's death, is, considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C. Example 2.S, facing impending death, deposited genetic material in a medical facility. Five years later, S's parent P died intestate, survived only by P's grandchild, X. Two months after P's death, S's surviving spouse notified P's personal representative of an intent to use S's genetic material to have a child. Fifteen months after P's death, the embryo was in utero, and twenty-four months after P's death, S's surviving spouse gave birth to a child, C, who then satisfied the 120-hour requirement of survival in Section 2-104(b)(3). Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Section 708(b)(2). Under this Code, C is considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Observation: Revised UPC 2-120 eliminates the time restriction that was contained in pre-2019 UPC 2-120(k), set forth on Text Page 67.

Section 2-121. Individual Born to Gestational or Genetic Surrogate. Parentage of an individual conceived by assisted reproduction and born to a gestational or genetic surrogate is determined under [cite to Uniform Parentage Act (2017) Article 8 other than Sections 810(b)(2) and 817(b)(2)][cite to equivalent provisions of state's parentage act][applicable state law].

Legislative Note: The first bracketed option is for states that have enacted the Uniform Parentage Act (2017). The reason for excluding Sections 810(b)(2) and 817(b)(2) is given in the Comment, especially in Examples 1 and 2. The second bracketed option is for states that have enacted a parentage act, other than the Uniform Parentage Act (2017), governing parent-child relationships created by assisted reproduction. The third bracketed option is for states that do not have a statute governing parent-child relationships created by assisted reproduction. The reference to "applicable state law" includes statutory, regulatory, and case law.

Comment The promulgation of the Uniform Parentage Act (2017) [UPA (2017)] enables this section to incorporate by reference almost all of the provisions of Article 8 of the UPA (2017). The two provisions inappropriate to incorporate here are Sections 810(b)(2) and 817(b)(2), which deny the existence of a parent-child relationship if an individual born as a result of a posthumous pregnancy fails to satisfy certain time limits. For illustrations of why these time limits on the existence of a parent-child relationship are inappropriate in the context of intestate succession, consider the following examples.

Example 1. S, facing impending death, deposited genetic material in a medical facility. S and S's spouse entered into an agreement with a surrogate. Five years later, S's surviving spouse arranged for the transfer of the genetic material to the surrogate. The surrogate gave birth to C. Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except

the time limits in Sections 810(b)(2) and 817(b)(2). After C's birth, S's parent P died intestate, survived only by P's grandchild X and by C. Under this Code, C, who is in being at P's death, is considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

Example 2. S, facing impending death, deposited genetic material in a medical facility. S and S's spouse entered into an agreement with a surrogate. Five years later, S's parent P died intestate, survived only by P's grandchild, X. Two months after P's death, S's surviving spouse notified P's personal representative of an intent to use S's genetic material to have a child by surrogacy. Fifteen months after P's death, the embryo was in utero, and twenty-four months after P's death, the surrogate gave birth to C, who then satisfied the 120-hour requirement of survival in Section 2-104(b)(3). Assume that all of the requirements in the UPA (2017) for S's parentage of C are satisfied except the time limits in Sections 810(b)(2) and 817(b)(2). Under this Code, C is considered a grandchild of P (i.e., a child of S) for the purpose of determining P's heirs. P's intestate estate is divided equally between X and C.

> **Note on New York Surrogacy Laws.** Until the enactment of legislation in 2021-Pub Health Law § 2599-cc- New York barred gestational surrogacy agreements, including a fine on paid agreements.

C. Half Bloods

Page 69. After UPC § 2-107, add:

The 2019 UPC amendments replaced the existing statute with the following:

Section 2-107. Inheritance Without Regard To Number Of Common Ancestors In Same Generation. An heir inherits without regard to how many common ancestors in the same generation the heir shares with the decedent.

Comment The pre-2019 version of this section provided: "Relatives of half-blood inherit the same share they would inherit if they were of the whole blood." This section was revised in 2019 to remove the references to blood, which are outdated given that parent-child relationships are formed in many ways including by adoption, assisted reproduction, and de facto parentage.

§ 2.03 ALLOCATING SHARES

A. Spouses

Page 72. Add new paragraph at end of page:

The surviving spouse's intestate rights may be avoided by a separation agreement. *See In the Matter of Estate of Petelle,* 195 Wash. 2d. 661 (2020). Courts differ on whether separation incident to divorce, which is not finalized, bars spousal rights. *Compare In re Estate of Von*

Greiff, 2020 WL 1968559 (Mich. Ct. App.) (rights still available) *with In re Estate of Racht*, 2016 WL 2909701 (Pa. Super. Ct.) (forfeiture).

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 file:///C:/Users/ibloo/AppData/Local/Temp/2019mar_MTPC_Mtg%20Draft.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 FN2A:

FN2A In 2019, 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. As explained in the Senate Bill Report:

> The process for recomposition is similar to those used for animals. The body is covered in straw and wood chips and over a couple of weeks is broken down into soil. This process is safe and effective for human disposition. It is natural, gentle, and sustainable, reducing carbon emissions. It uses one-eighth of the energy of cremation.

In 2021, Colorado and Oregon enacted legislation allowing "natural reduction" which "means the contained, accelerated conversion of human remains to soil." *See* Colo. Rev. Stat. § 2–4–401(3.6) and (6.9); Or. Rev. Stat. § 97.010. 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, Tanya D. Marsh, *You Can't Always Get What You Want: Inconsistent State Statutes Frustrate Decedent Control Over Funeral Planning*, 55 Real Prop. Tr. & Est. L.J. 147 (2020) *and* Shawn Irwin Walker, *Over My Dead Body: Preventing and Resolving Disputes Regarding the Disposition of the Dead*, 43 ACTEC L. J. 385 (2018).

Add after the 1st full paragraph:

Notes

1. An interesting issue involves the effect of a will on property acquired after a testator dies. Consider the case of *Matter of Keough*, 2021 NY Slip Op 03948 (N.Y. App. Div. 2021) where after the testator died Congress authorized compensation for hostages seized by Iran and for compensation to be paid to a deceased hostage's personal representative. Applying New York law which provides for a will to dispose of all property owned "at the time of his [or her] death", the court in *Keogh* held that the compensation could not pass under the will but would pass to the decedent's intestate takers. *See also Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

In contrast, UPC 2-602 provides that "A will may provide for the passage of all property the testator owns at death and all property acquired by the decedent's estate after the testator's death".

2. An interesting issue involves the postmortem right of publicity, specifically whether the right is an asset owned by a decedent at death and therefor subject to disposition by will (or descendible by intestacy). Some states provide that the right of publicity is an asset of a decedent, including California which enacted legislation in 1984 and New York which only enacted legislation in 2021.

B. The Mental Element

1. Intention

Page 91. After 2d sentence in last paragraph, add:

But cf. Taylor v. Hanks, 2021 Ala. LEXIS 17 (Ala. 2021) (misstatement in will that testator had no children may suggest lack of testamentary capacity).

2. Testamentary Capacity

Page 97. Add to Selected References:

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

3. Undue Influence

Page 104. In Note 2 before *Kremeer* cite, add:

Matter of Estate of Grenz, 948 N.W.2d 320 (N.D. 2020) (only part of will affected by undue influence voided by applying doctrine of partial invalidity) and

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

See Hodnett v. Hodnett, 269 So. 3d 317 (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).

4. Fraud

Page 111. Add after 1st sentence in first full paragraph:

See generally, Reid Kress Weisbord and David Horton, *Inheritance Forgery*, 69 Duke L.J. 855 (2020) (finding that forgery of wills as well as deeds and insurance policies not uncommon).

5. Tortious Interference with Expectancy

Page 111. Under *Tortious Interference with Expectancy*, delete 2d sentence and replace with:

The Restatement (Third) of Torts: Liab. for Econ. Harm § 19, at 160-61 (Am. L. Inst. 2020) defines this tort as follows:

> (1) A defendant is subject to liability for interference with an inheritance or gift if:
> (a) the plaintiff had a reasonable expectation of receiving an inheritance or gift;
> (b) the defendant committed an intentional and independent legal wrong;
> (c) the defendant's purpose was to interfere with the plaintiff's expectancy;
> (d) the defendant's conduct caused the expectancy to fail; and
> (e) the plaintiff suffered economic loss as a result.

In footnote 6, add after "received).":

Buboltz v. Birusingh, 2021 Iowa Sup. LEXIS 76 (June 11, 2021) (plaintiff must prove that the defendant had knowledge of the plaintiff's expectation to receive an inheritance from the decedent).

Page 116. Add as new Note 2A:

2A. The Iowa Supreme Court recently held that a suit for tortious interference must be joined with a will contest, reversing prior law. *Youngblut v. Youngblut*, 945 N.W.2d 25 (Iowa 2020). The Third Restatement of Torts: Liab. for Econ. Harm § 19 goes even further by limiting a claim for tortious interference with an inheritance or gift: "A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court." *Id.* § 19(2). Comment *c* explains:

> Thus if the defendant coerced the decedent into executing a will that excluded the plaintiff, the plaintiff's appropriate response is a claim to that effect in the probate court where the will is tested. A claim in tort is not available.

Page 117. At end of Note 3, add

But cf. Solon v. Slater, 2021 WL 1954846 (Conn. App. 2021) (where court held not undue influence issue in probate proceeding doctrine of collateral estoppel applied in issue suit for tortious interference).

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*, 931 510 (S.D. 2019).

Add to Selected References:

John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335 (2013).

Lauren Davis Hunt, Christopher T. Hodge, and Brian T. Thompson, *Alternatives to Tortious Interference With Inheritance*, 13 Est. Plan. & Comm. Prop. L.J. 59 (2020).

C. Will Execution

2. A Typical "Statute of Wills"

Page 121. After first sentence ending in "a copy.", add footnote 7A

7A. In 2021, Indiana enacted legislation authorizing the use of two or more original will counterparts. *See* Ind. Stat § 29–1–5–3 (c).

Delete last sentence and replace with the following:

As of the summer of 2021, five states have enacted non-uniform electronic wills legislation: Arizona, Florida, Indiana, Maryland and Nevada.[7] In addition, in July of 2019 the Uniform Law Commission approved a Uniform Electronic Wills Act, which Colorado, North Dakota, Utah and Washington have already has enacted. *See generally* Suzanne Brown Walsh & Turney Berry, *Electronic Wills Have Arrived*, TRUSTS & ESTATES 12 (Feb. 2020).

The features of an electronic will include a will that is created as an electronic record[8] 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 requires physical presence while Indiana, Florida, Maryland 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.

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[7] 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.

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

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).

Add to Selected References:

Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. Rev. 827 (2020).

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 126. Add new Note 6.:

6. **Covid-19**. In response to the pandemic caused by Covid-19, several state governors issued executive orders allowing remote witnessing by video conferencing. *See, e.g.*, N.Y. Executive Order 202.14. *See also In re Ryan*, 2021 WL 245023 (N.Y. Surr. Ct.) (video-conferencing which occurred during the pandemic acceptable for will execution).

Page 130. Add as last sentence on page:

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

Page 131. Add after sentence ending in "correct.":

See, e.g., *Matter of Schmidt*, 194 A.D.3d 723 (App. Div. 2nd Dept. 2021).

In 2d to last sentence of text ending with "requirements.", add footnote 10A:

10A. In a state that does not authorize UPC-type Self-Proved Will statutes, a self-proving affidavit will create a presumption of due execution. *See, e.g.*, *Matter of Dralle*, 143 N.Y.S.3d 699 (N.Y. App. Div. 2021).

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, delete the 2d sentence and add the following

Many holographic will jurisdiction cases hold that the signature requirement is satisfied by a signature at the beginning of a document. *See e.g., Estate of Mitchell*, 2020 WL 2097283 (Cal. Ct. App. 2020), *and 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).

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). *See generally* David Horton, *Wills Without Signatures*, 99 B.U. L. Rev. 1623 (2019).

Add new Note 3A:

3A. A state statute's harmless error rule does not apply to prevent a state's interested witness statute from applying. *See In re Estate of Shaffer*, 2020 WL 7866253 (Ohio 2020).

Page 147. Add to Selected References*:*

David Horton, *Wills Without Signatures*, 99 B.U. L. Rev. 1623 (2019).

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

1. Who Might Challenge

Page 148. After 1st sentence add footnote 13A:

13A. A will beneficiary who accepts benefits under a will has no standing to contest a will. *See Estate of Johnson*, 2021 Tex. LEXIS 426 (Tex. 2021).

2. Structural Elements

Page 149. Before *Hamel v. Hamel*, add:

In re Estate of Barger, 931 N.W.2d 660 (Neb. 2019) and

Page 150. Change heading from *Living Probate*, to *Premortem Probate.*

Under *Living Probate,* delete "A few", and substitute: "Some states"

After the first sentence add the following footnote 16:

16. These states include Alaska, Arkansas, Delaware, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, and South Dakota.

Page 151. Add at end of 4th line ending in "revokes it"

Absent statutory authority, premortem probate is not allowed. *See Kiene v. Wash. State Bank (In re Guardianship & Conservatorship of Radda)*, 955 N.W.2d 203 (Iowa 2021).

In *Lifetime trusts and other gifts*, add after sentence ending in "undue influence":

See, e.g., In re Passarelli Family Trust, 242 A.3d 1257 (Pa. 2020).

Page 154. Add as new Selected References:

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).

David Horton and Reid Kress, *Boilerplate No Contest Clauses*, 82 Law & Contemp. Probs. 69 (2019).

Evan J. Shaheen *In Terrorem Clauses: Broad, Narrow, or Both?*, 95 Notre Dame L. Rev. 1763 (2020).

§ 3.04 INTERPRETING WILLS: EXTRINSIC EVIDENCE

A. Patent and Latent Ambiguities

Page 160. In 2d paragraph, replace *Bagley* case with:

Brinkman v. Brinkman (In re Estate of Brinkman), 953 N.W.2d 1 (Neb. 2021)

Page 164. Add to **Problems**:

(e) My children and/or my issue shall include X and all children born to or adopted by testator after execution of the will. Does child Y take?

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 177. Add as 1st sentence to Note 1:

Kiknadze v. Elis, 2020 Md. App. LEXIS 842 (Md. App. Ct. 2020) followed *Estate of Gushwa* (revocation of will document not effective because not a will).

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(3) and *St. Jude Children's Research Hospital v. Scheide*, 478 P.3d 851 (Nev. 2020). *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.

§ 3.09 Contracts Regarding Wills

Page 188. After 1st sentence in 2d paragraph, add:

See, e.g., *In re Estate of McHugo*, 237 A.3d 1239 (Vt. 2020).

Chapter 4: LIFETIME ALTERNATIVES TO WILLS

Page 201. Under ***Question***, after question mark add: *Potter v. Potter*, 2021 Md. App. LEXIS 442 (Md. App. Ct., 2021) (LLC interest does not pass pursuant to LLC agreement but is an estate asset) *with*

Following the above addition, before the *Blechman* cite: delete *See*

After "LLC agreement" add:

based on applicable New Jersey LLC statute

§ 4.01 LIFETIME GIFTS

Page 205. Add at end of Note 2:

Gifts causa mortis can provide an end run around the necessity to comply with wills formalities. *See, e.g., In re Estate of Oaks*, 944 N.W.2d 611 (Wis. Ct. App. 2020).

§ 4.02 JOINT INTERESTS

Page 207. Note 3:

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

Page 208. In last paragraph, change "Almost every" to Every state except Texas

§ 4.04 TRANSFER ON DEATH DEEDS

Page 209. After 1st sentence, add:

See generally Danaya C. Wright and Stephanie L. Emric, *Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide*, 78 Md. L. Rev. 511 (2019).

Add to 1st sentence of FN 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). Unless a trust provides that revocation can only be made by a prescribed method, revocation will be recognized even though a method provided in the trust was not employed. *See Cundall v. Mitchell-Clyde*, 51 Cal. App. 5th 571 (Cal. Ct. App. 2020).

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).

Page 218. In Note 4, add before *MacIntyre:*

Barefoot v. Jennings, 456 P.3d 447 (Ca. 2020) and

Page 219. Add as new Note 6:

6. Should insurance on property transferred to a revocable trust continue to be insured on the theory that the settlor and the trust are the same? *Cf. Collison v. Dir. of Revenue*, 621 S.W.3d 165 (Mo. 2021) (settlor and revocable trust different so benefits for individual not available to trust).

Page 220. Add to Selected References:

Richard C. Ausness, *A "Mere Expectancy"? What Rights Do Beneficiaries of a Revocable Trust Have Prior to the Death of the Settlor?*, 32 Quinnipiac Prob. L.J. 376 (2019).

§ 4.07 RETIREMENT FUNDS

Page 227. Add to Selected References:

David A. Pratt, *Too Big to Fail? The U.S. Retirement System in 2019*, 27 Elder L.J. 327 (2019).

Chapter 5: CHANGED CIRCUMSTANCES

§ 5.01 ACTS OF THE PROPERTY HOLDER

B. Satisfaction

Page 242. In last line of Note 4 after "satisfaction apply?", add:

See In re Estate of Radford, 933 N.W.2d 595 (Neb. 2019) (advancement by satisfaction only applies to wills not to revocable trusts).

C. Divorce

Page 250. Add as new Note 1A:

1A. Note that UPC § 2-804(a)(5) includes as relatives of a former spouse those individuals who are related by affinity and after the divorce cease to be related by affinity, which involves the "connection existing in consequence of a marriage, between each of the married persons and the kindred of the other." *See Matter of Podgorski*, 471 P.3d 693, 697 (Ariz. Ct. App. 2020) (step children of former spouse may still be related by affinity after divorce).

Add as new Note 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).

Add at end of Note 4:

But see In re Estate of Easterday, 209 A.3d 331, 346 (Pa. 2019) **(**"ERISA does not preempt a state law breach of contract claim to recover funds that were paid pursuant to an ERISA-qualified employee benefit plan." *Hillman* was never mentioned in the opinion.)

Add as new Note 5:

5. A revocation-on-divorce statute may be avoided by a governing instrument which may include a separation agreement. *See, e.g.*, *Berke v. Fidelity Brokerage Services*, 841 S.E.2d 592 (N.C. Ct. App. 2020). *See generally* UPC § 2-804(b).

§ 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).

Add to Selected References:

Fabian N. Marriott, *No Disclaimer for the Domestic Support Evader: Why Alimony and Child Support Obligors Should Be Barred from Their Right to Disclaim Inheritances*, 71 Rutgers U.L. Rev. 1097 (2020).

C. Misconduct

Page 260. After FN 13 in 3d paragraph, add:

Some states bar a surviving spouse's elective share rights (and other rights) if that spouse abandoned the deceased spouse. *See, e.g.* New York Estates, Powers and Trusts Law § 5-1.2(a)(6). Although most abandonment provisions require some type of misconduct by the abandoning spouse, *see, e.g.*, Va. Code Ann. § 64.1-16.3 *(*persons who willfully desert or abandon a child or spouse and such situation continues until the death of the child or spouse are barred from intestate succession, elective share, exempt property, family allowance, and homestead allowance**),** a Missouri case barred a surviving spouse's elective share rights even though no misconduct was involved. See *Estate of Heil v. Heil*, 538 S.W.3d 382 (Mo. Ct. App. 2018).

Add before Virginia cite in FN 13:

Cf. Fla. Stat. Ann § 732.8031 (forfeiture on conviction for abuse, neglect, exploitation, or aggravated manslaughter of an elderly person or disabled adult);

Add at end of FN 13:

Although Pennsylvania statutorily bars a parent from taking by intestacy if the parent refuses to support a minor or dependent child, the parent must have a legal duty to support an adult child not just a social, moral, or ethical duty. *See Estate of Small v. Small,* 234 A.3d 657 (Pa. 2020).

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 4A:

4A. Can a law firm retained by alleged killer be required to pay retainer to estate of decedent if retainer was paid from life insurance proceeds received by the alleged killer? *In re Estate of Feldman,* 443 P.3d 66 (Colo. 2019) (no).

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, LL.C.*, 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).

Page 276. Add as Note 5:

5. Absent the enactment of a UTC § 112 provision, *see* Text Page 233, the ademption by extinction doctrine may not apply to lifetime trusts. *Compare Provident Tr. Co. v. Radford*, 933 N.W.2d 595 (Neb. 2019) (not applicable) *with Wasserman v. Cohen* on Text Page 272 (applicable).

§ 5.04 LAPSE

Page 279. After 1st sentence in Lapse discussion, add footnote 19:

19. Lapse may also occur if a beneficiary is not an individual, *e.g.*, a charitable organization. *Cf. Akerson v. Hamilton Cty.)*, 309 Neb. 470 (2021) (although lapse possible, no lapse when charitable organization was still in existence).

Page 282. In Note 2, add before *Estate of Kuruzovich*:

Norwood v. Barclay, 2019 WL 5288009 (Ala. 2019) and

Page 284. In Note 5, add new bullet after No-contest Clause bullet:

- *Negative Will Provision.* Alabama's anti-lapse statute not overridden by negative will provision. *Norwood v. Barclay*, 298 So. 3d 1051 (Ala.2019).

Chapter 6: PROTECTING THE FAMILY

§ 6.01 DISINHERITED SPOUSES

A. Community Property

Page 289-290. In Footnote 2:

Add Florida and Kentucky to the list of states that allow community property trusts.

C. 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).
>
> At end of 2d paragraph, add:

See, e.g., In re Revocable Trust Created by Sarkar, 145 N.E.3d 802 (Ind. Ct. App. 2020), *and Carmack v. Carmack,* 603 S.W.3d 900 (Mo. Ct. App. 2020).

Page 318. Add to Selected References:

Naomi Cahn, *What's Wrong about the Elective Share "Right"?*, 53 UC Davis L. Rev. 2087 (2020).

3. The Uniform Probate Code

Page 329. Add after **Question**:

In re Estate of Hall, 931 N.W.2d 482 (N.D. 2019).

D. Changes in Domicile

Page 333. Add Note 1A:

1A. Americans often change domiciles from one state to another. A 2016 survey showed that 7.5 million Americans did so in 2016. *See* State-to State Migration Flows: 2016, available at https://www.census.gov/data/tables/timeseries/demo/geographic-mobility/state-to-state-migration.html

Add after last sentence in Note 3:

In July 2021, the Uniform Law Commission revised and retitled the Uniform Disposition of Community Rights at Death Act as the Uniform Community Property Disposition at Death Act, a salient feature of the new Act is to extend its application to nonprobate transfers.

§ 6.02 FORGOTTEN SPOUSES AND CHILDREN

Page 338. After "Missouri type statutes"), add:

see, e.g., ., Vogel v. Mercantile Trust Co. Nat. Ass'n, 511 S.W.2d 784 (1974),*and more recently, Rogers v. Estate of Pratt*, 467P.3d 651 (Ok. 2020) and *Charter Oak Fire Ins. Co. v. Hollis*, 511 S.W.2d 583 (Tex. Civ. App. 1974).

After "Massachusetts type"). add: *See, e,g., Grigaitis v. Soucy*, 907 N.E.2d 681 (Mass. App. Ct.), *review denied*, 913 N.E.2d 868 (2009).

Permitted heir statutes apply to holographic wills. See, , *Chester v. Martin*, 2021 Okla. LEXIS 12 (Ok. 2020) (holographic will did not show intention to disinherit).

In 2d to last line in3d paragraph, add:

See, e.g., *In re Estate of Dow*, 174 N.H. 37 (N.H. 2021) (failure to mention afterborn child invokes pretermitted heir statute).

Page 339. Before "Section 2-302", add:

Section 2-301. Entitlement of Spouse; Premarital Will.

(a) If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless: (1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse; (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Sections 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902. FN

FN. The 2019 UPC amendments generally made non-substantive changes to UPC 2-302 but also amended the statute to take into account where an omitted child may have more than two parents.

Notes and Questions

1. Although transfers to an omitted spouse made outside the will may preclude application of an omitted spouse statute, *see* UPC § 2-301(a)(3), the failure to show that the deceased spouse intended the transfers to be in lieu of a will provision will not override the spouse's intestate rights under an omitted spouse statute. *See, e.g., Yost v. Yost,* 2020 WL 5269835 (W.Va. 2020), *and Ivey v. Ivey*, 261 So.3d 198 (Ala. 2017)). *See also Ferguson v. Critopolos,* 163 So3d. 330 (Ala. 2014) (factors to determine if lifetime transfers were intended in lieu of will provision).

2. Spousal pretermitted statutes differ from spousal election statutes. First, pretermitted protection is automatic. In contrast, a surviving spouse exercising an election right often must comply with a cumbersome election procedure. If the spouse dies before the election or before a given time period, the rights will not survive. Second, each statute may mandate different shares. Third, the pretermitted share is unlikely to extend beyond probate property, but a spousal election right might.[19] Fourth, language in a will can defeat a pretermitted share but not an elective share.

Page 340. At end of Note 3, add:

However, if a decedent dies with only personal property, the pretermitted law of the decedent's domicile will control. *See In re Estate of Dow*, 2021 WL 199619 (N.H. 2021).

Delete FN 19.

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.)

In Note 6, add at end:

Should a pretermitted heir statute apply to a child of a decedent who was adopted out? *Rogers v. Pratt*, 467 P.3d 651 (Okla.2020) (yes).

In Note 7, delete *Ferguson* cite.

Page 342. In 2d line, after "that power.", add:

See generally Phyllis C. Taite, *Freedom of Disposition v. Duty of Support: What's a Child Worth?*, 2019 Wis. L. Rev 325.

Page 344. Add to Selected References:

Alexis A. Golling-Sledge, *Testamentary Freedom vs. the Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices*, 12 Wash. U. Juris. Rev. 143 (2019).

§ 6.04 PUBLIC POLICY LIMITS

Page 344. Add to Selected References:

Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 Wash. L. Rev. 619 (2020).

Add as FN 20A after first sentence:

20A. As 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. In Note 2 (e) add at end:

See Julian Valdes, *From the "Jewish Clause" to the "Homosexual Clause": An Analysis of Beneficiary Restriction Clauses Which Restrict Same-Sex Marriage in Illinois,* 43 S. Ill. U. L.J. 771 (2019).

Add (f) as follows:

(f) Testator left property outright to a married child if at her death he was unmarried, *i.e.* he had divorced his wife, but if still married at her death the property would be held in trust for the child. Although this will provision did not rely on behavior after death, the court contrary to traditional analysis, see Professor Sherman's discussion in the 4th paragraph of his article on Page 343, held the provision violative of public policy as a restraint on marriage by encouraging divorce. *Rotert v. Stiles*, 159 N.E.3d 46 (Ind. Ct. App. 2020).

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. Unless an agent has the authority to self-deal, an act of self-dealing constitutes a breach of fiduciary duty and the remedy of recession is appropriate where the agent purchased the principal's property. *See Estate of Stoebner v. Huether*, 935 N.W.2d 262 (S.D. 2019).

Add new Note 3B:

3B. 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 3C:

3C. Absent specific gift-making authority, an agent is not allowed to make gifts. *See, e.g.*, *Davis v. Davis*, 835 S.E.2d 888 (Va. 2019).

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). However, the principal must be present at the time of signing for the agent to be acting as an amanuensis. *See Estate of Stoebner v. Huether*, 935 N.W.2d 262 (S.D. 2019).

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 so provides as does § 3 of the Uniform Recognition of Substitute Decision-Making Documents Act, which has been enacted in a few 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.

Add Note 1A:

1A. A guardian may make withdraw life-sustaining treatment in appropriate circumstances. *See, e.g., In re Guardianship of L.N.*, 173 N.H. 77 (N.H. 2020).

Page 388. Add to Selected References:

Joshua S. Rubenstein, *Standby Guardianship Legislation Summer 2019*, 12 Est. Plan. & Comm. Prop. L.J. 287 (2020).

Chapter 8: TRUSTS

Page 391. In Footnote 1, add before *Langbein* cite:

See, e.g., Lee-ford Tritt and Ryan Scott Teschner, *Re-Imagining the Business Trust as a Sustainable Business Form*, 97 Wash. U. L. Rev. 1 (2019).

§ 8.01 AN OVERVIEW

B. Modern Trust Law

Page 393. Add the following states to FN 3:

Colorado, Connecticut and Montana.

Add after line 8:

And, consistent with equitable principles, the doctrine of unclean hands may bar a party from pursuing a claim for relief. *See In re Niki & Darren Irrevocable Tr.*, 2021 Del. Ch. LEXIS 23 (l.Del.Ch. 2021).

C. Express, Resulting and Constructive Trusts

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

Compare Bewley v. Heady, 610 S.W.3d 352 (Ky. Ct. App. 2020) (no constructive trust imposed on beneficiaries of non-probate transfers by slayer because they were not unjustly enriched) and *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 404. At end of Note 3, add:

See, e.g., *In re Passarelli Family Trust*, 242 A.3d 1257 (Pa. 2020).

Add Note 3A:

3A. A handful of states allow premortem validation of lifetime trusts: Alaska, Delaware, Nevada, New Hampshire, North Carolina, Ohio and South Dakota.

Add new Note 3B:

3B. As in the case of wills, there may be a question whether a beneficiary of a revocable trust who is removed by a later amendment has standing to contest the amendment. *Barefoot v. Jennings*, 456 P.3d 447 (Ca. 2020), held that such a beneficiary has standing based on an allegation that the settlor lacked competence, was unduly influenced or fraud was involved.

Page 405.

Add after "without issue." in 3d line:

A no contest clause applies to a settlor who is a beneficiary. *See McMurtrie v. McMurtrie*, 2021 WL 1569396 (Va. 2021).

In 1st full paragraph, add before *Rafalko*:

Hunter v. Hunter, Trustee, 838 S.E.2d 721 (Va. 2020) (no forfeiture by requesting interpretation of trust provision); *Capobianco v. DiSchino*, 150 N.E.3d 1148 (Mass. Ct. App.2020) (request for accounting by trust beneficiary is not a will contest); *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);

Delete sentence staring with "*See also"*

At end of Note 4, add:

See, e.g., Ferguson v. Ferguson, 473 P.3d 363 (Idaho 2020). *See generally*

5. As in the case of no contest clauses in wills, states vary whether probable cause should bar forfeiture under a trust instrument. *Compare* S*iegfried v Barger*, 931 N.W. 2d 660 (Neb. 2019) (no contest clause enforceable because probable cause that undue influence involved) and *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) *with Gowdy v. Cook*, 455 P.3d 1201 (Wyo. 2020) (subjective intent irrelevant) and *Duncan v. Rawls*, 812 S.E.2d 647 (Ga. Ct. App. 2018) (no probable cause exception in Georgia). *See generally* 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).

Change Note 5 to Note 6.

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).

In last line before "N.Y. Estates, Powers and", add:

Homan v. Estate of Homan, 121 N.E.3d 1104 (Ind. Ct. App. 2019) (no trust if property was not declared to be held in trust although property was mentioned in trust agreement).

D. Beneficiaries

Page 416. Add in Note after "nephews.":

Indeed, beneficiaries do not need to be specifically named but they must be ascertainable within the rule against perpetuities. *See, e.g.*, *In re William R. Zutavern Revocable Trust*, 961 N.W.2d 807 (Neb. 2021). *See generally* 3d Rest. Trusts § 45.

E. Purposes

Page 422. Add to Selected References:

J. Sam Rodgers, *Do You Tru$t 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 431. After last sentence in Note 1, add:

But a trustee with uncontrolled discretion is still subject to the duty of loyalty and impartiality so that a distribution by the trustee to himself of all trust property can constitute an abuse of discretion. *See Roenne v. Miller*, 475 P.3d 708 (Kan. Ct. App. 2020).

Page 432. In Note 5 before *Hertel* cite, add:

In re Potter Exempt Trust, 593 S.W.3d 556 (Mo. Ct. App. 2019) and

Add before "Restatement":

Litigation may be needed to resolve where the trust provisions require that a beneficiary's other resources be taken into account. *See Matter of Raggio Family Trust*, 460 P.3d 969 (Nev. 2020). (Trustee's discretion to distribute trust property as "necessary for the proper support, care, and maintenance" of a beneficiary treated as only determining amount necessary not whether other resources of the beneficiary are to be taken into account.)

Create new paragraph beginning with "Restatement"

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. In Note 1, 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 spendthrifting of the principal interest. *Carmack v. Reynolds*, 391 P.3d 625 (2017). *See also Blech v. Blech*, 38 Cal. App. 5th 941 (2019).

Page 445. Add as new Note 1A:

1A. Although most states provide a special exception for child support and in other situations, South Dakota does not. *See* S.D. Cons. Laws §§ 55-1-24 and 25. In *Matter of Cleopatra Cameron Gift Trust*, 931 N.W.2d 244 (S.D. 2019), the Court held that the Full Faith and Credit clause does not require a South Dakota trustee to distribute trust property pursuant to a California order.

Page 446. Add to Selected References:

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

3. Asset Protection Trusts

Page 447. In paragraph 1, change UTC § 505(a)(1) to 505(a)(2) and add after last sentence:

Although UTC § 505(a)(2) does not provide for creditors' rights after the death of the settlor of a self-settled trust, creditors of the settlor may be allowed to reach trust assets after the settlor's death. *See De Prins v. Michaeles*, 154 N.E.3d 921 (Mass. 2020).

In 2d paragraph:

Add Connecticut, Indiana, 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*, 394 P.3d 940 (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 1 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

A. Reformation and Modification Based on Ambiguity and Mistake

Page 457. Before *Megiel* cite, add:

In re Jill Petrie St. Clair Trust Reformation, 464 P. 3d 326 (Kan. 2020);

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.

Add at end of 1st paragraph:

See generally, Maureen L. O'Leary, *A Powerful Tool: Modification or Termination of a Noncharitable Irrevocable Trust by Consent under Section 411(a) of the Uniform Trust Code,* 45 ACTEC L. J. 55 (2019).

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. In 2d paragraph of Note on Decanting, add:

Alabama, California, Illinois, Maine, Massachusetts, Montana, Nebraska, North Carolina and West Virginia have also enacted the Uniform Act.

Add at end of last paragraph in Note on Decanting:

See generally, John Fritz, *The Wild, Wild West: The Mechanics and Potential Uses of Trust Decanting,* 19 Wyo. L. Rev. 327 (2019).

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. Because the trustees violated the duty of impartiality by decanting, the trustees in *Hodges v. Johnson* were not entitled to be reimbursed for legal fees incurred in defending the decanting; the trustees were also required to reimburse the trust for expenses incurred in defending the decanting. *Hodges v.* Johnson, 244 A.3d 245 (N.H. 2020). 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. *See generally* Stewart E. Sterk, *Trust Decanting: A Critical Perspective,* 38 Cardozo L. Rev. 1993 (2017).

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. In the next to the last line, add after "if":

a court finds that

Add at end of Note 1 add the following:

UTC 410(b) provides that beneficiaries and trustees have standing to bring an action to terminate or modify a trust. Settlors do not have standing. *See Glass v. Faircloth*, 840 S.E.2d 724 (Ga. Ct. App. 2020)(all beneficiaries consented to remove a trustee as removal was not inconsistent with the material purposes of the trust). *See also Garland v. Miller*, 611 S.W.3d 275 (Ky. Ct. App. 2020) (settlor consent unnecessary if no material purpose for trust continuation). *But 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. 2018) (termination denied because contrary to settlor's intent to keep trust intact).

Page 462. In 2d full paragraph, add before *White* cite:

McGregor v. McGregor, 954 N.W.2d 612 (Neb. 2021) and

At the end of the 2d full paragraph, add:

Other UTC states, including Nebraska and Pennsylvania, have also rejected UTC 411(c)'s "presumption" and instead provide that a spendthrift provision constitutes a material purpose.

Add new Note 1A:

1A. UTC § 111 provides an interesting provision that allows beneficiaries the ability to enter into a binding nonjudicial settlement agreement regarding all aspects of a trust but with one major caveat: a nonjudicial settlement agreement is not effective if it contravenes a material trust purpose. Although not required, any beneficiary may request court approval of a nonjudicial settlement agreement.

McGregor v. McGregor, 954 N.W.2d 612 (Neb. 2021), involved a Nebraska nonjudicial settlement agreement based on UTC § 111. Because the trust contained a spendthrift provision, which Nebraska treats as a material purpose for trust continuation, the court refused to approve a nonjudicial settlement agreement.

D. Judicial Modification or Termination

Page 470. In Note 1 before *Carnahan* cite, add:

See, e.g., *Cleary v. Cleary*, 2020 Md. App. LEXIS 1209 (Md. Ct. Spec App. 2020 (successor trustee removed because of conflict), and

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

In Note 3 add before "UTC § 417":

See also Skelton v. Skelton, 2021 Ala. LEXIS 59 (Ala. 2021)(termination based on non-UPC statute).

§ 8.05 CHARITABLE TRUSTS

A. Creation and Enforcement of Charitable Trusts

Page 478. In Note 2, add after "*Accord*":

Derblom v. Archdiocese of Hartford, 247 A.3d 600 (Conn. App. 2021);

Page 479. Add new Note 4A:

4A. UTC § 110(a) grants rights of a qualified beneficiary to a charitable beneficiary that is expressly designated to receive distributions. Although the UTC comments require that the distributions be mandatory, *Attorney General v. Sanford*, 225 A.3d 1026 (Me. 2020) held that a discretionary charitable beneficiary has enforcement rights based on the language of UTC 110(a); the UTC comment was disregarded.

In Note 5 before *Smithers* cite, add:

Le Gassick v. University of Michigan Regents, 948 N.W.2d 452 (Mich. Ct. App.2019), *appeal denied*, 948 N.W.2d 591 (Mich. 2020) (executor and trustee have standing to contest misuse of gift by decedent);

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

Add at end of FN 3:

There may also be a question whether a provision creates a life estate or an estate defeasible on the happening of an event. *See Larsen v. Stack*, 842 S.E.2d 372 (Va. 2020) (based on extrinsic evidence to resolve ambiguous language life estate not created).

§ 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)

Pages 533-534. The 2019 UPC amendments replaced UPC § 2-705 with the following:

Section 2-705. Class Gifts Construed to Accord with Intestate Succession; Exceptions.

(a) [Definitions.] In this section:

(1) "Assisted reproduction" has the meaning set forth in Section 2-115.
(2) "De facto parent" has the meaning set forth in Section 2-115.
(3) "Distribution date" means the time when an immediate or a postponed class gift is to take effect in possession or enjoyment.
(4) "Gestational period" has the meaning set forth in Section 2-104.
(5) "In-law" includes a stepchild.
(6) "Relative" has the meaning set forth in Section 2-115.

(b) [Terms of Relationship.] Except as otherwise provided in subsections (c) and (d), a class gift in a governing instrument which uses a term of relationship to identify the class members is construed in accordance with the rules for intestate succession.

(c) [In-Laws.] A class gift in a governing instrument excludes in-laws unless:

(1) when the governing instrument was executed, the class was then and foreseeably would be empty; or

(2) the language or circumstances otherwise establish that in-laws were intended to be included.

(d) [Transferor Not Parent.] In construing a governing instrument of a transferor who is not a parent of an individual, the individual is not considered the child of the parent unless:

(1) the parent, a relative of the parent, or the spouse or surviving spouse of the parent or of a relative of the parent performed functions customarily performed by a parent before the individual reached [18] years of age; or 191

(2) the parent intended to perform functions under paragraph (1) but was prevented from doing so by death or another reason, if the intent is proved by clear and convincing evidence.

(e) [Class-Closing Rules.] The following rules apply for purposes of the class-closing rules:

(1) If a particular time is during a gestational period that results in the birth of an individual who lives at least 120 hours after birth, the individual is deemed to be living at that time.

(2) If the start of a pregnancy resulting in the birth of an individual occurs after the death of the individual's parent and the distribution date is the death of the parent, the individual is deemed to be living on the distribution date if [the person with the power to appoint or distribute among the class members received notice or had actual knowledge, not later than [6] months after the parent's death, of an intent to use genetic material in assisted reproduction and] the individual lives at least 120 hours after birth, and:

(A) the embryo was in utero not later than [36] months after the deceased parent's death; or

(B) the individual was born not later than [45] months after the deceased parent's death.

(3) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

(4) An individual who is in the process of being adjudicated a child of a de facto parent when the class closes is treated as a child of the de facto parent when the class closes, if the parentage is subsequently established.

The section has extensive comments and examples. The following comment is of particular interest:

Default Rules. The rules in this section are default rules. Under Section 2-701, the rules in this section yield if there is a finding of a contrary intention. One circumstance in which a court should not find a contrary intention is when the governing instrument contains a provision

excluding a child born to parents who are not married to each other, but the provision does not say anything about a child conceived by assisted reproduction. The question presented is whether such a provision excluding a nonmarital child also applies to a child resulting from a posthumous pregnancy after death has ended a marriage. In a strictly literal sense, a child resulting from a posthumous pregnancy is a nonmarital child. *See e.g., Woodward v. Commissioner of Social Security*, 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage, ... posthumously conceived children are always nonmarital children."). This interpretation should be rejected. A child resulting from a posthumous pregnancy after death has ended a marriage should be considered a marital child, not a nonmarital child. A provision in a will, trust, or other governing instrument that relates to the exclusion of a nonmarital child, without more, likely was not inserted with a child resulting from a posthumous pregnancy in mind. Unless the provision of the governing instrument excluding a nonmarital child manifests an intent also to exclude a child resulting from a posthumous pregnancy after death has ended a marriage, the provision should not be interpreted to exclude such a child. For similar reasons, a provision in a governing instrument excluding a nonmarital child which does not say anything about a child conceived by assisted reproduction should not be construed to exclude a child born to a gestational or genetic surrogate if the intended parents are married, whether the child is born while the intended parents are alive or after the death of an intended parent.

1. Status Questions

Page 536. Add new sentence before 1st full paragraph:

Although Alabama recognizes adult adoptions, an adopted stepchild was not allowed to take by construing trust to limit remainder beneficiaries to biological descendants, not adopted persons. *See Parris v. Ballantine*, 2020 WL 5740810 (Ala. 2020).

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).

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).

§ 9.03 Powers of Appointment

Page 553. Add in 2d paragraph:

Illinois, Kentucky, Nebraska and Nevada have also enacted UPOAA.

B. Creation and Exercise

4. Who Owns the Property

Page 563.

In Note 5, add before *Cessac* cite:

Estate of Eimers v. Eimers, 262 Cal. Rptr. 3d 639 (Cal. Ct. App. 2020) (powerholder required to refer to power but only referred to trust creating power held ineffective exercise);

In Note 5, add before "If a power" in line 7:

Because a California statute provides that an instrument cannot be reformed if a specific reference to a power of appointment requirement is required, will reformation not allowed to add the reference. *See Estate of Eimers v. Eimers*, 262 Cal. Rptr. 3d 639 (Ct. App. 2020), *But cf Estate of O'Connor*, 237 Cal. Rptr. 3d 519 (Ct. App. 2018) (instrument construed to provide specific reference).

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).

Add as new Note 5A:

5A. A donee of a specific (nongeneral) power may exercise a power by creating a trust in any person as trustee but the permissible appointees of the second power cannot include objects not provided for in the original power. *See, e.g., Wilmington Trust Co. v. Mills*, 2021 Del. Ch. LEXIS 130 (Del. 2021). This is the default rule of UPOAA § 305(c)(3) which the donor of the original power may override.

Add as new Note 5B:

5B. A donee who is both a permissible recipient and trustee has no fiduciary duty when exercising the power in her favor. *See Tubbs v. Berkowitz*, 260 Cal. Rptr. 3d 852 (Cal. Ct. App. 2020).

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

F. Reform

Page 584. After "Texas allows for immediate reformation", add FN 33A

FN 33A. For trusts that are irrevocable on or after September 1, 2021, and even for some trusts irrevocable before then, trusts may last for 300 years. *See* Section 112.036, Property Code RULE AGAINST PERPETUITIES, 2021 Tex. Sess. Law Serv. Ch. 792 (H.B. 654) (VERNON'S).

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 . . .

Connecticut (800 years), Georgia (360 years) and Texas (300 years) are the latest multi-century states.

Page 599. Add to Selected References:

Robert H. Freilich, in *Eliminating Perpetual Trusts Is a Critical Step towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. Rev. 65 (2019).

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 603. Add at end of 4th paragraph:

Section 94 of Restatement (Third) of Trusts provides standing rules. Comment b provides in part:

> A suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue. The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent.

Page 604.

The 4th line in the 1st full paragraph should read after the first word "estate" and before "2d Rest.":

See, e.g., Foster v. Foster, 304 So.3d 211 (Ala. 2020); *see generally*

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 611. Add before *Novelesty* cite in Note 5:

Tigani v. Tigani, 2021 Del. Ch. LEXIS 60 (Del. Ch. 2021), and

Page 613. Add before *McNeil case:*

Wing v. Goldman Sachs Tr. Co., N.A., 851 S.E.2d 398 (N.C. Ct. App. 2020) (trustees must remain neutral regarding the identity of trust beneficiaries); *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 616. Add after *Wells Fargo* case discussion in Note 3:

In a case of first impression, the Nevada Supreme Court held that the fiduciary exception does not apply in Nevada because only statutorily authorized exceptions apply and the fiduciary

exception is not so authorized. *See Canarelli v. Eighth Judicial Dist. Ct.*, 464 P.3d 114 (Nev. 2020).

Add as new paragraph after Restatement § 82 excerpt

In re Estate of McAleer, 248 A.3d 416 (Pa. 2021) (provides an extensive review of the fiduciary exception in the United States, however, the Court could not agree whether Pennsylvania should adopt the exception based on the common law).

Page 617. Add at end of 3d line:

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

Before *In re Bassin,* add:

Matter of Thomas, 113 N.Y.S.3d 447 (N.Y. App. Div. 2019) and

After *Bassin* cite, add:

But *see Thomas, In re Estate of Rabin*, 474 P.3d 1211 (Colo. 2020) (waiver allowed only to the extent necessary to properly administer the estate)

Add new Note 4:

4. An executor who is not a lawyer cannot represent the estate in a judicial proceeding because the representation is for others and thus would constitute the unauthorized practice of law. *See Estate of Gomez by and through Gomez v. Smith*, 845S.E.2d 266 (W.Va. 2020).

Add before **Problem**:

A personal representative may obtain communications between the decedent and his or her attorney that are necessary to administer the estate as the decedent impliedly waived the attorney-client privilege by appointing the personal representative. *See In re Estate of Rabin*, 474 P.3d 1211 (Colo. 2020).

Page 618. Add to Selected References:

Karen E. Boxx and Philip N. Jones, *Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate*, 44 ACTEC L.J. 223 (2019).

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

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 642. Add new Note 6:

6. An emerging investment strategy involves employing environmental, social, and governance (ESG) factors to make investment decisions. In *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381 (2020), Max M. Schanzenbach and Robert H. Sitkoff explore the efficacy of ESG investing.

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).

Max M. Schanzenbach and Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381 (2020).

3. Delegation and Direction

b. Direction

Page 648. At end of Note 3, add:

Although Texas law provides that a trust advisor is a fiduciary, *Ron v. Ron*, 836 Fed. Appx. 19 (5th Cir. 2020), held that a trust advisor does not owe duties to a trust beneficiary but to the trustee.

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 2021, several states have enacted the Act: Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Maine, Michigan, Montana, Nebraska, New Mexico, Utah, Virginia, Washington and West Virginia.

In 2d sentence, add at end:

vis-à-vis trust beneficiaries

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 662. Add at end of the Page:

In July of 2018, the Uniform Law Commission approved a new Fiduciary Income and Principal Act, which was 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 next discussed. The Act is in force in Arkansas, Colorado, Kansas, Utah and Washington.

Page 66. Add at end of Note 1:

Accord UFIPA § 401(d)(1).

Add at end of Note 2:

Sections 409 and 410 of the Fiduciary Income and Principal Act suggest that the percentage allocated to income be 3-5%.

Delete Note 5 and change Note 6 to Note 5

2. Trustee's Adjustment Power

Page 668. Add as Note 3:

Section 203 of the new Fiduciary Income and Principal Act, which was finalized in the fall of 2018, greatly expands the adjustment power in Section 104 of the 1997 Act. As explained in the Prefatory Note to the new Act

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.

3. The Noncharitable Unitrust Alternative.

Page. 673. In 3d to last line, change 30 to 35.

Page 674. Add as new paragraph before 1st full paragraph:

In July of 2018, the Uniform Law Commission approved a new Fiduciary Income and Principal Act, which was finalized in the fall of 2018. Article 3 provides very flexible unitrust provisions.

D. Other Fiduciary Duties

Page 687. In Note 1, add at end:

See generally, John P. Edgar, *Who Is A Qualified Beneficiary?* 45 ACTEC L. J. 23 (2019).

Page 689. After 1st full paragraph in Note 3, add:

See generally, Mel M. Justak and Anne-Marie Rhodes, *UTC's Duty to Inform and Report at 20 – How Mandatory is Transparency?* 45 ACTEC L. J. 49 (2019).

In Note 4, in 3d line after "qualified beneficiaries", add

over age 24

Add as new Note 4A:

4A. A request for an interpretation of the trust provision that waived the trustee's duty to inform and report did not violate a no-contest clause directed at a "contest" of trust terms. *Hunter v. Hunter*, 838 S.E.2d 721 (Va. 2020).

Before *Rafert* in FN 42, add:

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

Page 690. Add to Selected References:

W. Cameron McCulloch, Jr. and Laurel M. Smith, *The Porridge of Disclosure to Beneficiaries: Too Hot, Too Cold, or Just Right*, 13 Est. Plan. & Comm. Prop. L.J. 207 (2020).

§ 10.04 Remedies for Breach of Fiduciary Duties

Page 692. In FN 43 add as the 1st sentence:

Any beneficiary, even a contingent beneficiary, will have standing to sue a trustee. *See, e.g., In re William R. Zutavern Revocable Trust*, 961 N.W.2d 807 (Neb. 2021).

Add the following after the last sentence of the first paragraph:

See, e.g., Tigani v. Tigani, 2021 Del. Ch. LEXIS 60 (Del.Ch. 2021) (no removal because no showing of hostility); *In re Trust Created by Fenske*, 930 N.W.2d 43 (Neb. 2019) (no removal if settlor had material purpose for trust to continue). 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 697. Add after 1st sentence in Note 2:

See, e.g., Murphy v. Richert, 2021 U.S. Dist. LEXIS 100959 (N.D. Ill. 2021) (reprehensible conduct by counterfeiting trust; punitive damages awarded on a 1:1 basis with compensatory damages). *But see Slezak v. Matherly*, 958 N.W.2d 609 (Iowa Ct. App. 2021) (punitive damages not allowable).

Page 698. In 3d line of Note 5 after "profits approach.", add:

See Kenneth F. Joyce, *Trustee Liability for Breach of Trust—Loss or Profit, or Loss and Profit?*, 45 ACTEC L. J. 43 (2019).

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). Also, one beneficiary may recover from other beneficiaries a portion of legal fees incurred if the beneficiary's action resulted in a substantial pecuniary or even non-pecuniary benefit. *See Smith v. Szeyller*, 242 Cal. Rptr. 3d 585 (Ct. App. 2019).

Before sentence beginning with "However," add:

A state may authorize recovery of attorney's fees against a breaching trustee by a successful beneficiary. *See Zartman v. Zartman,* 168 N.E.3d 77 (Ind. App. 2021) (approving award of attorney's fees based on Indiana's statutes).

Delete *McNeil* cite and add instead: *Dansko Holdings, Inc. v. Ben. Tr. Co*., 991 F.3d 494 (3d Cir. 2021) (based on trust indemnification provision).

At end of note 10, add:

But cf. Goding v. Wilson, 956 N.W.2d 36 (Neb. 2021) (no reimbursement for attorney's fees for trustee who breached trust duties).

Page 700. Add to Selected References:

Daniel F. Blanchard III, *Attorney's Fees In Judicial Proceedings Involving Trusts, Estates, and Protected Persons: When Is an Award Just and Equitable?*, 72 S.C. L. Rev. 145 (2020).

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).