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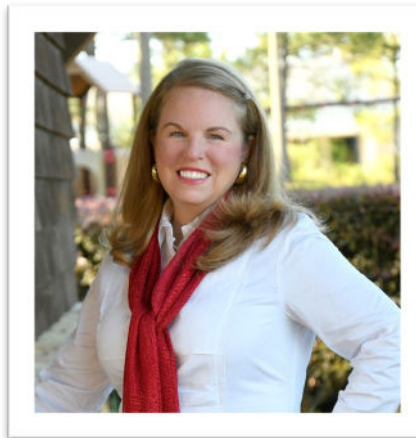
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From the Desk of the President

Thank you for the honor of representing the National College of Probate Judges as president this year. The canceling of the 2020 NCPJ Spring Conference was disappointing, albeit necessary. Though this year, the COVID-19 pandemic caused a widespread shut-down of courts, businesses, and gatherings of every sort, it enabled us all to draw our focus toward our families, our health, and perhaps even learning new skills.

Ironically, this highly contagious, sinister virus challenged us all to come together with the goal of keeping our distance. Social distancing created obstacles to the operation of courts everywhere. As you will read in this

Journal, NCPJ members, Judge Tim Grendell and his staff attorney, Michael Hurst, along with Judge James Dunleavy, wrote about how the courts they oversee have continued to op-



**Hon. Christine Butts,
President of NCPJ**

erate in compliance with social distancing guidelines. Drawing upon the diverse experiences of other judges and forging strong relationships with judicial colleagues is at the heart of NCPJ's mission. This esprit de corps greatly deepens our knowledge base, expands our range of experience, and enhances our ability to serve.

With optimism, we look forward to a time when the virus is in our rear-view mirror and we will once again enjoy the fellowship, support, and education that the National College of Probate Judges has offered its members since 1968.

A handwritten signature in black ink that reads "Christine Butts". The signature is written in a cursive, flowing style.

An Overview of Trusts and Trust Administration

These trust articles are the culmination of a longstanding cooperative effort between the National College of Probate Judges (NCPJ) and the American College of Trust and Estate Counsel (ACTEC). The NCPJ members who joined in this effort were Anne Meister, Hon. Rita Cobb, Hon. C. Jean Stewart, Hon. Tamara C. Curry, Hon. Mike Wood, and Hon. Christine Butts; the ACTEC members who joined in this effort were Kathleen Sherby, John T. Rogers, Jr., and Professor Emerita Mary Radford. We hope that this Overview of Trusts and Trust Administration will provide a useful roadmap to the legal challenges and issues involved.

I. Introduction

A. Objectives

This article is one of two on Trusts and Trust Administration. The purpose of the two articles is to provide basic information concerning trusts, trust administration, jurisdiction over trusts, the duties of trustees, and the rights of beneficiaries. Note that some state statutes and constitutions do not give the probate courts jurisdiction over matters relating to trusts. After completing the Trusts and Trust Administration articles, the reader will be able to:

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Maine's New Uniform Probate Code And COVID-19

By The Honorable James P. Dunleavy, Esq.
Judge of Probate, Aroostook County, Maine

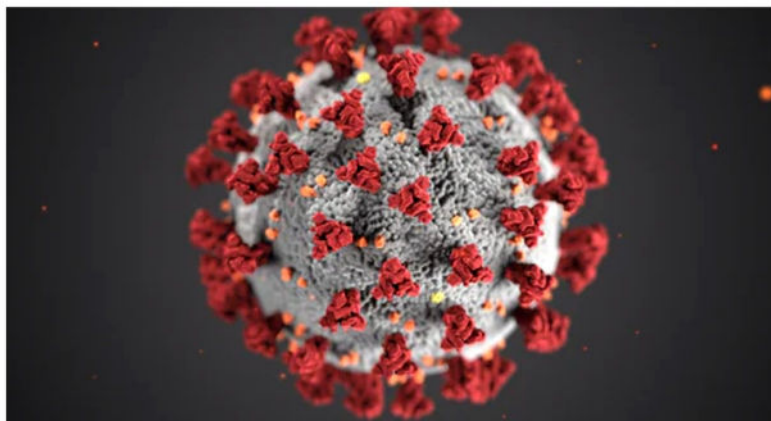
On March 13, 2020, Maine's Supreme Judicial Court issued an Emergency Order and Notice to Promote Courthouse Safety throughout the State of Maine's 16 counties in dealing with health hazards created by the coronavirus pandemic. This Supreme Court Order adhered to guidance provided by the Maine and United States Centers for Disease Control and Prevention. The Order provided that all people "identified as being infected by COVID-19 or having had contact with those infected by COVID-19, or having visited areas identified as problematic due to the prevalence of COVID-19 should not come to Maine's courthouses."

This Law Court Order announced that Maine's Judicial Branch would be "monitoring and managing the number of people in each courthouse in order to reduce the likelihood of the spread of COVID-19." On April 3, 2020, I issued the following Emergency Order and Notice regarding the Aroostook County (Maine) Probate Court. A link to my Emergency Order and Notice from April 3, 2020, can be found in the endnotes of this journal¹.

As of this writing (04/24/20), there have been 965 confirmed cases and 47 deaths in Maine attributed to this coronavirus disease, and more people are testing positive every day. Many of these infected Maine persons are elderly and listed as Respondents in pending adult guardianship cases under Maine's new Uniform Probate Code (MUPC), and some have already been adjudicated incapacitated and placed under guardianship protection in prior Maine Probate proceedings. Many of these elderly Maine people reside, and some have recently died there from COVID-19, in licensed Maine nursing homes or other assisted living facilities.

Our new MUPC became effective law in Maine on September 1, 2019, as I reported in the Fall 2019 Journal of the National College of Probate Judges. (Please note from the Fall 2019 Journal a typographical error where the word "decedents" should be descendants" where the article should state that "the gift will pass to the beneficiary's descendants").

The current article covers historical developments in Maine Guardianship law and COVID-19 history since then, with particular reference to how COVID-19 concerns have resulted in procedural changes in our Probate Courts, also bringing up to date many of the new concerns of the Maine State Legislature since our MUPC became law last year. Some of these concerns have been put "on hold" by the Maine Legislature because of the COVID-19 crisis in Maine, including a bill entitled "An Act to Amend the Maine Uniform Probate Code" (Legislative document #1863, House Paper #1334) received by the clerk of the Maine House of Representatives on December 19, 2019.



Maine's 16 County Probate Courts are located in one or more Maine State Courthouses in every one of our 16 counties. My own Aroostook County covers so much geographical territory—as the largest County in land area in the United States east of the Mississippi—that I actually hold court in four courthouse buildings (from Houlton in the south to Presque Isle and Caribou in the center, and Fort Kent in the north) at regularly scheduled intervals and often on emergency basis in the case of public and private guardianships, involving adult and minor respondents. The COVID-19 pandemic has significantly impacted, procedurally and substantively, the way that Maine's Probate Courts have handled adult guardianship cases in recent months since so many of the respondents in these cases are elderly people who reside in nursing homes or other similar facilities.

"[All People] identified as being infected by COVID-19 or having had contact with those infected by COVID-19, or having visited areas identified as problematic due to the prevalence of COVID-19 should not come to Maine's courthouses."

My article in our Fall 2019 Journal on the MUPC was written before the coronavirus pandemic became known as a pending national concern, and many of the changes in Maine law were made without consideration of some of the concerns which have arisen since the coronavirus pandemic became a national crisis. Some of the changes which became law only a few months ago (before COVID-19) to assure adequate due process notice and protection to some endangered elderly adults have become actual impediments to efficiently and expeditiously processing adult guardianships in the state, because of the need to assure notice and other procedural due process rights to elderly Maine citizens. In order to facilitate some of these MUPC concerns in the Aroostook County Probate Court, I also issued the following Temporary Order on April 3, 2020. The text of my temporary order can be found via the same link as the emergency order on the subsequent page.

Since our new MUPC became effective on September 1, 2019, and before the pandemic became prolific earlier this year, there have

(to be continued page 3)

Maine's New Uniform Probate Code (continued from page 2)

been several proposed bills by Maine legislators, ranging from minor changes in Maine Probate law up to and including massive restricting of Probate law in Maine. The proposed changes include the total elimination of our longstanding and successful system of elected part-time Probate Judges in favor of increasing the number of full-time appointed District Court Judges to be able to handle the increased caseload which would be inevitable if probate law jurisdiction were transferred from Maine's existing part-time elected County Probate system to a new and expanded full-time appointed system in Maine District Court judges. I do not think that it is likely that the Maine State Legislature will engage in such an extensive overhauling of our longstanding County Probate system in favor of a State Court system, certainly not while we are struggling with a healthcare COVID-19 pandemic, which has impacted the civil rights of many elderly and allegedly incapacitated persons being drawn into guardianship proceedings in Maine Courts. Indeed, I think this current legislative effort to reorganize Maine's current Probate system will fail just as many such efforts have failed since Maine voters amended the constitution of Maine in 1967 when voters conditionally repealed the offices of Probate Judges and Register.

None of Maine's 16 current part-time elected Probate Judges were serving in 1967 and many were not even alive at the time of this conditional repeal of Maine's successful Probate Court system. The Maine Legislature has never in 53 years since this conditional repeal exercised its option to reform our Probate Court system to establish full-time appointed District Court Judges with Probate jurisdiction.

However, the new MUPC was made effective on September 1, 2019, and did recodify in a major way many aspects of Maine Probate law which had been in effect for more than 50 years. Even so, the Maine Legislature still has not exercised its option to establish a full-time Probate Judge system, despite the fact that several unsuccessful legislative efforts to change Maine's Probate system from elected part-time to appointed full-time judges have been attempted. The Maine Legislature has never been satisfied that exercising its conditional constitutional option to change Maine's Probate system was worth the exorbitant costs of such an undertaking. But still, the effort has persisted until each time the Maine Legislature came face to face with the price tag attending such an expensive change.

Full-time appointed Maine State Judges are paid several times what part-time elected County Probate Judges are paid. Maine has 16 counties and each county has its own Probate Judge under our current system. Replacing this elected part-time judicial system with an appointed full-time judicial system, even if only eight full-

time judges were to replace our current 16 part-time judges, would involve a salary price tag of several times the current cost to Maine taxpayers, and result in less access to Probate Court services to Maine citizens than they have now. There would be significant costs to Maine taxpayers, and arguably less Probate service because of time and travel costs than Maine people currently have.

It appears to me that proponents of this change in Maine's Probate system have a philosophical preference for gubernatorial appointment of judges over popularly elected judges, which cannot be justified cost-wise, and which runs counter to the elected judicial system so prevalent in many of the states in our country. But a discussion over whether an appointed judicial system is preferable to a popularly elected one is beyond the intended scope of this article.

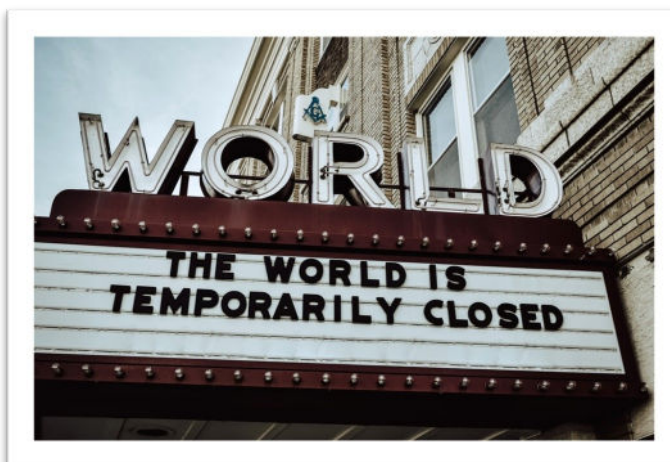
Maine's new comprehensive probate laws seek to protect our senior citizens from elder abuse and to provide Maine's elderly citizens with the protection of due process. Our new law requires an effort to seek less restrictive alter-

natives to the encroachments on personal civil liberties than full guardianship often involves by making it more difficult for family members of a respondent to be appointed guardians or conservators.

The disease of COVID-19 appears to be particularly virulent among Maine people over 65, the very people that the new MUPC seeks to protect from elder abuse. Just like COVID-19, elder abuse is itself a virus-like scourge that we must seek to defeat and, hopefully, our lawmakers will strive to combat both of these viruses by applying wise solutions to both problems. If we change our existing law to provide protection against elder abuse of vulnerable citizens, we must take care that these changes do not inadvertently also infringe on their civil liberties to procedural due process of law.

This is the second article in a series on Maine's new Uniform Probate Code published in this Journal. My colleagues and I on the Maine Probate Judges Assembly have already scheduled future meetings to address what many of us perceive as potential pitfalls, errors, and inconsistencies in the new MUPC and I hope to be able to report back to readers of this Journal on future developments regarding Maine's comprehensive new Probate law.

Judge of Probate James P. Dunleavy has served on the Executive Committee of the National College of Probate Judges (NCPJ) since 2014. He currently serves as the Secretary/Treasurer of the College. Before his election as Aroostook County Judge of Probate, he was elected to represent the people of Presque Isle, Maine in the House of Representatives of the Maine State Legislature. He is a graduate of the University of Maine School of Law and was Comments Editor of the Maine Law Review while in law school. ■



Impact of COVID-19 on Ohio's Probate Courts

By The Honorable Timothy J. Gren-
dell, Judge of Probate, Geauga Coun-
ty, Ohio and Michael Hurst, Staff

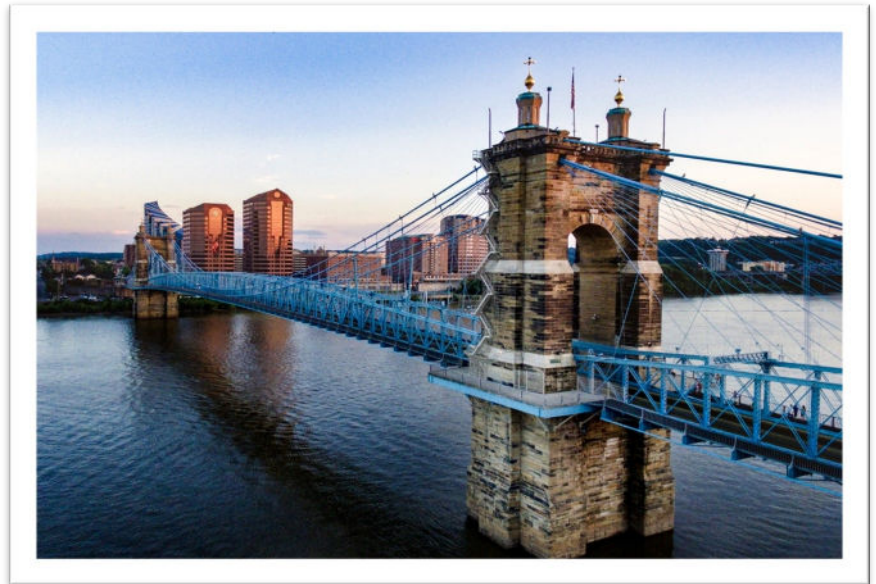
I. INTRODUCTION

The COVID-19 Pandemic has had an unprecedented impact on Ohio. Ohio has issued a number of orders to slow the spread of COVID-19. On March 9, 2020, Governor Michael "Mike" DeWine issued an executive order declaring a state of emergency in Ohio. The executive order allowed administrative agencies, such as the Department of Health, to issue guidelines and implement procedures to prevent the spread of COVID-19. On March 12, 2020, the Director of the Department of Health, Amy Acton, issued a Director's Order to limit mass gatherings in a single room and large events such as attendance in stadiums. On March 14, 2020, Director Amy Acton issued an order closing all K-12 Schools in the State of Ohio. This order was renewed on April 29, 2020, with schools to remain closed until June 30, 2020. Further, in order to slow the spread of COVID-19 to the most vulnerable of Ohio residents, the Department of Health issued an order limiting the access to nursing homes and similar facilities.

On March 22, 2020, the Department of Health issued a "Stay at Home Order." The Stay at Home Order instructed Ohioans to remain in their homes and engage in activities that were essential to health and safety. Further, the order exempted those who were engaged in "essential government functions." This included "judges and court personnel." This would allow judges and court personnel to carry out their constitutional mandates under Article IV, § 18 of the Ohio Constitution. Although COVID-19 has created an unprecedented situation, the State of Ohio's Judiciary has reacted with innovative and creative measures to uphold its constitutional mandate for people's access to the courts and justice.

II. OHIO'S JUDICIAL RESPONSE TO COVID-19

Chief Justice Maureen O'Connor of the Ohio Supreme Court has provided guidance and support to courts and judges throughout the State of Ohio during COVID-19. Pursuant to Art. IV, § 18 of the Ohio Constitution, Chief Justice O'Connor has made it known that courts need to remain functional in order to provide judicial



services. While courts must remain functional during COVID-19, Chief Justice O'Connor has reiterated that courts must adhere to guidelines and procedures ordered by the Director of Health.

Courts and judges throughout Ohio issued orders and procedures whereby they adhered to the guidelines established by the Department of Health, and at the same time remained open for people to access the courts and justice.

In order to help courts deal with COVID-19, the Ohio Supreme Court released \$4 million in emergency grants amid COVID-19. These grants allowed courts to implement technologies in their courtroom, thus limiting in-person contact with courts and improve video conferencing for arraignments and other needs. Further, the Ohio Supreme Court implemented an order tolling the time requirements in regard to the Rules of Civil Procedure and other court rules until the earlier of (1) Governor DeWine's termination of his executive order or (2) July 30, 2020. The Ohio Supreme Court's tolling order was retroactive to March 9,

2020. Further, the Ohio General Assembly adopted H.B. 197, which tolled statutes of limitations pertaining to civil and criminal statutes found in the Ohio Revised Code. Throughout COVID-19, the Ohio Supreme Court has provided support and guidance to courts throughout Ohio. The Ohio Supreme Court has helped courts on a technological basis while maintaining health guidelines.

“the order exempted those who were engaged in “essential government functions.” This included “judges and court personnel.” This would allow judges and court personnel to carry out their constitutional mandates”

(to be continued page 5)

Impact of COVID-19 on Ohio's Probate Courts (continued from page 4)

Also, tolling requirements have helped courts and attorneys during these unprecedented times.

III. OHIO PROBATE COURTS AND COVID-19

As for probate courts, each county probate court has faced its own unique challenge in the State of Ohio. Courts throughout Ohio have had more telephonic and video measures, all courts have postponed and continued trials, but all probate courts must remain available for critical judicial functions.

Probate courts throughout the State of Ohio have issued their own unique court orders. Geauga County Probate Court issued Administrative Order 2020-56, whereby the court granted a 60-day extension on filing inventories and accounts. Lorain County Probate Court issued an order whereby filings would be accepted via fax or email. Further, there has been a recent CLE where the Cuyahoga County Probate Court has taken steps to make available more types of filings through its E-filing portal. Probate courts in Ohio have responded in their own unique way throughout COVID-19 being faced with a wide array of unprecedented challenges.

A. Marriage Licenses

One particular issue that has faced probate courts during the COVID-19 Pandemic is marriage licenses. Pursuant to Ohio law, marriage licenses are issued by the probate court where the couple

resides, or if from out-of-state, where the ceremony is conducted. Ohio law requires that the couple appear in person to finalize the application in order to obtain their license to marry. The personal appearance requirement is particularly problematic and has led to a varied response by different probate courts. In some Ohio counties, the probate court remained open for couples to obtain a marriage license during the court's normal business hours. As in

keeping with health guidelines, couples who did come in for a marriage license had their temperature checked and screening questions were asked. Some probate courts set up an appointment system. This required couples to call in beforehand and set up an appointment before entering the court. Further, another probate court limited the issuance of marriage licenses to first responders, active military members, and those who provided proof of terminal illness.



Ohio probate courts faced challenges with people seeking marriage licenses who were out-of-state. Individuals who had trouble attaining a marriage license in their home state, traveled to Ohio in order to obtain a marriage license. Ohio law permits the issuance of marriage licenses to out-of-state residents only if they are married in the Ohio county where the marriage license was issued. Due to the COVID-19 guidelines issued at federal and state levels, those traveling had to quarantine for 14 days in order to stop the spread of the disease. Judges made known that those who traveled from

out-of-state had to follow federal and state guidelines and procedures before entering into probate court. Therefore, judges and the probate court faced challenges not only from within the state but also from those outside of Ohio.

B. Civil Commitments

Civil Commitments of patients with mental illness also presented a challenge. Pursuant to Ohio law, the probate court is required to conduct a hearing within five business days of a patient's involuntary commitment to a hospital or mental health treatment facility. An attorney representing the local mental health board and an attorney appointed for the patient are present for the hearing. Many counties hold these hearings at the hospital or medical facility.

In response to the COVID-19 situation, and the realization that some of the confined COVID-19 patients



(to be continued page 6)

Impact of COVID-19 on Ohio's Probate Courts (continued from page 5)

are in the hospital, some courts made arrangements for mental health boards, patients, and attorneys to appear by phone or by video link. Often a magistrate, who travels to the hospital or medical facility, conducts these proceedings which are recorded for appellate purposes.

C. Wills and Safekeeping

Further, probate courts faced the challenge of people filing wills for safekeeping during COVID-19. Pursuant to Ohio law, a person can file his or her original will for safekeeping with the probate court. However, there has been reduced access to probate courts during COVID-19 in order to slow the spread of the disease. In some jurisdictions, a person could still come in and obtain the will upon completing a health screen and temperature check. In other jurisdictions, an individual could call or write to request his or her original will and the court would send the original will by certified mail or other secured delivery service.

D. Guardianships

Guardianships were another unique problem probate courts faced. Pursuant to Ohio law, the probate court is required to send a court appointed investigator to conduct an in-person investigation of the alleged ward and file a report with the court. Upon the issuance of the Department of Health's Order limiting access to nursing homes and senior facilities, probate courts and court investigators had to be innovative. Some court investigators attempted to conduct telephonic interviews with alleged wards. In other cases, a guardian ad litem was appointed for the ward to assure that the ward's interest was protected in the ward's physical absence. Thus probate court judges and court investigators had to think of new ways to meet legal requirements for alleged wards.

While COVID-19 has impacted guardianship proceedings and pro-



cedure, there is a noteworthy guardianship worth sharing. In Geauga County, Ohio, there is a vibrant Amish community and their community helps and supports each other. Recently, a guardianship case was filed where the 36-year-old ward is a member of the Amish community. The ward has Down Syndrome and COVID-19. The ward was not married and in order for the ward to be admitted into the hospital, a guardianship had to be established. The ward's sister applied for emergency guardianship, and the court granted sister's petition for emergency guardianship. The Court held a hearing where the guardianship was extended due to the ward's situation. The family, however, due to the recent order prohibiting families into certain facilities, could not visit the ward. This was greatly distressing to the ward and her family. The Court appointed a lawyer to represent the ward and protect her interests. Due to the attorney's diligent work, the ward was moved to another facility where the family was permitted to visit. While COVID-19 impacts all of our lives, stories like this shed light on the work of probate judges who, by their actions, seek to help their community during such difficult times.

IV. Conclusion

The COVID-19 Pandemic has created an unprecedented situation for the Ohio Judiciary. As COVID-19 rapidly changed our everyday lives, Ohio probate courts had to adapt just as quickly. There is no doubt that there has been a learning curve for all probate courts, yet the response from Chief Justice Maureen O'Connor to make available funds for courts, judges implementing their own unique procedures to make available the courts to individuals while maintaining health guidelines, and the importance of court staff flexibility, should give probate court and the Ohio Judiciary as a whole, confidence if and when responding to a future health pandemic. ■



The Impact of Opioid Use Disorder on Probate Courts

By The Honorable Judge Tamara C. Curry,
Associate Judge of Probate
Charleston County, South Carolina

If you are like me, you have heard, read, or even seen on television some reference to the opioid epidemic in the United States and the impact it has on our own communities, courts, friends, and even family members. It is clear that this public health epidemic is real and one we cannot ignore. We also have an obligation to take a true look at how we can assist in saving the lives of individuals with an opioid use disorder who may come to our courts directly or indirectly.

For the past several years, it has been apparent that the issue of opioids and the results of their use are real. We read national reports, indicating prescriptions for drugs such as oxycodone (OxyContin), hydrocodone (Vicodin), and morphine are often used by persons for pain management after injury, surgery, or hospitalization. However, many of us, even in the courts are familiar with the prescription drugs or three FDA approved medications to treat Opioid Use Disorders, which include Methadone, Buprenorphine, or Naltrexone. Further, many of us in the courts are not aware of how to link individuals up to the life-saving medication Naloxone, also commonly known as Narcan.

People question: How can the use of these prescription drugs have created an epidemic? Why have suicide rates increased so much? Statistics show that a person can overdose when he or she takes too much of the painkiller.¹ They often experience slowed breathing, confusion, lack of oxygen to the brain, and even death. Opioid overdoses often occur when alcohol, sedatives, or a combination of the opioid painkillers are taken. Also, opioid overdoses occur when a person accidentally takes too much of the prescription or medicine.² Additionally, many people may overdose because they think they are taking one substance, but are actually taking something laced with Fentanyl or pure Fentanyl. In my home state of South Carolina, the increase in overdose death has been largely due to synthetic opioids, specifically Fentanyl.³ All courts, including Probate Courts, will continue to see a trickle-down effect on cases generated by the effects of opioid use. Judges who preside over general probate cases may see more cases involving individuals who have either committed suicide or overdosed. These cases may involve persons who have young children, subsequently resulting in a rise in guardianships and conservatorships for minors.

My very own state of South Carolina has seen an escalation in opioid deaths. We are currently 20th in the nation for overdose death according to drugabuse.gov.⁴ Additionally, in 2017, the rate per person of overdose deaths in South Carolina (15.5) was higher than the national rate per person (14.6). According to Department of Health and Environmental Control data for South Carolina, there has been an increase in overdose deaths from 2017-2018.⁵ Further, my own county of Charleston, South Carolina has the second-



highest overdose deaths in the state, recently dropping from the highest number of deaths in the state.⁶

While conversing with a colleague recently, we conversed about the number of cases where parents are seeking to be appointed as guardian or conservator for their adult children. Either they seek to provide care for their adult child who has a severe substance use disorder or seek to provide care for a person dually diagnosed with a substance abuse disorder and mental health disorder. When trying to determine a care plan for such persons, it is often difficult to find placement for a 20-30-year-old who many times is resistant to living in a traditional assisted living facility where the average age is above 70. Further, many of the sober living residences can be costly or too restrictive for individuals with an Opioid Use Disorder. These individuals are often in their 20s or 30s, have not accepted their addiction, cannot live independently, yet do not desire to succumb to someone else's control, nor the control of the court to make decisions involving their placement or finances. These are some of the most challenging cases to handle because of the age of these individuals and the impending years it will take to oversee matters. In addition to these challenges, these types of cases can also appear as trust cases with litigation attached.

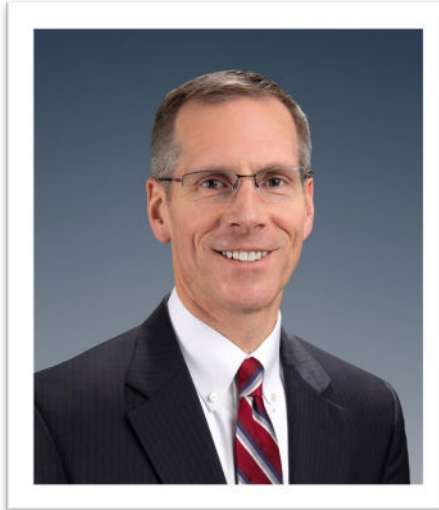
Lastly, if you are a probate judge or preside over a therapeutic court, such as a drug or mental health court, the issue of opioid use is often found in those cases. As judges, how can we help? Do we owe an obligation to assist if we become aware there is an opioid use disorder? Is there a way for us to save lives? I submit to you, "Yes, there is." We must become knowledgeable about the disease and know that there are a number of alternative treatments, such as Medication-Assisted Treatment (MAT), which can be recommended. You can inquire if there is a facility in your jurisdiction that offers such treatment. There are often many organizations and agencies eager to collaborate with the courts to help people within our communities. Make sure that you educate yourself on the disease in case there is an opportunity to assist a family, offer advice, or order treatment. ■

Presentation of the Treat Award

By Mary Joy Quinn

At the 2019 Fall Conference in Philadelphia, Pennsylvania, The National College of Probate Judges awarded Judge Paul J. Knierim of Connecticut with the 2019 Judge William W. Treat Award for Excellence. This is the NCPJ's highest honor in recognition of considerable contribution to the field of Probate Administration. For more information about the award or to nominate someone for the award, refer to the information provided below this article.

Judge Paul Knierim is a 1989 graduate of Yale Law School and son of a Probate Judge and recipient of this same award. Knierim served as a Connecticut State Representative for his hometown of Simsbury from 1991 to 1997. Judge Knierim was elected to serve on the probate bench of The Simsbury District of Connecticut in 1999, a position in which he served for 12 years. In 2009, Judge Knierim would oversee the consolidation of the Connecticut probate court system. Following this, he would serve as the Probate Court Administrator for the state of Connecticut. From this position, he was responsible for the continued education of the state's probate judges. His leadership yielded an elite, more efficient court, focused on bettering the understanding of their



Hon. Paul Knierim
2019 Recipient of the Treat Award

field. He is also credited with bringing the 21st century to the Connecticut probate courts, introducing technology, and further streamlining the courts' operations.

What truly sets Judge Knierim apart is not necessarily his career achievements but his commitment to the people he serves. Recognizing the unfortunate position of those that come to the probate court, he has stated that his primary job is to provide comfort to those in sensitive situations. The issues to be resolved in the courtroom are deep-seated and certainly require the delicate empathetic approach he makes paramount.

Today, Judge Knierim brings that approach, focused on empathy and conflict resolution, back home returning to private practice at Czepiga Daly Pope & Perry. There he applies his incredible talent for working with those in turmoil to reach resolution, focusing on mediation, as well as guardianship cases.

The National College of Probate Judges was honored to make Judge Knierim the 2019 Judge William W. Treat Award Recipient. ■

Nominations for the Treat Award

The Treat Award for Excellence was established by the National College of Probate Judges ("NCPJ") in 1978 in honor of Hon. William W. Treat, founder and President Emeritus of NCPJ. Judge Treat was appointed probate judge in Stratham, N.H., in 1958 and served until his retirement in 1983. He founded NCPJ in 1968 and served as its first President.

Judge Treat was a renowned judge, author, diplomat, professor, and banker. He was a graduate of the University of Maine and Harvard Graduate School of Business Administration and received honorary doctor of law degrees from the University of Maine in 1992 and the University of New Hampshire in 2001. In 1991 he received the Silver Shingle Award, the highest alumni award presented by the Law School of Boston University.

The Treat Award for Excellence was established by the National College of Probate Judges ("NCPJ") in 1978 to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the NCPJ. The College annually

selects one individual, a resident of the United States, who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields, which contribution is of outstanding merit. The award is presented at the annual banquet during the Fall NCPJ Conference. The Award Committee consults with leading probate practitioners and judges throughout the country, including members of the American College of Trust and Estate Counsel and the Trust and Estate Division of the American Bar Associations' Real Property, Trust and Estate Law Section. Nominations usually come from probate practitioners, probate judges, and academic leaders.

Nominations should be sent by July 1, 2020 to the office of the Treat Award at The National College of Probate Judges located at 300 Newport Avenue Williamsburg, VA 23185 or by email at ncpj@ncsc.org.

Presentation of the Isabella Award

This spring the nominations committee met and considered several highly qualified nominees for the Isabella Award. The committee was pleased to ultimately award the Isabella Award to Erica Costello.

Since Erica's graduation from law school in 2005, Erica has dedicated her career to improvements in guardianship administration and practices. She began as the Director of Adult Guardianship in a large Indiana county and then helped establish the Adult Guardianship Office for the entire state of Indiana. Her work in the guardianship field is wide-ranging and indefatigable. Three projects highlight her suitability for this award.

First, Erica spearheaded the Indiana Project on Abuse in Later Life (INPALL). INPALL's purpose was to develop and enhance services for older victims of abuse, neglect, and financial exploitation (including sexual assault, domestic violence, dating violence, and stalking) in St. Joseph County. It resulted in victim services that outlasted the project and the creation of a strong collaborative team to prevent, identify, and help older adult victims of abuse and neglect.

Second, Erica has worked tirelessly to promote supported decision-making as an alternative to full guardianship. An example of Erica's success in this area is the story of Jamie Beck. In June 2018, Jamie Beck became the first person in Indiana to have her guardianship terminated in favor of supported decision-making. Jamie is a 27-year-old woman diagnosed with mild intellectual



Erica Costello
2020 Recipient of the Isabella Award

disability. She was declared incapacitated in 2010 following the death of her parents and stepfather and placed in a nursing home. With the support of her then-guardian, Jamie moved into a supported-living home and began a pre-vocational program. She got a job in the community and then pursued vocational training. Before the training ended, she was offered a full-time position with benefits. She moved into an apartment and recently became engaged to be married. Supported decision-making formalizes the way that most adults make decisions by identifying trusted friends and supporters who make decisions and their consequences easy to understand. This initiative does not replace guardianships but provides more freedom for adults who do not need full guardianship. Erica collaborated with Indiana's Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) to establish the pilot project that made supported decision-making possible in Indiana.

Finally, Erica leads Indiana's Volunteer Advocates for Seniors or Incapacitated Adults (VASIA) program. Local VASIA programs in counties around the state recruit and train volunteer advocates to assist incapacitated persons. Her responsible management and inspiring growth of the program has greatly improved guardianship practices in Indiana, providing an example for other states across the country.

Being that the spring conference was canceled, in recognition of Erica's outstanding devotion to this field, she will be recognized at the award ceremony at this year's fall conference. ■

Nominations for the Isabella Award

Judge Isabella Horton Grant was a pioneering lawyer and judge who practiced law for 25 years before being appointed in 1979 to the San Francisco Municipal Court by Governor Jerry Brown and then in 1982 to the Superior Court. Judge Grant served as presiding judge of the Family Court, where she initiated a separate domestic violence calendar and helped pass California's no-fault divorce legislation. Judge Grant later served for 11 years as presiding judge of the Probate Court, where she streamlined court procedures, created the Guardianship Monitoring Program, and assured that up-to-date court rules were available to attorneys.

Judge Grant was an active member of the National College of Probate Judges and the recipient of its coveted Treat Award in 2000. In 2011, she was awarded, posthumously, the Rose Bird Award from the California Association of Women Lawyers. The Isabella Award is presented to the recipient at the NCPJ Spring Conference each year. Nominations for the award

should include the name, address, and position of the nominee and the nominators, together with a brief description of the accomplishments of the nominee. Supporting letters may be included. Nominations may be submitted by probate judges, probate practitioners, guardianship practitioners, academicians, or others having personal knowledge about the nominee.

Qualifying achievements may include a variety of activities, such as innovative programs leading to improvements in guardianship laws; articles, treatises, books, or other publications of unusual quality and impact on guardianship issues; leadership roles or other activities in organizations that have led to significant improvements in the laws, administration, or practices in the guardianship field.

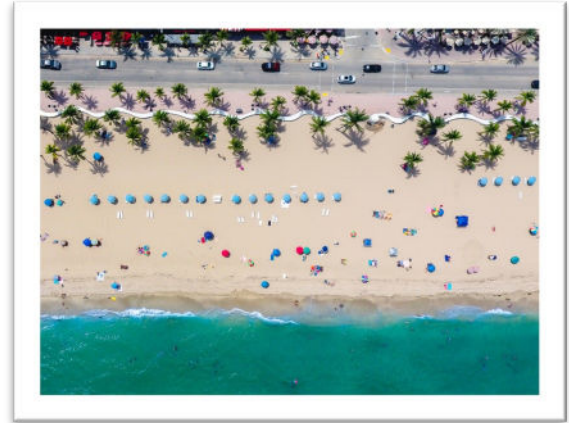
Nominations should be sent to the office of The Isabella Award at The National College of Probate Judges located at 300 Newport Avenue Williamsburg, VA 23185 or by email at ncpj@ncsc.org.

Upcoming Conferences

This spring, amid the outbreak of COVID-19, the Colorado Springs Conference was canceled. With lockdown orders and state of emergency declarations, attendance would be a challenging feat, and more than that, it would be genuinely unsafe to hold the conference. We are doing our best to reschedule the much-anticipated speakers for the spring conference of 2022 so that we may have a chance to hear from them. With that said, we are excited to announce the locations of our next four conferences.

Destin, Florida Fall 2020

Before the outbreak of COVID-19, NCPJ planned to meet from November 10th through the 13th in the coastal paradise of Destin, Florida, to hear an exciting lineup of speakers and to share in their valuable insight. The NCPJ Executive Board sent out a survey to determine how many members plan to attend the conference. We await the results of the survey and instruction from health officials before greenlighting the Fall Conference.

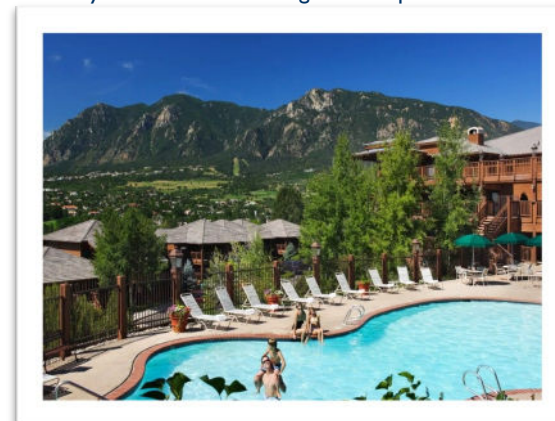


Savannah, Georgia Fall 2021

From November 7-13 join NCPJ in the historic city of Savannah Georgia, a city abounding in culinary intrigue and architectural grandeur. From the colonial capital of Georgia to a principal strategic port during both the American Revolution and the Civil War, being the oldest city in the state of Georgia has its perks.

Tucson, Arizona Spring 2021

From one scenic, sandy paradise to another, May 11-14 will see us travel to the lush heart of the Sonoran Desert. With culinary, cultural, and natural attractions, Tucson may be in a desert but it is an oasis for vacation. From Saguaro National Park to the west and Mount Lemmon to the east there is certainly no shortage of natural wonder in this idyllic valley.



Colorado Springs, Colorado Spring 2022

May 16-22 will see NCPJ come full circle as we take the spring conference back to Colorado Springs. From the Garden of the Gods to Pikes Peak, the fullest of Colorado's natural beauty is certainly on display. This town, having a large Ute native population, will also provide for an unparalleled cultural experience.

An Overview of Trusts and Trust Administration (continued from page 1)

- Identify legal issues involved in the administration of a trust.
- Apply the "best practices" for the administration of a trust.
- Handle the various types of proceedings the reader may see involving trusts in his or her court.

B. Pre-reading for this article

It is recommended that the reader do the following before continuing with this article:

- Review his/her jurisdiction's statutes governing trusts and trust administration.
- Review Uniform Trial Court Rules, supplemental local court rules, and Rules of Civil Procedure that apply to trust actions in his/her jurisdiction.¹

C. Citation of the Uniform Trust Code (UTC) as reference information will be used throughout this article, but the reader should be sure to refer to the applicable law in his or her own state.

II. Background and Terminology

A. Uniform Trust Code

The Uniform Trust Code, or "UTC", was drafted by the National Conference of Commissioners on Uniform State Laws, or "NCCUSL" (more commonly known as the Uniform Law Commission, or "ULC") with the intention to provide uniformity in state laws governing trusts. It was last amended in 2020. For a list of current UTC states and updates, please visit: <https://www.uniformlaws.org/committees/community-home?communitykey=193ff839-7955-4846-8f3c-ce74ac23938d&tab=groupdetails>

The text of the UTC may be found at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3d7d5428-dfc6-ac33-0a32-d5b65463c6e3&forceDialog=0>

At least 34 states and the District of Columbia have enacted the UTC in some form, making such changes in the statutory provisions as each state legislature determined to be appropriate. It is therefore critical to review the law of one's own jurisdiction when deciding trust matters.²

B. Terminology³

Amendment: A change in the terms of a trust by the Settlor.

Beneficiary: A person who has a present or future beneficial interest in a trust, vested or contingent, or who, in a capacity other than Trustee, holds a power of appointment over trust property. UTC § 103 (3).

Irrevocable Trust: Generally, a trust that cannot be revoked by the Settlor due to the terms of the trust, or a trust that was revocable during the Settlor's lifetime but became irrevocable after the Settlor died.

Modification: A change in the terms of a trust made as provided in the trust instrument or in accordance with applicable state law. This may require a court proceeding.

Restatement: A complete amendment of the trust by the Settlor that restates the terms of the trust in its entirety.

Revocable Trust: A trust that may be revoked by the Settlor during the Settlor's lifetime without the consent of the Trustee or a person holding an adverse interest. UTC § 103 (14). The Settlor is often the sole lifetime beneficiary of a revocable trust. The term "living trust" may be used to describe such a trust, although it is not a legal term.

Settlor: (Also known as a Trustor or Grantor) The person, including a testator, who creates, or contributes to, the trust. If more than one person creates or contributes to the trust, each such person is the Settlor to the extent of his/her contribution except to the extent that another person has the power to revoke or withdraw that portion. UTC § 103 (15).

(to be continued page 12)

An Overview of Trusts and Trust Administration (continued from page 11)

Special Needs Trust: An irrevocable trust established for a disabled person to enable the trust assets to be used for the supplemental and other needs of the beneficiary without making the beneficiary ineligible for government benefits during his or her lifetime. There are several types of special needs trusts.

- A. First-party special needs trusts established by or with the funds of a disabled person under the age of 65, created pursuant to federal law 42 U.S.C. §1396p (d)(4)(A), for the sole benefit of the disabled person and with payback provisions on the beneficiary's death.
- B. Pooled special needs trusts established by or with the funds of a disabled person of any age, created pursuant to federal law 42 U.S.C. §1396p (d)(4)(C), managed by an organization as a pooled fund for the beneficiary and other disabled persons, with payback provisions to the state or distribution to the charity managing the trust on the beneficiary's death.
- C. Third-party supplemental needs trusts established with the funds of a family member or other third party for the benefit of a disabled person. These trusts may be fully discretionary, may or may not include other beneficiaries, and are not required to have payback provisions.

Termination: The end of the trust administration pursuant to either the terms of the

trust or court order. The administration of a trust may continue after termination to wind up the trust.

Trust: A trust is created when a property is held by a trustee for the benefit of one or more persons.

A written instrument is not required to create a trust under the UTC, but clear and convincing evidence is needed to support the creation of an oral trust and its terms. UTC § 407.

Trustee: The person or entity who administers the trust and holds the legal title to the trust property. Trustee includes both the initial Trustee and any Successor Trustee and a Co-Trustee. UTC § 103 (20).

Trust Protector: A person—other than the Trustee, the Settlor, or a Beneficiary—who has expressly been given powers in the trust instrument over the trust provisions, trust property, the trustee, or the trust administration, may also be called a Trust Director, Trust Advisor, Trust Decision-Maker, Trust Remover, Distribution Advisor, Investment Advisor, or any other name provided in the trust serving the same function. A Trust Protector generally has only the powers expressly granted in the trust and governed by the provisions set out in the trust.

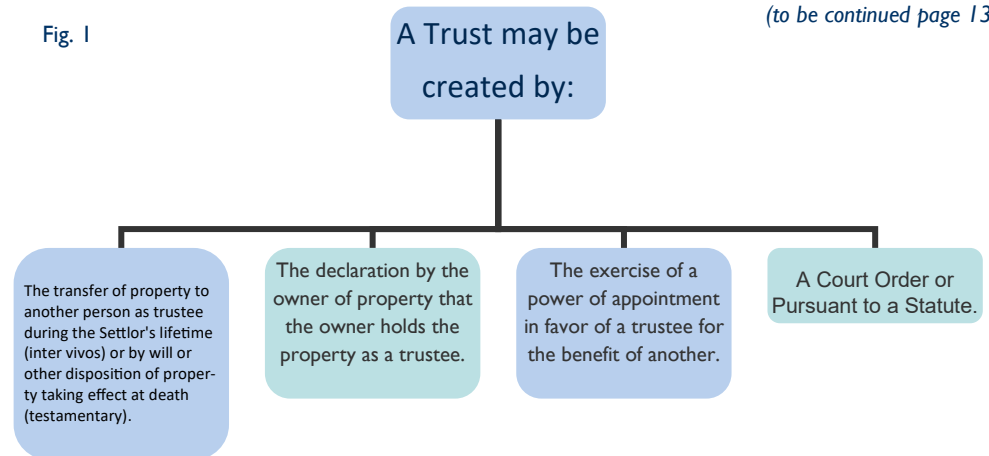
III. Judicial Role in Trust Administration

A. Trust Purposes

The UTC sets four overarching parameters for the creation of a trust—A trust may be created only to the extent (i) its purposes are lawful, (ii) it purposes are not contrary to public policy, (iii)

(to be continued page 13)

Fig. 1



An Overview of Trusts and Trust Administration (continued from page 12)

its purposes are possible to achieve, and (iv) the trust and its terms are for the benefit of its beneficiaries.⁴

B. Judicial Role in Administering a Trust

The court may intervene in trust administration "to the extent its jurisdiction is invoked by an interested person or as provided by law" and court proceedings "may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." UTC § 201.

In the comment to this UTC section, the drafters note the following:

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute.⁵

Further illustrations of the powers of the court under the UTC include:

- determining questions of construction;
- determining the existence or non-existence of any immunity, power, privilege, duty, or right;
- determining the validity of a trust provision;
- ascertaining beneficiaries and determining to whom a property will pass upon final or partial termination of the trust;
- settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers;
- instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary;
- granting powers to the trustee;
- fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation;
- compelling redress of a breach of a trust by any available remedy;
- approving or directing the modification or termination of a trust;
- approving or directing the combination or division of trusts; and
- authorizing or directing the transfer of a trust or trust property to or from another jurisdiction.⁶

C. Applicable Law

Unless modified by state law or the provisions of the UTC, both the common law of trusts and principles of equity are intended to apply and supplement the UTC.⁷

Section 9 of the UTC also incorporates the Uniform Prudent Investor Act, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=22cb68ce-097b-178f-899d-320e70be214d>, as part of the UTC. This Act, which was also drafted by the UTC, has been enacted in at least 43 states, the District of Columbia, and the U.S. Virgin Islands.

D. Jurisdiction

A key concept in the UTC is the principal place of administration of a trust, which may be set by the terms of the trust "as valid and controlling" provided that:

1. a Trustee's principal place of business is located in or a Trustee is a resident of the designated jurisdiction; and
2. all or part of the administration occurs in the designated jurisdiction.⁸

The principal place of administration may also be established based upon significant contacts. The Trustee has an obligation to administer a trust "at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."⁹ To fulfill that obligation, a Trustee may move the trust's place of administration to another jurisdiction, including outside of the United States. This does not "preclude the right of a court to order, approve, or disapprove a transfer."¹⁰

The court in a particular state obtains personal jurisdiction over a Trustee for any matter involving the trust whenever the trust's principal place of business is within that state, either initially or by the Trustee moving the trust's principal place of business to that state.¹¹ The court has jurisdiction over every beneficiary to the extent of the beneficiary's interest in the trust, and it also obtains personal jurisdiction over a beneficiary who accepts a distribution from the trust.¹²

Under the UTC:

1. the meaning and effect of trust terms are governed by the law of the jurisdiction selected in the choice of law provision of the trust, "unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue" or if there is no choice of law provision, "the jurisdiction having the most significant relationship to the matter at issue";¹³ and
2. in some jurisdictions, a court may have exclusive jurisdiction of proceedings concerning the administration of a trust and has concurrent jurisdiction with other courts (such as general civil courts or court departments) with respect to other proceedings involving a trust (e.g. a dispute with a third party).¹⁴

E. Venue

The UTC provision concerning venue for a judicial proceeding and venue for the appointment of a Trustee is optional.¹⁵ It provides that venue for a judicial proceeding is appropriate when:

1. the principal place of trust administration is in the county; or

(to be continued on page 14)

An Overview of Trusts and Trust Administration (continued from page 13)

2. the trust was created by an open probate proceeding situated in the county; or
3. there is no Trustee and a beneficiary resides in a county or trust property that is located in that county.

General rules of venue may apply in cases not covered by the venue section.

F. Necessary Parties

The Trustee is generally a necessary party to any matter involving a trust. All beneficiaries must generally be given proper notice of the proceeding even though the court may not have personal jurisdiction over them. A beneficiary may become a party by initiating an action, filing a responsive pleading, or appearing personally or through counsel.

In situations where the court is requested to modify or terminate a trust, it is sometimes permissible under the UTC for the court to find that the interests of all trust beneficiaries can be fairly and effectively championed by representation with fewer than all of the beneficiaries participating.¹⁶ This is commonly referred to as "virtual representation." In these cases, the court needs to be satisfied that the interests of the non-participating beneficiaries are substantially the same as those of the representative. Notice is an issue and informed non-participation by beneficiaries will not necessarily remove the need to take their interests into account. When there are incompetent/minor/missing beneficiaries and the court is not satisfied that their interests can be properly protected by way of representation, the appointment of guardian ad litem or the involvement of custodians may be appropriate to protect these interests.

IV. Operation of Trusts

A. Creation of a Trust

Under UTC § 402 and § 406, a trust is created only if the following requirements are met:

- Settlor has capacity to create the trust;
- Settlor's intent was to create the trust;
- The trust has a definite beneficiary, is a pet trust,¹⁷ or is a charitable trust;¹⁸
- The Trustee has duties to perform;
- The same person is not the sole Trustee and sole beneficiary of all beneficial interests (both life interests and remainder interests); and

- The Trust was not induced by fraud, duress, or undue influence.

A trust typically has the following provisions:

1. **Relationships Defined:** In understanding a particular trust, it is important to determine who is the Settlor, who is the Trustee, who are the current beneficiaries, who are the remainder beneficiaries (if any), and what the relationship is among the Settlor, the current beneficiaries, and the remainder beneficiaries. If there is more than one current beneficiary, you would also want to determine whether any beneficiary's interest takes precedence over those of one or more of the other beneficiaries. As for the future beneficiaries, there may be contingencies to their beneficial interests.
 2. **Purpose:** Since the intent of the Settlor generally determines the meaning of a trust, the Settlor may state material purposes in the trust to make it easier to determine Settlor intent. Any stated material purposes should be examined, and they must be lawful, not contrary to public policy, and possible to achieve. UTC § 404.
3. **Appointment of Trustee(s):** The trust identifies the Trustee or Trustees, and successor Trustees. The trust may provide that the Trustee may be removed under certain circumstances and not others, and may name a successor trustee or provide a procedure for appointing additional or successor trustees.
4. **Administration of Trust:** The trust provides direction to the Trustee regarding whether the Trustee is required to distribute a particular amount from the trust or whether the Trustee has discretion in distributing income or in distributing principal, or both, to the beneficiaries. The extent of the Trustee's discretion should also be set out in the trust. (See the discussion of Discretionary Trusts in 4.2 below.)
5. **Specific Gifts:** The Trustee may be directed to make specific distributions to certain beneficiaries. If so, it is important to determine whether these gifts are of specific monetary amounts or of specific property and whether the distribution is to be a one-time distribution or periodic distributions. If tangible personal property is owned by the trust, the Settlor may have specified what is to be done with such property.



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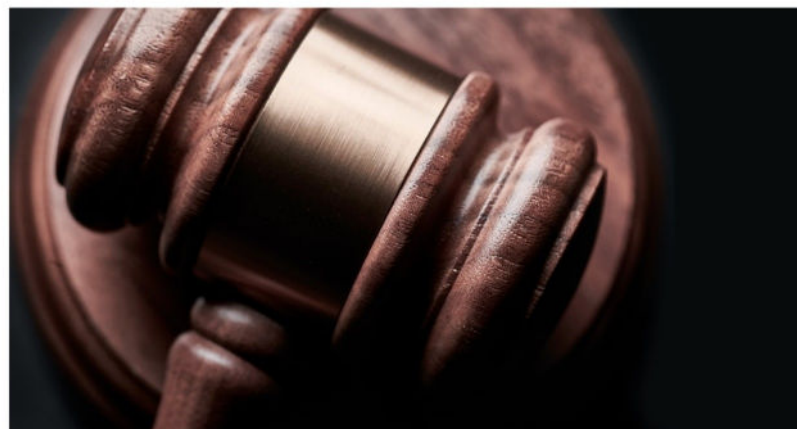
An Overview of Trusts and Trust Administration (continued from page 14)

6. **Division of Trust:** The trust may provide that the trust estate is to be divided, and the basis for making that division. The Trustee may be directed to divide the trust estate into separate trusts for individuals or families or may be directed to divide the trust estate by a formula based on some tax concepts (such as to segregate the property that is exempt from estate tax from that which is intended to qualify for a marital deduction or to segregate the property that is exempt from generation-skipping transfer tax from the property that is not exempt from such tax). Once a trust is divided, the beneficiaries of each of the subsequent trusts may be different.
7. **Trust Residue:** Trust property not otherwise directed to be specifically distributed becomes part of the trust residue, and the trust should provide for how the trust residue is to be distributed.
8. **Trustee Powers:** The powers of the Trustee usually are set forth in the trust. However, state law may provide powers.
9. **General Administrative Provisions:** The trust may provide other rules that are applicable to the trust. State law may provide rules to govern trusts when the trust does not address a particular issue.
10. **Signatures Required:** The signature of the Settlor is required.¹⁹ The signature of the Trustee may also be required depending on the jurisdiction and the form of the trust instrument. A state may have other formalities to be followed, such as requiring witnesses or notarization. The terms of the trust may also establish the formalities to be followed for executing the trust amendments.

Court orders may be needed to memorialize missing or incomplete terms of the trust. If a determination is made based upon the evidence that the trust will fail, the court will need to decide how the property at issue should be disposed of and may also need to make provision to unwind a failed attempt to create a trust by striking a deed, directing disgorgement of assets, and otherwise restoring the status quo prior to any actions that were taken pursuant to the failed trust.

B. Standards of Discretion

A trust may have different standards of discretion granted to the Trustee. For example, a trust may provide that the Trustee is to make distributions for the health, education, maintenance, and support of the beneficiary (sometimes referred to as an "ascertainable



standard" or a standard that is provable or able to be determined by extrinsic proof). Other trusts might authorize the Trustee to make distributions for any purpose for the benefit of the beneficiary, and still others might express the distribution standard as available for the "happiness" or "welfare" or "best interests" of the beneficiary. The trust instrument may provide for different standards of discretion for the trusts created under the same trust instrument.

The trust may also provide oversight as to the exercise of discretion by the Trustee, with some stating that the Trustee has "absolute," "sole," or "uncontrolled" discretion; others that the Trustee should exercise discretion "liberally." In some trusts, the Trustee is permitted to exercise discretion even to the extent of exhausting the trust. Review of the exercise of discretionary powers is often limited,²⁰ but notwithstanding terms such as "absolute," the Trustee's discretionary powers must be exercised in good faith and in accordance with the terms of the trust and the interests of the beneficiaries.²¹

Some Settlers state in the trust whether and to what extent the Trustee is to consider other resources in exercising discretion to make distributions. However the grant of discretion is expressed, the Trustee must exercise this discretionary authority in good faith and in accordance with the terms and purposes of the trust.

Finally, some trusts do not grant any discretion to the Trustee in making distributions to beneficiaries. The terms of the trust state that the Trustee must make certain distributions: these are known as mandatory distributions.

(to be continued on page 16)

***“The court will need to decide
how the property at issue
should be disposed of and may
also need to make provision to
unwind a failed attempt to
create a trust by striking a
deed.”***

An Overview of Trusts and Trust Administration (continued from page 15)



V. Trustee

A. Role of the Trustee

All property of a trust should be titled in the name of the Trustee since a trust is generally viewed as a relationship and not as a legal entity capable of holding title.¹ While it is common to refer to “trust assets” or “trust property,” generally ownership, title, and authority rest in the Trustee. This common shorthand may result in confusion when the court is called upon to address issues of trust mechanics in issuing orders dealing with deeds, written instruments, account titling, tax issues, and the like.

The Trustee takes charge of all trust property and signs all of the documents that are within the Trustee’s scope of authority, such as checks, deeds, loan applications, etc.

Under the UTC, the Trustee is authorized to delegate the Trustee’s duties and powers to an agent.²

The Trustee must maintain an inventory of the trust property and keep detailed records of all receipts, disbursements of expenses, and distributions to beneficiaries. The Trustee also allocates all receipts between income and principal and charges all payments of expenses to either income or principal (or partly to each in some cases), all in accordance with the terms of the trust and to the extent not provided in the terms of the trust, the principal and income law of the state.³ These allocations can and will make a difference in the benefits each beneficiary derives from the trust. The Trustee charges all distributions made to and among the beneficiaries either to income, principal, or both. The Trustee must account for all of these receipts, disbursements, and distributions in the books and records of the trust and provide reports of such transactions to the beneficiaries on a regular basis, at least annually.⁴ The Trustee must keep these trust books and records during the entire term of the trust; none of the trust

records can be destroyed until after the trust has terminated and the Trustee has properly discharged all duties.

B. Trustee Duties

A Trustee generally has important duties,⁵ including

- Duty to administer the trust in good faith and in accordance with the terms of the trust, the interests of the beneficiaries, and the provisions of state laws. UTC § 801.
- Duty of loyalty to administer the trust solely in the interests of the beneficiaries and not to engage in self-dealing. UTC § 802.
- Duty to act impartially when a trust has two or more beneficiaries with regard to the respective interests of all beneficiaries, in investing, managing, and distributing the trust. UTC § 803.
- Duty to administer the trust in a prudent manner considering the purposes, terms, and distributional requirements of the trust and in doing so, to exercise reasonable care, skill, and caution. UTC § 804.
- Duty to incur costs in the administration of the trust that are reasonable in relation to the trust property and purpose of the trust and the skills of the Trustee. UTC § 805.
- Duty to use any special skills or expertise. UTC § 806.
- Duty to exercise reasonable care to comply with the terms of a delegation and to exercise reasonable care, skill, and caution in delegating duties and powers. UTC § 807.
- Duty to follow the direction of the Settlor of a revocable trust. UTC § 808.
- Duty to take reasonable steps to control and protect trust property. UTC §§ 809 and 812.
- Duty to keep adequate records of the administration of the trust and to keep trust property separate from the Trustee’s own property. UTC § 810.
- Duty to take reasonable steps to enforce claims of the trust and to defend claims against the trust. UTC § 811.
- Duty to keep qualified beneficiaries⁶ of the trust reasonably informed about the administration of the trust, including providing copies of the trust upon request of a beneficiary and providing accountings to current beneficiaries and other beneficiaries who request such accountings. UTC § 813.

In addition, the UTC incorporates the Uniform Prudent Investor Act (“UPIA”) as Section 9 of the UTC.⁷ This Act sets a standard

(to be continued on page 17)

“The Trustee must keep these trust books and records during the entire term of the trust; none of the trust records can be destroyed until after the trust has terminated and the Trustee has properly discharged all duties.”

An Overview of Trusts and Trust Administration (continued from page 16)

of care and also addresses diversification of trust investments, duties at the start of the trusteeship, investment costs, compliance measured at the time of decision or action, and the duties of loyalty and impartiality. This Act is available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=22cb68ce-097b-178f-899d-320e70be214d&forceDialog=0>.

The standard of care provision of the UPIA, considered the “Heart of the Act,”⁸ has a number of similarities to the UTC, and provides as follows:

1. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
2. A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
3. Among the circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:



- a. general economic conditions;

- b. the possible effect of inflation or deflation;
 - c. the expected tax consequences of investment decisions or strategies;
 - d. the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible or intangible personal property, and real property;
 - e. the expected total return from income and the appreciation of capital;
 - f. other resources of the beneficiaries;
 - g. needs for liquidity, regularity of income, and preservation or appreciation of capital; and
 - h. an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
4. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

5. A trustee may invest in any kind of property or type of investment consistent with the standards of this Act.

6. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.⁹

C. Remedies for Breach of Trust

For claims of breach of trust, the court has a host of options set forth in UTC § 1001, Remedies for Breach of Trust:

1. Compel the Trustee to perform duties;
2. Enjoin the Trustee from committing a breach of trust;
3. Compel the Trustee to redress the breach of trust by paying money restoring property, or other means;
4. Order a Trustee to account;
5. Appoint a special fiduciary to take possession of the trust property and administer the trust;
6. Suspend the Trustee;
7. Remove the Trustee (as provided in UTC § 706);
8. Reduce or deny compensation to the Trustee;
9. Subject to UTC § 1012 (concerning Protection of Person Dealing with Trustee), void an act of the Trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(to be continued on page 18)

An Overview of Trusts and Trust Administration (continued from page 17)

10. Order any other appropriate relief.

Damages may also be awarded. As damages for a violation of a duty a Trustee owes to a beneficiary, the Trustee may be held liable to restore to the trust the greater of the amount of the actual loss suffered by the trust or the profit made by the Trustee, and may also be held liable for costs and expenses, including attorney fees, to any party.¹⁰ A Trustee may be accountable for any profit made “even absent a breach of trust.”¹¹

D. Powers of Trustee

The powers and limitations of the powers of the Trustee are as follows under UTC § 815:

- The Trustee has all powers conferred by the terms of the trust;
- The Trustee has any power over the trust property that an unmarried competent owner has over individually owned property;
- The Trustee has any power appropriate to achieve the proper management, investment, and distribution of the trust property;
- The Trustee has any other power specifically provided under applicable state statutes; and
- The Trustee does not have any power expressly excluded by the Settlor in the trust instrument.

A series of additional specific powers of the Trustee are set forth in UTC § 816.

E. Trustee Bond

Generally, there is no need for a corporate Trustee, which is required to provide a general bond for serving as a trustee of all of the trusts for which it is serving, to post a separate surety bond.¹²

The court may require a Trustee to give bond if such a bond is “needed to protect the interests of the beneficiaries or required by the terms of the trust and the court has not dispensed with the requirement.”¹³ Generally, bond is set for the value of the trust property and may also cover annual income and interest. The court may specify a different bond amount, may require a third-party guarantor, and may modify or terminate the bond at any time.¹⁴

F. Trustee Compensation

The trust instrument may provide the rate of compensation to be paid to the Trustee, sometimes viewed as a contractual rate. The trust instrument may also provide a procedure or a formula for Trustee compensation. Even when there is no direction as to the Trustee’s compensation, the UTC provides that the Trustee is entitled to reasonable compensation under the circumstances.¹⁵

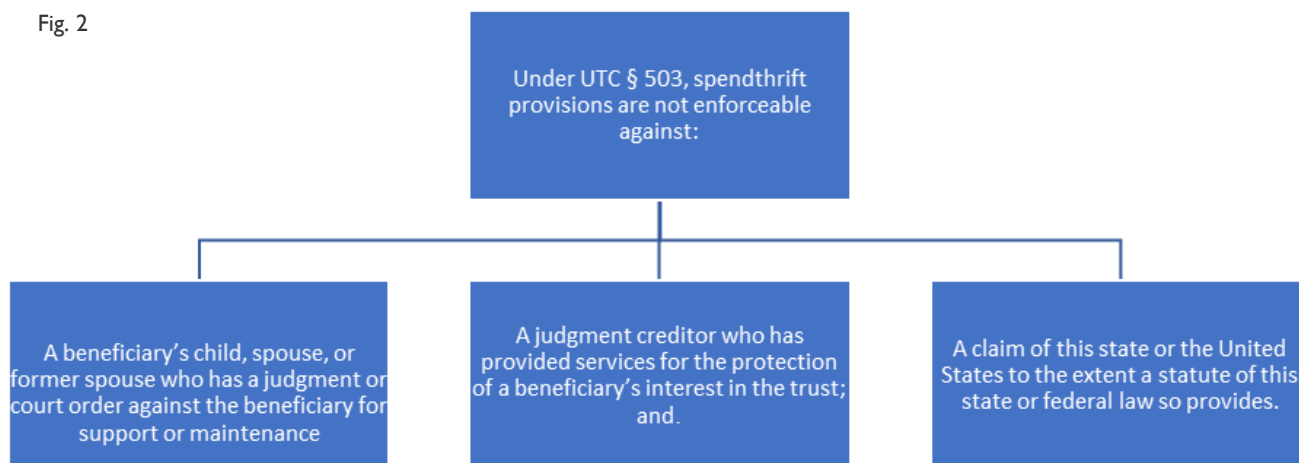
The UTC also specifically provides that a court may allow more or less Trustee compensation than the compensation specified in the trust instrument if the Trustee’s duties are “substantially different than those contemplated when the trust was created” or the compensation would be “unreasonably low or high.”¹⁶

A Trustee may also be reimbursed for expenses paid, with interest, when appropriate. Reimbursement may be made for expenses that have been properly incurred in the administration of the trust, or, if they were not properly incurred, to prevent unjust enrichment to the trust. A Trustee who advances money to the trust may be entitled to a lien against the trust for recovery of such advances and reasonable interest.¹⁷

VI. Creditor Claims

UTC §105 (b)(5) provides that the terms of the trust prevail except as to “the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust.”

Fig. 2



(to be continued on page 19)

An Overview of Trusts and Trust Administration (continued from page 18)

A trust that has a “spendthrift provision” prohibits the beneficiary from assigning the beneficiary’s present or future interest to a creditor. The spendthrift provision restrains both voluntary and involuntary transfers, and a creditor or assignee of the beneficiary may not reach the beneficiary’s interest before receipt by the beneficiary.¹⁸

There are exceptions to these restraints.

As a result, depending on the circumstances surrounding the trust and state law, the court may be able to consider property in a third party irrevocable trust when dividing marital property and determining the alimony or support award incident to a divorce. A spouse, former spouse, minor children of a trust beneficiary, and the federal and state governments are exception creditors in many jurisdictions, such that the court can authorize such a person to reach the beneficiary’s interest in the trust notwithstanding the presence of a spendthrift provision in the trust.

If there is no spendthrift provision, a creditor or assignee of a beneficiary can seek court authorization to attach both present and future distributions to or for the benefit of the beneficiary. UTC § 501. If the distribution is discretionary, however, the creditor or assignee cannot compel the Trustee to make a distribution, UTC § 504(b). By contrast, UTC § 506(b) provides, “Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.”

Special rules apply to claims against the Settlor of a trust. The property of a revocable trust is subject to claims of the creditors of the Settlor regardless of whether there is a spendthrift provision since the trust property is the Settlor’s property. For an irrevocable trust, UTC § 505 provides for a creditor to reach “the maximum amount that can be distributed to or for the Settlor’s benefit.” This UTC provision also addresses the intersection of probate and trusts in its provision for claims against the Settlor as follows:

After the death of a settlor, and subject to the settlor’s right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor’s death is subject to claims of the settlor’s creditors, costs of administration of the settlor’s estate, the expenses of the settlor’s funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor’s probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].¹⁹

VII. Nonjudicial Settlement Agreements

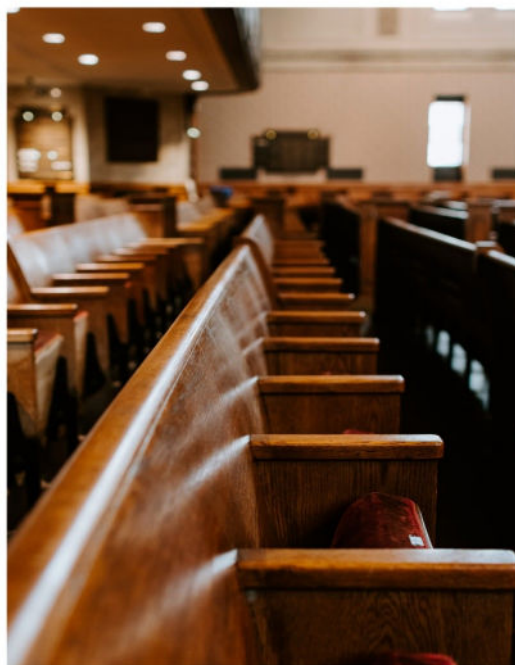
Under UTC § 111, a nonjudicial settlement agreement may be used to interpret trust provisions, approve Trustee accountings, determine Trustee liability, direct the Trustee to refrain from an act or perform an act, grant the Trustee a particular power, deal with Trustee compensation, appoint a Trustee or accept a resignation, or address any other matter that could be considered by a court, unless otherwise specifically excluded by the trust instrument or state law.

Nonjudicial settlement agreements are an important feature of the UTC, which encourages the appropriate use of such agreements and provides the following guidance in its comment to UTC § 111:

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such

agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement agreement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner. Trusts ordinarily have beneficiaries

“A trust that has a ‘spendthrift provision’ prohibits the beneficiary from assigning the beneficiary’s present or future interest to a creditor. The spendthrift provision restrains both voluntary and involuntary transfers, and a creditor or assignee of the beneficiary may not reach the beneficiary’s interest before receipt by the beneficiary.”



An Overview of Trusts and Trust Administration (continued from page 19)

who are minors, incapacitated, unborn, or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3. Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any co-trustees. But a nonjudicial settlement agreement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation. Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the ‘interested persons’ whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee’s administration, such as approval of a trustee’s report or resignation.

The UTC provides further that: “[a]ny interested person may request the court to approve a non-judicial settlement

agreement, to determine whether the representation ... was adequate, and to determine whether the agreement contains terms and conditions that the court could have properly approved.

VIII. Trust Litigation

A. Types of Actions Brought to the Court

Most trusts are designed not to require court intervention. In addition to the major litigation issues identified in 8.4, below, modification, termination, or other relief may be sought over the lifetime of a trust due to changes in circumstances or deficiencies in the trust.

These types of trust proceedings are frequently uncontested but may raise complicated issues for court determination. Examples of such actions include:

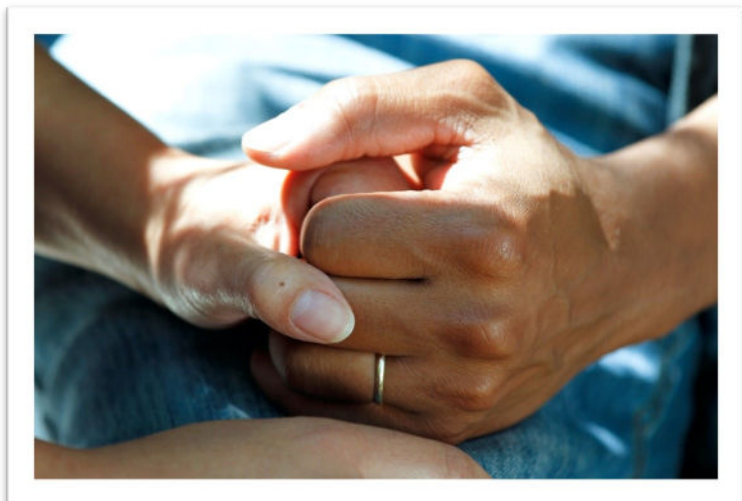
- Requests to modify a trust;
- Requests to fill a vacancy in trusteeship where a procedure is not otherwise provided for in the trust instrument;
- Requests to terminate an irrevocable trust under circumstances in which termination is not otherwise provided for in the trust instrument;
- Requests to resolve trusts without ascertainable beneficiaries;
- Requests to create trusts for incapacitated settlors or beneficiaries (often called supplemental needs or special needs trusts);
- Requests to approve settlements involving trusts;
- Requests to determine the terms of a trust in the absence of a trust instrument;
- Requests to construe a trust instrument or will, creating a testamentary trust;²⁰
- Requests where an oral trust is alleged; and
- Requests to confirm the existence of an oral trust.

B. Court Orders

When concluding trust proceedings, the court should determine whether the trust will be supervised or unsupervised in the future; and

1. if unsupervised, include in the court order a provision terminating the trust proceeding upon issuance of the order or at an appropriate time in the future;
2. if supervised, include in the court order the terms of supervision.

UTC § 201(b) provides that “a trust is not subject to continuing judicial supervision unless ordered by the court.”



An Overview of Trusts and Trust Administration (continued from page 20)

C. When Do the Terms of the Trust Prevail?

UTC § 105 provides default and mandatory rules for when the terms of the trust prevail over the provisions of the UTC and vice versa. Notably, under UTC § 105(b)(13), all of the other rules give way to “the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.”

UTC § 105(b) provides additional and more specific legal issues in which the provisions of the UTC prevail over the terms of the trust as follows, which include:

- the requirements for creating a trust;
- the duty of a Trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries,²¹ except that under UTC § 1008 the terms of the trust may relieve a Trustee of liability for breaches of trust as long as those terms do not purport to do so for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries;
- the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- the power of the court to modify or terminate a trust under sections 410 through 416 (the modification, termination and reformation provisions of the UTC);
- the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 (of the UTC);
- the power of the court under section 702 (Trustee’s bond provision of the UTC) to require, dispense with, or modify or terminate a bond;
- the power of the court under section 708(b) (compensation of Trustee provision of the UTC) to adjust a trustee’s compensation specified in the terms of the trust which is unreasonably low or high;
- the effect of an exculpatory term under section 1008 (Exculpation of Trustee provision of the UTC);
- the rights under sections 1010 through 1013 (Limitation on Personal Liability of Trustee, Interest as General Partner, Protection of Person Dealing with Trustee, and Certification of Trust provisions of the UTC) of a person other than a Trustee or beneficiary; and
- periods of limitations for commencing a judicial proceeding.²²

D. Litigation Issues in Trust Proceedings

Listed below is a brief description of the common types of trust litigation that may be brought in probate court.



- **Invalid Trust:** The trust does not conform to the legal requirements for the creation of a valid trust.
- **Trust Contest:** A party’s objection that the trust does not adhere to the Settlor’s actual intent, was obtained through undue influence or fraud, or is otherwise invalid. This objection may be based on any of the following claims:
- **Settlor’s Incapacity:** The Settlor lacked capacity to create the trust in that the Settlor did not know (i) the natural objects of his/her bounty, (ii) the extent of his/her property, or (iii) the disposition being made of his property in the trust the Settlor was signing. For revocable trusts, the capacity needed is the same as that required to make a will.²³
- **Undue Influence:** The trust (or trust amendment) was obtained through the undue influence of another on the Settlor such that the provisions in the trust instrument were not what the Settlor would have done absent the undue influence.
- **Fraud:** The trust was signed or the provisions in the trust were included as a result of fraud on the Settlor that caused the Settlor to include provisions in the trust that the Settlor would not otherwise have included.
- **Duress:** The trust was signed or provisions were included as a result of threat, coercion, or force; as with undue influence, the Settlor would not have acted absent the duress.
- **Mistake:** The trust contained a provision that was based on a mistake of fact or law, which provision would not have been included if the Settlor had not held the mistaken belief. For example, the Settlor could believe that a child had died, even though the child was still living, so that the Settlor made no provision in the trust for the child.
- **Revocation:** The trust has been previously and properly revoked.
- **Breach of Trust:** The Trustee violated one of the Trustee duties owed a beneficiary, such as the duty of loyalty, impartiality, or compliance with the Prudent Investor Act, or the duty to account.
- **Standard of Care:** The Trustee’s actions or inaction failed to meet the standard of care applicable to the Trustee under the circumstances. The standard of care may be set out in the trust instrument or by state law. ■

Endnotes

MAINE'S NEW UNIFORM PROBATE CODE AND COVID-19

¹ https://cdn.ymaws.com/www.mainebar.org/resource/resmgr/covid-19/Aroostook_County_emergency_O.pdf

IMPACT OF COVID-19 ON OHIO'S PROBATE COURTS

¹ As of May 10, 2020, Ohio has 24,018 confirmed cases of COVID-19 and 1,341 deaths. Ohio has averaged 594 cases over the past 21 days. These numbers are below that which was projected if no “social distancing” was implemented as well below if “strict social distancing” was implemented. <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/overview>; <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/forecast-model>

² On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D declaring a state of emergency. The executive order cites the symptoms of the disease and the response of the federal and state government of Ohio as of March 9, 2020.

³ Ohio Department of Health Director's Order, *In Re: Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio*.

⁴ Ohio Department of Health Director's Order, *In Re: Order the Closure of All K-12 Schools in the State of Ohio*.

⁵ Ohio Department of Health Director's Order, *In Re: Second Amended Order the Closure of All K-12 Schools in the State of Ohio*.

⁶ Ohio Department of Health Director's Order, *In Re: Amended Order to Limit Access to Ohio's Nursing Homes and Similar Facilities*. This amended order was issued on March 17, 2020 and the original order was issued on March 14, 2020.

⁷ Ohio Department of Health Director's Order, *In Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity*.

⁸ *Id.*

⁹ *Id.*

¹⁰ Art IV, § 18 of the Ohio Constitution states, “The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.”

¹¹ <https://www.supremecourt.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf>

¹² Governor Mike DeWine—3-19-2020 COVID-19 Update.

¹³ <http://www.sc.ohio.gov/coronavirus/courts/default.aspx>; The Ohio Supreme Court has created a database where anyone can view a court's procedures and response during COVID-19.

¹⁴ *03/27/2020 Administrative Actions, 2020-Ohio-1166*.

¹⁵ *In Re: Additional Orders for the Continued Operation of Geauga County Probate Court, Administrative Order 2020-56*.

¹⁶ *In Re: General Orders for the Continued Operation of the Lorain County Probate Court*.

THE IMPACT OF OPIOID USE DISORDER ON PROBATE COURTS

¹ <https://www.nimh.nih.gov/about/director/messages/2019/suicide-deaths-are-a-major-component-of-the-opioid-crisis-that-must-be-addressed.shtml>

² *Mental Health First*, 10 Things You Need to Know About the Opioid Epidemic, <https://www.healthline.com/health/opioid-withdrawal/mental-health-connection#1>.

³ <https://www.drugabuse.gov/opioid-summaries-by-state/south-carolina-opioid-involved-deaths-related-harms>; 2017 data.

⁴ <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state>

⁵ <https://scdhec.gov/>

⁶ <http://www.justpainkillers.com/>

Endnotes

AN OVERVIEW OF TRUSTS AND TRUST ADMINISTRATION PART I

¹ Uniform Trust Code, Copyright © 2000, 2010, National Conference of Commissioners on Uniform State Laws. In addition to the UTC provisions referenced in this article, the UTC also covers matters such as the personal liability of a Trustee, limitations of actions against a Trustee, payments of spousal and child support from trusts, and modification, reformation, and termination of trusts

² Note that some state statutes and constitutions do not give probate court jurisdiction over matters relating to trusts. UTC § 103(17) defines "state" to include a State of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. The term also includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

³ Terms that are defined in the UTC have a citation at the end of the definition.

⁴ UTC § 404, Trust Purposes

⁵ Comment to UTC § 202, Jurisdiction over Trustee and Beneficiary

⁶ UTC § 201 Role of Court in Administration of Trust, Comment, taken from California Probate Code § 17200

⁷ UTC § 106 Common Law of Trusts; Principles of Equity

⁸ UTC § 108(a), Principal Place of Administration

⁹ UTC § 108(b), Principal Place of Administration

¹⁰ UTC § 108(c), Principal Place of Administration

¹¹ UTC § 202(a), Jurisdiction over Trustee and Beneficiary

¹² UTC § 202(b), Jurisdiction over Trustee and Beneficiary

¹³ UTC § 107, Governing Law

¹⁴ UTC § 203, Subject-Matter Jurisdiction, is one of the bracketed provisions of the UTC, which provides a choice of options in the event that subject-matter jurisdiction is not already addressed by statute or rule or by virtue of having a unified court system. One option is for a state to provide that a designated court has exclusive jurisdiction whenever a court action is brought by a Trustee or beneficiary, regardless of the location of that person. Another option is to provide concurrent Jurisdiction by a court with other courts in the jurisdiction for court proceedings involving a trust, without reference to the role of the filer of the action.

¹⁵ UTC § 204, Venue (bracketed language)

¹⁶ The representation provisions of the UTC are set forth in Article 3, § 301, Representation: Basic Effect; § 302, Representation by Holder of General Testamentary Power of Appointment, § 303, Representation by Fiduciaries and Parents; § 304, Representation by Person Having Substantially Identical Interest; and § 305, Appointment of Representative.

¹⁷ For a pet trust, UTC § 408, Trust for Care of Animal.

¹⁸ For a charitable trust, UTC § 405, Charitable Purposes; Enforcement. In addition, UTC § 409 Non-charitable Trust Without Ascertainable Beneficiary, provides an exception for a trust created "for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee," with certain limitations imposed.

¹⁹ Except of course, for oral trusts, which can be valid. UTC § 407, Evidence of Oral Trust. As a result of permitting oral trusts, the UTC defines terms of a trust as follows: "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust Instrument or as may be established by other evidence that would be admissible in a judicial proceeding". UTC § 103(18)

²⁰ UTC § 201, Role of Court in Administration of Trust, Comment, with reference as well to Restatement (Second) of Trusts, §§ 187, 259 (1959)

²¹ UTC § 814, Discretionary Powers; Tax Savings.

Endnotes

AN OVERVIEW OF TRUSTS AND TRUST ADMINISTRATION PART II

¹ The District of Columbia Uniform Trust Code provides otherwise, authorizing trust property to be titled either in the name of the current Trustee as trustee or in the name of “the trustee” as Trustee of the trust, but also in the name of the trust by reference to the instrument creating the trust. D. C. Code, § 19-1304.18

² UTC § 807, Delegation by Trustee

³ Most states have adopted the Uniform Principal and Income Act of the Uniform Law Commission. <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=a367bd75-afa8-0ea6-9d16-c39170e54a4d&forceDialog=0>

⁴ UTC, § 813, Duty to inform and Report

⁵ It is important to check the trust instrument because, in many states, some of these duties may be varied by the settlor in the terms of the trust

⁶ “Qualified Beneficiary” is a term of art in the UTC. UTC § 103(13)

⁷ Uniform Principal and Income Act Copyright © 2003 National Conference of Commissioners on Uniform State Laws.

⁸ See Comment to UPIA § 2 Standard of Care; Portfolio Strategy; Risk and Return Objectives

⁹ UPIA § 2, Standard of Care; Portfolio Strategy; Risk and Return Objectives

¹⁰ UTC § 1002, Damages for Breach of Trust and UTC § 1004, Attorney’s Fees and Costs UTC § 1003, Damages in Absence of Breach

¹¹ UTC § 1003, Damages in Absence of Breach

¹² UTC § 702(c) adds an additional optional provision: “A regulated financial-service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.”

¹³ UTC §702(a), Trustee’s Bond

¹⁴ UTC §702(b). See also UTC § 105(b)(6) Default and Mandatory Rules

¹⁵ UTC § 708, Compensation of Trustee A reasonable compensation standard is also used in the National Probate Court Standards, Standard 3.1.4, Attorneys’ and Fiduciaries Compensation. Commentary to this standard provides the following guidance as to factors to be considered by a court when there is no guideline: “the usual and customary fees charged within that community; responsibilities and risks (including exposure to liability) associated with the services provided; the size of the estate or the character of the services required including the complexity of the matters involved; the amount of time required to perform the services provided; the exclusivity of the services provided; the experience, reputation and ability of the person providing the services and the benefit of the services provided.”

¹⁶ UTC § 708(b), Compensation of Trustee

¹⁷ UTC § 709, Reimbursement of Expenses

¹⁸ UTC § 502, Spendthrift Provision

Case law may provide that mere entitlement to a distribution subjects the distributable amount to a claim.

¹⁹ UTC § 505(a)(3)

²⁰ This type of action may arise when grantors deed real property, title accounts, or create legacies and devises to a trust for which no trust instrument or testamentary trust provisions exist.

²¹ Note that UTC sec. 1008, Exculpation of Trustee, provides that the terms of the trust may relieve a Trustee of liability for breaches of trust as long as those terms do not purport to do so for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interest of beneficiaries, or resulted from an abuse of a fiduciary or confidential relationship. UTC sec. 1108 is intended to be consistent with UTC sec. 105 as well as to disapprove certain prior case law.

²² Several items are bracketed in the UTC formulation, including UTC § 105(b)(8) which provides for a duty to notify beneficiaries who reach the age of 25 of the existence of the trust, the identity of the Trustee, and right to request Trustee reports, UTC § 105(b)(9) which provides for a duty to respond to the request of a beneficiary of an irrevocable trust for Trustee reports and certain other trust information, and UTC § 105(b)(14), concerning subject-matter jurisdiction of the court and venue.

²³ UTC § 601, Capacity of Settlor of Revocable Trust

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