

# Trust Advisors Forum

## Regulatory & Fiduciary Law Update

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*For Federated Hermes*  
*2024 Trust Advisors Forum*



# Today's Topics

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- ▶ Congressional Revenue Raisers
  - ▶ Federal Transfer Tax Update: New 2024 Numbers
  - ▶ Biden Administration Green Book 2024 Budget Proposals
  - ▶ IRS Notice 2024-02 re: SECURE 2.0 Guidance to Plan Admins.
  - ▶ IRS Chief Counsel Advice 202352018
  - ▶ Proposed Reg on Donor Advised Funds
- ▶ Federal Regulatory Guidance
  - ▶ DOL newly proposed Fourth Fiduciary Rule
  - ▶ DOL ESG Rule
  - ▶ Crypto Currency Revenue Ruling 2023-14
  - ▶ Corporate Transparency Act
- ▶ Fiduciary Case Law Update



# Federal Transfer Tax Exemptions

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- ▶ 2024 Increases
  - ▶ Portable Estate/Gift Tax Individual Exclusion
    - ▶ Increased from \$12.92m to \$13.61m per person
    - ▶ \$27.22 b/w married couple
  - ▶ Non-Portable GST Individual Exclusion \$13.61m
  - ▶ Annual Gift Exclusion increase from \$17k to \$18k
- ▶ Recall 2026 Sunset under 2017 TCJA
  - ▶ 2026 will sunset back to \$5m as adjusted for inflation
  - ▶ How likely is sunset to occur?
  - ▶ Repeat of 2010?



# Biden's 2024 Budget Proposals

- ▶ Income tax payable on unrealized gain at date of transfer
- ▶ Simplification of gift tax exclusion for annual gifts
  - ▶ No present interest requirement
  - ▶ \$50k max per year
- ▶ CLATs – 10% remainder requirement
- ▶ Limitations on GST exemption
- ▶ GRATs
  - ▶ Minimum 10 year term/ Maximum term life expectancy plus 10 years
  - ▶ Gift tax on greater of minimum 25% of value of transferred assets or \$500k
- ▶ Trust loans to beneficiaries treated as distributions for income and GST tax purposes
- ▶ Valuation of partial interests transferred between family members equal pro rata share of collective value owned by all family members



# DOL's "Retirement Security Rule"

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- ▶ Here we go again....
- ▶ DOL proposed its Fourth Rule on Oct. 31, 2023
- ▶ Would redefine who is an "investment advice fiduciary" under ERISA
- ▶ Would amend existing PTEs currently providing relief to investment advice professionals
  - ▶ Would make PTE 2020-2 commonly relied upon by financial institutions the primary relief
  - ▶ PTE 2020-2 requires investment advice professionals to acknowledge fiduciary status



# DOL's Environmental, Social Governance “ESG” Rule

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- ▶ DOL released final ESG Rule November 22, 2022: “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights”
- ▶ Clarifies application of ERISA fiduciary duties of prudence and loyalty in the selection of plan investments and the exercise of shareholder rights
- ▶ Per Final ESG Rule, fiduciaries of private sector retirement and other employee benefit plans governed by ERISA are required to focus on relevant risk and return factors, which may include the economic effects of climate change and other ESG factors as part of a prudent decision-making process



# IRS Chief Counsel Advice 2023-52018

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- ▶ Issued Nov. 28, 2023, Released Dec. 29, 2023
- ▶ IRS finds trust beneficiaries to have made a taxable gift by consenting to addition of trust provision authorizing the trustee to reimburse grantor for income tax paid on the grantor trust's income
- ▶ IRS held result would be the same even if simply failed to object
- ▶ Distinguishes prior guidance in Rev. Ruling 2004-64 and changes IRS position from PLR 2016-47001
- ▶ Ominous valuation threat under Reg. 25.2511(c)



# IRS Crypto Curr. Rev. Rul. 2023-14

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- ▶ Issued July 31, 2023
- ▶ Cash-method taxpayer which receives additional units of crypto currency for validating transitions on block chain must recognize the FMV of the validation rewards as income in year in which gain dominion and control
- ▶ Consistent with IRS view on treatment of mining income in Notice 2014-21



# Treasury Notice 88 Fed. Reg. 77922

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- ▶ November 14, 2023
- ▶ Requested comments on proposed regulations that would amend existing Treasury Regulations issued under section 4966 of the Code
- ▶ The Proposed Regulations relate to excise taxes on taxable distributions made by a sponsoring organization from a donor advised fund (DAF), and on the agreement of certain fund managers to the making of such distributions



# The Corporate Transparency Act

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- ▶ Reporting Companies must report beneficial ownership
  - ▶ Reporting Company: Any LLC, LP, LLP, PC, Delaware Business Trust (including foreign entities) registered with Secretary of State or tribal area unless excepted from reporting
  - ▶ 23 Exempted Entities, which are generally heavily regulated entities including:
    - ▶ Nonprofits
    - ▶ Publicly traded companies
    - ▶ Entities that are already required to file reports with FinCEN
    - ▶ Entities that are already required to register with the SEC
    - ▶ Dormant companies that don't own any assets
    - ▶ Domestic "Large Operating Companies" with 20+ employees and \$5 million or more in gross receipts or sales



# Who is a “Beneficial Owner”?

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- ▶ Focus is just as much on where money flows as who is in control
- ▶ Categories of Beneficial Owners:
  - ▶ 1) Individual who directly or indirectly owns 25% or more of interest in reporting company
    - ▶ Regs address Class A/B interests and safe harbor process
    - ▶ No family attribution, instead individual by individual
    - ▶ Trust could be beneficial owner
    - ▶ Indirect interest will come from Trusts via their beneficiaries
  - ▶ 2) Individual who exercises substantial control over the Reporting Company
    - ▶ Officers, Directors, Majority Voting Power
    - ▶ In Trust context, could include Trust Protector, Trust Advisor, Investment Manager
- ▶ Note: Could be one legal owner but multiple beneficial owners



# Must also report information on “Company Applicants”

- ▶ Applies only to companies formed after 1/1/2024
- ▶ One time reporting, once report company applicant you are done
- ▶ Has implications for law firms, possibly family offices
- ▶ Regs say two persons must report:
  - ▶ Person who directly files (paralegal)
  - ▶ Person primarily responsible for directing the filing (atty)
- ▶ Atty, paralegal/admin should get FINCEN Identifier
  - ▶ Provide to clients to include in BOI report



# Trust as “Beneficial Owner”

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- ▶ Trust constitutes beneficial owner when:
  - ▶ Owns 25% or more of reporting company
  - ▶ Exercises substantial control
- ▶ Trust beneficiaries are also considered beneficial owners when:
  - ▶ Sole permissible recipient of income or principal or can withdraw substantially all trust assts
  - ▶ Grantor who can revoke or withdraw substantially all of trust assts
- ▶ Trust Protectors, Trust Advisors, Investment Advisors may also be beneficial owners if they exercise substantial control
- ▶ What are the Trustee’s responsibilities?
  - ▶ Trust itself isn’t reporting company
  - ▶ Obligation to file BOI report lies on reporting company
  - ▶ But Trustee may have relevant info only it knows, and a residual obligation



# Updating Changes in Beneficial Ownership Interest

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- ▶ Reporting Company must update beneficial ownership interest within 30 days of any change
- ▶ Again, only Trustee may know of change in indirect beneficial ownership or substantial control



# Penalties?

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## ▶ Unlawful to:

- ▶ Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b); or
- ▶ Willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b).

## ▶ Penalty for Violations:

- ▶ Civil penalty of not more than \$500 for each day that the violation continues or has not been remedied; and
- ▶ Criminal fine of not more than \$10,000, or imprisonment for not more than 2 years, or both.



# Fiduciary Case Law Update

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# Jones v. Jones

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Mass. App. Ct. 9/6/2023

- ▶ Mass Lower Court included assets in trust mother created fbo daughter Juliana as marital assets for equitable distribution despite spendthrift clause
- ▶ Evidence showed that Juliana's mother "showered the family with gifts" and maintained a standard of living beyond their means, and Juliana used the mother's gifts to supplement their lifestyle over 19 year marriage
- ▶ Trust was residual share of GRAT created by Juliana's mother valued at appx \$1.3m admin by Independent Trustee
- ▶ GRAT paid taxes but made no outright distributions to Juliana at time of divorce
- ▶ Appeal Court found GRAT to be marital asset despite being "discretionary trust with spendthrift provision" because it is "fixed and enforceable property right"
- ▶ Mass. Court reached similar result in R.B. v. C.P. 2023 West Law 6522338



# *In re H. Boone Porter*

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2023 Mo. App. LEXIS 98 (2023)

- ▶ \$38m 1960 Double GST Exempt Trust fbo Individual Co-Trustee Boone and four living siblings, with one deceased sibling, Michael, who was survived by four children
- ▶ Corporate and Individual Trustee directed to distribute income and authorized in discretion to distribute principal for hospital, nursing, medical expenses, maintenance and support
- ▶ In 2012 all beneficiaries were notified of plan to distribute \$250,000 to each of Boone and his four siblings
  - ▶ Boone did not participate in the decision
  - ▶ No discretionary distribution fbo Michael's four children, who did not object
- ▶ Boone then asked Corporate Trustee to resign and distributed LP Interest (after third-party appraisals) to each income beneficiary pro-rata, including Michael's children
  - ▶ Boone relied upon independent third-party appraisal
  - ▶ Boone considered beneficiaries needs, stages of life, and notified all parties
- ▶ In action to remove Boone, Appellate Court upheld Boone's actions because of the process, finding Boone acted in good faith in reasonable reliance on the Trust instrument and did not breach duties of loyalty or impartiality or act indifferently towards Michael's children
- ▶ Court focused on the process and disclosure of actions



# *In re Trust of Harrison*

272 A.3d 45 (Pa. Super. 2022)

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- ▶ In 1995, the Harrisons created an irrev trust fbo grandson Michael, naming his father as sole trustee
- ▶ Trust instrument governed by Florida Law provided:
  - ▶ any time after Michael reached age 30, he “shall have the right to withdraw up to one-third of the principal”
  - ▶ a trustee could retain property distributable to a beneficiary “at any time when such beneficiary shall in the opinion of our Trustee be unable by reason of illness or other condition to properly manage his or her affairs”
- ▶ When Michael turned 30 in 2017, he requested a distribution of one-third of the trust principal
- ▶ Father Trustee refused on the basis that Michael was under a disability (ADHD) and frequently used marijuana, and implied that he was in the business of dealing marijuana and was perpetually unemployed
- ▶ Lower court held that father Trustee acted “outside” his discretion b/c evidence presented at the hearing failed to demonstrate how Michael’s childhood ADHD and later marijuana use presently rendered Michael unable to manage his affairs
- ▶ Lower court directed that the Trustee distribute 1/3 to Michael



# Harrison Cont'd

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- ▶ On appeal, the Trustee argued that lower court violated Florida law by supplanting his discretion, as Trustee, with the court's own discretion
- ▶ Appellate Court affirmed, noting:
  - ▶ “while the grant of absolute discretion to a fiduciary is very broad, a trustee is always subject to accountability to remaindermen where discretion is improperly, arbitrarily or capriciously exercised”
  - ▶ “[E]ven though a grant of ‘absolute discretion’ to a fiduciary is very broad, it does not relieve a trustee from the exercise of good faith or from being judicious in his administration of the trust, which administration is always subject to review by the court in appropriate instances”



# Trust of Holdship

288 A.3d 919 (Pa. Super. 2023)

- ▶ Corp Trustee granted discretion to make distributions for HEMS
- ▶ Benes alleged Successor Corp Trustee made an ad hoc policy change to require documentation to show how requested distributions would be related to and used for HEMS
- ▶ Benes sought to remove Corp Trustee and compel distributions due to change in policy, failure to make distributions without documentation, and for engaging outside counsel to represent it



# Holdship Court Holdings

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- ▶ Court found removal to be a drastic action only taken when trust estate is actually endangered and intervention necessary to save trust property
- ▶ Unanimous consent is not grounds for removal of trustee but rather UTC applies when governing instrument silent
- ▶ Trustee entitled to retain counsel



# Holdship Superior Court Holding

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- ▶ While the Corporate Trustee was successor in interest to initial trustee, there were no allegations regarding distance, complication, inability to serve, mishandling, lack of skills or failure to keep benes informed
- ▶ The Court found that the request to compel distributions essentially a request to modify the trust to which all beneficiaries can consent under UTC if not inconsistent with material purpose
- ▶ The Court held that a modification may strip the Trust of a material purpose: the discretion of the Trustee
- ▶ The Court denied the relief



# UTC 706: Removal of trustee

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The settlor, a cotrustee or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.

The court may remove a trustee if it finds that removal of the trustee best serves the interests of the beneficiaries of the trust and is not inconsistent with a material purpose of the trust, a suitable cotrustee or successor trustee is available and:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) the trustee has not effectively administered the trust because of the trustee's unfitness, unwillingness or persistent failures; or
- (4) there has been a substantial change of circumstances. A corporate reorganization of an institutional trustee, including a plan of merger or consolidation, is not itself a substantial change of circumstances.



# *In re Logan Benjamin Garner SNT*

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2022 WL 1434355 (Mich. Ct. App. May 5, 2022) (unpublished)

- ▶ Lower Court unilaterally questioned KeyBank's fiduciary fees and legal fees
- ▶ Family repeatedly testified it was satisfied with KeyBank and its fees
- ▶ Lower Court appointed a GAL, the GAL found that:
  - ▶ 1.55% fiduciary fee was "slightly higher than most rates charged by financial institutions to act as Trustee," but that the fees were not "excessive or unreasonable"
- ▶ The Court found that while fiduciary fee was not "unreasonable" it was also not "affordable"
- ▶ The Court of Appeals affirmed the lower court's removal of KeyBank as trustee because its attorney and fiduciary fees were generally reasonable but not reasonable for the specific trust under management



# *T/U/A Richard H. Wells*

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Pa. Super. 2022

- ▶ Bank president created perpetual charitable trust for VMI with his bank as Trustee
- ▶ VMI sought to terminate the trust and add to its endowment
- ▶ Court rejected VMI's attempt to terminate trust b/c the settlor had clearly wanted a perpetual trust and no evidence of excessive fees or other trust inefficiencies that would merit terminating the trust
- ▶ Note: Fees were consistent with market rates



# *In re Otto Bremer Trust*

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2023 Minn. App. LEXIS 4 (2023)

- ▶ 1994 Charitable Trust with no named charitable beneficiaries funded with various investments held in community banks known as “Bremer Financial Corporation”
- ▶ Per instrument, BFC’s shares to be retained and may only be sold if in opinion of trustee necessary or proper to respond to unforeseen circumstances
- ▶ Three individual Trustees were named
- ▶ Trust had FMV of \$2b, consisting mostly of BFC stock
- ▶ Trust had distributed more than \$700m to charitable purposes
- ▶ Trustee Lipshultz used \$2k in trust assets for personal purposes



# Otto Bremer Trust: Trustee Lipschultz

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- ▶ BFC board met with investment banker to consider “strategic alternatives” of going public, merging or selling
- ▶ Only Lipschultz was interested in selling
- ▶ Lipschultz hired an investment banker to coordinate a hostile board takeover and sell 7% of shares to hostile investors and told the banker:
  - ▶ he wanted investors who “live for this kind of thing” so to not bring “friendlies...only real investors who only care about making money and are willing to do whatever is necessary” and that he wasn’t “f---ing around”
- ▶ Lipschultz texted he was “looking forward to observing the carnage”
- ▶ AG sought to remove the trustees
- ▶ Before trial, Lipschultz pressured the CFO for Junior Achievement (to which Trust had given \$1.5m) to fight his removal if it wanted continued distributions
  - ▶ Junior Achievement voted to return the funds to the Bremer Trust



# Otto Bremer Trust Appellate Holding

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- ▶ Missouri lower court removed Lipschultz but not remaining two trustees
- ▶ On appeal, the Appellate Court affirmed Lipschultz's removal, noting
  - ▶ Even where trust grants complete discretion, a trustee cannot exercise it in a manner that violates fiduciary duty to beneficiaries
  - ▶ Lipschultz self-dealed by using trust funds for personal purposes even if de minimus (\$2k in \$2b trust)
  - ▶ Lipschultz's aggression and hostility were vindictive and personal, not in the best interest of the Trust, and placed his interests above the trust
  - ▶ Lipschultz's pressure of Junior Achievement interfered with the trust's administration and harmed charitable beneficiaries



# Little v. Davis

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974 N.W.2d 70 (Iowa 2022)

- ▶ In 2016, Donald K. and Collen Davis married; created a trust funded with jointly owned farmland Donald acquired before marriage
- ▶ The trust agreement could only be amended while both spouses were living, and provided that “[u]pon the death of the first Co-Trustor to die . . . the then surviving Co-Trustor . . . shall not have the power to amend, revoke and/or terminate the [trust]”
- ▶ Upon the last of their deaths, the trust distributes to Donald’s four children



# Donald's Amendment

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- ▶ After Collen's death in 2017, Donald asked children to consent to an amendment that would give Donald the power to alter, amend or revoke the trust
- ▶ Donald and his four children signed the consent document
- ▶ In 2018, Donald executed an amendment that altered the disposition of the trust estate to greatly reduce his daughter's share
- ▶ On Donald's death his daughter sought to have the 2017 amendment voided



# Davis Appellant Holding

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- ▶ Under Iowa Trust Code, an irrevocable trust may be modified or terminated without court approval only “upon the consent of the settlor and all of the beneficiaries”
- ▶ Question was whether statute’s use of the singular term “settlor” required only the consent of the surviving settlor to modify the trust without court approval
- ▶ The Supreme Court of Iowa held that amendment required joinder of both settlors, citing Iowa Code Section 4.1 (17), which states, “Unless otherwise specifically provided by law the singular includes the plural, and the plural includes the singular”
- ▶ Supreme Court affirmed the grant of summary judgment and held that the amendment to the irrevocable trust was invalid without Colleen’s consent



# *In re James M. Kurtz Prot. Trust*

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2023 Mich. App. LEXIS 2126 (2023)

- ▶ James and Barbra created irrev trust in 1995 fbo children from prior marriage to ensure equal distribution among them
- ▶ Trust agreement prohibited one grantor from amending or revoking the dispositive provisions following first spouse's death
- ▶ Trust agreement provided for the "use and benefit of the surviving grantor" and required the trustee to pay as much of the trust assets "to the surviving grantor as the surviving grantor may request"
- ▶ After Barbara's death, James created a new trust for his sons and moved \$410k in assets from the Joint Trust to his new trust
- ▶ Barbara's children sought to set aside the transfer and new trust
- ▶ In reconciling the conflict in terms of Joint Trust, the Court held intent was to protect assets for their children and the withdrawal right had to be read in that context such that withdrawal only permitted for the surviving spouse's support
- ▶ Court held that James' actions breached the terms



# Brock v. Brock

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2022 WL 3223171 (Tenn. Ct. App. 8/10/22)

- ▶ J. Don Brock's Will created a marital trust for his wife as sole income and principal beneficiary during her lifetime, with assets passing to his son upon her death
- ▶ Son asked for accounting on the basis that he was a qualified beneficiary under the Tenn. UTC
- ▶ Trustees denied the request under the Will, which provided that:
  - ▶ 13.4 Reports. The fiduciary shall not be required to make any inventory or appraisal of the assets of my estate or any trust or to file reports, inventories or settlements with any court. However, the fiduciary shall upon written request at reasonable intervals render to each then current income beneficiary of my estate or the trust estate, or to the natural or legal guardian of the beneficiary, full statements of all receipts and disbursements and a schedule of all assets and liabilities of the trust or my estate.



# Brock Court Holdings

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- ▶ Lower Court held the Will's intent was to limit duty to inform and report: son not entitled to an accounting
- ▶ The Tennessee Court of Appeals held that trust terms limiting the trustees' duty to provide information only to current income beneficiaries overrides the Tennessee Trust Code provisions requiring disclosure of information to any qualified beneficiary



# Salce v. Cardello

384 Conn. 90 (2023)

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- ▶ Mae Salce added an In Terrorem Clause when she amended her Trust and Will to leave certain real estate to her daughter Joan to the exclusion of her son John.

- ▶ The Clause in both the Trust and Will provided:

“If a beneficiary under this trust agreement directly or indirectly objects in any manner to any action taken or proposed to be taken in good faith by any trustee and/or files any creditor’s claim against the trustee (without regard to its validity) then that person’s right as a beneficiary of this trust agreement shall be determined as if the person and the person’s descendants had predeceased the settlor without surviving issue.”

- ▶ Attorney assumed role as Trustee and Executor after Mae’s daughter Joan declined to serve.

- ▶ Mae’s children Joan and John objected to Atty’s admin on the basis that the death tax returns included non-taxable assets and inflated values resulting in more tax due and owing.

- ▶ Attorney refused to amend the return when the issues were brought to his attention and said he would only do so if the probate court so ordered.



# Salce Cont'd

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- ▶ Joan sued the Attorney as Trustee/Executor but withdrew her request before hearing
- ▶ John then attempted to invoke the In Terrorem Clause stating that Joan's court filing seeking redress of the fiduciary administration resulted in a forfeiture of her share
- ▶ Probate court held Attorney erred in his administration and that neither John nor Joan's filings invoked the In Terrorem Clause
- ▶ On appeal the Connecticut Supreme Court affirmed, finding that while Joan "technically violated" the unambiguous clause, it would violate public policy to enforce the In Terrorem Clause when seeking to correct administrative issues, such as preparing tax returns, and, for example, discretionary investments
- ▶ Fiduciary principals require that 1) a beneficiary be allowed to compel an accounting; 2) a fiduciary minimize tax burden; and 3) a fiduciary not mismanage estate assets or commit waste
- ▶ Multiple States allowing In Terrorem Clauses refuse to invoke them under the "Statutory Duty Exception" when objections are to a fiduciary's mismanagement, delay, or other value note violating a no-contest clause



# Trust under d/o/t of Nell G. Jack

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PA Super. Ct. Opinion dtd 9/14/2022

- ▶ Nell Jack created Trust naming her daughter Christine as Trustee with powers to remove/appoint successor trustee
- ▶ Nell Jack granted Christine a special power of appointment under the Trust
- ▶ Christine has three sons, one of whom is Robert
- ▶ Christine removed and added various Trustees and in 2001 added McElwain as Co-Trustee with her and PNC, allegedly because PNC refused to abide by her request for a \$10m investment in S.W. Jack Drilling Co., which would have given the Trust a majority interest
  - ▶ PNC allegedly said the request was self-dealing on Christine's part
- ▶ Once Christine appointed McElwain, they, as majority, overruled PNC on the investment request in 2001
- ▶ McElwain then removed PNC and the Trust was amended to eliminate the requirement for a Corporate Trustee



# UTC 703: Cotrustees

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- ▶ **(a) Majority decision.**--Cotrustees who do not reach a unanimous decision may act by majority decision.
- ▶ **(c) Performance.**--A cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under the law or other reason or the cotrustee has properly delegated the performance of the function to another trustee.
- ▶ **(f) Liability.**--Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.
- ▶ **(g) Reasonable care.**--Each trustee shall exercise reasonable care to:
  - ▶ (1) prevent a cotrustee from committing a breach of trust involving fraud or self-dealing; and
  - ▶ (2) compel a cotrustee to redress a breach of trust involving fraud or self-dealing.
- ▶ **(h) Dissenting trustee.**--A dissenting trustee shall join the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a breach of trust involving fraud or self-dealing.



# UTC 709: Administrative Expenses

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- ▶ **Reimbursement of expenses - UTC 709.**
- ▶ **(a) Reimbursement from trust property.**--A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
  - ▶ (1) expenses that were properly incurred in the administration of the trust; and
  - ▶ (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- ▶ **(b) Advance.**--An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.



# *Nell Jack Lower Court Proceedings*

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- ▶ In 2018, Robert filed a Petition to Compel an Account, which was filed and then objected to by Robert on the basis of breach of fiduciary duty and self-dealing
- ▶ In September 2020, Robert filed a Petition for Injunctive Relief to enjoin:
  - ▶ Christine and McElwain from expending Trust assets on OC defense
  - ▶ Christine from exercising her Special Power of Appointment
- ▶ OC appointed Special Master, and after oral argument entered an Order in March 2021 so enjoining Christine



# *Nell Jack Superior Court Appeal*

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- ▶ Christine and McElwain appealed to Superior Court on the basis that UTC section allowing for injunctive relief pending removal of trustee is only applicable to remedy a breach of trust that has occurred or may occur
- ▶ Injunctive relief inappropriate where:
  - ▶ No evidentiary hearing held
  - ▶ No findings of fact
  - ▶ No finding of immediate and irreparable injury



# Applicable State UTC Sections

## 7766(c) & 7781(b)

- ▶ 7766(c) Court remedies.--Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under section 7781(b) (relating to remedies for breach of trust - UTC 1001) as may be necessary to protect the trust property or the interests of the beneficiaries.
- ▶ 7781(b) Remedies.--**To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief**, including the following: ---
  - ▶ (2) Enjoining the trustee from committing a breach of trust.



# *The Appellate Court's Jack Opinion*

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- ▶ The Superior Court agreed with Christine and McElwain that the OC erred and vacated its Order and remanded for an evidentiary hearing and findings of fact
  - ▶ Preliminary injunction appealable interlocutory order
  - ▶ Preliminary injunction may be granted only after written notice and hearing to protect clear right from immediate and irreparable injury
  - ▶ Here, injunction sought September 2020 and OC entered order granting it on oral argument alone in February 2021 without findings of fact



## *But that's not all...*

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- ▶ The Superior Court's Opinion further held that the OC may not enjoin Christine, individually, from exercising her Special Power of Appointment held individually and in a non-fiduciary capacity
- ▶ The scope of review re: a POA is whether the donee (Christine) exercised the POA within the conditions imposed by the donor (Nell Jack)
- ▶ Holder of POA is a beneficiary (not a trustee or fiduciary) who is therefore under no duty to act in good faith
- ▶ The only limitations on the POA are those imposed by the donor



# Christine's Special POA

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- ▶ Article I, Section 2.2 of the Trust provides as follows:
  - ▶ During the lifetime of Christine [] or upon her death, the Trustees shall distribute the Trust Estate to or for the benefit of such one or more of the issue of Christine [] as Christine [] may appoint by specific reference in a deed or in her will to this power; provided, however, that Christine [] shall have no authority hereunder to discharge any legal obligation she may have.



# *In re Karam Family Trust*

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Arizona Ct. of App. 2021

- ▶ Trust beneficiary exercised special lifetime power of appointment to remove a remainder beneficiary
- ▶ The Trust's subsequent termination with the consent of each remaining (and not removed) beneficiary was challenged
- ▶ The AZ Court of Appeals held that where POA properly exercised, which it was here, the later termination with the consent of only the remaining beneficiaries was valid



# *Della Franzia Real Estate Trust*

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## Bucks Co. O.C. 2022

- ▶ Trust owned real estate
- ▶ Trustee hired her husband, a realtor, to sell the real estate
- ▶ Real estate sold for \$1.7m with a \$37k commission to husband
- ▶ Two years later, after obtaining a subdivision, the buyer sold half of the acreage of the real estate for \$2.75m
- ▶ Trust beneficiary sought an accounting, which had to be restated because it was not in the correct format
- ▶ Beneficiary objected and sought removal/surcharge of the Trustee for self-dealing in engaging her husband as the real estate agent and paying for professional fees because the CPA who prepared the accounting was not familiar with the court rules and charged \$63k



# Della Franzia Court Holdings

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- ▶ Testimony that the Trustee's appraisal of the real estate prior to her selling it was for \$1.25m and the Trustee sought the advice of her counsel before engaging her husband as agent, and he received a standard commission
- ▶ Court noted that transaction b/w trustee and him/herself or a spouse is voidable but that it was not the Trustee's husband who was the buyer
- ▶ Court found that Trustee did not engage in self-dealing in engaging her husband as agent, but rather did breach her duty of prudence in selecting him because he was inexperienced in dealing with large tracts of land and subdivision and surcharged her \$37k
- ▶ Court found Trustee engaged qualified CPA and didn't know he was unfamiliar with the OC rules and therefore did not surcharge the Trustee for the deficiently filed account
- ▶ Overall—The Trustee's performance was not perfect but did not amount to a serious breach of duty which merited her removal



# Mandell Trust

Montg. Co. OC

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- ▶ Settlor established five trusts for each of his children and their issue, including son Gerald
- ▶ The Trustees of Gerald's Trust filed a Petition seeking approval of \$242,600 in their legal fees and payment of \$7,000 to Gerald's counsel for his legal fees
- ▶ Legal fees incurred in negotiating a \$600,000 lump sum distribution from the Trust
- ▶ After the \$600,000 distribution, the Trust corpus was \$312,900 and with an expected receipt of \$487,000
- ▶ Gerald's children objected pro se to the Trustee's legal fees



# UTC 805: Costs of administration

51

- ▶ In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.



# *The Mandell Court Holding*

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- ▶ The Court noted the Trustee has a duty to preserve the trust assets and to only incur costs that are reasonable in relation to the trust
- ▶ The legal fees were appx 20% of the total Trust estate prior to the distribution and over 30% of the anticipated balance
- ▶ The court held that over \$200k in legal fees were not appropriate and could not be justified



# Vaccarello Trust

Montg. Co. O.C. 2022

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- ▶ Decedent died survived by two daughters and a son who were beneficiaries of her estate and trust
- ▶ The Trust was valued at appx. \$1.4m
- ▶ Daughters sought an accounting of the Trust, and when filed by the Corporate Trustee they objected
- ▶ Ultimately, the daughters withdrew all objections but for the Trustee's legal fees which totaled appx. \$455,000
- ▶ The son asked that the legal fees be paid by the portion of the Trust attributable to the daughters



# Court-Applied Factors

54

- ▶ UTC 805: In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.
- ▶ Factors Considered:
  - ▶ Amount of work performed
  - ▶ Character of services rendered
  - ▶ Difficulty of the problems involved
  - ▶ Importance of the litigation
  - ▶ The amount or value of the property in question
  - ▶ The Degree of responsibility incurred
  - ▶ Whether fund involved was "created" by the attorney
  - ▶ Professional skills and standing of the attorney in his profession
  - ▶ The results the attorney obtained
  - ▶ The ability of the client to pay an equivalent fee
  - ▶ The amount of money or value of the property in question



# Vaccarello Court Findings

55

- ▶ Attorney was experienced in OC litigation, but the hourly rate was higher than most experienced attorneys in the county
- ▶ The Trustee's counsel billed \$35k for a Petition for Adjudication—which is a form pleading
- ▶ The daughter's counsel testified their firm charges \$10-13,000 for the filing of a Petition for Adjudication
- ▶ The legal fees were disproportionately high given the value of the Trust
- ▶ The Trustee representative responsible for reviewing the legal invoices had no first-hand knowledge of why or how this particular counsel was selected and did not know the typical hourly rates for similar counsel and did not create a budget
- ▶ The Trustee also failed to preserve the value of the Trust estate in the defense costs
- ▶ The Trustee's counsel also billed contrary to the engagement letter, which precluded more than one attorney billing at a time absent specific circumstances



# Vaccarello Court Holdings

56

- ▶ The Corporate Trustee breached its fiduciary duty by failing to ensure reasonable legal fees were incurred in defending the objections b/c:
  - ▶ Trustee lacked awareness of fees charged
  - ▶ Did not review or question the legal invoices
  - ▶ Approved payment for bills which contradicted its engagement letter
- ▶ The Court reduced the hourly rate of the Trustee's counsel and reduced the \$35,000 audit petition prep to \$13,000
- ▶ The Court denied the son's apportionment request because he meaningfully participated in the litigation



# *Middleton Trust*

Montg. Co. 2022

57

- ▶ Settlor created irrev non-charitable trust naming his son as the sole current beneficiary
- ▶ The Trustee filed an accounting and the Trustee and beneficiary son entered into a settlement agreement, and then the son sought to remove the Trustee
- ▶ The Settlor filed responsive pleadings and objections
- ▶ The Trustee and beneficiary objected to the Settlor's standing
- ▶ The lower court held the settlor lacked standing to participate and struck his pleadings, which the Settlor appealed



# Lower Court Holdings

58

- ▶ The Court held that the Order was not appealable without permission of the Superior Court
- ▶ The Court then addressed standing, which requires that a party have an interest which is:
  - ▶ 1) Substantial—discernable adverse effect
  - ▶ 2) Direct—the challenged conduct directly harms the interest
  - ▶ 3) Immediate—when the causal connection with the harm is neither remote not speculative
- ▶ The Court found the Settlor failed to allege a sufficient enough interest and that he would be impacted by the outcome of the proceedings
- ▶ The Court found that the Settlor's statutory right to certain on-going participation under the UTC was not sufficient enough of an interest



# Settlor's Statutory Rights under UTC

59

- ▶ **UTC 813: Duty to inform and report**
  - ▶ **(a) Duty to respond to requests.--**A trustee shall promptly respond to a reasonable request by the settlor of a trust or by a beneficiary of an irrevocable trust for information related to the trust's administration.
  - ▶ Legislative comments state “the enforcement of a trust is left largely to its settlor while sui juris”, which the Court found related to revocable trusts rather than non-charitable irrevocable trusts
- ▶ **UTC 706: Removal of trustee**
  - ▶ **(a) Request to remove trustee; court authority.--**The settlor, a cotrustee or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.



# *In re Estate of Susan Kittler*

60

Pa. Super. Opinion dtd 9/25/2023

- ▶ Decedent Susan Kittler was in NH following a hospital stay during height of pandemic in Oct-Nov 2020
- ▶ Susan and her attorney met to have comprehensive conversation re: wishes and he drafted a Will per her direction
- ▶ Attorney arranged remote notary and witnesses, and Susan signed the Will remotely using electronic DocVerify on 11/24/2020
  - ▶ PA Depart of State condoned DocVerify's standards and safeguards
  - ▶ Remote notary saw Susan's ID
  - ▶ DocVerify allowed Susan to create a computer-generated authentic signature—not font



# *In re Estate of Susan Kittler, Cont'd*

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- ▶ Hearing before Lancaster ROW 7/18/2022 where scrivener, notary and witnesses testified
- ▶ OC concluded that Susan's signature failed to meet PA's legal standard for a valid Will because it was not "executed"
- ▶ Appellant claimed OC had no support for fact that e-signature is invalid and looked to Black's Law Dictionary and fact that Pa R.C.P. 76 defines signature to include computer-generated signature created, transmitted or secured by electronic means
- ▶ On appeal, Superior Court cited long standing case law where "father" at the end of Will constituted "execution" under "intent-based" inquiry



## Questions:

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