evolution of the prudent man standard by judicial decision, the Restatement (Third) of Trusts adopted a revised prudent investor rule. The stated purpose of the new rule was to reinvigorate the *Harvard College* standard:

> The terms of the prudent investor rule in the new Restatement begin by returning, with modest reformulation, to the essence of the *Harvard College* dictum in an effort to restore that opinion's originally intended generality and flexibility. The terms of the rule then continue in an effort to modernize trust investment law and to make its underlying principles and the relevant financial considerations more readily understandable. This was intended to discourage a repetition of earlier difficulties and temptations in application and elaboration.
>
> The language of the rule and the accompanying commentary were thus designed to preserve the law's adaptability. The mandates of the prudent investor rule were confined to those that seemed essential to: (i) a meaningful duty of prudence, based on its traditional elements of care, skill and caution; (ii) the protection and implementation of fiduciary goals; and (iii) supplying useful guidance to trustees, their counsel and courts, taking account of the varied needs and objectives of individual trusts and trustees.[82]

5.3 ***Maryland's Version of the Prudent Investor Rule***. In 1994, the prudent investor rule was incorporated in Maryland statute. That rule, however, only applies to a fiduciary who is either a trust company, an investment advisor controlled by a trust company, or "a person who makes an election" under the statute to be governed by the statute.[83] The prudent investor rule provides standards for a fiduciary making investment decisions:

> (b) A fiduciary shall:
>
> (1) Invest and manage fiduciary assets as a prudent investor would, considering the purposes, terms, distribution requirements, and other circumstances of the governing instrument and the nature of the fiduciary appointment;
>
> (2) Exercise reasonable care, skill, and caution regarding the anticipated effect on the fiduciary assets as a whole under the facts and circumstances prevailing at the time of any action by the fiduciary;
>
> (3) Invest and manage not in isolation but in the context of the fiduciary assets as a whole and as part of an overall investment strategy that

[82] Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 Iowa L. Rev. 1151, 1155 (1992).

[83] Estates & Trusts § 15-114(g) provides that the election is made by filing with the Commissioner of Financial Regulation a statement that the person elects to be controlled by the section for all fiduciary assets controlled by the person. In other words, it is not a trust-by-trust election.

incorporates risk and return objectives reasonably suitable under the terms of the governing instrument and the nature of the fiduciary appointment;

(4) Diversify investments unless, under the circumstances, the fiduciary reasonably believes it is in the best interests of the beneficiaries or furthers the purposes for which the fiduciary was appointed not to diversify;

(5) Review fiduciary assets within a reasonable time after acceptance of the fiduciary appointment and make and implement decisions concerning the retention or disposition of investments existing prior to the appointment in order to conform with this section;

(6) Pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the fiduciary's duty of loyalty and impartiality and the purposes for which the fiduciary was appointed;

(7) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(8) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the fiduciary appointment.

(c) A fiduciary's investment decisions shall be judged in accordance with the following guidelines and standards:

(1) No specific investment or course of action is, taken alone, prudent or imprudent;

(2) The fiduciary may exercise reasonable business judgment regarding the anticipated effect on the portfolio of fiduciary assets as a whole under the facts and circumstances prevailing at the time of the decision or action;

(3) The fiduciary shall have no liability for continuing to hold fiduciary assets existing at the time the fiduciary appointment was accepted or subsequently added pursuant to proper authority if, and as long as, the fiduciary, in the exercise of good faith and reasonable prudence, considers the retention to be in the best interests of the beneficiaries or in the furtherance of the goals of the governing instrument;

(4) Subject to all other provisions of this section, the fiduciary may retain as fiduciary assets an interest in the fiduciary, if the fiduciary is a corporation, or in any corporation controlling, controlled by, or under common control with the fiduciary; and

(5) In making an investment decision, the fiduciary may consider, without limitation:

(i) General economic conditions;

(ii) The possible effect of inflation;

(iii) The expected tax consequences of investment decisions or strategies;

(iv) The role each investment or course of action plays within the investment of the portfolio of fiduciary assets as a whole;

(v) The expected total return of the investment including both income yield and appreciation of capital;

(vi) The reasonableness of any costs associated with the investment; and

(vii) The status of related assets of beneficiaries.

> (d) To the extent that any provision of this section is inconsistent with the terms of a governing instrument, the terms of the governing instrument shall control.[84]

Those who are not corporate trust companies or who do not elect to be governed by the statute continued to be governed by the Maryland interpretation by case law of the prudent man rule.[85]

5.4 ***The Theoretical Underpinnings of the New Rule.*** Although the reporter for the Restatement (Third) of Trusts stated that "a scrupulous effort was made to avoid either endorsing or excluding particular theories of economics or investment,"[86] the main theoretical underpinning of the Prudent Investor Act was, in fact, the "efficient market" or "modern portfolio of theory" of trust investment: "The uniform prudent investor act implements a tightly interconnected set of reforms. These adjustments to the legal regime were driven by profound changes that have occurred across the past generation in our understanding of investment function. This new learning about the investment process is called the theory of efficient markets, or more broadly, Modern Portfolio Theory (MPT)."[87]

5.5 ***Diversification and the Modern Portfolio Theory.*** Modern Portfolio Theory drives the need for the trustee to diversify thus minimizing the risk to the portfolio. The diversification required by the Modern Portfolio Theory, however, is not merely holding multiple securities. It is constructing a portfolio where the inherent risk of the portfolio is balanced by the various holdings:

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[84] Estates & Trusts § 15-114.

[85] As noted in the discussion of the *Baltimore City Trustees* case, this may not be a huge distinction. Others, however, hold that the prudent man rule in Maryland continues to follow the asset-by-asset approach. John A. Cogar, *Trustee Power Tools: Income Adjustments and Unitrust Conversions*, 36 Md.B.J. 24 (March/April 2003) ("Before that date (1994), the so-called prudent man rule had defined the investment responsibility of Maryland trustees for over 150 years. Over time the prudent man rule became inflexible as specific investment results were mandated by state 'legalists' statutes and restrictive Court decisions that focused on each separate investment, rather than the overall results.")

[86] Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 Iowa L. Rev. 1151, 1154 (1992).

[87] John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 642 (1996).

A fundamental tenet of MPT is the premise that all investments, including U.S. Treasuries, may become worthless or more commonly, may not perform in the manner anticipated, a concept referred to as "risk." Every investment faces internal and external factors which give rise to risk, known as "firm risk." Every company faces the internal risk of being defrauded by an employee or a third party. In addition, factors outside the company, external factors, also impact the value of an investment. For example, during the oil embargo of 1973, international oil stocks decreased in value, but the shares of domestic oil producers increased in value. A portfolio which consisted of both stocks reduced risk because the decline in value of the international oil stocks was offset, in whole or in part, by the increase in value of the domestic oil producers. Of course, both of these oil companies are impacted by demand for oil. To reduce risk, an investor should invest in a wide range of stocks and even in different asset classes that move in different directions as various external market changes occur. In MPT parlance, investors should acquire investments that have negative or low correlations to each other. By purchasing assets with negative or low correlations to each other, an investor can substantially reduce the risk associated with a specific investment. Diversification thus involves much more than buying stocks in two companies versus only holding stock in one company. It involves purchasing stocks, bonds, hedge funds, commodities, and other investments in a manner to reduce the "diversifiable risk" of investing in a single asset or single class of assets. Managing risk thus involves using "care and skill in an effort to minimize or at least reduce diversifiable risks."

According to MPT, investors demand a higher return for taking on more risk. For example, U.S. Treasuries provide relatively little return because they present little risk. On the other hand, investors demand higher returns from stocks in small companies which have a greater probability of disappointing investors. According to MPT, the market pays investors for taking on more "compensated risk," that is risk associated with fluctuating interest rates, inflation, exchange rates and general market changes. However, as stated in the comments to UPIA §3, "nobody pays the investor for owning too few stocks." An investor, therefore, receives no market benefit for retaining a concentration. Since an investor can reduce the risk of holding a concentration by diversifying, yet not decrease return, it is imprudent for an investor to hold a concentration unless non-market factors justify retaining the concentration. Hence, unless special circumstances exist or the trust waives the duty to diversify, the UPIA requires a trustee to diversify because prudence dictates against a fiduciary taking uncompensated risk. "Sound diversification is fundamental to the management of uncompensated risk." Diversification may be the most universally accepted precept of prudent investing.[88]

The poster child for the case for compelling trustee distribution under the prudent

[88] Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 359-61 (2010).

investor rule is *In Re Will of Dumont*, a case (until reversal) imposed a $21 million surcharge on the corporate trustee.[89] In that case, a testator left his Eastman Kodak stock to a trust with the direction that it be preserved for eventual distribution to his heirs at the termination of the trust. The trust provisions also, however, provided that the stock could be sold if there was "some compelling reason other than diversification of investment" to sell the stock. The *Dumont* Court held that the Prudent Investor Act makes diversification a default requirement for trusts.

Diversification was recognized as a part of the trustee's general duty of prudence in a Maryland case pre-dating the adoption of the Prudent Investor Rule. In that case, *Green v. Lombard*, the Court of Special Appeals upheld a surcharge resulting from losses that would have been minimized if the investments had been more diversified (the trustee "failed to diversify investments so as to minimize the risk of large losses.").[90] In that case, however, "diversification" is probably not used as it would be under the Modern Portfolio Theory.

5.6 ***Diversification and Special Assets.*** Although in *Dumont* the testator had a "family history with the Kodak company, and it was Kodak which had created the family's wealth,"[91] if an asset's special relationship or special value, if any, to the purposes of the trust or to the beneficiaries is paramount then the concentration of assets with a "special relationship" or "special value" to the purposes of the trust may be retained regardless of the obligation to diversify. Thus, cases involving the residence or a family farm or closely held family businesses generally will not be forced to be liquidated in the name of diversification.[92] From a drafting advantage, however, it is prudent to specifically make the holding of the asset an integral part of the testator's trust purpose.

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[89] *In Re Will of Dumont*, 4 Misc. 3d 1003(A), 791 N.Y.S.2d 868 (2004).
[90] *Green v. Lombard*, 28 Md. App. 1, 7, 343 A. 2d 905, 910 (1975).
[91] *In Re Will of Dumont* at ftn. 1.
[92] See Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 370-375 (2010).

EXTRINSIC EVIDENCE AND THE TERMS OF THE TRUST

6.1 ***Rules of Construction and Settlor Intent.*** Whether interpreting a testamentary trust or an inter vivos trust, the role of the Court is purportedly the same – to implement the intent of the settlor:

> When overseeing the administration of an estate, probate courts are primarily concerned with ascertaining and carrying out the testator's intent. Courts have used a multiplicity of adjectives to express the importance of this task, describing it variously as "paramount," "fundamental," "cardinal," "primary," "overarching," "controlling" "basic," "proper," and even as "the cornerstone," "the touchstone," or "the polestar" driving their duty, regardless of the unreasonableness or eccentricity of the will's terms. Whether they call it interpretation, construction, or something else, most courts agree that, in dealing with the contents of a will, the initial step is to determine the testator's intent at the time the will was executed. That determination employs the presumption that the testator knew the law in force at the time of such execution. After determining the testator's intention, the court's duty is to carry out that intention unless it is illegal, violates public policy, or is unconstitutional. This governing framework continues to be vaunted in recent will-interpretation jurisprudence as serving donative freedom, one of the core values of Anglo-American property law.[93]

Oddly, the rules of construction that pertain to testamentary trusts are different from those that govern inter vivos trusts:

> *c. Trusts created by will.* If a trust is created by will, the terms of the trust are determined by the provisions of the will as interpreted in light of all the relevant circumstances and direct evidence of intention in accordance with the general rules of law governing interpretation of wills.
>
> * * *
>
> *d. Trusts created inter vivos by written instrument.* If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the governing instrument as interpreted in light of all the relevant circumstances and such direct evidence of the intention of the settlor with respect to the trust as is not denied consideration because of a statute of frauds, the parol-evidence rule, or some other rule of law. On the statutes of frauds, see §§ 22–24 (and cf. § 20), and on the parol-evidence rule, see

[93] Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. L. Rev. 65, 69-70 (2005). Although this statement of the importance of seeking and implementing the settlor's intent is in the setting of testamentary transfers, it is equally applicable to inter vivos trusts. See Restatement (Third) of Trusts § 4.

§ 21.[94]

6.2 ***The Plain Meaning Rule and Testamentary Trusts.*** The general rule of will construction, that extrinsic evidence of a testator's intent is not admissible, but that such testimony related to the settlor's intent in an inter vivos trust may be admissible, has a ripple effect. Generally, testamentary trusts are not to be modified due to mistake or to more fully comport with the settlor's intent which is not the rule for inter vivos trusts: "[T]he doctrine of (trusts) reformation is ordinarily applicable only in cases … involving inter vivos trust instruments. Here we are confronted with a testamentary trust and … the general prohibition against reformation of a will would prevail."[95] This non-reformation rule as to wills or testamentary trusts, as distinct from the treatment of nonprobate transfers, is universal under the common law:

> The no-reformation rule is peculiar to the law of wills. It does not apply to other modes of gratuitous transfer - the so-called nonprobate transfers - even though many are virtually indistinguishable from the will in function. Reformation lies routinely to correct mistakes, both of expression and of omission, in deeds of gift, inter vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death. Alternatively, courts sometimes find it necessary to remedy mistakes in these nonprobate transfers by imposing a constructive trust on the mistakenly named beneficiary in favor of the intended beneficiary.[96]

The general rule of construction for wills is, of course, the plain meaning rule. Courts are to tease out the meaning from the four corners of the will without resort to extrinsic evidence, including extrinsic evidence from the drafter of the document:

> And the evidence of the draftsman of the will is not offered to contradict the will. In the case of Fersinger v. Martin, 183 Md. 135, on page 138, 36 A.2d 716, at page 718, this Court, speaking through Judge Collins, said, 'The general rule is that no expression as to the intention of the testator may be considered for the

[94] Restatement (Third) of Trusts § 4.
[95] *Shriners Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2, 312 A.2d 546, 555 (1973).
[96] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 523 (1982).

> reason that an oral utterance would not be a compliance with the statutory requirement that the will be in writing. Miller on Construction of Wills, Section 40; Darden v. Bright, 173 Md. 563, 568, 198 A. 431. We cannot resort to extrinsic evidence to ascertain from the draftsman what the testator instructed or intended him to say, nor can we in order to establish the intention of the testator accept his declarations.' See also Board of Visitors, etc., v. Safe Deposit & Trust Co., Md., 46 A.2d 280. The testimony of the draftsman is, therefore, clearly inadmissible to show what the testator intended by Paragraph II. A testator cannot be heard to say what were his intentions in putting a certain clause in his will, and his attorney, who drafted the will, cannot say what the testator told him about it unless there is a latent ambiguity in the words of the will. No such ambiguity exists here.[97]

> The essential irrationality of the plain meaning rule has been long noticed:

> [W]e think that there is no principled way to reconcile the exclusion of extrinsic evidence in the law of wills with the rule of admissibility in the law of nonprobate transfers. Not surprisingly, the no-extrinsic-evidence rule has long been embattled even in the traditional law of wills; it has been subjected to a variety of exceptions, some of which we discuss below in part II; and it is now on the decline. Wigmore's immensely influential critique of the no-extrinsic-evidence rule underlies its abrogation in California and New Jersey. Wigmore argued that any effort to limit the proofs to the words of a document runs afoul of the "truth ... that words *always* need interpretation ...." Wigmore coined the famous phrase that "the 'plain meaning' ... is simply the meaning of the people who did *not* write the document."[98]

Also:

> There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to define how they would have dealt with the unforseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.[99]

6.3 ***Exceptions to the Plain Meaning Rule***. The plain meaning rule is not, however, absolute. In Maryland there are at least two formal exceptions involving will interpretation that permit extrinsic evidence despite the plain meaning rule: (1) the latent ambiguity exception, and

[97] *Bradford v. Eutaw Sav. Bank of Baltimore City*, 186 Md. 127, 135-6, 46 A.2d 284, 288 (1946).
[98] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev., page 526 (1982).
[99] *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand in a concurring opinion.)

(2) evidence of the facts and circumstances of the settlor's situation at the time of trust creation. Additionally, there are cases permitting extrinsic evidence to rebut the presumption that a document that complies with all the testamentary formality rules does not necessarily mean that the decedent had read and understood the will thus permitting the document to be set aside. Finally, there are evidentiary cases involving charitable bequests that, if having general application which they seem to have, would foretell a more modern, permissive approach to the admissibility of extrinsic evidence. The plain meaning rule has been characterized as an historic relic with limited, recognized utility by several Courts:

> Because of a growing distrust and dissatisfaction with the application of hidebound interpretive rules to testamentary documents, the law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the wills context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution, the use of will interpretation manuals has fallen from favor and the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined.[100]

6.4 ***The Latent Ambiguity Exception***. The exception for an ambiguity turns on whether the ambiguity is latent or patent. A latent ambiguity is one where the terms of the will are definite but that term could yield more than one meaning because of facts not showing on the face of the instrument. An example of the latent ambiguity would be a bequest to "John Doe" without any further identification where extrinsic evidence would be required to determine which John Doe was intended for the bequest. A patent ambiguity is one arising from an apparent contradiction within the document or where a term is used in the document that could yield several meanings. Obviously, in the example of the latter case the line between patent and latent ambiguity is fine:

[100] Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. L. Rev. 65 (2005).

> That a latent ambiguity does not exist in the provisions of Roberts' will is equally clear. Such an ambiguity occurs when "the language of the will is plain and single, yet is found to apply equally to two or more subjects or objects." *Darden v. Bright*, 173 Md. 563, 569, 198 A. 431 (1938). Extrinsic evidence is generally admissible to resolve a latent ambiguity. *Monmonier v. Monmonier*, 258 Md. 387, 390, 266 A.2d 17 (1970); *Bradford v. Eutaw Savings Bank*, 186 Md. 127, 136, 46 A.2d 284 (1946); *Fersinger v. Martin, supra*, 183 Md. at 138-39, 36 A.2d 716; *Darden v. Bright, supra*, 173 Md. at 569, 198 A. 431; *Cassilly v. Devenny*, 168 Md. 443, 449, 177 A. 919 (1935). Indeed a latent ambiguity is "not discoverable until extrinsic evidence is introduced to identify the beneficiaries or the property disposed of by will, when it is developed by such evidence, either that the description in the will is defective, or that it applies equally to two or more persons or things." 4 W. Bowe & D. Parker, *Page on the Law of Wills* § 32.7, p. 255 (rev. ed. 1961).[101]

If the ambiguity, however, is latent then the extrinsic evidence may come in.

6.5 ***Exception to Plain Meaning for Surrounding Circumstances.*** The second exception to the plain meaning rule has likewise been long-standing: that evidence of the circumstances surrounding and informing the testator's situation is admissible if there is an ambiguity regardless of whether that ambiguity is latent or patent:

> ***(b) Qualifications and true scope of (plain meaning) rule***
>
> The statement of the rule given in the next preceding subdivision is too broad, and has led to much confusion among the courts. No such unqualified rule can stand in the face of the numerous cases admitting some extrinsic evidence where the indefiniteness, inaccuracy, or ambiguity was apparent on the face of the instrument.
>
> * * *
>
> According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of the testator and all the relevant facts and circumstances surrounding him at the time of the making of the

[101] *Emmert v. Hearn*, 309 Md. 19, 26-7, 522 A.2d 377, 381-2 (1987). In *Emmert*, the "ambiguity" was whether "personal property" meant tangible personal property or tangible and intangible personal property. The excluded evidence was that of the draftsman of the will and various family members who would have testified that the term only meant tangible personal property. The Court, however, held that it could determine the issue without resort to extrinsic evidence and determined that the language meant tangible and intangible property. A Florida Court, wrestling with the identical issue, saw an ambiguity and brought in extrinsic evidence ruling the other way. As for the Maryland case, the Florida Court stated "We treat it (the Maryland decision) as a minority view in conflict with the view expressed here." In *Estate of Walker*, 609 So.2d 623, 625 (Fla. 1992).

will, for the purpose of explaining or resolving even a patent ambiguity.[102]

This evidence frames the settlor's point of view when he or she drafts the document:

> Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as 'the Board of Foreign and the Board of Home Missions;' and thus the court is enabled to avail itself of the light which the circumstances in which the testator was placed at the time he made the will would throw upon his intention. 'The law is not so unreasonable,' says Mr. Wigram, 'as to deny to the reader of an instrument the same light which the writer enjoyed.' Wig. Wills, (2d Amer. Ed.) 161.[103]

Thus Courts look to the particular circumstances of a decedent to ascertain the "plain meaning" of the words used: "If we put ourselves, in the traditional place, behind the armchair of the testator as he contemplates the disposition he wished to be made to the objects of his bounty, we would be standing behind a man who was not unaware of the problems and methods of early, as contrasted to late, vesting of trust estates and one upon whom had been urged the desirability of continuing property in trust."[104] Also: "Sitting in Loretta's armchair, her testamentary intent becomes clear …"[105]

This exception to the plain meaning rule that enables the Courts to sit in a testator's "armchair" does not permit direct evidence of intent by extrinsic evidence but may yield a close approximation. In one Maryland case, for example, the Court addressed the meaning of the phrase "upon the youngest living grandchild (of the testator's sister) … attaining the age of twenty-one years" in a testamentary trust.[106] The Court concluded that the phrase could have one

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[102] Admissibility of extrinsic evidence to aid interpretation of will, 94 A.L.R. 26 (Originally published in 1935.) (Section IIe(4)(b)).
[103] *Gilmer v. Stone*, 120 U.S. 586, 590, 7 S.Ct. 689, 690 (1887).
[104] *Marty v. First Nat. Bank of Baltimore*, 209 Md. 210, 218, 120 A.2d 841, 845 (1956).
[105] *Bregel v. Julier*, 253 Md. 103, 111, 251 A.2d 891, 895 (1969).
[106] *Marty v. First Nat. Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956).

of two different interpretations – vesting when the sister's grandchildren then in being had all reach twenty-one years of age as of any point in time or, effectively measured after all of the sister's children had died (thus closing the class) and then waiting for the youngest to reach twenty-one years of age. The Court opted for the second reading based on the extrinsic evidence of the testator's situation. This evidence concluded that early vesting had caused adverse tax issues in his mother's estate and that he was urged, upon receiving assets from his family, to continue those assets in trust. Examining the circumstances at the time of the execution of his will in order to place the Court in his "armchair" at the critical moment, required that extensive extrinsic evidence be entertained in order to interpret what certain words in his testamentary trust meant. In a word, it established his intent as that intent was expressed in the language of the trust. This was not a case where the Court found a latent ambiguity.

6.6 ***Other "Exceptions" to the Plain Meaning Rule.*** Not rising to an exception to the plain meaning rule per se, there are Maryland cases that permit direct extrinsic evidence of a testator's intent nevertheless. In one case, a will was challenged solely based on whether it properly followed the testamentary formalities and whether that document was, in fact, an expression of the testatrix's last wishes. The testatrix was ill, facing surgery, and had executed two wills within two days of each other. The wills were dramatically different from each other. The second will was upheld despite the fact that the last name of a legatee had been crossed out and a new name substituted by hand in the will. The Court based its ruling that the second will was valid on the parol evidence offered by witnesses to the will that the actual intent of the testatrix as expressed to them was reflected in the second will not in the first will. Additionally, because the second will was more in line with the testatrix's older wills this likewise demonstrated that she would have wanted to have the provisions that were contained in the

second will apply at her death.[107]

In another case, where the testatrix signed a document purporting to be her will when she was ill and under the influence of narcotics, the will challenge was based on whether the decedent knew the contents of the document that she had signed. That, in turn, raised the issue of what she had attempted to accomplish with her will (what her intent was) and whether the signed document accomplished that intent. The Court held that in these "unusual and exceptional" circumstances, extrinsic evidence of the draftsman's error could be used to support the contention that she had not read and understood her will before signing it thus not having it admitted to probate.[108]

6.7 ***Plain Meaning and Inter Vivos Trusts.*** The restrictions imposed by the plain meaning rule on the introduction of extrinsic evidence of intent do not apply to inter vivos trusts: "If the meaning of the writing is uncertain or ambiguous, evidence of the circumstances is admissible to determine its interpretation."[109] Such evidence is permitted to aid in the construction of the language of a trust:

> Oral evidence will be received, however, to remove an ambiguity in the construction of the trust instrument by explanation of the meaning of the words therein, based on the situation of the parties and other facts. This principle (applies) … both as to private and charitable trusts.[110]

Indeed, in Maryland a trust of personalty may be created solely by parol evidence.[111]

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[107] *Gage v. Hooper*, 165 Md. 527, 169 A. 925 (1934).

[108] *Lyon v. Townsend*, 124 Md. 163, 91 A. 704 (1914). See also *Effective Mistake of Draftsmen (Other Than Testator) In Drawing Will*, 90 A.L.R.2d 924 (originally published in 1963).

[109] Restatement (Second) of Trusts § 38 (1959).

[110] George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 51. Also: "The Courts have, however, distinguished between using oral evidence to supply a term entirely missing and offering oral testimony to clear up ambiguities, explain doubtful terms, and give a setting to the writing. If all of the essential elements of the writing are present, they may be clarified by non-documentary evidence." George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 88.

[111] *Shaffer v. Lohr*, 264 Md. 397, 287 A.2d 42 (1972) (A joint bank account was regarded as an inter vivos trust because an expression of clear and unmistakable intent to create such a trust could be proved by parol evidence.) Presumably, the *Shaffer* decision would be now impacted by the multiple account statute. Parol evidence can also

Because parol evidence can be used to interpret trusts that were created inter vivos, parol evidence may also be used to reform or modify such a trust:

> In trust law, a settlor's unilateral mistake is sufficient to reform an inter vivos trust, provided the settlor received no consideration for the creation of the trust. The same rule applies even after the death of the settlor, provided the reformation is necessary to carry out his intent. Courts have frequently corrected scriveners' errors by reforming unilateral mistakes in trust instruments. In addition, courts have corrected omissions resulting from scriveners' mistakes. Because a revocable inter vivos trust can imitate a will, in that the settlor can retain the equitable life interest and the power to alter or revoke the beneficiary designation, the differing result hinges on terminology. Significantly, a scrivener's error can serve as a basis to reform a pour over will. A court, however, generally will not reform a testamentary trust under similar circumstances, unless the will which contained the trust can be reformed. It seems arbitrary for the law to hold that an inter vivos trust used as a receptacle for assets poured over from probate can be reformed, while a testamentary trust cannot. If will substitutes, including revocable trusts, can be reformed for scriveners' errors, then wills should also be able to be reformed under similar circumstances, especially when both kinds of instruments accomplish the same testamentary objectives.[112]

A Maryland case held that after the death of the settlor, the beneficiary could press for a modification due to mistake to the same degree that the settlor could have brought such an action for modification.[113]

HEARSAY RULE

7.1 ***The State of Mind/Intent Exception to the Hearsay Rule.*** The Maryland rules provide an exception to the hearsay rule that covers a declaration of intention:

> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation,

---

be used to establish a resulting and constructive trust, including such trusts regarding land. *Jahnigen v. Smith*, 143 Md.App. 547, 795 A.2d 234 (2002); *Fasman v. Pottashnick*, 188 Md. 105, 51 A.2d 664 (1947).

[112] 40 Cath. U. L. Rev. 1, 34-35.

[113] *Kiser v. Lucas*, 170 Md. 486, 185 A. 441 (1936). See also *Roos v. Roos*, 42 Del. Ch. 40, 203 A.2d 140 (1964) (Citing *Kiser* for the proposition that a declaration of trust may be amended to reflect the intent of the settlor after his or her death.)

identification, or terms of declarant's will.[114]

This hearsay exception, the "state of mind" exception, is a true exception: it permits someone else to testify to the declarant's statements and those statements are offered for the truth of the assertions made. Thus, in *Ederly v. Ederly*, 193 Md.App. 215, 996 A.2d 961 (2010) the Court held that a woman's supposed declaration of where she wanted to be buried (Israel not Maryland) was admissible in a dispute among her children as to the eventual disposition of her body. *Ederly* is a remarkable case because the then state of mind obviously was not offered to prove "the declarant's future action" which, as the *Ederly* Court observed, is the usual circumstance. In *Ederly*, by definition, others and not the declarant would need to take the further action.

7.2 ***Exception Covers the Declarant's Later Action***. In *Figgins v. Cochrane*, 403 Md. 392, 942 A.2d 736 (2008) the Court of Appeals ties the state of mind for state of intention to the declarant's (and no one else's) later action:

> In order to side-step the ruling of the Court of Special Appeals that correctly articulated that Maryland law does not permit testimony regarding the forward-looking aspect of the state of mind of a declarant when the declarant takes no further action after making a declaration, *see Figgins*, 174 Md.App. at 23–43, 920 A.2d at 585–97, Ms. Figgins contends that the trial judge erred because the proffered statement was admissible to show the state of mind of Mr. Borison, her father's attorney, rather than her father.
>
> We, however, have concluded consistently that evidence of a "forward-looking" state of mind is admissible only to show that the declarant, *not the hearer*, subsequently acted in accord with his or her stated intention.[115]

At least one intermediate appellate Court held that the state of mind exception must result in future action. In *Farah v. Stout*, 112 Md.App. 106, 684 A.2d 471 (1996), the Court upheld the exclusion of a decedent's statements purportedly saying that he was going to leave his caretakers money in his will as compensation for their services. The *Farah* case upheld the exclusion of the

[114] Maryland Rule 5-803(b)(3).
[115] *Figgins v. Cochrane*, 403 Md. 392, 420-1, 942 A.2d 736, 753 (2008).

testimony on the basis that the decedent's will did not reflect that he made such a provision, and therefore did not result in the future action required by Maryland Rule 5-803(b)(3). The Appellants, of course, regarded the failure to take the further action as a breach of the decedent's contract with them. The *Farah* case, therefore, appears to hold that future action must be an element of the admissibility of the statements.

7.3 ***Future Action May Include No Action.*** Subsequent Court of Appeals' decisions, however, do not follow this tack. In *Yivo Institute for Jewish Research v. Zalenski*, 386 Md. 654, 874 A.2d 411 (2005), for example, the Court permitted testimony of the decedent's intent or state of mind that did not result in future action. In *Yivo*, the decedent left a bequest in his will to a charity and then he later made a gift to the same institution. The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will.

Another Maryland case illustrated the backward looking element of Maryland Rule 5-803(b)(3). *National Society of Daughters of American Revolution v. Goodman*, 128 Md.App. 232, 736 A.2d 1205 (1999) involved whether a restricted gift to the D.A.R. for the purpose of funding its nursing home facility lapsed because the D.A.R., in fact, did not maintain a nursing home. The decedent had prepared a will leaving part of her estate to Gallaudet University and part of her estate to the D.A.R. for the nursing home. After execution, the attorney contacted D.A.R. to discuss the gift and learned that the D.A.R. did not maintain a nursing home. He thereupon contacted his client who said that she did not want any gift going to the D.A.R. in that situation but all to Gallaudet University. The attorney prepared a new will but his client died

before she adopted to execute the new will. Nevertheless, the testimony was permitted as a backward looking declaration of what she intended to do with her original will.

DEAD MAN'S STATUTE

8.1 ***The Maryland Dead Man's Statute.*** The dead man's statute in Maryland states:

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.[116]

This statute purportedly seeks to "equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent or at least by requiring those asserting claims against a decedent's estate to produce testimony from disinterested persons."[117] The dead man's statute has long been subject to criticism: "[T]he dead man's statute (is) an anachronism and an obstruction to truth."[118]

8.2 ***Dead Man's Statute is Strictly Construed***. The dead man's statute may have the purpose of equalizing the playing field but it is narrowly construed because it is an exception to the general rule permitting evidence to be heard: "The statute is an exception to the general rule that all witnesses are competent to testify … and is strictly construed 'in order to disclose as much evidence as possible' without ignoring the purpose of the statute. … In close cases involving the dead man's statute, Maryland precedent consistently has favored the admission of testimony." *Walton v. Davy*, 86 Md.App. 275, 285, 586 A.2d 760, 765 (1991).

One example of the narrow construction of the dead man's statute is reflected by the case

[116] Courts & Judicial Proceedings § 9-116.
[117] *Reddy v. Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 558-9 (1978).
[118] 1938 ABA Report on evidence as quoted in Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change*, 53 Clev. St. L. Rev. 75, 80 (2006).

Reddy v. Mody. *Reddy* involved three causes of action in a medical malpractice case that resulted in death. The first cause of action was an action by the decedent's estate and the other two causes of action were by the decedent's husband and the decedent's child for wrongful death. The Court held that the dead man's statute did not apply as to the wrongful death actions because those actions were not brought by or against the personal representative. The estate case, on the other hand, fell directly into the statute. In *Reddy*, the testimony of a nurse (an employee of the defendant hospital) and the testimony of the attending physician (one of the defendants) were admitted. On appeal, the Court held that the testimony of the nurse was admissible but not that of the doctor:

> The first two issues raised by the appellants attack the trial court's ruling that Nurse Nella Williams was a competent witness. It is the appellants' position that the working relationship of the appellee, Dr. Mody, and Nurse Williams was such as to render her a "party" for the purposes of the Dead Man's Statute and, therefore, she was rendered incompetent to testify. We disagree.
>
> The purpose of the Statute, as was pointed out above, is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955). This disability, while protecting the deceased's estate, can create a great injustice to the survivor. As was stated in C. McCormick, Evidence, s 65 (2d ed. 1972):
>
> "Most commentators agree that the expedient of refusing (to) listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard."
>
> Faced with the uncertainty and injustice created by the Dead Man's Statute, the Maryland Courts have sought to construe strictly the Statute in an effort to disclose as much evidence as the rule will allow.[119]

8.3 ***Examples of Strict Construction***. The exclusion of the nurse in *Reddy* as a non-party, although obviously very much associated with the party, illustrates the narrow

[119] *Reddy v. Mody*, 39 Md.App. 675, 681, 388 A.2d 555, 560 (1978).

interpretation of the statute. In *Trupp v. Wolff*, the Court of Special Appeals listed some witnesses who had been permitted to testify regardless of the statute:

> 1. "the husband of a party who would obviously benefit emotionally as well as tangibly by his wife's recovery, *Marx v. Marx*, 127 Md. 373;
> 2. a stockholder of a party corporation notwithstanding obvious similarity of tangible interest differing in degree only, *Downs v. Md. & Del. Ry. Co.*, 37 Md. 100;
> 3. an officer of a corporation which was a party, *Guernsey v. Loyola Fed., etc., supra*;
> 4. witnesses, not parties to the suit, who were stockholders or directors of a party corporation, *Whitney v. Halibut*, 235 Md. 517;
> 5. legatees under a will where the estate would benefit from a recovery by the executor, *Schaefer v. Spear, Ex'r.*, 148 Md. 620;
> 6. a daughter named as party defendant called by the plaintiff mother notwithstanding her "identity of interest" with the "opposite party" calling her, *Cross v. Iler*, 103 Md. 592;
> 7. a son where his mother's estate was suing his creditors to enforce a prior lien on stock in his name. In spite of the obvious benefit to the son who was named a party defendant by the estate, he was permitted to testify when called by opposite party. *Duvall, Adm'r v. Hambleton & Co.*, 98 Md. 12." (*Trupp* at 599-600).[120]

In *Farah v. Stout*, the purported caretaker's husband was not permitted to testify, not because of his indirect interest as the husband, but because he had originally claimed to be directly owed money from the decedent in the original pleading. His amendment to the pleading to remove himself as a party plaintiff was to no avail.[121]

8.4 ***A "Transaction" for Purposes of the Statute***. The dead man's statute precludes testimony "concerning any transaction with or statement they made by the dead or incompetent person." The test for determining whether there has been a "transaction" within the meaning of the dead man's statute is whether the deceased, if living, could contradict the assertion by his own knowledge. In *Boyd v. Bowen*, 145 Md. App. 635, 806 A.2d 314 (2002) one part of the lawsuit was whether money paid by a third party to a lawyer to facilitate the decedent's new will

[120] *Trupp v. Wolff*, 24 Md. App. 588, 599-600, 335 A.2d 171, 178-9 (1975).
[121] *Farah v. Stout*, 112 Md.App. 106, 684 A.2d 471 (1996).

constituted a "transaction" between the third party and the decedent. The Court held that it was such a transaction:

> The appellant maintains she was not a party to the transaction because the transaction was solely between Mr. Arch and Mrs. Cole. Admittedly, the professional relationship being established at the meeting was between Mr. Arch and Mrs. Cole, and did not include the appellant. The term "transaction" as used in the dead man's statute, however, has a broader meaning than it might in other situations. Mrs. Cole, if alive, could, based on personal knowledge, contradict the appellant's testimony on the issue of reimbursement of the legal fees. Accordingly, the meeting was a "transaction with" the decedent, and the trial court properly precluded the appellant's testimony on the matter.
>
> The dead man's statute expressly prohibited the appellant from testifying about anything Mrs. Cole may have said to indicate her intention to reimburse the appellant.
>
> Further, the appellant could not testify that she paid Mrs. Cole's legal fees because she "understood" that she would be reimbursed at some point in the future.

The documents themselves, however, can be introduced into evidence but not testimony that links the documents to a "transaction" or other arrangement between the party and the decedent. The Court of Appeals in *Stacy v. Burke*, 259 Md. 390 (1970), on the other hand, permitted the nephew/claimant to identify and introduce two critical letters sent to him by the uncle/decedent, regardless of the Dead Man's Statute. In that case, the Court made certain important distinctions:

- "The statute does not make the party in an action to which the statute applied incompetent as a witness for all purposes but only in regard to 'any transaction had with or statement made by' the decedent.

- Although the letters permitted to be introduced by the nephew/claimant, in fact, related directly to the transaction, the introduction of these documents "was not testifying in regard to any transaction had with or statement made by Uncle Erle."

This was despite the fact that those very letters had to do with the "transaction" in question.

Likewise, in *Ridgely v. Beatty*, 222 Md. 76 (1960), checks and payments by the son-in-law/claimant were admissible by him because those checks and payments were not a "transaction" with the mother-in-law/decedent. This was despite the fact that those very checks

and payments were the proof of his support of the decedent (the disputed contention in that case). In *Ridgely*, the distinction was made between permitting the introduction of documents versus the introduction of testimony as to what the "agreement or understanding" was between the claimant and the decedent about those payments:

> "In the instant case the claimant, over the objection of the executor, was allowed to testify as to some sixty checks given by the claimant to third persons during the period of time when he and his family resided with the decedent. The checks represented payments which had been made on the mortgage and expenditures for coal, electricity, telephone, taxes, legal expenses and hospital bills. The court permitted the clamant to identify each check, describe it and to state the item for which the check was given, but it would not permit him to connect such payments with any 'agreement or understanding or transaction' the claimant had with the decedent."

8.5 ***Opening the Door to Excluded Evidence.*** The dead man's statute explicitly permits otherwise excludable evidence to be admitted if the door is opened. The statute holds that such testimony is excluded "unless (the party is) called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement." Thus, if a party is cross-examined by an adverse party in regard to the transaction with the decedent then the protection of the dead man's statute has been waived.[122] Additionally, the Maryland dead man's statute applies only to "testimony of a party to a cause which would tend to increase or diminish the estate of the decedent."[123] Thus it should not apply in any suit among various legatees as to what is to be distributed to them.

CONFIDENTIAL RELATIONSHIP

9.1 ***Confidential Relationship and the Burden of Proof.*** In Maryland, the existence of a confidential relationship operates differently for inter vivos gifts than for testamentary gifts.

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[122] *DeMarco v. DeMarco*, 261 Md. 396, 275 A.2d 471 (1971); *Stacy v. Burke*, 259 Md. 390, 260 A.2d 837 (1970).
[123] *Reddy v, Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 559 (1978).

A confidential relationship is deemed to exist in certain relationships (attorney/client, trustee/beneficiary, principal/agent) but otherwise is a matter of fact to be established by the evidence:

> Among the factors to be examined in determining whether this [confidential] relationship has come into being are the parent's advanced age, his physical debility, his mental feebleness, and his dependence on his child. None of these factors is necessarily conclusive and each should be given that weight which is warranted by the circumstances then present. Masins v. Wilson, 213 Md. 259, 131 A.2d 219 (1959). Normally it is the minor child who relies heavily upon his parent for care and protection or for guidance in business affairs so that a confidential relationship exists between them with the duties running from the adult to the minor. It is only when, as a result of debility or feebleness, a parent becomes dependent on his child for aid and counsel, that a confidential relationship is re-established....[124]

While *Treffinger* and *Figgins* dealt specifically with the existence of a confidential relationship between a parent and a child, the factors set forth in these two cases provide an instructive analytical framework in which to determine that a confidential relationship existed under the circumstances of this case "which does not involve a parent/child relationship."[125]

Once a confidential relationship has been determined to exist, it raises a presumption that any inter vivos gift is a product of undue influence. The burden then shifts to the recipient of the gift to rebut the presumption: "[T]he 'heavy' burden shifted to appellants to rebut the presumption of undue influence by establishing that 'the transfer was the free and uninfluenced act of the grantor, upon full knowledge of the circumstances connected with it and of its contents.'"[126]

The rule governing testamentary gifts, however, is different. The existence of the confidential relationship merely is one fact among many that may or may not raise the specter of undue influence. It does not shift the burden of proof. In *Upman v. Clark*, 359 Md. 32, 753

[124] *Treffinger v. Sterling*, 269 Md. 356, 305 A.2d 829, 832 (1973).
[125] *Conrad v. Gamble*, 183 Md.App. 539, 553, 962 A.2d 1007, 1015-6 (2008).
[126] *Conrad v. Gamble*, 183 Md.App. 539, 555, 962 A.2d 1007, 1016-7 (2008).

A.2d 4 (2000) the Court of Appeals determined that a revocable trust that resulted in a large gift at the death of the grantor should be treated under the testamentary rules not under the inter vivos trust rules for the purpose of applying the presumption.

ATTORNEY/CLIENT PRIVILEGE

10.1 ***The Privilege and the Attorney for a Trust.*** The attorney/client privilege, of course, is well-recognized and founded on public policy:

> Intended to encourage "full and frank communication between attorneys and their clients," the attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Nonetheless, the privilege is not absolute, and this court has noted that it "is to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir.1996) (internal citations and quotation marks omitted).
>
> Courts have recognized one such limit in the context of fiduciary relationships. Rooted in the common law of trusts, the fiduciary exception is based on the rationale that the benefit of any legal advice obtained by a trustee regarding matters of trust administration runs to the beneficiaries. Consequently, "trustees ... cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege." *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del.Ch.1976).[127]

In dicta, the U.S. Supreme Court described the fiduciary exception to the general attorney/client rule:

> English courts first developed the fiduciary exception as a principle of trust law in the 19th century. The rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. *Wynne v. Humberston*, 27 Beav. 421, 423–424, 54 Eng. Rep. 165, 166 (1858); *Talbot v. Marshfield* 2 Dr. & Sm. 549, 550–551, 62 Eng. Rep. 728, 729 (1865). The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees. *Ibid.; Wynne, supra*, at 423–424, 54 Eng. Rep., at 166.
>
> The fiduciary exception quickly became an established feature of English

[127] *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 226 (4th Cir.Md. 2011).

common law, see, *e.g.*, *In re Mason,* 22 Ch. D. 609 (1883), but it did not appear in this country until the following century. American courts seem first to have expressed skepticism. See *In re Prudence–Bonds Corp.,* 76 F.Supp. 643, 647 (E.D.N.Y.1948) (declining to apply the fiduciary exception to the trustee of a bondholding corporation because of the "important right of such a corporate trustee ... to seek legal advice and nevertheless act in accordance with its own judgment"). By the 1970's, however, American courts began to adopt the English common-law rule. See *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103–1104 (C.A.5 1970) (allowing shareholders, upon a showing of "good cause," to discover legal advice given to corporate management).

The leading American case on the fiduciary exception is *Riggs Nat. Bank of Washington, D.C. v. Zimmer,* 355 A.2d 709 (Del.Ch.1976). In that case, the beneficiaries of a trust estate sought to compel the trustees to reimburse the estate for alleged breaches of trust. The beneficiaries moved to compel the trustees to produce a legal memorandum related to the administration of the trust that the trustees withheld on the basis of attorney-client privilege. The Delaware Chancery Court, observing that "American case law is practically nonexistent on the duty of a trustee in this context," looked to the English cases. *Id.,* at 712. Applying the common-law fiduciary exception, the court held that the memorandum was discoverable. It identified two reasons for applying the exception.

First, the court explained, the trustees had obtained the legal advice as "mere representative[s]" of the beneficiaries because the trustees had a fiduciary obligation to act in the beneficiaries' interest when administering the trust. *Ibid.* For that reason, the beneficiaries were the "real clients" of the attorney who had advised the trustee on trust-related matters, and therefore the attorney-client privilege properly belonged to the beneficiaries rather than the trustees. *Id.,* at 711–712. The court based its "real client" determination on several factors: (1) when the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust assets. That the advice was obtained at the beneficiaries' expense was not only a "significant factor" entitling the beneficiaries to see the document but also "a strong indication of precisely who the real clients were." *Id.,* at 712. The court distinguished between "legal advice procured at the trustee's *own* expense and for his *own* protection," which would remain privileged, "and the situation where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake." *Ibid.* In the latter case, the fiduciary exception applied, and the trustees could not withhold those attorney-client communications from the beneficiaries.

Second, the court concluded that the trustees' fiduciary duty to furnish trust-

> related information to the beneficiaries outweighed their interest in the attorney-client privilege. "The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship," the court explained, "is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust." *Id.*, at 714. Because more information helped the beneficiaries to police the trustees' management of the trust, disclosure was, in the court's judgment, "a weightier public policy than the preservation of confidential attorney-client communications." *Ibid.*
>
> The Federal Courts of Appeals apply the fiduciary exception based on the same two criteria. See, *e.g., In re Long Island Lighting Co.*, 129 F.3d 268, 272 (C.A.2 1997); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233–234 (C.A.3 2007); *Solis v. Food Employers Labor Relations Assn.*, 644 F.3d 221, ——, 2011 WL 1663597, 2011 U.S.App. LEXIS 9110, (CA4, May 4, 2011); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (C.A.5 1992); *United States v. Evans*, 796 F.2d 264, 265–266 (C.A.9 1986) *(per curiam).* Not until the decision below had a federal appellate court held the exception to apply to the United States as trustee for the Indian tribes.[128]

Although no Maryland state case exists extending the *Riggs* holding to Maryland, challenges to the extent of the attorney/client privilege as to a trustee's lawyer crops up during discovery of such cases and eventually will undoubtedly be the subject in an appellate case.

[128] *United States v. Jicarilla Apache Nation*, 131 U.S. S.Ct. 2313, 2321-2, 180 L.Ed.2d 187. (2011). See also Ruste Reid, William R. Mureiko and D'Ana H. Mikeska, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

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