

TRUST LITIGATION

The Enforcement of Beneficiary Rights

**Maryland State Bar Association
November 4, 2011**

Frederick R. Franke, Jr.
Law Office of Frederick R. Franke, Jr.
77 Franklin Street
Annapolis, Maryland 21401
410-263-4876
www.fredfranke.com
© 2011

Table of Contents

| | Page |
|---|------|
| 1. Introduction..... | 1 |
| 1.1 The Origin of the Duty Owed | 1 |
| 1.2 The "Terms of the Trust" | 1 |
| 1.3 Fiduciary Duty Generally | 2 |
| 1.4 Fiduciary Standards and Trustee Identity | 4 |
| 1.5 The Common Law and the Codification of the Law of Trusts | 6 |
| 2. Causes of Action | 7 |
| 2.1 Equity Jurisdiction for Actions Against Trustees | 7 |
| 2.2 Actions Against Trustees in General | 8 |
| 2.3 Remedies..... | 9 |
| 2.4 Cost of Suit | 11 |
| 2.5 The Impact of Exculpatory Clauses..... | 12 |
| 2.6 Tortious Interference with an Inheritance..... | 13 |
| 3. Right to Information | 15 |
| 3.1 The Nature and Scope of the Trustee's Duty: the Johnson Decision | 15 |
| 3.2 Accountings and Revocable Trusts..... | 16 |
| 4. Distribution and Trustee Discretion..... | 18 |
| 4.1 Settlor Intent: Support/Discretionary Trusts..... | 18 |
| 4.2 The Support/Discretionary Trust Distinction in Maryland | 21 |
| 4.3 Eliminating the Categories under the UTC and Restatement (Third)..... | 22 |
| 4.4 Retaining the Categories Under the Maryland Trust Code Proposal..... | 23 |
| 4.5 Ascertainable Standards and Estate Planning | 24 |
| 4.6 Ascertainable Standards are Measurable | 26 |
| 4.7 The Rights of Remainder Beneficiaries and Ascertainable Standards | 27 |
| 4.8 Extended Discretion and Court Enforcement of Distributions | 29 |
| 4.9 Extended Discretion and the Uniform Trust Code | 31 |
| 5. Trustee Investment Obligations | 34 |
| 5.1 The "Prudent Man Standard" | 34 |
| 5.2 The Prudent Investor Rule | 35 |
| 5.3 Maryland's Version of the Prudent Investor Rule..... | 36 |
| 5.4 The Theoretical Underpinnings of the New Rule | 38 |
| 5.5 Diversification and the Modern Portfolio Theory | 38 |
| 5.6 Diversification and Special Assets..... | 40 |
| 6. Extrinsic Evidence and the Terms of the Trust..... | 41 |
| 6.1 Rules of Construction and Settlor Intent..... | 41 |
| 6.2 The Plain Meaning Rule and Testamentary Trusts..... | 42 |
| 6.3 Exceptions to the Plain Meaning Rule..... | 43 |

| | | |
|------|---|----|
| 6.4 | The Latent Ambiguity Exception..... | 44 |
| 6.5 | Exception to Plain Meaning for Surrounding Circumstances..... | 45 |
| 6.6 | Other "Exceptions" to the Plain Meaning Rule | 47 |
| 6.7 | Plain Meaning and Inter Vivos Trust..... | 48 |
| 7. | Hearsay Rule | 49 |
| 7.1 | The State of Mind/Intent Exception to the Hearsay Rule | 49 |
| 7.2 | Exception Covers the Declarant's Later Action | 50 |
| 7.3 | Future Action May Include No Action | 51 |
| 8. | Dead Man's Statute | 52 |
| 8.1 | The Maryland Dead Man's Statute..... | 52 |
| 8.2 | Dead Man's Statute is Strictly Construed | 52 |
| 8.3 | Examples of Strict Construction | 53 |
| 8.4 | A "Transaction" for Purposes of the Statute | 54 |
| 8.5 | Opening the Door to Excluded Evidence..... | 56 |
| 9. | Confidential Relationship | 56 |
| 9.1 | Confidential Relation and the Burden of Proof | 56 |
| 10. | Attorney/Client Privilege | 58 |
| 10.1 | The Privilege and the Attorney for a Trust | 58 |

TRUST LITIGATION
The Enforcement of Beneficiary Rights
By Fred Franke*

INTRODUCTION

1.1 ***The Origin of the Duty Owed.*** By definition, a trust creates duties owed by the trustee to the beneficiary.¹ These duties, fiduciary in character, inform the core definition of a trust: "A trust ... is a fiduciary relationship with respect to property for the benefit of another person."²

The nature and scope of these duties depend, of course, on the terms of the trust as well as on the application of "an unusually high standard of ethical and moral conduct"³ owed by the trustee to the beneficiary that is inherent in the office of being a fiduciary.

1.2 ***The "Terms of the Trust."*** The terms of the trust communicate the settlor's intent which intent is the lodestar of trust interpretation: "The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings."⁴ Obviously this definition casts a wide net, limited only by various rules of evidence and construction:

The phrase "the terms of the trust" is used in a broad sense in this Restatement, as in many statutes and cases. It includes any manifestations of the settlor's intention at the time of the creation of the trust, whether expressed by written or spoken words or by conduct, to the extent the intention as expressed in the manner that permits proof of the manifestation of intent in judicial proceedings. The terms of the trust may appear clearly from written or spoken words, or they may be provided by statute, supplied by rules of construction, or determined by interpretation of the words or conduct of the settlor in the light of all of the circumstances surrounding the creation of the trust.

Among the circumstances that may be of importance in determining the terms of

* Frederick R. Franke, Jr., Annapolis, Maryland, Copyright 2011.

¹ Used in this paper, a "trust" means a private express trust. It does not include "resulting" or "constructive" trusts.

² Restatement (Second) of Trusts § 2 (1959).

³ George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 1 (rev. 2d ed. 1982).

⁴ Restatement (Third) of Trusts § 4 (2003) (Emphasis added.)

the trust, either in the absence of a written instrument declaring those terms or in matters about which a written instrument is silent or ambiguous, are the following: (1) the situations of the settlor, the beneficiaries, and the trustee, including such factors as age, legal and practical competence, personal and financial circumstances, and the relationships of these persons and these factors to each other; (2) the value and character of the trust property; (3) the purposes for which the trust is created; (4) relevant business and financial practices at the time; (5) the circumstances under which the trust is to be administered; (6) the formality or informality, the skill or lack of skill, and the care or lack of care with which any instrument containing the manifestation in question was drawn.⁵

1.3 ***Fiduciary Duty Generally.*** At common law, the fiduciary duty governing trusts generally "resolves into two great principles, the duties of loyalty and prudence ... Sub-rules of fiduciary administration abound ... All of these rules are subsumed under the duties of loyalty and prudence, they are means of vindicating the beneficial interest."⁶ Of these two great principles, the duty of loyalty has been described as the "essence" of the fiduciary relationship.⁷ Loyalty dictates that the trustees act for the sole benefit of the beneficiary: "The duty of loyalty requires the trustee 'to administer the trust solely in the interest of the beneficiary.'" This obligation implements the beneficiaries' entitlement to the trust assets. The trustee owns the assets, but only to facilitate the beneficiaries' enjoyment."⁸ The duty of loyalty directs the duty owed by the trustee to the interests of the beneficiary. Although it would ordinarily exclude all selfish acts by a trustee, the exclusivity of the duty of loyalty is subject to an important exception: "The most commonly recognized exception to application of the rule is that where the settlor has expressly or impliedly approved of the self-dealing transaction of conflict of interest position."⁹

⁵ Restatement (Third) of Trusts § 4, cmt. a (2003).

⁶ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 655-6 (1995).

⁷ Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 Mo. L. Rev. 279, 280 (2002) ("The duty of loyalty has been called 'the essence of the fiduciary relationship' and even has been considered an expression synonymous with fiduciary.").

⁸ Langbein, *Contractarian*, supra note 6, at 655.

⁹ George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 543.

The Maryland Court addressed this exception in *Goldman v. Rubin*.¹⁰ In that case, the testator appointed as personal representative family members who were also board members of the closely held corporation. As such, they implemented an I.R.C. § 303 redemption – effectively dealing with themselves. Nevertheless, it did not constitute an act of self dealing:

Here the personal representatives are not the ones who placed themselves in a position of conflict. They were placed in that position by Max, through the provisions of his will. He appointed as his personal representatives four of the five directors of MRI and then caused the personal representatives to deal with themselves, as directors, and with Bernard as president, as inexorably as if the will had expressly so directed.

* * *

The question then is whether divided loyalty in this redemption transaction constitutes a breach of duty in and of itself. We think not. The selection of Max of directors and officers of MRI to be his personal representatives may be equated with the appointment of the surviving partner of the intestate as personal representative in *Gianakos v. Magiros*, *supra*, so that the personal representatives here were 'authorized to take action which might, under other circumstances, constitute a conflict between (their) personal position(s) and (their) fiduciary capacity.'

* * *

The effect of this holding is that, in such cases, the burden of proof on the issue of breach of trust is not initially on the fiduciary, because there is no presumption against the fiduciary based on his acting, despite divided loyalty, in the intended transaction. Consequently the burden of proof in this case is as stated in *Lopez v. Lopez*, 250 Md. 491, 501, 243 A.2d 588, 594 (1968):

(T)he person who challenges the conduct of a trustee, must first allege that the trustee has a duty and has been derelict in the performance of his duty, and offer evidence in support of this allegation. Then, and not until then, does the trustee have the burden of rebutting the allegation. In the absence of such proof, there is no duty on the trustee to prove a negative: i.e., that he has not been derelict in the performance of his duties.¹¹

The second "great principle" of fiduciary duty is prudence. "The duty of prudence is a reasonableness norm, comparable to the reasonable person rule of tort. An objective standard of

¹⁰ *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713 (1982).

¹¹ *Goldman v. Rubin*, 292 Md. 693, 708-714, 441 A.2d 713, 721-24 (1982).

care places the trustee "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."¹²

1.4 *Fiduciary Standards and Trustee Identity.* There is nothing explicit in the Common Law or in the Uniform Trust Code or, indeed, the Maryland Trust Code (a legislative proposal not yet enacted, see § 1.5 below) that differentiates between the professional and the non-professional trustee. The various fiduciary duties apply with equal force, in theory, to both.

At least one law professor believes that a different set of rules should be formally recognized to apply to the non-professional trustee – particularly with respect to the duties of loyalty and to delegation. Her point is that, in practice, courts have long carved out such a distinction:

Courts, with their case-specific approach to rules, intuitively understand that the identity of the trustee should make a difference in assessing liability for breach of fiduciary duty. Whether expressly or implicitly, courts gradually have developed two sets of rules. Thus, changing fiduciary standards to protect the non-professional was never really necessary

* * *

A trustee breaches its duty of loyalty when it personally profits from transacting business with the trust. As the following sections demonstrate, the standard for determining trustee liability for such a breach should vary depending on whether the trustee is a professional or non-professional. Over time, case law has evolved to take account of this difference. A review of cases from the last decade establishes that courts generally do not hold non-professional trustees liable for self-dealing acts taken in good faith to benefit the trust. Professional trustees, however, are subject to the no further inquiry rule, which requires them to obtain advance approval prior to transacting with the trust. In the following sections, I develop an analytical framework to explain why this doctrinal development is sound.

* * *

[A] significant number of trusts with non-professional trustees are family trusts that create a built-in conflict of interest between the trustee's fiduciary obligations and personal interests. For example, a settlor may create a by-pass or credit-

¹² Langbein, *Contractarian*, supra note 6, at 655.

shelter trust, naming her spouse as trustee and income beneficiary with limited rights to principal distribution, and her children as remainderman. Or, a settlor might devise shares of a family owned corporation in trust to benefit his descendants, and name a child who controls the company as trustee with the power to vote the trust's shares. In these situations, that the trustee will take actions that benefit herself is practically guaranteed; applying the no further inquiry rule to impose liability when the trustee does not understand the need to obtain advance approval surely would frustrate the settlor's intent.

The case can be made, then, that non-professional trustees should be judged differently than professionals when they transact with the trust without obtaining advance approval. Increasingly, courts are recognizing as much. A review of case law over the past decade establishes that not one court has removed a non-professional trustee or imposed personal liability for self-dealing without advance approval when the trustee's self-interested transaction was a good faith attempt to benefit the trust and effectuate the settlor's objectives. On the other hand, courts find that trustees have breached their duty of loyalty when a reasonable person should have known that the self-dealing act would not benefit the trust. Although courts are not always clear about what standard they are applying, several courts have expressly rejected beneficiaries' arguments that the no further inquiry rule should apply to non-professional trustees.¹³

Professor Leslie's "proof" that courts uniformly apply a softer standard to the non-professional trustee includes a Maryland case, *Helman v. Mendelson*,¹⁴ where the Court of Special Appeals declined to remove a non-professional trustee who borrowed money from the trust because the transaction was fair and the trustee acted in good faith. In that case, the Court distinguished between the trustee/beneficiaries who made the self-dealing loans in *Helman* with cases where similar transactions triggered a bright line approach.¹⁵ The *Helman* Court declined to apply the no-further-inquiry rule to a non-professional trustee.

The suggestion that *Helman* is an example of courts applying looser standards to non-professional trustees has been challenged:

As to the application of the no further inquiry rule to amateur trustees, the cases cited by Professor Leslie in fact allow good faith to excuse self-dealing, contrary

¹³ Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 Cardozo L. Rev. 2713-29 (2006).

¹⁴ *Helman v. Mendelson*, 138 Md.App. 29, 769 A.2d 1025 (2001).

¹⁵ *Helman v. Mendelson*, 138 Md.App. 29, 55-6, 769 A.2d 1025, 1040-1 (2001).

to the no further inquiry rule, where the transaction was not in fact harmful. But in each case, the court grounded the deviation on a well-recognized exception to the rule. The sampling of available reported cases is small, however, and we cannot know what is happening at the trial court level in unappealed cases.

* * *

With respect to the amateur trustee, Professor Leslie correctly notes that when the settlor chooses a family member or friend as trustee, that selection is most likely based on factors involving that particular person's attributes and relationships with the beneficiaries of the trust. Often, the trustee has a beneficial interest in the trust, such as in cases where an adult child is named as trustee of a trust for settlor's surviving spouse, who may be parent of the trustee, where the adult child and her siblings are the remainder beneficiaries. The effect of the no further inquiry rule could be significantly ameliorated if courts recognized that the settlor has impliedly waived any conflicts or self-dealing prohibitions by putting a person with an interest in the trust in the position of trustee. Broadening the exceptions to the self-dealing rule to allow a good faith test where the structure of the trust indicates that such transactions would be within the settor's intent would be more narrow than moving to a good faith test for all amateur trustees, but the latter may negate the rule in cases where the traditional justifications for the rule are still present. The rule was intended to protect the beneficiary because of the difficulty of monitoring -- particularly where the beneficiary has limited capacity -- and the ease with which a trustee can abuse its power over another person's assets.¹⁶

Professor Boxx's reading of *Helman* is that the Court excused the self-dealing conduct because of an exculpatory clause that imposed a good-faith exception to actionable conduct.

1.5 ***The Common Law and the Codification of the Law of Trusts.*** At present, the law of trusts in Maryland is largely a creature of the common law. Conceptually, rules regulating complex human relationships, like the fiduciary duties owed by a trustee to a trust beneficiary, may be more perfectly developed by the evolutionary process of the common law as opposed to the attempting to codify such rules: "What has been said [about the development of judge-made law] will explain the failure of all theories which consider the law only from its formal side; whether they attempt to deduce a corpus from a priori postulates, or fall into the humbler error of

¹⁶ Karen E. Boxx, *Distinguishing Trustees and Protecting Beneficiaries: A Response to Professor Leslie*, 27 Cardozo L. Rev. 2753, 2756-61 (2006).

supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is that the law is always approaching, and never reaching, consistency. It is forever adapting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."¹⁷ The Common Law of Maryland, and of most states, has a dearth of cases offering guidance. In the 2011 General Assembly, the Maryland State Bar Association proffered a codification of the law of trusts modeled after the Uniform Trust Code.¹⁸ This proposed codification (the "Maryland Trust Act"), as well as the Uniform Trust Code itself, does not purport to sweep away the common law but to augment it.¹⁹ Although not yet governing the law of Maryland, this Paper will also address the treatment of trust enforcement under the Uniform Trust Act and the Maryland Trust Act.

CAUSES OF ACTION

2.1 *Equity Jurisdiction for Actions Against Trustees.* Actions by beneficiaries against trustees are the exclusive province of Equity: "It is very certain that the supervision of trusts is the province of a court of equity ..."²⁰ Thus, such actions may not be re-characterized as law actions:

"Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity." 3 A.W. Scott & W.F. Fratcher, *The Law of Trusts* § 197, at 188 (4th ed. 1988) (Scott). Like the early English courts of law, "modern

¹⁷ Oliver Wendell Holmes, Jr., *The Common Law, Lecture I-Early Forms of Liability* (Project Gutenberg 2000, www.gutenberg.org).

¹⁸ HB 750 was introduced, then withdrawn, in the 2011 Session of the Maryland General Assembly and the text may be found on its website archive.

¹⁹ The Reporter for the Uniform Trust Code addressed the relationship that the UTC was meant to have with the existing body of Common Law: "[E]fforts to reduce rules to writing will result in excess rigidity and insufficient discretion vested in the Courts to adapt to changing conditions. Even on issues that drafters have elected to codify, the UTC, in many cases, does not specify every detail, the drafters preferring flexibility and brevity to greater precision." David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143-144 (2002).

²⁰ *Woods v. Fuller*, 61 Md. 457, 459, 1884 WL 5922 (1884). Quoted in *Kann v. Kann*, 344 Md. 689, 701, 690 A.2d 509, 515 (1997).

courts have not permitted the beneficiary of a trust to maintain an action at law for tort against the trustee for breach of trust." *Id.* § 197.1, at 189. Consequently, "[w]here the trust estate includes chattels and the trustee deals wrongfully with them, the remedy of the beneficiary is by a suit in equity, and not by an action of trespass, trover, detinue, replevin, or case, or any other action at law." *Id.* at 190 (footnote omitted). Professor Bogert succinctly expressed the same concept when he wrote: "In other words equity has original and complete jurisdiction over trusts and will enforce the rights of a beneficiary because they arise out of a trust." G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 870, at 136 (rev.2d ed. 1995 Repl.Vol.). As stated in Restatement (Second) of Trusts § 197 (1987), the rule is that "[e]xcept as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable." *Id.* at 433. Those exceptions, not applicable here, arise where the trustee's duty is immediately and unconditionally to pay money or to transfer a chattel to the beneficiary. *Id.* at 434.²¹

2.2 Actions Against Trustees in General. The Restatement (Second) of Torts recognizes liability for a violation of fiduciary duty.²² Largely resting on the Restatement as its basis, the Court of Special Appeals held: "That breach of fiduciary duty is an independent and viable cause of action in Maryland."²³ Shortly after the Court of Special Appeals made that pronouncement, such approach was explicitly rejected by the Court of Appeals:

Accordingly, we hold that there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries. This does not mean that there is no claim or cause of action available for breach of fiduciary duty. Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem.²⁴

The key to the *Kann* decision is that there is no "omnibus tort" but that a plaintiff must identify

²¹ *Kann v. Kann*, 344 Md. 689, 703, 690 A.2d 509, 516 (1997). The exception is when the trustee owes an ascertainable amount to a beneficiary. *Nelson v. Howard*, 5 Md. 327, 331, 1854 WL 3384 (1854); Restatement (Second) of Trusts § 198 (1987) ("If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary ... If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary ...").

²² Restatement (Second) of Torts § 874 (1977) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

²³ *Hartlove v. Maryland School of the Blind*, 111 Md.App. 310, 333, 681 A.2d 584, 594 (1996).

²⁴ *Kann v. Kann*, 344 Md. 713 A.2d 521 (1997). The *Kann* Court "disapproved" of the reasoning of the *Hartlove* Court and, consequently, reversed it. *Hartlove v. Maryland School of the Blind*, 344 Md. 720, 690 A.2d 526 (1997).

the specific duty breached.²⁵ Nevertheless, *Kann* has been characterized as "a bit muddled:"

To be sure, the post-*Kann* landscape has been a bit muddled. In *McGovern v. Deutsche Post Global Mail, Ltd.*, JFM-04-0060, 2004 U.S. Dist. LEX IS 15215, at (D.Md. Aug. 4, 2004), Judge Motz stated:

Courts have not entirely agreed on how to interpret the language of *Kann*. Compare *Swedish Civil Aviation Admin. v. Project Mgmt. Enterprises, Inc.*, 190 F.Supp.2d 785, 801 (D.Md.2002) (breach of fiduciary duty can be part of other causes of action, but no independent tort for breach of fiduciary duty, especially if alternative remedies available), *Kerby v. Mortgage Funding Corp.*, 992 F.Supp. 787, 803 (D.Md.1998) (no universal tort of breach of fiduciary duty, at least where other remedies exist), and *Bresnahan v. Bresnahan*, 115 Md.App. 226, 235, 693 A.2d 1, 5 (1997) ("in light of *Kann*, it is doubtful that *Hartlove [v. Maryland School for the Blind]*, 111 Md.App. 310, 681 A.2d 584 (1996), *vacated*, 344 Md. 720, 690 A.2d 526 (1997),]s creation of an independent tort of breach of fiduciary tort [sic] has survived") (dictum), with *Garcia v. Foulger Pratt Develop., Inc.*, 155 Md.App. 634, 682, 845 A.2d 16, 44 (2003) (*Kann* means that whether there is a tort for breach of fiduciary duty must be determined on a case-by-case basis), and *BEP, Inc. v. Atkinson*, 174 F.Supp.2d 400, 405-06 (2001) (plaintiff did state claim for breach of fiduciary duty because requirements set forth in *Kann* were satisfied).²⁶

The lesson of *Kann* in the context of trust litigation, however, is plain: there is no nebulous breach of fiduciary duty action but one must plead and prove a specific breach of a specific duty, the action is an equity action and not a law action, there is no right to a jury trial, and there is no right to punitive damages.

2.3 Remedies. As noted, punitive damages are not available in actions by a beneficiary against the trustee in the usual case.²⁷ Although the *Kann* Court held that punitive damages were not available based on the venerable law/equity distinction, it also hinted at a policy basis for the rule, quoting Learned Hand: "The law ought not make trusteeship so

²⁵ In Maryland, of course, a Circuit Court complaint is required to contain a factual based pleading which, presumably, will set out the specific duty breached. See Paul Mark Sandler & James K. Archibald, *Pleading Causes of Action in Maryland*, § 1.6 (4th Ed. MICPEL 2008)

²⁶ *Novara v. Manufacturers Traders and Trust Co.*, Slip Opinion, 2011 WL 3841538 (2011).

²⁷ That is not to say there could not be a separate action at law not arising from the trustee's action as trustee per se. See discussion of tortious interference with an expectancy, below.

hazardous that responsible individuals and corporations will shy away from it."²⁸ The remedies available for the breach of duty, however, are broad, and include:

- Compelling the trustee to perform the trustee's duty.
- Enjoining the trustee from committing a breach of trust.
- Compelling the trustee to redress a breach of trust by paying money or restoring property.
- Ordering the trustee to account.
- Appointing a special trustee to take possession of the trust property and administer the trust.
- Suspend the trustee.
- Remove the trustee.
- Reduce or deny compensation to the trustee.
- In certain circumstances void the act of the trustee and impose a lien or construct a trust on trust property wrongfully disposed of.²⁹

Under Maryland practice, the petition includes asking the Court to assume jurisdiction of the trust in order to implement the remedies. Md. Rule 10-501. Although the Maryland Trust Code has yet to be enacted, Maryland has codified the grounds for removal:

- (a)(1) A court shall remove a fiduciary who has:
- (i) Willfully misrepresented material facts leading to his appointment or to other action by the court in reference to the fiduciary estate;
 - (ii) Willfully disregarded an order of court;
 - (iii) Shown himself incapable, with or without fault to properly perform the duties of his office; or
 - (iv) Breached his duty of good faith or loyalty in the management of property of the fiduciary estate.
- (2) A court may remove a fiduciary who has:
- (i) Negligently failed to file a bond within the time required by rule or order of court;
 - (ii) Negligently failed to obey an order of court; or
 - (iii) Failed to perform any of his duties as fiduciary, or to competently administer the fiduciary estate.
- (b) Procedures for the removal of a fiduciary shall be conducted by the court in accordance with the provisions of the Maryland Rules applying to a fiduciary.
- (c) The provisions of this section shall not apply to personal representatives.³⁰

Obviously, the statute essentially feeds back to the Common Law of trusts providing that the

²⁸ *Dabney v. Chase National Bank*, 196 F.2d 668, 675 (2nd Cir. 1962) as quoted in *Kann v. Kann*, 344 Md. 710 A.2d 519 (1997).

²⁹ This list paraphrases § 1001 of the Uniform Trust Code. Also see § 14.5-901 of the Maryland Trust Code for an identical listing. Each list is non-inclusive – expressly including "other appropriate relief." These lists parallel George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 861 (rev. 2d. ed. 1982).

³⁰ Estates & Trusts § 15-112.

Court shall remove the trustee who has breached his duty of good faith or loyalty in the management of the trust property and may remove a trustee for failure to perform any of his fiduciary duties, leaving both of these categories undefined.

2.4 ***Cost of Suit.*** The successful defense by the trustee of a removal action will permit the trustee to charge the trust for his or her attorney's fees:

The classic judicial statement of this principle was by Cardozo in 1918 in the case of *Jessup v. Smith*, 223 N.Y. 203, 119 N.E. 403. One of the trustees under the will of Samuel J. Tilden successfully defended himself against an effort to have him removed as trustee. In holding that he was, therefore, entitled to the payment of counsel fees out of the trust assets, Judge Cardozo reasoned, at 119 N.E. 404:

'The question remains whether the services were beneficial in the preservation of the trust. We have no doubt that they were. Mr. Smith had been named in the will as a trustee. He owed a duty to the estate to stand his ground against unjust attack. He resisted an attempt to wrest the administration of the trust from one selected by the testator and to place it in strange hands.'

In 1959 in *Weidlich v. Comley*, 2 Cir., 267 F.2d 133, Judge Learned Hand, for the Second Circuit, applied the rule of *Jessup v. Smith*, holding at 134:

' . . . (T)he plaintiff's first complaint is the allowance to the defendant out of the trust assets of his expenses in defending himself in the action. The argument is that these expenses were incurred in the defendant's individual interest, and may not be charged against the trust. That completely misses the true situation: a trustee was appointed to administer the assets; the settlor selected him to do so, and whatever interferes with his discharge of his duty pro tanto defeats the settlor's purpose. When the trustee's administration of the assets is unjustifiedly assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties. This has been uniformly the ruling, so far as we have found.³¹

Moreover these fees may be charged to the share of the beneficiaries who are bringing the action rather against the common fund.³²

A beneficiary's legal fees, on the other hand, generally follows a modified "American

³¹ *Saulsbury v. Denton Nat. Bank*, 25 Md.App. 669, 674-5, 335 A.2d 199, 201-2 (1975).

³² *Hitchens v. Safe Deposit and Trust Company of Baltimore*, 193 Md. 62, 66 A.2d 97 (1949); *Urquhart v. Alexander & Alexander Inc.*, 218 Md. 405, 147 A.2d 213 (1958).

Rule:"

Traditionally, legal fees incurred by beneficiaries in connection with the trust's administration, including accounting proceedings, are not allowable as charges against the trust estate, even if the beneficiary successfully asserts a claim against the trustee. Under the Uniform Trust Code, however, the court is granted the discretion to award attorney's fees to any party, to be paid by another party or from the trust, "as equity and justice may require," which has been applied to allow fees of beneficiaries' counsel to be paid from the trust, even when the beneficiary did not prevail in the proceeding. Further, under exceptions to the traditional rule, fees may be allowed from the trust estate for beneficiaries' counsel if their attorneys' services result in a benefit to the trust estate or other beneficiaries or if the fees were incurred to construe the terms of the trust. In many jurisdictions legal fees of a beneficiary or cotrustee incurred in successfully asserting a claim against the trustee for breach may, in the court's discretion, be charged against the trustee, personally.³³

As the notes for Section 1004 of the Uniform Trust Code indicate, the equity court in trust cases had "historic authority to award costs and fees, including reasonable attorney's fees" to beneficiaries. Also, of course, such fees could be seen as necessitates in the support trust context. As discussed below, a wholly discretionary trust may also provide a beneficiary with enforceable rights that could justify such fees being paid. The Maryland Trust Code parallels the Uniform Trust Code in permitting successful beneficiaries to cover their legal fees from the trust.³⁴

2.5 *The Impact of Exculpatory Clauses.* Maryland generally recognizes exculpatory clauses to limit the liability of the trustee.³⁵ To be effective, however, the exculpatory clause must not relieve a trustee of liability for a breach of trust that is committed in bad faith or intentionally committed.³⁶

³³ George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 970 (rev. 2d. ed. 1982).

³⁴ Maryland Trust Code § 14.5-904.

³⁵ *Sullivan v. Mosner*, 266 Md. 479, 295 A.2d 482 (1972). See also *Edwards Family Limited Partnership v. Barlow*, 915 F.2d 1564 (4th Cir. 1990) (unpublished).

³⁶ Restatement (Second) of Trusts § 222 (1959). The Restatement also states that if the exculpatory clause was placed in the instrument as the result of the abuse by the fiduciary of an existing duty between the trustee and the settlor at the time of the trust then it may not be effective. According to the Restatement, however, "The mere fact

2.6 ***Tortious Interference with an Inheritance.*** Tortious interference with an inheritance has been described by the Restatement (Second) of the Law of Torts: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift ..." ³⁷ As the Court of Appeals noted, ³⁸ many jurisdictions recognize the tort:

Courts in other jurisdictions have recognized the tort of intentional interference with an expected inheritance. *DeWitt v. Duce*, 408 So.2d 216 (1981); *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978); *Cyr v. Cote*, 396 A.2d 1013 (Me.1979); *Lewis v. Corbin*, 195 Mass. 520, 81 N.E. 248 (1907); *Hammons v. Eisert*, 745 S.W.2d 253 (Mo.App.1988); *Doughty v. Morris*, 117 N.M. 284, 871 P.2d 380 (N.M. Ct.App.1994); *Bohannon v. Wachovia Bank & Trust Co.* 210 N.C. 679, 188 S.E. 390 (1936); *Firestone v. Galbreath*, 67 Ohio St.3d 87, 616 N.E.2d 202 (1993); *King v. Acker*, 725 S.W.2d 750 (Tex.App.1987); *Barone v. Barone*, 170 W.Va. 407, 294 S.E.2d 260 (1982). A substantial number of courts permit plaintiffs to maintain such actions only when they have exhausted probate proceedings or can show that such proceedings would not have provided adequate relief. See *Moore v. Graybeal*, 843 F.2d 706, 710 (3rd Cir.1988); *McGregor v. McGregor*, 101 F.Supp. 848 (D.Colo.1951), *aff'd*, 201 F.2d 528 (10th Cir.1953); *Benedict v. Smith*, 34 Conn. Sup. 63, 376 A.2d 774 (Conn. Super. Ct.1977); *DeWitt, supra*; *Robinson v. First State Bank of Monticello*, 97 Ill.2d 174, 73 Ill.Dec. 428, 434, 454 N.E.2d 288, 294 (1983); *Axe v. Wilson*, 150 Kan. 794, 96 P.2d 880, 888 (1940); *Allen v. Lovell's Adm'x*, 303 Ky. 238, 197 S.W.2d 424 (1946); *Brignati v. Medenwald*, 315 Mass. 636, 53 N.E.2d 673, 674 (1944).

Generally, the numerous other jurisdictions that have recognized the tort have done so based on the fundamental principle that "where there is a right, there is a remedy." *King v. Aker*, 725 S.W.2d 750, 754 (Texas 1987) (Preventing the inheritance by transferring the property subject of the specific bequest before death via a forged power of attorney while the testator was unconscious.); *Creek v. Laski*, 227 N.W. 817, 818-20 (Mich. 1929) (Post death destruction of the Will by the personal representative to avoid the bequest to another.)

that the trustee draws the trust instrument and suggests the insertion of a provision relieving the trustee of liability does not necessarily make the provision ineffective."

³⁷ Restatement (Second) of the Law of Torts (1979), Section 774 B, "Interference With Other Forms of Advantageous Economic Relations".

³⁸ *Anderson v. Meadowcroft*, 339 Md. 218, 223, 661 A.2d 726, 728 (1995).

The Court of Appeals has not explicitly recognized the tort of interference with an inheritance. It did, however, go to great length to describe the tort in a case where the elements of the tort were not present – essentially giving Maryland courts a roadmap as to how to look at this tort. The Court of Appeals compared tortious interference with an inheritance to wrongful or malicious interference with economic relations which is recognized in Maryland:

We have adopted the tort of wrongful or malicious interference with economic relations. *Alexander v. Evander*, 336 Md. 635, 650, 650 A.2d 260 (1994); *Macklin v. Logan*, 334 Md. 287, 296-302, 639 A.2d 112 (1994). But we have not yet considered expanding the tort to apply to interference with gifts or bequests, nor, therefore, have we considered the compatibility of such an expansion with caveat proceedings. In the business context, where the tort does apply, we have required that the interference be "independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships." *Alexander, supra*, 336 Md. at 657, 650 A.2d 260.³⁹

The distinction that the Court is making is that like the tort involving economic relations, tortious interference with an inheritance cannot be a substitute for the existing causes of actions involving inheritances, such as undue influence (the facts in *Meadowcroft*), caveats or the other varieties of will or trust contests.

A federal case illustrates the difference between a caveat or similar action and the intentional tort plead here. *In re Marshall*⁴⁰ involved an allegation, not that Mr. Marshall's son engineered a different bequest than his father actually wanted to leave his new (and substantially younger) wife, Anna Nicole Smith, but that the son manipulated events to derail that bequest. Apparently the father could not be swayed from leaving the bequest. The son therefore took various actions to make sure that his father's instructions were not followed despite his father's clear instructions. This case resulted in the U.S. Supreme Court decision, *Marshall v. Marshall*,

³⁹ *Anderson v. Meadowcroft*, *supra*. at Md. 224, and A.2d 728-9.

⁴⁰ 253 B.R. 550, 559-60, (Bkrcty. C.D. Cal. 2000).

547 U.S. 293, 311 (2006), which involved a collateral issue of whether the so-called "probate exception" to federal jurisdiction trumped federal bankruptcy jurisdiction. The Court determined that the probate exception is not triggered for a claim of tortious interference with an inheritance because it seeks an in personam judgment and does not involve an interpretation or enforcement of rights under a will or trust. In other words, it is a wholly separate action.

RIGHT TO INFORMATION

3.1 *The Nature and Scope of the Trustee's Duty: the Johnson Decision.* The issue as to the scope and nature of a trustee's duty to provide information to a beneficiary is before the Maryland Court of Appeals in *Johnson v. Johnson*⁴¹. In the Court of Special Appeals, however, this right to information and to an accounting was expressed in sweeping terms that emphasized that those rights were essential if beneficiaries have enforceable rights. The Court of Special Appeals, quoting Bogert, held:

A [testator] who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot force the trustee to any particular line of conduct with regard to the trust property or sue for breach of trust. The trustee may do as he likes with the property, and the beneficiary is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach.⁴²

Johnson actually involved two separate trusts: a marital trust ("Trust A") and a credit shelter trust ("Trust B") with the widow/stepmother as sole trustee and the only beneficiary during her life. Her stepson was the vested remainderman to the credit shelter trust. Although

⁴¹ *Johnson v. Johnson*, Case No. 63, September Term, 2009, pending. The author of these materials is the attorney for the beneficiary in his quest for an accounting and has been such attorney since the origin of the case in the Circuit Court for Calvert County. To date, the beneficiary has prevailed twice: in the Circuit Court for Calvert County and in the Court of Special Appeals. Oral argument was presented to the Court of Appeals on January 8, 2010. As of the date hereof the Court has not rendered an opinion.

⁴² *Johnson v. Johnson*, 184 Md. App. 643, 657, 967 A.2d 274, 282 (2009) [quoting Bogert § 973].

the credit shelter trust provided that she receive all income during life, the right to withdraw principal was governed, unsurprisingly, by an ascertainable standard.⁴³ The widow/stepmother had extensive rights as to the marital trust, including, she claimed, a general inter vivos and testamentary power of appointment.⁴⁴

The stepson's rights in the marital trust might have been seen as more problematic but the Court of Special Appeals upheld the right to a full accounting on both trusts because the administration of the marital trust necessarily impacts the administration of the credit shelter trust:

Alternatively, Catherine contends that if James is entitled to an accounting, it should be limited to Trust B. We disagree and conclude that James can request an accounting of the entire Trust. While his interest in Trust B is more defined, he has an interest in Trust A and how Catherine manages it. While Catherine is living, she has access to both trusts and the management of Trust A potentially affects the proceeds available for Trust B. In short, the trusts are inextricably linked and limiting James's right to an accounting of Trust B will not satisfy the Trustee's legal responsibility to him.⁴⁵

At oral argument, the Court of Appeals seemed focused on whether a remainder beneficiary could force an accounting as to what appeared to be essentially a revocable trust.

3.2 *Accountings and Revocable Trusts.* The Common Law did not distinguish particularly between revocable and irrevocable trusts.⁴⁶ The Treatises, however, uniformly hold that remaindermen of revocable trusts do not have any right to an accounting or other remedies

⁴³ The trust explicitly provided that the credit shelter trust discretionary distributions were to be governed by an ascertainable standard. In the absence of such an explicit provision, however, Maryland law may impose ascertainable standards on a trustee's/beneficiary's right to withdraw under certain circumstances. Estates & Trusts Article § 14-109.

⁴⁴ The trust document was not altogether clear and the remainderman never conceded that there was an inter vivos general power.

⁴⁵ *Johnson v. Johnson* at 655/281. "More problematic", of course, because the marital trust had language that may have provided a general power of appointment exercisable during the lifetime of the stepmother/trustee.

⁴⁶ Indeed, a trust that is silent as to revocability is presumed irrevocable under the common law. *Liberty Trust Co. v. Weber*, 200 Md. 491, 90 A.2d 194 (1952).

as long as the settlor remains competent. According to Bogert⁴⁷:

Given that a settlor's power of revocation is the equivalent of ownership of the assets subject to the power, the duties of a trustee of a revocable trust are owed exclusively to the settlor, and the trustee cannot be held liable for conduct knowingly approved by a competent settlor that otherwise would be actionable. As a result, at least while the settlor is competent, *the trustee of a revocable trust, while clearly subject to normal fiduciary duties to the settlor, is not accountable to, and is under no duty to provide information about the trust to, non-settlor beneficiaries.*

This view that the trustee of a revocable trust has an exclusive duty to the settlor and no others is supported by the Restatement (Third) of Trusts: "Furthermore, as long as the settlor (of a revocable trust) has capacity to understand and evaluate information provided by the trustee regarding the administration of the trust, the trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute."⁴⁸

A recent Kentucky case, relying on Kentucky statute, held that the trustees of a revocable trust had a duty to inform remaindermen that the remaindermen were being changed due to a modification to the trust which modification, not incidentally, also replaced the trustee giving notice.⁴⁹ That case drew strong criticism as being counter to existing law.⁵⁰

The Uniform Trust Code codifies a trustee's duty to inform a beneficiary. It limits the pool of beneficiaries entitled to information to "qualified beneficiaries" which is defined as beneficiaries either entitled to current distributions or those considered "first-line remaindermen."⁵¹ The qualified beneficiaries are to be kept reasonably informed and the UTC

⁴⁷ George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 964 (2011) (emphasis added).

⁴⁸ Restatement (Third) of Trusts, §74 (2003).

⁴⁹ *JP Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697 (Ky. 2009).

⁵⁰ Turney P. Berry, David M. English & Dana G. Fitzsimons, *Longmeyer Exposes (or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust*, 35 ACTEC L.J. 125 (2009).

⁵¹ UTC § 103, cmt.

spells out the scope of the information that is to be provided.⁵²

The Uniform Trust Code backstops the duty to inform by making these provisions part of the mandatory, non-modifiable, rules governing trusts regardless of the terms of a specific trust.⁵³ The Uniform Trust Code, however, makes this an optional mandatory rule that may be somewhat modified on a state-by-state basis.⁵⁴ The Maryland Trust Code follows the Uniform Trust Code and makes the provisions part of the non-modifiable, mandatory rules for trusts.⁵⁵

DISTRIBUTIONS AND TRUSTEE DISCRETION

4.1 *Settlor Intent: Support/Discretionary Trusts.* The beginning point as to the extent and degree that a beneficiary may compel a distribution is, of course, the intent of the settlor as that intent is captured by the terms of the trust. Restatement (Second) of Trusts § 128 (1959) ("The extent of the interest of the beneficiary of a trust depends upon the manifestation of intention of the settlor ...")

Historically, the manifestation of this intention was generally fitted into two distinct categories; whether the trust was a "support" or "discretionary" trust:

d. Discretionary trusts. By the terms of the trust it may be provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his discretion shall see fit to pay or apply. In such a case it depends upon the manifestation of intention of the settlor to what extent the trustee has discretion to refuse to make such payment or application. If the settlor manifests an intention that the discretion of the trustee shall be uncontrolled, the beneficiary cannot compel the trustee to make any payment to

⁵² UTC § 813. The Maryland Trust Act follows suit. See § 14.5-103 and § 14.5-813 of the Maryland Trust Code.

⁵³ UTC § 105(b) sets out the non-modifiable terms. For qualified beneficiaries the non-modifiable term is only regarding those beneficiaries 25 years of age or older.

⁵⁴ See Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (Summer 2005) ("The intention between the concept of information and reporting is a fundamental duty of the trustee and the desire of some settlors to limit or eliminate information and reporting has led to controversy over the information and reporting provisions in the UTC.") Mr. Millard sets out some of the state variations to the duty to inform. Also see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 202 (2002) ("The most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the '... disclosure requirements.'") Professor English was the reporter for the UTC.

⁵⁵ Maryland Trust Code, §§ 14.5-106, 14.5-813 A.

him or application for his benefit, if the trustee does not act dishonestly or arbitrarily or from an improper motive. See § 187.

* * *

e. Trust for support. By the terms of the trust it may be provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary. In such a case the beneficiary cannot compel the trustee to pay to him or to apply for his benefit more than the trustee in the exercise of a sound discretion deems necessary for his education or support.⁵⁶

In practice, the two categories are not separate and distinct, but matters of the degree of latitude that a Court will give to the trustee in his or her exercise, or non-exercise, of discretion:

A discretionary trust is one in which the settlor gives the trustee authority over the trust, for example, to use discretion in the timing and amount of income payments to the beneficiary. A settlor may provide that the trustee have "sole, absolute and uncontrolled" discretion whether to pay or apply trust income or principal to or for the benefit of the beneficiary. The settlor may also give less latitude to the trustee's discretion, for example, describing it as "sound discretion," or "as the trustee deems appropriate," or simply, "the trustee's discretion." If the settlor does not impose any standards or guides that the trustee is to consider, these trusts are sometimes called pure discretionary trusts. However, it has become more common for the settlor to limit the trustee's discretion by a standard, for example, for the trustee to exercise discretion for the support and education of the beneficiary. These are also now considered discretionary trusts. These descriptions of the trustee's discretion and the standards for application of discretion are useful to determine the beneficiary's interest in the trust; however, there is little uniformity between, or even within, jurisdictions.

Even with a pure discretionary trust in which the trustee's discretion is "sole and absolute," or "uncontrolled," and the trust is without standards, the beneficiary may obtain judicial review to determine whether the trustee has abused that discretion. If there were no judicial review, and the terms were taken literally, the trustee would, in effect, be the owner of the trust property and the settlor's trust terms would be precatory only.

The difference in the court's review of a trustee's discretion is a matter of degree; the courts have permitted a continuum of discretion. The court will review a trustee's more extensive discretion to determine whether the trustee acted or failed to act in good faith and with proper motive. For example, a beneficiary may question the trustee's good faith where the trustee made trivial or no income payments to the beneficiary in more than one year, or made payments to some

⁵⁶ Restatement (Second) of Trusts § 128 (1959).

beneficiaries but not to others who are in similar circumstances. Some courts determine whether the trustee acted arbitrarily and capriciously.

The Restatement (Second) of Trusts § 187 position was that the trustee must act "in a state of mind contemplated by the settlor," and this position is repeated in the Restatement (Third). For example, under a direction for the trustee to pay income for the settlor's spouse's "comfortable support and maintenance," a court will review the trustee's very parsimonious payments to the surviving spouse as an abuse of discretion for failing to follow the settlor's guidance and ignoring the settlor's state of mind.

At the other end of the continuum, where the trustee's discretion is least extensive, courts may give the trustee less latitude and review for reasonableness. A court will not set aside a trustee's reasonable exercise of discretion. Thus, if one term of a trust provides for the trustee, "in his sole and absolute discretion," to make payments of principal to the beneficiary where the trustee determines that the beneficiary is capable of wisely investing the funds, but also another term provides that the trustee "in his discretion," make payments of principal to the beneficiary for emergencies in the beneficiary's health, a court, reviewing for the trustee's abuse of discretion, should defer more to the trustee's decision whether the beneficiary is capable of investing wisely than it defers to the trustee's decision not to make payments where the beneficiary claims a health care emergency.

In fact, however, courts do not always distinguish these terms in their review of the trustee's abuse of discretion. Courts will always require the trustee to act in good faith and to accomplish the trust's purposes. They also often require the trustee to act reasonably. One court, for example, interpreting trust language that ranged from "discretion" over income payments, "sole discretion" over principal payments, and "sole discretion" that was "absolute and binding," said that it would not interfere with trustees who acted "in good faith from proper motives, and within the bounds of reasonable judgment."

When a settlor creates a discretionary trust that imposes standards for the beneficiary's support or for support, maintenance, and education, these trusts are now often called discretionary support trusts. The courts have had difficulty determining how to enforce the beneficiary's interest in these trusts. Because of the support standard, the trustee's discretion is more restricted than it would be under a pure discretionary trust, but the trustee has more discretion than in a pure support trust. Trust terms for support have been interpreted to mean that the trustee is to be guided by the beneficiary's accustomed standard of living, or "station in life," and usually also includes support for the beneficiary's household. Discretionary support trusts are also treated in § 229, post.

The Restatement (Third) of Trusts and the Uniform Trust Code now eliminate the distinction between discretionary and support trusts, treating the latter as a

discretionary trust with a standard.⁵⁷

4.2 ***The Support/Discretionary Trust Distinction in Maryland.*** An illustration of the use – and elasticity – of these categories in Maryland occurs in *First National Bank of Maryland v. Department of Health and Mental Hygiene*.⁵⁸ In that case, a trust was established for the benefit of the testatrix's daughter who resided in Spring Grove Hospital for over twenty years. The terms of the trust document would probably be characterized by Bogert as a "hybrid": ("My trustees ... shall pay from time to time the net income and so much of the principal as they, in their absolute and uncontrolled discretion, may determine, to my daughter, Annesley Bond Baugh, or, in their absolute and uncontrolled discretion, may apply the same for her maintenance, comfort or support.") The trustees refused to invade principal to pay Spring Grove Hospital thus forcing the shortfall to the state of Maryland.

The *First National* Court saw the classification of the trust as either support or discretionary as determinative:

The paramount issue now before us is whether the trust principal may be charged with the costs of the care of Annesley Bond Baugh. The answer to this question, in turn, depends on which of two commonly recognized types of trusts the testatrix intended to create, that is, whether by the fifth item of her will she intended to establish a support trust or a discretionary trust.

A support trust, it is generally recognized, is one that provides that "the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary . . . ," thereby barring the beneficiary from transferring his interest and precluding his creditors from reaching it. Restatement (Second) of Trusts s 154 (1957); Accord, G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* s 229, at 726 (2d ed. 1965); 2 A. Scott, *The Law of Trusts* s 154, at 1176 (3d ed. 1967). If this trust were entirely for the support of Miss Baugh, however, she could, by showing the trustees have abused their discretion, compel them to make any payment reasonably necessary for that purpose, *Offutt v. Offutt*, 204 Md. 101, 110, 102 A.2d 554, 559 (1954) (quoting Restatement of Trusts s 128, Comment e (1935)); likewise, this Court has recognized that when a supplier of necessities the State in this case has a

⁵⁷ George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 228 (2011).

⁵⁸ *First Nat. Bank of Md. v. Dept. Health and Mental Hygiene*, 284 Md. 720, 399 A.2d 891 (1979).

claim against the beneficiary of a support trust, the interest of the beneficiary in the trust can be reached to compel payment for the required items or services. *Safe Deposit & Tr. Co. v. Robertson*, 192 Md. 653, 660, 65 A.2d 292, 295 (1949) (quoting *Restatement of Trusts* s 157 (1935)); See *Pole v. Pietsch*, 61 Md. 570, 573-74 (1884).

In contrast, if, by direction of the settlor, all or any part of the trust assets can be totally withheld from the beneficiary by the trustees then, to the extent it can be so retained, a discretionary trust would be created. The *Restatement of Trusts*, Second, sets forth the definition and incidents of a discretionary trust as follows:

(I)f by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal. (*Restatement (Second) of Trusts* s 155(1) (1957).)

Accord, G.G. Bogert & G.T. Bogert, *Supra*, s 228, at 717, 720-21; 2 A. Scott, *Supra*, s 155, at 1180. Thus, payment cannot be compelled out of a discretionary trust unless it is shown that the trustees have acted arbitrarily, dishonestly, or from an improper motive in denying the beneficiary the funds sought. *Restatement (Second) of Trusts* s 128, Comment d (1957); See *Offutt v. Offutt*, *supra*, 204 Md. at 110, 102 A.2d at 558.

The Court then determined that the trust was a discretionary trust, at least as to corpus, regardless of the modifying language.

4.3 ***Eliminating the Categories under the UTC and Restatement (Third).*** As noted above, the *Restatement (Third) of Trusts* and the *Uniform Trust Code* eliminated the distinction between support and discretionary trusts, generally treating a support trust "as a discretionary trust with a standard."⁵⁹ This approach drew some heated debate. Critics of the approach adopted by the *Restatement (Third)* and the *Uniform Trust Code* perceived that there was a change from the common law of trusts and that this change exposed trust assets to heightened exposure to the claims of the beneficiaries' creditors. Mark Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 *Est. Plan.* 375 (2004). Such criticism has drawn pronounced refutation. Kevin D. Millard, *Rights of Trust Beneficiaries Under the*

⁵⁹ George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* § 228 (2011).

Uniform Trust Code, 34 ACTEC L.J. 57, 63 (2008) ("[N]ote that the theory that a creditor could not reach the trust because the creditor stood in the shoes of the beneficiary and the beneficiary could not force distributions from the trust was flawed, because no matter how broadly worded the trustee's discretion was, it was always subject to review by a court for abuse."); Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 Cardozo L. Rev. 2551, 2581 (2006) ("Implicit in the critics' argument is the assertion that, by granting a trustee extended discretion, the trustee's exercise of that discretion becomes essentially unreviewable. But this has never been true at common law. An essential principle of the common law of trusts is that a trustee's exercise of discretion is always subject to judicial review, no matter how broadly the trustee's discretion may be described ... [T]hat will not be interpreted so as to relieve the trustee from an obligation to account for its discretionary judgments. Because a trustee is a fiduciary, it would be inconsistent with the concept of a trust to insulate a trustee's exercise of discretion from all judicial review."); Also see Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 567, 601-618 (2005) and Richard E. Davis, *Uniform Trust Code and SNTs; Should UTC Be Feared, Embraced or Ignored?*, 5 NAELA J. 13, 49 (2009):

Most of the UTC is non-controversial. Furthermore, in most situations it strengthens the protections afforded to beneficiaries of spendthrift and SNTs. Attacks on the effect of UTC adoption on SNTs by critics contain numerous unsupported statements, mischaracterizations and misinformation about the UTC and about American trust law in general. Most states have developed a significant amount of case law defining the relationships between trustee and beneficiary. The few post-enactment UTC decisions dealing with Medicaid eligibility that have appeared, together with the 2009 POMS (Program Operations Manual System of the Social Security Administration) provisions, have done nothing to change that. The changes made by the UTC are founded on sound public policy and do nothing to undermine SNT planning.

4.4 ***Retaining the Categories Under the Maryland Trust Code Proposal.*** Unlike the

Uniform Trust Code, the Maryland Trust Act retains the distinction between support and discretionary trusts. Almost any discretionary provision sweeps the trust into the discretionary trust category under the Maryland proposal.⁶⁰ Nevertheless, discretionary trusts are subject to Court oversight for trustee abuse of discretion (including the failure to act reasonably in exercising discretion).⁶¹ The claims of creditors to discretionary trusts, however, are severely limited under the Maryland Trust Act as is the case under the UTC.⁶²

4.5 ***Ascertainable Standards and Estate Planning.*** Many trusts, of course, with an eye on the estate tax exclusionary rules, provide the corpus distributions (or, for that matter, income distributions) are to be governed by an "ascertainable standard." Indeed, by tying trustee discretion to an ascertainable standard, married couples can engage in estate planning without imposing on the surviving spouse a third party trustee. It permits the surviving spouse to be his or her own trustee which often is the recommended estate planning technique:

In terms of the marital planning endeavor, the most common form of marital and non-marital Trust drafting entails a relatively simple structure that we all know well. The non-marital Trust receives the largest amount of a married decedent's gross estate that can pass with the least amount of federal estate tax (with a potential state death tax cost in some "decoupled" jurisdictions – that part of this planning has not yet been resolved by most planners). In 2008 this means the first \$2 million goes into the non-marital Trust. The balance of the estate typically qualifies for the marital deduction.

* * *

[M]y *default* recommendation (all other things being equal) would be (to the extent the client is willing and the spouse is able) to begin with a template or recommended plan that would ... make the spouse trustee of each (trust.)⁶³

The foundation of this basic estate planning technique is the rule that a beneficiary is not

⁶⁰ Maryland Trust Act § 14.5-104(C).

⁶¹ Maryland Trust Act § 14.5-203.

⁶² Maryland Trust Act § 14.5-502.

⁶³ Jeffrey N. Pennell, *The Joseph Trachtman Lecture – Estate Planning For The Next Generation(s) Of Clients: It's Not your Father's Buick Anymore*, 34 ACTEC L.J. 2, 8-9 (2008).

the "owner" of a trust even if the beneficiary is the trustee of that trust as long as the discretionary distributions are limited to an "ascertainable standard." 26 U.S.C.A. § 2041(b)(1)(A) provides that the federal gross taxable estate includes all property over which a decedent had a general power of appointment or a power to invade except for a power to invade that is limited by an ascertainable standard: "A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment." Thus, it is possible for the beneficiary to be the sole trustee or a co-trustee of a trust for his or her benefit as long as the power to make discretionary payments is limited by such an ascertainable standard. The distinguishing feature of a limited power of appointment, as opposed to a general power of appointment, is that the standard permits the power to be exercised in a manner "reasonably measurable in terms of [the beneficiaries'] needs." U.S. Treas. Reg. § 2041-1(c)(2).

The federal gift tax provisions run parallel to the estate tax provisions in the treatment of an ascertainable standard. Under the gift tax provisions, the exercise of a general power of appointment is deemed to be a transfer by the donee of the power but the exercise of a power to consume or invade limited by an ascertainable standard is exempted from the general rule. 26 U.S.C.A. § 2514(c)(1). The gift tax regulations give a description of powers of appointment that are limited by ascertainable standards:

A power is limited by such a standard (an ascertainable standard) if the extent of the possessor's duty to exercise or not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). As used in this subparagraph, the words "support" and "maintenance" are synonymous and their meaning is not limited to the bare necessities of life. A power to use property for the comfort, welfare or happiness of the holder is not limited by the requisite standard. Examples of powers that are limited by the requisite standard are powers exercisable by the holder's "support,"

"support and reasonable comfort" "maintenance in health and reasonable comfort," "support in his accustomed manner of living," "education, including college and professional education," "health," and "medical, dental, hospital and nursing expenses and the expenses of invalidism."

U.S. Treas. Reg. § 25.2514-1(c)(2).

4.6 ***Ascertainable Standards are Measurable.*** The "ascertainable standards" are ascertainable for the very reason that they are measurable. In *Ithaca Trust Co. v. United States*, 279 U.S. 151, 49 S. Ct. 291 (1929) the issue was whether a charitable estate tax deduction was permissible where a trust for the widow's maintenance "in as much comfort as she now enjoys" preceded the gift over to the charity. The Supreme Court upheld that the deduction for the gift over stating: "The standard was fixed in fact and capable of being stated in definite terms of money." Because the ascertainable standards are fact based, such standards are not rooted in the opinion of the trustee/beneficiary. In a New York case, for example, the issue was whether the widow, who was a co-trustee of a trust for her benefit to maintain her standard of living, could unilaterally determine the extent of the principal invasion. In that case, the Court held that she did not have the right to determine the extent of the principal invasion: "'standard of living' is therefore the manner in which one lives at a particular time; it is a fact to be established by proof of relevant circumstances ... they are facts which may be readily established ... contrary to the counsel for the trustees, the decedent did not intend to confer upon the trustees the power to determine her 'standard of living.' 'Standard of living' is a fact not an opinion." *In Re Golodetz' Will*, 118 N.Y.S.2d 707, 713 (N.Y. 1952) (In *Golodetz* the trustees had "absolute and uncontrolled" discretion to invade the principal to maintain the widow in her accustomed standard of living.) Nor are the ascertainable standards of support and maintenance to be determined by a beneficiary: "It is clear that the Testator did not intend the last-quoted clause (the standard of living clause) to constitute a designation of his wife as the person to determine

the amount to which she is entitled from the trust and hence it is a matter for the Court to determine upon a proper showing. It may be observed, moreover, that the construction urged upon us by the Petitioner (the widow) would enable her in effect to destroy the trust." *In Re Morse' Will*, 98 N.Y.S.2d 43, 47 (N.Y. Sur. 1950).

4.7 ***The Rights of Remainder Beneficiaries and Ascertainable Standards.*** A trustee, when exercising a distribution standard, must balance the needs of the current beneficiaries and the remaindermen. Indeed, this rule, characterized as a duty of impartiality informs the basis for the Uniform Trust Code and the Maryland Trust Code rules requiring information to be given to the current life beneficiary and, at least, to the first-line remaindermen. The duty of impartiality governs a trustee's conduct regardless of the identity of the trustee, including when a trustee is also a beneficiary. *Caver v. Caver*, 176 Md. 171, 183, 4 A.2d 132, 138 (1939) ("As a trustee Mrs. Caver was under a duty to exercise her power to sell fairly and impartially for the equal benefit of all of the remaindermen and any grant of a gift, benefit or advantage to one remainderman at the expense of the others would constitute a breach of that duty.")⁶⁴ Restatement (Second) of Trusts § 183 (1957) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."); Restatement (Second) of Trusts § 232 (1957) ("If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."); Restatement (Third) of Trusts § 79 (2005), gen. cmt. b. at 128-129 ("The duty of impartiality is an extension of the duty of loyalty to beneficiaries ... In many modern trust situations, the trustee (or one or more co-trustees) will be a life beneficiary or perhaps a remainder beneficiary. In a case of this type, there will inevitably be some conflicts of interest that are approved, implicitly at least either

⁶⁴ Mrs. Caver was the trustee and current beneficiary who "sold" property to one of the remaindermen at less than fair market value and took back a note.

by the settlor or through an appointment process that is authorized by the terms of the trust ... In these circumstances there is, on the one hand, some inference of a preference for a confidence in the trustee-beneficiary but, on the other hand, a general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality." Internal references omitted.)

The exercise of a distribution power by a trustee (regardless of who is trustee) involves a fiduciary judgment which the Courts will oversee to prevent misinterpretation or abuse of the discretion:

§ 50. Enforcement and construction of discretionary interests.

(1) A discretionary power conferred upon the Trustee to determine the benefits of a Trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by a Trustee.

(2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the Trustee depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the Trust.

Restatement (Third) of Trusts § 50 (2001). In a word, the trustee abuses his or her discretion when he or she makes or fails to make a distribution contrary to the express terms of the trust:

[A]n abuse of discretion occurs when a trustee acts from an improper even though not dishonest motive, such as when the act is undertaken in good faith but for a purpose other than to further the purposes of the Trust or, more specifically, the purposes for which the power was granted ... [A] discretionary power to make distributions for a beneficiary's "support" does not permit the Trustee to make well-intentioned, even otherwise reasonable, distributions that are not support-related.

Restatement (Third) of Trusts § 87 cmt. c at 244 (2005). (Emphasis added.); *Waesche v. Rizzuto*, 224 Md. 573, 587; 168 A.2d 871, 877 (1961) ("A court of equity will not interfere in the exercise of the discretionary power conferred on the trustees provided that the power was honestly and

reasonably exercised. However, it must appear that the trustees acted in good faith, having a proper regard to the wishes of the testator and to the nature and character of the trust reposed in them.")

4.8 ***Extended Discretion and Court Enforcement of Distributions.*** In some trusts, however, the settlor appears to grant discretion without any standard or measurement of the settlor's intent. In those cases, the settlor grants extended discretion ("absolute" or "unlimited" or "uncontrolled" discretion). Extended discretion, according to the first two Restatements of Trusts, obviates the requirement that the trustee act reasonably:

The mere fact that that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor, may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have "absolute" or "unlimited" or "uncontrolled" discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.⁶⁵

In his treatise, Professor Scott distills the test to the "state of mind not contemplated" standard: "The real question is whether it appears that the trustee is acting in a state of mind in which it was contemplated by the settlor that he should act."⁶⁶ This shift away from "reasonableness" would appear to embrace subjective criteria which, by its nature, would be difficult for a court to second guess. It reduces the standard from a test of whether an abuse of discretion has occurred, in trusts providing for extended trustee discretion, to whether the power

⁶⁵ Restatement (First) of Trusts and Restatement (Second) of Trusts § 187, cmt. j.

⁶⁶ Scott, *supra* n. 36, § 187.

was exercised or, for that matter not exercised, in bad faith or through some other showing of improper motive and not in the state of mind contemplated by the settlor that he or she would act.

In practice, however, the courts impose a reasonableness standard regardless of whether the discretion is extended or absolute despite the early treatment in the first two Restatements:

The authorities do not appear to support the Restatement position that there is no requirement of reasonableness in the exercise of a power granted in the trustee's absolute discretion. Most courts have held that the exercise of an absolute power is subject to the court's review and determination as to whether the power had been unreasonably exercised by the trustee.⁶⁷

* * *

It would appear that the difference in the attitude of the courts towards "simple" discretionary powers, on the one hand, and "absolute" or "uncontrolled" discretionary powers, on the other hand, is one of degree rather than kind. The courts appear more likely to find an abuse of a simple discretionary power than an abuse of an absolute or uncontrolled discretionary power. In addition to the commonly recognized factors used to determine whether there has been an abuse of discretion, a standard of reasonableness has been applied by the courts in judging the exercise of a discretionary power (whether simple or absolute), a standard implied from the settlor's intent and the purposes expressed in the trust instrument. With respect to court review of discretionary powers, this standard is consistent with the standard of care and skill of a prudent man and is based upon established fiduciary standards and principles.⁶⁸

This was also the conclusion of Professor Halbach in his seminal 1961 article: that "reasonableness" was, in fact, required in every case involving extended discretion, but usually the Courts framed the discussion under "the state of mind contemplated by the settlor" standard:

[I]n numerous cases the trustee's 'absolute' or 'controlled' discretion has been overturned on much the same ground as that on which simple discretions have often been upset – typically, unreasonably small payments to the beneficiary. Such cases *can* be interpreted as coming within the *Restatement* formulation requiring the trustee to act in the 'state of mind' ... contemplated by the settlor, 'and the modern opinions, almost without exception, have expressed their results

⁶⁷ Bogert, *supra* n. 34, § 560.

⁶⁸ George G. Bogert, George T. Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 560 (rev. 2d ed. Cum. Supp. 2009).

in these terms when interfering with the trustee's judgment. Even though language in the decisions tends to perpetuate the *Restatement's* wording of the rule, any distinction between the test of reasonableness and the state-of-mind test is difficult to discern from the holdings of these cases. In fact, the requirements set out in the dicta of some cases, phrased in terms of requiring 'reasonable judgment' and 'sound discretion,' go far in obliterating any such distinction.⁶⁹

If good faith was purely subjective (the "pure heart" test), enforcement would be illusory – effectively negating the trust. Trusts presuppose giving enforceable rights to beneficiaries. In a Delaware case, for example, the trust instrument stated that distributions by a committee of trustees were "not subject to review by any court." In that case, the Court ignored the provision: "A trust where there is no binding legal obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property."⁷⁰

4.9 ***Extended Discretion and the Uniform Trust Code.*** The non-modifiable Uniform Trust Code good faith standard, like the standard traditionally governing extended discretion under common law, is applied in a way to implement the settlor's intent and to benefit the beneficiaries. As such, it implies the reasonable exercise of discretion. This mirrors the approach of the Restatement (Third):

§ 50. Enforcement and construction of discretionary interests.

(1) A discretionary power conferred upon the trustee to determine the

⁶⁹ Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425, 1429 (1961), Professor Halbach's article followed the Restatement (Second) of Trusts by two years but collects and discusses cases that largely substantiate the discussion of the enforcement of discretionary trusts contained in § 50 of the Restatement (Third) of Trusts. That this is so, of course, should come as no surprise as Professor Halbach is its Reporter. The cases that Professor Halbach discusses in his article should further put to rest any suggestion that the Restatement (Third) of Trusts radically departed from existing law in this regard.

⁷⁰ *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. Supr. Ct. 2002). There are potential adverse federal tax consequences if a trustee cannot be held to a reasonableness standard as to discretionary distributions. One of the exceptions to grantor income tax inclusion, for example, requires that a power to appoint must be under a reasonably definite, ascertainable standard: "[I]f a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or non-exercise of a power, the power is not limited by a reasonably definite standard." Treas. Reg. § 1.674(b)-1(b)(5)(i). A similar position could be advanced for federal gift and estate tax purposes. Thus when drafting provisions giving a trustee, who is also a beneficiary, distribution discretion under "ascertainable standards," it may be prudent not to use extended discretion language. Generally, of course, a trust without the trustee's obligation to account is not a trust: "A settlor who attempts to create a trust without any accounting in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity." Bogert, *supra* n. 34, at § 974.

benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.

(2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust.⁷¹

Thus, where under § 187 of the Restatement (Second) a trustee's exercise or non-exercise of a discretionary power is only subject to review upon a showing of "abuse," now under § 50 of the Restatement (Third), a trustee may be second-guessed by a Court if the trustee's exercise of a discretionary power was grounded in a "misinterpretation" or the "abuse" of the discretion, and "abuse" is broadly defined. In either event, the standard governing trustee conduct, regardless of whether such trustee enjoyed extended discretion, was never simply that of good faith alone but good faith in reasonably implementing the settlor's intent for the benefit of the beneficiary.⁷²

Neither under the Uniform Trust Code, or at Common Law, is good faith used in the contract law sense. Although "good faith" forms an important role under the Uniform Trust Code, it is not a defined term and one would expect the Courts to continue to use the extensive body of the common law of trusts for an understanding of its sense and definition.⁷³ Whether in the context of a non-modifiable baseline rule under Section 105(b)(3) or when defining the limits of absolute discretion under Section 814(a), good faith under the Uniform Trust Code should be understood in its traditional trust sense. It approximates the Common Law of trusts and, by wedding good faith to the settlor's intent and the interests of the beneficiaries, it dances back to a

⁷¹ The Restatement (Third), § 50.

⁷² In one Maryland case, for example, the Court held that the job of the Court is to imagine the testatrix's world view to ascertain her intent. *Bregel v. Julier*, 253 Md. 103, 111, 251 A.2d 891, 895 (1969) ("Sitting in Loretta's armchair, her testamentary intent becomes clear.")

⁷³ Professor Langbein (one of the Uniform Trust Code drafters), however, suggests that one look to the body of law in contract discussing the meaning of "good faith." John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, at note 96 (2004) (directing one to a treatise by Professor Robert S. Summers for "a succinct account of the nuances developed in contract law ... emphasizing the core notion of honest dealing."). The UTC did not so restrict the definition.

general fiduciary duty that cannot be modified by the terms of the agreement: "[A] settlor may not so negate the responsibilities of the trustee that the trustee would no longer be acting in the fiduciary capacity."⁷⁴

Indeed, the standards regulating a trustee's exercise of discretion as to beneficiary distributions are generally seen as the exercise of fiduciary duty:

A trustee's discretionary power with respect to trust benefits is to be distinguished from a power of appointment. The latter is not subject to fiduciary obligations and may be exercised arbitrarily within the scope of the power.⁷⁵

It is the fiduciary nature of the exercise of discretion that guarantees review and regulation by the Courts: "[N]o language, however strong, will entirely remove any power held in trust from the reach of a Court of Equity."⁷⁶

⁷⁴ Unif. Trust Code § 105, cmt. Within limits, of course, section 105 permits modification of the basic fiduciary duties, including the duty of loyalty. Sections 105(b)(3) and 814(a) provide absolute backstops to the ability to modify such duties by prohibiting the elimination of the obligation to act in good faith and in accordance with the terms and purposes of the trust and in the interests of its beneficiaries. The "missing" piece of this litany, if you will, is the obligation to act in the "sole" interest of the beneficiaries. This opens the door to permitting trustees to engage in acts of self-interest as long as the activity is in the best interest of the trust beneficiaries. Langbein, *Questioning the Duty of Loyalty*, *supra* n. 17; Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor Langbein*, 47 Wm. & Mary L. Rev. 541 (2005). The benefit-the-beneficiaries rule is mandatory. Langbein, *Mandatory Rules*, *supra* n. 45, at 1112 ("A default rule is one that the settlor can abridge, but only to the extent the settlor's term is 'for the benefit of [the] beneficiaries.' The requirement that there be benefit to the beneficiaries sets the outer limits on the settlor's power to abridge the default law.") Coupled with the modern portfolio theory of trust investing, the benefit-the-beneficiary rule may cause difficulties when a settlor wishes to have a trust hold a particular asset instead of a broad array of assets and asset classes. Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. Rev. 1165, 1168 (2008) ("Under Professor Langbein's formulation of the benefit-the-beneficiaries rule, the 'benefit' of a trust provision is determined by reference to objective notions of prudence and efficiency rather than the settlor's subjective intent. Carried to its logical extreme, this emerging reading of the benefit-the beneficiary rule (the 'emerging rule') could redefine the area of trust investment management. Trust documents frequently include specific investment management directives, such as a mandate that the trustee retain a certain portfolio investment or family business. Whereas trust law historically has honored such restrictions, the emerging rule seemingly would enforce only those which maximize economic value for the trust beneficiaries. If the settlor's chosen restrictions fail this objective test of economic benefit, they simply can be cast aside."); Benjamin H. Pruett, *Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective*, 35 ACTEC L.J. 331, 352 (2009) ("These provisions (the benefit-the-beneficiary rules) leave open the possibility that any provision of a trust that deviates from normal fiduciary practice might be found to be 'out of bounds' on the grounds that such a provision violates the rule that the trust provisions must be 'in the interest of' and 'for the benefit of' the beneficiaries.")

⁷⁵ Restatement (Third) § 50 cmt. a.

⁷⁶ *Stix v. Comm.*, 152 F.2d 562, 563 (2nd Cir. 1945) (J. Learned Hand) (A case involving a trust providing the trustee with "sole and exclusive discretion.") The modern fusion of equity and law courts supplies Professor Langbein with an additional support for his view that trusts should be treated as contracts. Langbein, *Contractarian*, *supra* n. 6, at 649 ("Scott was alarmed over the movement then underway to bring about the fusion of law and equity

TRUSTEE INVESTMENT OBLIGATION

5.1 ***The "Prudent Man Standard."*** Before the enactment of Estates & Trusts § 15-114 (The Prudent Investment Standards), Maryland generally followed the "prudent man standard":

As stated above, one of the common-law fiduciary duties is the requirement that trustees act prudently in managing trust affairs. *Shipley v. Crouse*, 279 Md. 613, 621, 370 A.2d 97 (1977); *Zimmerman v. Coblenz*, 170 Md. 468, 484, 185 A. 342, 349 (1936); *Johnson v. Webster*, 168 Md. 568, 576, 179 A. 831, 834 (1935); *Fox v. Harris*, 141 Md. 495, 506, 119 A. 256, 260 (1922); *Gilbert v. Kolb*, 85 Md. 627, 634–636, 37 A. 423 (1897); *Gray v. Lynch*, 8 Gill 403, 431 (1849); *Green v. Lombard*, 28 Md.App. 1, 5, 343 A.2d 905, 909, *cert. denied*, 276 Md. 743 (1975). The Court in *Shipley v. Crouse*, *supra*, 279 Md. at 621, 370 A.2d at 102 (quoting G. Bogert, *The Law of Trust and Trustees*, § 541 (2d ed. 1960), explained as follows: " 'A trustee is required to manifest in all his management of the trust the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question.'"⁷⁷

The prudent man standard had its origin in *Harvard College v. Amory*,⁷⁸ which generally proscribed the trustees were to manage trust investments as a prudent man would manage his investments with an eye toward the long-term health of those investments rather than investing in speculative ventures:

Trust investment law in the prior Restatements was founded on the classic dictum of *Harvard College v. Amory*, admonishing trustees in general and flexible terms "to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the

in American civil procedure and judicial administration. He was worried that the fusion might remove the law of trusts from the nurturing hand of the specialist equity bench, and indeed, that fusion might cause trust litigation to be subjected to jury trial. In England and most leading American jurisdictions, the law of trusts had been the province of separate equity courts or equity divisions... Two generations later, with the place of jury-free equitable jurisdiction over trusts now secure in our fused civil procedure, we can safely acknowledge the contractarian character of the modern trust.")

⁷⁷ *Board of Trustees of Employees' Retirement System of Baltimore City v. Mayor and City Council*, 317 Md. 72, 102-103, 562 A.2d 720, 735 (1989). This case was a challenge by the trustees of the city's pension fund to a city ordinance requiring divestment in companies doing business in South Africa. The Court of Appeals held that it was not a breach of the trustees' duty of prudence to limit the universe of potential investments to those companies not doing business in South Africa.

⁷⁸ *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830).

capital to be invested." Restatement Second of Trusts ("Restatement Second") section 227 thus directed trustees "to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived." Language similar to that of Restatement Second is now found in statutes and judicial opinions in most American jurisdictions.

In the hands of the judiciary, general prudent-man principles of care, skill and caution were developed, applied and elaborated on case by case. As generalizations were articulated and an effort was made to offer guidance to trustees, the prudent man rule tended to lose much of its generality and adaptability. Decades ago it was acknowledged in a leading treatise that "what was decided in one case as a question of fact tend[ed] to be treated as a precedent establishing a rule of law." Courts showed a tendency "even in the absence of a statute to lay down definite subsidiary rules on what is and what is not a prudent investment" and to treat a case disapproving a particular investment by a trustee "as a precedent holding that no investment of that type is proper."⁷⁹

The prudent man rule generally was applied by the Courts on an investment-by-investment basis.

This approach to analyzing trustee behavior distorted "real world" investment behavior of examining the portfolio as a whole.⁸⁰

Although the general interpretation of the prudent man rule seemed to focus on asset-by-asset basis, the Maryland Courts may not take such a constrained view of the rule. In the *Baltimore City Trustees*⁸¹ case, for example, the issues of whether the city ordinance requiring divestment from companies doing business with South Africa impaired the trustees' duty of prudence was discussed in something that might be viewed as a whole portfolio theory although ultimately that Court dismissed the concern that the ordinance would preclude any investments in the largest of American large cap stocks.

5.2 ***The Prudent Investor Rule.*** In response to the constraints imposed by the

⁷⁹ Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 Iowa L. Rev. 1151, 1152 (1992).

⁸⁰ Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. Rev. 52, 66-7 (1987) ("The principle underlining ... subsequent judicial analysis, is a particular idea of safety: only if each investment is safe, measured in isolation, will the collection of investments (the portfolio) be safe.") Professor Gordon outlines how the rule of *Harvard College v. Amory*, the granddaddy of the American prudent man rule, evolved from one of common-sense judgments to a "constrained" rule that was often found in the modern cases.

⁸¹ *Board of Trustees of Employees' Retirement System of Baltimore City v. Mayor and City Council*, 317 Md. 72, 562 A.2d 720 (1989).

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:

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.

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 fn. 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 unforeseen 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 *Guisseppi 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

¹⁰² Admissibility of extrinsic evidence to aid interpretation of will, 94 A.L.R. 26 (Originally published in 1935.) (Section II(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

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 claimant 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.

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).

INDEX

Table of Cases

| | |
|--|------------|
| <i>Anderson v. Meadowcroft</i> , 339 Md. 218, 661 A.2d 726 (1995) | 13, 14 |
| <i>Board of Trustees of Employees' Retirement System of Baltimore City v. Mayor and City Council</i> , 317 Md. 72, 562 A.2d 720 (1989) | 34, 35 |
| <i>Boyd v. Bowen</i> , 145 Md. App. 635, 806 A.2d 314 (2002) | 54 |
| <i>Bradford v. Eutaw Sav. Bank of Baltimore City</i> , 186 Md. 127, 46 A.2d 284 (1946) | 43 |
| <i>Bregel v. Julier</i> , 253 Md. 103, 251 A.2d 891 (1969) | 32, 46 |
| <i>Caver v. Caver</i> , 176 Md. 171, 4 A.2d 132 (1939) | 27 |
| <i>Conrad v. Gamble</i> , 183 Md. App. 539, 962 A.2d 1007 (2008) | 57 |
| <i>Creek v. Laski</i> , 227 N.W. 817, (Mich. 1929) | 13 |
| <i>Dabney v. Chase National Bank</i> , 196 F.2d 668 (2nd Cir. 1962) | 10 |
| <i>DeMarco v. DeMarco</i> , 261 Md. 396, 275 A.2d 471 (1971) | 56 |
| <i>Ederly v. Ederly</i> , 193 Md. App. 215, 996 A.2d 961 (2010) | 50 |
| <i>Emmert v. Hearn</i> , 309 Md. 19, 522 A.2d 377 (1987) | 45 |
| <i>Estate of Walker</i> , 609 So.2d 623 (Fla. 1992) | 45 |
| <i>Farah v. Stout</i> , 112 Md. App. 106, 684 A.2d 471 (1996) | 50, 54 |
| <i>Fasman v. Pottashnick</i> , 188 Md. 105, 51 A.2d 664 (1947) | 49 |
| <i>Figgins v. Cochrane</i> , 403 Md. 392, 942 A.2d 736 (2008) | 50, 51, 57 |
| <i>First Nat. Bank of Md. v. Dept. Health and Mental Hygiene</i> , 284 Md. 720, 399 A.2d 891 (1979) | 21 |
| <i>Gage v. Hooper</i> , 165 Md. 527, 169 A. 925 (1934) | 48 |
| <i>Gilmer v. Stone</i> , 120 U.S. 586, 7 S.Ct. 689 (1887) | 46 |
| <i>Goldman v. Rubin</i> , 292 Md. 693, 441 A.2d 713 (1982) | 3 |

| | |
|---|----------|
| <i>Green v. Lombard</i> , 28 Md. App. 1, 343 A.2d 905 (1975) | 40 |
| <i>Guisseppi v. Walling</i> , 144 F.2d 608 (2nd. Cir. 1944) | 43 |
| <i>Hartlove v. Maryland School of the Blind</i> , 111 Md. App. 310, 681 A.2d 584 (1996)..... | 8 |
| <i>Harvard College v. Amory</i> , 26 Mass. (9 Pick) 446 (1830) | 34 |
| <i>Helman v. Mendelson</i> , 138 Md. App. 29, 769 A.2d 1025 (2001) | 5, 6 |
| <i>Hitchens v. Safe Deposit and Trust Company of Baltimore</i> , 193 Md. 62, 66 A.2d 97 (1949) | 11 |
| <i>In Re Golodetz' Will</i> , 118 N.Y.S.2d 707 (N.Y. 1952) | 26 |
| <i>In Re Marshall</i> , 253 B.R. 550 (Bkrcty. C.D. Cal. 2000) | 14 |
| <i>In Re Morse' Will</i> , 98 N.Y.S.2d 43. (N.Y. Sur. 1950) | 27 |
| <i>In Re Will of Dumont</i> , 4 Misc. 3d 1003(A), 791 N.Y.S.2d 868 (2004) | 40 |
| <i>Ithaca Trust Co. v. United States</i> , 279 U.S. 151, 49 S.Ct. 291 (1929) | 26 |
| <i>Jahnigen v. Smith</i> , 143 Md. App. 547, 795 A.2d 234 (2002) | 49 |
| <i>Johnson v. Johnson</i> , Case No. No. 63, September Term (2009) Pending | 15 |
| <i>Johnson v. Johnson</i> , 184 Md. App. 643, 967 A.2d 274 (2009) | 15, 16 |
| <i>JP Morgan Chase Bank, N.A. v. Longmeyer</i> , 275 S.W.3d 697 (Ky. 2009) | 17 |
| <i>Kann v. Kann</i> , 344 Md. 689, 690 A.2d 509 (1997) | 8, 9, 10 |
| <i>King v. Aker</i> , 725 S.W.2d 750 (Texas 1987) | 13 |
| <i>Kiser v. Lucas</i> , 170 Md. 486, 185 A. 441 (1936) | 49 |
| <i>Liberty Trust Co. v. Weber</i> , 200 Md. 491, 90 A.2d 194 (1952) | 16 |
| <i>Lyon v. Townsend</i> , 124 Md. 163, 91 A. 704 (1914) | 48 |
| <i>McNeil v. McNeil</i> , 798 A.2d 503 (Del. Supr. Ct. 2002) | 31 |
| <i>Marshall v. Marshall</i> , 547 U.S. 293 (2006) | 14 |
| <i>Marty v. First Nat. Bank of Baltimore</i> , 209 Md. 210, 120 A.2d 841 (1956) | 46 |

| | |
|--|------------|
| <i>National Society of Daughters of American Revolution v. Goodman</i> , 128 Md. App. 232, 736 A.2d 1205 (1999) | 51 |
| <i>Nelson v. Howard</i> , 5 Md. 327, 1854 WL 3384 (1854) | 8 |
| <i>Novara v. Manufacturers Traders and Trust Co.</i> , Slip Opinion, 2011 WL 3841538 (2011) | 9 |
| <i>Reddy v. Mody</i> , 39 Md. App. 675, 388 A.2d 555, (1978) | 52, 53, 56 |
| <i>Roos v. Roos</i> , 42 Del. Ch. 40, 203 A.2d 140 (1964) | 49 |
| <i>Saulsbury v. Denton Nat. Bank</i> , 25 Md. App. 669, 335 A.2d 199 (1975) | 11 |
| <i>Shaffer v. Lohr</i> , 264 Md. 397, 287 A.2d 42 (1972) | 48 |
| <i>Shriners Hospital for Crippled Children v. Maryland Nat. Bank</i> , 270 Md. 564, 312 A.2d 546 (1973) | 42 |
| <i>Solis v. Food Employers Labor Relations Ass'n</i> , 664 F.3d 221 (4th Cir. Md. 2011) | 58 |
| <i>Stacy v. Burke</i> , 259 Md. 390, 260 A.2d 837 (1970) | 55, 56 |
| <i>Stix v. Comm.</i> , 152 F.2d 562 (2nd Cir. 1945) | 33 |
| <i>Sullivan v. Mosner</i> , 266 Md. 479, 295 A.2d 482 (1972) | 12 |
| <i>Treffinger v. Sterling</i> , 269 Md. 356, 305 A.2d 829, 832 (1973) | 57 |
| <i>Trupp v. Wolff</i> , 24 Md. App. 588, 335 A.2d 171 (1975) | 54 |
| <i>United States v. Jicarilla Apache Nation</i> , 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011) | 60 |
| <i>Upman v. Clark</i> , 359 Md. 32, 753 A.2d 4 (2000) | 57 |
| <i>Urquhart v. Alexander & Alexander, Inc.</i> , 218 Md. 405, 147 A.2d 213 (1958) | 11 |
| <i>Waesche v. Rizzuto</i> , 224 Md. 573, 168 A.2d 871 (1961) | 28 |
| <i>Walton v. Davy</i> , 86 Md. App. 275, 586 A.2d 760 (1991) | 52 |
| <i>Woods v. Fuller</i> , 61 Md. 457, 1884 WL 5922 (1884) | 7 |
| <i>Yivo Institute for Jewish Research v. Zalenski</i> , 386 Md. 654, 874 A.2d 411 (2005) | 51 |

Statutes

| | |
|--|--------|
| Maryland Rule 5-803 | 50, 51 |
| Maryland Rule 10-501 | 10 |
| Md. Code Ann., Cts. & Jud. Proc. § 9-116 | 52 |
| Md. Code Ann., Est. & Trusts § 14-109 | 16 |
| Md. Code Ann., Est. & Trusts § 15-112 | 10 |
| Md. Code Ann., Est. & Trusts § 15-114 | 36, 38 |

Other Authorities

| | |
|--|---|
| Berry, Turney P., David M. English, and Dana G. Fitzsimons, <i>Longmeyer Exposes (or Creates) Uncertainty About the Duty of Inform Remainder Beneficiaries of a Revocable Trust</i> , 35 ACTEC L.J. 125 (2009) | 17 |
| Bogert, George G. and George T. Bogert, <i>The Laws of Trusts and Trustees</i> | 1, 2, 10, 12, 15, 17, 21, 22, 29, 30, 31, 48, |
| Boxx, Karen E., <i>Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code</i> , 67 Mo. L. Rev. 279 (2002) | 2 |
| Boxx, Karen E., <i>Distinguishing Trustees and Protecting Beneficiaries: A Response to Professor Leslie</i> , 27 Cardozo L. Rev. 2753 (2006) | 6 |
| Cogar, John A., <i>Trustee Power Tools: Income Adjustments and Unitrust Conversions</i> , 36 Md.B.J. 24 (March/April 2003) | 38 |
| Cooper, Jeffrey A., <i>Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law</i> , 88 B.U. L. Rev. 1165 (2008) | 33 |
| Danforth, Robert T., <i>Article Five of the UTC and the Future Creditor's Rights in Trusts</i> , 27 Cardozo L. Rev. 2551 (2006) | 23 |
| Davis, Richard E., <i>Uniform Trust Code and SNTS; Should UTC Be Feared, Embraced or Ignored?</i> , 5 NAELA J. 13 (2009) | 23 |
| English, David M., <i>The Uniform Trust Code: Significant Provisions and Policy</i> | |

| | |
|--|----------|
| <i>Issues</i> , 67 Mo. L. Rev. 143 (2002) | 7, 18 |
| Gordon, Jeffrey N., <i>The Puzzling Persistence of the Constrained Prudent Man Rule</i> , 62 N.Y.U. L. Rev. 52 (1987)..... | 35 |
| Halbach, Edward C., Jr., <i>Problems of Discretion in Discretionary Trusts</i> , 61 Colum. L. Rev. 1425 (1961) | 31 |
| Halbach, Edward C., Jr., <i>Trust Investment Law in the Third Restatement</i> , 77 Iowa L. Rev. 1151 (1992)..... | 35, 36 |
| Holmes, Oliver Wendell, Jr., <i>The Common Law, Lecture I-Early Forms of Liability</i> (Project Gutenberg 2000) | 7 |
| Kiziah, Trent S., <i>The Trustee's Duty to Diversify: An Examination of the Developing</i> <i>Case Law</i> , 36 ACTEC L.J. 357 (2010) | 39, 40 |
| Langbein, John H., <i>The Contractarian Basis of the Law of Trusts</i> , 105 Yale L.J. 625 (1995) | 2, 4, 33 |
| Langbein, John H., <i>Mandatory Rules in the Law of Trusts</i> , 98 Nw. U. L. Rev. 1105 (2004) | 32, 33 |
| Langbein, John H. and Lawrence W. Waggoner, <i>Reformation of Wills on the Grounds</i> <i>of Mistake: Change of Direction in American Law?</i> , 130 U. Pa. L. Rev. 521 (1982) | 42, 43 |
| Langbein, John H., <i>The Uniform Prudent Investor Act and the Future of Trust</i> <i>Investing</i> , 81 Iowa L. Rev. 641 (1996)..... | 38 |
| Leslie, Melanie B., <i>Common Law, Common Sense: Fiduciary Standards and Trustee</i> <i>Identity</i> , 27 Cardozo L. Rev. 2713 (2006)..... | 5 |
| Leslie, Melanie B., <i>In Defense of the No Further Inquiry Rule: A Response to Professor</i> <i>Langebin</i> , 47 Wm. & Mary L. Rev. 541 (2005)..... | 33 |
| Merric, Mark and Steven J. Oshins, <i>Effect of the UTC on the Asset Protection of</i> <i>Spendthrift Trusts</i> , 31 Es. Plan. 375 (2004) | 22 |
| Millard, Kevin D., <i>The Trustee's Duty to Inform and Report Under the Uniform Trust</i> <i>Code</i> , 40 Real Prop. Prob. & Tr. J. 373 (Summer 2005) | 18 |
| Millard, Kevin D., <i>Rights of Trust Beneficiaries Under the Uniform Trust Code</i> , 34 ACTEC L.J. 57 (2008) | 22 |
| Newman, Alan, <i>Spendthrift and Discretionary Trusts: Alive and Well Under the</i> | |

| | |
|--|--------|
| <i>Uniform Trust Code</i> , 40 Real Prop. Prob & Tr. J. 567 (2005) | 23 |
| Pennell, Jeffrey N., <i>The Joseph Trachtman Lecture – Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick Anymore</i> , 34 ACTEC L.J. 2 (2008) | 24 |
| Pruett, Benjamin H., <i>Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective</i> , 35 ACTEC 331 (2009) | 33 |
| Reid, Ruste, William R. Mureiko and D'Ana H. Mikeska, <i>Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary</i> , 30 Real Prop. Prob. & Tr. J. 541 (1996) | 59 |
| Sandler, Paul Mark and James K. Archibald, <i>Pleadings Causes of Action in Maryland</i> (4th Ed. MICPEL 2008) | 9 |
| Storror, Richard F., <i>Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction</i> , 56 Case W. Res. L. Rev. 65 (2005) | 41, 44 |
| Wallis, Ed, <i>An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change</i> , 53 Clev. St. L. Rev. 75 (2006) | 52 |
| 26 U.S.C.A. § 2041(b)(1)(A) | 25 |
| 26 U.S.C.A. § 2514(c)(1) | 25 |
| 40 Cath. U. L. Rev. 1 | 49 |
| 94 A.L.R. 26 (1935) | 46 |
| 90 A.L.R. 2d 924, <i>Effective Mistake of Draftsman (Other than Testator) in Drawing Will</i> (1963) | 48 |
| Maryland Trust Code § 14.5-901 | 10 |
| Maryland Trust Code § 14.5-904 | 12 |
| Maryland Trust Code § 14.5-103 | 18 |
| Maryland Trust Code § 14.5-813 | 18 |
| Maryland Trust Code § 14.5-106 | 18 |
| Maryland Trust Act § 14.5-104(C) | 24 |
| Maryland Trust Act § 14.5-203 | 24 |

| | |
|--|--------------------------------------|
| Maryland Trust Act § 14.5-502..... | 24 |
| Restatement (First) of Trusts..... | 29 |
| Restatement (Second) of Trusts (1959) & (1987)..... | 1, 8, 12, 18, 27, 29, 30, 31, 48 |
| Restatement (Third) of Trusts (2003)..... | 1, 2, 17, 22, 27, 28, 31, 33, 36, 41 |
| Restatement (Second) of the Law of Torts (1979)..... | 8, 13 |
| Treasury Regulation § 1.674(b)-1(b)(5)(i) | 31 |
| Treasury Regulation § 2041-1(c)(2)..... | 25 |
| Treasury Regulation § 25.2514-1(c)(2)..... | 26 |
| Uniform Trust Code § 103 | 17 |
| Uniform Trust Code § 813 | 18 |
| Uniform Trust Code § 814 | 32 |
| Uniform Trust Code § 105 | 18, 32 |
| Uniform Trust Code § 1001 | 10 |