

Estate/Trust Planning & Litigation Topics

**St. Mary's County Bar Association
Continuing Legal Education
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The Law of Estates and Trusts
Planning · Administration · Litigation

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Publications

Lawyers of the firm have published articles on tax and other topics related to their professional interests, including: "*Medicaid Planning for Maryland Family Lawyers*," MARYLAND BAR JOURNAL, Vol. 49, No. 2 March/April 2016 (Co-Author with Phyllis J. Erlich); "*Self-Settled Asset Protection Trusts for Married Couples in Maryland*," Steve Leimberg's Asset Protection Planning Newsletter (April 2015); "*The Terms of the Trust: Extrinsic Evidence of Settlor Intent*" ACTEC JOURNAL, Spring 2014 (Co-author with Anna Katherine Moody); "*Benevolent Benefactors Be Aware: Changes in Medicaid Policy Result in Fairer Treatment of Gifts*," MARYLAND BAR JOURNAL, Vol. 47, No. 3, May/June 2014 (Co-author with Laurie S. Frank); "*Is this the Death of Ahlborn? The Self-Defeating Expansion of States, Authority to Seek Reimbursement Under the Medicaid Secondary Payer Act*," NAELA NEWS, February/March 2014 (Co-author with Jason A. Frank). "*Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*," ACTEC JOURNAL, Winter 2010; "*Asset Protection and Tenancy by the Entirety*," ACTEC JOURNAL, Spring 2009; "*Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*," MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES, 1996.

Lectures/Course Presentations

Lawyers of the firm participated as a lecturers in various continuing education programs for lawyers, including: "*Succession Planning: Not Just for Senior Lawyers*" (MSBA 2018); "*A Survey of the Common Types of Fiduciary Litigation*" (University of Baltimore Law Forum 2018 Symposium); "*Estate Planning for Federal Employees*" (U.S. Census Bureau 2018); "*Deadman Statute and Hearsay Issues and Objections for Orphans' Court Judges*" (Judicial College of Maryland 2018); "*Elder Financial Abuse: 2018 Update*" (MSBA 2018); "*Pesky and Persistent Evidentiary Issues in Estate & Trust Litigation*" (MSBA 2018); "*Avoiding Will Contests*" (ACTEC Annual Meeting 2018); "*Contested Guardianships*" (NAELA Maryland-DC Chapter 2017); "*Will Drafting in Maryland*" (MSBA 2017); "*Transmittal of Issues from Orphans' Court to Circuit Court*" (Judicial College of Maryland 2016); "*ABA Section of Real Property, Trust & Estate Law Domestic Asset Protection Trust*

Planning: Jurisdiction Selection Series” (eCLE, ABA 2015); *“Document Drafting for the Elder Law Practitioner”* (MSBA 2015); *“Orphans’ Court Judges’ Orientation”* (Judicial Institute of Maryland 2015); *“The Maryland General and Limited Power of Attorney Act”* (ACTEC Mid-Atlantic Region 2015); *“Maryland Trust Act,”* (MSBA 2014); *“Heirs, Legatees and Related Issues”* (Judicial Institute of Maryland 2013); *“Estate/Tax Implications of DOMA after the Windsor Case”* (MSBA 2013); *“Asset Protection, An Overview for Maryland Estate and Trust Lawyers”* (MSBA 2013); *“Terms of the Trust”* (ACTEC Mid-Atlantic Region 2013); *“A Beneficiary’s Right to Information”* (MSBA 2012); *“Trust Litigation: The Enforcement of Beneficiary Rights”* (MSBA 2011); *“Asset Protection: An Overview for Maryland Estate and Trust Lawyers”* (MSBA 2010); *“Back to the Future, Schoukroun and the Spousal Election”* Hot Topics in Elder Law, (MICPEL 2009); *“A Match Made In Heaven – Using Tenancy by the Entirety for Creditor Protection Without Sacrificing Estate Planning”* (MSBA 2009); *“The Estate Planning Implications of Stripping Fiduciary Duty From the Revised Uniform Limited Partnership Act”* (ACTEC Maryland/DC Meeting 2009); *“Choice of Law: Tenants by the Entirety Across State Lines”* (ACTEC Mid-Atlantic Region 2009); *“Aspects of Disclaimers Under the Uniform Disclaimers Property Interests Act”* (Estate Planning Council of Delaware 2008); *“Asset Protection – A Guide for Maryland Estate and Trust Lawyers”* (MICPEL Advance Estate Planning Institute 2006); *“Revocable Inter Vivos Trusts”* (MICPEL 2004 and 2006); *“Valuation Discounting”* (MICPEL 2003; MSBA 2002 and 2003); *“Business Valuation”* (MICPEL 1998); *“Family Partnerships”* (MICPEL 1996); *“Avoiding Probate - Will Substitutes”* 1996; *“Basic Estate Planning”* (MICPEL 1993).

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1.0 Court of Appeals on Will Formalities

1.1 Requirement For a Valid Will:

"[E]very will should be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator." Est. & Trusts § 4-102.

The statute allows two exceptions: a wholly holographic will by a testator serving in the armed services signed outside the U.S. is valid for a limited period of time [Est. & Trusts § 4-103] and a will in writing signed by the testator if it conforms with the law of domicile or where executed. [Est. & Trusts § 4-104]. This latter provision permits holographic wills if valid in the jurisdiction where executed.

1.2 Origin of Valid Will Requirements

"[T]he statutory requirements for the valid execution of a will have remained virtually unchanged in Maryland for over two hundred years. In 1798, the General Assembly enacted the first testamentary statute in Maryland, which included strikingly similar language for devises ..." *Castruccio v. Est. of Castruccio*, 456 Md. 1, 7 (2017).

Essentially, the required will formalities grew from the English Statute of Frauds governing transfers of interests in land. *Casson v. Swogell*, 304 Md. 641, 649 (1985). Its purpose is to guard against fraud by requiring certain formalities including the solemn attestation of the witnesses. *Id.* at 650, quoting Lord Mansfield from a 1757 case.

1.3 The Court of Appeals Will Formalities Case

In *Castruccio v. Est. Castruccio*, 456 Md. 1 (2017) ("the Castruccio Caveat Case"), the Court of Appeals revisited will formalities.

The Appellant pressed three main arguments:

- That the will was defective because the witnesses signed on a page not also containing the testator's signature and that page was not attached to the signature page.
- That the will was not entitled to a presumption of due execution because the attestation clause did not recite the statutory requirement that the witnesses signed in the presence of the testator.
- That there were certain disputed facts that precluded summary judgment.

1.3.1 Witnesses signing on the same page or physically attached to the testator's signature page.

The basis for the contention was from *Shane v. Wooley*, 138 Md. 75 (1921).

In *Shane*, Mrs. Shane signed her name at the foot of a one page will.

The one page will was put in an envelope and sealed. The "witnesses" signed the outside of the envelope with an attestation clause.

The *Shane* court held that the witnesses signatures on the envelope did not constitute valid attestation.

The Court of Appeals in the Castruccio Caveat Case distinguished between *Shane* which involved a one page will and the rule governing multi-page wills.

Shane, per the Court of Appeals, established a rule that if the witnesses are not signing the will itself but a separate paper, that paper must be physically connected to the will in order for it to satisfy the statutory requirements.

The rule for a multi-page will is different: a multi-page will is not invalid merely because the pages are not physically connected, as long as "they are connected by their internal sense by coherence or adoption of parts." [Quoting from a 1913 North Carolina case, *In Re Swaim's Will*, 78 S.E. 72 (1913) which, in turn, quotes from Lord Mansfield in *Bond v. Seawell*, 3 Burr. 1774: "If the first sheet was in the room at the time when the latter sheet was executed and attached, there would be no doubt of its being a good will and a good attestation of the whole will."]

1.3.2 The Content and Importance of an Attestation Clause

An attestation clause is not a requirement of a valid will. Those requirements remain that a will must be (1) in writing, (2) signed by the testator or by someone at the testator's express direction in his presence, and (3) attested and signed by 2 credible witnesses.

The proponent of a will carries the burden of proving the elements of a valid will by the preponderance of the evidence. *Groat v. Sundberg*, 213 Md.App. 144, 152 (2013).

An attestation clause is a provision at the end of a will that recites the formalities required for a valid will that is signed by the witnesses. *Slack v. Truitt*, 368 Md. 2 (2002).

One way the proponent of the will establishes its validity is through an attestation clause in the will itself: "[A]n attestation clause reciting facts necessary for the valid execution of a will is prima facie evidence of due execution of the will ..." *Van Meter v. Van Meter*, 183 Md. 614 (1944).

Once the presumption of due execution attaches to a will, the caveator has the burden to show by "clear and convincing evidence that the facts stated in the attestation clause are untrue." *Slack v. Truitt*, 368 Md. 2 (2002).

The attestation clause in the Castruccio Caveat Case was deficient in that it failed to state that the witnesses signed in the presence of the testator. Thus the attestation clause, standing alone, was not prima facie evidence of due execution.

The circuit court, however, found that the testimony of the witnesses coupled with the imperfect attestation clause met the burden and there was "sufficient evidence from the document and/or surrounding circumstances to make a prima facie case for the satisfaction of the statutory requirements for execution of a will." [*Castruccio* at 32.]

Once the prima facie threshold was met, the caveators needed to show by clear and convincing evidence that it was not duly executed.

1.3.3 Summary Judgment Requirements

The Castruccio Caveat Case was decided at summary judgment. Once the due execution was established by the prima facie evidence, the caveators failed to show otherwise.

The disputed facts raised by the caveators were: (1) conflicting deposition testimony from the witnesses whether the will was stapled (which it appeared not to be when admitted to probate) and (2) conflicting evidence that the testator initialed each page (the will submitted for probate was not).

The Court of Appeals held that neither was a "material" fact.

2.0 Extrinsic Evidence in Will Interpretation

2.1 Background: The Plain Meaning Rule

The plain meaning rule "prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'" John H. Langbein & Lawrence W. Waggoner, "Reformation of Wills are the Grounds of Mistake: Change of Direction in American Law," 130 U.Pa.L.Rev. 521 (1982).

In *Emmert v. Hearn*, 309 Md. 19 (1987) a testator bequeathed all his "personal property" to one group of legatees. The issue was whether the phrase "personal property" was intended to only mean tangible personal property or intangibles as well (stocks and bonds). The attorney drafting the will testified in his deposition that his client only meant to convey his tangible personal property by that provision and that the stocks and bonds were to fund a testamentary trust. Nevertheless, the Court of Appeals held that the phrase conveyed all personal property including stock and bonds.

The *Emmert* court held that "the paramount concern of the court is to ascertain and effectuate the testator's expressed intent gathered from the four corners of the will. Because nothing on the face of the will qualifies or limits the bequest, the plain meaning must prevail. [Indeed, the Court of Appeals begins its textual analysis by citing the Webster Dictionary definition of "personal property" – that it is everything not real property.]

2.2 The Surrounding Circumstances Exception to the Plain Meaning Rule

The fact that it is the expressed intent appearing from the face of the documents does not mean, however, that it must be read out of context. A long-standing exception to the plain meaning rule is the rule that the meaning must be read in the context of the testator's circumstances.

The surrounding circumstances exception to the plain meaning rule provides that the document is to be understood as the testator understood it – against the backdrop of his or her occupation, property holdings and relationships with family and others.

The courts must look to the circumstances of the decedent to ascertain the plain meaning of the words used. Thus, in *Marty v. First Nat'l Bank of Balt.*, 209 Md. 210 (1956) the court held "[I]f we put ourselves in the traditional place, behind the armchair of the testator as he contemplated 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."

In *Marty*, the issue was what the plain reading of a trust provision meant. The case was decided by looking to extrinsic evidence of how the testator's mother, in her will, pushed him into creating a trust within 6 months of her death to place assets coming to him outright as remainderman in his grandfather's trust into a new trust. If he failed to do so, the mother's will diverted what would otherwise be a bequest to him to a different beneficiary.

In *Castruccio v. Est. of Castruccio*, 239 Md.App. 345 (2018) ("the Castruccio Declaratory Judgment Case"), the issue was the extent to which the trial court could consider extrinsic evidence of the surrounding circumstances to assist in the interpretation of a will.

The Castruccio Declaratory Judgment Case involved a will that required the widow to have on file with the county register of wills her own will in order to inherit her husband's residuary estate.

The extrinsic evidence of the surrounding circumstances consisted of testimony that the husband disliked his wife's various relatives, that he tried to get her cooperation to establish a joint estate plan so that "his" portion of their estate would not go to those relatives at her death and that the requirement that he imposed in his will was his, albeit imperfect, attempt to reach that result.

In the Castruccio Declaratory Judgment Case, the extrinsic evidence did not change the literal meaning of the will, it only explained why he constructed his will as he did.

The Appellees argued that the authorities (cases and historic treatises) held that the only restriction on such extrinsic evidence is that it cannot contradict the literal or plain meaning of a will.

The Castruccio Declaratory Judgment court detailed 6 separate Court of Appeals decisions permitting extrinsic evidence to assist in will interpretation: "In view of these authorities, it is beyond any serious dispute that the circuit court could properly consider the circumstances surrounding the execution of Dr. Castruccio's will for the purpose of understanding or explaining what he had done."

3.0 The Impact of Certain Provisions of the Maryland Trust Act on Planning, Administration and Litigation

3.1 Terms of the Trust

3.1.1 The terms of the trust is a defined phrase under the Maryland Trust Act ("MTA"):

"(z) 'Terms of a trust' means the manifestation of the intent of the settlor regarding the provisions of a trust as expressed in the trust instrument or as maybe established by other evidence that would be admissible in a judicial proceeding." MTA § 14.5-103(z).

This definition of the phrase "terms of the trust" is consistent in each manifestation of the Restatement of Trusts. Restatement (Third) of Trusts § 4 (2003); Restatement (Second) of Trusts § 4 (1959); Restatement (First) of Trusts § 4 (1935). The definition of terms of the trust under the MTA definitional provisions is word for word from the Uniform Trust Code (UTC).

Prior to the adoption of the MTA, Maryland law distinguished between the handling of testamentary trusts and inter vivos trusts. A testamentary trust was held to the same plain meaning rule as applied to wills. Inter vivos trusts, on the other hand, had a more permissive ability to introduce extrinsic evidence in aid of its construction.

The MTA opened the door to the use of extrinsic evidence in reformation of the plain terms of the trust regardless of whether it is testamentary or inter vivos. MTA § 14.5-413 states: "A court may reform the terms of a trust, even if unambiguous, to conform the terms to the intention of the settlor if it is proved by clear and convincing evidence that both the intent of the settlor and the terms of the trust were affected by a mistake of fact or law, whether an expression or inducement."

The UTC comment for § 415 (which is § 413 in the MTA) states: "A mistake of expressions occurs when the terms of the trust misstate the settlor's intention, failure to include a term that was intended to be included or include a term that was not intended be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. ... Mistakes of expression are frequently caused by scrivener's errors while mistakes of inducement often trace to errors of the settlor. ... In determining the settlor's original intent, the court may

consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof."

3.2 Other Modifications Under the MTA

3.2.1 The MTA permits modification or termination of a trust in furtherance of the purposes of the trust. This provision permits a court to modify "the administrative or dispositive terms of the trust or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purpose of the trust." MTA § 14.5-411(a)(1).

3.2.1.1 The UTC comment on its identical provision regarding modifying or terminating due to unanticipated circumstances is UTC § 412. The UTC § 412 comment states in part: "This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. ... For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. ... The purpose of the 'equitable deviation' authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. ... While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created.

MTA § 14.5-411(b) also permits a court to "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impractical or wasteful or impair the administration of the trust." The comment to the UTC version of MTA § 14.5-411 explains the principle behind permitting deviation from the terms of the trust in the face of testamentary freedom: "Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. The owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others."

3.2.2 MTA § 14.5-410 permits the termination of non-charitable irrevocable trusts "on consent of the trustee and all beneficiaries, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." The concept that a trust may be terminated as long as it does not violate any material purpose of the trust is a nod to the *Clafin* Rule first stated in the famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). In *Clafin*, the settlor had created a trust with distributions to his son structured as being paid in three separate amounts when the son reached ages of 21, 25, with the remainder distributed to the son at age 30. That trust was not subject to a spendthrift provision so the beneficiary would be free to transfer his future interest although such a transferee would need to wait for the son to achieve the requisite age. Nevertheless, the court held that the material purpose of such a structure may well have been to ensure that the beneficiary could not spend all the property at once and therefore refused to permit termination.

MTA § 14.5-410 also states that "the existence of a spendthrift provision or similar protective language in the terms of the trust does not prevent a termination of a trust ...". Presumably, that statute means that a spendthrift provision per se is not considered a material purpose of the trust if other evidence could rebut that proposition. Maryland law, however, has a long history of cases holding that a spendthrift provision is, per se, a material purpose of the trust and therefore precludes termination. MTA § 14.5-410 permits court approval of modification or termination of the trust which would be the prudent approach if the spendthrift provision is a concern.

3.2.3 MTA § 14.5-412 permits the termination of a trust if the fair market value of the trust is \$100,000 or less. Each qualified beneficiary is required to receive notice from the trustee of the proposed termination and any qualified beneficiary may object to such termination thus triggering a court proceeding. Prior Maryland law had a similar provision permitting termination of a trust if a corporate trustee was serving. This formalizes that procedure, extends it to all trusts regardless of whether a corporate trustee is serving, and sets forth a procedure to follow in terminating such trust.

3.2.4 MTA § 14.5-414 permits modification of the terms of a trust to achieve the tax objectives as the settlor. That provision also permits the modification to have retroactive effect. The comment to the analogous UTC section (§ 416) states: "Whether a modification made by the court under this section will be recognized under federal tax laws is a matter of federal law."

3.3 Creditor Protection Aspects of MTA

3.3.1 MTA § 14.5-502 insulates third-party discretionary trusts from enforcement of the debts of the beneficiary: "A beneficiary of a discretionary distribution provision has no property right in a trust interest that is subject to a discretionary distribution provision. ... A beneficial interest that is subject to a discretionary distribution provision may not be judicially foreclosed, attached by a creditor, or transferred by the beneficiary." MTA § 14.5-502(a)(1) and (2).

3.3.1.1 MTA § 14.5-103(f) broadly defines "discretionary distribution provision." It permits, for example, for a trust provision that provides one or more standards or other guidance for the exercise of the discretion or contains a spendthrift provision to be a discretionary distribution provision. This definition, in part, adopts the *First Nat. Bank of Md. v. Dept. Health and Mental Hygiene*, 284 Md. 720 (1979) case in determining whether a distribution standard taints an otherwise discretionary trust.

3.3.1.2 MTA § 14.5-502(e) permits, however, a creditor of a beneficiary of an otherwise discretionary distribution trust to have his/her power to withdraw reached by the creditor during the period the power may be exercised. That provision, however, is clear that the creditor only may reach that portion subject to the power to withdraw.

3.3.1.3 Similarly, MTA § 14.5-502(f) holds that if the beneficiary makes contributions to the trust subject to the discretionary distribution provision that portion is likewise exposed to the creditor.

3.3.2 MTA § 14.5-504 codifies the enforceability of spendthrift provisions. A trust subject to a spendthrift provision created by a third person shall not be exposed to the creditors of the beneficiary. Nor may that beneficiary voluntarily transfer the beneficiary's interest.

3.3.2.1 MTA § 14.5-504(e) makes it explicit that the use, occupancy, enjoyment of a residential real property as designated by the trustee to a beneficiary in a spendthrift trust is not subject to the enforcement of the debt against the beneficiary. See, for example, *Watterson v. Edgerly*, 388 A.2d 934 (Md.App. 1978) which held that a creditor "has no standing to complain" when the debtor husband transferred all of his interest to a residence to his wife because it was held by tenants by the entirety and then the wife provided that the residence go by will to a spendthrift trust for the husband's benefit. The wife died 61 days after the transfer of the real estate to her. The court held that the initial transfer from the entireties to the wife was not a fraudulent transfer and that the husband continued to live in the house did not make it available to the husband's creditors. This section of the MTA makes it clear that the creditors would have no interest in the residence regardless of the occupancy by the debtor spouse.

3.3.2.2 MTA § 14.5-510(a) states: "A creditor may not attach, exercise, reach, or otherwise compel distribution of the beneficial interest of a beneficiary that is a trustee or the sole trustee of the trust, but that is not a settlor of the trust, except to the extent that the interest would be subject to the claim of the creditor were the beneficiary not acting as co-trustee or sole trustee of the trust." This means that a third-party spendthrift trust may be created with ascertainable standards with the beneficiary the sole trustee without exposing those assets to non-support creditors. In other words, this technique would insulate a child acting as his/her own trustee of the parent's spendthrift trust, if properly constructed, and have those assets immune from tort creditors including creditors arising from professional malpractice.

3.3.3 MTA § 14.5-511 carried forward the tenants by the entirety immunity of property held in a tenants by the entirety trust to the extent it would be immune had it not been transferred to the trust.

3.3.3.1 This provision provides that the property must have been held prior to the transfer into the trust by a marital couple prior to the transfer into the trust.

3.3.3.2 Maryland permits real property and personal property to be held as tenants by the entirety. See *Bruce v. Dyer*, 309 Md. 421 (1987) (entireties are favored by law) and see also *Diamond v. Diamond*, 298 Md. 24 (1983) ("It is well-established that this court recognizes that a tenancy by the entireties may be created in personal property.") The Maryland tenants by the entirety trust provisions permit a good planning opportunity especially when asset protection concerns need to be balanced with disability planning concerns.

3.4 Notice and Information Requests

3.4.1 The MTA effectively establishes two separate statutes of limitations for creditor claims against the settlor of a revocable trust at the settlor's death. If a large estate of a deceased settlor is commenced then the property of a trust that was revocable at the death of the settlor is not subject to those creditors if the creditor has not filed a proper claim as specified under the usual

probate limitations for claims. See Est. & Trusts § 8-103. (Generally 6 months after the date of the decedent's death). Note that the statute of limitations in the Maryland probate setting is "a self-executing statute and therefore not repugnant to due process." See *Lampton v. LaHood*, 94 Md. App. 461 (1993) distinguishing *Tulsa Professional Collections Services, Inc. v. Pope*, 485 U.S. 478 (1988).

3.4.1.1 MTA § 14.5-508(b) mandates, however, if a large estate is not opened then to start the statute of limitations the trustee of the trust of which this decedent was the settlor must publish notice and the claim will be barred unless within 6 months after the date of the first publication of the notice the creditor files a claim.

3.4.2 MTA § 14.5-813 obligates the trustee, upon accepting a trusteeship, and within 90 days after the date the trustee acquires knowledge of the creation of an irrevocable trust or the formerly revocable trust became irrevocable must notify qualified beneficiaries of the trust existence, the identity of the settlor or settlors, of the right for the qualified beneficiary to request a copy of the trust instrument, and the right of the trust to a trustee's report describing the trust property, liabilities, receipts and disbursements and other information that would enable the beneficiary to enforce his/her rights as a beneficiary.

3.4.2.1 A qualified beneficiary is a term of art and it includes a distributee or permissive distributee of trust income and principal, someone who would be a distributee or permissive distributee if the current such persons right terminates or someone who would be a distributee or permissive distributee if the trust terminated and no power of appointment was exercised. MTA § 14.5-103(t).

3.4.3 MTA § 14.5-306 permits a settlor to designate a representative for a beneficiary who is not liable to the beneficiary except upon a showing of intentional wrongdoing or that the representative act with reckless indifference to the purposes of the trust or to the interest of the beneficiary. This provision was added in 2017 to the MTA.

3.4.4 MTA § 14.5-301 states that notice to the person who is authorized to represent such a beneficiary would bind the beneficiary unless the represented person objects to the representation.

4.0 A Survey of the Common Estate/Trust & Litigation Topics

4.1 Fiduciary Litigation: In General

4.1.1 “[A] person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship” Restatement (Third) of Trusts, § 2, cmt.b.

4.1.2 Fiduciary relationships exist in various settings: trustee-beneficiary, guardian-ward, agent-principal, attorney-client, and in partnership relations. The nature and extent of the duties imposed differ somewhat depending on the relationship.

4.1.3 The term “fiduciary litigation” generally refers to disputes involving the exploitation by a fiduciary or someone in another confidential relationship with persons with diminished capacity or disputes involving trusts or estates.

4.2 Fiduciary Litigation: A Guardianship (Pre-Mortem)

4.2.1 Purpose of a Guardianship:

- Conveys legal standing to the guardian to sue (or be sued) on behalf of the ward. Md. Rule 2-202.
- Gives constructive notice of ward’s inability to enter into legal contracts. *Seaboard Surety Co. v. Boney*, 135 Md. App. 99 n.3 (2000). (The notice is effective “even though the other party to a particular transaction may have no knowledge or reason to know of the guardianship”.)
- Subordinates any agent serving under a power of attorney to the guardian. E&T § 17-105 (e).

4.2.2 Once a guardian is appointed, the guardian may sue to enforce the ward’s rights and pursue claims, including:

- Contract claims (declaratory judgments and/or rescission)
- Equitable claims (including unjust enrichment and imposing constructive trusts).
- Breach of fiduciary duty actions

4.3 Fiduciary Litigation: The Maryland Power of Attorney Act (Pre-Mortem)

4.3.1 The Act imposes duties that include (E&T § 17-113(a)):

- Act in accordance with principal’s reasonable expectations, to extent known, otherwise in principal’s best interest; Act with care, competence, and diligence for the principal; Act only within the scope granted in the power of attorney.

4.3.2 Unless the power of attorney “opts out,” duties also include:

- Act loyal for principal’s benefit and attempt to preserve the principal’s estate plan to the extent known.

4.3.3 The Act creates a broad class of persons who may sue an agent for improperly acting (E&T § 17-103):

- The principal’s spouse, parent, or descendant.
- An individual who qualifies as a presumptive heir of the principal.

- A person named as a beneficiary to receive property or other benefit upon the principal's death or who has an interest in a trust created by or for the principal's benefit.

4.4 Fiduciary Litigation: The Maryland Trust Act Treatment of Revocable Trusts (Pre-Mortem)

4.4.1

- While competent, the trustee exclusively owes all fiduciary duties to the settlor. (E&T § 14.5-603).
- If the settlor of a revocable trust becomes incapacitated, an income beneficiary shall have the right to enforce the trust as if it's irrevocable. (E&T § 14.5-603(b)).
- Disabled settlor can be represented by other individuals in a trust dispute: a guardian, an agent having specific authority to act with respect to trust matters, and parents and other ancestors. (E&T § 14.5-303).
- The Maryland Rules permit an "interested person" to petition a court to assume jurisdiction over the fiduciary estate of a minor or disabled person. Md. Rule 10-501. "Interested person" has a broad definition and includes the disabled person's heirs at law. Md. Rule 10-103.

4.5 Fiduciary Litigation: The Maryland Uniform Declaratory Judgements Act (Pre-Mortem and Post-Mortem)

4.5.1 Authorizes a court to determine "rights or legal relations in respect to the trust or the estate of [a] decedent, minor, disabled person, or insolvent" by ordering a fiduciary to do or abstain from doing something, or to determine "any question" arising in the administration of the estate or trust. (Cts. & Jud. Proc. § 3-408).

4.5.2 Permits intervention by "[a]ny person interested as or through a personal representative, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or in the estate of a decedent, a minor, a disabled person, or an insolvent." (Cts. Jud. Proc. § 3-408).

4.6 Fiduciary Litigation: Caveat/Will Contest (Post-Mortem)

4.6.1 Caveat actions **must** be filed prior to 6 months following the first appointment of a personal representative under a will. (E&T § 5-207).

- The petition cannot be amended after the limitation to add an additional ground. *Hegmon v. Novak*, 130 Md.App. 703 (2000). (The court did not permit the petition to be changed to add an undue influence ground to the caveat).

4.6.2 The grounds for will contests are (1) lack of due execution, (2) lack of testamentary capacity, (3) that the will, or part of the will, was the product of an insane delusion, (4) that the will, or part of the will, was the result of undue influence, (5) that the will, or part of the will, was made as a result of fraud.

4.6.3 Although primary jurisdiction is in the Orphans' Court, a party may transmit factual issues to be determined by the Circuit Court. (E&T § 2-105; Md. Rule 6-434). The transmittal of factual issues does not just apply to caveat but to any controversy before the Orphans' Court.

4.7 Fiduciary Litigation: The Maryland Trust Act (Post-Mortem)

4.7.1 By statute, it does not completely supplant the common law of trusts and the principles of equity which supplant the MTA. (E&T § 14.5-106).

4.7.2 The MTA codifies certain common law duties of the trustee and clarifies who is eligible to intervene in the administration of a trust. Certain duties, such as the duty of loyalty, are codified. (E&T § 14.5-802).

4.7.3 Judicial intervention: on invocation of the court's jurisdiction by an interested person, on the court's own motion, or as otherwise provided by law, the court may intervene actively in the administration of the trust, fashioning and implementing remedies as the public interest and the interest the beneficiaries may require. (E&T § 14.5-201(a)).

4.7.4 Unlike many other states, the probate court has no jurisdiction over trusts in Maryland.

4.7.5 Representative Types of Cases:

- Construction: to determine the "terms of the trust" which means "the manifestation of the intent of the settlor...as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." (E&T § 14.5-103(2)(emphasis added)).
- Trust reformation which includes reformation to achieve a tax objective (E&T § 14.5-414), to reform the trust in order to further the purposes of the trust (E&T § 14.5-411), to conform the trust to the true intentions of the settlor even if contrary to the unambiguous language of the instrument (E&T § 14.5-413).
- Removal of trustee and appointment of a successor trustee.

4.8 Fiduciary Litigation: Litigation Concerning Administration of Estates (Post-Mortem)

4.8.1 Breach of fiduciary duty cases including breach of the duty of loyalty, improper investment decisions and charges, unauthorized self-dealing by a trustee.

4.8.2 Suit over the accuracy of accountings, to stop or force a sale of an asset, to account for assets not otherwise revealed by the fiduciary.

4.8.3 Effective July 1, 2018, the Orphans' Courts may develop alternative dispute programs and order parties to mediate disputes. (Md. Rule 17-601 through 17-605). Interested persons may agree to alter the dispositional pattern in the Will. *Brewer v. Brewer*, 386 Md. 183 (2005).

4.9 Fiduciary Litigation: Elective Share Cases (Post-Mortem)

4.9.1 A surviving spouse has a statutory right to elect against the net estate of the deceased spouse. (E&T § 3-203).

4.9.2 The statute provides that the surviving spouse has a right to take instead of under a will:

- 1/3rd if there is also surviving issue.
- 1/2 if no surviving issue.

4.9.3 This election applies by the explicit terms of the statute to probate assets only.

4.9.4 The Maryland common law expanded the elective share from the probate assets to include non-probate assets over which the decedent retained control on a case by case basis under the general principles of equity.

4.9.5 The courts used a theory based on a fraud on the spousal election: "The doctrine of fraud on marital rights represents an effort to balance the social and practical undesirability of restricting the free alienation of personal property against the desire to protect the legal share of a spouse." *Whittington v. Whittington*, 205 Md. 1, 11 (1954).

4.9.6 The *Whittington* court developed factors to consider: the completeness of the transfer, the motive of the transferor, the participation by the transferee in the transfer, the degree to which the surviving spouse is stripped of his or her interests in a marital part of the decedent's property.

4.9.7 In 1990, the Court of Appeals seemed to create a "super" factor: the control over the asset. *Knell v. Price*, 318 Md. 501 (1990).

4.9.8 In 2008, *Karsenty v. Schoukroun*, 406 Md. 469 (2008)(Harrell, J.) recharacterized the case as a balancing of equitable principles rather than shoehorning the analysis into a template of "fraud."

4.9.9 The *Schoukroun* court held that "a decedent's intent to defraud her or his surviving spouse is not the proper focus of the analysis of the issue. While left mostly unspoken, this Court consistently has looked at the nature of the assailed inter vivos transfer, regardless of the authority." *Schoukroun* at 509.

4.9.10 The *Schoukroun* court established three considerations: whether the deceased spouse continue to enjoy the transferred property, whether the transfer was a reasonable and legitimate estate planning arrangement, and looking at the *Whittington* factors.

4.9.11 In *Schoukroun*, the Court saw the determinative factor providing for the decedent's only child who was the product of an earlier marriage and that he and the surviving spouse were only married for a period of four years.

4.9.12 Accordingly, the current rule applies a balancing of equitable factors: "These cases call for the discriminating exercise in judicial discretion." *Schoukroun* at 503 quoting from a 1949 Maryland Law Review article by Melvin Sykes of Baltimore.

4.9.13 The planning community, however, would prefer a brighter line by statute. H.B. 0777 (Del. Dumais) is the response to that concern.

4.9.13.1 The elective share would be based on an "augmented estate." Generally, the augmented estate consists of the probate estate, the revocable trust, all property over which the decedent could name beneficiaries (IRAs, Insurance, TOD Accounts), the decedent's share of joint accounts, and certain life time gifts.

4.9.13.2 Amounts passing to the surviving spouse reduce the elective share amount. This includes credit for a percentage of amounts passing in trust for the surviving spouse.

4.9.13.3 A court may modify the amount determined by the formula based on criteria set out in the statute. These criteria include motivation of the decedent, the family relationship to the transferee, and the duration of the marriage.

4.10 Fiduciary Litigation Structural Shortcomings of the Maryland Elective Share Statute (Post-Mortem)

4.10.1 "The Traditional Elective Share Method of spousal protection is insufficient for many reasons. For example, it fails to protect the spouse from complete disinheritance, which can be accomplished through non-probate arrangements – such as living trusts, life insurance, joint ownership, and retirement – to people other than the surviving spouse. Additionally, this Method gives a windfall to the surviving spouse of a short-term marriage, in a marriage with unequal premarital wealth, or when the surviving spouse inherits through non-probate arrangements." Angela M. Vallario, Spousal Election: Suggested Equitable Reform for the Division of Property at Death, 52 Cath.U.L.Rev. 519, 536 (2003).

SUPPLEMENT

Elder Financial Abuse Private Causes of Action

1. Guardianship vs. Alternative Causes of Action

- (a) Guardianship is a comparatively drastic, invasive remedy. The end result is the Circuit Court assuming ultimate responsibility over the alleged disabled person. *Kicherer v. Kicherer*, 285 Md. 114 (1979). The alleged disabled person loses the right to make important decisions about his or her living arrangements, finances, etc., depriving him or her of an important liberty interest. *In re Lee*, 132 Md. App. 696 (2000). The Court obtains a permanent role in overseeing the finances and well-being of the alleged disabled person. From a practical perspective, it may create an adversarial dynamic between the person bringing the claim and the alleged disabled person.
- (b) Obtaining a guardianship does not, in and of itself, remedy other losses or financial abuses that have taken place. For example, if a family member has been misappropriating funds, the guardianship may help to prevent further abuse, but will not remedy past harms.
- (c) Additionally, there may already be other asset management mechanisms in place. These include powers of attorney, revocable trusts, or joint bank accounts. Depending on the type of harm that has occurred, Maryland law provides a number of causes of action that may be asserted either in lieu of or in addition to a guardianship proceeding.

- 2. Hypothetical:** A client believes that his sister is taking advantage of his elderly widowed mother. The sister lives with the mother and handles all her finances and medical appointments. The sister is named as the mother's agent under a durable power of attorney and as her health care agent under her advance directive. The mother's brokerage account is titled in the mother's revocable living trust, with sister named as first successor trustee. Client has seen bank statements that show large cash withdrawals from his mother's bank account and, following a review of

property tax records, sees that sister has been added as a joint owner with rights of survivorship on mother's condo.

3. Threshold Issue: Standing:

- (a) All suits must be prosecuted by the real party in interest. Md. Rule 2-201.
- (b) Md. Rule 2-202 ("Capacity") states that "[a]n individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for protection of the individual under disability." Md. Rule 2-202(b). An "individual under disability" means an individual under the age of 18 years or an individual incompetent by reason of mental incapacity.
- (c) A key threshold question is always whether and individual has the right to file a claim, either of his or her own accord or on behalf of the alleged disabled.

4. Private Causes of Action Other than Guardianships

(a) Maryland General and Limited Power of Attorney Act:

1. Duties imposed: The Maryland General and Limited Power of Attorney Act imposes statutory duties upon "an agent that has accepted appointment." These include the duty to act in accordance with the principal's reasonable expectations to the extent known, and otherwise to act in the principal's best interest; to act with care, competence, and diligence for the principal; and act only within the scope granted in the power of attorney. Md. Code Ann., Estates & Trusts § 17-113(a) (Md. Code, Est. & Trusts Article is referred to herein as "ET"). There are also a number of "default" duties that apply unless the power of attorney provides otherwise, including the duty to act loyally for the principal's benefit, to not create a conflict of interest that impairs the agent's ability to act impartially, and to attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest on all relevant factors.
2. Statutory remedies:

- A. ET § 17-102: A principal or an interested person may file a petition under Title 15, Chapter 500 ("Injunctions") of the Maryland Rules in the Circuit Court for the county in which the power of attorney is recorded to enjoin an agent to comply with requirements relating to disclosure of receipts, disbursements, or transactions by the agent. "Interested person" is not defined under Title 17.
- B. ET § 17-103: Permits certain persons to "petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief." There is a large class of individuals who may file such a petition, including the principal's spouse, parent, or descendant, "[a]n individual who would qualify as a presumptive heir of the principal," or a "person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate." However, the court must dismiss the petition on motion by the principal unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.
- C. As of October 2018, there is only one published Maryland decision citing ET §§ 17-102 or 17-103. *Ibru v. Ibru*, ___ Md. App. ___, 2018 WL 4624918, 2018. (2018) In *Ibru*, the Court of Special Appeals held that a principal's descendant has the right—in the descendant's individual capacity—to bring a Circuit Court civil action to review the conduct of the agent. *Ibru*, 2018 WL 4624918 at *13. In *Ibru*, the civil action—a complaint for declaratory judgment to invalidate a power of attorney based on fraud, duress, and lack of capacity—was brought while the principal was alive. *Id.* at *1. The complaint was later amended, after the

principal's death, to include claims for constructive trust and an accounting. *Id.*

a) The Court held that a descendant has a civil cause of action in his or her own individual capacity (as opposed to bringing the civil action in a representative capacity on behalf of the principal) under ET § 17-103.

b) The (then-deceased) principal's estate was not an indispensable party, even though the requested relief (nullifying transfers into joint bank accounts; imposition of a constructive trust) would potentially result in a claw-back of funds into the estate. The Court relied on *First Nat'l Bank of Md. v. Dep't of Health & Mental Hygiene*, 284 Md. 720 (1979), which held that even though certain beneficiaries were not joined in an action, such parties were not "indispensable" when other parties in the action could effectively represent their interests. *Id.* at n. 11.

c) One major issue that was not addressed by the Court: Would the Dead Man's Statute apply in the post-mortem action to invalidate transfers made by the agent under the power of attorney, given the fact that the principal's estate was not a party? *See* Md. Code, Cts. & Jud. Proc. § 9-116 (Dead Man's Statute).

D. The *Ibru* holding is consistent with authorities outside of Maryland. E&T §§ 17-102 and 17-103 are analogous to §§ 114 and 116, respectively of the Uniform Power of Attorney Act. The Comment to § 116 supports the Court of Special Appeals' holding in *Ibru*, stating that the "primary purpose

of this section is to protect vulnerable or incapacitated principals against financial abuse" by creating "broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct." *See also Cartwright v. Batner*, 15 N.E. 3d 401, 412 (Ohio App. 2d. 2014) (similar holding as *Ibru*, although—unlike Ohio—Maryland has not adopted § 117 of the Uniform Power of Attorney Act, which provides a specific restitutionary remedy for agent misconduct).

(b) Maryland Trust Act (MTA)

1. Duties imposed: The MTA codifies certain common law duties of a trustee and clarifies who is eligible to intervene in the administration of a trust. Certain duties, such as the duty of loyalty, are codified. ET § 14.5-802. Otherwise, the common law of trusts and principles of equity supplement the MTA. ET § 14.5-106.

2. Judicial Intervention

A. Section 14.5-201 states that "[o]n invocation of the court's jurisdiction by an interested person, on the court's own motion, or as otherwise provided by law, the court may intervene actively in the administration of a trust, fashioning and implementing remedies as the public interest and the interests of the beneficiaries may require." ET § 14.5-201(a). This power is vested in the courts "having equity jurisdiction," i.e. the Circuit Courts.

B. Standing Issues:

a) For a revocable trust, rights of the beneficiaries are subject to the control of the settlor and the duties of the trustee are owed exclusively to the settlor. ET § 14.5-603. The fact that the settlor becomes incapacitated or loses the capacity required to create a will does not convert a revocable trust into

an irrevocable trust. ET § 14.5-601. However, while a trust is revocable and the settlor does not have the capacity to revoke the trust, a beneficiary to which distributions may be made during the lifetime of the settlor shall have the right to enforce the trust as if it were irrevocable. ET § 14.5-603(b).

- b) Consequently, if the revocable trust permits distributions to an individual other than the settlor during the settlor's life, the permissible distributees have the right to intervene in the administration of the trust. Otherwise, they do not have standing on their own to challenge the trust administration.
- c) If the settlor is disabled, certain individuals are entitled to represent the settlor with respect to trust disputes. Depending on the circumstances, these include the guardian of the property or person, an agent having specific authority to act with respect to trust matters, and parents and other ancestors. ET § 14.5-303.
- d) Additionally, the Maryland Rules permit an "interested person" to petition a court to assume jurisdiction over the fiduciary estate of a minor or disabled person. Md. Rule 10-501. "Interested person" has a broad definition, and includes the disabled person's heirs at law. Md. Rule 10-103. A court supervising a trust administration may act on its own accord to compel the trustee to perform his duties under the trust. Restatement (Second) of Trusts § 200(h).

(c) Declaratory Judgment:

1. Maryland's declaratory judgment statute provides a statutory cause of action and remedy that is conceptually similar to equity courts' exercise of jurisdiction over the administration of trusts and estates. *Kann v. Kann*, 344 Md. 689, 701 (1997) (analogizing declaratory judgment procedure under ET § 3-408 to historical equity procedure in trust and estate matters).
2. Md. Code Ann., Courts & Judicial Proceedings § 3-408 authorizes a court to determine "rights or legal relations in respect to the trust or the estate of [a] decedent, minor, disabled person, or insolvent" by ordering a fiduciary to do or to abstain from doing something, or to determine "any question" arising in the administration of the estate or trust. Md. Code Ann., Courts & Judicial Proceedings §3-408.
3. The declaratory judgment act permits intervention by "[a]ny person interested as or through a personal representative, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or in the estate of a decedent, a minor, a disabled person, or an insolvent." Md. Code Ann., Courts & Judicial Proceedings §3-408.
4. The declaratory judgment statute closely tracks the 1922 Uniform Declaratory Judgments Act, and was enacted in Maryland in 1973. From its enactment until the 2016 General Assembly session, Maryland's declaratory judgment statute differed from the uniform law in an (arguably) important way: the court's intervention was limited to "the trust or the estate of a decedent." In 2016, the Annual Corrective Bill changed the language of § 3-408 to more closely track the language of the 1922 uniform law to permit the court to intervene in "the trust or the estate of the decedent, minor, disabled person, or insolvent." 2016 Md. Laws. Ch. 8 (S.B. 506).

(d) Unjust Enrichment/Constructive Trust:

1. Constructive trust is an equitable remedy imposed by courts of equity whenever the title to property is found in one who, in fairness, ought not to be allowed to retain it. They may be created even when no express trust is involved, but when property has been obtained or retained by other unconscionable conduct. The court merely uses the constructive trust as a method of forcing the defendant to convey to the plaintiff. Sandler, Paul Mark & James K. Archibald, *Pleading Causes of Action in Maryland* § 8.19 (4th Ed.) (2008); *Wimmer v. Wimmer*, 287 Md. 663, 668 (1980) ("[C]onstructive trust is a remedy employed by a court of equity to convert the holder of legal title to property to a trustee for one who in good conscience should reap the benefits of the possession of said property.")
2. Elements:
 - A. Generally: (1) There is an acquisition of property in which the plaintiff has some good equitable claim; (2) There is evidence of wrongdoing such as fraud, misrepresentation, or other improper method; and (3) There are circumstances which render it inequitable for the holder of the legal title to retain the beneficial interest. Sandler, *supra*, at § 8.20; *Wimmer*, 287 Md. at 668.
 - B. Confidential relationship: (1) There is an acquisition of property in which the plaintiff has some good equitable claim; (2) There is a confidential relationship; and (3) The confidential relationship was breached by the dominant party, with the property transferred from the trusting party to the dominant party. Sandler, *supra*, at § 8.21; *Wimmer*, 287 Md. at 668–71; *Figgins v. Cochrane*, 403 Md. 392, 410 (2008).
3. Confidential relationship: Proof of a confidential relationship is often key in constructive trust cases. Normally, the plaintiff must prove both the wrongdoing and the unfairness of the transaction by

clear and convincing evidence. *Wimmer*, 287 Md. at 668-69. However, if the plaintiff proves that there was a confidential relationship between the transferor and transferee, and the transferee is the "dominant" party in the relationship, a "heavy" burden shifts to the transferee to prove the fairness and reasonableness of the transaction. *Figgins*, 403 Md. 392. The transferee must prove that the transfer was the free and uninfluenced act of the transferor, upon full knowledge of all the circumstances connected with it and its contents. *Id.* Factors in determining whether a confidential relationship exists include the familial relationship (e.g. parent-child, husband-wife), the subservient party's age/infirmity, and the subservient party's reliance upon dominant party for care or protection or guidance in business affairs. *Id.* at 410.