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## Keeping Current - Probate [notes]

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# KEEPING CURRENT PROBATE

## CASES

**ATTORNEYS: Attorney-client privilege applies to matters after joint representation ends.** In a divorce proceeding, the plaintiff moved for the issuance of a subpoena to the attorney who had drafted two revocable trusts for the defendant in 2013 and 2016 respectively, asking for complete copies of the files. The trial court granted the motion but, on appeal, the intermediate New York appellate court reversed with respect to the 2016 trust. The 2013 trust was drafted in the course of joint representation of the spouses in connection with their estate planning, and the privilege cannot apply. The 2016 trust, however, was drafted after the representation of the plaintiff ended in 2013 and did not constitute the same matter involved in the joint representation. The attorney-client privilege, therefore, applied to the records relating to the 2016 trust. *Feighan v. Feighan*, 118 N.Y.S.3d 674 (App. Div. 2020).

**BINDING DEFAULT BENEFICIARY: Decree cannot terminate future interest subject to a power of appointment without notice to its holder.** The decedent created a testamentary trust for the surviving spouse that gave the spouse a testamentary power of appointment with the takers in default being the children from the couple's prior marriages. If a child did not survive the spouse, the child's issue would take the child's share per stirpes. Litigation over the decedent's estate was settled in 1991, and the resulting

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decree changed the taker in default to the spouse's child or that child's issue. The court found that the decedent's children had disclaimed any interest in the trust. The decedent's grandchildren were not given notice of the 1991 decree eliminating their interests in the trust. The surviving spouse died in 2016 without having exercised her testamentary power of appointment. A grandchild of the decedent whose parent predeceased the spouse petitioned to be recognized as a beneficiary of the trust, arguing the 1991 decree was void because he never received notice of the proceeding that led to the original decree. The court decided that the 1991 decree was valid and binding because the grandchild had no "cognizable property interest in the trust." On appeal, the California intermediate appellate court reversed. The court held that the grandchild had a future interest in the trust property even though it was contingent on decedent's child predeceasing and the grandchild surviving termination of the trust. The court also acknowledged the grandchild's interest could have been eliminated by the surviving spouse's exercise of the power of appointment. *Roth v. Jelley*, 259 Cal. Rptr. 3d 9 (Ct. 2020).

**DISCRETIONARY TRUSTS: Trustee is not required to take other resources into account in making discretionary distributions.** The decedent's lifetime trust divided at the decedent's death

into a marital deduction trust and a credit shelter trust. The surviving spouse was a life income beneficiary and was the trustee for both trusts. The terms of each trust gave the trustee authority to invade the principal as the trustee determines in the trustee's discretion as "necessary for the proper support, care, and maintenance" of the surviving spouse. The decedent's daughters were remainder beneficiaries of the marital trust and sued the trustee for breach of trust based on the trustee's making principal distributions only from the credit shelter trust of which the surviving spouse's grandchildren are remainder beneficiaries. The trial court granted the daughters' motion to compel an accounting of the credit shelter trust because the word "necessary" refers to the surviving spouse's other resources and therefore does "provide otherwise." Accordingly, the trust overruled the default statutory rule, which provides that a trustee need not take into account a beneficiary's other resources in making decisions about discretionary distributions. On appeal, the Nevada Supreme Court reversed, holding that in reading the trust as a whole, the word "necessary" refers only to the amount of a principal distribution and does not require a threshold determination of financial need. *In re Raggio Family Trust*, 460 P.3d 969 (Nev. 2020).

**ELECTIVE SHARE: Revocable trust is not created with the intent to disinherit a spouse.** The surviving spouse exercised the elective share right against the deceased spouse's will and claimed assets in the deceased spouse's revocable trust on the basis that the trust was created in contemplation of death to defeat the surviving spouse's right. After losing at trial, the surviving spouse appealed, and the intermediate

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Indiana appellate court affirmed. In reaching its conclusion, the court cited the creation of the trust more than 20 years before death, the extensive funding of the trust within five years of its creation, the spouses' history of keeping their property separate from each other, the surviving spouse's creation of a similar trust disinherit the other spouse as part of their joint estate planning, and the spouses' awareness of each other's estate plan. *In re Revocable Trust Created by Sarkar*, 145 N.E.3d 802 (Ind. Ct. App. 2020).

#### POWERS OF APPOINTMENT:

##### Donee who is also a trustee has no fiduciary duty in exercising power.

After the spouse's death, the surviving spouse exercised a power of appointment over property in a trust created by the couple. The trust appointed the surviving spouse as trustee with the power to appoint all trust property to himself. The exercise of the power destroyed the interests of the couple's child and grandchildren who were contingent beneficiaries. The child petitioned the court to find that the surviving spouse's fiduciary duties as trustee limited his exercise of the power of appointment. The court granted the surviving spouse's motion for summary judgment, and the California intermediate appellate court affirmed. The court held that the trust expressly authorized the surviving spouse to appoint to himself. Once the power was properly exercised, the court found that the surviving spouse as trustee was required to distribute the property in compliance with the exercise of the power. The court noted that the result would be the same had the surviving spouse resigned as trustee before exercising the power because the successor trustee would have been required to distribute the trust property in accord with the exercise of the power. *Tubbs v. Berkowitz*, 260 Cal. Rptr. 3d 852 (Ct. App. 2020).

**PRO SE:** Lay trustees representing themselves are not engaged in the unauthorized practice of law. Trustees represent themselves in a proceeding litigating the meaning of the trust

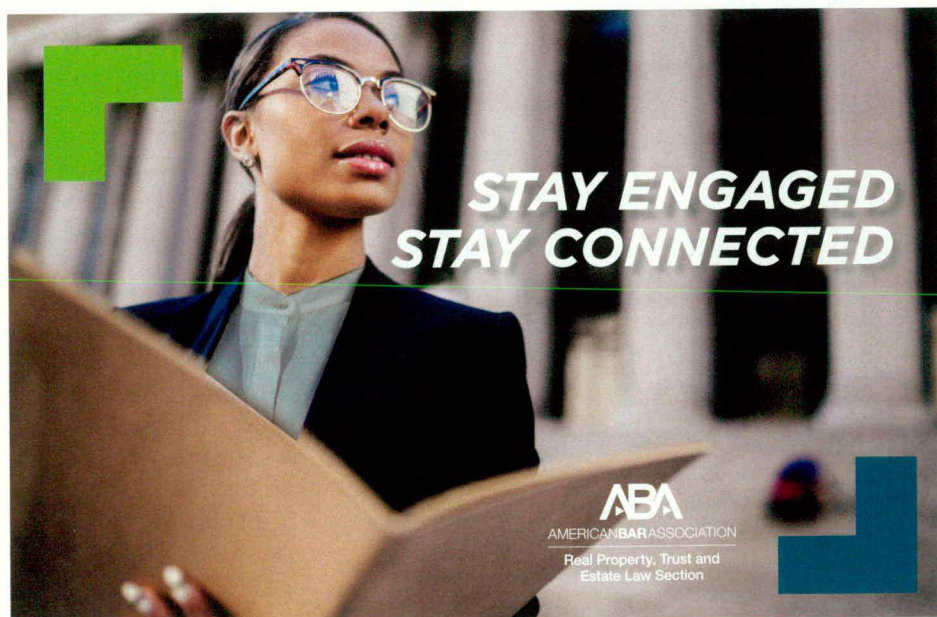
terms. The court held that they were not engaged in the unauthorized practice of law, distinguishing its ruling from its opinion in *Ziegler v. Nickel*, 75 Cal. Rptr. 2d 312 (Ct. App. 1998), holding that, in that case, the trustees were representing the trust in litigation between a third party and the trustee and therefore were representing the interests of the beneficiaries—something that can be done only by a duly licensed attorney. In the present case, the trustees had filed a petition for instructions and were seeking “judicial clarification on how to interpret a trust document” rather than acting on behalf of the beneficiaries. *Donkin v. Donkin*, 260 Cal. Rptr. 3d 844 (Ct. App. 2020).

#### TAX CASES, RULINGS, AND REGULATIONS

**ESTATE TAX:** Farm remains in decedent's gross estate despite transfer to family limited partnership because of retained rights of control. The decedent transferred a family farm through a living trust to a family limited partnership. The court held the transfer was not a bona fide sale because the decedent retained possession and enjoyment of the farm after transferring it and continued to manage the farm. He then sold the farm in the family limited partnership (FLP) and maintained the proceeds as his funds. The

Tax Court held that both the value of the farm and the value of the partnership interest should be included in the gross estate and that, under IRC § 2043, the value of the partnership interest could be subtracted out. It also held that transfers to the decedent's children were determined to be gifts, as there was no evidence to support that the gifts were loans. Further, the gross estate was increased by the amount of gift tax paid. The FLP also transferred money to a revocable trust before the decedent died but those funds were not includible in the decedent's gross estate as they were largely used to pay his income tax liability. Even though the gross estate increased, the estate was denied an increase in the amount of its charitable deduction because it was not ascertainable whether, on the date of death, the trust would receive additional funds to make charitable donations. Finally, the Tax Court held that the attorney fees were not allowable under state law because the estate had no evidence that the attorney completed work for the estate administration. *Moore v. Commissioner*, T.C. Memo 2020-40.

**ESTATE TAX:** Label of transfer as an assignment does not equate to transfer of assignee interest when the transfer is broad and unlimited. The decedent formed a limited liability



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partnership using his assets. He held an 88.99 percent limited partner ownership interest, and his family members owned the other interests. The decedent established a revocable living trust of which he was the settlor, the beneficiary, and held the power to modify the trust. He remained the beneficiary of the trust until his death. On the day that the partnership was created, the decedent assigned his interest in the limited partnership to the revocable trust via his power of attorney. Although the transfer was labeled an assignment, it transferred all rights associated with the interest to the trust, including the right to vote. The transfer met all requirements of the partnership agreement for a transfer of a partnership interest and admission as a substitute partner. When the decedent died, the estate filed its tax return listing the stake in the limited partnership as an assignee interest with discounts for lack of marketability, lack of control, and lack of liquidity. The IRS issued a notice of deficiency with a different valuation of the estate which

the estate challenged in Tax Court. The Tax Court concluded that the revocable trust held a limited partner interest and that as a beneficiary of the decedent's revocable trust, the estate included a limited partnership interest and not an assignee interest. The Fifth Circuit affirmed the Tax Court's decision upholding the notice of deficiency for estate tax purposes. *Streightoff v. Commissioner*, 954 F.3d 713 (5th Cir. 2020).

**GRAT: Assets of grantor-retained annuity trust are included in the decedent's gross estate when a decedent dies shortly before the expiration of the annuity term.** The decedent transferred her one-half interest in a partnership that owned rental real estate to a GRAT. The decedent was to receive annual annuity payments for 15 years or until her death. She died shortly before the expiration of the GRAT term. All trust assets were properly included in the decedent's gross estate because she retained a right to income from the property. Accordingly, the Ninth Circuit affirmed the district court's rejection of the refund claim and held that the annuity flowing from a GRAT was covered within IRC § 2036(a) (1) even though the term annuity was not used in the statute. *Badgley v. United States*, 957 F.3d 969 (9th Cir. 2020).

**TRUST: State statutes do not cause the release of the general power of appointments for gift tax and estate tax purposes.** The decedent was a beneficiary of two substantially similar trusts, neither of which indicated a governing state law. The trusts provided that the net income was to be paid to the decedent during his lifetime. Upon his death, the net income was to be paid to or for the benefit of his issue with representation. The decedent was the trustee of both trusts at the time of his death. While the decedent lived in one state, the state enacted a law that stated that, unless the trust expressly stated differently, a beneficiary serving as trustee may only make discretionary distributions for the benefit of his health, education, support,

or maintenance. Before the statute, the decedent's power to distribute trust corpus to himself constituted a general power of appointment over the corpus of the trust. After the statute was enacted, his power was limited to an ascertainable standard. The private letter ruling stated he did not have a general power of appointment for gift tax purposes after the enactment of the statute. Nor did his death create a release of a general power of appointment by the decedent that would cause him to be treated as the transferor for gift tax purposes. The decedent later moved to a different state with a similar statute already in place regarding beneficiary trustees. The private letter ruling determined the decedent did not have a general power of appointment at the time of his death and the lapse of his fiduciary powers as trustee at death did not constitute a release of a general power of appointment that would cause the trust value to be included in his estate for estate tax purposes. The private letter ruling also determined that the statutes did not affect the exempt status of the trust for generation-skipping transfer tax purposes. PLR 202020010.

## LITERATURE

**CONNECTICUT—TRUSTS.** In *New Direction: The Connecticut Uniform Directed Trust Act*, 33 Quinnipiac Prob. L.J. 274 (2020), Alexis S. Gettier, Christiana N. Gianopoulos, and Margaret St. John Meehan explain the Act referenced in the article's title and discuss the new planning opportunities the Act provides. They set forth considerations for practitioners and potential donors in advising and implementing planning techniques under the Act.

**GUARDIANSHIP.** The purpose of Eleanor Crosby Lanier's article, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36-37 Buff. Pub. Interest L.J. 155 (2017-2019), is to identify, examine, and better understand existing legal and practical barriers to limited guardianship and to

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recommend possible alternatives.

**LITIGATION RECOVERIES.** In *Plan and Preserve*, Trial, Apr. 2020, at 28, Kevin Urbatsch and Michele P. Fuller explain that “to help ensure the financial security of clients with disabilities, you need to evaluate how a litigation recovery will impact their public benefits and how to protect those resources.”

**LIVE HAND CONTROL.** In his article, *Restraining Live Hand Control of Inheritance*, 79 Md. L. Rev. 325 (2020), Mark Glover seeks to develop a unifying theoretical framework that can guide policymakers in deciding when and how to restrain a donee’s discretion to accept or reject a gift. The article explores specific reform proposals that can increase the social welfare generated by the inheritance process.

**MARIJUANA ASSETS.** Brandy M. Parry’s Note, *Puff, Puff, Pass: How State Marijuana Laws May Impact Probate Courts and Lead to Liability*, 33 Quinnipiac Prob. L.J. 178 (2020), focuses on the potential liability surrounding the passing of marijuana from a decedent to a beneficiary. He proposes a possible solution to keep these assets out of the probate system and limit the potential liability for beneficiaries through the creation of a marijuana trust.

**NO-CONTEST PROVISIONS.** In his Note, *In Terrorem Clauses: Broad, Narrow, or Both?*, 96 Notre Dame L. Rev. 1763 (2020), Evan J. Shaheen explains how to enhance the effectiveness of no-contest clauses and recommends expanding their use to non-probate assets.

**SETTLEMENTS.** Kelli Byers Hooper explains that before entering into a negotiation to resolve personal injury and wrongful death cases, you must “consider how divorce and probate issues may impact settlement terms and the distribution of funds” in *Family First*, Trial, Apr. 2020, at 40.

**STATE TRANSFER TAXES.** In her Note, *Why the End Is Here For State*

*Death Transfer Taxes and How States Should Respond*, 96 Wash. U. L. Rev. 1137 (2019), Jenny L. Juehring argues that state death transfer taxes cannot adequately address wealth inequality and provide little remaining benefit. She proposes that states should consider a gradual repeal of the death transfer tax to allow time for taxpayers to make appropriate changes to their estate plans.

**TAXATION OF GIFTS.** In his article, *How Should Gifts Be Treated Under the Federal Income Tax?*, 2018 Mich. St. L. Rev. 81 (2018), David Hasen does not take a position on which view is correct. He rather concludes that a number of possible regimes, including the regime in effect, are equally reasonable, depending on what one takes to be the purpose of the income tax system. What Mr. Hasen hopes to show is that much of the apparent disagreement about the proper taxation of gifts is really disagreement over other issues that are not likely resolvable and that they have not been sufficiently discussed by commentators.

**TRANSGENDER INHERITANCE.** In her article, *The Dilemma of the Transgender Heir*, 33 Quinnipiac Prob. L.J. 147 (2020), Carla Spivack argues that inheritance law, in addition to offering a solution to a potential doctrinal problem, can play an expressive role by presumptively pulling transgender heirs into the notional matrix of what constitutes “family” for inheritance purposes.

**WYOMING—DECANTING.** In his Comment, *The Wild, Wild West: The Mechanics and Potential Uses of Trust Decanting*, 19 Wyo. L. Rev. 327 (2019), John Fritz discusses the mechanics of decanting in Wyoming as well as those states from which the clients of Wyoming’s attorneys may originate.

**WYOMING—GUARDIANSHIP.** In *Wyoming Is More Likely Than Not Behind in Guardianship Proceedings: The Unconstitutional Standard for Guardianship Under Wyoming Statute Section 3-2-104*,

19 Wyo. L. Rev. 391 (2019), Kasey J. Benish argues that Wyoming’s current preponderance of the evidence standard for determining guardianship is unconstitutional and proposes that it be replaced with a clear and convincing evidence standard.

## LEGISLATION

**IDAHO** authorizes a person who executes a health care directive to file it with the Idaho Department of Health and Welfare. 2020 Idaho Laws Ch. 297.

**INDIANA** allows anatomical gifts to be indicated on hunting, fishing, and trapping licenses. 2020 Ind. Legis. Serv. P.L. 11-2020.

**KENTUCKY** adopts the Revised Uniform Fiduciary Access to Digital Assets Act. 2020 Ky. Laws Ch. 63.

**KENTUCKY** enacts legislation to promote living organ and bone-marrow donations. 2020 Ky. Laws Ch. 107.

**MARYLAND** clarifies the law regarding estate tax portability. 2020 Md. Laws Ch. 111.

**UTAH** becomes the first state to adopt the 2018 Uniform Fiduciary Principal and Income Act. 2020 Utah Laws S.B. 45.

**UTAH** enacts the Financial Exploitation Prevention Act. 2020 Utah Laws H.B. 459.

**VERMONT** adopts the Revised Uniform Unclaimed Property Act. 2020 Vt. Laws No. 93.

**VIRGINIA** enacts the Uniform Directed Trust Act. 2020 Va. Laws Ch. 768.

**WASHINGTON** adopts the Uniform Directed Trust Act. 2020 Wash. Legis. Serv. Ch. 303.

**WEST VIRGINIA** enacts Uniform Trust Decanting Act. 2020 W. Va. Laws S.B. 668. ■