2022 FIDUCIARY LITIGATION UPDATE

2022 Seminar Material

M0108.22

New Jersey Institute for
Continuing Legal Education

A Division of the State Bar Association
NJICLE.com

This page intentionally left blank

2022 FIDUCIARY LITIGATION UPDATE

Speakers

Gerard G. Brew, Esq.
McCarter & English, LLP
(Newark)

Andrew J. DeMaio, Esq.
Neff Aguilar, LLC
(Red Bank)

Melissa Osorio Dibble, Esq.
Archer & Greiner, P.C.
(Voorhees)

Timothy M. Ferges, Esq.
McCarter & English, LLP
(Newark; New York City)

Glenn A. Henkel, Esq., LL.M., CPA, A.E.P.
Kulzer & DiPadova, P.A.
(Haddonfield)

Steven K. Mignogna, Esq.
Archer & Greiner, P.C.
(Voorhees, Princeton, Flemington; New York City; Philadelphia, PA; Wilmington, DE)

In cooperation with the New Jersey State Bar Association **Real Property, Trust & Estate Law Section** **M0108.22**

Table of Contents

2022 FIDUCIARY LITIGATION UPDATE

BY: STEVEN K. MIGNOGNA, ESQ.
MELISSA O. DIBBLE, ESQ.
Archer & Greiner, P.C.
1025 Laurel Oak Road
Voorhees, N.J. 08043

GERARD G. BREW, ESQ.
TIMOTHY M. FERGES, ESQ.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, N.J. 07102

ANDREW J. DEMAIO, ESQ.
Neff Aguilar, LLC
125 Half Mile Road, #101
Red Bank, N.J. 07701

GLENN HENKEL, ESQ.
Kulzer & DiPadova, P.A.
76 E. Euclid Avenue, #300
Haddonfield, N.J. 08033

Case summaries prepared by Steven K. Mignogna, Anthony R. La Ratta, Melissa Osorio Dibble, Donald P. Craig, Eimi S. Figlio, Andrew J. Cevasco, Timothy E. Horn, Matthew M. Nicodemo, Daphne Goldman and Kelly M. Barry

This page intentionally left blank

TABLE OF CONTENTS

This page intentionally left blank

I. JURISDICTIONAL AND PROCEDURAL ISSUES

Krivulka v. Lerner, 2:20-CV-09724, 2021 WL 3260851 (D.N.J. July 30, 2021)

The plaintiff was the widow and co-executor of the estate of her husband. She claimed that defendants failed to disclose conflicts of interest during the administration of the estate. She filed in federal court based on diversity of jurisdiction. The defendants moved to dismiss the action, claiming that the decedent was domiciled in New Jersey at his death and therefore there was no diversity of jurisdiction.

The court determined that the decedent moved to New Jersey in 2000. He had a New Jersey driver's license, had bank accounts in New Jersey, and worked in New Jersey. The defendants met with the decedent between 2009 and 2016 and created a will and codicil which listed him as a resident of New Jersey. The decedent discussed potentially relocating to Arizona but wrote to the defendants late in 2016 and confirmed he was not planning to change his domicile. However, the majority of his last year of life was spent in Arizona, and he passed away in Arizona in February 2018. He also had other connections in Arizona.

In the end, the court found that while decedent maintained an objective physical presence in both New Jersey and Arizona, he intended New Jersey to constitute his domicile. There was no subject matter jurisdiction and no diversity of citizenship.

Estate of Partee v. Jones, No. A-0765-19T1, 2020 WL 6688913 (N.J. Super. Ct. App. Div. Nov. 13, 2020)

Twin sisters Dianne and Dionne owned as tenants in common the Philadelphia home in which they grew up. On January 19, 2017, Dianne transferred her interest to Dionne, but this deed was not notarized until May 11, 2017.

On June 19, 2017, Dionne deeded the property to her daughter, Loree.

Dianne died in 2017. The estate filed a six-count complaint against Loree and Dionne, as well as the notary who completed the attestation and affixed her seal on the deeds. The notary never answered and default judgment was entered against her. She did not appeal.

During a two-day bench trial, the court heard from multiple witnesses regarding whether Dianne wanted to sell or gift her interest in the property to Loree.

The Chancery Division found that Dianne did not intend to give her interest in the house to Loree. The judge entered judgment in favor of the estate and against Loree in the amount of $100,000, representing the fair market value of Dianne's share of the property.

The trial court also applied an equitable remedy, finding that the deeds transferring Dianne's share of the real estate to Dianne and then to Loree would be voided if Loree did not pay the $100,000 to the estate.

The trial court noted that, under Pennsylvania law, a deed is void if not filed within 90 days. The court also observed that if the notary had misdated her stamp and deliberately misrepresented otherwise to the Pennsylvania Recorder of Deeds, such actions would be construed as a fraud upon the state.

In the end, the court held that the deed from Dionne to Loree was invalid under Pennsylvania law.

On appeal, the court found that the factual findings of the trial court were supported by adequate, substantial, and credible evidence. The Appellate Division also noted that, in contrast to the deference given to a trial court's factual findings, legal determinations of a lower court are reviewed *de novo*.

The Appellate Division cited considerable authority regarding the broad latitude of the Chancery Division in fixing an equitable remedy. At the same time, the Appellate Division found that a New Jersey court had no jurisdiction to void a deed to Pennsylvania property.

The Appellate Division distinguished the lack of jurisdiction regarding an out-of-state property and the *in personam* jurisdiction the court has over litigants:

> We believe the crux of this case, however, is not whether the deed was valid, nor whether a New Jersey court has the authority to void that deed. Nor does the outcome hinge on a finding that Loree or Dionne used wrongful tactics to trick Dianne into seeding her interest in the homestead. We believe the critical finding is that Dianne did not intend to give away her share of the house for no value. That conclusion is supported by adequate, substantial and credible evidence. In those circumstances, applying equitable principles, the probate court acted appropriately and within the wide latitude of its discretion to order Loree to compensate the estate for one-half the fair market value of the house.

Id. at *4.

Mac Naughton v. Power Law Firm, A-3711-19, 2021 WL 2964324 (N.J. Super. Ct. App. Div. July 15, 2021)

This case addresses the importance of naming additional parties pursuant to *Rule* 4:5-1(b)(2) in initial pleadings.

Plaintiff W. James Mac Naughton ("Jim") appealed a May 27, 2020 Order granting summary judgment to defendant Power Law Firm, LLP, Jinhee Bae, and Meghan Maier. Jim was a co-trustee with his uncles of a trust established by his parents. In 2012, a dispute arose between the co-trustees concerning the use of a Trust asset – a vacation home in Cape Cod. The co-trustees consulted with the defendant law firm for legal advice regarding the management of the Trust asset. Several years later, in March 2017, a second dispute arose as to Jim's use of Trust funds. The other co-trustees – Jim's uncles – consulted with defendants again for legal advice concerning the dispute. In an attempt to resolve the matter, defendants communicated with Jim, and even drafted an agreement, to attempt to resolve the dispute. The matter did not resolve amicably, and thus the co-trustees eventually decided to pursue litigation against Jim. They were referred by defendants to another law firm for purposes of litigation against Jim.

In May 2018, the co-trustees (represented by the new law firm) filed an amended verified complaint against Jim, and the litigation was settled over a year later. In November 2019, Jim filed a complaint against defendants – the law firm that had advised the co-trustees – alleging legal malpractice, breach of fiduciary duty, and breach of fiduciary duty to a former client. The defendant law firm filed an answer and simultaneously moved for summary judgment. The trial court granted defendant's motion and dismissed Jim's complaint, finding that Jim's failure to appraise the court of defendants in his initial pleadings ran afoul of the entire controversy doctrine and *Rule* 4:5-1.

The Appellate Division affirmed, finding that the entire controversy doctrine reflects a long-held preference that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation. Further, the court found that pursuant to *Rule* 4:5-1(b)(2) a party is required to certify in his or her initial pleadings the names of any non-party who should be joined in the action or who is subject to joinder because of potential liability to any party on the basis of the same transactional facts.

In the instant matter, Jim was aware as early as 2017 of the potential claims he had against defendants, and his failure to assert the claim, or at least advise the court of any non-party who should be joined in the action was inexcusable as it was apparently a deliberate strategy to obtain depositions and discovery to utilize in a subsequent action. The court also agreed that defendants were substantially prejudiced by the inexcusable failure. Defendants were deprived of the opportunity to participate in the extensive discovery process in the underlying action and to permit Jim to duplicate that process would be unfair to the defendants.

Edita Applebaum v. William P. Fabian, et al., Civ. No. 18-11023-KM-JSA, 2021 WL 5833454 (D.N.J. December 9, 2021)

This case highlights the so-called "probate exception" to federal jurisdiction, in addition to more frequent bars to recovery that practitioners are likely to face in federal and state courts.

Decedent Todd Harris Applebaum passed away testate in November 2012. At death, his largest assets consisted of the stock in his solely-owned corporation, Todd Harris Company ("THC"); a condominium; a 51% stake in Toben Investments, Inc. ("Toben"), with a single asset of a commercial building; and a 401(k)-plan containing approximately $100,000 that did not list his wife, plaintiff Edita Applebaum ("Edita"), as a beneficiary.

Decedent's will bequeathed 60% of his stock in THC to a trust for the benefit of Edita and the couple's three children. The balance of his estate passed to Edita outright. The will appointed decedent's son, Benjamin Applebaum ("Applebaum"), and decedent's close friends and business associates, William Fabian ("Fabian") and Frank Rajs ("Rajs"), as trustees of the trust. Fabian was also named as executor of decedent's estate. Notably, as executor, the will vested Fabian with the power to "sell, convey, mortgage, lease, invest, reinvest, exchange, manage, control, retain or otherwise deal with any and all property, real or personal, comprising [decedent's] estate, … and to make distribution under [the] Will wholly or partly in kind or money." *Id.* at *1.

Fabian was appointed executor in December 2012. Following his appointment, THC's shareholders held a meeting and elected Fabian and Rajs as directors. At that time, Rajs was also appointed as THC's president and CEO. Edita attended the meeting.

Between December 2012 and June 2013, on three separate occasions, THC drew down on a line of credit with Sun Bank that decedent had personally guaranteed. In June 2013, Sun Bank became aware of decedent's death and declared a default under the loan agreement. The bank alleged decedent's signature had been forged on the drawdown paperwork submitted in the months after his death and filed an action against decedent's estate, THC, Rajs, and THC's controller.

In response to the lawsuit, THC and Toben's board of directors held a special meeting. Counsel for THC and decedent's estate advised the board that Sun Bank would likely prevail in the lawsuit but had offered to settle the matter for roughly $350,000. After exploring different options, THC's board agreed to cause the company to borrow $350,000 from Fabian and to execute a promissory note. Edita and Applebaum guaranteed the loan. At the special meeting, Fabian disclosed he had made other loans to THC, but they had been kept off the company's books, which likely allowed THC to obtain the line of credit.

To cover taxes and estate administration expenses, Fabian caused Toben to sell its commercial building for $800,000 in October 2013. He used a portion of the sale proceeds to pay himself back for the monies he had loaned to THC and to advance funds to THC for its business operations.

Edita accused Fabian of selling the Toben building for less than its fair market value. She had also begun to question how THC was being managed during a brief stint of employment with the company, which began in June 2013. THC fired her in December 2013, and, not long thereafter, Fabian elected to distribute her 40% share in THC in cash.

On March 31, 2014, Edita filed an 11-count complaint in New Jersey Superior Court. She claimed Fabian, Rajs, and others had defrauded THC and breached their fiduciary duties to the company. She also brought claims against Fabian, Rajs, and others in her individual capacity for intentional interference with inheritance and intentional infliction of emotional distress. Additionally, she asserted a claim for breach of fiduciary duties against Fabian for selling the Toben property. By way of an order to show cause, she sought emergent relief to remove Fabian as executor, to remove Fabian and Rajs as officers of THC and Toben and trustees of the trust and to replace them with herself, and to compel Fabian to distribute her 40% share of THC and 51% share of Toben in kind.

The trial court found Edita failed to show a likelihood of success on the merits and denied her request for emergent relief. Over the next few years, the trial court also denied her continual requests to remove Fabian as Executor.

On April 30, 2019, the trial court approved Fabian's final estate accounting over Edita's exceptions. Moreover, the court found no evidence of fraud by Fabian, dismissed all claims against him and the other defendants, approved the distribution of her 40% share in THC in cash instead of in kind, and closed the estate. Edita subsequently appealed.

In April 2021, the Appellate Division affirmed the trial court's rulings but remanded the matter for a limited evidentiary hearing on exceptions to Fabian's accounting that were unrelated to the sale of the Toben property and distribution of cash in lieu of the THC shares. The Appellate Division held that the trial court had properly concluded there was no evidence to substantiate Edita's fraud claim. It also upheld the trial court's approval of the distribution of cash to Edita instead of the THC shares, explaining that the "will's clear grant of discretion to the executor" prevailed over New Jersey law's preference for in-kind distributions. *Id*. at *4.

While her state court action was still pending, in June 2018, Edita filed a 12-count complaint against many of the same defendants in the United States District Court for the District of New Jersey. After Edita amended her Complaint twice, the defendants moved to dismiss the Second Amended Complaint (the "2nd AC") in its entirety.

The 2nd AC alleged the following: (1) federal RICO violations, (2) common law fraud, (3) defamation, (4) New Jersey CEPA violations, (5) conversion, (6) ERISA violations, (7) intentional infliction of emotional distress, (8) tortious interference with prospective economic advantage, (9) negligence, (10) John Doe counts, (11) New Jersey RICO violations, and (12) civil conspiracy. The district court dismissed all 12 claims, finding that they were time-barred, failed to state a claim, or were otherwise barred by the litigation privilege or the probate exception. As to the federal and New Jersey RICO claims, the district court found that six of the seven predicate acts fell outside the four-year statute of limitations. The remaining predicate act, based upon the defendants' alleged litigation fraud and perjury in filings in the state court action, was not an eligible predicate racketeering act under the RICO statute and failed on the merits. Moreover, the First Amendment and the *Noer-Pennington* doctrine, which immunizes a party who petitions the government for redress from liability arising out of that petition, protected the defendants' submissions in the state court action.

With respect to Edita's fraud claim, the district court held that she had failed to identify a specific misrepresentation that she had relied on to her detriment. Thus, she failed to state a claim for common law fraud under New Jersey law.

Edita's defamation and CEPA claims likewise failed. The defamation claim, which arose out of the statements the defendants made in affidavits filed with the probate court, was barred, in part, by the applicable one-year statute of limitations. The underlying statements were also protected by the litigation privilege, which immunizes a litigant from liability for statements made in the course of a judicial proceeding. Edita's CEPA claim based upon her alleged wrongful termination from THC was similarly time-barred. Moreover, her efforts to allege a "continuing violation" based upon the defendants' actions in the probate action were barred by the litigation privilege and the *Noer-Pennington* doctrine.

Edita's conversion and ERISA claims failed to allege that she was a beneficiary of the 401(k) account. In addition, she could not allege that payment of the 401(k) to the decedent's estate injured her. Thus, the district court found that she failed to state a conversion claim and lacked standing to bring an ERISA claim.

The district court further held that Edita's intentional infliction of emotional distress and civil conspiracy claims were barred, in part, by the probate exception. The district court noted that the probate exception "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court…." *Id.* at *5. Thus, to the extent either claim sought to overturn the probate court's decision to allow Fabian to distribute cash in lieu of the THC shares, both claims failed. Moreover, Edita failed to allege conduct that approached the level of outrageous required to state an emotional distress claim, and the remaining allegations comprising her civil conspiracy claim were not actionable.

Edita's claims for tortious interference and negligence also warranted dismissal. Edita was unable to plausibly allege that she had a protectable interest in the funds from the decedent's

401(k), certain compensation that had been paid to Fabian, or the Toben property. Therefore, she did not allege a cognizable claim for tortious interference. Furthermore, the district court observed that her negligence claim was based upon Fabian's alleged breach of fiduciary duties that he owed her as executor of decedent's estate. The trial court and the Appellate Division had already considered that theory of liability and rejected it on the merits. Those decisions were final and had "claim- and issue-preclusive effect." *Id.* at *14. Consequently, the district court dismissed both claims.

Finally, the district court denied Edita's cross-motion to amend her Complaint a third time, finding that any further amendment would be futile.

II. DISPUTES AS TO PRE-DEATH CONDUCT AND ASSETS PASSING OUTSIDE A WILL

Estate of Sandor v. Lugowe, No. BER-C-54-21, 2021 WL 3162993 (N.J. Super. Ch. Div., Bergen Cty. July 12, 2021)

The decedent died on January 20, 2018, and the court appointed an administrator pendente lite of the estate (the "Administrator"). The Administrator filed an action to set aside inter vivos gifts made by Decedent's grand-nephew, Anthony Russo, Jr. ("Russo"), who was also Decedent's agent under his power of attorney. The Administrator joined in the litigation the bank at which Decedent kept most of his assets, asserting that it was likewise liable for the improper transfers.

The bank filed a motion for summary judgment, which the court granted. Specifically, the court determined that: (1) the New Jersey Uniform Fiduciaries Law, N.J.S.A. § 3B:14-52 et seq. shielded the bank from liability; (2) the power of attorney document waived liability against the bank; and (3) the only inference that could be drawn from the record was that the bank performed adequate due diligence and did not act in bad faith.

In the Matter of the Estate of Rudolph Hauke, et. al., No. A-4528-19, 2022 WL 274266 (N.J. Super. Ct. App. Div. Jan. 31, 2022)

Gregory and Thomas Hauke filed an action against Paul Hauke involving non-probate assets and change of beneficiary claims. The parties reached a settlement which they framed into a consent judgment and a mutual general release, with one limitation. Specifically, the release provided that the parties retained the right to file exceptions to the estate and trust accountings.

The executor, Hoyle, filed accounts to which Paul filed exceptions, to which Gregory and Thomas replied. Over the course of five days, the court conducted a hearing to address the accounts and Paul's exceptions. Gregory and Thomas did not introduce the release into evidence, but instead waited until closing arguments to assert, for the first time, that the release barred any relief based on Paul's exceptions. Paul's counsel objected, noting that the argument was not supported by any evidence of record. The court sustained the objection and ordered a surcharge of $157,533.47 against Gregory and a surcharge of $160,817.86 against Thomas.

The Appellate Division affirmed the decision on the accounting and the exceptions, but remanded to the Chancery Division for consideration of (1) whether the release barred Paul's filing of the exceptions that resulted in the surcharges and (2) whether Gregory and Thomas waived their right to rely on the release. *In the Matter of the Estate of Rudolph Hauke,* No. A-

5200-17 (App. Div. Mar. 25, 2020). In the remand order, the Appellate Division pointedly noted that the parties had spent 23 months preparing for trial and five days in trial, but Gregory and Thomas waited until closing arguments to raise the release as an issue.

On remand, the trial court determined that the release did not bar Paul's filing of exceptions or the resulting surcharges imposed on Gregory and Thomas, and that Gregory and Thomas had waived their right to rely on the release by not raising it as a defense until their closing argument.

Gregory and Thomas filed a second appeal. The Appellate Division affirmed both of the trial court's determinations.

In re: Estate of Ronald Pearlstein, deceased, No. 2015-X0204 (C.P. Montgomery March 31, 2022)

The decedent left one-third of his residuary estate to his second wife (Arlene) and the other two-thirds to be split evenly among his three children from his first marriage.

The executor, filed a First and Final Accounting on January 2, 2019 and a Second and Interim Accounting on April 4, 2019. Objections were filed to both. Three transactions occurring prior to the decedent's death remained open for appeal: (1) the "Unimog Deal"; (2) Wells Fargo checking account; and (3) the "Irwin mortgage". All three events occurred in the seven months prior to the decedent's death while he was battling thyroid cancer.

<u>The Unimog Deal</u>

The decedent operated a private lending business where he issued short-term, high-interest loans secured by mortgages on real property. During the seven months prior to his death, the decedent loaned $100,000 to an entity called Unimog. The decedent's children alleged Arlene unduly influenced the decedent into making the loan payable to the decedent and Arlene jointly, rather than to the decedent alone. The appellate court found that a confidential relationship existed between the decedent and Arlene and that Arlene substantially benefitted from the deal. However, the appellate court also found that the children failed to show that the decedent had a weakened intellectual state when the deal was being negotiated, even though they showed by clear and convincing evidence he was in such a state when the deal closed with Arlene's assistance.

<u>The Wells Fargo account</u>

On December 8, 2014, the decedent added Arlene as a joint owner of a Wells Fargo checking account. On January 7, 2015, Arlene transferred all the funds from the account to another joint account. Shortly thereafter, Arlene withdrew $225,000 from the second joint account and deposited that amount into an account owned solely by her. The decedent's children alleged the decedent was unduly influenced in adding Arlene to the account and sought a surcharge in the amount of $225,000. The appellate court first looked to whether Arlene exerted undue influence in getting her name added to the account. The court once again found a confidential relationship between the decedent and Arlene and that Arlene substantially benefitted from the arrangement. However, insufficient evidence was presented by the decedent's children to support a finding of weakened intellectual state at the time Arlene was added to the account. The appeals court distinguished that diminished physical capacity does not mean that a person also has diminished medical capacity. The court then looked to whether Arlene improperly transferred the funds from the joint account to her own account. The court found that one spouse is not permitted to empty a jointly held account without the consent of the other spouse under the Multiple-Party Accounts Act. 20 Pa. C.S.A. § 6301 *et seq.* Thus, Arlene acted improperly when she emptied the joint account and deposited the funds into her own account. However, the court acknowledged that the remedy for the improper deposit was to return the funds to the joint account. Because the joint account was made without undue influence and owned by Arlene and the decedent as tenants by the entirety, Arlene was entitled to the entire amount anyway. Thus, Arlene had a right to the funds and no surcharge was appropriate.

<u>The Irwin Mortgage</u>

Another mortgage was held jointly by the decedent and Arlene. The decedent's children did not allege undue influence. However, they alleged that title to the property was flawed and did not create a tenancy by the entirety, but a tenancy in common. Thus, the decedent's children sought one-half of the proceeds from the mortgage. The appellate court found that, although the deed to the property did not use the words "husband" and "wife", the decedent and Arlene held the property as tenants by the entirety because Pennsylvania law creates a presumption that property purchased by a married couple will be held that way. Additionally, the court found no evidence of an intent to have the property held as tenants in common or a joint tenancy, which would negate the presumption.

III. DISPUTES REGARDING THE VALIDITY AND INTERPRETATION OF WILLS

In re Estate of Stumm, No. A-0655-18T2, 2019 WL 4620342 (N.J. Super. Ct. App. Div. Sept. 24, 2019)

This appeal involved the interpretation of a will and the application of N.J.S.A. § 16:11-23 to resolve whether a bequest should pass to The Presbytery of the Palisades and the Presbyterian Church, U.S.A. Estate (collectively "the Presbytery"), or to a local church.

The decedent, Ruth Stumm, was long-time a member of the First Presbyterian Church of Wood-Ridge ("Church of Wood-Ridge"). Her 2010 last will provided that a portion of the residue would pass "unto the [Wood-Ridge church] or its successor to establish an endowment in the name of Gustave Herre."

Stumm died in 2016. In the interim, the Church of Wood-Ridge dissolved in 2014.

The executor of Stumm's estate sought advice and direction from the court as to the interpretation of the bequest. In response, the Presbytery, the Church of Moonachie, and the United Presbyterian Church of Lyndhurst claimed they were the successors of the Church of Wood-Ridge's assets and therefore entitled to the residuary bequest to the Church of Wood-Ridge.

The Presbytery contended that under N.J.S.A. § 16:11-23, it was entitled to the Church of Wood-Ridge's share of Stumm's estate because it was the successor to the dissolved church's assets. The Presbytery also argued that Stumm knew it was the successor to the local church and she could have changed her will after the local church was dissolved if that was her intent.

The trial court conducted a three-day bench trial and concluded that the Church of Moonachie was entitled to the bequest, based on Stumm's probable intent. In addition, the judge set forth ten reasons why N.J.S.A. § 16:11-23 did not confer the status of successor on the Presbytery.

On appeal, the Presbytery argued that the trial judge improperly conducted a trial to determine Stumm's "probable intent" and evaluated extrinsic evidence rather than reading the plain and unambiguous language of her will. In addition, it argued that the trial court's decision was inconsistent with N.J.S.A. § 16:11-23.

The Appellate Division rejected these arguments and affirmed the trial court. Citing *In re Trust of Nelson*, 454 N.J. Super. 151, 159 (App. Div. 2018), and related precedent, the appellate court explained that a trial judge is permitted to look beyond the plain language of the will to ascertain the decedent's intended meaning, and the trial court had properly concluded that Stumm's probable intent was that a local church, such as Church of Moonachie, was the proper recipient of the bequest.

The Appellate Division likewise rejected the Presbytery's contention that N.J.S.A. § 16:11-23 directs that, when a local Presbyterian Church dissolves, a bequest to the local church vests in the Presbytery. Instead, N.J.S.A. § 16:11-23 provides that all property held by a local church *at the time of its dissolution* shall go to the Presbytery; the statute is silent as to a devise to the local church after dissolution.

In re Estate of Hoffman, No. A-3455-19, 2021 WL 914184 (N.J. Super. Ct. App. Div. March 10, 2021), certif. denied, 258 A.3d 350 (2021)

This decision addresses the interpretation of a will as to a devise of bank accounts that had become depleted by the testator's death.

Charles and Marian Hoffman had been married for 50 years. They had no children, but had a close relationship with Marian's brother and his three children, the Olivers.

Marian died intestate on June 1, 2016. Charles was her sole heir.

After meeting twice with his attorney and four times with the attorney's paralegal, Charles executed his will on August 2, 2016. Charles died testate on April 4, 2018. Charles's brother Eugene qualified as executor.

Charles's will devised "the total sum of monies received from the estate of his deceased wife, including bank accounts, certificates of deposit, stocks, and bonds to be distributed to the Olivers, *per stirpes,* as set forth on the attached Schedule A (Nos. 2 and 3 only)." *Id.* at *3.

The will devised the remainder of the estate, including the other bank accounts noted on Schedule A, to Eugene. Schedule A was attached to the will. Among other assets, it listed as

Nos. 2 and 3, accounts at First Hope Bank with balances of $69,000.00 and $213,000.00, respectively.

Eugene testified that these two accounts were closed at Charles's direction; specifically, Eugene testified that the two accounts, which Charles referred to in his will as accounts Nos. 2 and 3, had been transferred to Charles upon Marian's death. Eugene testified that the funds in those two accounts had been used to pay Charles's caregivers, hospital bills, and transportation costs. The funds had also been used to provide a bond for a sand and gravel business that was operated on Eugene's property. Eugene testified that when Charles died, only $16,000 remained in these two accounts.

The attorney who wrote the will advised Charles that although the will provided for the disposition of these two bank accounts, Charles could use the money any way he wanted to during his lifetime because the accounts were not in a trust.

The trial court found that when Charles died, the funds in these two accounts had been used to pay Charles's expenses and the bond for Eugene's business. The trial court stated that the money never really belonged to the Olivers because it was not in a trust and Charles had the right to dispose of the funds as he saw fit during his lifetime. The court found that the devise of these two accounts to the Olivers was a specific devise which had adeemed.

The Olivers appealed, arguing that the devise of these two accounts was not a specific devise but a demonstrative devise. The court stated:

> There are three types of testamentary gifts: general, specific and demonstrative. *Busch v. Plews,* 19 N.J. Super. 195, 204 (Ch. Div. 1952), *aff'd.* 21 N.J. Super. 558 (App. Div. 1952), *aff'd* 12 N.J. 352 (1953). A general legacy is a bequest of personal property payable out of the general assets of the testator's estate rather than from specific property included therein. Citing *Plews*, 12 N.J. at 356 (citing *In re Low*, 103 N.J. Eq. 435, 437 (Prerog. Ct. 1928).
>
> A specific legacy is a bequest of personal property *in specie* and not payable from other assets of the estate. *Id.* (citing *Camden Trust Company v. Kramer,* 136 N.J. at 261, 270 (E&A 1945)). A demonstrative legacy is a request payable primarily out of specified property but chargeable against other assets of the estate if that property is insufficient . . ." *Id*. (citing *Kramer,* 136 N.J. Eq. at 270).
>
> To render a bequest specific, a testator must have contemplated the subject of a legacy to be a specific identical thing. *Plews*, 19 N.J. Super. at 205. Absent such an intention, "A legacy will be deemed either general or demonstrative, depending upon whether a fund or particular property is indicated as the primary source of its payment." *Id*. *See also Kramer,* 136 N.J. at 270 (stating that "if the subject matter is not sufficiently individuated, the legacy is treated as general or demonstrative"). Since specific legacies are subject to ademption and thus typically frustrate the testators' donative

> intent, "courts lean against construing legacies as specific." *Plews*, 12 N.J. at 356 (citing *Kramer*, 136 N.J. Eq. at 270).

Id. at *4-5.

The court also noted that when deciding whether a devise is specific or general, the intention of the testator must control.

On appeal, the Olivers argued that since the devise under Charles's will to them was for "a total sum of monies that Charles had acquired from Marian's estate," that he intended that the devise would be paid from, but not exclusively from, the two accounts listed on Schedule A. *Id.* at *5.

The Appellate Division disagreed and affirmed, noting that the devise limited the "sum of monies to the two accounts listed on Schedule A and identified as Nos. 2 and 3 only." *Id.* at *5.

The Appellate Division found that the will did not give the Olivers a devise in an amount equal to the amount of money received by Charles from Marian's estate but rather that Charles's use of the word "only" was intended to limit the devise to the Olivers to these two accounts. The appellate court noted that the phrase, "total sum of monies," was not defined by a specific amount, but by reference to the two accounts.

The court noted that the language in the will, which specifically provided that the devise shall be paid out of certain specified bank accounts, was intended as a limitation of the fund out of which payment of the devise was to be made. Charles did not intend to give the Olivers a specific sum of money from his estate; he chose instead to give the Olivers a sum of money on deposit in specific bank accounts.

In re Estate of Grischuk, A-3890-18, 2021 WL 3160466 (N.J. Super. Ct. App. Div. July 27, 2021)

This appeal encompassed a will contest and a dispute as to counsel fees.

The decedent was survived by her sister, defendant Olga Sweeney ("Olga"), her nephew, plaintiff Michael David ("Michael"), and others.

With the assistance of her long-time attorney, the decedent drafted five wills over an 11-year period. She executed her final will in 2015 ("2015 Will").

Michael sought to invalidate the 2015 Will. He alleged that the decedent lacked testamentary capacity and that Olga exercised undue influence.

After a four-day bench trial, the trial court rejected Michael's claims, upheld the 2015 Will, and ruled on counsel fees. The appeal thus addressed (1) incapacity, (2) undue influence, and (3) counsel fee awards.

1. Incapacity

The trial court found that the decedent had testamentary capacity when she executed the 2015 Will. The court concluded that Michael's incapacity claim was based only on his subjective opinion that the decedent was in failing health when she executed the will. Michael's opinion was contradicted by the other testimony and medical records.

The Appellate Division affirmed and explained that a very low degree of mental capacity is required to execute a will. Courts must consider whether the testator was able to "comprehend the property [she was] about to dispose of; the natural objects of [her] bounty; the meaning of the business in which [she was] engaged; the relation of each of these factors to the others, and the distribution that is made by the will." *In re Livingston's Will*, 5 N.J. 65, 73 (1950). Capacity is tested at the time of execution of the will. *Id.* at 76.

In addition, a decedent is presumed to have been of sound mind and competent when she executed the will. *Haynes v. First Nat'l Bank*, 87 N.J. 163, 175-76 (1981). "[T]he burden of establishing a lack of testamentary capacity is upon the one who challenges its existence . . . [and] must be [proven] by clear and convincing evidence." *In re Estate of Hoover*, 21 N.J. Super. 323, 325 (App. Div. 1952).

Michael argued that the trial court ignored medical records establishing that the decedent suffered from anxiety and depression and was in a weakened state at the time she executed the will. He also argued that the court overlooked testimony from the decedent's caregiver regarding her physical and mental state.

The Appellate Division disagreed and noted that the record contained other evidence that the decedent was mentally sharp and making reasoned decisions at the time she executed the 2015 Will. The attorney who prepared the will and was present for its execution had no doubt of the decedent's capacity.

2. Undue Influence

The trial court concluded that Michael had not proven that Olga exerted undue influence on the decedent as to the 2015 Will. The court relied on the testimony of the drafting attorney. The court further found that, although Olga was present when the decedent met with her attorney before executing the will, Olga neither spoke to the decedent nor the attorney about its contents nor to anyone else to influence the bequests.

As to a presumption of undue influence, the trial court found that Olga and the decedent maintained a confidential relationship – for example, they shared a joint bank account, and had both been represented by the attorney who drafted the 2015 Will. The trial court also noted that one could reasonably conclude that suspicious circumstances surrounded the decedent's changes to Michael bequests in her series of wills.

Nevertheless, the court concluded that Michael's claim of undue influence failed in the context of the entirety of the case, because the facts simply were lacking to prove that Olga dominated the decedent or that the decedent relied upon Olga to make decisions on her behalf. Instead, the court found that the decedent made all of her financial decisions and continued to pay her own bills until her death. Although Olga had written checks on the joint account she held with the decedent, these were at the decedent's direction and for her convenience. Olga made no financial decisions on behalf of the decedent, nor did she benefit from any of her activities on the decedent's behalf.

The Appellate Division again affirmed, explaining that not all influence is "undue." Mere persuasion, suggestions, or the opportunity to exert influence over a testator are not sufficient to invalidate a will. *Livingston's Will*, 5 N.J. at 73.

Indeed, the Appellate Division agreed with the trial court that, even though a confidential relationship and suspicious circumstances existed, "the suspicion was dispelled by proof of [the] decedent's independent and informed decision to execute the will." *Grischuk*, at *4.

3. Counsel Fees

Michael applied to the trial court for an award of attorney fees and costs from the estate pursuant to *Rule* 4:42-9(a)(3). Olga opposed the motion and cross-moved for sanctions against Michael pursuant to N.J.S.A. § 2A: 15-59.1(a) and *Rule* 1:4-8 for having filed frivolous claims.

The trial court awarded Michael $84,030.00 in attorney's fees and $5,350.91 in costs and denied Olga's motion for sanctions. The court concluded that Michael had reasonable cause to file his complaint based on information then in his possession. However, Olga's discovery responses made clear that Michael's claims were baseless and he should not have proceeded to trial. As a result, the court awarded Michael only those attorney fees and costs on the incapacity claim up to the point of his receipt of the decedent's medical records and on the undue influence claim up to the last deposition of a trial witness. The court awarded no attorney fees or costs to Michael related to trial preparation after August 12, 2017, or for the trial.

After summarizing the standards for counsel fee awards, the Appellate Division concluded that the trial court acted within its discretion when it awarded the fees and costs to Michael. However, the appellate court agreed with Olga that the trial court's decision lacked precision: the court did not identify the date on which Michael received the decedent's medical records or explain in any detail the amounts sought by Michael but disallowed. In addition, the court issued only a conclusory statement that the time spent by Michael's attorneys and the hours they expended were reasonable.

After noting that a remand would result in additional expenses which would further deplete the relatively modest estate, and that the trial judge had retired, the appeals court undertook its own review of Michael's application for attorney fees. It concluded that the amount of fees and costs awarded reflected an equitable exercise of the trial court's discretion in light of the record, Michael's lack of success, and the court's conclusions regarding reasonable cause.

Finally, the Appellate Division rejected Olga's argument that the trial court erred when it denied her motion for sanctions. Although the trial court did not issue findings of fact and conclusions of law addressing Olga's motion for sanctions, the judge found that Michael had reasonable cause to file his complaint and to pursue his claims through discovery. Implicit in those findings was the conclusion that Michael's complaint was not frivolous. In addition, the trial court's limitation on the award of attorney fees and costs was sufficient to resolve Olga's claims that Michael's pursuit of a trial was wrongful.

In re Estate of Rost, A-1807-19, 2021 WL 1307458 (N.J. Super. Ct. App. Div. Apr. 8, 2021)

This decision embodies a rare instance in which, in citing the complete lack of evidence and weak arguments on the merits, a court enforced an in terrorem, or no-contest, clause.

Annie Rost died in September 2018, leaving behind a sizeable estate. Her will devised the estate among her four children and various charities. Her will also contained an in terrorem provision in Paragraph Fourteenth:

> Any beneficiary under this, my Will, who shall institute, prosecute or abet any action to contest or to set aside in whole or in part this, my Will, shall be excluded from any share or interest in my estate, and I hereby direct that the property or interest to which he or she might otherwise have become entitled shall be devised to DEBORAH HOSPITAL FOUNDATION, for general purposes, absolutely and in fee simple, with the exception that the devises under Paragraphs Seventh and Eighth would become part of my residuary estate and distributed pursuant to Paragraph Ninth.

The decedent's daughter, Claudia Handwerker, filed a caveat with the Surrogate's Court six days after her mother's death, which stated (emphasis added):

> I, Claudia Joan Handwerker, Daughter of Annie Rost, late of the town of Princeton, County of Mercer, State of New Jersey, who died on September 12, 2018, do hereby caveat and protest against the granting of Letters of Administration, or admitting to probate any paper writing purporting to be the Will of Annie Rost, as well as the appointment of a personal representative of the Estate of Annie Rost.

On multiple occasions, finding the complete failure of Claudia to present any evidence to support her claims, the trial court determined that Claudia's caveat constituted a challenge to the will and that her claim was filed and then continued without probable cause. Therefore, the in terrorem clause barred her from inheriting under the will. Her share was devised to Deborah Hospital.

The Appellate Division affirmed, in an unreported decision.

Both the trial court and the appeals court raised the inconsistency and lack of foundation in Claudia's filings. More specifically, several months after the filing of the caveat, another family member filed a complaint and order to show cause to dismiss the caveat and admit the will to probate. Claudia filed an answer and unverified counterclaim. In her answer, Claudia "consent[ed] to removing the Caveat, allowing the Will to be probated and ask[ed] that the relief set forth in the attached counter-claim be granted." *Id*. at *1. However, in the counterclaim, Claudia objected to "Clause No. [seven] of the Will giving the Princeton house to my brother" and further objected to his appointment as executor under the will. *Id*.

Claudia later filed an amended answer and counterclaim that "consent[ed] to removing the Caveat and allowing the Will to be probated. . . ." *Id*. It also "object[ed] to Clause No.

[twelve] of the Will appointing Norman Rost, Executor, and Sonya Bradski as Substitute Executor." *Id*. The answer requested that Claudia be appointed executor. It further "object[ed] to Clause No. [seven] of the Will giving the Princeton house to my brother Norman Rost. . . ." *Id*.

Claudia did not verify the pleadings or provide any certification or affidavits to support her claims.

On the return date of the order to show cause, in March 2019, Claudia's attorney advised the trial court:

> Judge, we do not oppose the introduction of this will today. The provisions of this will, [ninety] percent of it, my client's okay with. She will withdraw the caveat which I said in my answer. She will allow the will to be probated. She will allow the will to proceed. We are here, Judge, on a motion to allow my counterclaim to proceed. . . .

Id. at *2.

The trial judge explained that the record did not support Claudia's allegations, nor did she supply a certification in anticipation of the hearing:

> I don't have anything in support of this counterclaim today. . . . There's nothing in here to indicate that there's any fact supporting this. This is a return date on the order to show cause. This is a summary trial. Since you already agreed the will could be probated, there's nothing about the proving of the will that needs to be tried so there's no discovery required.

Id.

The trial court ruled against Claudia, finding that the court had the authority to dispose of the case on the return date, as a summary proceeding. The caveat was dismissed, all relief to Claudia was denied, and the will was admitted to probate.

Later, Claudia filed another application, by way of a verified complaint and order to show cause demanding an accounting of the estate, the appointment of a temporary executor, and attorney's fees for bringing the action.

Thereafter, Deborah Hospital filed a verified complaint to enforce the in terrorem provision of the will.

When argument occurred on those later applications, the trial court assessed two issues. The first was whether the caveat was a challenge to the will. The court found that it was: a caveat is the formal mechanism by which one gives notice of a challenge to a will that has been or is expected to be offered for probate. *In Re Stockdale*, 196 N.J. 275 (2008); *In Re Myers' Will*, 20 N.J. 228, 235 (1955).

The second issue was whether "probable cause" existed for the caveat, pursuant to N.J.S.A. 3B:3-47, which provides that "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." *Haynes v. First Nat. State Bank of N.J.*, 87 N.J. 163, 189 (1981).

Based on the record before it, the trial court determined that: Claudia lacked probable cause to contest the will; the in terrorem clause excluded Claudia from inheriting under the will; and Claudia's share in the estate would pass to Deborah Hospital per the terms of the will.

Claudia moved for reconsideration. The trial court denied that motion, noting again that Claudia had presented no evidence and that there was no justification for her continued filings.

Claudia appealed. First, she argued that her caveat was not a challenge to the will. The Appellate Division rejected Claudia's argument, and stressed that Claudia had filed the caveat and refused to withdraw it before litigation ensued. This necessitated the application to seek to admit the will to probate. And in response to that application, Claudia continued to assert her claims and challenge at least portions of the will:

> Claudia's argument that the caveat was not a challenge to the will is without merit. Although, upon being sued, she agreed to withdraw the caveat, she continued to object to and contest the will. Despite her contention that she withdrew her caveat, her counterclaims clearly attempted to "contest or to set aside in whole or in part" the provisions laid out in Annie's will, in violation of Paragraph Fourteenth.

*Rost, 2021 WL 1307458 at *6.*

The Appellate Division then reached whether probable cause existed for Claudia's challenges. It noted that Claudia's filings were unverified. The appeals court also referred to the trial record as to positions taken by Claudia and her counsel:

> At the hearing on the return date of the order to show cause… Claudia sought the court's leave to file her amended answer and counterclaim. Her attorney stated, "[w]e want to correct some . . . things in the will" and "prove that this executor is not honest enough to conduct the job." Claudia's counsel admitted that "[t]hese are allegations, Judge." Moreover, during argument on the motion for reconsideration, Claudia's counsel candidly admitted: "[W]e didn't offer anything in March to support our caveat. We didn't offer any probable cause in March. We didn't really come up with anything in March. That's all true Judge."

Id. at *7.

The Appellate Division concluded that the trial court properly tried the action on the return day pursuant to *R*. 4:67-5. Claudia had the burden to produce evidence to the court to establish a basis for her challenges and failed to provide any grounds:

> [Claudia] was required to show probable cause to support her caveat on the return date. Claudia did not do so. She did not present any verified pleadings, affidavits, or certifications to rebut the complaint. To the contrary, even six months after the filing of the caveat, on the day of trial of the summary action, her attorney requested time and discovery to prove her allegations. Because there was "no genuine issue as to any material fact," the court properly decided the action on the pleadings. *See R.* 4:67-5.

Id.

The Appellate Division thus did not disturb the trial court's finding that "Claudia did not present any evidence to support her challenge to the will at the [initial] hearing on the order to show cause. The [trial] court affirmed its decision that the caveat was a challenge to the will during the arguments on Claudia's motion for reconsideration." *Id.*

Estate of Small v. Small, 234 A.3d 657 (PA 2020)

The central question was whether a father had forfeited his share of his son's estate.

The Pennsylvania Supreme Court determined that forfeiture had not occurred, and the father was entitled to inherit as an intestate heir.

The son was eighteen when he sustained gunshot wounds that rendered him a paraplegic. His mother provided the son with assistance and some financial support until the son's paramour later assumed those duties.

The father was absent and did not provide care or support for the son during the last few years of his life.

The son died intestate at age 37, and without a spouse or descendants. He left no will. He had never been declared incapacitated.

The sole estate asset was a $90,000 wrongful death award recovered by the mother as administrator.

Under Pennsylvania intestacy law, the son's estate would pass to the parents. The mother petitioned for an order that the father should not inherit under a statutory exception where, for one year or more prior to the death of the parent's minor or dependent child, the parent failed to perform the duty to support the minor or dependent child or, for one year, deserted the minor or dependent child.

The Orphan's Court denied the petition. The mother appealed, and the Pennsylvania Supreme Court affirmed.

It notes that the Pennsylvania probate code does not define "dependent child" nor does the statutory construction act. However, the statutes require any dependency on the child's part to be one that gives rise to a duty of support by the parent. The use of the phrase, "the duty," leaves no room for an interpretation whereby the child was dependent, in some sense of the word, but there was no corresponding duty on the part of the parent to provide support. A child cannot have been dependent unless the parent had a support duty.

The forfeiture statute did not support the mother's position that the father's duty should be understood in an informal, social, moral, or colloquial sense. The duty under that statute must arise from some legally recognized source, such as common law, a statute, a contract, or a court order.

The son was an adult when he died. The Court observed that, while a parent may have a duty to support into adulthood a child who becomes disabled while a minor, that concept did not apply here because the son became disabled as an adult.

Estate of Jesus Del Haya v. Tebelio Valdes and Librada Valdes and Mortgage Electronic Registration Systems, Inc. and Loancare, LLC, No. A-2229-20 (N.J. Super. Ct. App. Div. June 29, 2022)

This case addresses (i) whether New Jersey courts are obligated to establish a property's fair market value before ordering its sale in a partition action and (ii) whether a married couple that owns property with a third person presumptively does so as tenants by the entirety. The Appellate Division answered "no" to both questions.

Jesus A. Del Haya ("Decedent") died testate. Prior to his death, Decedent purchased a two-family home with Tebelio Valdes ("Tebelio") and Librada Valdes ("Librada"), a married couple. Decedent, Tebelio and Librada were all individually named as borrowers on the $300,924.00 mortgage secured to purchase the property. Decedent left his entire interest in the property to his estate (the "Estate").

The Estate filed a complaint for partition of the property by sale that was uncontested by Tebelio and Librada. Tebelio and Librada subsequently filed a motion to vacate default and an answer and counterclaim alleging, in relevant part, that the Estate did not have an interest in the property because Decedent's interest transferred to them as the other owners of the property upon his death. The Estate alleged Tebelio and Librado collectively owned fifty percent of the property as tenants by the entirety by virtue of being married and that Decedent owned the other fifty percent as a tenant in common.

After a two-day trial, the trial court found that Decedent, Tebelio and Librada owned the property as tenants in common, with each individual entitled to a one-third interest, and that there was no evidence of survivorship rights. Further, the court found that Tebelio and Librada did not own a joint fifty percent interest as tenants by the entirety simply because they were married, without other documentation indicating such a tenancy existed. As a result, the Estate was entitled to demand partition of the property.

The trial court granted Tebelio and Librada a right of first refusal if they desired to purchase the property. Additionally, the court required the parties to secure a fair market value appraisal of the property. If Tebelio and Librada failed to secure an adequate mortgage commitment within thirty days, they waived their right of first refusal and the property would be listed for sale.

Tebelio and Librada did not produce a mortgage commitment within this timeframe, causing the Estate to file an enforcement motion to compel the listing of the property. Tebelio and Librada opposed the motion on the sole ground that they obtained a mortgage commitment. However, oral argument revealed that the commitment was insufficient to cover the existing mortgage, let alone sufficient to purchase the Estate's interest. The trial court placed its ruling granting the motion to compel on the record, wherein it suggested several methods the parties could use to value the property for sale.

Tebelio and Librada appealed the ruling, arguing that the court erroneously failed to include a fair market valuation of the property or, alternatively, a method of valuation for the parties to use. The Estate argued (i) the issue of valuation was not raised below and was therefore barred, (ii) the proposed mortgage commitment was inadequate to support a buy-out and (iii) Tebelio and Librada waived their right to a buy-out after failing to produce an adequate mortgage commitment within the stated period.

The Appellate Division agreed with the trial court and ordered partition of the property. Further, it found that neither party submitted testimony or documentary evidence regarding the fair market value of the property. The trial court offered suggestions as to how the parties could determine fair market value in its oral opinion. The Appellate Division observed that Tebelio and Librada took no action to determine the property's fair market value nor did they provide legal support for the notion that the court is obligated to provide a fair market valuation in a partition action. The trial court's suggestion that a realtor may list the property at a price based on various market factors to ascertain what a willing buyer would pay for the property was an acceptable method of valuation. Moreover, it was not improper for the court to make such a suggestion in the absence of expert evidence of the property's value.

Likewise, the Appellate Division found that the trial court did not abuse its discretion when it held that the Estate, Tebelio and Librada were each entitled to a one-third interest in the property as tenants in common. Tebelio and Librada were not listed on the deed or the original mortgage as husband and wife or as tenants by the entirety. Under the totality of the circumstances, the trial court correctly concluded that the property was owned by Decedent, Tebelio and Librada as tenants in common.

In the Matter of Francesco Ventre, Docket No. A-0011-21 (N.J. Super. Ct. App. Div. July 8, 2022)

This case evaluates a testator's probable intent as to the discharge of debt owed by jointly by his son and daughter-in-law and, more specifically, whether extrinsic evidence can be used to show that the decedent intended the debt to be discharged as to the son but not the daughter-in-law.

Anthony Ventre ("Anthony"), son of decedent Francesco Ventre ("Decedent") and executor of the Decedent's estate, appealed a trial court ruling that the Decedent's will required a debt owned jointly by Anthony and his wife, Carol ("Carol"), to be completely discharged and not discharged as to Anthony only.

The Decedent loaned Anthony funds to purchase property upon which Anthony hoped to build a two-family home. Anthony and Carol moved into one of the units upon its completion. Around the same time, Anthony secured new funding to recast the construction loan, and, to complete that transaction, Carol was placed on the deed. To protect the Decedent's loan to Anthony, the Decedent's longtime attorney, Arthur Balsamo ("Balsamo"), prepared a note, mortgage, and deed that transferred title from Anthony alone to Anthony and Carol together. The note was signed by both Anthony and Carol and contained a provision addressing the possibility of the couple's divorce. It stated, "I will pay principal and interest on demand or in the event the property secured by the mortgage which is being executed simultaneously herewith is sold or in the event of a divorce of the above-named mortgagors." No payments were ever made on this note by Anthony or Carol, nor did the Decedent demand payment.

Shortly after signing the note and mortgage, the Decedent had a will drafted by Balsamo that contained the following provision in Article 3: "I do give, devise and bequeath the unpaid principal balance and accrued interest, if any, in and to a certain mortgage lien which I hold on the property [owned by Anthony] … unto my son, Anthony Ventre. It is my wish and I direct that such debt be forgiven and the mortgage lien cancelled of record by my [E]xecutor."

Anthony and Balsamo agreed that the language of the first sentence meant that Anthony would receive the money he and Carol owed his father. However, Balsamo argued that the second sentence meant that the debt would be forgiven and the lien discharged in its entirety, even though the Decedent never stated he intended to release Carol from the debt.

Balsamo stated he was careful to confirm with the Decedent that he wanted the debt forgiven and the mortgage cancelled because that would mean that the Decedent's wife would not receive any of the proceeds from the note upon his passing. Balsamo also stated that the Decedent understood this meant Anthony and Carol would own the property free and clear of any encumbrances.

Conversely, Anthony argued that since the Decedent and Balsamo never discussed Carol when preparing the will, they did not intend to release her from the debt. Anthony also alleged that the Decedent was aware of the marital trouble of Anthony and Carol and their impending divorce and, as a result, would not have intended her to benefit from his will.

The trial court concluded that Article 3 of the will was ambiguous as to whether the debt was to be forgiven as to Anthony only or forgiven in its entirety. The presence of ambiguity in a will calls for the application of the doctrine of probable intent. *In re Estate of Munger*, 63 N.J. 514, 521 (1973). This means that the court was tasked with considering the will and extrinsic evidence to effectuate the probable intent of the testator. *Id.*

The trial judge found Anthony to not be a credible witness because his testimony was clouded by his involvement with his divorce litigation. The court found Balsamo to be a credible witness, in part because of his long-time relationship with the Decedent. Furthermore, the court was convinced by Balsamo's testimony regarding the Decedent's statements made privately when executing the will, for which Anthony was not present. The court thus found using the doctrine of probable intent that the Decedent intended the entire debt to be discharged at his death, even though that would indirectly benefit Carol.

Anthony appealed.

The Appellate Division determined the trial court's findings were fully supported by the evidence, especially Balsamo's testimony and notes. Likewise, the Appellate Division did not find that the trial judge misapplied the doctrine of probable intent. It agreed that no direct or extrinsic evidence supported the position that thee Decedent intended that Carol remain liable for the debt originally taken by Anthony in his own name. Thus, there was no reason to disturb the will. The Appellate Division also agreed that the trial judge correctly rejected self-serving statements made by Anthony's sister, Carmela, regarding an alleged meeting she had with the Decedent and Balsamo after the will was executed. Carmela alleged Balsamo never mentioned Carol being a beneficiary, direct or indirect, of the Decedent's estate. Balsamo did not recall that conversation and neither party could produce evidence of it. Carmela was permitted to provide extensive testimony about her perspective on the deteriorating nature of Anthony and Carol's relationship, Carol's alleged disrespect of the Decedent, and her recollection of the alleged meeting with Balsamo. Thus, the Appellate Division was unpersuaded that any of the extrinsic evidence presented by Anthony or Carmela altered the Decedent's probable intent when preparing his will.

As a result, the Appellate Division upheld the discharge of the entire debt in Article 3 of the will.

In the Matter of the Estate of Russomanno, Docket No. A-3760-20 (N.J. Super. Ct. App. Div. July 22, 2022)

Daniel J. Russomanno, the decedent, died leaving two children, a daughter and son. About a month after the decedent's death, the decedent's daughter filed a verified complaint seeking appointment as administrator of her late father's intestate estate. In response, the son filed an answer and counterclaim seeking to admit to probate an unsigned will as the decedent's last will and testament. Following the daughter's motion for summary judgment, the trial court found that because the son could not provide any evidence that the decedent reviewed or gave his final assent to the unsigned document, the document could not be admitted to probate as the decedent's last will and testament. The son then appealed the trial court's decision.

On appeal, the trial court's decision was affirmed. In affirming the decision, the Appellate Division analyzed the factual record to determine whether any evidence submitted by the son could "clearly and convincingly show that decedent reviewed the [draft] will . . . and assented to it as his will." *Id.* at *3. In reviewing the factual record, the court highlighted certain facts, including the following:

Prior to 2012, the decedent had a will that divided his estate equally between his two children. Neither the son nor the daughter possessed the original or copy of the will. On November 26, 2012, decedent and his children met with an attorney to discuss the preparation of a new will. During this meeting, the decedent expressed to the attorney that "he wanted his house to go to [his son], [his daughter] was to receive a specific bequest of $20,000, and the balance of his estate was to be distributed equally between his two children." *Id.* at *1.

In January 2013, after decedent paid a portion of the attorney's requested retainer fee, the attorney sent the decedent a draft of a will. Thereafter, the attorney followed up with the decedent on several occasions regarding the draft will. The son certified that the decedent may have signed the draft will and further certified that the decedent handed him an envelope sometime in 2013, which purportedly contained the signed will. This envelope was said to have been lost as a result of a flood in the son's basement. The son acknowledged that he never opened the envelope and, therefore, he did not know whether it, in fact, contained the will prepared by the attorney. Neither the son nor the daughter disputed the fact that the decedent never responded to the attorney regarding the draft will. It was further undisputed among the parties that no one saw the decedent sign the draft will.

Ultimately, based upon the factual record, the Appellate Division affirmed the trial court, holding that "no rational factfinder could be clearly convinced that decedent reviewed and assented to the [draft] will." The Appellate Division further found the trial court "correctly concluded that [the daughter] was entitled to summary judgment declaring that decedent had died testate." *Id.* 10.

In the Matter of the Estate of Yvonne Albericci, Docket No. A-3377-20 (N.J. Super. App. Div. July 26, 2022)

Defendant filed a will contest, claiming that her mother was suffering from diminished mental capacity caused by terminal stomach cancer which allegedly made her susceptible to undue influence from her sons.

Defendant Dara Albericci challenged the probate of her late mother's Will. Dara contended that she was disinherited because her brothers, plaintiffs Steven, Corry, and Scott Albericci, exerted undue influence on their mother. The Will directed that after payment of debts and funeral expenses, the residue of the estate was to be divided equally among plaintiffs, per stirpes. Decedent's other son, Robert, and two daughters, Dara and Deborah Albericci, were to be excluded from receiving any share of the estate "for reasons known to each of them."

After a seven-day trial, the trial judge dismissed Dara's will contest with prejudice, finding there was nothing suspicious about Yvonne's execution of her Will. In his oral decision, the judge explained there was no evidence that the "strong-willed" Yvonne was feeble and not thinking clearly when she met with a lawyer, who had been recommended by a friend and was unknown by the parties, to prepare and then execute her Will.

The judge found there was no evidence that Yvonne was influenced by plaintiffs to leave the entirety of her estate to them and disinherit Dara. The judge noted plaintiffs had taken care of their "dying mother," whereas Dara had "alienated" her mother before she became ill and had not spoken to her in the three years before her death. In fact, the judge found that from the day Dara became aware of her mother's terminal illness until the day her mother died, she did not visit or call her, nor did she write to her. Dara also did not attend her mother's funeral service, despite being invited by her siblings.

Despite her unsuccessful challenge, Dara filed a Rule 4:42-9(a)(3) motion to have the estate pay her attorneys' fees of $87,018.75 and costs of $2,874.54. The trial judge denied the fee application, finding that Dara had failed to establish "reasonable cause" for the Will contest and that it would be unfair for the estate to pay her attorney fees and costs. In rejecting the fee application, the trial judge reiterated that "there was really nothing that even touched upon . . . undue influence here [by plaintiffs], [or the existence of] a confidential relationship [between plaintiffs and Yvonne] or suspicious circumstances" surrounding the execution of the Will. *Id.* at *3-4.

On appeal, Dara argued that the trial judge abused his discretion because she claimed to have established both a confidential relationship and suspicious circumstances at trial. The Appellate Division disagreed.

Citing *In re Reisdorf*, 80 N.J. 319, 327 (1979), the Appellate Division noted that the allowance of counsel fees and costs in a will contest under Rule 4:42-9(a)(3) is discretionary. Further, "fee determinations by trial [judges] will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." At *4 (quoting *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 444 (2001); *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995))."

The appellate court further noted that "[e]xcept in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute." *Reisdorf*, 80 N.J. at 326. An unsuccessful contestant is entitled to reimbursement upon a showing of "reasonable cause," defined as a belief that "rested upon facts or circumstances sufficient to excite in the probate court an apprehension that the testator lacked mental capacity or was unduly influenced." At *5 (quoting *In re Will of Caruso*, 18 N.J. 26, 35 (1955)).

The Appellate Division also cautioned that it is incumbent upon the trial judge not to reduce an attorney fee request based on the judge's personal policy of "discouraging or 'deterring'" fee-shifting cases. *Id.* at *5 (quoting *In re Probate of the Alleged Will and Codicil of Macool*, 416 N.J. Super. 298, 314 (App. Div. 2010)).

In this case, the appellate court found that the trial judge's denial of Dara's fees and costs "did not constitute an abuse of discretion, let alone a clear abuse of discretion." *Id.* at *5. The finding of no reasonable cause, and thus that the estate was not responsible for Dara's attorney fees and costs, were supported by credible evidence in the record. The trial judge's rulings were affirmed.

IV. ENFORCEABILITY OF ARBITRATION CLAUSE IN WILL

In re Estate of Samuel P. Hekemian, No. P-47921, 2021 WL 6884165, (N.J. Super. Ch. February 7, 2022)

The decedent, Samuel P. Hekemian ("Decedent"), was survived by his wife and their four sons, including the plaintiff and one of the defendants. The Decedent left a Last Will and Testament ("Will") that named the defendants as the executors and trustees.

The Will contained an arbitration clause:

> SEVENTEENTH: Any dispute regarding the interpretation this Will and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration, in the following manner: (A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors

> and/or trustees, collectively), none of whom shall be an interested party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof. (B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in the absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall be paid from such trust, or assessed against the parties as may be determined by the arbitrator, as part of the decision. (C) Arbitration shall be the exclusive remedy for resolving disputes concerning this Will and the trusts created hereunder, including but not limited to the administration of the Will and such trusts; provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an arbitrator hereunder.

After the Will was probated, the plaintiff requested an early distribution or a loan from the trusts. That request was denied. The plaintiff subsequently filed a judicial action to enforce his rights and compel an accounting.

The defendants sought to enforce the arbitration clause in the Will. They argued that the plaintiff was bound by the arbitration clause by (i) failing to challenge the validity of the Will, (ii) seeking to receive the benefits of the Will and (iii) seeking an accounting in his capacity as a beneficiary. The defendants also relied on New Jersey's strong public policy preference for arbitration and the fact that the Decedent inserted an arbitration clause in his Will, evidencing his intent, by the statement in the Will (emphasis added) that arbitration "shall be the *exclusive remedy* for resolving disputes." The defendants acknowledged that no New Jersey precedent existed on the issue but cited *Rachal v. Reitz*, 403 S.W.3d 840 (2013), in support of their position.

In addition, the defendants argued that New Jersey courts have compelled a non-signatory to arbitrate when the non-signatory "engaged in conduct, either intentional or under circumstances that induced reliance, and that [the parties seeking to compel arbitration] acted or changed their position to their detriment." *See Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 189 (2013) (quoting *Knorr v. Smeal*, 178 N.J. 169, 178 (2003)). Thus, the equitable estoppel doctrine prevents a non-signatory from "cherry picking" the provisions of a contract.

Applying these principles to the facts in this case, the defendants noted that the plaintiff had written to the defendants "I hereby formally request a distribution from the Credit Shelter Trust and/or loan from the Credit Shelter Trust, Generational-Skipping Marital Trust and/or Residual Martial Trust." Additionally, the plaintiff made numerous statements which showed that he sought to avail himself of the benefits under the Will and the trusts.

In response, the plaintiff asserted that the arbitration provision was unenforceable under New Jersey law. The plaintiff argued that *Rachal* has no precedential value to a New Jersey court; involved an *inter vivos* trust, not a will; and involved a situation in which the beneficiary had received benefits from the trust, whereas the plaintiff had received no such benefits.

The plaintiff further asserted that arbitration is a remedy of a contractual nature, and that mutual assent is a prerequisite for enforcement of an arbitration agreement. The plaintiff also disputed the defendants' estoppel theory because they failed to establish the plaintiff engaged in conduct that induced their reliance. Finally, the plaintiff argued that he was only seeking an accounting and cited Article Sixteenth of the Will, which provided that a fiduciary "may submit the account to a court for approval and settlement."

The trial court recognized New Jersey's strong public policy favoring arbitration as a mechanism for resolving disputes. At the same time, in probate matters the court must honor and effectuate a decedent's intent. *N.J.S.A.* 3B:3-33.1 ("the intention of a testator as expressed in his will controls the legal effects of his dispositions").

The trial judge recognized that no court in New Jersey had addressed whether an arbitration clause in a will is valid or enforceable, and the legislature had not enacted any statute permitting arbitration clauses in wills and trusts.

The trial judge drew a comparison to *in terrorem* clauses, which are "designed to compel compliance with the testator's wishes through fear…. In 1977, the New Jersey legislature, via statute, rendered *in terrorem* clauses unenforceable." *Id. at *5*(citations omitted). The court cited *Haynes v. First Nat'l State Bank*, 87 N.J. 163 (1981), for the principle that *in terrorem* clauses would not be enforced where there is probable cause to challenge the instrument. The judge noted that neither the judiciary nor the legislature has defined "probable cause" in the context of a will contest, but the *Restatement of Property (Second)* states that "a contestant's good faith belief is not enough if there was no reasonable basis for it." *Restatement (Second) Property (Donative Transfers)*, ¶ 9.1 comment j (1981). The court found that "probable cause to bring a challenge to a will exists if a reasonable person, based on the evidence, could conclude that there is a substantial likelihood that the will challenge would be successful." *Id.* (citation omitted).

In the end, the trial court concluded that the plaintiff could not be compelled to arbitrate, on several grounds. First, the Will was not a contract between two parties in the traditional sense, and the benefits of the Will had not extended to the plaintiff based on the traditional principles of contract and agency law. The plaintiff had not agreed to arbitrate disputes concerning the Will because the Will was "not a contract or an agreement of consensual understanding between two parties." *Id.* at *7.

In addition, the plaintiff had grounds to challenge the administration of the estate. His only motivation was to seek an accounting. At the same time, the plaintiff had shown that he had received minimal information about the administration of the estate. He had a statutory right to receive an accounting under *N.J.S.A.* 3B:17-2.

Next, the trial court found that the arbitration provision in the Will was unenforceable. "[T]here is a lack of mutual assent regarding the Article Seventeenth arbitration clause. The [Will] is a statement of testamentary intent, not an instrument that reflects a consensual understanding between parties. In short, a will is not a contract, nor is it an agreement as defined in *Rachal*." *Id.* at *6.

The judge continued, "No court in New Jersey has ruled that a will is an agreement between the testator and their beneficiaries for the purposes of arbitration provisions because there lacks a consensual understanding between parties in the will context where only one party has expressed an intent to arbitrate… Therefore, on basic contract principles, the lack of mutual assent to the provision renders the provision unenforceable….” *Id.* (citation omitted).

Finally, the court determined that the arbitration clause at issue failed to apprise the plaintiff of his right to sue, and he had no opportunity to expressly waive that right. Under New Jersey law, for an arbitration clause to be valid, there must be a clear waiver of the right to sue. Litigants' rights "to avail themselves to the court process is so important that any court scrutinizing an arbitration clause in an agreement must determine that any party subject to the arbitration clause is apprised of their rights." *Id.* at *7.

V. TRUST DISPUTES

Jemison v. Jemison, CV 17-13571, 2021 WL 1171689 (D.N.J. Mar. 29, 2021), appeal filed, No. 21-1805 (3d Cir. Apr. 23, 2021)

The court granted a motion for summary judgment in favor of defendants, William D. Jemison ("William") and Michael S. Jemison ("Michael"), who were former officers and members of the Heyco, Inc. Board of Directors (the "Board") and co-trustees and beneficiaries of the Jemison Family Trust (the "Trust"). Their brother, plaintiff Steven Jemison ("Steven"), a former shareholder of Heyco and a co-trustee and beneficiary of the Trust, brought the action. He alleged that between 2012 and 2017, William and Michael breached their fiduciary duties in their capacities as trustees of the Trust and directors of Heyco, Inc. ("Heyco") when they approved certain transactions. Specifically, Steven charged Michael and William with self-dealing, lack of impartiality, willful misconduct, conflict of interest, breach of loyalty, breach of the duty of care, and unjust enrichment.

The Trust was created by the parties' father, William H. Jemison ("Mr. Jemison"), and he appointed himself the initial trustee. William, Michael, and Steven, along with their sister, Susan Jemison ("Susan"), were beneficiaries of the Trust, with equal interests in its assets, the primary asset being 70% of Heyco voting shares. The remaining shares of Heyco were owned by non-parties, Hank Klumpp ("Klumpp") and Harry Largey ("Largey"). Upon Mr. Jemison's death, the four siblings became co-trustees of the Trust.

Heyco was a holding company for two wholly-owned subsidiaries: Heyco Metals, Inc. ("Metals"); and Heyco Products, Inc. ("Products"). The Board had four members: Michael, William, Klumpp, and Largey.

Steven challenged three corporate actions which took place between 2012 and 2017: (1) Heyco loaned and subsequently forgave two $500,000 loans – one to Michael and the other to William; (2) Heyco paid commissions to Michael and William in connection with the sale of Products; and (3) Heyco sold Metals to a company owned by Michael and his children.

Claims for Breach of Fiduciary Duty as Directors of Heyco

In New Jersey, directors of a corporation are expected to act in good faith with the same diligence, care, and skill a prudent person would exercise under similar circumstances. *See* N.J.S.A. § 14A:6–14. The courts, however, have long recognized "the business judgment rule" doctrine, under which the judiciary resists interfering with decisions made by boards of directors so long as the directors had the power to make the decision and there is "no showing of bad faith." *Jemison,* at *7.

The rule is a rebuttable presumption, and the person who challenges a corporate decision has the burden of showing the corporate decision-maker acted in bad faith. If the challenger is able to make such a showing, the burden of proof shifts to the defendants to show that "the transaction was, in fact, fair to the company." *Id.* (citing *In re PSE&G S'holder Litig.,* 173 N.J. 258, 307 (2002)). "Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task" as "the burden ... is to show irrationality." *Id.* (citing *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005)). In deciding whether the rule protects the directors' actions, the court should ask: "(1) whether the actions were authorized by statute or by charter, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable.'" *Id.* (citing *Seidman v. Clifton Sav. Bank, S.L.A.*, 14 A.3d 36, 52 (N.J. 2011)).

Steven argued that issuance and forgiveness of the loans to Michael and William constituted self-dealing or a breach of fiduciary duty. The loans were tied to their compensation, and N.J.S.A. § 14A:6-8(3) gives directors the authority to establish reasonable compensation, and to lend money and otherwise assist any corporate director, officer, or employee if it may reasonably be expected to benefit the corporation. In addition, a corporate board has broad discretion to set the terms and conditions of a loan.

The court determined that Steven did not adequately show that the loans, the forgiveness thereof, and the Products sale commissions paid to William and Michael were an inappropriate exercise of the Board's judgment. In support of its decision, the court explained that during the timeframe when the Board began to forgive the loans, the company had significant assets, and regularly issued dividends to its shareholders. Each time the Board forgave a portion of the loans, and ultimately, the loans in their entirety, the Board reviewed the status of the loans and the company books. The court also determined that the commissions were appropriate and within the discretion of the Board.

Steven's arguments that the sale of Metals to Michael and his family was a conflict of interest, and therefore a breach of fiduciary duty, were likewise unsuccessful. N.J.S.A. § 14A:6-8 allows such transactions provided that one of these three circumstances is met: (1) the transaction is fair and reasonable to the company at the time it is approved; (2) the director's common interest in the transaction is disclosed to the board and the board approves the decision, and at least one consenting director is disinterested; or (3) the director's common interest in the transaction is disclosed or known to the shareholders, and they authorize the transaction. N.J.S.A. § 14A:6-8(a)-(c).

In this case, Michael recused himself from the decision to sell Metals to his family business, the other directors unanimously approved the transaction, and both Klumpp and Largey were disinterested parties; further, all of the directors waived their right to a commission from the sale. Finally, the sale price was in line with valuations from two independent experts.

<u>Claims For Breach of Fiduciary Duty as Trustees</u>

Steven also argued that Michael and William did not act in the best interests of the beneficiaries with regard to the loans, the commissions, and the sale of Metals to Michael's family. The court however limited Steven's breach of fiduciary duty claims to the sale of Metals because he did not raise the claims with regard to the loans and commissions with the trial court.

New Jersey's Uniform Trust Code ("NJUTC") requires trustees "to administer the trust with undivided loyalty to, and solely in the best interests of, the beneficiaries." A conflict of interest arises when a trustee and an enterprise enter into a transaction regarding trust property in which the trustee has an interest that might affect his judgment. *See* N.J.S.A. § 3B:31-55(c)(4). If the trustee fails to act in the beneficiaries' best interests, his is liable for the harm caused by his breach of duty.

The court determined that William and Michael had the authority to vote the Trust's shares of Heyco in order to approve the Board's decision to sell Metals, and Steven did not show that Michael and William acted contrary to the beneficiaries' best interests. The Trust clearly vested in the trustees the right to vote corporate stock, and there was no requirement that the co-trustees act unanimously. In the absence of such a requirement, the NJUTC permits trustees to act by a majority decision. Here, three of the co-trustees – Michael, William, and Susan – voted in favor of the Board's decision.

Steven also argued that Michael and William were prohibited from voting as trustees to approve Board decisions that would benefit them; Steven, however, provided no New Jersey law or statute to support that claim. In fact, such a position is inconsistent with New Jersey trust law and the Trust itself, which sanctioned Michael and William's dual roles as trustees of the Trust and Heyco directors.

Unjust Enrichment

Steven also claimed that Michael was unjustly enriched by taking the loans and commissions, and by approving the sale of Metals to himself for less than the Company's true value.

Unjust enrichment is proven when a plaintiff shows that a defendant received a benefit, at plaintiff's expense and "under circumstances that would make it unjust for defendant to retain said benefit without paying for it." *Id.* at *16. The court determined that these claims were essentially the same as Steven's claims for breach of fiduciary duty, and he did not carry his burden of showing the Michael and William acted beyond the scope of their authority.

Schultz v. Glasser, No. A-5239-18T3, 2021 WL 269674 (N.J. Super. Ct. App. Div. Jan. 27, 2021)

Husband and wife, Robert Schultz, Sr. ("Robert") and Mary Ann Schultz ("Mary Ann"), created an *inter vivos* trust ("Trust"), of which they were the primary beneficiaries. Upon the death of the survivor of them, their children, Robert Schultz, Jr., ("Bobby") and Donna Schultz ("Donna"), were the remainder beneficiaries. In the event Bobby or Donna died without issue, the survivor of them would inherit all of the Trust property. The Trust also stated that Bobby would receive real estate owned by the Trust and located in New Jersey.

Robert died in 2014.

The Trust held various parcels of real estate, including the home in New Jersey and real property in South Carolina. In 2017, Bobby and Donna's cousin, Kathleen, prepared a quitclaim deed transferring the South Carolina property from the Trust to Bobby. She claimed Mary Ann wanted to transfer the property to Bobby because he visited the state frequently was hoping to move there; Mary Ann signed the quitclaim deed.

Bobby lived in the New Jersey property until he died in early 2018. Just weeks before he passed away he transferred the New Jersey property from the Trust to himself and Kathleen as joint tenants with right of survivorship. Bobby also listed Kathleen as the sole beneficiary of his will.

After Bobby died, Mary Ann, by her attorney-in-fact, and Donna, individually and on behalf the estate of Robert Schultz, Sr. ("Robert's Estate"), filed a complaint alleging Bobby breached his fiduciary duty to the Trust beneficiaries. They sought a judgment declaring the transfer of the New Jersey property to Kathleen null and void. They argued the New Jersey property belonged to the Trust, not to Bobby's estate.

Kathleen, individually and on behalf of the estate of Robert Schultz, Jr. ("Bobby's Estate"), counterclaimed for equitable relief, seeking the imposition of a resulting or constructive trust because Bobby paid about 54 percent of the purchase price of the New Jersey property.

Donna and Kathleen testified at trial, and the judge found neither witness credible and some of their testimony highly speculative.

In the end, the court was forced to rely primarily on the documents offered for evidence.

With regard to the New Jersey property, Kathleen argued that Bobby was the settlor of the Trust because he had contributed to the purchase price of the property, and therefore had a right to amend the Trust, which the he did by executing the quitclaim deed. The court disagreed, finding that the evidence offered as to why Bobby made payments was purely speculative, and the reason Bobby exchanged funds with his parents was unknown, as he was not a settlor.

Further, the Trust designated Robert and Mary Ann as the sole trustees during their lifetime, and Mary Ann was living when the property was transferred. The judge agreed that Bobby violated his fiduciary duty to the beneficiaries of the Trust and voided the New Jersey deed.

Kathleen and Bobby's Estate appealed. They argued that Bobby paid $163,000 toward the purchase price of the New Jersey property, and thus his estate was entitled to a constructive trust as to the sums paid.

Donna, Robert's Estate, and Mary Ann cross-appealed, asserting that the trial judge erred by not allowing them to amend the complaint to assert an undue influence claim concerning the South Carolina property and because the court failed to award Robert's Estate its attorney fees and costs as tort damages for the undue influence.

The Appellate Division affirmed the trial court's decision. It emphasized that it is the court's obligation to uphold a testator's dispositions of property, whether made by will or trust. Determining the testator's intent is the court's goal, and this can include interpreting a trust; only when necessary should a trust be reformed, and it should be reformed in accordance with the settlor's intent.

In this case, the Trust was clearly worded, and Bobby was never appointed trustee. Bobby would only receive the New Jersey property if he survived Robert and Mary Ann, which he did not. Because he predeceased Mary Ann and left no surviving issue, the Trust plainly stated that his share was to be distributed to Donna, and not his estate. Given that he was not named the trustee, he had no authority to make the transfer.

As to the funds Bobby paid to his parents, a constructive trust is only warranted when the court finds there was some wrongful act and the failure to find a constructive trust will result in unjust enrichment. Kathleen and Bobby's Estate did not meet their burden in this respect.

As to plaintiffs' cross-appeal, the appellate court noted that the grant of leave to file an amended complaint is within the discretion of the trial judge and is specific to the facts of each case. Here, the trial judge denied the plaintiffs' request because to allow them to amend the complaint at the last minute to raise a claim of undue influence would have been unfair to the defendants who would have had the burden shifted to them based on the existence of a confidential relationship.

Burgess v. Johnson, 835 F. App'x 330 (10th Cir. 2020)

The court held that a trustee could not invoke an arbitration provision in a trust to compel beneficiaries to arbitrate.

Defendant Howard Johnson was the sole trustee of a trust created under Oklahoma law. The plaintiffs were the beneficiaries of the trust. In May 2019, the plaintiffs sued the trustee in the United States District Court for the Northern District of Oklahoma alleging that he breached his fiduciary duties by wrongfully taking trust assets and spending trust money.

The trustee moved to stay the proceedings and compel arbitration under §§ 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. He argued that a certain provision of the trust constituted an arbitration agreement that entitled him to compel arbitration under the FAA. The district court denied the trustee's relief, and the trustee appealed.

The Tenth Circuit affirmed the district court's order.

The arbitration provision of the trust was as follows:

> The Arbitration Provision is § II, ¶ (1)(c) of the Trust Declaration. Section II is entitled "General Provisions Relating to Trusts." Aplt. App., Vol. 1 at 25. It states in ¶ 1 that the trustees "shall have power to manage and contract with respect to the Trust estate, in the same manner and to the same extent as Grantor could do had Grantor owned such Trust estate individually," and it also grants the trustees certain additional powers "in their sole discretion," such as the power to lease any portion of the Trust estate and to retain property received by the trustees "without regard to diversification." *Id.* The Arbitration Provision, ¶ 1(c), conveys to the trustees the power "[t]o compromise, contest, *submit to arbitration* or settle all claims by or against, and all obligations of, the Trust estate or the Trustees[.]" *Id.* (emphasis added).

Johnson, 835 F. App'x at *332. The trustee argued that the above provision authorized him to compel the trust beneficiaries to arbitrate their dispute with him.

The court found there was no ambiguity in the arbitration provision in the trust, in that it simply provided the trustee with a range of options in seeking to resolve a dispute involving the trust. The language in the provision was purely permissive. The trustee could decide to arbitrate or settle any claim, but the provision did not compel an adversary to arbitrate disputes. *Id*. at *332-33.

Furthermore, the court rejected the trustee's argument that the trust granted the trustees the power to exercise authority in their sole discretion, and thus, the sole discretion to compel arbitration. The court found that sole discretion does not mean that the trustees have absolute power to compel arbitration, but rather that no one can tell them whether to decide to arbitrate. *Id*.

Finally, the trustee cited a series of cases to argue that the United States Supreme Court ruled that a permissive arbitration clause is a mandatory arbitration clause. The court found those cases to stand for a narrow proposition of law in the particular context of collective-bargaining agreements and thus not applicable to the facts at hand.

Ultimately, the court held that the arbitration provision in the trust "only allows the [t]rustee to agree to resolve disputes through arbitration and does not empower him to compel others -- even trust beneficiaries -- to submit their disputes to arbitration." *Id*. at *334.

Attorney General v. Sanford, 225 A.3d 1026 (ME 2020)

This case stands for the proposition that the discretionary charitable distributee of a charitable trust has standing under the Uniform Trust Code to sue the trustee of charitable trust for breach.

The decedent established the Seal Cove Auto Museum ("Seal Cove"). He also established a charitable trust to support his automobile collection. After his death in 2007, the trust acquired most of the cars and an endowment to support maintenance and display of the collection. The trust permitted, but did not require, the trustees to make distributions to Seal Cove.

The auto collection was displayed at Seal Cove for many years. In 2008 and again in 2014, the trust entered into contracts that allowed the display of the collection at Seal Cove, and under the contracts the trust paid Seal Cove $200,000 annually to support operations. Under the contract, Seal Cove had the right to renew the contract for five-year periods in perpetuity if Seal Cove met certain museum standards.

Seal Cove sued the trustees, alleging excessive compensation and self-dealing. The attorney general of Maine raised the same allegations and sought the same relief as Seal Cove.

On motion of the trustees, the Seal Cove complaint was dismissed for lack of standing by Seal Cove.

The trial court also approved a consent decree between the trustees and the attorney general that limited future compensation but did not include the disgorgement of previously received compensation.

Seal Cove appealed, and the Maine Supreme Judicial Court reversed the finding of lack of standing. That court determined that Seal Cove was not a qualified trust beneficiary under the Maine Uniform Trust Code (MUTC). However, the MUTC gives a charitable organization expressly designated to receive charitable trust distributions the rights of a qualified beneficiary. A charity having the rights of a qualified beneficiary thus has standing to assert a claim of breach of trust.

In Re: Trust Established under Agreement of Sarah Mellon Scaife, Deceased dated May 9, 1963, No. J-A06008-22, 2022 WL 1617129, (Pa. Super. May 23, 2022)

In the context of litigation regarding objections to a trustees' account, the estate of a deceased beneficiary sought production of unredacted versions of previously produced documents on the basis of a fiduciary exemption to attorney client privilege and the attorney work product doctrine. Following the issuance of the Pennsylvania Supreme Court's plurality decision in *In Re Estate of McAleer,* 248 A.3d 416 (Pa. 2021) ("*McAleer II*") the orphans' court required the production of the unredacted documents.

In affirming the orphans' court decision, the Pennsylvania Superior Court concluded that "a fiduciary exception to the attorney-client privilege is consistent with Pennsylvania law." *Scaife*, 2022 WL 1617129, at *14. In support of this conclusion, the court relied on *Follansbee v. Gerlach,* 56 Pa. D. & C.4th 483 (C.C.P. Allegheny 2002), *McAleer II,* and *In Re Estate of McAleer,* 194 A.3d 587 (Pa. Super. 2018)("*McAleer I*"). The conclusion was based upon the court's balancing the interests of protecting communications between attorneys and their clients, and the obligation of a trustee to inform beneficiaries regarding the administration of the trust.

Of particular interest is that, unlike in the previous cases, the court found no support for conditioning the fiduciary exception on whether the trust paid counsel fees. It did, however, determine that "a trustee is privileged from disclosing to beneficiaries or co-trustees' (sic) opinions obtained from, and other communications with, counsel retained for the trustees' personal protection **in the course, or in anticipation, of litigation**," finding that "the balancing of interests affords the greatest protection to beneficiaries, trustees and counsel." *Scaife*, 2022 WL 1617129, at *15. (emphasis in original).

Sacks v. Dissinger, No. SJC-131105, 488 Mass. 780, 178 N.E.3d 388 (Mass. Dec. 29, 2021)

After learning that they had been removed as beneficiaries of a trust created by their grandfather, the plaintiffs brought an action more than two years after their grandfather's death, alleging that their removal as beneficiaries arose from undue influence by other family members upon their grandfather.

The Supreme Judicial Court of Massachusetts held that claims for intentional interference with expectancy and unjust enrichment did not challenge the validity of a trust and therefore were not time-barred under the one-year statute of limitations. Instead, the claims were subject to the three-year statute of limitations for tort actions.

Trust Under Deed of Walter R. Garrison, No. 1429 EDA 2020, 264 A.3d 398 (Pa. Super. Sep. 27, 2021)

The Superior Court of Pennsylvania denied a petition for declaratory judgment and ruled that nonjudicial trust modification agreements between the settlor and beneficiaries of three irrevocable trusts and purporting to grant the beneficiaries the power to remove and replace the independent trustees after the settlor's death were ineffective and invalid under the Pennsylvania Uniform Trust Act.

In addition, the purported removals and replacements of trustees pursuant to the nonjudicial trust modification agreements were deemed invalid.

Currently this is a non-precedential decision, but subject of a pending appeal.

In the Matter of the Colecchia Family Irrevocable Trust, No. 20-P-224, 100 Mass. App. Ct. (Mass. App. Ct. Nov. 29, 2021)

Michael Colecchia ("Michael") filed suit against trustees of an irrevocable trust created by his parents alleging, in relevant part, breach of the fiduciary duties to inform and to account. The Appellate Division found that the trial court erroneously dismissed two of the Complaint's six counts.

Michael's parents, Mario and Lillian Colecchia, created an irrevocable trust on February 3, 2005, into which they transferred a quitclaim deed to their home. The terms of the trust treated Michael and his five siblings differently, with Michael and his two brothers to receive ten percent of the res each and the remaining seventy percent to be split between his three sisters. Two of Michael's sisters, Donna and Denise, were named trustees of the trust. Michael alleged he did not know of the trust's existence at any time before his parents' deaths and that Denise and Donna breached their fiduciary duties as trustees for failing to inform him of the trust's existence.

The Appellate Division found that the trustees' fiduciary obligations to inform and account to the beneficiaries of the trust were triggered when those beneficiaries became entitled to the trust property, i.e. when they become "qualified beneficiaries". This meant that the trustees did not owe Michael fiduciary obligations until after their parents' deaths. Thus, since Michael's allegations as to these counts rely on events during Mario and Lillian's lifetimes, there was no violation of those fiduciary duties.

VI. SPOUSAL RIGHTS IN PROBATE LITIGATION

Gabey v. Gabey, A-0322-20, 2021 WL 2011605 (N.J. Super. Ct. App. Div. May 20, 2021)

Husband and wife**,** Richard and Ruth Gabey, had been married for approximately 41 years when Richard filed for divorce in April 2019. While the divorce was pending, Ruth executed a will in September 2019 in which she acknowledged that she was "currently married" to Richard but "anticipate[d]" they would be divorced "shortly." She declared in the will that Richard "[was] to receive no benefit from [her] estate." Ruth died shortly thereafter, while the divorce action was still pending.

In January 2020, the executor of Ruth's estate filed a motion in the matrimonial court to be substituted as the party in interest in Ruth's place.

Richard cross-moved for summary judgment, seeking to dismiss the divorce action in light of Ruth's death. The court denied the executor's motion and granted Richard's motion to dismiss. The executor appealed the dismissal and argued that the executor should be substituted in Ruth's place as the party in interest in the divorce matter.

The Appellate Division affirmed the trial court. Specifically, it noted that except in certain circumstances, divorce proceedings abate with the death of one of the parties. *See Carr v. Carr*, 120 N.J. 336, 342-43 (1990); *Kay v. Kay*, 200 N.J. 551 (2010), *aff'g o.b.*, 405 N.J. Super. 278 (App. Div. 2009).

The executor argued that the exceptions found in *Carr* and *Kay* – that a surviving spouse or a deceased spouse's representative could continue a matrimonial action "for the limited purpose of proving that the deceased spouse had diverted marital assets" – applied in this case. *Kay*, 200 N.J. at 552 (citing *Carr*, 120 N.J. at 353-54). However, the *Kay* decision limited the exception and held that an estate: (1) could not pursue a claim that was "merely one for equitable distribution of an agreed-upon universe of marital property"; and (2) could not "assert a new claim," but would be relegated only to "continu[ing] claims raised before death [that], in fairness, should not be extinguished lightly or prematurely." *Id*. at 553-54.

In light of the restrictions imposed by *Carr* and *Kay* and the fact that Ruth never claimed that Richard had wrongly diverted martial assets, the appellate panel affirmed the trial court's order terminating the matrimonial litigation.

VII. CLAIMS BY AND AGAINST FIDUCIARIES

In re Estate of Applebaum, A-3948-18, 2021 WL 1570289 (N.J. Super. Ct. App. Div. Apr. 22, 2021)

The plaintiff appealed numerous orders in connection with the administration of the estate of her deceased husband. The primary assets of the estate were the decedent's interests in certain businesses; the case epitomizes the interplay (and often tension) between a decedent's businesses and his estate.

Three points of the appeal are the focus of this summary. First, the plaintiff appealed the trial court's denial of her request to remove the executor. Citing the standards in N.J.S.A. § 3B:14-21(c), the trial court found that removal of an executor should be granted only sparingly. *Wolosoff v. CSI Liquidating Tr.,* 205 N.J. Super. 349, 360 (App. Div. 1985). The Appellate Division agreed:

> "Where a decedent has chosen and designated persons to act as fiduciaries respecting his estate, . . . courts [should] act[] with reluctance to remove them from office." *Connelly v. Weisfeld,* 142 N.J. Eq. 406, 411 (E. & A. 1948) (citation omitted). Accordingly, "[c]ourts are reluctant to remove an executor or trustee without clear and definite proof of fraud, gross carelessness, or indifference." *In re Hazeltine's Est.,* 119 N.J. Eq. 308, 314

> (Prerog. Ct. 1936); *see also In re Margow's Est*., 77 N.J. 316, 326 (1978) (noting courts are "hesitant to defeat the will of the testator," even where a chosen executor is flawed). "[S]o long as an executor or trustee acts in good faith, with ordinary discretion and within the scope of his [or her] powers, his [or her] acts cannot be successfully assailed." *Connelly*, 142 N.J. Eq. at 411.

Applebaum, at *7.

Second, the plaintiff appealed the trial court's approval of an in-cash distribution of the stock that comprised the residue of the estate. The will devised 60% of company stock to a trust but did not directly address the remaining 40% of the stock; the will simply devised the remainder of the estate to plaintiff.

Citing N.J.S.A. § 3B:23-1 to -10, the appeals court found no abuse of discretion concerning the in-cash distribution of the stock. Although that plain language of the will did not indicate whether the decedent preferred distributions in-kind or in cash, the will provided the executor with the discretion to make that determination. Even if the preference for in-kind distribution under N.J.S.A. § 3B:23-3 was applied, both the executor and the trial court had exercised their discretion regarding distribution of the stock in cash.

Third, the plaintiff appealed the trial court's approval of the final accounting. The Appellate Division began by noting that accounting actions are commenced as summary proceedings. *R.* 4:83-1; *R.* 4:67-5; N.J.S.A. § 3B:2-4 (allowing actions by fiduciaries to proceed in summary manner); *Garruto v. Cannici,* 397 N.J. Super. 231, 240-41 (App. Div. 2007). In turn:

> "[A] court must make findings of facts, either by adopting the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing." *Courier News v. Hunterdon Cnty. Prosecutor's Off.,* 358 N.J. Super. 373, 378-79 (App. Div. 2003). If there are genuine issues as to any material fact, the court should conduct an evidentiary hearing on those disputed issues. *Tractenberg v. Twp. of W. Orange*, 416 N.J. Super. 354, 365 (App. Div. 2010) (citing *R.* 4:67-5); *Courier News,* 358 N.J. Super. at 378. Accordingly, "at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action[.]" *R.* 4:67-5.

Applebaum, at *11.

The Appellate Division also summarized exceptions to accountings, quoting *R.* 4:87-8 and explaining the procedural nature of the process:

> Exceptions to an executor's account are "a vehicle for determining the propriety of the executor's statement of assets and claims for allowance." *Perry v. Tuzzio,* 288 N.J. Super. 223, 229 (App. Div. 1996). Our Supreme Court has described an action to settle an account as "a formalistic proceeding" that "involves a line-by-line

> review [of] the exceptions to an accounting." *Higgins v. Thurber,* 205 N.J. 227, 229 (2011) (citing *R.* 4:87-1(a)). Although persons making an objection may file an answer, no counterclaim or crossclaim can be filed without leave of court. *R.* 4:67-4(a).

Id.

The court likewise explained that *R.* 4:87-8 does not specify how the exceptions must be presented, except that they must be written, signed by the person making the exceptions or his or her attorney, and must identify "the item or omission excepted to, the modification sought in the account[ing,] and the reasons for the modification." *R.* 4:87-8.

The plaintiff had filed an answer disputing the value of the decedent's business, the executor's commissions, and the executor's claims for counsel and accountant fees. She had also provided the reasons for the modifications she sought.

On this issue, therefore, the appeals court reversed, and remanded for a limited hearing:

> [T]he Chancery court will have the discretion to limit the evidentiary hearing to genuine, material disputes concerning the accounting…. We make this final point because a review of the record establishes that plaintiff's various lawyers have often made allegations of fraud and misconduct while failing to identify specific facts supporting those claims. The brief submitted by plaintiff on this appeal illustrates that point. Plaintiff's counsel repeatedly used words such as "brazenly," "clearly spurious," "draconian," "inhumane," "rampant," "Orwellian," "pernicious," "nefarious," "mind-boggling," and "death penalty." Those hyperboles are a poor substitute for reasoned analysis of the facts and law. Accordingly, although we are constrained to remand this matter for an evidentiary hearing, the Chancery court will have the appropriate discretion to conduct a hearing that is focused on the presentation of facts supported by evidence and facts that are limited to appropriate exceptions to the final accounting.

Applebaum, at *12.

Anand v. Anand, A-3253-19, 2021 WL 1714193 (N.J. Super. Ct. App. Div. Apr. 30, 2021)

The plaintiff was the executor of the estate. She asserted that the defendants failed to provide an accounting of funds derived from the sale of the decedent's property under a power of attorney.

The defendants moved to dismiss the action, asserting that: the power of attorney was executed in the United Kingdom; the real property that was sold was located in India; the proceeds were in banks in India; and the decedent's will was probated in the United Kingdom.

The trial court dismissed the action on venue grounds, finding that the proper venue was in India, where the real property was located.

The Appellate Division reversed and remanded. It concluded that the record lacked meaningful findings of fact. The trial court should have permitted "jurisdictional discovery." If jurisdiction were established in New Jersey, then the trial court could address the proper venue. The appeals court also noted that venue requirements are not jurisdictional. Finally, the trial court should have also considered the doctrine of *forum non conveniens*.

In re Gloria T. Mann Revocable Tr., 468 N.J. Super. 160 (App. Div. 2021)

Gloria Mann ("Gloria") died on August 10, 2017. Her children, plaintiff David Mann ("David") and defendant Doree Gottlieb ("Doree"), were the primary beneficiaries and successor co-trustees of the Gloria T. Mann Revocable Trust ("Trust").

A few months after Gloria passed away, David and Doree retained an attorney to assist them with the Trust administration. They opened bank accounts and bank personnel conducted credit checks and judgment searches that revealed four outstanding judgments against David that were over 10 years old.

David met with Doree and her husband soon thereafter and according to David, Doree was worried that the judgments would affect their ability to administer the Trust. She also expressed this concern to the trust attorney. David agreed to resign as co-trustee. The Trust attorney drafted the resignation documents and David signed them on November 24, 2017. He subsequently submitted the resignation to the banks holding Trust assets, and Doree was thereafter the sole trustee of the Trust.

Displeased with Doree's administration of the Trust, David filed a Verified Complaint about eight months after he resigned, seeking: an account of Doree's administration; return of trust property; an order declaring him trustee of the Trust; compensatory, consequential, incidental, nominal and expectation damages, and interest; and attorney's fees.

The trial court dismissed David's complaint with prejudice and ordered Doree to provide an updated accounting and to distribute the Trust assets in accordance with the court's order. The court additionally set dates for Doree's counsel to file a fee application.

David appealed the trial court's judgment on the above as well as its subsequent order allowing Doree's counsel fees to be paid from Trust assets. He argued that the trial court erred in: (1) finding that David had resigned as trustee; (2) declining to award David adequate compensatory, punitive, and equitable damages in light of Doree's conduct; (3) failing to order the Trust to pay David's legal fees and costs from the Trust, and assessing all such fees against Doree's interest in the Trust; and (4) preventing David from presenting rebuttal witnesses.

The Appellate Division affirmed the trial court's decision for the reasons set forth below.

Trustee Resignation

The facts supported the trial court's finding that David had resigned as trustee. The resignation document was unambiguous on its face, and David submitted the resignation to the banks which caused him to be removed from the accounts.

While the applicable law generally requires that notice be provided to beneficiaries when a trustee resigns, such notice was not required in this case because the Trust instrument provided for continuing administration of the Trust and the only other primary beneficiary -- Doree -- knew that David resigned.

Compensatory, Punitive, and Equitable Damages for Trustee Misconduct

David claimed that the court should award him compensatory, punitive, and equitable damages for Doree's misconduct, which he claimed included: poor investment decisions, making distributions to herself without offering a similar distribution to David, and failing to keep David informed of the Trust administration.

Investment Decisions

David asserted that Doree's failure to invest over $700,000 violated the Prudent Investor Act ("the Act"). While the Trust allowed Doree to hold Trust funds in commercial and savings loan accounts, David argued that that was only suitable when Gloria was alive and acting as trustee. As a result of being held in savings accounts, the assets realized a return on investment of only 0.45% over a 28-month period. David argued that this investment strategy was not in compliance with the requirements of the Act.

Under the Act, a fiduciary has a six-month grace period in which it is required to review the trust assets, and make and implement a plan regarding the administration of the assets. N.J.S.A. § 3B:20-11.7. After the six-month period expires, the fiduciary has a duty to make the trust property "productive so that a reasonable income will be available for the beneficiaries." *See Pa. Co. for Ins. on Lives v. Gillmore,* 137 N.J. Eq. 51, 58 (Ch. 1945).

The Act also provides that the prudent investor rule "may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument," and a fiduciary is not liable to a beneficiary to the extent that it relies on those trust provisions. N.J.S.A. § 3B:20-11.2(b).

The Trust at issue had such provisions which allowed Doree to hold Trust property without regard to diversification or productivity, and to deposit them in savings accounts. The court also noted that Doree was under an obligation to manage the Trust's assets with caution. The appellate panel determined that the trial court was correct in its determination that Doree had not violated the Act.

Interim Distributions

The court also determined that damages were not incurred as a result of Doree's refusal to make interim distributions to David. The trust attorney had advised Doree that she should wait to make interim distributions to David from November 2017 until the inheritance taxes were paid. Under the broad powers granted the trustee under the Trust, Doree had authority to pay trust expenses and any liabilities sustained in the Trust's administration, as well as to distribute Trust assets. The Trust instrument did not compel her to make interim distributions. A beneficiary's right to compel distributions is limited by the terms of the trust. *See Tannen v. Tannen*, 416 N.J. Super. 248, 265-67 (App. Div. 2010).

The appellate panel determined that other than Doree's $37,000 distribution to herself, she did nothing inappropriate in administering the Trust. That distribution to herself, without making an equal distribution to David, was in violation of Doree's fiduciary duty. *See* N.J.S.A. § 3B:31-56.

However, David's claim that he was entitled to interest on the $37,000 not distributed to him above and beyond the 5% awarded by the trial court was without merit. David's expert opined on the income David could have earned on his share of the Trust if he was managing the investment. The trial court dismissed the expert's opinion as pure speculation and concluded damages were not appropriate. Specifically, in order for David to recover lost profits, he must show with certainty the amount he lost; the court instead awarded the undistributed funds with 5% interest. The appellate court determined that the trial court's decision was well within its discretion.

An additional award based on punitive damages for Doree's breach of trust for failing to make a distribution to David when she made one to herself was not appropriate, in part because David did not claim punitive damages in his Verified Complaint, as is required. *See* N.J.S.A. § 2A:15-5.1. Even if David had requested the relief in his Complaint he did not demonstrate by clear and convincing evidence that Doree acted with actual malice or acted with wanton and willful disregard. *See* N.J.S.A. § 2A:15-5.12(a).

Informing Beneficiaries of Trust Administration

N.J.S.A. § 3B:31-67(a) requires "[a] trustee [to] keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." David did not make any inquiries of Doree until April 2018, at which time there was about a two-week delay before the trust attorney responded to him. Other than her breach with regard to the $37,000 distribution, the trial court determined that Doree had complied with her fiduciary duties. Furthermore, David did not show how Doree's failure to inform him of actions she took resulted in any loss to him.

Award of Counsel Fees and Costs

David objected to Doree's counsel fee application by simply stating in his appeal that Doree's misconduct should result in a punitive damages award and that she should not be reimbursed for her legal fees from the Trust. Since he did not adequately brief the issue, David waived his right to challenge the fee award. Irrespective of that failure, the appellate court stated that David failed to show that Doree attempted to deprive David of any Trust asset, which could preclude her from receiving a fee award. *See Behrman v. Egan*, 31 N.J. Super. 95, 100 (Ch. Div. 1953), *modified*, 16 N.J. 97 (1954). The trial court did not abuse its discretion in awarding counsel fees and costs to Doree.

On appeal, David also requested that his fees be paid by the Trust, but he made no such application to the trial court; accordingly, the appellate panel did not address that claim.

In re Estate of Farag, A-3204-19, 2021 WL 2309622 (N.J. Super. App. Div. June 7, 2021)

This family dispute spanned six years of litigation.

The parties were three adult siblings whose mother made an inter vivos transfer to one of the siblings of $228,000, with instructions to hold the funds in trust and distribute the funds evenly among all the siblings following the mother's death. However, the sibling who received the funds allegedly used a large portion of the funds for personal expenses.

The parties' mother also conveyed equal shares of her home to the parties.

Following the mother's death, the trial court appointed an attorney to serve as administrator of her estate.

The plaintiff moved into the home following the mother's death and lived there until it was sold, paying most of the real estate taxes and improvement expenses. The plaintiff ultimately had to be ejected from the home.

The trial court adopted the administrator's recommendations regarding the plaintiff being reimbursed for certain improvement expenses and charged for occupancy of the home, along with the administrator also being awarded fees for his services.

The Appellate Division affirmed a portion of the appeal and dismissed the remainder.

Victory's Dawn, Inc., et al., v. Clarence Anicholas Clemons, III, et al., No. 21-9744 (D.N.J. February 17, 2022)

This case – out of the District Court of New Jersey – addresses issues as to the intellectual property rights of a decedent which were held in trust. The intellectual property rights were those of the legendary saxophonist with the Bruce Springsteen and the E Street Band, known as "The Big Man" – Clarence A. Clemons – who passed away in 2011.

Clemons had established a trust (the "Trust") for the benefit of his four sons. The Trust provides that the trustee has sole control over Clemons' name and likeness until the youngest of Clemons's sons reaches the age of 25, set to occur in 2023.

Two of Clemons' older sons, Charles and Nick, began marketing products using Clemons' name and likeness without authorization from the Trust. For instance, in 2017 they set up a limited liability company called "Big Man's West, LLC" to sell beer, agreed to license the name "Big Man's Brew" to a third party, sought capital from private equity investors to help fund the beer business, and represented themselves as having control over Clemons's intellectual property rights even though the Trust had not granted such authorization. In December 2020, they posted on social media advertising "Big Man Blazed Goods" for sale in Asbury Park, and in January 2021 social media posts they advertised a "2021 Big Man's Bash."

Eventually the Trust sued the defendants, Charles and Nick and Big Man's West, LLC, for violations under the Landham Act and various torts. The Trust also moved for a preliminary injunction to enjoin the defendants from using Clemons's name and likeness without authorization. The defendants never answered the complaint. Thus, the court granted the Trust's injunction.

However, the defendants ignored and continued violating the Order, by posting on social media.

The Trust argued that the defendants' ongoing violations of the Order warranted holding the defendants in contempt and imposing sanctions. The court agreed.

The defendants knew about the Order because it was served on them, and the plaintiff identified at least 11 separate instances of social media postings by the defendants that violated the Order. Finally, the defendants did not oppose the motion. The plaintiff requested two types of contempt: a per diem fine for the defendants' ongoing noncompliance; and reasonable attorney's fees associated with the filing of the motion. The court awarded both penalties.

In re the Estate of Richard Ehrlich, Deceased, No. A-4033-19 (N.J. Super. Ct. App. Div. March 11, 2022)

This appeal is the latest development in the ongoing litigation of the estate of Richard Ehrlich – the seminal (and nationally recognized) case involving a writing intended as a will.

The underlying litigation began with the death of Richard Ehrlich, plaintiff's uncle on September 21, 2009. Ehrlich, an attorney, left an unsigned will, which was admitted to probate pursuant to the Appellate Division case – *Estate of Ehrlich*, 427 N.J. Super. 64 (App. Div. 2012). The will favored plaintiff over his brother and sister. Following the Appellate Division's decision, plaintiff and the siblings reached a settlement.

In December 2009, the trial court appointed a temporary administrator of the estate. On July 15, 2011, the temporary administrator's first intermediate account was approved. At the time no exceptions were filed. A few months later, plaintiff subsequently filed a motion to remove the administrator and to vacate the order approving the accounting. The application was denied pursuant to N.J.S.A. § 3B:17-8, which provides that a judgment allowing an account operates as res judicata.

Because of a conflict, the matter was transferred to a different county. In July 2014, the trial court found, among other things, that none of plaintiff's "exceptions" satisfied the requirements of *Rule* 4:87-8. Plaintiff filed a motion for reconsideration that was denied, and on January 20, 2015, the trial court entered an order denying plaintiff's "exceptions" and including directions for the administrator as to the sale of real estate.

In 2019, plaintiff filed a complaint in federal court alleging the administrator had breached his fiduciary duty as administrator and violated the rules for professional conduct as an attorney. During the federal court proceedings, the administrator was deposed. The information disclosed in the deposition included that he was advised to list the property for a lower price and that if he had done so, the property would have been sold sooner for a more favorable sum. Further, the administrator produced documents from 2015 regarding tax sale certificates that were never redeemed. Plaintiff claimed that this was newly-discovered evidence, and thus filed a motion to vacate previous court orders. The District Court found the evidence was not new, as the state court had previously addressed the issues.

This led to a "new" complaint filed by plaintiff in the state trial court in February 2020, seeking to vacate all prior orders regarding the accountings. He based the complaint on the alleged "newly" discovered evidence regarding the sale of the property and the tax certificates. The administrator responded by filing a motion to dismiss the complaint, and the trial court granted the motion, stating that the specific allegations in the complaint were previously addressed and were barred by res judicata. Plaintiff appealed.

The Appellate Division first addressed plaintiff's challenge to the trial court's resolution of the motion to vacate the prior orders approving the accountings. The Appellate Division found that even if those claims had been brought in timely manner, i.e., within one year of the judgment, they would nonetheless fail because plaintiff had the obligation to perform due diligence and did not fulfill that responsibility. For instance, plaintiff could have done precisely the same search prior to the final accounting as to the real estate and the tax certificates and it was plaintiff's burden to establish that the administrator had erred.

With regard to plaintiff 's claims related to subsection (f) of Rule 4:50-1, which permits relief from orders or judgments for reasons not provided in the Rule's other subsections, the Appellate Division found that the trial court did not abuse its discretion by not allowing plaintiff relief under that subsection of that Rule. Plaintiff had asserted that the administrator's conduct in withholding and suppressing the discovery of the tax sale liens was the type of misconduct that the Rule is designed to remedy. However, the record did not support that claim, since plaintiff did not object to the final accounting.

Next, the Appellate Division addressed plaintiff's argument that there was an exception to N.J.S.A. § 3B:17-8. Plaintiff argued that an exception to the statute arises because of this newly-discovered evidence. The Appellate Division disagreed, finding that the plaintiff 's claims were barred by res judicata. More specifically, his claims occurred from the same set of facts, between the same parties, and out of the same transaction or occurrence – i.e., the accounting, which had previously and repeatedly denied in state and federal court.

With regard to the motion to dismiss, plaintiff argued on appeal that it should not have been granted without discovery, testimony, or a hearing. The Appellate Division affirmed the trial court's decision, finding that there was no newly-discovered evidence and plaintiff's relief was barred by legal preclusion doctrines.

Finally, the Appellate Division addressed an argument from plaintiff regarding the fact that he could not be found to have waived exceptions to the final accounting because it was his attorney's actions that prevented him from doing so. The trial court did not rule on this argument, because it was not raised at the trial level. However, the Appellate Division found that plaintiff had no legal right to distinguish between exceptions he raised through his attorney and exceptions he now claims he would have raised based on alleged newly-discovered evidence. "Plaintiff employed counsel, counsel raised exceptions on behalf of his client, and that ends the matter." *Id*. at *19.

Nelson v. Burr, No. 81456-COA, 492 P.3d 1234 (Nev. App. Aug. 18, 2021)

Lynita and Eric Nelson, a married couple, sought legal advice from Jeffrey Burr regarding ways to protect a portion of their assets from creditors. Burr allegedly advised Lynita that his suggested approach would not affect equitable distribution of assets in the event of divorce and would otherwise not inhibit the collection of child support or alimony. The Nelsons followed Mr. Burr's advice. Almost twenty years later, Eric filed for divorce. The Nevada Supreme Court found that the estate plan was structured such that alimony and child support could not be taken from Eric's trust that was set up thereunder and that assets should not have been equalized between Eric and Lynita's trusts by the district court prior to distribution.

Lynita filed a malpractice suit against Burr within two years of that determination. The district court granted Burr's motion to dismiss, agreeing that Lynita's suit was time-barred. The Appellate Court disagreed, finding that Lynita's claim accrued with the Nevada Supreme Court's ruling because that was the final ruling adversely affecting her distribution of assets under the estate plan. By filing the malpractice suit within two years of that date, Lynita had filed timely under Nevada law.

In re: Trust Under Deed of Wallace F. Ott, 271 A.3d 409 (Pa. Super. October 12, 2021)

In the context of litigation regarding objections to a trustee's account, the Pennsylvania Superior Court, in affirming the Orphans' Court decision, concluded that a letter sent by the trustee to the settlor at the time the trust was established constituted a contract as to income compensation. The court relied on the fact that the trustee stated in the letter that it intended to charge a specified fee. The letter was found to be a written fee agreement for the purposes of Section 7768 of the UTA, 20 Pa.C.S. §7768, which requires the agreement to be signed by the settlor or anyone authorized by the trust instrument to sign fee agreements, even though the letter was not signed by the settlor. In so ruling, the Superior Court relied on the orphans' court's finding that under the circumstances, the settlor and the trustee manifested an intent to be bound by the terms of the letter.

The Superior Court also affirmed the finding of the orphans' court that an offer to accept reduced compensation, some months before the litigation began, constituted compelling evidence to rebut the statutory presumption that fees set in a competitive market are deemed to be reasonable. See 20 Pa.C.S. §7768(d). The Court held that the reduced amount was reasonable even though the trustee informed the trust beneficiaries that it would seek court approval of the full amount, of fees calculated in accordance with its standard fee schedule, in the event the beneficiaries did not consent to the amount of the principal fee commission.

The Ott decision provides important lessons to trustees when communicating with beneficiaries about their compensation. First, to the extent a letter setting forth the terms of the fee is intended merely to inform trustees of the current fee and not a contract regarding fees for the life of the trust, it should say so. Second, an offer to accept a reduced amount of compensation prior to the onset of litigation will cap the amount of compensation deemed to be reasonable, whether or not it is intended to be contingent upon the avoidance of litigation.

VIII. FIDUCIARY AND ATTORNEY COMPENSATION

In re Estate of Oh, No. A-2760-18, 2021 WL 1096710 (N.J. Super. App. Div. Mar. 23, 2021)

This decision is the latest phase in a dispute between two brothers regarding the assets of their father. *In re Estate of Byung Tae-Oh*, 445 N.J. Super. 402 (App. Div. 2016). This ruling dealt with counsel fees.

The decedent died intestate, as a resident of Korea. His estate was valued at $31 million.

The defendant/son, Hyung Kee Oh, had started a business in the United States. The decedent had wired $900,000 to an account of the business.

The plaintiff, Wonki Oh, sued in Korea to determine the value of the estate and further alleged that the defendant's share in the estate had to be reduced by the inter vivos transfers from the decedent to the defendant. In the New Jersey litigation, among other claims, the plaintiff asserted that the decedent had New Jersey assets and sought the appointment of an administrator for the estate. The plaintiff also claimed that the $900,000 transfer represented the decedent's investment in the other son's business and in turn was an asset of the estate. The defendant denied that the decedent had any assets in New Jersey and argued the $900,000 was a gift.

The trial court awarded counsel fees to both parties. The defendant appealed, arguing that the plaintiff was not entitled to fees because he had done nothing to benefit the estate. The plaintiff cross-appealed.

The Appellate Division found that the defendant's fee application should have been denied in its entirety; it reversed the trial court's award of almost $1 million in fees. The court found that the defendant took no action that benefitted or assisted in the creation of the fund in court; instead, he contested the claim that the $900,000 was an estate asset and instead asserted that the funds were a gift to him personally. Indeed, the defendant did all in his power to avoid the creation of the fund in court.

The appeals court likewise rejected the defendant's claim that the plaintiff's motion for fees was untimely, and traced the standards and rules for fee awards in the rulings of the trial court.

The Appellate Division likewise found that, while the plaintiff's primary motivation may have been for himself, his action still benefitted the estate and the other estate beneficiaries.

Finally, the appeals court supported the award of counsel fees to the plaintiff but found that the trial court needed to assess that award in light of a number of factors, including the value of the estate, the amount in dispute, the skill and ability of the attorney, the result obtained, and the benefits and advantages to the estate. The matter was remanded for that analysis.

In re Estate of Blair, No. A-1394-19, 2021 WL 1424066 (N.J. Super. Ct. App. Div. Apr. 15, 2021)

This appeal addressed the courts' ability to limit ongoing filings by a *pro se* petitioner involving the estate of her aunt. Eventually the trial court precluded the party from filing additional pleadings against the estate, its beneficiaries, and its attorneys, without first obtaining leave from the court.

Three prior appeals had already been filed by the petitioner. The dispute centered on a will contest. In 2014, the trial court granted summary judgment against the petitioner. Thereafter, she filed more than 30 pleadings over four years, aimed at reversing the summary judgment.

At one point, in 2015, the trial court granted the estate's motion to impose sanctions for frivolous litigation. The Appellate Division reversed that ruling, as not supported by a proper certification under the Court Rules.

In 2016, the petitioner filed claims in federal court against Bergen County and the Bergen County Surrogate's Office. These claims failed.

Later, in 2019, the petitioner filed a motion to amend prior rulings of the trial court, to remove degrading references to her in those decisions, and to have the judge recuse himself. The court denied that motion.

Around that same time, the trial court granted a motion by the estate to preclude the petitioner from any additional filings without leave from the assignment judge of Bergen County. The trial judge included a 27-page opinion on the constitutional and public policy bases for limiting the petitioner's filings.

The petitioner appealed. The Appellate Division affirmed. It explained that courts have the inherent authority, if not the obligation, to control frivolous or vexatious litigation. Where traditional sanctions fail to deter a litigant, an assignment judge may enjoin that party from bringing further actions. However, this power must be used sparingly, and balanced against the fundamental public right to access to the courts.

In this case, the Appellate Division observed that the petitioner never relented in her filings, despite numerous rulings against her and her brush with sanctions. The appeals court found no basis to disturb the trial court conclusion that the petitioner's filings demonstrated a pattern of frivolous litigation designed to harass the estate, its attorneys, the court, and the court staff.

The estate cross-appealed the trial court's denial of financial sanctions against the petitioner. After reviewing the standards under *R*. 1:4-8 for frivolous filings, the Appellate Division noted that the standard of review on appeal was abuse of discretion. It found no basis to disturb the trial court's denial of financial sanctions against the petitioner. The trial court had sufficiently sanctioned the petitioner by enjoining further filings, and had determined that monetary sanctions would be inadequate to curtail the petitioner.

In re Estate of Balassone, A-0399-20, 2021 WL 2285232 (N.J. Super. Ct. App. Div. June 4, 2021)

Nicholas Balassone died on November 25, 2008. Decedent's grandnephew, Robert, was appointed executor. In April 2011, in response to an action by Arthur, a beneficiary, the court entered the first of three orders compelling the executor to file a formal account. The executor failed to do so.

In December 2012, in response to a separate action filed by a different beneficiary, Joyce, the court entered a second order compelling the executor to account. Again, the executor failed to do so.

In July 2015, Arthur and David, the spouse of a beneficiary, filed an action for judgment removing the executor. In September 2015, the court entered an order directing the executor to make final distribution of the estate's assets within 30 days. In November 2015, the executor filed an accounting but did not make distribution.

In January 2016, the court ordered that the executor settle the estate within 30 days. Again, the executor failed to comply.

In June 2016, the probate judge ordered the executor to provide a final estate accounting. Again, the executor did not comply.

In January 2017, the judge removed Robert as executor. In the order, the judge noted, "In removing the executor, the court made no finding as to the cause for the removal of the executor at this time . . . ."

In May 2017, Robert sent a check for $102,000 to the successor fiduciary. However, Robert did not forward the estate's records.

In August 2017, the judge ordered Robert to make the entire estate file available within seven days. The order also awarded plaintiffs $3,300 in attorney's fees.

Three years later, in May 2020, Arthur and David moved for approximately $49,000 in attorney fees from Robert, citing his delay in administering the estate as necessitating their filing of various motions related to the estate. Arthur and David did not seek fees from the estate.

In August 2020, the probate judge denied the motion for fees, concluding that since there was no will contest or attorney malpractice claim, there was no exception to the American Rule that would support fee-shifting against Robert.

The Appellate Division affirmed, noting that plaintiffs were "unable to cite any court rule or statute in support of their claims for attorney's fees." Rather, plaintiffs had relied on *Packard-Bamburger & Co., Inc. v. Collier*, 167 N.J. 427, 444-45 (2001). *Packard-Bamburger* was distinguished by the Appellate Division because in *Packard-Bamburger*, the fee-shifting was based upon an attorney malpractice action.

Since the motion did not seek fees from the estate, there was no discussion of the "fund in court" exception to the American Rule. Also, *R*. 1:10-3, which provides for counsel fees to a party who successfully moves for enforcement of litigant's rights, was apparently never raised by the moving parties because the motion for fees was not a motion to enforce litigants' rights.

In re Estate of Tkachuk, A-3578-19, 2021 WL 2711116 (N.J. Super. Ct. App. Div. June 30, 2021)

Karen Lesso Conover ("Conover") was the executor and primary beneficiary of the estate of Margaret C. Tkachuk ("Estate"). The law firm she retained to assist her with the administration of the Estate made a tax allocation error that benefited her.

Mark Lesso ("Lesso"), a residual beneficiary of the Estate, filed a complaint that sought an accounting and alleged that the $61,878 tax payment made from the residuary estate was in error. Conover hired a second law firm to represent her in the litigation, and she eventually reimbursed the tax payment to the Estate. Conover later retained a third firm to represent her with respect to both the administration of the Estate and the litigation.

The parties entered into a settlement agreement and submitted a consent order ("Order") to the court which required Conover to put the first law firm on notice of a potential malpractice claim related to the tax error. Conover never fulfilled this obligation. The Order further required all attorneys seeking fees and costs in connection with the litigation to file their fee applications with the court. Any party whose attorneys who were already paid by the Estate and whose fee application was not approved by the court would be required to return such fees to the Estate.

After reviewing the fee applications, the court rendered a decision that required Conover to reimburse $33,129 to the Estate for counsel fees charged by attorneys who represented her in the litigation and whom she paid from Estate funds – thus creating a fund in court. Any unpaid fees would become Conover's personal responsibility. The court awarded Lesso's attorneys $25,986.85 in fees and costs which were to be paid from the fund in court.

Conover filed a motion for reconsideration, which was denied and increased the amount she owed the Estate to about $39,000. She appealed the trial court order and the reconsideration denial.

On appeal, Conover asserted that the trial court: (1) erred to the extent it awarded Lesso's legal fees to be paid from the Estate under *Rule* 4:42-9(a)(3) and under *In re Estate of Vayda,* 184 N.J. 115 (2005); (2) abused its discretion when it ordered Lesso's feeds be paid from the fund in court, when the court's decision was motivated by equitable considerations; and (3) erred by making determinations as to disputed facts on an incomplete record.

The appellate court affirmed the trial court order and denial of the motion for reconsideration. Specifically, the panel found that the trial judge had noted during the reconsideration motion hearing that the reference to *Rule* 4:42-9(a)(3) was a typographical error, and instead intended to award plaintiff's legal fees under *Rule* 4:42-9(a)(2) which governed the payment of counsel fees from a fund in court. Further Conover's reliance on *Vayda* was misplaced. The appellate panel agreed that in this matter, the successful litigant's – i.e. Lesso's – counsel fees should be paid out of the Estate.

Additionally, the trial court's decision that Conover should be responsible for her own fees and reimburse said fees to the Estate, creating the fund in court, was not an abuse of discretion, nor a misinterpretation of the law. The appellate court confirmed that the trial court correctly followed the two-step process evaluating when legal fees should be paid from a fund in court, as illustrated in *Porreca v. City of Millville*, 419 N.J. Super. 212, 225 (App. Div. 2011). Specifically, the court considered (1) whether Lesso was entitled as a matter of law to an attorney fee award under the fund in court exception, and (2) whether the fee amount, which was within the discretion of the court, was reasonable under the facts of the case.

As to Conover's third argument, the court determined that while the underlying record in this case may have been incomplete, it was harmless error because the basis for determining the allocation of fees was not based on Conover's actions as executor of the Estate, but rather on the creation of a fund in court.

Lastly, Conover argued that she should not be responsible for the first law firm's fees because they were retained to assist with the administration of the Estate. The appellate panel affirmed the lower court's decision since the first firm did not represent the Estate, but rather Conover in her capacity as the executor of the Estate. Furthermore, Conover had agreed and subsequently failed to notice the first law firm of a potential malpractice claim. Had she done so, and prevailed, those fees would have been returned to the Estate.

In re Estate of Felix Fornaro, No. A-2346-19, 2021 WL 5104820 (N.J. Super. Ct. App. Div. November 3, 2021)

This matter came to the Appellate Division a second time, following a 2019 remand to the trial court for application of the criteria relevant to an award of counsel fees. *In re Estate of Felix Fornaro,* No. A-3836-15T1, 2019 WL 2172791 (N.J. Super. Ct. App. Div. May 20, 2019).

In December 2011, the decedent, Felix Fornaro, executed a will (the "December 2011 will") which provided that his daughter, plaintiff Linda Picone, would receive 10 percent of his estate, and that his son, defendant Carmine Fornaro, would receive 80 percent. The remaining 10 percent would be distributed among decedent's grandchildren. The 2011 will revoked a 1999 will, which had divided the estate equally between decedent's two children.

Four months after the 2011 will was admitted to probate, Picone filed a complaint in the Probate Part to invalidate the will. Picone alleged, among other things, that the decedent's mental and physical afflictions, along with his frailty, made him vulnerable to the undue influence exerted on him by his son, Fornaro. Picone also alleged that decedent lacked testamentary capacity at the time he executed the will. The trial court dismissed the latter claim during trial, and dismissed the undue influence claim at the end of trial.

Before and following trial, Picone filed motions alleging there was a presumption of undue influence and that the burden of proof should be shifted to Fornaro. The trial court denied the motion on both occasions, finding that while there were suspicious circumstances, there was no confidential relationship between the parties. As such, the trial court held that Fornaro did not exert undue influence over his father, upheld the 2011 will, and entered a judgment in favor of the defendant.

After entry of a final judgment, both parties filed motions for counsel fees and costs. The court entered an order to provide an allowance to Picone for her counsel fees but denied her request for costs. The court granted Fornaro's application for counsel fees and costs.

Picone appealed the trial court's denial of her pretrial motion to shift the burden of proof to Fornaro. She also appealed the denial of her costs. Fornaro appealed the allowance of counsel fees to Picone, alleging that the trial court failed to take into consideration the requisite factors before authorizing fees and cost.

First, the Appellate Division considered whether there was a confidential relationship between decedent and Fornaro. After examining the record, the Appellate Division affirmed the trial court's decision that there was no confidential relationship. The court explained that the evidence showed that the decedent was not influenced by Fornaro. Specifically, the court pointed to the testimony of the decedent's doctor, that the decedent was not "directable" in December 2011, and the testimony from several witnesses who testified that the decedent was defiant, strong-willed, independent, and stubborn.

The Appellate Division also held that the trial court did not err when it denied Picone's request for costs. The court reasoned that the court rules allow costs to be provided to a prevailing party. Since Picone did not prevail at trial, she was not entitled to costs.

Next, the Appellate Division addressed Fornaro's contention that Picone was not entitled to fees. Under *Rule* 4:42-9(a)(3), the court may award fees if it appears that there was a reasonable cause for contesting the will, even if the party challenging the will is unsuccessful. To satisfy the reasonable cause requirement, the petitioners must provide the court with facts that justify inquiry into the sufficiency of the will. The trial court found that the decedent's declining health, age, and the fact that a friend of Fornaro drafted the will, gave Picone reasonable cause to contest the 2011 will. Even though the final analysis did not support a finding of undue influence, Picone had satisfied her burden of showing reasonable cause.

Finally, the court considered Fornaro's contention that the court had failed to consider the factors in *R.P.C.* 1.5(a) and *In re Bloomer's Estate,* 37 N.J. Super. 85 (App. Div. 1955) before awarding counsel fees to Picone. Under *R.P.C.* 1.5(a), factors determining the reasonableness of a fee include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

Id. at *19-20 (citing from *R.P.C.* 1.5(a)). Additionally, in estate matters the court should also consider the *Bloomer* factors, namely:

> (1) the amount of the estate and the amount thereof in dispute or jeopardy as to which professional services were made necessary; (2) the nature and extent of the jeopardy or risk involved or incurred; (3) the nature, extent and difficulty of the services rendered; (4) the experience and legal knowledge required, and the skill, diligence, ability and judgment shown; (5) the time necessarily spent by the attorney in the performance of his services; (6) the results obtained; (7) the benefits or advantages resulting to the estate, and their importance; (8) any special circumstances, including the standing of the attorney for integrity and skill; and (9) the overhead expense to which the attorney has been put.

Id. at *20 (citing *Bloomer's*, 37 N.J. Super. at 94 (App. Div. 1955)).

After taking these factors into consideration, the court must establish the reasonable hourly rate the attorney is permitted to charge and then determine whether the hours billed are reasonable.

In the 2019 decision. the Appellate Division concluded that the trial court did not conduct the proper analysis before it awarded attorney's fees. The trial court should have expressly stated its findings of fact and conclusions of law, along with consideration of the factors and legal authority. Instead, the trial court only gave a brief statement that left the Appellate Division unable to discern whether it applied the factors. *Id*. at *21-22. Thus, the Appellate Division remanded the issues of counsel fees and costs back to the trial court for further fact finding.

On remand, the trial court considered the factors set forth in *R.P.C.* 1.5(a) and *In re Bloomer's Estate*, *supra,* and awarded counsel fees to both Picone and Fornaro. Both parties appealed.

In the 2021 opinion, the Appellate Division explained that an allowance of counsel fees "… is a matter which rests in the sound discretion of the trial court. [We] will not interfere unless the record discloses manifest misuse of that discretion." *Id*. at 6 (internal citations omitted). Since the trial court had on remand considered the appropriate criteria and provided detailed findings, the Appellate Division concluded that there was no basis to find an abuse of discretion. The awards of counsel fees were affirmed.

Konefal v. Landau, Superior Court of New Jersey, Docket No. A-0024-20 (N.J. Super. Ct. App. Div. Nov. 4, 2021)

This case had initially addressed the award of counsel fees under New Jersey frivolous litigation law, Rule 1:4-8 and N.J.S.A. ¶ 2A:15-59.1. After a bench trial, the trial judge dismissed plaintiff's complaint and later awarded fees to defendant of just under $40,000 because plaintiff had provided insufficient evidence to support her contentions at trial. *See Konefal v. Landau*, No. A-2781-18 (App. Div. May 13, 2020).

Plaintiff Valerie Konefal sued defendant Howard Landau in the Law Division over Howard's alleged management of funds left to Valerie and her sister, Howard's wife, Eileen ("Marie"), by their mother. After their mother's death in 1995, Valerie raised questions about her share of her mother's assets. When Valerie demanded her share, Howard denied ever managing any of the funds and asserted that he did not hold any funds on Valerie's behalf.

In January 2017, Valerie filed a complaint against Howard, alleging breach of fiduciary duty, fraud, conversion, and unjust enrichment. Howard's counsel then sent Valerie's attorney a notice and demand to withdraw the complaint, pursuant to R. 1:4-8 only. Valerie did not withdraw the complaint but instead amended her pleadings to name her sister as a defendant, seeking an accounting, disgorgement, and constructive trust relief. Later, the court declared Marie incapacitated and appointed a guardian for her.

The trial judge conducted a two-day bench trial in November 2018. The next day, the judge entered an order dismissing Valerie's complaint with prejudice and issued a written decision setting forth credibility findings, findings of fact, and reasons for dismissing plaintiff's complaint. In her comprehensive, 22-page decision, the trial judge found Howard more credible than Valerie, and rejected Valerie's contentions about Howard managing or investing his late mother-in-law's money, having access to any such funds, or that Howard owed Valerie any money.

The judge specifically found that contrary to Valerie's contentions, there was no proof that Valerie's mother had made an *inter vivos* gift to Marie. Rather, the judge found that Marie was handling her mother's funds under a power of attorney which expired upon death and that the mother's Will reflected her intent to leave her estate to both daughters.

The judge found that Valerie had offered no evidence of how much money was left at the time of her mother's death, other than her own testimony about conversations with her sister, Marie, now incapacitated. Further, the evidence demonstrated that Valerie had never asserted a claim for an accounting until 2012 at the earliest. The judge did not find Valerie's testimony credible "on a preponderance of the evidence standard, let alone a clear and convincing standard."

Howard subsequently filed a motion for legal fees under R. 1:4-8 and N.J.S.A. ¶ 2A:15-59.1. The trial judge granted the motion. The judge concluded that Valerie's claims against Howard were frivolous given that she had failed to prove her mother had any money at the time of her death, she took no action to pursue her claim for approximately 17 years, and never hired an expert to prove the value of her mother's investments, if any. The trial judge concluded that Valerie had failed to produce "anything other [than] bare allegations."

On appeal, the Appellate Division reviewed the counsel fee sanctions under an abuse of discretion standard. The appellate court concluded that the trial judge did not conduct the required analysis of Howard's claim for fees and did not adequately set forth her reasons for granting the motion. Rather, the trial judge only relied upon the finding that Howard was more credible than Valerie, who, for that reason, could not prove her claim. According to the Appellate Division, this was not a sufficient basis to award fees. In addition, the judge did not provide any analysis of the separate claims against Valerie and her attorney.

N.J.S.A. ¶ 2A:15-59.1 and Rule 1:4-8 permit a judge to award attorney fees as a sanction against a litigant or an attorney for pursuing a frivolous complaint. R. 1:4-8 applies only to attorneys or self-represented parties, and N.J.S.A. ¶ 2A:15-59.1 applies to represented parties. Both the Rule and the statute require that the prevailing party seeking the sanction prove that the non-prevailing party acted in bad faith, "for the purpose of harassment, delay or malicious injury," or pursued the action "without any reasonable basis in law or equity and could not . . . support [its actions] by a good faith argument for an extension, modification or reversal of existing law." *Konefal*, pp. *7-8 (quoting N.J.S.A. ¶ 2A:15-59.1(b)(1) to (2) (other citations omitted)).

The Appellate Division also noted that courts "must strictly interpret the frivolous litigation statute and Rule 1:4-8 against the applicant seeking attorney's fees and/or sanctions." *Id.* at *9 (quoting *Wolosky v. Fredon Twp.*, 31 N.J. Tax 373, 390 (2019)). In other words, courts should exercise restraint in awarding frivolous litigation sanctions. The goal of the law is to deter baseless litigation without discouraging honest, creative advocacy, while at the same time keeping in mind public policy that litigants should usually bear their own litigation costs. In short, a judge should only award sanctions for frivolous litigation in exceptional cases.

A finding of bad faith is a requirement for awarding frivolous litigation sanctions. An unsuccessful plaintiff who may perhaps be overly optimistic in seeking a remedy does not necessarily mean that the litigation was frivolous. In addition, the trial judge must determine whether the moving party served the requisite written notice and demand that the frivolous claim be withdrawn.

The Appellate Division also pointed out that when a prevailing party seeks sanctions against an attorney under R. 1:4-8 *and* against a party under N.J.S.A. ¶ 2A:15-59.1, the trial judge must consider the respective responsibility of each. *Id.* at *12 (citing *Savona v. DiGiorgio Corp.*, 360 N.J. Super. 55, 63 (App. Div. 2003)).

The Appellate Division vacated the fee award and remanded the matter for reconsideration because the trial judge did not provide a complete analysis of the motion seeking fees under the Rule and the statute. The trial judge did not address whether the notice sent by Howard was sufficient under the Rule or the statute. Also, the judge never analyzed whether Valerie or her attorney acted in bad faith.

On the limited remand, the trial court awarded counsel fees to Howard in the amount of $39,391.60.

Valerie appealed, arguing that she was denied due process, that defendant's notice was deficient, that the trial court did not act impartially, that her complaint was not frivolous, and that the counsel fee award was excessive. (The remand judge had also vacated her earlier determination awarding counsel fees against Valerie's counsel and his law firm, but Valerie did not appeal that ruling.)

The Appellate Division rejected plaintiff's arguments as having been raised in her prior appeal. The court noted that the remand order expressly directed the trial court to only set forth specific findings as to each element of defendant's claim for counsel fees and explain the reasoning for awarding fees to defendant. The court declined to consider issues Valerie asserted beyond the scope of its remand instructions and would not compel the trial judge to conduct a separate hearing on the attorney fee issue, re-examine issues previously resolved, or address issues not raised in plaintiff's initial appeal.

Based on the trial court's comprehensive findings on remand, the Appellate Division affirmed the award of fees to defendant. Here, the judge painstakingly detailed her reasons for finding Valerie's claims were filed in bad faith. The judge also considered the factors under RPC 1.5(a) in calculating the amount of the attorney fees awarded. In fact, given the contentious nature of this litigation, the Appellate Division found that the amount of the attorney fees awarded was "eminently reasonable and relatively conservative."

The court also commented on its instruction to the trial judge to analyze the sufficiency of Howard's written demand that Valerie withdraw her complaint under R. 1:4-8. Specifically, under R. 1:4-8(b)(1), the moving party is required to serve the opposing party with written notice and a demand describing the specific conduct alleged to have violated the Rule.

Here, Howard's R. 1:4-8 letter, served during the early stages of the case, identified nine reasons why the claims in Valerie's complaint lacked merit, constituted a frivolous pleading, and were filed in bad faith. In her July 21, 2020, written decision, the trial judge thoroughly examined Valerie's claims, reviewed her conduct, and explained the reasons for finding Valerie filed her pleading in bad faith.

In short, the Appellate Division affirmed the judge's award of counsel fees to defendant.

In the Matter of the Estate of Wicker W. Doornbosch, Docket No. A-3225-19 (N.J. Super. Ct. Aug. 19, 2022)

This appeal arose out of probate litigation over the estate of Wicker W. Doornbosch, who died in 2016. The parties reached a settlement in open court. Counsel for appellant Farash put the terms on the record. Farash swore under oath that he understood and agreed he was entering into a binding settlement, and that by accepting it he would have no further interest in the estate, not be entitled to an accounting, have no right to challenge commissions, and have no right to seek legal fees from the estate. He also agreed that there would be income tax consequences in connection with his receipt of an IRA.

Farash's counsel insisted on a written agreement and mutual releases when the settlement was placed on the record. Adverse counsel (for the administrator of the estate) did not object, so long as the agreement did not vary from the terms on the record. In response to a specific question from his counsel, Farash agreed the parties would exchange mutual releases.

In the months that followed, Farash refused to execute releases, and the estate refused to pay the settlement funds without them. Farash objected to a term in the agreement making him responsible for all penalties and interest related to the IRA.

The trial judge denied Farash's motion to enforce the settlement agreement pursuant to Rule 1:10-3 without prejudice, finding it premature as Farash had not contacted the financial institution to have his share of the IRA paid out to him and thus had no idea as to whether there would be any interest and penalties. The judge further ordered that once Farash received the IRA funds, the administrator should calculate the balance due and send a check in that sum to Farash's counsel, to be held in escrow pending Farash's execution of the releases.

Several months later, the administrator moved to enforce the settlement and for attorneys' fees, claiming Farash refused to execute the releases. Farash opposed the motion and cross-moved for his fees. By that time Farash's counsel (his third attorney) had withdrawn; Farash argued the motions on his own behalf.

The trial judge rejected Farash’s arguments. Farash signed the release in court. The trial judge denied fees to both parties.

Farash appealed two orders, arguing the trial judge abused his discretion in failing to remove the executor and in denying Farash's request for fees and costs for the administrator's violation of the settlement agreement.

The Appellate Division affirmed. The probate judge's decision as to whether to award attorneys' fees was a matter committed to his sound discretion and would be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion.

The appeals court also affirmed the trial judge’s denial of Farash's motion to enforce the settlement agreement while Farash refused to execute the IRA forms, the settlement agreement and the mutual releases; his motion was both speculative and premature. There was thus no basis for an award of fees to Farash on a Rule 1:10-3 motion he lost. Moreover, since Farash had no counsel by the time of the motion, he incurred no counsel fees. He was not entitled to attorney fees for representing himself on the motion.

Finally, the Appellate Division rejected Farash's complaints about the probate judge's failure to remove the administrator, especially since he settlement of the probate litigation precluded his re-litigation of claims that either were raised or could have been raised in that proceeding.

In the Matter of the Estate of Joseph Krivulka, Deceased, Nos. A-0863-20 & A-0803-21 (N.J. Super. Ct. App. Div. Aug. 26, 2022)[1]

This consolidated appeal centered on Rule of Professional Conduct (RPC) 1.9 and whether a former client gave informed written consent to a law firm's representation of the client's co-fiduciary as part of an estate administration.

Lowenstein Sandler LLP (Law Firm) acted as personal counsel for the decedent, Joseph Krivulka (Decedent), and his wife, appellant Angela Krivulka (Angela), and also served as counsel for their different businesses over the course of many years. In 2009, the Decedent and Angela retained Law Firm to jointly represent them for estate planning purposes, which included the preparation of wills, multiple trusts, powers of attorney, and advance health care directives. As part of her estate plan, Angela named one of the Decedent's business attorneys at Law Firm as a successor executor, trustee, attorney-in-fact, and health care agent to the Decedent. The Decedent named the same attorney to serve as co-executor (the Attorney Executor) with Angela under his will. The will gave the Attorney Executor the power to appoint one or more co-executors to serve with him at any time. However, Angela was not vested with the same power.

Following the Decedent's death in February 2018, Angela and the Attorney Executor retained Law Firm in March 2018 to represent them as co-executors of the Decedent's estate. The engagement letter specified that the firm would jointly represent Angela and the Attorney Executor, advise them on their responsibilities as co-fiduciaries, and assist them with preparing tax returns and probate documents. The letter also discussed the potential risks of joint representation, including conflicts of interest, and stated that Angela was agreeing to waive any conflict that might arise as a result of the joint representation. Notably, although the letter stated that conflicts might arise, it failed to elaborate in any way on actual or potential conflicts that existed or might develop between Angela and the Attorney Executor or Law Firm as a result of their prior representation of the Decedent in connection with his businesses or of the Decedent and Angela with respect to their estate plans.

Less than two weeks after Angela signed the engagement letter, she notified Law Firm that she intended to seek separate counsel based upon a number of perceived conflicts. The alleged conflicts included, but were not limited to: the Attorney Executor's failure to complete succession planning relative to the Decedent's business entities, despite having received instructions from the Decedent to do so shortly before his death; the Attorney Executor's personal financial interest in many of the Decedent's company transactions; and the dearth of information being provided to her, as wife and as a co-executor and beneficiary of the estate.

Approximately two months after it received Angela's letter, Law Firm withdrew from representing three of the Decedent's businesses in a proposed sale, citing the Attorney Executor's appointment as co-executor of Decedent's estate and his personal stake in one of the entities as the reason for the withdrawal. Angela discharged Law Firm from representing her as co-executor and obtained new counsel shortly thereafter.

[1] This case should not be confused with *Krivulka v. Lerner*, 2:20-CV-09724, 2021 WL 3260851 (D.N.J. July 30, 2021), discussed *supra*.

Two years after discharging Law Firm, Angela filed two actions—one in her individual capacity in Arizona state court (the Arizona Litigation) and the other individually and in her capacity as co-executor in federal court in New Jersey. In the Arizona Litigation, Angela sought a declaratory judgment that the "vast majority (if not the entirety) of [the] total assets" of her and Decedent "were community property." *Id.* at 8 - 9. In the federal court action, Angela sued Law Firm and the Attorney Executor for legal malpractice and breach of fiduciary duty based upon their alleged failure to disclose information essential to her estate planning and to revise thee Decedent's estate plan according to his instructions.

Angela pointed to a March 2016 memorandum prepared by Law Firm as the underlying basis for her malpractice and breach of duty claims. The memorandum, which was addressed to her and Decedent, discussed the ramifications of changing their domicile from New Jersey to Arizona from an estate planning perspective, including, among other things, the fact that "Arizona is a so-called 'community property' state" in which property acquired during the marriage is deemed to be equally owned by both spouses. *Id.*at 10. Although Angela and the Decedent were both listed as intended recipients of the memorandum, Angela certified that she never saw or received it until after the Decedent passed away and there was no evidence in the record that anyone at Law Firm had sent it or discussed it with her.

Angela alleged that she and her husband had originally purchased a home in Arizona in 2008, which they moved into and began treating as their primary residence in 2009. She claimed that Law Firm's failure to disclose the memorandum amounted to malpractice and a breach of duty because the firm had failed to advise her that estate planning as an Arizona resident would benefit her. She also alleged that Law Firm had failed to discuss the legal significance of updating items such as driver's licenses and voter registrations with her and had misled and improperly directed her to list the Decedent's New Jersey address on his death certificate, without telling her how it would impact the administration of the Decedent's estate. Finally, she claimed that Law Firm did not address "any issues or conflicts that existed [as of March 2018] or that might arise from Law Firm's joint representation of [her and the Attorney Executor], or, for that matter, any of the substance of the engagement letter" when it was presented for her to sign. *Id.* at 13.

Shortly after Angela commenced the Arizona Litigation, the Attorney Executor invoked his power of appointment under the Decedent's will and appointed a former New Jersey probate judge to serve with him as a third co-executor. Less than a month later, the third co-executor filed an action for advice and direction in the Superior Court of New Jersey, Monmouth County Probate Part, seeking (a) confirmation that any majority of the co-executors could pay any administration expenses from the assets that comprised the estate and (b) interim relief allowing the estate to pay attorneys' fees to defense counsel in the Arizona Litigation, in addition to certain other expenses.

Angela answered the complaint for advice and direction and simultaneously filed a motion to disqualify Law Firm from further representing the Attorney Executor as a co-executor of the Decedent's estate. In support of her motion, Angela argued that Law Firm was advancing and advocating positions on behalf of the Attorney Executor which were "materially and diametrically adverse" to her interests in the estate and in the Decedent's assets and that she "never gave an informed consent" to such adverse representation, as RPC 1.9 required. *Id.* at 16.

The trial judge denied Angela's motion, citing both the conflict waiver language that Angela had agreed to in the engagement letter and the roughly two-and-half-year delay between the time Angela first raised a conflict as an issue and the time she moved to disqualify Law Firm. Angela later filed a second motion to disqualify Law Firm in response to her co-executors' request that she be removed as an executor due to her efforts to obtain "all or substantially all of the Estate's assets" for herself in the Arizona Litigation. *Id.* at 19. The trial court removed Angela on that basis but denied her motion. She appealed the trial court's orders.

The Appellate Division reversed the trial court's rulings denying Angela's motions to disqualify and affirmed her removal as co-executor. As to its decision to disqualify Law Firm, the court explained that the "nature, domicile, and assets of [Angela and Decedent's marriage], including assets and residency, necessarily impacted and encompassed both their estates" and were clearly relevant and material to the administration of the Decedent's estate "because they affect how the estate will be administered and to whom the assets will pass. [Angela's] ongoing Arizona Lawsuit, where she seeks to acquire a greater share of marital assets, shows the overlap between [her] own estate planning and [Decedent's] estate planning and how this previous estate planning affects how [his] estate is administered." *Id.* at 29.

The Appellate Division further observed that Angela's pursuit of a greater amount of assets from the estate materially and directly conflicted with the Attorney Executor's duty to uphold the estate plan that Law Firm had prepared for Decedent. Additionally, the court stated, "The evidence suggests [the Decedent] deliberately structured his Estate, and even concealed information from [Angela], so that New Jersey would remain his domicile and certain of his assets would not pass to [Angela] as community property." *Id.* at 30. Consequently, the appellate panel concluded that a material adversity existed "between [Angela's] individual interest as a beneficiary of [D]ecedent's Estate and [the Attorney Executor's] interest in administering the Estate," and the conflict could only be waived under RPC 1.9(a) if Angela, a former estate planning client, had given Law Firm informed written consent. *Id.*

Although Law Firm's engagement letter acknowledged it had a duty to obtain Angela's informed, written consent to joint representation after full consultation and disclosure, the Appellate Division held that there was no credible evidence that any meaningful consultation or disclosure ever took place. In addition to failing to disclose the conflicts related to Law Firm's joint representation of Angela and the Decedent with respect to their estate plans, including residency and domicile issues, the court found that there was similarly no evidence that "anyone from Law Firm explained to [Angela] that she and [the Attorney Executor] were not equal co-executors since [Decedent's] will granted [the Attorney Executor] the power to appoint additional co-executors," which enabled the Attorney Executor to dilute Angela's voting power. *Id.* at 32 – 33. Given that Law Firm had failed to adequately explain the risks of joint representation or how potential conflicts might arise, the court held that Angela's execution of the engagement letter did not constitute her informed written consent under the Rules of Professional Conduct.

The appellate panel further held that there was no undue delay that resulted in Angela waiving her right to seek Law Firm's disqualification under the circumstances, especially where she had only recently become aware of certain evidence and any alleged delay in Angela's filing of her complaints and her motion to disqualify was caused by Law Firm's failure to provide her with the "full disclosure and consultation" that the Rules of Professional Conduct required. *Id.* at 39.

Finally, the Appellate Division upheld the trial judge's decision removing Angela as a co-executor because of the personal claims that she filed against the estate in the Arizona Litigation.

IX. <u>DISPUTES AS TO CHARITABLE TRANSFERS</u>

In re Bierstadt Paintings Charitable Tr., Dated October 6, 1919, A-0529-20, 2021 WL 3057076 (N.J. Super. Ct. App. Div. July 20, 2021)

In 1919, J. Ackerman Coles ("Coles"), a well-known doctor, art collector, and philanthropist, gifted *inter vivos* two paintings to the City of Plainfield ("the City"). The paintings, by Albert Bierstadt, have been held in a charitable trust by the City and displayed in the City's library in the municipal building.

These paintings have since been held by the City in the charitable trust, with the City acting as trustee. One of the paintings, a landscape, is entitled "Autumn in the Sierras." The other work, the one at issue, is entitled "The Landing of Columbus"; the City alleged that this work depicts racial themes and undertones. As such, the City instituted a lawsuit requesting modification of the trust so it could sell the paintings.

One hundred years after the paintings were donated, the City filed a petition seeking modification of the trust under the *cy pres* doctrine and N.J.S.A. § 3B:31-29(a). The City asserted that the Columbus painting contains racist implications and to display it in a public forum in a community comprised of mostly people of color would continue to cause irreparable harm. The City further alleged that the Columbus painting no longer provided an aesthetic enjoyment to the community, and thus the charitable trust was impractical. The only remedy the City sought was judicial modification of the trust pursuant to the *cy pres* doctrine, to enable the sale of both paintings. The City proposed that the proceeds from the sale would be held in trust by Plainfield Promise, a charitable organization that would use the money to create a financial literacy program for the City's youth, create a college scholarship fund for City residents, and establish and construct the "Plainfield Center of Excellence," a recreational educational facility. The City conceded that the Sierras work was not offensive, but asserted that the municipality did not have the economic resources to maintain and protect the highly valued painting.

In 2016, the Columbus painting was appraised at $15,000,000 and the Sierras was valued at $4,500,000.

The Attorney General's Office had no objection to the sale of the paintings but questioned whether the intended plan to use the proceeds from the sale was in line with the grantor's intent. Thus, they left the ultimate decision on the modification of the trust, the sale of the paintings, and the use of the proceeds to the discretion of the court.

A beneficiary under Coles's will – the Scotch Plains Baptist Church – also submitted a letter to the court stating that if Coles was alive, he would not agree to the sale of the paintings, as he wanted to honor his father with the display of the paintings.

The trial court considered Coles's will, a 1986 memorandum from the City addressing the sale of the paintings, and a 1987 letter authorizing the exposition of the paintings in a museum. The trial court found that there was no evidence that Coles would have intended to have the paintings sold. In fact, his intent was evidenced by the way he devised the paintings with specific instructions and also the way he donated other items of value from the Coles family, which simply could not have been liquidated. The trial court found that the City was permitted to relocate the paintings or donate them to a museum, but denied the City's application to modify the charitable trust and sell the paintings.

The Appellate Division affirmed the trial court decision, finding that in applying the *cy pres* doctrine, the court must make two determinations: (1) if accomplishment of the particular purpose of the trust has become impossible, impractical, or illegal; and (2) if the court makes such a finding, to apply the trust funds to a charitable purpose as nearly as possible to the particular purpose of the settlor if there was a general intent to promote charity. The trial court had rejected the City's argument that it was impractical to retain the paintings, stating that the City did not sufficiently demonstrate why the paintings could not be placed in a different location, such as a museum. The Appellate Division agreed, not convinced by the City's argument that the current social perceptions of Columbus rendered the continued ownership of the paintings impractical. The City was free to display the paintings in any location it chose. The Appellate Division also noted that the appraised value of the paintings reflected how highly coveted the works of art were.

Although it did not need to address the second prong, finding that City had not demonstrated the accomplishment of the trust was impractical, the appeals court commented on the second prong of the *cy pres* analysis. If the City was able to establish the impracticability test, the paintings could only be sold if a court finds that Coles originally donated with the general intent to promote charity. The Appellate Division found that the City had not offered evidence of Coles's general charitable intent; for instance, if Coles intended to support education in the community, as the City asserted, he would likely have made a monetary donation or bequest, not a gift of two masterpiece paintings valued by him more than any dollar amount.

Breslin v. Breslin, 276 Cal. Rptr. 3d 913 (Ct. App. 2021), reh'g denied (Apr. 20, 2021), review denied (July 14, 2021)

The decedent ("Decedent") died in 2018, leaving an estate valued at between \$3 and \$4 million which was held in a living trust dated July 27, 2017 (the "Trust"). The Trust was amended and restated on November 1, 2017 ("Restated Trust"). David Breslin ("Breslin") was named the successor trustee in the Restated Trust.

The Restated Trust made three specific devises and directed that the remainder be distributed to the persons and charitable organizations listed on exhibit A in the percentages set forth. No such exhibit A was initially located, but Breslin found a document titled "Estates Charities (6/30/2017)" (the "Document") which listed 24 charities with handwritten notes appearing to be percentages.

Breslin filed a petition to confirm him as successor trustee and to determine the Trust's beneficiaries in the absence of exhibit A. Breslin served the charities listed on the Document. Several charities did not file formal responses.

The trial court confirmed Breslin as successor trustee and ordered mediation among all interested parties, including Decedent's intestate heirs and the listed charities. All of the interested parties, including intestate heirs and those listed on the Document, received notice of the mediation before it took place.

The notice explicitly stated that the mediation may result in a settlement agreement, and that persons and parties who received notice of the date, time, and place of the mediation but did not participate may nonetheless be bound by the terms of any agreement reached at the mediation.

Only the intestate heirs and five of the listed charities appeared at the mediation. They reached an agreement that awarded specific amounts to the various parties who had appeared, with the residue paid to the intestate heirs.

One of the participating parties filed a petition to approve the settlement, and the charities who did not participate in the mediation (the "Charities") filed their objections. Sometime between the signing of the settlement agreement and its submission to the court for approval, Breslin located exhibit A which listed the Charities as beneficiaries of the Trust.

The court granted the petition to approve the settlement and denied the Charities' objections on the grounds that they did not file a response to Breslin's petition to determine the beneficiaries and did not appear at the mediation.

The Charities appealed, and the appellate court affirmed.

The appellate court noted that it had previously held that "a party who chooses not to participate in the trial of a probate matter cannot thereafter complain about a settlement reached by the participating parties." *Id.* at 918 *(citing Smith v. Szeyller,* 242 Cal. Rptr. 3d 585, 591 (Ct. App. 2019)). While there was no trial in this case, the trial court ordered the mediation, and it was a critical part of the probate proceedings. The Charities could not, therefore, ignore the court's order to participate in medication and then oppose the result.

The trial court made participation in mediation a precondition to a trial. *See* Cal. Prob. Code § 17206 (West). When the Charities failed to participate in the mediation, they waived their right to a trial. Since the Charities were not entitled to a determination of factual issues, such as Decedent's intent, they could not raise such issues for the first time on appeal.

The Charities also argued that Breslin failed in his duty as trustee to deal impartially with all beneficiaries, but the court found this argument to be without merit, concluding that the Charities' failure to participate was not Breslin's fault.

The Charities further argued that Breslin breached his fiduciary duties when he approved large gifts to Decedent's family, including himself, even though they stood to receive little or nothing under the terms of the Trust. The court rejected this argument as well noting that the charities who *had* participated in the mediation also approved the gifts to the family members. The Charities' argument also assumed that the beneficiaries of the trust were known, but in fact the court did not determine the identity of the trust beneficiaries.

Based on the above, the appellate court affirmed.

The appellate decision included a dissent. Appellate Judge Martin J. Tangeman asserted that the Trust should be administered according to Decedent's intent, which meant honoring his wishes above all else.

Judge Tangeman further stated that the court's reliance on *Smith, supra,* was misplaced because in that case, the beneficiary's failure to participate in mediation did not impact her inheritance and "preserved a common fund for the benefit of [her and] the [other] nonparticipating beneficiaries." *Breslin*, 276 Cal. Rptr. 3d at 810 *(citing Smith*, 242 Cal. Rptr. 3d at 594). Further, the nonparticipating beneficiary in *Smith* "forfeited her objections because she did not submit them until after the probate court had approved the settlement." *Id.* (*citing Smith*, 242 Cal. Rptr. 3d at 590).

In this case, the settlement disinherited the Charities and redistributed their share of the estate to other beneficiaries. Furthermore, the notice language unilaterally decreed that a party could settle the case on the Charities' behalf.

Lastly, Judge Tangeman pointed out that the facts changed substantially when Breslin found exhibit A, since it confirmed that the Charities had an unqualified right to inherit the funds from the Decedent's estate, and a "charitable gift must be carried into effect if it 'can possibly be made good.'" *Id. (citing Estate of Tarrant*, 38 Cal. 2d 42, 46 (1951)).

X. LEGAL MALPRACTICE AND SIMILAR CLAIMS

Cohen v. Horn, No. CV 19-5604, 2021 WL 50279 (D.N.J. Jan. 6, 2021), aff'd in part, vacated in part, and remanded, No. 21-1223, 2021 WL 2935029 (3d Cir. July 13, 2021)

This was a legal malpractice case in the context of a will contest. A *pro se* plaintiff, Barry Cohen ("Cohen"), filed suit against his former attorney, as result of his attorney's alleged negligent representation in connection with Cohen's attempt to challenge his late father's will. The federal district court dismissed Cohen's case on summary judgment.

Cohen's father had executed a last will and testament in 1999 (the "1999 Will"). Under the 1999 Will, any remaining funds after satisfaction of debts and funeral expenses would be placed in trust for Cohen's mother, Selma Cohen ("Selma"). Cohen and his sister were named co-trustees. Upon Selma's death Cohen and his sister were to receive $200,000. In 2011, Cohen's father died and Selma probated the 1999 Will.

Several years following his father's death, in 2016 Cohen retained attorney Horn of the Jeff Horn Law Group, LLC, to represent him in a lawsuit regarding the administration of his father's estate. In response, Selma's counsel advised the parties that Cohen's father had executed a new will in 2009 (the "2009 Will") that left everything to Selma. Selma counterclaimed to probate the 2009 Will. Cohen challenged the 2009 Will on the basis that his father lacked testamentary capacity.

After Cohen and his counsel clashed over litigation strategy, Horn moved to withdraw as Cohen's counsel. Horn was relieved as counsel, and several months later, the trial court issued a judgment finding that Cohen's father had intended to revoke his 1999 Will and admitting the 2009 Will to probate. In response, Cohen filed a malpractice suit against Horn and his law firm in state court. Horn subsequently removed the matter to the federal court based on diversity jurisdiction and then filed a motion for summary judgment.

The federal court granted defendants' motion for summary judgment, finding that Cohen had failed to establish a prima facie case that Horn had breached a duty he owed to Cohen that proximately caused Cohen to suffer damages.

For instance, Cohen asserted that Horn failed to oppose a motion to quash. The record reflected that six days after the motion was filed, Horn emailed Cohen to inform him that the anticipated budget to oppose the motion to quash would be between $1,000 and $2,000, and to confirm whether Cohen wanted Horn to proceed with the opposition. Cohen did not present any evidence which suggested Cohen responded and requested that Horn oppose the motion. In early January, Horn informed Cohen that he was withdrawing as his counsel. On January 27, 2017, Horn informed Cohen, via email, that the court had scheduled both the motion to be relieved as counsel and the motion to quash for February 6, 2017, and that if Cohen did not hire new counsel or file a *pro se* response, the motions would be unopposed. The district court thus found that Cohen did not satisfy his burden of demonstrating that Horn breached a legal obligation regarding the motion to quash.

The district court also noted that Cohen was provided with sufficient time to obtain substitute counsel, such that Cohen's failure to prosecute his case could not be reasonably attributed to Horn's withdrawal from the case. Cohen had ample time to retain new counsel, to pursue discovery and file the responsive briefings or to file them *pro se*.

Finally, the district court also found that Cohen had failed to show he would have prevailed in his will contest. Cohen could not demonstrate that even if Horn had performed the requested actions, the underlying lawsuit would have resulted in a favorable recovery for Cohen, because he has not produced evidence sufficient to create a factual question regarding his father's testamentary capacity or the validity of the 2009 Will.

In granting Horn's motion for summary judgment, the district court reasoned:

> The only admissible evidence which casts doubt on Harry Cohen's testamentary capacity is [Cohen's] own assertion that his father's mental state was failing. But as explained above, failing mental state does not equate to a lack of testamentary capacity. Accordingly, [Cohen's] conclusory statement that his father lacked testamentary capacity is insufficient to establish that [Cohen] could have succeeded in the underlying estate matter.

Id. at *7.

In re Robertelli, 248 N.J. 293 (2021)

This New Jersey Supreme Court case highlights the importance of lawyers educating themselves on technology and commonly used forms of social media.

In 2007, respondent John Robertelli ("Robertelli") represented the Borough of Oakland and an Oakland police sergeant in a personal-injury lawsuit filed by Dennis Hernandez ("Hernandez"). In preparing a defense, Robertelli requested his paralegal -- Valentina Cordoba ("Cordoba") -- conduct internet research into Hernandez. *Id*. at * 3.

Although some of the facts were in dispute, Robertelli testified that at the time (in 2007-2008), he did know much about Facebook or how it worked. For instance, he did not know that Facebook had different privacy settings or what it meant to send a "friend" request. He stated that he told Cordoba to monitor whether Hernandez was placing information about the lawsuit on the internet, and that he had no understanding that Cordoba was communicating directly or indirectly with Hernandez. *Id*. at * 7.

Cordoba testified that at first Hernandez's Facebook page was public. When it was turned private, she told Robertelli she could no longer access the information unless she sent him a "friend" request. She testified that Robertelli eventually told her to go ahead and send a "friend" request to Hernandez. Cordoba then forwarded Hernandez a message through Facebook, stating he looked like one of her favorite hockey players. Hernandez then sent her a "friend" request. *Id*.

Hernandez disputed these facts, testifying that his Facebook page was always private, and that Cordoba sent him a "friend" request that he accepted. At the time he accepted the request, he did not know Cordoba was working for the law firm representing the parties he was suing. *Id*.

Robertelli forwarded to Hernandez's attorney the Facebook postings downloaded by Cordoba. Hernandez's attorney accused Robertelli of violating New Jersey Rule of Professional Conduct (RPC) 4.2, which prohibits a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. *Id*. at * 4.

In May 2010, Hernandez filed a grievance with the District Ethics Committee. The Committee declined to docket the grievance for full review. In July 2010, Hernandez's attorney wrote to the Office of Attorney Ethics ("OAE") asking it to investigate the "unethical" conduct of Robertelli. The OAE filed a complaint against Robertelli, alleging he violated several RPCs. After a hearing before the Special Master in 2008, the Special Master concluded that the OAE failed to prove by clear and convincing evidence that Robertelli violated the RPCs and dismissed the disciplinary complaint. *Id*. at * 5.

Following a de novo review of the record, six members of the Disciplinary Review Board determined that Robertelli violated the RPCs. Robertelli filed a petition challenging the determination.

The New Jersey Supreme Court held that the OAE had not sustained its burden of proving by clear and convincing evidence that Robertelli violated the RPCs. The Court found that in 2008 Facebook was not as well-known as a social media platform and that Robertelli did not know how it functioned.

Despite the Court finding that the disciplinary charges against Robertelli be dismissed, the Court warned the bar that had the events of this case occurred in 2021, the conclusion would have be different:

> To be sure, a lawyer litigating a case who -- by whatever means, including through a surrogate -- sends a "friend" request to a represented client does so for one purpose only: to secure information about the subject of the representation, certainly not to strike up a new friendship. Enticing or cajoling the represented client through a message that is intended to elicit a "friend" request that opens the door to the represented client's private Facebook page is no different. Both are prohibited forms of conduct under RPC 4.2. When the communication is ethically proscribed, it makes no difference in what medium the message is communicated. The same rule applies to communications in-person or by letter, email, or telephone, or through social media, such as Facebook.

Id. at * 13

Finally, the Court cautioned that "lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven." *Id*. at *14.

Schindel v. Feitlin, A-2888-19, 2021 WL 2391583 (N.J. Super. Ct. App. Div. June 11, 2021), certif. denied, 248 N.J. 381 (Sept. 24, 2021)

Before his death in November 2016, the decedent, Arnold, executed three wills. In the first will, executed in July 2014, Arnold gave the bulk of his estate to his son, David (the petitioner), and made specific bequests to his friend, Hindy. The will designated David and Hindy as co-executors.

The second will was executed in December 2015 and, among other things, bequeathed Arnold's residuary estate in equal shares to David and Hindy.

The third will, executed in May 2016, contained a number of specific bequests, including $25,000 to David. It bequeathed the bulk of the estate's residue to Hindy and designated her as executor.

The defendant in this matter was the New Jersey attorney who drafted all three wills for Arnold.

When Arnold died in November 2016, Hindy offered the May 2016 will to probate; David filed a caveat and litigation ensued ("Probate Case"). David alleged that Arnold lacked sufficient capacity to execute the May 2016 will, and that it was the product of Hindy's undue influence. David sought instead probate of the July 2014 will and an order designating him as sole executor of the estate.

During the Probate Case, David's counsel deposed the drafting attorney, who represented neither Hindy nor the estate in the Probate Case. The Probate Case settled, and the settlement agreement included terms that released the parties' attorneys from any and all claims or causes of action arising from or pertaining to the Probate Case, including those claims which could have been raised in the Probate Case. The court entered an order in June 2018 probating the July 2014 will, enforcing the terms of the settlement, and dismissing the litigation.

David then filed a legal malpractice claim against the drafting attorney. Specifically, David complained that when the drafting attorney prepared the May 2016 will, he either knew or should have known that Arnold was being unduly influenced by Hindy and that Arnold lacked capacity.

The drafting attorney filed an answer and a third-party complaint against Hindy for contribution and indemnification. Hindy moved to dismiss the drafting attorney's third-party complaint, and he filed a cross-motion seeking dismissal of David's complaint pursuant to the entire controversy doctrine. The Law Division judge granted both motions.

David filed a motion for reconsideration, which the judge denied. David appealed. The issues considered by the Appellate Division were: (1) whether the entire controversy doctrine applies to probate proceedings; (2) if it does apply, whether the drafting attorney suffered substantial prejudice because of David's failure to bring his malpractice claim at the same time he litigated the Probate Case; and (3) whether David would have been entitled to a jury trial on the malpractice claims.

The appellate court affirmed the Law Division's decision as follows.

Entire Controversy Doctrine

Court Rule 4:30A articulates the entire controversy doctrine principle that all related legal issues in a legal controversy should occur in one litigation and in one court. While the *Rule* does not require the joinder of all parties, *Rule* 4:5-1(b)(2) requires parties to certify in their initial pleading that they have joined all non-parties who should be joined in the action, including those who should be joined due to potential liability under the same facts alleged in the pleadings. This ensures that the courts control which parties should be joined and which claims remain under the jurisdiction of the court. If a party fails to comply with the *Rule*, and the failure was inexcusable, then the right of the undisclosed party to defend itself in the successive action has been substantially prejudiced, and the successive action will be dismissed under the entire controversy doctrine.

In this case, the appellate court determined that David's two claims raised in the malpractice action – that the drafting attorney knew, or should have known, that Arnold lack capacity and that Hindy was unduly influencing Arnold – were based on the same facts raised in the Probate Case, and therefore the malpractice claims arose from interrelated facts and the entire controversy doctrine applied. Therefore, the trial court's dismissal of David's Complaint was appropriate.

Legal Malpractice Claim

David claimed that his malpractice claim did not accrue until the Probate Case ended. The appellate court disagreed and stated that the accrual date in a legal malpractice situation is when the facts of the malpractice claim are discoverable and the client sustained actual damages. Accordingly, David's claim accrued when he knew that the drafting attorney had drafted the three wills and that the third will reduced David's share of the estate and excluded him as executor.

David also argued that under *Higgins v. Thurber*, 205 N.J. 227 (2011), the probate court was an inappropriate forum to assert his legal malpractice claim and that legal malpractice claims that arise in the context of probate litigation are excepted from the entire controversy doctrine. David's reliance on that case was erroneous. The focus of *Higgins* was a summary accounting, which is concerned with the conduct of the executor – it is not an attack on a decedent's will. *Higgins* recognized that in some instances a probate proceeding *should* encompass a claim of legal malpractice. Accordingly, David should have joined the drafting attorney in the Probate Case and asserted the malpractice claims in that proceeding.

Right To a Jury Trial

David asserted that his right to a jury trial on the malpractice claim would be abrogated if he were forced to pursue it in the same forum as his challenge to the 2016 will. *Higgins*, however, explicitly permits a chancery court to include such a claim. The courts have further recognized that the Chancery Division may conduct jury trials unless the right to jury trial is waived. *See O'Neill v. Vreeland*, 6 N.J. 158, 167–68 (1951). Finally, a court may, on its own initiative, "try with an advisory jury any issue not triable of right by a jury." *Rule* 4:35-2.

Under this guidance, the malpractice claim could have been tried by a jury in the Probate Case, with the trial judge using the jury strictly in an advisory capacity on the issues of testamentary capacity and undue influence.

Accordingly, the appellate panel concluded that David's failure to assert the malpractice claim, or at least advise the court that the drafting attorney might be liable under the same facts as those presented in the will contest, was inexcusable.

Substantial Prejudice

David then argued that even if his failure to alert the court of the potential claim was inexcusable, the drafting attorney did not suffer substantial prejudice from the failure. The appellate court disagreed. It noted that the loss of available evidence and proofs needed to mount a defense is not the only harm suffered by a party who has not been joined in a matter – substantial prejudice can also be a result of the impact of the legal posture of the litigation which might expose the non-joined parties to claims of higher damages than they might otherwise have faced.

Here, for example, the drafting attorney was prejudiced because: he was already deposed in the Probate Case and might have to be deposed again under the malpractice claim; David's claim for damages could include attorney's fees for the Probate Case and the legal malpractice claim; David might have a claim for damages to the extent that the settlement with Hindy diminished his share of the estate; and most importantly, the drafting attorney had no voice in the terms of settlement agreement and the release because he was not a party.

Clark v. Stover, 242 A.3d 1253 (Pa. 2020)

Clients brought a legal malpractice action against their attorney and law firm. The trial court entered summary judgment in favor of the attorney and the law firm and the appellate court affirmed. The clients appealed to the Pennsylvania Supreme Court, arguing that it should implement the "continuous representation rule" with respect to tolling relevant statutes of limitations.

The underlying controversy entailed litigation related to a decedent's estate, wherein David Clark ("David") retained an attorney to commence an action with regard to the estate. The attorney later filed a second complaint on behalf of Monica Clark ("Monica"), the decedent's mother. Both claims failed, and David and Monica filed the legal malpractice action in 2015, alleging professional negligence and breach of contract.

The attorney filed a motion for summary judgment, which the trial court granted, finding that David and Monica knew of the alleged negligence and breach of contract more than four years before filing the malpractice action. The applicable statutes of limitations require a negligence action to be brought within two years after accrual. *See* 42 Pa. C.S. § 5524(7). A breach of contract claim must be raised within four years after the breach. 42 Pa. C.S. § 5525.

The appeals court affirmed the trial court decision based on the "occurrence rule," under which the statutory period begins upon the happening of the alleged breach of duty. David and

Monica urged the adoption of the "continuous representation rule," which states that the statutes of limitations do not begin to run until the attorney's representation is terminated. In its decision not to adopt the continuous representation rule, the appellate panel cited the judiciary's previous rejection of this position in *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437, 442 (Pa. Super. 2003), *aff'd per curiam*, 881 A.2d 1266 (2005)).

The Pennsylvania Supreme Court also declined to adopt the continuous representation rule, explaining that the legislature establishes statutes of limitations and that the Pennsylvania Constitution specifically prohibits the courts "from suspending or altering any statute of limitations or of repose via rulemaking." *Clark*, 242 A.3d at 1256 (citing PA. CONST. art. V, § 10(c)). David and Monica cited to no relevant statutes that would work in favor of application of a continuous representation approach; the General Assembly alone has the authority to adopt the rule.

Dreher v. Ross, et al., Docket No. A-3805-19, (N.J. Super. Ct. App. Div. April 22, 2022)

Plaintiff filed an action in the Law Division alleging professional negligence, legal malpractice, breach of fiduciary duty, and fraud, in addition to certain other claims, against the attorney and law firm (collectively "Defendants") that prepared plaintiff's late mother's ("Decedent") last will and financial power of attorney ("POA").

The POA was drafted in 2013 and named Decedent's only surviving son as her agent. The will, prepared nearly a year later, bequeathed 80% of Decedent's tangible personal property to the son and the remaining 20% to plaintiff and appointed the son as executor.

In 2015, plaintiff became concerned that her brother had improperly used the POA to financially benefit himself and his immediate family. As a result, plaintiff retained counsel who wrote to Defendants, asked if they had prepared estate planning documents for Decedent, and requested copies if documents existed. Defendants responded that they were unable to confirm if Decedent was a client or whether they had drafted estate planning documents for her.

Decedent died in 2016. Thereafter, plaintiff brought suit in the Chancery Division seeking to invalidate the will and recover the funds that her brother had allegedly misused for his and his family's benefit. Once the matter settled, plaintiff sued Defendants in the Law Division on the theory that plaintiff was a third-party beneficiary of Defendants' legal services and Defendants had facilitated her brother's fraud upon her by refusing to disclose the details of their representation of Decedent.

Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court granted the motion, dismissing plaintiff's fraud claim without prejudice and the balance of the complaint with prejudice. As to the fraud claim, the trial court noted that the complaint contained generalized allegations and failed to allege that Defendants made a material misrepresentation to plaintiff. Nor did the complaint allege that Defendants intended for plaintiff to rely on any such misrepresentation. Consequently, plaintiff had not pled her fraud claim with the requisite specificity.

Plaintiff's legal malpractice claim was similarly deficient. The trial court found that Defendants did not represent plaintiff. Moreover, plaintiff had not established that Defendants "believed, or had reason to be believe, [she] relied on their performance of their duties or that [she] was an intended beneficiary" of the work the Defendants performed for Decedent or plaintiff's brother. Id. at *4. With respect to the POA, the court noted that although the document referred to Decedent's "issue" that term only identified a class of persons to whom plaintiff's brother could make gifts and did not entitle plaintiff to any particular gift. In fact, plaintiff was not specifically mentioned anywhere in the POA document. Id.

Plaintiff's negligent advice claim also could not withstand dismissal. Plaintiff failed to allege that Defendants' advice to Decedent and plaintiff's brother was intended to benefit her or that Defendants knew or had reason to know that she would rely on their advice. Indeed, the trial court observed that plaintiff's complaint conceded she had not been told anything by Defendants.

After receiving leave to file an amended fraud count, plaintiff filed a first amended complaint alleging fraud, as well as "an entirely new cause of action for 'breach of fiduciary duty, fraud, and/or any other causes of action allowed by law.'" Id. at 7. Defendants moved to dismiss, and the trial court granted the motion, finding that plaintiff had failed to specify how she had detrimentally relied on Decedent's POA, Decedent's will, or Defendants' legal advice with respect to those documents for purposes of her fraud claim. The trial court also dismissed plaintiff's newly-pled count since she had only been granted leave to file an amended fraud claim.

The Appellate Division affirmed. The court echoed the trial judge's observation that plaintiff had "failed to assert how Defendants made material representations to her and how she relied on those misrepresentations." Id. at *9. The Appellate Division further held that Defendants had no duty to disclose to plaintiff that they represented Decedent. As such, Defendants' refusal to provide that information did not amount to a material misrepresentation. Besides, even if Defendants made a material misrepresentation, plaintiff did not specify how any alleged misrepresentation impacted her, which, in and of itself, was fatal to her claim.

Finally, the Appellate Division found that no attorney-client relationship existed between plaintiff and Defendants. Thus, by definition, plaintiff's legal malpractice claim failed.

Newsome v. Peoples Bancshares, Inc., No. 2020-CA-00290-SCT, 328 So.3d 87 (Miss. Nov. 04, 2021)

Keely McNulty was retained as counsel to file a conservatorship petition appointing Marilyn Newsome conservator of settlement funds received in her daughter Victoria's medical malpractice lawsuit. McNulty coordinated the establishment of the conservatorship account at a local bank by presenting the relevant court orders. The court orders did not describe how the bank was to make disbursements and opted to use cashier's checks. For each disbursement, McNulty drafted and filed the order, delivered the signed order to the bank and the bank issued the check. All of this was done without Marilyn's signature.

After some time, it came to light that the chancellor overseeing Victoria's conservatorship informed his nephew, who owned a construction company, about the exact bid he needed to submit to win the bid to build Victoria's special-needs home, Marilyn sued all parties involved, including the bank. Marilyn alleged the bank should not have made disbursements from the conservatorship account without her approval. The Appellate Division agreed with the trial court that McNulty had apparent authority to act on Marilyn's behalf. Marilyn failed to object to the process at any point and continued to cash the checks. The bank detrimentally relied on McNulty's apparent authority to act on Marilyn's behalf and did not otherwise owe Marilyn fiduciary duties.

XI. MISCELLANEOUS CONCERNS

U.S. v. Estate of Kelley, No. 3:17-cv-965-BRM-DEA, 2020 WL 6194040, 126 AFTR 2d 2020-6605 (D.N.J. Oct. 22, 2020)

Lorraine Kelley died on December 30, 2003, and her brother, Richard Saloom ("Saloom"), and Richard Lecky were co-executors of her estate. The co-executors filed a Form 706 on behalf of the Estate of Lorraine Kelley ("Kelley Estate"), reporting an estate tax liability of $214,412 and a gross estate of over $1.7 million. The IRS examined the estate tax returns, and Saloom consented on the Kelley Estate's behalf to the assessment of an additional tax liability of $448,367, which was based on a corrected gross estate of over $2.6 million for a total tax of $662,780. As of September 2, 2019, the total unpaid balance of the Kelley Estate's estate tax liability was $688,644.

Saloom was the sole beneficiary of the Kelley Estate, and distributed and received all of the estate property without paying the estate tax. In late 2007, Saloom tried to resolve the tax liability and entered into an installment agreement with the IRS. Saloom died in March 2008, and his daughter, Rose Saloom ("Rose"), continued to make payments to the IRS.

When Saloom died, his gross estate included property valued at over $1.1 million. Rose was appointed executor of the estate of Richard Saloom ("Saloom's Estate) and filed a New Jersey inheritance tax return that listed Saloom's debt as including $456,406 in "indebtedness" for "federal tax." *Id.* at *2. Rose was the sole beneficiary of Saloom's Estate, and she eventually distributed and received all the property from it, without paying the tax due to the IRS.

In February 2017, the United States filed a complaint seeking reduction of the estate tax assessment to judgment against the Kelley Estate, transferee liability against Saloom' Estate, fiduciary liability against Saloom's Estate, fiduciary liability against Rose , and liability against Rose under the New Jersey Uniform Fraudulent Transfer Act ("UFTA").

Rose filed a motion to dismiss the complaint, which the court denied. The government later filed a motion for summary judgment. The parties entered into a consent judgment with respect to the claims against the Kelley Estate and closed the case. The United States later requested that the court re-open the case and restore the motion for summary judgment with respect to the claims against Rose and the Saloom Estate.

The court granted summary judgment against the Saloom Estate for the tax liability of the Kelley Estate because a beneficiary who "receives property from a decedent's estate is personally liable for any unpaid estate tax based on the value of the property received." *Kelley*, at * 3 (citing 26 U.S.C. § 6324(a)(2)). Summary judgment was appropriate in this case because Rose presented no arguments or evidence for why neither she nor her father's estate was liable for the Kelley Estate tax liability. Since there was no genuine issue of material fact in this respect, the government's motion was granted.

The court also granted summary judgment against the Saloom Estate for fiduciary liability under 31 U.S.C. § 3713(b) for the estate tax liability of the Kelley Estate. Section 3713 imposes personal liability on a fiduciary when he distributes assets to himself, before paying a government claim.

Personal liability will attach if the government can establish three elements: "(1) the fiduciary distributed assets of the estate; (2) the distribution rendered the estate insolvent; and (3) the distribution took place after the fiduciary had actual or constructive knowledge of the liability for unpaid taxes." *Id.* at *4.

The United States claimed that Saloom, as executor of the Kelley Estate, "distributed all of its approximately $2.6 million in property to himself, which rendered the estate insolvent," even though he had knowledge of the Kelley Estate's unpaid tax liability. *Id.* Rose did not present any evidence to dispute any of the three elements, and the court granted the government's motion for summary judgment as to fiduciary liability against Saloom's estate.

Using the same criteria outlined above, the court also granted the government's request for summary judgment against Rose for fiduciary liability under 31 U.S.C. § 3713(b) for the estate tax liability of the Saloom Estate. Specifically, Rose knew of the Saloom Estate's tax liability, but nonetheless transferred the assets to herself rendering the state insolvent, none of which she disputed.

The court, however, denied the United States' motion for summary judgment against Rose under the UFTA, which has the goal of preventing a debtor from placing his or her property beyond a creditor's reach by way of a fraudulent transfer. The UFTA states that a transfer can be found fraudulent if, among other things, the debtor made the transfer (a) "[w]ith the actual intent to hinder, delay, or defraud any creditor of the debtor," and if the debtor "intended to incur or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due." *Kelley,* at *5 (citing N.J.S.A. § 25:2-25).

The court determined Rose had no such intent, but rather, the transfer was the result of an inheritance, and the property remained within the reach of the government because Rose was still personally liable for the unpaid tax – it made no difference that the Saloom Estate was insolvent.

U.S. v. Giraldi, No. A-2234-19T1, 2021 WL 243833 (N.J. Super. App. Div. Jan. 26, 2021), certif. denied, 246 NJ 4334 (2021)

This action involves a dispute over penalties for the non-willful failure to file a Report of Foreign Bank and Financial Accounts ("FBAR") form pursuant to the Bank Secrecy Act of 1970 (the "BSA"), 31 U.S.C. § 5311 *et seq.*

Congress enacted the BSA in response to the increasing unavailability of bank records – both foreign and domestic – of persons suspected of being involved in financial crimes such as money laundering. Specifically, the BSA requires the filing of certain reports and records that aid in "criminal, tax, or regulatory investigations or proceedings," or in conducting "intelligence or counter intelligence activities." 31 U.S.C. § 5311.

Under the BSA, U.S. citizens, residents, or those doing business in the U.S. must keep records or file reports when they "make[ ] a transaction or maintain [ ] a relation for any person with a foreign financial agency." 31 U.S.C. § 5314(a).

The Secretary of Treasury has implemented **Error! Hyperlink reference not valid.**Section 5314 through a series of regulations which include requiring covered individuals who have "a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" to file an FBAR form annually when those accounts collectively exceed $10,000 during the calendar year. 31 C.F.R. §§ 1010.350, 1010.306(c). The Secretary of Treasury may impose civil monetary penalties on individuals who violate any provision of the BSA, irrespective of whether such violations are willful or non-willful.

In this case, the defendant, Frank Giraldi ("Giraldi"), was a U.S. citizen who owned four foreign financial accounts. The government maintained that Giraldi should have disclosed his four accounts on FBAR forms for the years 2006 through 2009. In 2014, Giraldi voluntarily disclosed that he did not file FBAR forms for any of the tax years at issue.

Accordingly, the government assessed $160,000 for 16 separate $10,000 FBAR penalties – one penalty for each of Giraldi's four accounts that were not disclosed on four years' worth of FBAR forms. Giraldi eventually paid the government $60,000 in four $15,000 checks – one for each of the relevant tax years.

The government then filed a lawsuit to collect the remaining $100,000, plus interest. Giraldi filed a motion for partial summary judgment on the limited issue of whether under the BSA the maximum $10,000 penalty can be assessed against each undisclosed account, or if the maximum $10,000 fine is to be assessed against each non-willful failure to file the FBAR form.

The court focused on whether in enacting the BSA, Congress intended to penalize non-willful violations of Section 5314 on a per-FBAR form or on a per-account basis, when the BSA's non-willful provision simply states that penalties "shall not exceed $10,000.")31 U.S.C. § 5321(a)(5)(B)(i).

The court reasoned that with regard to willful failures to report the existence of a foreign account, Congress clearly intended to penalize such failures on a per account basis. Specifically, the BSA provides a maximum penalty that is the greater of $100,000 or 50 percent of "*the balance in the account* at the time of the violation." 31 U.S.C. §§ 5321(a)(5)(C), 5321(a)(5)(D)(ii) (emphasis added). Given that Congress obviously knew how to attach penalties on an account-specific basis, its failure to use similar account-specific language with regard to non-willful failures to report "is persuasive evidence" that it did not intend the provision to yield account-specific penalties in those situations. *U.S. v. Bittner*, 469 F. Supp. 3d 709, 719 (E.D. Tex. 2020).

For this reason and other reasons set forth in the opinion, the court granted Giraldi's motion for partial summary judgment.

Pine Brook Care Center v. D'Alessandro, No. A-3197-18T1, 2020 WL 6852609 (N.J. Super. App. Div. Nov. 23, 2020)

In 2014, Michael D'Alessandro was adjudicated incapacitated. His three daughters, Antoinette, Nancy and Maryanne, were appointed co-guardians.

In 2016, Michael was admitted to Pine Brook Care Center. The Pine Brook admission package included an Admission Agreement which advised that federal and state law prohibit a nursing home from requiring a third-party guarantee of payment to the facility as a condition of admission, expedited admission, or continued stay in the facility. The Admission Agreement also obligated the co-guardians to apply for Medicaid.

The admission package included a Payor Agreement which stated that although the facility *did not require* a third-party guarantee of payment, the facility *did require* an individual who has legal access to a resident's income or resources to sign a contract, without incurring personal liability, to provide payment to the facility from the resident's income or resources.

On May 2017, Antoinette and Nancy were discharged as Michael's guardians, leaving Maryanne as the sole guardian.

In October 2017, one year after Michael's admission to the nursing home, Maryanne first applied for Medicaid benefits on Michael's behalf. The application was denied because Maryanne never supplied the requested financial information. No other efforts were made by Maryanne, Antoinette, or Nancy to obtain Medicaid benefits for their father.

Michael obtained approval for Medicaid benefits effective September 21, 2018, apparently as the result of an application filed by Pine Brook.

Pine Brook filed a collection action against Michael and his three daughters for the balance due. The daughters responded that the New Jersey Nursing Home Act left the care facility unable to pursue them. The trial court granted summary judgment to the daughters.

The Appellate Division reversed the grant of summary judgment, noting:

> The Nursing Home Act serves to complement the Federal Nursing Home Reform Act, Congress' statutory scheme intended to protect nursing home residents and their families.… As explained by the court in *Manahawkin Convalescent*, federal law has long barred nursing homes accepting either Medicaid or Medicare from compelling third-party guarantees of resident payment, but permits such facilities to require individuals with legal access to the resident's assets to pay for the resident's care with such assets.

Pine Brook, at *8 (quoting *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 116 (2014)).

The Appellate Division continued that in 1997, the New Jersey Legislature amended the Nursing Home Act to add language similar to the federal provision. The New Jersey amendment provides in pertinent part that "a nursing home shall not, with respect to an applicant for admission or a resident of the facility, require a third-party guarantee of payment . . . , except that when an individual has legal access to a resident's income or resources available to pay for facility care pursuant to a durable power of attorney, order of guardianship or other valid document, the facility may require the individual to sign a contract to provide payment to the facility from the resident's income or resources without incurring personal financial liability." *Id.* (quoting N.J.S.A. § 30:13-3.1(a)(2)).

The appellate court disagreed with the trial judge's reliance on *Manahawkin Convalescent* and explained that in that case, the court was required to determine only whether a contract obligating a third-party to make payments for a resident's care from the resident's assets violated the New Jersey Nursing Home Act. The court was not presented with, and did not decide, the broader issue presented in *Pine Brook* – i.e., whether the New Jersey Nursing Home Act prohibits the imposition of personal liability on a third-party based on (i) contractual obligations that are not guarantees of payment or (ii) other tort-based theories of liability.

It is important to note that the Appellate Division did not grant judgment in favor of Pine Brook; the court only reversed summary judgment in favor of the defendants. In *dicta*, the court stated:

> we observe, however, that an agreement to make an application for Medicaid benefits on Michael's behalf is not a guarantee of payment or an agreement to pay proscribed by the Nursing Home Act. By making any purported agreement to apply for Medicaid payments, the co-guardians did not guarantee payment for the cost of Michael's nursing home care or agree to pay these costs. Thus, any such agreement, if proven, does not run afoul of the New Jersey Nursing Home Act and is not unenforceable under its terms.

Id. at *11.

Faulk v. Martucci, No. A-2234-19T1, 2021 WL 243833 (N.J. Super. Ct. App. Div. Jan. 26, 2021), certif. denied, 246 NJ 433 (2021)

Defendant Anne Martucci ("Anne") appealed from an order awarding a constructive trust in favor of plaintiff Janette Faulk ("Janette") as guardian of Harry Faulk ("Harry"), an incapacitated person. Janette was Harry's daughter.

Prior to being found to be an incapacitated person, Harry had a career in construction demolition and later heavy-equipment and machinery scrap sales. Anne worked as Harry's secretary and bookkeeper; they were also in a romantic relationship for over 40 years.

Over the course of his career, Harry was involved with or operated various businesses and owned certain lots of land in connection with those companies, in particular, the parcels that are the subject of this case. Collectively, they were known as the "front lots" and "back lots" of the property called "the Meadows."

In the 1980s, Harry purchased the front lots, and Harry's friend and personal attorney represented him in the transaction. Later, the same attorney created Edgar-Charles Realty Corporation ("Edgar-Charles") for Harry with Anne as incorporator and co-trustee, along with Harry's sister, June Ochsner ("June").

Harry later transferred title of the front lots to Edgar-Charles with the same attorney representing both Harry and Edgar-Charles in the transaction. Later, when the back lots became available for purchase, the attorney represented both parties in the transaction. Edgar-Charles conducted no business and served no purpose other than holding legal title to the properties upon which Harry operated his business.

June later resigned her interest in Edgar-Charles, but received nothing in return. In June 2005, Anne, on behalf of Edgar-Charles, transferred the back lots to Anne Martucci, Inc., by quitclaim deed for nominal consideration. Anne admitted that Harry did not acknowledge the transfer of title of the front lots in writing.

In 2014, a stroke rendered Harry incapacitated. The following year, Anne deeded the front and back lots to herself for nominal consideration.

In August 2018, the court appointed Janette as Harry's guardian. She learned of the Meadows property transfers to Anne and filed a complaint in her capacity as guardian of the person, seeking to void Anne's legal title to the property. Anne filed a motion to dismiss for lack of standing, which Janette opposed. The trial judge denied the motion, and Anne filed her answer.

After a two-day bench trial, the judge found that Harry retained an equitable interest in the property and that Anne wrongfully transferred the property to herself. The judge imposed a constructive trust for Harry, and ordered Anne to transfer the property and provide an accounting.

Anne appealed on several points. The Appellate Division affirmed the trial court's decision.

The first issue before the appellate panel was whether Janette had standing. While the appellate court determined that the matter was not properly before it because of filing deficiencies by Anne, it nonetheless concluded that Janette had statutory standing under N.J.S.A. § 3B:12-57(f)(10), as Harry's guardian of the person to seek recovery of property held in constructive trust by Anne.

The court next addressed Anne's appeal with regard to the constructive trust. Constructive trusts are appropriate when a person who has acquired possession title to property should not be allowed to retain possession or title because it would be inequitable. In order to impose a constructive trust, the court must find that the property has been obtained through a "wrongful act which unjustly enriches the recipient." *Id.* at *5. The burden to establish the right to the remedy must be established by the party demanding the relief by clear and convincing evidence.

In this case, the trial judge rightly determined the transfer was wrongful. The Appellate Division noted that the trial court did not find Anne or Harry's attorney to be credible witnesses – they could not satisfactorily explain the reasons for their actions, and their testimony was inconsistent and unsupported by documentary evidence.

The trial judge then found that Anne was unjustly enriched when she impermissibly transferred a sizable asset out of the reach of Harry's financial guardian and deprived Harry of a significant resource that could be used for his care.

The appellate court also addressed Anne's laches defense. It noted that Anne failed to assert the defense diligently, and her one-time mention of the defense in her answer did not preserve the defense through the span of the litigation. Even so, the court, relying on *Mancini v. Twp. of Teaneck*, 179 N.J. 425, 433 (2004), analyzed the three factors relevant to the laches defense and found Anne's argument wanting. Specifically, the court considered "(1) whether [the] alleged act [was] unreasonably distant in time, (2) whether [the] plaintiff knew or should have known of a valid claim based on that act, and (3) whether the plaintiff's delay in filing [the] claim has caused undue prejudice to [the] defendant." *Faulk*, at *7 (quoting *Mancini*, 179 N.J. at 433). The Appellate Division affirmed the lower court, noting that the actions Janette complained of occurred only four years earlier, and Anne was not prejudiced by the delay.

Finally, the appellate court rejected Anne's argument that the trial judge should not have allowed Janette's counsel to cross-examine defendant's sole attorney witness on disciplinary transgressions. The court disagreed, noting that N.J.R.E. 607 allows a party to introduce extrinsic evidence relevant to the issue of credibility, and misconduct by an attorney is admissible to impeach an attorney's credibility.

Karoyan v. Estate of Grimaldi, No. A-2695-19, 2021 WL 1115996 (N.J. Super. Ct. App. Div. Mar. 24, 2021)

The decedent resided for many years with plaintiff in a two-family house owned by the decedent. His will granted plaintiff a life estate in one of the two units on the property.

After the probate of the will, the decedent's adult children filed suit, alleging undue influence by plaintiff as to the will and certain *inter vivos* transfers. The settlement of that litigation included plaintiff giving up her life estate and some of the inter vivos transfers.

Following the settlement, plaintiff submitted a claim to the estate's executor, alleging she paid $32,163.63 toward renovation of the house. She provided cancelled checks amounting to $15,563.63 and asserted she had made cash payments of $16,600. Plaintiff then received $15,563.63 from the estate and signed a release stating that plaintiff "will be paid a total of $15,563.63, in full payment of making this [r]elease" by which she "agree[d] that [she] will not seek anything further including any other payment from" the estate.

Several months after that release, plaintiff filed suit seeking $16,600 in damages from the estate. In granting summary judgment in the estate's favor, the trial judge noted the court's obligation to enforce a settlement absent a demonstration of fraud or other compelling circumstances.

The Appellate Division affirmed, rejecting plaintiff's reliance on not having counsel when she signed the release and her assertion that the release was the product of mistake. Instead, the release stated plainly that by signing the release and accepting the payment, plaintiff was releasing the remainder of her claim and would be unable to seek "anything further" from the estate.

Crane v. Crane, No. BER-C-174-20, 2021 WL 2396548 (N.J. Super. Ch. Div. May 28, 2021)

After a trial that featured testimony from nine witnesses, the court had to determine the decedent's intentions with respect to her burial location and the disposition of her remains.

Decedent Joyce Crane was the mother of Jacqueline and Michael. Jacqueline resided in New Jersey, while Michael was domiciled in Israel.

Prior to Joyce's death, Jacqueline filed an action in New Jersey seeking to enjoin her brother from removing their mother or her remains from New York Presbyterian-Weill Cornell Medical Center ("NYP"), where she was a patient.

Shortly before Joyce's death, the court scheduled a hearing in connection with Jacqueline's request for a temporary restraining order ("TRO"). As part of these proceedings, the court appointed a guardian ad litem ("GAL")for Joyce. After oral argument, the court enjoined Michael from removing Joyce or her remains from NYP without the express permission of Jacqueline and the GAL.

The day before the TRO hearing in New Jersey, Michael filed his own application in New York, seeking to allow him to control Joyce and the disposition of Joyce's remains and upon her death bury her in Israel. After Joyce died only days later, the New York court declined to exercise jurisdiction over the matter and deferred to the New Jersey court with respect to the disposition of Joyce's remains. The New York action was voluntarily dismissed.

Michael proceeded to file an answer with counterclaims in the New Jersey action. The New Jersey court ordered Joyce to be interred at Mt. Carmel Cemetery in Queens, New York ("Mt. Carmel"), pending an adjudication as to Joyce's wishes as to her final burial location.

At trial, Jacqueline testified that in the 1970s, Joyce's father purchased a burial plot at Mt. Carmel, consisting of eight to 10 burial places for members of the family. According to Jacqueline, Joyce's parents, siblings, aunts, uncles, grandparents, and other family members of Joyce are buried at Mt. Carmel. Although Joyce's burial wishes were not a frequent topic of discussion, Joyce would state to Jacqueline whenever they would visit their deceased relatives that Mt. Carmel was to be "her resting place." Joyce also told her daughter that she wanted a specific song played at her funeral. Jacqueline further testified that she never agreed with Michael that Joyce should be buried in Israel and never discussed Joyce's funeral plans with Michael. Joyce never expressed to Jacqueline a desire to live in Israel.

Michael testified that in 2003, he and Joyce executed reciprocal powers of attorney in which each designated the other as agent. Michael stated that Joyce wanted to execute the 2003 POA because she and Michael were travelling more frequently, and it would be simpler if they had reciprocal powers of attorney to conduct business on the other's behalf. Specifically, section 2(f) of the 2003 POA authorized Michael to "make advance arrangements for [Joyce's] funeral and burial, including the purchase of a burial plot and marker, and such other related arrangements as [Michael] shall deem appropriate." Michael testified that he reviewed this provision with Joyce before she signed it.

Michael further testified that in October 2003, after executing the 2003 POA, Joyce signed a document entitled "Appointment of Agent to Control Disposition of Remains" ("the Designation"), which appointed Michael as agent to control the disposition of Joyce's remains upon her death and advising that her remains were not to be cremated in accordance with Jewish law. Michael drafted the Designation based on a form given to him by a friend who was a New York attorney. Joyce signed the Designation at Michael's office, and the witnesses who signed were acquaintances of Michael who worked in his office building. However, Michael did not have the original of the Designation.

Michael also testified that on several occasions, Joyce expressed a desire to live with Michael in Israel and that she wanted to be buried near Michael in Israel. He further testified that Joyce was not assigned a specific grave in the family burial plot in Mt. Carmel and that there are no documents which state that Joyce intended to be buried in one of the plots in Mt. Carmel. He stated that Joyce never expressed a desire to be buried with her family at Mt. Carmel.

Michael purchased a burial plot for Joyce in Israel on the day of the TRO hearing using Joyce's funds. He testified that he did not purchase the burial plot earlier because he had hoped that Joyce would recover from her illness.

The court also heard testimony from other witnesses, including:

Ronald Marchand, who had known Joyce for over 20 years, testified that he had last seen Joyce about a year before her death, at which time she stated that she wanted to be buried next to her brother and sister at Mt. Carmel.

Bernie Hernando, a close personal friend of Michael's for approximately 20 years, testified that after he discussed a tradition among people from Spain, who bring their deceased relatives from New Jersey back to Spain, Joyce stated that she intended to be buried in Israel.

Sharon Troth was a co-worker and close friend of Joyce who testified that she believed Joyce wanted Michael to be the one to arrange for Joyce's burial because she was closer to Michael and he helped her with finances. Troth also testified that Joyce told her several times that she wanted to be buried in Israel because she was dedicated to Michael.

Ashley Bland, a nurse's aide and Joyce's caretaker, testified that Joyce told her four or five times that she wanted to be buried in Israel and that Joyce often mentioned the Kaddish, a Jewish prayer, and that she wanted to die, but not in New Jersey.

In post-trial briefs, Michael argued that the 2003 POA and the Designation evidence that Joyce wanted Michael to control Joyce's funeral arrangements and the disposition of her remains. On the other hand, Jacqueline questioned the authenticity of the Designation and cited that the 2003 POA does not deal in any manner with Joyce's burial location or wishes.

The trial court analyzed the application of the Cemetery Act, specifically N.J.S.A. § 45:27-22. The court also took into consideration New York Public Health Law § 4201, an updated version of which became law in 2006, which governs the disposition of a decedent's remains. The court found that the New Jersey Cemetery Act governs this dispute, not the New York statute. However, the court noted that there is "no doubt" that the Designation relied upon by Michael is based on the updated New York statute. This fact is significant because the Designation relied upon by Michael at trial to assert that he controls the disposition and burial of Joyce's remains was purportedly executed in October 2003. However, the updated § 4201, including the proposed format of the Designation, was not enacted into law until 2006. As result, the court found the genuineness of the Designation to be "in serious question."

The trial court determined that Michael's testimony concerning the Designation "is simply not credible," concluding that the Designation could not have been prepared in October 2003 as asserted by Michael. "In light of the court's conclusion that Michael has attempted to mislead the court regarding the Designation, this court has determined to reject all of Michael's testimony at the trial regarding Joyce's intentions as to her burial location and disposition of her remains." *Id.* at *21.

The court's criticism of Michael's actions was clear:

> In short, all the facts and circumstances regarding the Designation lead this court to the conclusion that the Designation is a

> manufactured document which reveals nothing about Joyce's intentions as to the place of her burial or who should be in charge of disposing of her remains. Rather, the purported Designation simply reveals the lengths to which Michael will go to pursue his own misguided narrative in an effort to subvert the court's determination of Joyce's intentions.

Id.

The trial court also found that the 2003 POA, by itself, is insufficient to demonstrate that Joyce intended to appoint Michael to be her agent for the disposition of her remains or to bury her in Israel.

Since the court concluded that neither the Designation nor the 2003 POA provide sufficient evidence to determine Joyce's probable intent as to the disposition of her remains or her burial wishes, the next step was to reconcile that Jacqueline and Michael have equal statutory standing under the Cemetery Act to determine Joyce's burial wishes.

In its analysis of a decedent's probable intent, the court is to consider any evidence of communications, written or otherwise, between the decedent and others that express the decedent's wishes, desires, and expectations for funeral arrangements or disposition of remains. Citing *Matter of the Estate of Travers*, 457 N.J. Super. 477 (Ch. 2017), the court should consider certain factors, namely (1) the decedent's wishes and who would abide by same, (2) the nature of the relationship between the petitioners and the decedent, (3) the decedent's religious beliefs and/or cultural practices, and (4) the best interests of the estate. *Travers*, 457 N.J. Super. at 484-85.

<u>Decedent's Wishes</u>

Joyce did not express an intent with respect to her burial wishes in her Wills from 1998 and 1999. The 2003 POA does not specifically detail her burial wishes either. There was conflicting testimony regarding Joyce's burial wishes, prompting the court to scrutinize each witness's testimony to determine credibility and Joyce's intent.

The court discounted the testimony of several witnesses, most notably Michael. The court found any testimony that Joyce repeatedly expressed a desire to be buried in Israel to be not credible.

The court found it persuasive that most of Joyce's family is buried at Mt. Carmel and that she was close to her sister. Joyce resided in New York and New Jersey her entire life, and while she visited Michael in Israel on several occasions, Joyce never resided there or owned any real property there. The court determined that Joyce did not express an intent to be buried in Israel, and the facts and circumstances indicate that Joyce wished to be buried with her family at Mt. Carmel. The court also concluded that Jacqueline would abide by Joyce's wishes regarding the burial location of her remains.

<u>Nature of Relationship between Petitioners and Decedent</u>

Based on the trial testimony, the court found that Jacqueline maintained a closer relationship with Joyce and that she is in a better position to know Joyce's desires and expectations upon Joyce's death. It was undisputed that Jacqueline and Joyce lived approximately 15 minutes from each other for at least the last 15 years and that Jacqueline and her sons would visit Joyce nearly every day. In addition, Joyce attended Jacqueline's sons' extracurricular events on a weekly basis, and Jacqueline saw Joyce nearly every day after Joyce became ill.

In contrast, Michael has lived outside of the United States since at least 2006. Michael would visit Joyce when he was traveling to the United States for business approximately two to four times per year, and Joyce would visit Michael's son in the United Kingdom on occasions.

Considering these circumstances, the court found that Jacqueline had a closer relationship to Joyce at the time of her death and in the preceding years. Accordingly, Jacqueline is in a better position to know Joyce's wishes and desires for disposition of remains.

Religious Beliefs and Cultural Practices

The parties are "in sharp dispute as to Joyce's religious practices." The evidence presented shows that Joyce observed some, but not all, Jewish traditions. Joyce also served as an inter-faith minister. Based on the evidence, the court concluded that "while Joyce was raised Jewish and was mindful of Jewish traditions, she was not deeply observant and, based on her religious beliefs, she would not have sought to be buried in Israel. *Id.* at *29.

Best Interests of the Estate

The court found that since no one had taken any action to probate Joyce's estate, the "best interests of the estate" factor plays no role in the court's determination.

Lastly, the court addressed the equitable considerations of the case, namely Michael's unclean hands:

> Here, Michael seeks this court's assistance in allowing him to disinter Joyce and bury her remains in Israel. However, Michael's own misguided efforts to provide supposed evidence of Joyce's wishes causes this court to conclude he does not have 'clean hands.' As such, the court will not grant the relief requested by Michael.

Id. at *30.

In short, the court found that Joyce did not designate any individual, including Michael, to determine her burial location or to dispose of her remains. In the trial court's view, Joyce intended to be buried with her family at Mt. Carmel.

In re Estate of Bhagat, No. A-4986-18, 2021 WL 1327174 (N.J. Super. Ct. App. Div. Apr. 9, 2021)

Three separate lawsuits in different jurisdictions were involved in this matter: Burlington County, New Jersey; the Bombay High Court in India; and Essex County, New Jersey.

The Burlington County litigation ("Burlington Litigation") involved a business dispute between the decedent, Amratlal C. Bhagat ("Amratlal"), and his son, Bharat A. Bhagat ("Bharat"). Amratlal sued Bharat claiming that this son transferred a hotel owned by Amratlal's family corporation to a limited liability company owned by Bharat. Bharat filed a motion for summary judgment, which the trial court granted after finding that the transfer was a presumptive gift. The appellate court agreed.

Amratlal filed a petition for certification. The New Jersey Supreme Court reversed the summary judgment, holding that the burden to overcome the presumption that the transferred property was a gift required clear and convincing evidence. *Bhagat v. Bhagat,* 217 N.J. 22, 47 (2014). The Court concluded that there were sufficient factual issues to preclude summary judgment and to require a trial. Amratlal died before the matter was resolved at the trial court.

The estate litigation involved three wills executed by Amratlal: a 1997 will, a 2003 will, and a 2011 limited will/codicil. The 2003 will disinherited Bharat after he transferred the hotel, so he attempted to probate the 1997 will before the Bombay High Court. Ranjana Jethwa ("Ranjana") filed suit in Essex County to probate the 2003 will and void the 1997 will ("Essex Litigation"). The Essex County Court denied Ranjana's petition given the pending will contest in the Bombay High Court, but acknowledged the need for a neutral administrator to represent the Estate in the Burlington Litigation.

In 2014, the Essex County court appointed an attorney as temporary limited administrator of Bharat's estate (the "Administrator") to prosecute the Burlington Litigation. The Administrator reviewed the Burlington Litigation and determined to settle the matter because it was "a close case" and the Estate had insufficient assets to fund a trial.

The Administrator and Bharat agreed that the hotel would be sold for $4 million and the Estate would receive 59 percent of the net proceeds. The Administrator filed a motion in the Essex Litigation seeking leave to approve the settlement. Ranjana opposed the motion, arguing that the Estate's claim against Bharat in the Burlington Litigation was worth $29 million.

After hearing arguments from Ranjana's counsel and the Administrator "and conducting his own cost-benefit analysis, the judge in the Essex Litigation concluded it was in the best interest of the Estate to compromise the claim.... The judge noted [c]ourts place a high value on settlement and determined the Burlington Litigation should be settled." *Id.* at *3 *(internal quotes omitted).* The court called Ranjana's $29 million valuation of the claim "fanciful." *Id.*

Ranjana appealed and argued that the Essex County judge's approval of the settlement was in error. The appellate court disagreed. It was satisfied that the trial court did not abuse its discretion in approving the litigation. The trial judge outlined in his decision the "weaknesses in the evidence, the risks to both parties associated with a trial, and the possibility of a "recoverability issue" because Bharat may not have the "the assets to ... pay off a $29 million judgment." *Id.* at *5. The judge "conducted a thorough cost-benefit analysis of the settlement and determined the settlement was fair, reasonable, and not overly generous to either Ranjana or Bharat." *Id.*

Estate of Rosalie Jean Ryan, No. A-2806-19, 2021 WL 5630394 (N.J. Super. App. Div. Dec. 1, 2021)

This Appellate Division case that covers several common topics that practitioners encounter in estate litigation including, but not limited to, discovery deadlines, the doctrine of laches, and statute of limitations.

Plaintiffs -- the five Kirschling brothers -- Patrick, Thomas, William, John and Michael[2] -- were engaged in litigation against their sister, Veronica Kirschling ("Bonnie"), as to both their mother's estate and their aunt's estate. As to the prior litigation regarding their mother's estate the parties settled.

This case focused primarily on with the litigation as to the estate of their aunt, decedent Rosalie Jeanne Ryan. Plaintiffs filed a Verified Complaint in May of 2016 against Bonnie, alleging that she breached her fiduciary duty as an agent under a Power of Attorney ("POA") for the decedent. At the time of the decedent's death, Medicaid had a $232,619.50 lien against her estate for unreimbursed nursing home and medical care expense accrued during the last four years of her life. *Id.* at *2.

In 2003, Bonnie moved the decedent, then 83, into the home Bonnie shared with her mother. Plaintiffs were aware of this move and of the diminishing capacity of the decedent. *Id.* at *4. The decedent had authorized direct deposit of her pension directly into a bank account (referred to as the "835" bank account) in Bonnie's name only.

When the settlement was reached regarding the prior litigation, plaintiffs were unaware of the 835 account's existence. *Id.* However, plaintiffs did obtain information from Bonnie during the prior litigation. For instance, during discovery regarding their mother's estate, plaintiff's obtained records and financial information regarding the decedent, and they deposed Bonnie regarding the decedent's direct deposit authorizations, annuity statements, the POA she signed in favor of Bonnie in 2003, and correspondence with the United States Internal Revenue Service. *Id.* at *3.

By the time plaintiffs filed their lawsuit against Bonnie in 2016 -- over 13 years after Bonnie moved in with the decedent -- regarding their aunt's estate, the relevant financial institutions had destroyed any records regarding the decedent's accounts and Bonnie had disregarded many of her records in accordance with common tax advice and lost records due to a flood.

In discovery, plaintiffs attempted to compel Bonnie to produce a detailed financial certification covering her handling of the decedent's assets from 2003 to 2014. When they moved for an Order compelling Bonnie to complete the certification, the judge refused because it would be impossible for anyone to provide such detailed information from memory. Plaintiffs deposed Bonnie over five days in the litigation and were able to obtain from the bank the history of the 835 account. Plaintiffs flagged twelve unexplained transactions, both deposits and withdrawals. They claim the unexplained transactions totaled $254,433.70. The trial court identified $250,849.70 in unexplained transactions; however, after applying the doctrine of laches and the statute of limitations, the trial court concluded it would only consider unexplained transactions dating back to May 13, 2010, which equaled $15,000. The trial court specified that

[2] For ease of reference, the parties are referred to by their first names.

the funds were not necessarily wrongfully taken, but rather merely unexplained, as Bonnie was unable to recall the reason for the withdrawals. Thus, the trial court ordered Bonnie to repay the decedent's estate $15,000.

The trial court also barred plaintiff's proposed financial expert during the trial, since discovery had concluded.

The plaintiffs appealed, and the Appellate Division affirmed the trial court decision. First, the Appellate Division discussed the trial court's denial of plaintiffs' motion to compel Bonnie to certify her financial information. The trial court noted that no one could be expected to recreate 11 years of detailed financial information without any access to records. Further, plaintiffs had deposed Bonnie, providing another avenue through which to obtain whatever information was available to her. The Appellate Division found it was not an abuse of discretion to deny plaintiffs' application, both because the records were unavailable and alternate means to obtain the information were available through interrogatories or deposition.

Similarly, it was not an abuse of discretion for the judge to have barred their financial expert. The court looked at the civil discovery deadlines for guidance, finding that the plaintiffs' request to present an expert was raised well over 600 days after discovery had commenced.

The plaintiffs also argued that it was an error to apply the statute of limitations, because the discovery rule tolled the accrual of the plaintiffs' cause of action. The Appellate Division reasoned that although the discovery rule is an equitable doctrine to avoid harsh consequences, "it is not applicable when a reasonable person exercising ordinary diligence knew or should have known of the injury issue." *Id.* at *12. In this case, the trial court had found that the family knew of decedent's cognitive issues and that she was unable to care for herself as early as 2003. Thus, the judge rationally applied the six-year statute of limitations beginning in 2004 when Bonnie first comingled funds in the 835 account. The plaintiffs' claim was long expired by the time they filed their complaint on May 13, 2016.

Next, the court addressed the plaintiffs' claim that the trial court's application of the doctrine of laches was in error. Laches is an equitable affirmative defense barring recovery due to an unexplainable and inexcusable delay in bringing suit, and that delay prejudices another party. *Id.* at *13. There was no doubt in this matter that the plaintiffs knew of the decedent's failing state of mind and inability to care for herself. Had they initiated legal action in 2003, financial records would have been available and Bonnie's recollection would have been fresh. *Id.* at *14. Furthermore, the trial court had found that the discovery in the prior litigation involving their mother's estate had alerted at least one of the plaintiffs to some of the issues regarding Bonnie and the decedent's accounts. The court stated: "There is no discernable reason why plaintiffs delayed litigation about decedent's estate when they were suspicious of Bonnie's management of decedent's funds as early as 2011. Their failure to sue earlier left Bonnie without the records necessary to defend herself essentially without recourse." *Id.* at *15.

Finally, the court noted that the plaintiffs asserted that the unexplained withdrawals totaled $254,433.70, which was less than the Medicaid lien. The award of $15,000 payable by Bonnie passed through the estate in satisfaction of the Medicaid lien. Thus, there was no way that the plaintiffs were going to be able to recover any damages given the amount of the lien. *Id.* at *17.

In re Administration of Estate of John J. McLaughlin, No. A-2718-19, 2021 WL 4239656, (N.J. Super. Ct. App. Div. Sept. 17, 2021)

This ruling addressed whether a settlement had been reached, based primarily on email exchanges of counsel.

The decedent was the brother and uncle of the parties, who had long been litigating issues as to the administration of the estate.

The parties informed the trial judge several times that they had settled, but never submitted a stipulation. The judge directed certain parties to file a motion to enforce a settlement. The judge next reviewed various emails between counsel, exchanging the written proposed settlement agreement, as well as the agreement itself. The trial court noted that the attorney for the decedent's sister, Rita Loughlin, advised his adversary and the administrator of the estate, "I'll get back to you," after receiving a final draft of the agreement that included contested mutual releases. The judge interpreted that final email to mean that noting was left open and concluded that, since counsel was acting with apparent authority on his client's behalf, a settlement had been reached.

Rita Loughlin appealed.

The Appellate Division reversed and found that the email exchange did not support the finding that Loughlin's attorney (as her agent) gave final consent on his client's behalf to the settlement. The appellate court explained that, while an attorney is presumed to possess authority to act on behalf of the client, settlements are governed by contract law and require assent to the essential terms to be valid. After a detailed review of the email exchanges of counsel --- against the backdrop of a long history to the litigation -- the court concluded that a settlement had not been reached. The emails constituted offers and counteroffers, not unequivocal acceptance of a proposal, and so no contract was formed. Moreover, questions of fact were left open by the email chain and the delay in that chain. The issue should not have been decided without further proceedings and a more developed record.

N.J. Advisory Comm. on Prof'l Ethics, Op. No. 739 (2021)

The Opinion concludes that lawyers who copy their clients on emails to opposing counsel should not then claim an ethics violation when opposing counsel uses "reply to all" and includes the client in the email. Lawyers who include their clients on group emails are deemed to have implicitly consented to opposing counsel replying to the entire group.

An attorney asked the Advisory Committee on Professional Ethics (the "Committee") whether opposing attorneys violate Rule of Professional Conduct 4.2 when they "reply all" to an email on which the sending attorney included his client. The Rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter." RPC 4.2.

The goal of the RPC 4.2 is to protect the clients from "overreaching by opposing counsel and guarding the clients' right to advice from their own lawyer." N.J. Advisory Comm. on Prof'l Ethics, Op. No. 739 (2021).

The Committee found that it is not a violation of RPC 4.2, for opposing counsel to "reply all" to an email on which the sending attorney has included his or her client in the "to" or "cc" line of a group email. In those instances, the attorney is "deemed to have provided informed consent" to the communication from opposing counsel who replies to all.

If the sending lawyer does not wish to provide such consent, he has the burden of forwarding the communication separately to the client or blind-copying the client. The Committee further recommended that if an attorney wishes to show opposing counsel that the client has been provided a copy of the email, the sending attorney should simply type "cc:" and the client's name at the end of the email.

Finally, the Opinion (footnote 4) lists other jurisdictions that have rejected this concept of implied consent in the emails.

In re Estate of McAleer, 248 A3d 445 (PA 2021)

In February 2019, the Supreme Court of Pennsylvania granted allowance of appeal of an appellate decision regarding discoverability of invoices for legal fees in trust litigation, stating the issue as follows: "Do the attorney-client privilege and work product doctrines protect communications between a trustee and counsel from discovery by beneficiaries when the communications arose in the context of adversarial proceedings between the trustees and beneficiaries?"

On April 7, 2021, after hearing argument in May 2020, the Pennsylvania Supreme Court issued a series of opinions that recited that the Justices were unable to reach a consensus on the merits. By operation of law, therefore, the trial court was affirmed.

A summary of the appellate decision, *In re Estate of McAleer*, 2018 PA Super. 227 (2018), is below.

In re Estate of McAleer, 194 A3d 587 (PA Super. 2018), rev'd, 248 A3d 445 (PA 2021), and rev'd, 248 A3d 416 (PA 2021)

The settlor's son and trustee, William McAleer, was involved in extensive litigation with two stepsons of the settlor, who were beneficiaries of the trust. Upon an accounting by the trustee, the beneficiaries raised objections, including that certain expenses paid by the trustee for legal fees were unreasonable.

The trust provided that the trustee could "charge additional fees for services… such as fees for legal services…." Later in the document, the settlor "encourage[d] my Trustee to obtain appropriate legal advice if my Trustee has any questions concerning its duties and responsibilities as Trustee."

An accounting set forth approximately $220,000 in claimed legal fees. In discovery on that issue, the beneficiaries requested "BILLING STATEMENTS; Produce copies of billing statements for all … attorney fees as such are included in the Second and Final Account." In response, the beneficiaries received redacted bills with 223 entries blacked out. The trustee had never filed any objection to the beneficiaries' discovery request for those invoices. And when the beneficiaries filed a motion to compel their production, the trustee failed to respond until oral argument on that motion. The lower court ordered production of un-redacted invoices. The trustee had filed a similar request (for legal bills directed to the beneficiaries), but it was denied.

The Pennsylvania Superior Court held that the trustee "failed to set forth specific facts to show that either the attorney-client privilege or the work product doctrine was applicable and properly invoked." *Id.* at 596. As a result, the Superior Court held that appellate review was precluded. Because it found that the order under review was not a final order, an order certified as final, an interlocutory order appealable as of right, an interlocutory order appealable by permission, or an appealable collateral order, the appeal was quashed.

However, at the end of its opinion, the court began a discussion of a trustee's duty to furnish information to beneficiaries, referring to Section 82 of The Restatement (Third) of Trusts, and specifically comment f concerning communications with counsel, and the opinion of the Allegheny County Court in *Follansbee v. Gerlach*, 56 Pa. D. & C.4th 483, 22 Fid. Rep.2d 319 (2002). The Superior Court indicated that it was "constrained to agree" with the trial court, which had followed *Follansbee*. *McAleer*, 194 A.3d. at 596. That case had followed other cases (among mixed authority) that held that communications concerning claims or potential claims against the trustee might be protected, but that communications about trust administration would not be.

Wilburn v. Mangano, 851 S.E.2d 474 (Va. 2020)

The decedent signed a will devising her home to her daughters but giving her son the option to purchase the property from his sisters for an amount equal to the tax assessed value in the year of the decedent's death. A month before she died, the decedent signed a codicil that revised the option purchase price to "an amount equal to the fair market value at the time of [her] death."

Soon after the decedent died, her son sent his sisters notice of his intent to exercise the option, and indicated that he intended to purchase to the property according to the terms of the will or the terms of the codicil – depending upon which the court upheld. He then sued to set aside the codicil. After a trial, the jury found that the codicil was valid.

The sisters then sued to compel the son to purchase the property under his exercise of the option and offered to settle by selling at the mean price between two appraisals that they had obtained. The son contended that there was no enforceable contract because "fair market value at the date of [Decedent's] death is not a sufficiently specific term to establish mutual assent to the Property's purchase price." *Id*. at *475.

The Virginia Supreme Court acknowledged that an option contract becomes a contract of sale once the holder gives notice of his desire to exercise the option. Contracts for sale of land that are incomplete, uncertain, or indefinite in their material terms are not to be specifically enforced by a court in equity. Since it is a material term, the price of the property must be stated in the agreement itself or the agreement must provide a mode for ascertaining the price with certainty. Absent a fixed price or a mode for fixing the price, an agreement is incomplete.

Accordingly, the term "fair market value" was insufficient to compel specific performance by the son. Fair market value is usually understood to mean the price that the seller is willing to accept, and the buyer is willing to pay, in an arm's-length transaction and on the open market. It appears, then, that the decedent gave her son the option to purchase the property at a price he was willing to pay and his sisters were willing to accept on the open market and in an arm's-length transaction. Since the codicil did not provide the price, or a means of ascertaining the price with certainty, it lacked the precision that would allow the court to compel specific performance by the son.

HUNY & BH Associates, Inc. v. Silberberg, No. A-1696-17 (N.J. Super. App Div. December 27, 2021)

This appeal arose out of a dispute between a wealthy father, Daniel Silberberg, and his daughter Yael. Yael claimed assets of an inter vivos trust that Daniel established for Yael's benefit and custodial accounts that Daniel established and funded.

After a lengthy bench trial, the Law Division, Bergen County denied Yael's claims to the trust assets and granted in part and denied in part her claims to custodial account balances. In an 83-page opinion, the Appellate Division affirmed in part and reversed in part. The Appellate Division's numerous holdings are briefly summarized below.

1) The New Jersey trial court had jurisdiction to adjudicate disputes over the trust. The court's exercise of specific jurisdiction over Yael, a trust beneficiary, was proper because Yael had sufficient contacts with New Jersey and availed herself of the privilege of conducting activities in the forum state, New Jersey.

2) Yael did not waive her objection to the jurisdiction of the trial court; a court may have specific jurisdiction over defendant as to one claim, but not as to another.

3) The trial court properly denied Yael's demand for a jury trial as untimely. The demand was not made until shortly before a scheduled trial date.

4) The trial court properly addressed and decided an issue that had not been raised prior to trial: whether the trust at issue was revocable or irrevocable. A trial court may introduce new issues when the interests of justice require. Yael had an adequate opportunity to address the fact relating to the issue at trial.

5) New York law, not New Jersey law, governed the question of whether a trust was properly reformed to regard it as revocable rather than irrevocable.

6) New Jersey statutory rules contained in the NJ Uniform Trust Code apply to determine which law governs an action.

7) Under New Jersey's version of UTC section 107, the terms of a trust may designate which state's law applies to the construction or interpretation of a trust.

8) Under New Jersey's version of UTC section 403 (N.J.S. 3B:31-20), a provision in the trust agreement did not affect the determination of which state's law governed the validity of the trust. Rather, section 403 validates a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts.

9) Questions concerning the administration of the trust were governed by New York law because the trust instrument specified New York law.

10) Although the trustees of the trust had the power to change the situs of the trust, including the law governing administration, from New York to New Jersey, they never did so.

11) In connection with a decanting creating a new series of trusts from the original trust, the trustees did not have the power to retroactively change the law governing the administration of the original trust. The trustees' attempt to do so was ineffective.

12) New York law permitted the trial court to reform the original trust to find that it was revocable even though the unambiguous terms of the trust agreement provided that it was an irrevocable trust, and even though an attorney engaged to decant the trust regarded it as irrevocable.

13) The trial court's factual findings supporting the trust's reformation were supported by sufficient credible evidence in the record.

14) The transfer of the original trust's assets to new trusts with different terms was permissible because the trust was revocable by the grantor, who initiated the transfer. The transfer was not required to satisfy the New York decanting statute because it was not a decanting.

15) The trustees of the original trust did not violate their fiduciary duties by failing to inform Yael of a stated right to withdraw assets from the trust upon attaining age 21. Because the trust was revocable, the trustees were obligated to comply with directions from the settlor. Even if the trustees owed a duty to the beneficiary, she did not sustain her burden of proving that she suffered a loss from the trustees' actions.

16) Yael's claim to assets held in a UTMA account upon her attainment of age 21 was not barred by the statute of limitations. The six-year statute of limitations governed that claim. The discovery rule applied to toll the statute of limitations until Yael became aware of her right to the funds held in the account.

17) Funds contributed to a UTMA account after Yael reached age 21 were gifts to her, which she is entitled to recover.

18) Yael's husband had no standing to assert claims against the trust. He was not named as a beneficiary, and a purported "transmutation agreement" between him and his wife did not confer standing on him.

19) The trial court properly imposed sanctions on Yael's husband. His claims were frivolous and unsupported and violated the trial court's procedural orders in the case. Sanctions were properly imposed despite the failure of the plaintiffs to send a "safe harbor" letter under R. 1:4-8 because the trial court also relied on R. 1:10-3.

P.A. Comm. on Legal Ethics and Prof'l Responsibility, Op. No. 2021-300 (2021)

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (the "Committee") adopted and endorsed New York State Bar Association Ethics Opinion 1182 ("NY Opinion") in Opinion 2021-300 ("PA Opinion"), to provide guidance to attorneys who retain original, signed Wills belonging to their estate planning clients.

The Committee concluded that under Pa. R.P.C. 1.15, attorneys must maintain original, signed Wills until they are permitted to dispose of them in the manner outlined in the PA Opinion.

Many estate planning attorneys store clients' original, signed estate planning documents so that the documents are available when needed. Since these original documents are client property, attorneys have certain obligations related to securely storing Wills and maintaining up-to-date client address information so they can inform the client of office moves and closures.

The NY Opinion was issued in response to an attorney inquiry regarding the more than 500 Wills, some more than 70 years old, that were in his possession and for whom he could not locate the testators with due diligence. The attorney asked that he be permitted to dispose of the Wills. The New York State Bar Association Ethics Committee concluded that the attorney was prohibited by New York Rule of Professional Conduct 1.15 from disposing of the documents because the Wills constitute property.

Pa. R.P.C. 1.15, like NY R.P.C. 1.15, upon which the NY Opinion relied, requires attorneys to safeguard client property. Therefore, an attorney must store original Wills separately from the attorney's own property and take appropriate steps to protect the documents.

Pa. R.P.C. 1.15(c) also requires attorneys to preserve client property "for a period of five years after termination of the client-attorney or Fiduciary relationship or after distribution or disposition of the property, whichever is later." The Committee concluded that:

> attorneys must maintain original Wills until they (1) provide them to the client, the client's executor or some other person authorized to possess the Will, (2) are notified that the client no longer needs the Wills to be stored (such as when a client drafts a new Will), or (3) are authorized to dispose of them by statute, rule or some other procedure.

P.A. Comm. on Legal Ethics and Prof'l Responsibility, Op. No. 2021-300.

The Committee also suggested that attorneys who are currently keeping original documents for their clients review their files and confirm that they have current contact information for those clients. If they do not have current information, attorneys should take reasonable steps to obtain current addresses. An attorney should also notify clients if the attorney's office has relocated or their contact information has changed, and ask the client as to whether the client prefers that the attorney continue storing the documents, return them to the client, or meet with the client to review and revise the documents.

Moynihan v. Lynch, 250 N.J. 60 (March 8, 2022)

This New Jersey Supreme Court decision addresses the validity of a palimony agreement.

Beginning in 1997, plaintiff Kathleen Moynihan ("Kathleen") and defendant Edward Lynch ("Edward") were involved in a long-term romantic relationship. In 2000, Kathleen and her children moved into to a home in Bordentown, New Jersey. Edward had purchased the home with a mortgage and had title to the home. Kathleen had contributed the down payment. They shared the financial responsibilities of the home, and over time, Edward moved into the home and became more active in family life. While the parties discussed marriage they never wed.

In 2007, Edward transferred title to the home into a trust and named Kathleen as the beneficiary upon his death. In 2013, he converted his ownership of the home into a joint tenancy with the right of survivorship naming himself and Kathleen on the deed.

Sometime between 2012 and 2014, the parties entered into a handwritten agreement drafted by Edward, which provided the following in the event their relationship ended: (1) Edward would pay off the property within five years of vacating; (2) after paying off the mortgage, Edward would sign the deed over to Kathleen; (3) until the mortgage is satisfied, Edward would pay the monthly mortgage payments; (4) Edward would pay the property taxes for two years after his departure; and (5) Edward would pay $100,000 to Kathleen five years after vacating the property. The parties signed the agreement, had it notarized, but they did not consult with counsel.

In or around 2015, the parties split, and Edward refused to abide by the agreement.

Kathleen filed a complaint seeking enforcement of the agreement either as a written palimony agreement or an alleged oral palimony agreement that she claimed the parties had entered into before the 2010 amendment to N.J.S.A. § 25:1-5 to include subparagraph (h). Subparagraph (h) mandated that palimony agreements be reduced to writing and "made with the independent advice of counsel." Kathleen challenged N.J.S.A. § 25:1-5(h) on constitutional grounds. Alternatively, she sought enforcement of the agreement on equitable grounds. Edward denied the existence of an oral palimony agreement and asserted that the written agreement was not enforceable because the parties had not received the independent advice of counsel before entering into it.

At the trial court level, Kathleen testified that their relationship was like a marriage and that Edward told her there was no reason to consult an attorney to make it legal. Edward diminished the relationship and gave conflicting testimony about whether he intended to be bound by the agreement. Ultimately, the trial court found that N.J.S.A. § 25:1-5(h)'s attorney review requirement did not contravene Kathleen's constitutional rights. The trial court determined that the written agreement was not a palimony agreement, but more akin to a landlord/tenant agreement. Finally, the trial court found that the couple did not enter into an enforceable oral palimony agreement.

The Appellate Division reversed, but it upheld the finding that the parties did not reach an oral palimony agreement. The New Jersey Supreme Court granted certification. 246 N.J. 324 (2021).

The New Jersey Supreme Court reversed in part and affirmed in part and remanded to the trial court. Ultimately, the Court found that the palimony agreement, as written and signed without the attorney review requirement, was enforceable. N.J.S.A. § 25:1-5(h) – in imposing an attorney review requirement to enforce a palimony agreement -- contravenes Article I, Paragraph 1 of the New Jersey Constitution. The Court further found that the parties did not enter into an oral palimony agreement.

The Statute of Frauds generally requires that certain agreements be signed by the party against whom enforcement is sought. In 2010, the Legislature amended the statute to include palimony agreements. Prior to the amendment, New Jersey's common law recognized that an unwed couple could enter into an oral palimony agreement involving marital-type relationships. The feature that distinguishes N.J.S.A. § 25:1-5(h) from all other provisions in the Statute of Frauds is the requirement that each party to the palimony agreement secure independent advice of counsel. No other law in the state conditions enforceability of an agreement between private parties on attorney review. Furthermore, none of the jurisdictions that enforce palimony agreements mandate that the parties consult with attorneys before entering into such agreements.

The Court did not agree with Kathleen's argument that N.J.S.A. § 25:1-5(h)'s attorney review requirement violated the contract clause of the United States and New Jersey Constitutions. The essential aim of the contract clause is to restrain a state legislature from passing laws that retroactively impair preexisting contracts. This concern – that the legislation reaches back to alter an already-existing contract and causes fundamental unfairness – was not present in this case, since Kathleen and Edward signed the agreement well after the effective date of N.J.S.A. § 25:1-5(h).

Next, the Court considered whether under the substantive due process guarantee of Article I, Paragraph 1 of the State Constitution, the state generally can impose on an individual the burden of retaining counsel to review a private contract. The right to "personal liberty" guaranteed in Article I, Paragraph 1 protects against the government arbitrarily interfering with the right to individual autonomy. The original Statute of Frauds did not require a person to consult with an attorney before entering into a contract, but the amendment mandates attorney review only for palimony agreements.

To determine whether parties have a particular liberty interest to enter into a written palimony agreement, the Court applied a balancing test weighing three factors:

(1) The nature of the right at stake;

(2) The extent to which the challenge statutory scheme restricts that right; and

(3) The public need for statutory restriction.

Id. at 88.

The Court opined that the right of personal autonomy is infringed upon by the requirement that an attorney participate in the process of entering into a palimony agreement. An attorney's services may impose a cost that the parties do not want to bear or cannot afford. Attorney review almost certainly will result in fewer palimony agreements. Further, the imposition of an attorney review requirement is an arbitrary government restriction that contravenes Kathleen's substantive due process rights.

In conclusion, the Court found there was sufficient credible evidence in the record to support the trial court's determination that the parties did not have an oral palimony agreement before 2010, but the palimony agreement, as written and signed, without the requirement of attorney review, was enforceable. "That portion of N.J.S.A. 25:1-5(h), which imposes an attorney-review requirement to enforce a palimony agreement, contravenes Article I, Paragraph 1 of the New Jersey Constitution." *Id*. at 91.

Thus, the Court struck down the attorney review requirement of N.J.S.A. 25:1-5(h). Palimony writings must still be in writing and signed, if not by both parties, at least by the party against whom the agreement is to be enforced, just like all agreements enumerated in the Statue of Frauds.

Testa v. State, A-0693-20 (N.J. Super. App. Div. April 20, 2022)

Relying on the Uniform Unclaimed Property Act ("UUPA"), N.J.S.A. §§ 46:30B-1 to -109, plaintiff alleged he was entitled to monies that had escheated from his deceased parents' estates to the New Jersey Unclaimed Property Administration. At the trial level, plaintiff's complaint was dismissed under Rule 4:6-2(e), his requests for injunctive relief were denied, and his motion for reconsideration was denied. Plaintiff, appearing *pro se,* then appealed the trial court's determinations.[3]

The Appellate Division affirmed, finding that the complaint failed to state a claim upon which relief may be granted, the trial court lacked jurisdiction, and the challenge to the Unclaimed Property Administration's alleged failure to immediately turn over the funds to which plaintiff claimed he was entitled was not ripe for adjudication.

First, the court noted that the Unclaimed Property Administration has 120 days following the filing of a claim to provide written notice of whether the claim is denied in whole or in part. N.J.S.A. § 46:30B-78. Plaintiff filed his pleadings five days after submitting his claim to the Unclaimed Property Administration, and by the time the motion to dismiss was heard, only 38 days had elapsed since plaintiff's filing. Plaintiff did not cite any authority establishing that defendants had a "legal duty to render a determination as to plaintiff's claim more quickly than required under the UUPA." Accordingly, the court held that the Unclaimed Property Administration was entitled to the full 120 days to complete its obligations, and therefore, the complaint was properly dismissed.

For similar reasons, the court also found the case was not ripe for adjudication as the matter was not yet resolved at the agency level. Specifically ruling on plaintiff's request for injunctive relief, the court found plaintiff did not suffer any harm, as the only harm plaintiff complained of was the purported delay in turning over monies. The court noted that the UUPA specifically provides for payment of interest for the period the Unclaimed Property Administration holds property. N.J.S.A. § 46:30B-79.

In addition, the court found plaintiff's complaint was otherwise barred because he failed to exhaust his administrative remedies. Plaintiff initiated the process under N.J.S.A. § 46:30B-77(a); however, he failed to allow for the completion of the process, and he failed to cite any exception.

Finally, the trial court's dismissal of plaintiff's complaint with prejudice was affirmed on jurisdictional grounds. The court found that the Appellate Division is the proper jurisdiction for "review of any action or inaction of defendants concerning plaintiff's claim for return of unclaimed property under the UUPA," not the Law Division. *See K. Hovnanian Cos. of N. Central Jersey, Inc. v. N.J. Dep't of Envtl. Prot.*, 379 N.J. Super. 1, 9 (App. Div. 2005); *see also* N.J.S.A. § 46:30B-84; R. 2:2-3(a)(2).

3 It is worth noting that plaintiff acknowledged to the trial court he had received $626,884.24 from the Unclaimed Property Administration.

As to plaintiff's reconsideration motion, the Appellate Division did not find any abuse of discretion.

In the Matter of the Irrevocable Trust of John L. Marchisotto, Deceased, Docket No. A-3453-19 (N.J. Super. Ct. App. Div. April 21, 2022)

Although courts are often patient with *pro se* litigants, this appeal serves as a reminder that the rules of civil procedure apply to all litigants and failing to comply with them can result in drastic consequences, including sanctions and the dismissal of a matter with prejudice.

In March 2018, John F. Marchisotto ("John"), a *pro se* plaintiff, filed an action against his sister, Debra Canova ("Debra"), the executor of the estate of their father, John L. Marchisotto ("Decedent"), and the trustee of the Decedent's irrevocable trust. Based upon the limited record filed by John on appeal, he originally asked the trial court solely to compel Debra to prepare an accounting. He later changed his position, however, and, without providing any competent evidence, claimed that Debra had not only misused her power of attorney for the Decedent, but had also unduly influenced the Decedent to change his will when he allegedly became ill and relied on her for his care.

The trial court ordered Debra to prepare and file a formal accounting, which consisted of 875 pages, including supporting documentation, in response to John's complaint. Rather than file exceptions to the formal accounting, John demanded a supplemental account based upon his alleged concern that Debra may have diverted funds during an earlier time period. The trial court attempted to address John's apprehension by requiring Debra to provide him with an additional informal accounting. Nevertheless, John contended, without evidence, that his sister had stolen substantial sums of money and that the source documentation for the accountings, including bank and brokerage house statements, were fraudulent.

Not long after filing his complaint, John began conducting his own investigations, including, but not limited to, contacting institutions with his allegations of fraud and reporting the estate's attorney and others to different law enforcement and disciplinary authorities. He also continually filed "innumerable rambling, nearly incomprehensible motions and other submissions with the court, seemingly mindless of the cost to the trust or the court rules governing his conduct." *Id.* at *10. This caused the trial judge to propose the appointment of a discovery master. The trial judge ordered John to provide the court with certain financial information to evaluate his ability to share the cost of a master, but John failed to comply.

After John asserted his fraud claims, the estate propounded interrogatories to discover the factual basis of the allegations. Because John failed to answer the interrogatories, the trial court dismissed his complaint without prejudice in March 2019. John moved to reinstate his pleadings in April 2019, but the trial judge denied his motion and indicated she would reconsider her ruling only if John provided "comprehensible responses to specific interrogatories." *Id.* at *11.

In December 2019, Debra moved to dismiss John's complaint with prejudice. The court denied the motion, however, and gave John another opportunity to submit responsive answers, providing him with guidance as to what the court rules required.

When John served Debra with his amended answers, she renewed her motion to dismiss his complaint with prejudice. The trial court granted the motion, and the Appellate Division affirmed, observing that John had been ordered to provide more fully responsive answers to specific interrogatories — not just once but on multiple occasions. The Appellate Division further noted that John's "flagrant and continuous failure to comply with the rules, despite the repeated efforts of [the trial court] to explain to him what he needed to do to move the case forward, rested with him and no one else." *Id.* at *20. Moreover, the increased costs caused by John's "wasteful" motions, which unfairly burdened the beneficiaries, constituted an additional factor relevant to the trial court's decision to dismiss the matter with prejudice, particularly where John had failed to present any evidence to support his fraud claims. *Id.* at *20-21. Finally, John's decision to "truncate the [appellate] record" left the Appellate Division without any basis on which to overrule the trial judge's award of sanctions, including $81,848.70 in fees and $3,976.33 in costs. *Id.* at *2, 22-23.

Chandler v. Kasper, Docket No. A-2143-20 (N.J. Super. Ct. App. Div. June 14, 2022)

In *Chandler v. Kasper*, Docket No. A-2143-20 (App. Div. October 7, 2021), the Appellate Division dismissed a plaintiff's cause of action under the Survivor's Act (N.J.S.A. 2A:15-3), finding that the plaintiff (the decedent's daughter) did not have standing to file a lawsuit under the Survivor's Act because she had not yet been appointed as administrator of her father's estate. Following the decision, the plaintiff filed a motion with the New Jersey Supreme Court for leave to appeal. On January 18, 2022, while the motion was pending, the New Jersey State Legislature amended the Survivor's Act and the Wrongful Death Act (N.J.S.A. 2A:31-2) through Assembly Bill 6133. The language of the respective Acts, as amended, now each permit certain persons to pursue a lawsuit for damages for wrongful death on behalf of the deceased's survivors.

As a result of the plaintiff's motion and the new legislation, the Supreme Court granted plaintiff's motion and summarily remanded the matter to the Appellate Division with instructions "to consider the impact of the new legislation." On remand, the Appellate Division in *Chandler v. Kasper*, A-2143-20 (App. Div. June 14, 2022) applied the newly amended language of the Survivor's Act and held "that based on the express language of the statute as amended, plaintiff became qualified to pursue her late father's Survivor's Act claim because, at the time she filed the complaint, she was acting in her capacity as an [administrator *ad prosequendum*]." *Id.* at *8.

Puglia v. Phillips, Docket No. A-5367-18 (N.J. Super. Ct. App. Div. August 15, 2022)

This matter involves a mix of estate, property and procedural issues, including offers of judgment.

The decedent's children were the beneficiaries of her estate ("Estate"). A lengthy, acrimonious dispute arose regarding the Estate's primary asset, a sixty-seven-acre farm (the Property). In the Probate Part, defendants filed a complaint against plaintiffs, alleging that improper use of the Property. Plaintiffs filed a counterclaim against defendants and the Estate, alleging, among other things, wrongful eviction under the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 to -61.12. After extensive litigation in the Probate Part, defendants purchased the Property from the Estate. Plaintiffs' counterclaims were severed and transferred to the Law Division.

Ultimately, the Law Division judge entered orders denying plaintiffs partial summary judgment and granting defendants partial summary judgment. The court dismissed plaintiffs' claim for wrongful eviction and denied plaintiffs' motion for reconsideration.

In the interim, defendants filed an offer of judgment allowing plaintiffs to take judgment against them in the amount of $10,107.77. By letter dated April 1, 2019, and filed with the court on April 2, plaintiffs' counsel responded to the offer, telling defense counsel and the court that his clients accepted the offer of judgment. The next day, April 3, 2019, by separate letter to the judge, plaintiffs' counsel acknowledged his previous acceptance of the offer of judgment but asserted that it only applied to the open claims currently before the court and did not apply to the claims under the Anti-Eviction Act.

After considering oral argument, the judge entered judgment in plaintiffs' favor for $10,107.77.

Plaintiffs appealed. The Appellate Division affirmed.

After reviewing Rule 4:58-4(c) and its history and amendments, the appeals court determined that:

> Nothing in the Rule limits the claims covered by the settlement offer to only those still pending before the court. Allowing a party to accept an offer of judgment only as to claims still pending, while at the same time permitting extinct claims to be resurrected for purposes of appeal, is not only contrary to the plain language of the Rule but also undermines the general purpose of the Rule, which is to foster settlements.
>
> *Puglia v. Phillips*, Docket No. A-5367-18 at *13.

Therefore, plaintiffs' acceptance of defendants' offer of judgment settled all claims by and against defendants, under Rule 4:58-4(c), including plaintiffs' claims dismissed by interlocutory orders on summary judgment and for which reconsideration was denied.

XII. NEW JERSEY GUARDIANSHIP COURT RULES

Guardianship Rule Amendments: R. 4:86-2(b); R. 4:86-4; R. 4:86-6

The New Jersey guardianship Court Rules have been amended to establish a policy for background screenings of certain proposed guardians of incapacitated persons. The amendments are effective as of May 15, 2021, and are summarized as follows.

R. 4:86-2(b) has been amended to require the petitioner to annex to the complaint an affidavit or certification setting forth the criminal and civil judgment history of the proposed guardian. If the complaint does not identify a proposed guardian, the certification shall be filed prior to the entry of the judgment of legal incapacity and the appointment of the guardian. The Administrative Director of the Courts will establish a background screening policy for proposed guardians of incapacitated adults, which may include fingerprinting.

Certain individuals and entities are exempt from the new requirement. These include: parents of allegedly incapacitated children; spouses of, and those in a civil unions or domestic partnerships with, allegedly incapacitated persons; certain temporary guardians; certain agencies; public officials appointed as limited guardians for medical purposes; financial institutions; and attorneys licensed and in good standing in the State of New Jersey. The court, however, may require any of the above individuals and entities to undergo background screening as a prerequisite to appointment based on the individual facts of the case.

R. 4:86-4 was amended to require the order to show cause to include provisions requiring any proposed guardian to comply with any applicable background screening policy, and to provide that a copy of the policy shall be provided with the order.

R. 4:86-6 requires the guardian's acceptance of appointment to include an acknowledgment of compliance with any background screening policy for proposed guardians of incapacitated adults promulgated by the Administrative Director of the Courts.

The amended Rules can be found at https://njcourts.gov/notices/2021/n210322a.pdf.

About the Panelists…

Gerard G. Brew is a Partner in McCarter & English, LLP in Newark, New Jersey. He concentrates his practice in the representation of clients in disputed matters involving estates, trusts, fiduciaries, family issues and small businesses (partnerships and closely-held corporations). Handling numerous litigated and non-litigated family disputes, he has been appointed by courts to mediate disputes related to these issues, represents clients in litigation and handles estate planning and administration matters.

Admitted to practice in New Jersey and New York, Mr. Brew has been a Fellow, New Jersey State Chair and Mid-Atlantic Regional Chair of the American College of Trust and Estate Counsel (ACTEC) and a member of ACTEC's Fiduciary Litigation Committee. He has also been a member of the American Bar Association's Section on Real Property & Trust and Estate Law, where he has served on its governing Council and as Group Chair and Vice Chair of the Estate Litigation and the Ethics and Malpractice Group and its committees.

Mr. Brew is the author of the *New Jersey Probate Procedures Manual* (ICLE 2008) and a contributing editor to the *New Jersey Estate Litigation Manual* (ICLE 2006, authored by Steven K. Mignogna, Esq.) and the *New Jersey Estate Planning Manual* (ICLE 2007, authored by Glenn A. Henkel, Esq.). He has also been an Adjunct Professor of Law at New York Law School, where he has taught New Jersey estate administration. In 2014 he received the New Jersey State Bar Association *Pro Bono* Award.

Mr. Brew received his B.A. from Rutgers College and his J.D. from Rutgers University School of Law, where he was Managing Research Editor for the *Rutgers Computer & Technology Law Journal*. He served as Law Clerk to the Honorable Nicholas Scalera, Superior Court of New Jersey, Appellate Division.

Andrew J. DeMaio is a Member of Neff Aguilar, LLC in Red Bank, New Jersey, where he concentrates his practice in estate planning and administration, the litigation of estate and trust matters, federal and state taxation, and charitable giving.

Admitted to practice in New Jersey and New York, Mr. DeMaio is a Fellow of the American College of Trust and Estate Counsel (ACTEC), Past Chair of ACTEC's Technology in the Practice Committee and a member of the American Bar Association and its Sections on Taxation and Real Property, Trust and Estate Law. He is a member of the New Jersey State and Monmouth Bar Associations, and a member and Past Chair of the Board of Consultors of the New Jersey State Bar Association Real Property, Trust and Estate Law Section.

Mr. DeMaio frequently lectures on estate and tax planning topics, trust and estate litigation, and on lawyers' use of technology. He has been an author and editor for Leimberg Information Services, Inc., an online current events publication for lawyers and other estate planning professionals. In 2003 and 2016 Mr. DeMaio received the New Jersey State Bar Association's Legislative Service Award, most recently for his work on the study and enactment of the *New Jersey Uniform Trust Code*. He is also the recipient of the NJSBA Real Property, Trust and Estate Law Section's Dorothy G. Black Distinguished Service Award.

Mr. DeMaio received his undergraduate degree from Rutgers College and his law degree from Cornell Law School. He received his LL.M. in Taxation from New York University School of Law.

Melissa Osorio Dibble is a Partner in the Voorhees, New Jersey, office of Archer & Greiner P.C., where she concentrates her practice in estate and trust litigation, and has handled all varieties of probate, general equity and Orphans' Court matters, including accountings, Will contests, breach of fiduciary duty actions, trust modifications, and matters involving the *Uniform Prudent Management of Institutional Funds Act* and the *Slayer Statute*. She has represented a variety of institutions and individuals, including banks, universities, executors, trustees, beneficiaries of estates and trusts, and intestate heirs.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, Ms. Dibble has been President of the Estate and Financial Planning Council of Southern New Jersey and Probate and Fiduciary Litigation Vice Chair of the American Bar Association Section of Real Property, Trust & Estate Law. She is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and a member of the Camden County Bar Association Probate & Trust Committee, the New Jersey Women Lawyers and the New Jersey State, Pennsylvania, Burlington County and Philadelphia Bar Associations. She has also served on the Probate & Trust Section of the Philadelphia Bar Association and several community boards.

Ms. Dibble has lectured on estate and trust litigation topics to bar associations and other organizations, and her articles have appeared in the *New Jersey Law Journal* and other publications. She is a former Mock Trial Coach for Paul VI High School and the recipient of several honors, including *Probate & Property Magazine*'s Excellence in Writing Award.

Ms. Dibble received her B.A., *cum laude*, from Bryn Mawr College and her J.D. from Rutgers University School of Law-Camden, where she was President of the Association for Public Interest Law, articles editor for the *Rutgers Journal of Law & Public Policy* and a member of the Domestic Violence Clinic. She interned for the Honorable Joseph H. Rodriguez, United States District Court for the District of New Jersey, and was Law Clerk to the Honorable Richard H. Wells, Superior Court of New Jersey, Camden Vicinage.

Timothy M. Ferges is a Partner in McCarter & English, LLP in the firm's Newark, New Jersey, and New York City offices, where he concentrates his practice in trust and estate law, including trust and estate litigation, estate planning, and trust and estate administration. Mr. Ferges brings and defends breach of fiduciary duty claims and handles contested accounting proceedings, Will and trust construction matters, and other fiduciary disputes; and represents beneficiaries, individual fiduciaries, and large institutional trust companies as well as charitable and non-profit organizations in those disputes. He also counsels high-net-worth individuals and families in estate planning goals while integrating asset protection and minimizing exposure to income and transfer taxes.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Mr. Ferges has been a member of the American Academy of Attorney—CPAs, and the American Bar Association Section of Real Property, Trust and Estate Law, where he has served as Vice Chair of a committee in the Trust & Estates Litigation Group. He is a member of the Mid-Atlantic Fellows Institute of the American College of Trust & Estate

Counsel (ACTEC) and has been a member of the New Jersey State Bar Association Real Property, Trust and Estate Law Section and the New York State Bar Association's Trusts and Estates Law Section, where he has served on the Estate Litigation Committee. In addition to being an attorney, he is also a Certified Public Accountant and has been a member of the Board of Trustees of the Springpoint Senior Living Foundation.

Mr. Ferges has lectured for ICLE, the National Business Institute and other organizations, and his articles have appeared in the *New Jersey Law Journal* and other publications. He is the recipient of several honors.

Mr. Ferges received his B.S. from Rutgers University; his M.B.A. from Rutgers Business School; his J.D. from Seton Hall University School of Law, where he served as Director of the Appellate Advocacy Moot Court Board and as a member of the Interscholastic Moot Court Board; and his LL.M. in Taxation from New York University School of Law. He was Law Clerk to the Honorable Walter Koprowski, Jr. and the Honorable Renee Jones Weeks, Probate Part, Chancery Division, Superior Court of New Jersey.

Glenn A. Henkel, LL.M., CPA, A.E.P. is a Shareholder in Kulzer & DiPadova, P.A. in Haddonfield, New Jersey. His particular areas of expertise include complex estate planning; tax-exempt organizations; and probate, trust and estate law. In addition to being an attorney, he is also a Certified Public Accountant and was designated as an Accredited Estate Planner by the National Association of Estate Planning Councils in 2006.

Admitted to practice law in New Jersey and Pennsylvania, and before the United States Tax Court, Mr. Henkel is a Fellow of the American College of Trust and Estate Counsel (ACTEC), has served on the Board of Directors of the Philadelphia Estate Planning Council and has been Chair of the Council's Ethics Committee. He is Past Chair of the New Jersey State Bar Association's Taxation Law and Real Property, Probate and Trust Law Sections, and Past Co-Chair of the NJSBA CLE Advisory Committee. Mr. Henkel is a member of the American Bar Association and has been Co-Chair of the Probate and Trust Committee of the Camden County Bar Association, for which he is also a former Trustee. He is also a member of the New Jersey Society of Certified Public Accountants (for which he served as President of the Southwest Jersey Chapter) and the American Institute of Certified Public Accountants, and is Past President of the Estate and Financial Planning Council of Southern New Jersey, Inc.

Mr. Henkel is a co-author of the *New Jersey Estate Planning Manual: Theory, Practice & Forms – 2007* (with Steven K. Mignogna and Gerard G. Brew). He is an editor of and contributing author to *New Jersey Estate and Trust Litigation: 2nd Edition – 2012* (by Steven K. Mignogna) and to *New Jersey Probate Procedures Manual – 2009* (by Gerard G. Brew), all published by ICLE. A former Assistant Professor of Tax Law at Rutgers University School of Law, Mr. Henkel was the recipient of the 2005 Founders Award for lifetime achievement bestowed by the Estate and Financial Planning Council of Southern New Jersey. He was the recipient of ICLE's Alfred C. Clapp Award in 2009, has published articles in national journals and has lectured extensively to lawyers, accountants and estate planners. In 2015, he received the Dorothy G. Black Award for distinguished service from the Real Property, Trust and Estate Law Section of the New Jersey State Bar Association; in 2016 he received the Distinguished Legislative Service Award from the New Jersey State Bar Association for his years of effort on the Uniform Trust Code; and in 2018 he received the Outstanding Service Award from the NJSBA Taxation Section.

A *magna cum laude* graduate of Rider College, Mr. Henkel received his J.D. from Rutgers University School of Law-Camden, where he graduated with honors, was a member of the *Rutgers Law Journal* and was awarded the Prentice Hall Award for outstanding performance in the area of taxation. He received his L.L.M. in Taxation from New York University.

Steven K. Mignogna is a Shareholder in the Litigation Department of Archer & Greiner, P.C., with offices in Voorhees, Princeton and Flemington, New Jersey; New York City; Philadelphia, PA; and Wilmington, DE. He concentrates his practice in commercial litigation, with an emphasis on litigation involving probate matters, estates, trusts, gifts, fiduciaries, guardianships and real estate. Chair of the firm's Estate and Trust Litigation Group and Co-Chair of the Estate and Trust Litigation Group, he has represented both institutions and individuals, and has handled cases in state and federal courts at the trial and appellate levels.

Admitted to practice in the state and federal courts of New Jersey and Pennsylvania, and before the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Mignogna is a Fellow of the American College of Trust and Estate Counsel (ACTEC), State Chair for ACTEC for New Jersey, Chair of ACTEC's Fiduciary Litigation Committee, serves on the ACTEC Board of Regents and on several other committees of the organization. He has been Chair of the Litigation, Ethics and Malpractice Group's Alternative Dispute Resolution and Probate and Fiduciary Litigation Committees of the of the American Bar Association's Real Property, Trust and Estate Law Section, serves on the Advisory Committee of the Heckerling Institute and is a Senior Fellow of the Litigation Counsel of America, a national honorary society for trial lawyers.

Mr. Mignogna has lectured and authored articles for ICLE, ACTEC, the Heckerling Institute, the American Law Institute, the American and New Jersey State Bar Associations, and other organizations. He is the main author of *Estate and Trust Litigation* and the editor of and contributing author to *The New Jersey Estate Planning Manual* and *New Jersey Probate Procedures Manual*, all published by ICLE. He has been quoted in several publications, including *The Wall Street Journal* and *U.S. News and World Report*, and is the recipient of several awards, including ICLE's Distinguished Service Award in 2017 and the Professional Lawyer of the Year Award bestowed by the Camden County Bar Association and the New Jersey Commission on Professionalism in the Law in 2020.

Mr. Mignogna received his B.A. from St. Joseph's University, where he graduated at the top of his class, and his law degree, with high honors, from Rutgers University School of Law-Camden.