TRUST DRAFTING FUNDAMENTALS

2024 Seminar Material

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New Jersey Institute for Continuing Legal Education

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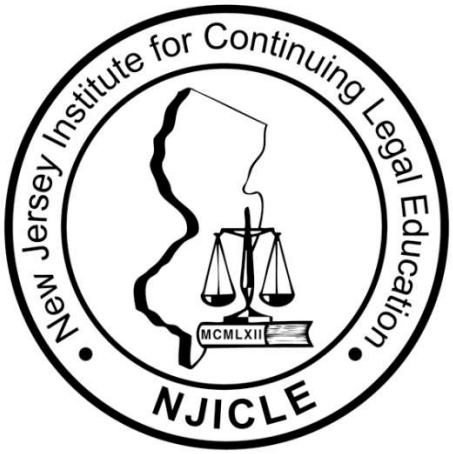

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TRUST DRAFTING FUNDAMENTALS

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Basics of Trust Drafting and Using Trusts in Estate Planning
Joshua F. Cheslow, Esq.

This is a "What" and "How To" course. There are plenty of "Why" courses out there, but this course is about the mechanics of drafting.

A trust is a fiduciary relationship in which a trustee holds legal title to specific property with a fiduciary duty to manage, invest, and safeguard the trust assets for the benefit of designated beneficiaries, who hold equitable title. If a person wants to make a lifetime gift to her son, she can give the property outright to him, or she can create a lifetime ("inter vivos") trust for his benefit. If a person wants to leave his daughter property under his will, he can bequeath the property to her outright, or he can create a testamentary trust for the daughter's benefit. A gift in trust can be advantageous where the beneficiary is a minor, incapacitated, or is inexperienced in handling money. Lifetime and testamentary trusts are often created for tax reasons. In one sense, a trust can be viewed as a contract between the settlor/grantor/creator and the trustee concerning the use of the property for a third party, called the beneficiary.

Since this is a trust drafting seminar, we are only concerning ourselves with express trusts, not resulting trusts arising from the presumed intention of the owner of property, or constructive trusts which are equitable remedies available in cases of unjust enrichment. Express trusts arise from the expressed intention of the owner of property to create the trust relationship with respect to the property. We are also only concerning ourselves with private trusts, not charitable trusts, although many principles remain the same across both types of trusts.

A complex web of both state and federal statutory law, case law, court rules, and the Restatement (Second) of Trust, which was adopted by the New Jersey courts, comprised the vast majority of "trust law" in New Jersey. With the enactment of the New Jersey Uniform Trust Code, the main legal authority governing trusts has been, at the very least, supplemented by the non-comprehensive, NJ UTC, wherein the code acknowledges that the "common law governing trusts and principles of equity supplement this act, except to the extent modified by this Act or another statute of this state" NJSA 3B:31-6.

The NJ UTC was enacted July 17, 2016, NJSA 3B:31-1, et. Seq. governs trustees' duties and powers, relations among trustees, and the beneficiary's rights and interests. But, trust law at its roots derives from the same body of law that governs all those things in Ancient England which a Chancellorship provides for – benevolent protection for what were once terms "lunatics and idiots", the passage of property from deceased to living heir, and the separation of the vulnerable from the vicissitudes of a modern life and economy. The Chancery Courts, therefore, were the place for doing what "ought to be done" for those who are protected, a term more commonly known as equity. The equity courts today are responsible for holding protectors accountable to their wards, and requiring the active enforcement of duties and responsibilities upon those who are appointed to act as fiduciaries.

The venue for trust actions in New Jersey is, in the case of testamentary trusts, where the decedent was domiciled at his date of death. R. 4:83-4(c). In the case of inter-vivos trusts, where any property of the trust estate at the commencement of the action is located or in the

county in which trustee is domiciled at the time the action is commenced. R. 4:83-4(d). The virtual representation of mentally incapacitated persons, minors, or unborn children in trust proceedings is covered by the NJ UTC. The courts will apply both common law and the NJ UTC, as well as the court rules, in actions to modify, terminate, or reform trusts, to settle accountings of trustees, to decant trusts, or to handle disputes over trust administration.

As discussed above, a trust is a division of the responsibilities of ownership of a thing from the enjoyment of ownership of a thing. Drafting is the key to effective trusts. NJSA 3B 31-5 states in relevant part that, "The terms of a trust prevail over any provision of this act….". In essence, trusts are (or should be) very flexible vehicles for creating the rules for the use of one's property – they can say almost anything. Therefore, saying what you mean in a trust is the art of making a trust say what you intend for it to accomplish. It is telling the story of a settlor's intent, a trustee's job, and a beneficiary's rights. It is proper drafting.

Trust Creation – Intervivos and Testamentary Trusts

Under the NJ UTC, there are three methods for creating a trust: (1) a transfer of property under a written instrument to another person as trustee during the settlor's lifetime or by will or other written disposition taking effect upon the settlor's death; (2) a written declaration by the owner of property that the owner holds identifiable property as trustee; or (3) a written exercise of a power of appointment in favor of a trustee. N.J.S.A. 3B:31-18. The NJ UTC is a focus of later course materials, and as a result we will not delve deeper into questions of trust validity and enforceability here, merely to mention that the creation of a trust presupposes certain basic concepts that are dealt with both statutorily and in the common law, such as the settlor's capacity to make a trust and the presence of a definite beneficiary.

As we examine the language used by practitioners to formulate written trust instruments, we focus on trust creation language that is the intentional, express, and written act of a Settlor forming a trust (Grantor is often used interchangeably with Settlor; Creator less frequently so). As the drafter, consider what is happening when a trust is created – the split of legal and equitable title coupled with the imposition of fiduciary duties on the holder of the legal title. Therefore, trusts must distinguish themselves from other legal relationships, such as Agency (giving written authority to do something on behalf of another); Bailment (being in possession of another's borrowed property); Condition Subsequent (the performance of a future promise); Custodianship (having a fiduciary relationship with respect to another's property).

Here is a sample of trust creation language:

> "This Trust Agreement is entered into this 4th day of May, 2021, by **DONALD DUCK** residing at 123 Nottingham Way, Duckburg, New Jersey, the Settlor, and **DAISY DUCK**, residing at 123 Nottingham Way, Duckburg, New Jersey as Trustee. The Trust created herein shall be known as the "DONALD DUCK 2021 TRUST AGREEMENT".

This is known as a declaration of trust. This simple paragraph leaves no question that the Settlor intended to create a trust, from nominating a trustee to entitling the name of the trust. Notice this paragraph says nothing about some of the most important elements of a trust, such as the revocability of the trust or the terms that govern the trust.

In fact, the only thing we actually know about the above trust is that it is created by a living person to take effect during that person's lifetime, since it is being signed on a date and time in the future. It is a lifetime trust ("inter vivos"). Had the trust been created under the person's Last Will and Testament, however, it would have been a testamentary trust. Testamentary trusts do not become effective until after a testator dies and the Will is admitted to probate.

Therefore, to create a lifetime trust, it is not enough to merely express an intention to do so in the future; there must also be a delivery of legal title to the specified assets, as follows:

> "Agreement made the _____ day of _____, 20__, between **JOHN DOE** referred to herein as the "Grantor" and **ROBERT DOE** and **JANE DOE** referred to herein as the "Trustees". The Grantor hereby irrevocably assigns and delivers to the Trustees the life insurance policies and other property described in Schedule A annexed hereto, together with any additional property which may hereafter be transferred to and accepted by the Trustees, IN TRUST, to be held, managed, administered and distributed by the Trustees as provided in this Agreement.

Again, a simple paragraph that leaves no question that the Settlor intended to create a trust, and it goes a step further. There is a specific delivery of identified property, thus identifying this trust as an inter vivos trust.

The creation of a testamentary trust requires that some portion or all of a beneficiary's inheritance to be placed in trust and that the intention be expressed in a testamentary document. If a settlor intends to create a testamentary trust, then the split of title and the imposition of duties does not occur until the settlor dies. The language in a Will might look something like this:

> "If the property of my residuary estate would be distributable to a person who is under the age of twenty-one (21) at such time, then I direct that, in lieu of being paid or distributed to such person, the property shall be held or retained by my trustee, in trust, as a separate trust for such person."

Here, the testator creating a will has limited the distribution of inheritances from his residuary estate that would pass to minors (defined as age 21 and under at the time of the distribution). The establishment of this simple trust is, generally speaking, intended to avoid the need to appoint guardians of the estate of minor beneficiaries and to provide them with the benefit of a more flexible property arrangement. Of course, a precondition of the validity of this type of trust is the validity of the will itself.

Trust Creation – Revocable and Irrevocable Trusts

Trusts may be revocable or irrevocable by its terms. A revocable trust is a trust where the settlor reserves the right to amend or revoke the trust. It usually provides for a client's needs during life and then, at death, provides for outright distribution or continuation in an irrevocable trust for descendants.

Under the NJ UTC, a trust that does not expressly provide that it is irrevocable, or is not proved by clear and convincing evidence that it was intended to be irrevocable, is revocable. Creating a revocable trust under NJ law, therefore, does not require additional creation language, but should not be left to the statutory presumptions built into the UTC, since this is a departure from other states where the presumption is actually the opposite. Therefore, revocability should be established expressly by language such as:

.

> "**RIGHT TO REVOKE AND AMEND.** The Settlor reserves the right during her lifetime, by an instrument in writing, signed and acknowledged by Settlor and delivered to the Trustee:
>
> (1) To revoke this instrument entirely and to receive from the Trustee all trust property remaining after making payment or provision for payment of all expenses connected with the administration of this trust.
>
> (2) From time to time to alter or amend this instrument in any and every particular.
>
> (3) From time to time to change the identity or number, or both, of the Trustee.
>
> (4) From time to time to withdraw from the operation of this Trust any or all of the trust property."

Here, the trust instrument specifies whether it is amendable or revocable, avoiding the risk that the character of the trust is not properly established or understood by the settlor. Note that in this instance, the power of revocation is effective only if it complies with the terms of the trust requiring the delivery of an instrument in writing, signed and acknowledged by the settlor during his or her lifetime.

An irrevocable trust may be amended only under a set of limited conditions but is otherwise unchangeable. The settlor is not deemed to be the owner of a trust (thus by delivering the property causing the trust formation to be irrevocable) where an independent trusts holds powers to "(1)to distribution, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or (2)to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries whether or no income beneficiaries". IRS Treas. Reg. 1.674(d)-2(b).

> "The Trustee may distribute so much, all or none, of the net income and principal, as the trustee, in its sole and absolute discretion, shall deem appropriate, to or among any one or more of the beneficiaries hereinafter named, in equal or unequal shares."

In this case, the trust is giving an independent trustee the same broad power to make distributions that the settlor enjoys with respect to his or her own property. By doing so, and without any further language to the contrary, the irrevocability of the trust formation is complete, since the trustee and the settlor cannot both retain the authority to exercise the same broad powers. By giving up those powers, and completing delivery of the trust property to the trustee, the divestiture of ownership in the settlor occurs for purpose of establishing irrevocability of the trust. Here, under this "fully discretionary" trust, so long as the trustee is not also solely the settlor, or a party deemed subordinate or subservient to settlor under IRC Sec. 672(c) in the exercise of powers under the trust (thus making it either a disregarded entity, such as a revocable

trust, or a "sham trust"), then the language above establishes that the trust terms create an irrevocable trust. This applies both to trusts that begin life as revocable trusts and to trusts that are irrevocable from their creation.

Trust Purpose

The material purpose of a trust is an important concept in trust drafting. Much like contracts (Trusts are a related concept), materiality goes to the heart of trust interpretation. Material purpose itself is both a legal and practical application. On the one hand, in NJ the 'material purpose" of a trust from a legal standpoint can be derived either from the purposes expressed in the instrument or from the testator's probable intent as gleaned from the testator's dominant purpose and plan as it appears from the entirety of a testator's will when read and considered in light of the surrounding circumstances. Fidelity union Trust Co. v. Robert, 36 N.J. 561, 565 (1962). On the other hand, the material purpose of a trust directs the practical applications of trust administration made by a trustee or the court in, for instance, making or withholding a distribution, and modifying or terminating a trust.

The settlor's desire to provide for an protect someone is probably the most common reason for creating a trust.

> "**PURPOSE.** It is my intent in the establishment of this Trust to provide for the care, maintenance, support, health, enjoyment, and education of my daughter."

This provision gives the trustee some direction. The administration of the trust's property is for the benefit of the settlor's daughter's support. The effect of expressly stating such a material purpose (as opposed to another) is to make such a trust incapable of being terminable by consent of the beneficiary and trustee, whereupon the mechanisms established by the settlor for the support and maintenance of daughter might be frustrated or contravened.

Similar concerns arise for settlors worried about the alienation or acceleration of trust funds for the benefit of a beneficiary's creditors, so called "spendthrift trusts".

> "No interest of a beneficiary in the principal or income of this trust may be anticipated, assigned, or encumbered, or subjected to any creditor's claims or legal process prior to the actual distribution to the beneficiary"

Attorneys should be aware of the extent to which spendthrift provisions exempt interests in trust from creditors' claims. For instance, typically even if the trust prohibits the beneficiary from transferring the interest, the beneficiary may validly direct the trustee to distribute the interest to another person. Moreover, now under the NJ UTC, our state departs from the common law regarding spendthrift provisions and does not presume that a spendthrift provision constitutes a material purpose of the trust. N.J.S.A. 3B:31-27(c).

If a settlor's purpose is to shield a beneficiary's interest from his or her own inexperience or imprudence, then the planner should include more robust provisions that prevent any voluntary or involuntary transfers of the beneficiary's interest, such as perhaps requiring the trustee to pay

the income or principal directly to or for the benefit of the beneficiary, and never upon any written or oral direction or assignment. Another robust provision may look something like this:

> I transfer to my Trustee the property listed in Schedule A, attached to this agreement, to be held on the terms and conditions set forth in this instrument. I retain no right, title or interest in the income or principal of this trust or any other incident of ownership in any trust property. My Trustee shall have no right, power, privilege, or authority to invade or distribute income or principal of the trust to or for my benefit, under any circumstances. Notwithstanding any provision of this agreement to the contrary, under no circumstances may I serve as Trustee at any time.

Here, the direction to the trustee is that no trust property, and no income or principal may ever come out of the trust for the benefit of the settlor. There can be no question the purpose is asset protection.

> "My Trustee may not participate in the exercise of a power or discretion conferred under this agreement that would cause the Trustee to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code. Specifically, the Trustee may not use such powers for his or her personal benefit, nor for the discharge of his or her financial obligations."

Here, the direction is that the trustee is restricted from applying distributions to the financial obligations of the trustee (among other things). This provision is more complex than previous provisions we have looked at. This is a form of asset protection for situations in which the presence of the settlor as a trustee on an irrevocable trust could have the impact of characterizing the trust property as "available" to the trustee/settlor. For a trust to be valid, the same person cannot be sole trustee and sole beneficiary of all beneficial interests. N.J.S.A. 3B:31-19. This provision is designed to avoid the collapse of a trust for that reason.

Other more comprehensive provisions that establish trust purpose and provide direction to all parties might look something like this:

> "Settlor is creating this trust as part of her estate plan to ensure efficient management, administration, and protection of the trust assets for her beneficiaries. In order to maximize the benefit to the trust beneficiaries, Settlor gives the Trustee broad discretion with respect to the management, distribution, and investment of assets in the trust. The objective is that the assets in this trust will not be subject to the claims of any beneficiary's creditors. All provisions of this agreement shall be construed so as to accomplish Settlor's objectives. Any beneficiary has the right at any time to release, renounce, or disclaim any right, power, or interest that might be construed or deemed to defeat Settlor's objectives."

Here the purpose of the trust is to provide for asset management, asset administration, and asset protection.

> "I intend that the beneficiaries of the separate trusts created by my Trustee upon my death under the terms of this Agreement with respect to the trusts interests in any Qualified Retirement Plan qualify as Designated Beneficiaries after my death under the minimum distribution rules contained in Section 401(a)(9) of the Internal Revenue Code and applicable regulations."

Here, the purpose is to create a "see-through" trust for purposes of qualifying the trust beneficiary of a qualified plan with hopefully more favorable tax consequences than a trust beneficiary typically would have.

> "During the lifetime of the Grantor, the Trustee shall have the power to pay, or apply for the benefit of Grantor's spouse, such amounts of trust income and principal as Trustee, in its sole discretion, for the health, education, maintenance, and support of said spouse."

Here we have created a support trust. This provision attempts to answer the question, what does support actually mean"? Generally in the absence of a definition, "support" will typically mean the standard of living to which the beneficiary was accustomed at the time of trust creation. The provision is further providing flexibility to the trustee by defining the level of support as well as leaving an amount of discretion to the trustee, particularly as it relates to the use of both income and principal of the trust property.

> "In an effort to provide the Trustee with guidance in making distributions under the standard provided hereinabove, the Trustee may consider…"
>
> > "such circumstances and factors as the Trustee believes are relevant"
> >
> > "other income and assets available to the beneficiary"
> >
> > "the character and habits of the beneficiary"
> >
> > "the beneficiary's stated life plan and goals"
> >
> > "the beneficiary's ability to handle money"
> >
> > "the extent to which any such distribution could contribute to the beneficiary's poor behavior or sense of entitlement."

Here, we see a host of other types of consideration permissible by a trustee and expressly drawn into the instrument.

We previously looked at creating revocable trusts. We also stated that revocable trusts are usually established for the benefit of the settlor. Trust purpose can get lost in the context of a revocable trust, then, since the outcome of the creation of such a trust does not change much, if anything about the treatment of the trust property.

Why a revocable trust then? One of the most common reasons is probate avoidance. At death, while the assets are includible in the settlor's estate for tax purposes, they are not actually owned by the settlor individually. Thus, if all of settlor's assets have been transferred to the revocable trust, then at death, there is nothing to probate in the settlor's individual estate. Achieving probate avoidance is desirable in states where many activities of an executor must be approved by the court, such as Florida and New York, to skirt administrative delays and expense. Since New Jersey probate is less complex than that in states like Florida, revocable trusts have not been as popular in New Jersey (although they are certainly employed in many circumstances).

Other common reasons driving interest in revocable living trusts in the estate planning context include the fact that revocable trusts are easily amended without the formalities of changing a will; that the trust agreement is not a public document, unlike a will; and the smooth transition of fiduciary authority at the death or incapacity of the settlor. Lastly, a New Jersey specific issue arises in that all assets are subject to a lien for New Jersey inheritance tax, but the lien does not attach to all assets nor require a tax waiver to release the lien. More specifically, assets in

revocable trusts do not require waivers before liquidation and transfer. Of course, the assets would still remain subject to tax.

This type of trust is akin to simply moving settlor's assets from her right pocket to her left pocket. Substantively and functionally, there are few if any differences between a settlor owning assets in a revocable trust and owning them instead in her individual name. As long as the settlor has reserved the right to revoke the trust at any time, in most situations the settlor will be treated for tax purposes as if he had not established a trust but had remained the outright owner of the trust property. In fact, it is ignored for income tax purposes. Furthermore, a revocable trust offers no tax saving of either federal estate and gift taxes or New Jersey inheritance and estate taxes.

Trust Administration

The trustee will need powers sufficient to accomplish the job of administering the trust property in conjunction with the trust purpose. That said, special provisions or more detailed instructions come only after basic provisions applicable to all trusts are set forth in the instrument.

> "I appoint my brother, **JAMES DOE**, as trustee of each trust hereunder. If he shall fail or cease so to act for any reason, I appoint my sister, **DIANE DOE**, to serve as trustee in his place and stead. I authorize my trustee to employ, at the expense of the trust, such attorneys, custodians, accoutnants, investment advisors, or other professionals as my trustee believes is in the best interest of the trust."

Here is a simple trustee appointment. Of course, a will or trust that appoints an individual as trustee generally should appoint a successor or provide a mechanism for the selection of a successor. For instance, the adult beneficiaries could be given a power to appoint someone other than themselves as successor trustee (or if tax considerations are not an issue, or they were not given any "tax sensitive" powers, the beneficiaries could be given the right to appoint one or more of themselves as successor trustees).

For testamentary trusts, a testator often will include language waiving bond.

> "I direct that no bond shall be required of my trustee or any successor trustee for any purpose."

Here, the testator's intent clearly is to avoid the costs of a fiduciary bond and rely upon the good faith of the appointee, reducing both expense and the depth of the supervisory role of the probate court in administering the trust.

Often, the powers afforded to trustees under the terms of a trust instrument are incorporated in detail, rather than by reference to a particular statutory body or other amalgamation of precedent, so as to "freeze" the applicable law at the time the instrument was drafted with preferential language or rules. This often requires a complete restatement of a trustee's powers even if the local law were to provide a Trustees' Powers Act or similar. Investment criteria of a trustee, can limit the trustee or give broad and unfettered authority to the trustee.

> "I authorize the trustee to invest in property of all kinds. In making investment decisions, I direct the trustee to take into account the other investments of the trust, the overall investment strategy of the trust, the duration of the trust, the needs of the beneficiaries, the tax circumstances of the trust, and the economic conditions."

Although this may seem somewhat perfunctory, the prudent investor rule that dominates typical trust investment authority required each individual investment to be analyzed separately, and with an extremely limited scope for considering whether an investment is "speculative" or "safe". Here, the presence of a broad authority for investments that accounts for the other investments in a trust should free the trustee from the unreasonable application of the prudent investor standard of investments.

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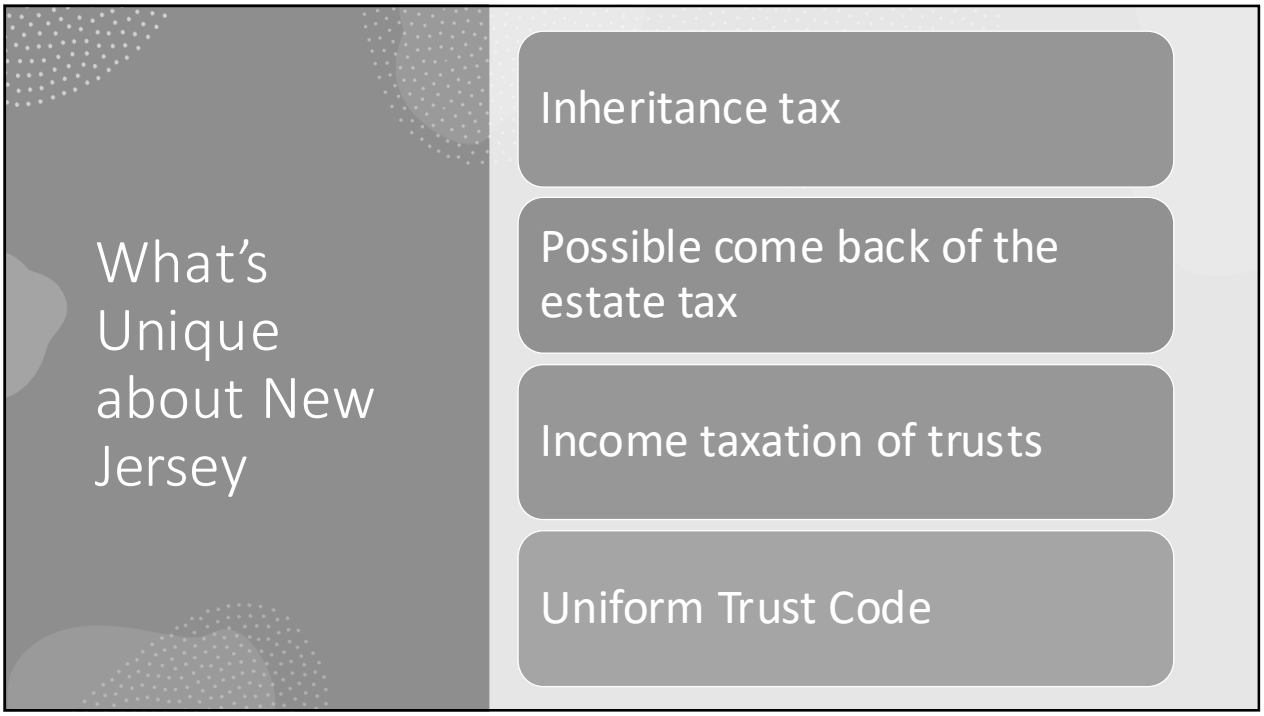
ADVANCED DRAFTING IN NEW JERSEY DURING A BIDEN ADMINISTRATION
STACEY M. VALENTINE, ESQ.

Biden Administration Proposals and Implications

- Decreased estate tax exemption to $3.5M
- Decreased gift tax exemption to $1M
- Increase in estate tax rate to 45%
- Change in rules regarding a step up in basis
- The “unknown” regarding certain types of trusts (GRATs and ILITs)


"Advanced Planning"
Considered "next level" planning for high net worth and ultra high net worth individuals
Consists of wealth transfer to future generations
Income and estate tax considerations


What's Unique about New Jersey
Inheritance tax
Possible come back of the estate tax
Income taxation of trusts
Uniform Trust Code

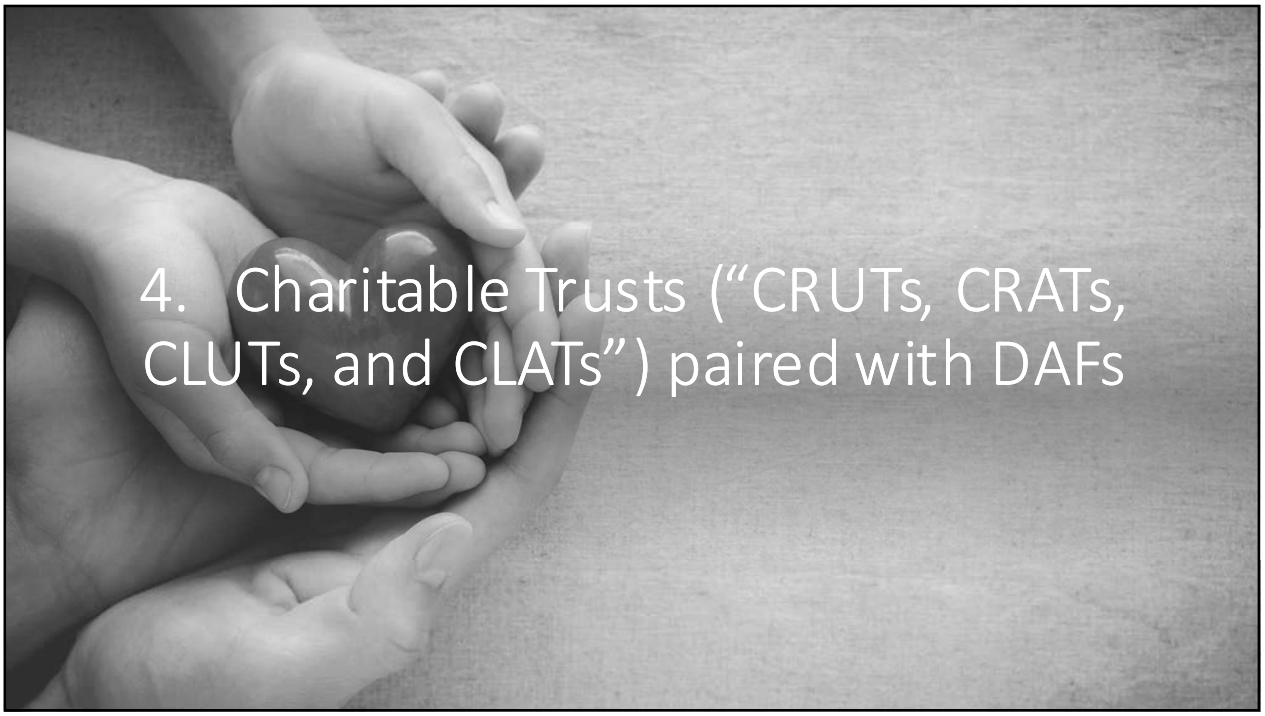
How do you determine if your client should utilize next level planning?

Top 5 Wealth Transfer Techniques

1. Irrevocable Life Insurance Trusts ("ILITs")


2. Grantor Retained Annuit Trusts ("GRATS")

3. Spousal Lifetime Access Trusts (“SLATs”)

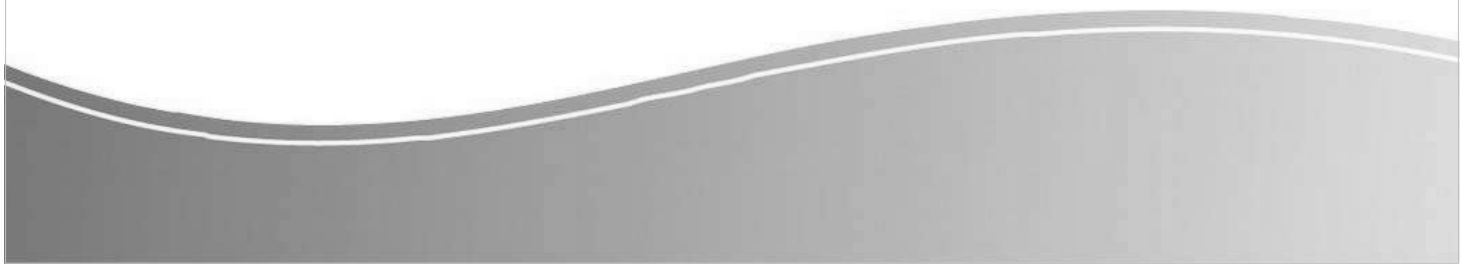

4. Charitable Trusts (“CRUTs, CRATs, CLUTs, and CLATs”) paired with DAFs


5. Charitable trusts
paired with ILITs

Questions?

NJ Elder and Disability Overview

Mark R. Friedman, 2020



- Why are we talking about this? Isn't this program supposed to be about trusts or something?
- People who come to you for estate planning services will occasionally have elder or disability law issues
- Important to know enough to recognize these issues

Special needs planning

- If you're meeting with someone about estate planning…
- And they have a child (or any other beneficiary) with disabilities…
- They may need special planning
- Ask!

- People with disabilities may qualify for a variety of disability benefits
- Some of the most common and important are Supplemental Security Income (SSI) and Medicaid

- SSI is a cash assistance program that pays out a monthly benefit, usually $500 - $750
- Medicaid is a government-run health insurance program that pays for healthcare at low or no cost

- Both of these benefits programs are means-tested…
- That means that to qualify for these programs, you must have assets and income within certain limits, usually very low

- For SSI and the most common Medicaid program, beneficiaries must have assets under $2,000
- This means that if a person with disabilities who is getting Medicaid and SSI receives an inheritance, it will likely disqualify her from those programs

- This can be a serious disruption to the person's life
- Medicaid might be paying for medical care or social programs on which the person relies, including a group home
- After spending down inheritance, may be difficult to get back on these programs

- This would be an unfortunate result
- Parents wanted to leave money to their child to make her life easier, but instead they've made it harder, something they would never want

- Instead, inheritance for child should be set aside in a special needs trust (SNT)
- In NJ, we also call it supplemental needs trust or supplemental benefits trust

- Using SNT, inheritance can be held in trust and managed by trustee
- SNT can make distributions (trust money can be spent) on things that help the beneficiary, things the beneficiary needs or wants

- ...but, beneficiary (the person with disabilities) doesn't own the trust funds, and has no control over how they are spent
- Trustee has to adhere to terms of trust, which usually say trust funds can only be spent on beneficiary
- ...but beneficiary can't direct that spending

- SNT is discretionary – distributions are solely within the discretion of the trustee
- Because beneficiary has no control over how trust is spent, trust assets are not considered available when determining eligibility for SSI, Medicaid and other means-tested benefits

- Who needs SNT? When would you need it?
- If your client wants to benefit anyone who gets (or may get) means-tested disability benefits
- Sometimes it's hard to tell...

- Some benefits are not means-tested
- Social Security Disability Insurance (SSD / SSDI) – eligibility is based on your (or a family member's) work history
- Same thing for Medicare

- In theory, if a person with disabilities is only getting SSD and Medicare, they don't need SNT, but…
- Sometimes it's hard to tell whether a person is on SSD or SSI – they often don't know

- And some people who get SSD and Medicare also get Medicaid, so they still need SNT (they may not know they get Medicaid)
- And some people who don't get benefits now may get them in the future
- Children under age 18 with disabilities usually don't get benefits currently (due to imputed income), but likely will in the future

- Best practice: If a client wants to benefit someone with disabilities, consider special needs planning, or consider working with someone who does a lot of special needs planning

Long term care

- Shifting gears…
- Some older people (and sometimes younger people) experience neurological conditions such as dementia and Alzheimer's disease
- Over time, these conditions often rob people of the ability to take care of themselves and live independently

- People who can't take care of themselves anymore (due to mental or physical conditions) will often need long term care (LTC)
- This is different than acute care – care that's mean to treat a specific, discrete condition

- Long term care is custodial care, to help with basic activities of daily living that the person can no longer do, such as getting dressed, eating and preparing food, moving around, basic hygiene, etc.
- LTC is long-term because, unfortunately, people who need it often need it for the rest of their lives

- LTC is often provided at home first, maybe by a family member, maybe a spouse or child
- But as situation progresses (possibly health deteriorates), that becomes no longer feasible
- At that point, professional LTC is needed… home health aides, assisted living facility or nursing home

- One thing all three settings have in common, in both NYC and New Jersey… is that they're incredibly expensive
- Aides through an agency typically cost around $25 / hr… thousands per month
- ALF usually around $9,000
- Nursing home usually around $13,000

- Even people with substantial assets, if they need a few years of long term care, can quickly deplete their estates, leaving their spouse impoverished and their heirs bereft

- There's one government program that can pay for long term care – Medicaid
- Only gov't program that pays for substantial, indefinite LTC – Medicare only pays for very limited rehab care
- But Medicaid has very strict asset limits, as we discussed earlier

- In addition to a LOT of other requirements (more substantial for LTC program)...
- Applicants must have less than $2,000 in assets to qualify
- If your life savings are several hundred thousand… that's a problem
- (one note – NY doesn't count retirement accounts, NJ does)

- Can’t you just give all your money away or sign your house over to your kids?
- No – when you apply for Medicaid, the Medicaid agency reviews your financial records for the past five years to see if you’ve made any gifts (and see if you’re hiding anything)
- For gifts, they impose a penalty, a time period during which they won’t pay for your care

- You can't just make gifts willy-nilly, because the gift penalty can be crushing
- People who run afoul of it may be left with no money, no Medicaid, and no way to pay for incredibly expensive care that they need
- In that case, the person, their family, and maybe even their lawyer may get sued by care providers, sometimes for tens or hundreds of thousands

- Instead, a competent elder law attorney can often devise a plan that complies with Medicaid rules to qualify the person for Medicaid much sooner, and have the government pay for their care
- ...while preserving significant assets within the family that otherwise would be lost to care costs

- Why the heck am I telling you all this? Why do you care?
- The population of people who are interested in estate planning, and of people who need long term care planning services, often overlaps substantially

- You may meet with a couple in their 70's or 80's where one spouse is starting to slip, getting forgetful, starting to lose ability to take care of himself, may need LTC in the near to mid future
- ...or after you've done their will, couple may come back to you years later with this problem

- For people in their 40's and 50's, sometimes they are dealing with these issues with their parents… sometimes, they'll be taking care of a parent who is starting to experience dementia or physical problems

- One warning, and it may sound self-serving but it's true: Don't try to do Medicaid planning yourself unless you really know what you're doing
- Medicaid rules are incredibly complex, full of gotcha's, and with care costing $10,000+ per month, small mistakes can have very expensive consequences

- If somebody raises these issues or asks about long term care, and they're interested in protecting assets, the best practice is to refer them to a competent elder law attorney
- Somebody knowledgeable and experienced
- CELA – Certified Elder Law Attorney by the ABA-accredited National Elder Law Foundation – is a good qualification to look for

- But one thing we all can do to help with elder law issues…
- Draft a power of attorney that includes gift provisions in appropriate circumstances

- Power of attorney (POA) is a basic estate planning document everyone should have
- In it, the principal (the person signing it) can appoint an agent to manage his financial affairs

- In New York, most estate provisions are found in the Estates, Powers and Trusts Law (EPTL)
- But POA is under General Obligations Law (GOL)
- ...and they're even helpful enough to give you a statutory form!

- ...but to make gifts in New York using a POA, a special statutory gifts rider is required, which they're also helpful enough to provide you
- New Jersey is similar (but different!)

- In NJ, there's no statutory form for POA
- Most estate stuff is in Title 3B (N.J.S.A. 3B), but power of attorney provisions are generally under Title 46
- Under, N.J.S.A. 46:2B-8.13a, gifts under a power of attorney are prohibited unless the document explicitly authorizes gifts

- A general grant of authority, such as “my attorney-in-fact may make any act I could make,” is not sufficient to authorize gifts

- Why does this matter?
- For people who need long term care, asset protection planning will often involve making gifts – transferring ownership between spouses, transferring assets to children in a planned way, etc.

- If the person has lost capacity (the mental capacity to understand what they're doing), they can't make gifts themselves
- Their power of attorney agent may think they can make gifts, but they can't, unless the document explicitly authorizes it

- In our POA documents, we usually recommend clients include a provision authorizing gifts for long term care planning purposes
- In our standard provision, such gifts must follow the person's estate plan (generally follow the person's will, unless all beneficiaries consent otherwise), but other limits don't apply

- ...No restriction on amount… sometimes people limit gifts to annual gift tax exclusion limit ($15k currently), but this can frustrate asset protection
- Attorney-in-fact can make gifts to self
- This only works if principal trusts attorney-in-fact completely (generally true for POA)

- Another thing to bear in mind…
- If one spouse is healthy and the other spouse needs long term care, sometimes it doesn't make sense for healthy spouse to leave their entire estate to ill spouse, who will just have to spend it on long term care
- Asset protection planning often includes changes to estate plan

Guardianship

- If someone has already lost capacity, they can't sign new estate documents
- If they never made a power of attorney, or their POA doesn't include necessary provisions, then likely no one will be able to manage their affairs without a guardianship

- In guardianship process, applicant applies to court to find that a person is incapacitated and can't manage her affairs
- Applicant asks court to appoint a guardian for the alleged incapacitated person, usually the applicant herself (typically a spouse or child)

- Guardian is different from attorney-in-fact or healthcare representative
- POA agent or healthcare directive agent is appointed by the principal, and has to adhere to principal's wishes and instructions
- Power is derived from what the principal appoints

- A guardian's power is derived from the state, not from the person
- The person (principal) has power over their agent, but a guardian has power over the person (ward)
- Agent is like an employee, but guardian is like a parent

- For this reason, guardianship is useful in a variety of situations
- ...as we discussed earlier, may be only way to do long term care planning if person has lost capacity and no appropriate POA

- Guardianship is sometimes needed if an older person with dementia is making terrible decisions…
- E.g., sending all their money off to a person abroad who claims to be a romantic partner

- Often, parents want guardianship over children with disabilities when the children reach age 18 (or 21)
- Parents are often shocked to learn that kid with severe disabilities, who parents have been doing everything for their whole lives, is now considered a legal adult when they reach age 18

- ...and therefore, banks, healthcare providers, insurance company, group home, etc. can't deal with parents (or even talk to parents), and have to deal with kid (who can't manage affairs due to disability)

- In NJ, to file for guardianship you have to file a complaint in Superior Court
- Papers are filed through county surrogate, usually in county where alleged incapacitated person resides

- Have to file certifications from two doctors, who have examined person within past 30 days, and who find that person lacks capacity to manage affairs
- Also have to file information about the person's finances… easy for young people, harder for older people

- Alleged incapacitated person (AIP) has right to counsel, usually a court-appointed attorney
- AIP can make the process difficult and expensive if they don't want a guardian
- Also true if there's a dispute over who should serve as guardian, e.g. parents who went through a bitter divorce

- If guardian is appointed, guardian usually has broad powers over the person and their finances
- ...but gifts still require separate court authorization

- Thank you!
- Questions?
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The Uniform Trust Code

Timothy M. Ferges

On January 19, 2016, New Jersey enacted its version[1] of the Uniform Trust Code (the "Trust Code"). The model Uniform Trust Code (the "UTC"), which was adopted by the National Conference of Commissioners on Uniform State Laws, is the basis of New Jersey's Trust Code. The model UTC was adopted to both codify common law principles of trusts and to create uniformity of law among the states.

Many of the UTC's statutes were modified by our legislature in it adoption of New Jersey's Trust Code. It contains many provisions that should be considered by estate planners in preparing trusts. (In addition, its provisions should be noted in administering trusts and can also be relevant in litigated disputes involving trusts.) Of course, there is also extensive law that preexisted the 2016 adoption of the Trust Code and that continues to be relevant, including New Jersey's probate code codified under Title 3B of the New Jersey statutes and our extensive common law governing trusts. *See* N.J.S.A. 3B:31-6 ("the common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State").

As under our common law, the Trust Code makes it clear that a settlor's intent is paramount. N.J.S.A. 3B:31-2 (providing "terms of a trust" means "the manifestation of the

[1] The Trust code is cited as N.J.S.A. 3B:31-1 et seq.

settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding"). Thus the initial provisions of the Trust Code mandate that the trust terms generally prevail over the Trust Code itself. *N.J.S.A.* 3B:31-5(b).

Despite this great emphasis on settlor intent, there are certain default provisions under the Trust Code that a settlor is unable to supersede. Those default requirements include, for example, provisions governing formation of a trust; a trustee's duty to act in good faith and in accordance with the trust terms; the requirements that the trust terms be for the benefit of a beneficiary; the requirement that the trust not be contrary to public policy; and the court's ability to modify, in accordance with the Trust Code, the limits of exculpatory language in a trust agreement; and other specified exceptions. *Id*. Most of these provisions seem to be aimed at preventing a trustee's abuse or violation of essential fiduciary obligations.

1. CREATION OF TRUSTS

The Trust Code imposes requirements for the creation of a trust – many of which preexisted the adoption of the Trust Code. Of course, a trust cannot be created if the settlor lacks the capacity to do so. *N.J.S.A.* 3B:31-19(a)(1). The Trust Code seems to treat a revocable trust as a will substitute. It provides that the capacity required to execute a *revocable* trust is the same as that for a will. *N.J.S.A.* 3B:31-42. New Jersey common law defines the "testamentary" capacity required to execute a will. *Gellert v. Livingston*, 5 N.J. 65, 71 (1950).

Under the Trust Code, the settlor must also indicate the intention to create the trust. *N.J.S.A.* 3B:31-19(a)(2). As a general matter, a trust must also have "definite beneficiaries" (however, exceptions may exist where the trust is charitable, where the trust is established for the

care of animals, or under other limited circumstances). *N.J.S.A.* 3B:31-19(a)(3). "A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to the provisions of [N.J.S.A.] 46:2F-10 or any other applicable rule against perpetuities." *N.J.S.A.* 3B:31-19(b). Finally, the trustee must have duties to perform and a sole trustee cannot be the sole beneficiary of the trust. *N.J.S.A.* 3B:31-19(a)(4)-(5).

The Trust Code recognizes a trust may not be valid if its creation was illegally procured by one other than the settlor. Thus "a trust is void to the extent its creation was induced by fraud, duress, or undue influence." *N.J.S.A.* 3B:31-23. This is in conformity with extensive New Jersey common law that preexisted the adoption of the Trust Code. Those cases address circumstances in which inter vivos transfers (if the trust was created during the settlor's lifetime) or testamentary transfers (if created at death) may be set aside on those grounds. *See, e.g., Pascale v. Pascale*, 113 N.J. 20 (1988) (setting forth grounds for challenge to inter vivos transactions as products of undue influence and distinguishing them from challenges to testamentary transfers).

Thus the common law and other New Jersey statutory law must still be considered in advising clients with respect to the creation of trusts. As recognized under the Trust Code, the "common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State." *N.J.S.A.* 3B:31-6 (emphasis added).

2. TYPES OF TRUSTS GOVERNED BY THE TRUST CODE

The Trust Code governs a wide range of trusts. It includes provisions that specifically govern revocable trusts (*see, e.g., N.J.S.A.* 3B:31-42) as well as irrevocable trusts (*see, e.g., N.J.S.A.* 3B:31-27). The Trust Code also contains provisions governing trusts established for

charitable purposes (*see, e.g., N.J.S.A.* 3B:31-22), noncharitable purposes (*see, e.g., N.J.S.A.* 3B:31-25), and the care of animals (*see, e.g., N.J.S.A.* 3B:31-24).

With respect to charitable trusts, the Trust Code describes what constitutes a valid "charitable purpose" under New Jersey law. *N.J.S.A.* 3B:31-22(a) ("a charitable trust is one that is created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purpose the achievement of which is beneficial to the community"). The code also addresses situations in which the settlor did not name a specific charitable beneficiary. That scenario will not cause a charitable trust to fail (despite the general requirement of the Trust Code that a trust have a "definite beneficiary"). Instead if a trust either does not specify a particular charitable purpose or beneficiary, the court can select a charitable purpose or beneficiary so long as its selection is consistent with the settlor's intent. *N.J.S.A.* 3B:31-22(b).

The Trust Code recognizes the standing of a broad range of individuals and entities to enforce the terms of a charitable trust. Under *N.J.S.A.* 3B:31-22(c), "a proceeding to enforce a charitable trust may be brought by the settlor, by the Attorney General, by the trust's beneficiaries or by other persons who have standing." While the New Jersey Attorney General has long had an interest in enforcing the terms of charitable trusts, the Trust Code apparently will allow a grantor standing to enforce a charitable trust he or she created, even if the trust is irrevocable.

Despite the general requirement that a trust have a "definite beneficiary," the Trust Code also specifically allows for the creation of certain "noncharitable trusts without ascertainable beneficiar[ies]." *N.J.S.A.* 3B:31-25. Such trusts may be created for (i) a "noncharitable but otherwise valid purpose without a definite or definitely ascertainable beneficiary" or (ii) "a

noncharitable but otherwise valid purpose to be selected by the trustee." An example of such a trust might be a trust created for the care of a cemetery plot. *See* NCCUSL comments on UTC 409. As with charitable trusts, the Trust Code also grants the settlor standing to enforce the terms of a trust governed by N.J.S.A. 3B:31-25. In the alternative, another person designated under the trust instrument or the court can supervise the trust's administration. *N.J.S.A.* 3B:31-25(b). Under this provision, trust property must generally be applied to its "intended use." *N.J.S.A.* 3B:31-25(c). To the extent, however, property is "not required for its intended use," it is to be distributed back to the settlor or the settlor's estate." *Id*.

3. TRUSTEE DUTIES

a. Duty of Disclosure

A trustee's duty of disclosure to his or her beneficiaries has long existed under New Jersey law. Pursuant to our common law, if the trustee wishes to be absolved of liability, he has a duty to disclose all material facts pertaining to the trust administration. As stated in *Liberty Title & Trust Co v. Plews*, 6 N.J. 28, 39 (1950), the

> trustee, as a fiduciary, is under a duty to make full and complete disclosure of all transactions in relation to his trust. He is permitted neither to conceal nor to misrepresent, and if he fails in his duty to disclose the true facts so as to give notice to interested parties of any illegal or improper investments, it amounts to fraud such as will permit a decree approving his account to be opened.

To fulfill this obligation, a trustee, of course, may be required to account to the beneficiaries – either informally or formally via a court proceeding. *See N.J.S.A.* 3B:17-1 et seq; *Rule* 4:87-1 et seq.

The Trust Code imposes additional specific obligations of disclosure upon a trustee. Those obligations include the obligation to "keep the qualified beneficiaries[2] of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." *N.J.S.A.* 3B:31-67(a). The Trust Code provides that a trustee must respond promptly to a beneficiary's request for information relating to the trust administration. *Id*. In addition, if the beneficiary requests a copy of the trust instrument, the trustee now has an affirmative obligation to produce it. *N.J.S.A.* 3B:31-67(b).

On the other hand, where certain information is supplied, the Trust Code now offers the trustee certain protections against beneficiary claims. If the trustee provides the beneficiary "a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding," a six month statute of limitations is imposed for the beneficiary to assert a claim of breach of trust against the trustee. *N.J.S.A.* 3B:31-74(a). Under that statute, a "report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence." *N.J.S.A.* 3B:31-74(b). Absent such a report, a five year statute of limitations runs from the date of the first to occur of "(1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust." *N.J.S.A.* 3B:31-74(c).

b. **Duty of Loyalty**

Under our preexisting law, trustees have likewise owed a duty of loyalty. Thus transactions of a trustee affected by a conflict of interest of the trustee are subject to scrutiny. *N.J.S.A.* 3B:14-36. "[T]he legal principle that undivided loyalty is of the very essence of a trust

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[2] The "qualified beneficiary" is a concept introduced under the Trust Code. It is described in further detail below.

relationship and that a trustee may not place itself in a position where its interest is or may be in conflict with its duty is firmly entrenched in our jurisprudence. . ." *In re Carter's Estate*, 6 N.J. 426, 436 (1951). Consequently,

> (m)any forms of conduct permissible in a workaday world for those acting at an arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior. [*Id* (quoting *Meinhard v. Salmon*, 294 N.Y. 458, 465 (1928)).]

The Trust Code confirms that transactions involving trust property that benefit the trustee or are otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary unless the transaction was authorized by the trust terms; the transaction was approved by the court; a claim challenging the transaction is time-barred; the beneficiary consented or ratified the transaction; or the transaction was performed before the individual or entity became trustee. *N.J.S.A.* 3B:31-55(b); *see also N.J.S.A.* 3B:31-55(c) (explaining when a transaction is presumed to be affected by such a conflict of interest).

c. **Duty to Prudently Invest and Manage Trust Assets**

It has been the law of New Jersey since before the adoption of the Trust Code that a trustee, in investing and managing the trust's assets, must act prudently. Under New Jersey's Prudent Investor Act,

> (a) fiduciary shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill and caution. [*N.J.S.A.* 3B:20-11.3(a)].

Included among the requirements of the Prudent Investor Act, is the general obligation to diversify the trust investments. *N.J.S.A.* 3B:20-11.4 ("a fiduciary shall diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without

diversifying"). The Act states "[t]he prudent investor rule expresses a standard of conduct, not outcome." *N.J.S.A.* 3B:20-11.9. Thus the statute focuses on the manner in which the trustee makes investment decisions, as opposed to the results obtained. Moreover, it operates only in default of express provisions in the Trust agreement to the contrary. *N.J.S.A.* 3B: 20-11.2(b) ("the prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions in the trust instrument"). Therefore where a trust agreement mandates or permits the trustee not to diversify the trust holdings and contains provisions exculpating her from investing the trust assets in that manner, the trustee may not be held liable for acting contrary to the Prudent Investor Act so long as he or she acts in conformity with the trust terms. *Matter of Post*, 2018 WL 3862756 (App. Div. August 15, 2018) (finding that a trustee was not permitted to diversify the trust holdings, despite the provisions of the Prudent Investor Act because the trust terms specifically forbade diversification).

The Trust Code recognizes the enforceability of exculpatory provisions, but with exceptions. *N.J.S.A.* 3B:31-77. No provision of a trust agreement can exculpate a trustee from acting in bad faith or with indifference of the trust terms or a beneficiary's interests. *N.J.S.A.* 3B:31-77(a). As stated *supra* and under N.J.S.A. 3B:31-5(b)(8), this limitation on exculpatory language cannot be trumped by the trust terms.

New Jersey's Prudent Investor Act provides that in fulfilling her role,

> a fiduciary may delegate investment and management functions that a prudent fiduciary of comparable skills could properly delegate under the circumstances. The fiduciary shall exercise reasonable care, skill and caution in: (1) selecting an agent . . . (2) establishing the scope and terms of the [agency] . . . : and (3) periodically reviewing the agent's actions . . . . [*N.J.S.A.* 3B:20-11.10(a)].

The Trust Code defines the manner of delegation in a similar manner. It likewise requires the trustee to participate prudently in selecting an agent, defining in writing the scope of delegation,

and reviewing periodically the agent's actions. *N.J.S.A.* 3B:31-60(b). Thus under New Jersey law, it continues to be imperative that a trustee secure sufficient professional advice in fulfilling his or her obligations.

d. **Duty of Impartiality**

Under the Trust Code, if a trust has more than one beneficiary, the trustee is under a fiduciary duty to act impartially when dealing with each of their respective interests. *N.J.S.A.* 3B:31-56 ("the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests"). This is consistent with existing common law as well as other statutory law, such as New Jersey's Prudent Investor Act. *See* N.J.S.A. 3B:20-11.6 ("If a trust has two or more beneficiaries, the fiduciary shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries"). Thus, unless the trust terms provide otherwise, the trustee is to treat all beneficiaries equitably in her administration of the trust unless the trust terms provide otherwise.

4. BENEFICIARIES

The Trust Code requires that a trust be established "for the benefit of its beneficiaries." N.J.S.A. 3B:31-21. The Trust Code broadly defines a "beneficiary." A beneficiary, of course, includes any person with a "present or future interest, vested or contingent" in the trust. N.J.S.A. 3B:31-3. It also, however, includes a person who holds a power of appointment, "the owner of an interest by assignment or other transfer," and in the case of a charitable trust, "any person who is entitled to enforce the trust."

a. "Qualified Beneficiaries"

The Trust Code describes the role of a "qualified beneficiary" – a concept that is unique to the Trust Code. A "qualified beneficiary" is "a beneficiary who, on the date the beneficiary's qualification is determined:

> (1) is a distributee or permissible distributee of trust income or principal;
>
> (2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date; or
>
> (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Put another way, a "qualified beneficiary" is one who could currently receive a distribution from the trust or is likely to receive trust property when the current beneficiaries die or when the trust terminates. The class of "qualified beneficiaries" is determined at the time of the inquiry.

Under the Trust Code, there are scenarios in which the trustee must notify the "qualified beneficiaries" of certain issues that might arise. When "qualified beneficiaries" are to receive notice under the Trust Code, however, "the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice." *N.J.S.A.* 3B:31-10(a). Thus, for example, if a contingent remainderman seeks notice, that remainderman must be given the same notice provided to the "qualified beneficiaries." Moreover, a charitable organization designated to receive distributions under a charitable trust or one who is appointed to enforce a trust established for the care of an animal or another noncharitable purpose also has the rights of a qualified beneficiary. *N.J.S.A.* 3B:31-10(b). Finally, the New Jersey Attorney General has the rights of a qualified beneficiary in connection with a charitable trust. *N.J.S.A.* 3B:31-10(c).

Qualified beneficiaries, and those with the right to receive notice under N.J.S.A. 3B:31-10, must be notified of a change of the principal place of administration of the trust or the termination of an uneconomic trust. *N.J.S.A.* 3B:31-8(d); 3B:31-30(a). In addition, as a general

matter, a trustee is required 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." *N.J.S.A.* 3B:31-67(a).

In addition to the right to receive notice, the Trust Code empowers the "qualified beneficiaries" with certain authority. For example, in the event of a vacancy in the trusteeship of a noncharitable trust, if the trust terms do not name a successor or provide a procedure for the appointment of a successor, the Trust Code now allows a successor to be appointed by unanimous agreement of the qualified beneficiaries. *N.J.S.A.* 3B:31-49(c). Therefore if the trust terms cannot fill a vacancy, the trustee or beneficiaries need not resort to a court proceeding to fill a vacancy if the "qualified beneficiaries" can come to such an agreement.

b. Representation

The Trust Code adopts many of the virtual representation principles contained in Rule 4:26-3. It also supplements and expands upon those principles. For example, N.J.S.A. 3B:31-16 authorizes one to represent a minor or incapacitated person who has a "substantially identical interest." (A similar concept exists under Rule 4:26-3(c), which allows the court to designate a member of a class to represent the other members of a class in a court action.) Of course, principles under our existing court rules, such as the "vertical virtual representation" under Rule 4:26-3(a) still govern court proceedings involving trusts.

Under Rule 4:26-3(b), "where a party to an action is the donee of a power of appointment of any type, it shall not be necessary to join the potential or permissible appointees of the powers or takers in default." The Trust Code contains its own provision allowing representation by a holder of a power of appointment, but it seems to be narrower in scope than the principle under our court rules. *See N.J.S.A.* 3B:31-14(a) (providing a holder of a *general testamentary* power of

appointment can represent and bind "persons whose interests, as permissible appointees, takers in default, or otherwise are subject to the power").

The Trust Code also allows a guardian of the property to appear and represent a minor or incapacitated person in an action, and a guardian of the person to represent his or her interest if there is no guardian of the property. *N.J.S.A.* 3B:31-15(a)-(b). If no guardian has been appointed, a parent may appear and represent the minor. *N.J.S.A.* 3B:31-15(f). In addition, an agent may represent a principal (if the agent has authority to act with respect to the particular issue), a trustee may represent and bind beneficiaries of a trust, and a personal representative may represent those interested in an estate. *N.J.S.A.* 3B:31-15(c)-(e). Of course, no conflict of interest can exist between the representative and the person represented. *N.J.S.A.* 3B:31-15.

5. DIRECTED TRUSTS

In recent years, jurisdictions have been adopting legislation that recognize trusts in which a grantor can divide trust administration roles between the trustee and a third party decision maker. Put another way, the various roles and responsibilities of a trustee (i.e., the trustee's roles as custodian, administrator, investment manager, distribution director, accountant and other various roles) can be divided between different parties. This legislation has also allowed grantors to assign new protective roles to third party decision makers outside the scope of the trust administration. All of these trusts are typically referred to as "Directed Trusts."

To put it very simply, a "Directed Trust" is a trust under which a designated third party decision maker, who is not the trustee, is assigned a role in connection with the trust's administration.

That third party decision maker (who I will refer to as a "Trust Director") may be assigned a designated aspect, or aspects, of the trust administration that would otherwise be handled by the trustee[3] (a "Power of Direction," discussed in more detail below). In that case, responsibility for the administration of the trust is bifurcated. That third party decision maker may also be assigned an entirely different role that falls outside the scope of a trustee's duties (a "Power of Protection," also discussed in more detail below).

Directed trusts have been long recognized under New Jersey common law. *Ames v. Bank of Nutley*, 178 A. 363, 364 (N.J. Ch. 1935) (grantor retained power to direct trustee's investments), *aff'd per curiam*, 183 A. 172 (1936); *Ditmars et al. v. Camden Trust Co. et al.*, 10 N.J. Super. 306 (Ch. Div. 1950), modified, 10 N.J. 471 (1952) (trustee not required to seek court instruction regarding proposed sale of trust securities, where life beneficiary, whose consent to sale was required under will, did not consent to such sale). That older case law, however, did not shed much light on the nature or roles of Trust Directors and Directed Trustees nor did it extensively address the governance of directed trusts. Thus Trust Directors and Directed Trustees were forced to act without much law to guide them in navigating their powers and obligations.

The majority of states in the United States have now adopted directed trust statutes. One of those states is New Jersey, which has in fact adopted two such statutes under the Trust Code. The first statute -- N.J.S.A. 3B:31-61 (New Jersey's "Power to Direct" statute) -- is a modified adaptation of the Uniform Law Commission's UTC 808. [A redlined comparison showing how UTC 808 was modified to form N.J.S.A. 3B:31-61 is attached to these materials as

[3] I will refer to the trustee of a directed trust as a "Directed Trustee."

Exhibit "A."] New Jersey's Power to Direct statute governs the role of Trust Directors and Directed Trustees in general. *See* N.J.S.A. 3B:31-61.

The second statute -- N.J.S.A. 3B:31-62 (New Jersey's "Powers to Direct Investment Functions") -- is not based on any statute found in the Uniform Trust Code. That second statute is instead a modified adaptation of Delaware's own directed trust statute (12 Del. Code 3313). [A redlined comparison showing how 12 Del. Code 3313 was modified to form N.J.S.A. 3B:31-62 is attached to these materials as Exhibit "B."] New Jersey's Power to Direct Investment Functions statute governs the roles of Trust Directors and Directed Trustees only to the extent the Trust Director can direct investment of trust assets.

Put another way, while New Jersey's Power to Direct statute (N.J.S.A. 3B:31-61) seems to be a statute of general application to directed trusts, New Jersey's Powers to Direct Investment Functions statute (N.J.S.A. 31-62) is more limited in scope as it only governs directed trusts that empower a Trust Director to control trust investments.

a. <u>Directed Trust Statute #1: New Jersey's "Powers to Direct" Statute Based on UTC 808 [N.J.S.A. 3B:31-61]</u>

N.J.S.A. 3B:31-61 modifies UTC 808 in two significant ways. First, with respect to a trustee's obligation to comply with the direction of the Trust Director, the statute provides as follows:

> (i)f the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with a <u>written</u> exercise of the power unless the attempted exercise is contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. [N.J.S.A. 3B:31-61(b) (emphasis added)]

Accordingly, while New Jersey legislature adopted the mandate that the trustee act in accordance with directions of the Trust Director under UTC 808(b), that obligation to comply is

limited to the written directions of the Trust Director. *See N.J.S.A.* 3B:31-61(b). [*See* Exhibit A attached to these materials.]

The second significant modification made by the New Jersey legislature is to UTC 808(d)'s categorization of a Trust Director as "presumptively a fiduciary." New Jersey deleted the reference to the Trust Director as "presumptively a fiduciary." *See N.J.S.A.* 3B:31-61(d). Accordingly, it also deleted reference to the Trust Director's liability for a loss resulting from a "breach of fiduciary duty." *See id*. [*See* Exhibit A attached to these materials.] New Jersey's statute provides as follows:

> A person[4], other than a beneficiary, who holds a power to direct is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from the holder's failure to act in good faith. [N.J.S.A. 3B:31-61(d) (emphasis added)]

N.J.S.A. 3B:31-61 (b) (discussed above), however, states that the Directed Trustee cannot act in accordance with a Trust Director's written exercise of the Trust Director's power if "the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." *N.J.S.A.* 3B:31-61(b) (emphasis added). Thus while the New Jersey legislature apparently deliberately deleted the Uniform Law Commission's recognition that the Trust Director is "presumptively a fiduciary", it continues to reference fiduciary duties owed by the Trust Director.

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[4] While it is not specifically explained within N.J.S.A. 3B:31-61, the "person" who may hold a power to direct might include an individual or an entity, such as a bank. *See N.J.S.A.* 3B:1-1 (providing that as used under Title 3B, the term "Person" means an "individual or an organization").

b. Directed Trust Statute #2: New Jersey's "Powers to Direct Investment Functions" Statute Based on Delaware's Directed Trust Statute [N.J.S.A. 3B:31-62]

In addition, under its Trust Code, New Jersey adopted a second directed trust statute -- N.J.S.A. 3B:31-62 (New Jersey's "Powers to Direct Investment Functions" statute) -- which works in conjunction with N.J.S.A. 3B:31-61. This second New Jersey directed trust statute is not found anywhere in the Uniform Law Commission's Uniform Trust Code. It is instead based on Delaware's directed trust statute -- 12 Del. Code 3313.

Delaware's directed trust statute unambiguously provides that, as a general matter, a Trust Director is a fiduciary. 12 Del. Code 3313. New Jersey adopted Delaware's statute, but only with respect to Trust Directors who have authority to direct trust investments. *N.J.S.A.* 3B:31-62.[5]

New Jersey refers to this Trust Director as an "Investment Adviser." *N.J.S.A.* 3B:31-62(a). Under this statute,

> (w)hen one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, such persons shall be considered to be investment advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides."[6] [*Id* (emphasis added).]

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[5] To the extent a Trust Director is given authority to direct other aspects of the trust administration (for example, the trust's distributions), it would seem that Trust Director's actions would be governed by N.J.S.A. 3B:31-61 (not N.J.S.A. 3B:31-62).

[6] In contrast, Delaware's Directed Trust statute provides that "(w)hen one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity." 12 Del. Code 3313.

N.J.S.A. 3B:31-62 includes substantial exculpatory provisions that protect a Directed Trustee who must follow the directions of an Investment Adviser. It confirms that if the trustee acts in accordance with the Investment Adviser's instructions regarding trust investments, "then except in cases of willful misconduct or gross negligence[7] on the part of the [Directed Trustee] so directed, the [Directed Trustee] shall not be liable for any loss resulting directly or indirectly from any such act." *N.J.S.A.* 3B:31-62(b). Moreover, "except in cases of willful misconduct or gross negligence" by the Directed Trustee, the Directed Trustee is not "liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser's failure to provide such consent[8] after having been requested to do so by the [Directed Trustee]." *N.J.S.A.* 3B:31-62(c).

The statute also specifies that if the Directed Trustee must follow the direction of an Investment Adviser regarding investment decisions, unless "the governing instrument provides otherwise, the Directed Trustee shall have no duty to:

> (1) Monitor the conduct of the investment adviser;
>
> (2) Provide advice to the investment adviser or consult with the investment adviser; or
>
> (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the [Directed Trustee] would or might have exercised the [Directed Trustee's] own discretion in a manner different from the manner directed by the investment adviser." [N.J.S.A 3B:31-62(e) (emphasis added).]

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[7] The words "gross negligence" are absent from the Delaware statute. *See* 12 Del. Code 3313. Under Delaware law, the directed trustee is not liable "except in cases of willful misconduct." *Id*.

[8] Under Delaware law, the Directed Trustee is also not liable for "any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's objection to such act." 12 Del. Code 3313.

While the Directed Trustee has no duty to engage in such actions, should the trustee choose to engage in certain actions, the trustee is granted substantial protections. The statute provides that

> (a)bsent clear and convincing evidence to the contrary, the actions of the [Directed Trustee] pertaining to matters within the scope of the investment adviser's authority, such as confirming that the investment adviser's directions have been carried out and recording and reporting actions taken at the investment adviser's direction, shall be presumed to be administrative actions taken by the [Directed Trustee] solely to allow the [Directed Trustee] to perform those duties assigned to the [Directed Trustee] under the governing instrument. Such administrative actions shall not be deemed to constitute an undertaking by the [Directed Trustee] to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser's authority. [N.J.S.A. 3B:31-62(e) (emphasis added).]

Thus, while a Directed Trustee has no obligation to monitor the Investment Adviser or otherwise participate in the investment of the trust assets, should the trustee choose to do so, the trustee will not become liable for investment decisions.

6. NONJUDICIAL SETTLEMENT AGREEMENTS

The Trust Code provides a mechanism to address certain trust administration matters and avoid court proceedings in the process. *N.J.S.A.* 3B:31-11. To some degree, nonjudicial agreements have always existed to resolve potential disputes – for example, approval of informal trust accountings by beneficiaries, outside of court, have long been recognized as enforceable under our law. *See*, *e.g.*, *Estate of Lange*, 75 N.J. 464 (1978).

A nonjudicial settlement agreement, however, can be entered "with respect to any matter involving a trust." *N.J.S.A.* 3B:31-11(b). The only limitations are that it cannot "violate a material purpose of the trust", it must include "terms and conditions that could be properly approved by the court under this act or other applicable law", and it cannot create a result

"contrary to other sections of Title 3B of the New Jersey statutes, including, but not limited to, terminating or modifying a trust in an impermissible manner." *N.J.S.A.* 3B:31-11(c), (f).

To achieve a nonjudicial settlement agreement under the Trust Code, all "interested persons" – all "persons whose consent would be required in order to achieve a binding settlement to be approved by the court" – must be parties to the agreement. *N.J.S.A.* 3B:31-11(a). N.J.S.A. 3B:31-11 describes examples of matters that may be resolved by nonjudicial settlement, such as, for example, the construction of a trust agreement or resolving the liability of a trustee. *N.J.S.A.* 3B:31-11(d).

7. MODIFICATION OR TERMINATION OF TRUSTS

Traditionally, as estate planners, we have advised our clients that in establishing an irrevocable trust, the grantor cannot later modify or reform the agreement without a (potentially expensive and lengthy) court proceeding. New Jersey has long recognized the doctrine of probable intent, established under our common law, as a tool to reform trusts. *See Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962). New Jersey courts will apply that common law or statutes under our probate code (N.J.S.A. 3B:3-34 through 48) to reform a trust so that it will conform to the grantor's probable intent. .

In adopting the Trust Code, our legislature has made the modification process much simpler. New procedures now exist under which one can modify or terminate an irrevocable trust without resorting to a court proceeding. This is an important development as even the most carefully and thoughtfully drafted instruments can warrant a revision where changed circumstances arise in the future. For example, tax laws, the personal circumstances or financial

circumstances of a beneficiary, or the administrative requirements imposed on fiduciaries may change.

The Trust Code incorporates multiple trust modification statutes. For example, the Trust Code now allows a noncharitable irrevocable trust to be modified or terminated by consent of the trustee and all beneficiaries (without the involvement of the court) "if the modification or termination is not inconsistent with a material purpose of the trust." N.J.S.A. 3B:31-27(a). In addition, all of the beneficiaries of a noncharitable irrevocable trust can agree to modify the trust (apparently without the participation of a trustee) "if the court concludes that modification is not inconsistent with a material purpose of the trust." *Id.* Likewise, all beneficiaries can agree to terminate a trust "if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." N.J.S.A. 3B:31-27(b).

If not every beneficiary consents to the modification or termination under N.J.S.A. 3B:31-27(a) or (b), the modification or termination may nonetheless "be approved by the court if the court is satisfied that (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected." *N.J.S.A.* 3B:31-27(e).

The Trust Code further codifies certain common law provisions allowing the court to reform a trust. For example, under the cy pres doctrine, a court may alter a particular charitable purpose designated in an instrument if the purpose becomes impossible or impracticable to fulfill. *See Howard Savs. Inst. of Newark v. Peep*, 34 *N.J.* 494, 500-01 (1961). That doctrine was adopted and expanded under the Trust Code. *See N.J.S.A.* 3B:31-29. Under that statute, if the charitable trust becomes "unlawful, impracticable, impossible to achieve, or wasteful", the court may modify or terminate the charitable trust "by directing that the trust property be applied

or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes." N.J.S.A. 3B:31-29(a).

The doctrine of equitable deviation has also long been recognized under New Jersey common law and governs charitable trusts as well as noncharitable trusts. Under that doctrine, a court can alter an administrative provision of a trust where compliance has become "impossible, illegal or in conflict with the essential purpose of the trust." *Howard Savs. Inst. of Newark*, 34 *N.J.* at 502. In conformity with that doctrine, under N.J.S.A. 3B:31-28, the court may "modify the administrative or dispositive terms of a [charitable or noncharitable] trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." *N.J.S.A.* 3B:31-28(a). The statute mandates, however, that to the extent possible, such modification or termination be in accordance with the settlor's probable intent. *Id*. In addition, the court may modify the administrative terms "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *N.J.S.A.* 3B:31-28(b).

The Trust Code includes other provisions that reinforce the court's power to reform a trust to conform to the settlor's probable intent in specific circumstances. For example, *N.J.S.A.* 3B:31-33 specifically permits a court to modify a trust to achieve the grantor's tax objectives. That issue was previously addressed in cases such as *In re Estate of Branigan*, 129 N.J. 324 (1992) and *In re Estate of Ericson*, 74 N.J. 300 (1977). The Trust Code also adopts a provision allowing for termination of uneconomical trusts (law that already exists in other jurisdictions, such as New York). *N.J.S.A.* 3B:31-30 (authorizing a trustee to terminate a trust having a value of less than $100,000 without court approval after notice to qualified beneficiaries).

Exhibit A
Comparison of UTC 808 to N.J.S.A. 3B:31-61

~~UTC 808~~N.J.S.A. 3B:31-61. Powers to Direct.

a. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

b. If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with ~~an~~a written exercise of the power unless the attempted exercise is ~~manifestly~~ contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a ~~serious~~ breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

c. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

d. A person, other than a beneficiary, who holds a power to direct is ~~presumptively a fiduciary who, as such, is~~ required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from ~~breach of a fiduciary duty~~the holder's failure to act in good faith.

Exhibit B
Comparison of 12 Del. Code 3313 to N.J.S.A. 3B:31-62

~~12 Del. Code 3313. Advisers~~N.J.S.A. 3B:31-62. Powers to Direct Investment Functions.

~~(~~a~~) Where 1~~.When one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, ~~distribution decisions or other decision of the fiduciary,~~ such persons shall be considered to be investment advisers and fiduciaries when exercising such authority ~~provided, however, that~~unless the governing instrument ~~may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity~~otherwise provides.

~~(~~b~~).~~If a governing instrument provides that a fiduciary is to follow the direction of an ~~adviser or is not to take specified actions except at the direction of an~~investment adviser, and the fiduciary acts in accordance with such a direction, then except in cases of ~~wilful~~willful misconduct or gross negligence on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

~~(~~c~~).~~If a governing instrument provides that a fiduciary is to make decisions with the consent of an investment adviser, then except in cases of ~~wilful~~willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser's ~~objection to such act or~~ failure to provide such consent after having been requested to do so by the fiduciary.

~~(~~d~~).~~For purposes of this section, ~~unless the terms of the governing instrument provide otherwise,~~ "investment decision~~""~~ means with respect to ~~all of the trust's investments (or, if applicable, to investments specified in the governing instrument)~~any investment, the retention, purchase, sale, exchange, tender or other transaction ~~or decision~~ affecting the ownership thereof or rights therein ~~(including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers,~~ and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

~~(~~e~~).~~Whenever a governing instrument provides that a fiduciary is to follow the direction of an investment adviser with respect to investment decisions~~, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser~~, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1)Monitor the conduct of the investment adviser;

(2)Provide advice to the investment adviser or consult with the investment adviser; or

(3)Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the investment adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the investment adviser's authority ~~(~~, such as confirming that the investment adviser's directions have been carried out and recording and reporting actions taken at the investment adviser's direction~~)~~, shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument ~~and such~~. Such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser's authority.

~~(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:~~

~~(1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;~~

~~(2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and~~

~~(3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.~~

MEAN WHAT YOU SAY WHEN DRAFTING TRUSTS

WITH SAMPLE LANGUAGE

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OVERVIEW OF TRUST DRAFTING

Trust law derives from the same body of law that governs all those things in Ancient England which a Chancellorship provides for – benevolent protection for what were once terms “lunatics and idiots”, the passage of property from deceased to living heir, and the separation of the vulnerable from the vicissitudes of a modern life and economy. The Chancery Courts, therefore, were the place for doing what “ought to be done” for those who are protected, a term more commonly known as equity. The equity courts today are responsible for holding protectors accountable to their wards, and requiring the active enforcement of duties and responsibilities upon those who are appointed to act as fiduciaries.

OVERVIEW OF TRUST DRAFTING

- A trust is a division of the responsibilities of ownership of a thing from the enjoyment of ownership of a thing.
- NJ UTC enacted July 17, 2016, NJSA 3B:31-1, et. Seq. governs trustees duties and powers, relations among trustees, and the beneficiary's rights and interests.
- NJSA 3B 31-5 states in relevant part, "b. The terms of a trust prevail over any provision of this act except:"
- In essence, trusts are very flexible vehicles for creating the rules for the use of one's property – they can say almost anything
- Drafting is the art of making a trust say what you intend for it to accomplish

OVERVIEW OF TRUST DRAFTING

- In case you're wondering, those exceptions:

(1) the requirements for creating a trust;

(2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(4) the power of the court to modify or terminate a trust under N.J.S.3B:31-26 through N.J.S.3B:31-33 ;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in article 4 of this act; 1

(6) the power of the court under N.J.S.3B:31-47 to require, dispense with, or modify or terminate a bond;

(7) the duty under subsections a. and b. of N.J.S.3B:31-67 to respond to the request of a qualified beneficiary of an irrevocable trust who has attained the age of 35 years for a copy of the trust instrument or for other information reasonably related to the administration of the trust;

(8) the effect of an exculpatory term under N.J.S.3B:31-77 ;

(9) the rights under N.J.S.3B:31-79 through N.J.S.3B:31-81 of a person other than a trustee or beneficiary;

(10) periods of limitation for commencing a judicial proceeding; and

(11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

TRUST CREATION

- "The trust is called the "Jane Doe Irrevocable Trust Agreement." However, the following format should be used for taking title to assets: "John Doe, Trustee of the Jane Doe Irrevocable Trust Agreement dated March 10, 2020." For the purpose of transferring property to the trust or identifying the trust in any beneficiary or pay-on-death designation, any description referring to the trust is effective if it reasonably identifies the trust."

- Irrevocable Trust Agreement

TRUST CREATION

- "This Trust Agreement is entered into by **Donald Duck** residing at 123 Nottingham Way, Duckburg, New Jersey, the Settlor, and **Donald Duck** and **Daisy Duck**, residing at 123 Nottingham Way, Duckburg, New Jersey as Trustees. The Trust created herein shall be known as the "DONALD DUCK 2020 CHARITABLE REMAINDER UNITRUST AGREEMENT".

- Charitable Remainder Trust

TRUST DISTRIBUTIONS

- "My Trustee shall pay the distribution amount set forth below to or for the benefit of my son A during his life, in quarter-annual installments."

- Mandatory Distribution Trust.

TRUST DISTRIBUTIONS

- "During the lifetime of the Grantor, the Trustee shall have the power to pay, or apply for the benefit of Grantor's spouse, such amounts of trust income and principal as Trustee, in its sole discretion, for the health, education, maintenance, and support of said spouse."

- Support trust

TRUST DISTRIBUTIONS

- "The Trustee may distribute so much, all or none, of the net income and principal, as the trustee, in its sole and absolute discretion, shall deem appropriate, to or among any one or more of the beneficiaries hereinafter named, in equal or unequal shares."

- Discretionary Trust

TRUST DISTRIBUTIONS

- The Trustee shall have no right, power, privilege, or authority to invade or distribute income or principal of the trust to or for Settlor's benefit, under any circumstances.
- Restricted Distribution Clause

TRUST DISTRIBUTIONS

- "The Trustee may distribute so much, all or none, of the net income and principal of the Trust, as the trustee, in its sole and absolute discretion, shall deem reasonably necessary for the health, education, support, or maintenance of the beneficiary."

- Hybrid discretionary/support trust

TRUST DISTRIBUTIONS

- "The Trustees hereby acknowledge receipt of the property set forth in Schedule A, to have and to hold the same in Trust, nevertheless, to use and apply such part, all, or none of the net income and principal of this trust on behalf of, or to pay such part, all, or none thereof to, the Settlor's wife and any, all, or none of Settlor's issue, at such times and in such amounts, equally or unequally, or to or for the benefit of any one or more of them to the exclusion of others, as the Trustees, in their sole and uncontrolled discretion see fit."

- Sprinkle Trust provision

TRUST DISTRIBUTIONS

- "The Trustee may distribute so much, all or none, of the net income and principal of the Trust, as the trustee, in its sole and absolute discretion, shall deem reasonably necessary to provide for my wife in the manner to which my wife has been accustomed immediately prior to my death."

- Standard of Living as an Ascertainable Standard

TRUST DISTRIBUTIONS

- "In an effort to provide the Trustee with guidance in making distributions under the standard provided in subsection ___ above, the Trustee may consider such circumstances and factors as the Trustee believes are relevant, including but not limited to the other income and assets available to the beneficiary, the character and habits of the beneficiary including the beneficiary's stated life plan and goals and the beneficiary's ability to handle money, or the extent to which any such distribution could contribute to the beneficiary's poor behavior or sense of entitlement."

- Supplement to an ascertainable standard clause

TRUST DISTRIBUTIONS

"In an effort to provide the Trustee with guidance in making distributions under the standard provided in subsection ___ above, the Trustee may consider…"

- "such circumstances and factors as the Trustee believes are relevant"
- "other income and assets available to the beneficiary"
- "the character and habits of the beneficiary"
- "the beneficiary's stated life plan and goals"
- "the beneficiary's ability to handle money"
- "the extent to which any such distribution could contribute to the beneficiary's poor behavior or sense of entitlement."

- Other types of distribution standards

15

TRUST DISTRIBUTIONS

- "The Trustees shall distribute to each surviving child all of the principal of his or her separate Trust as follows: (i) one-third (1/3) thereof when such child attains or has attained age thirty-five (35); (ii) one-half (1/2) thereof when such child attains or has attained age forty (40) and (iii) the remainder thereof when such child attains or has attained age forty-five (45)."

- Distribution patterns

TRUST DISTRIBUTIONS

- "My Trustee, other than an Interested Trustee, may distribute to any one or more of the Lifetime Beneficiaries as much of the net income and principal of the trust property as my Trustee may determine advisable for any purpose. If my Trustee is an Interested Trustee, my Trustee may distribute to any one or more of the Lifetime Beneficiaries as much of the net income and principal of the trust as my Trustee determines is necessary or advisable for their health, education, maintenance, and support. A distribution to or for the benefit of a Lifetime Beneficiary shall be charged to the trust as a whole rather than against the beneficiary's ultimate share. My Trustee shall have no right, power, privilege, or authority to invade or distriBute income or principal of the trust to or for my benefit. In this agreement, "Lifetime Beneficiary" does not include me."

- Distribution for Asset Protection

TRUST DISTRIBUTIONS

- "If, under the provisions of this Article above, a share or portion thereof becomes distributable to a descendant of a child of Settlor who has not attained the age of twenty-one (21), and for whom no other Trust or share is held under this Article, the Trustees shall retain such share or portion in Trust as a separate Trust, and shall pay to such descendant of a child of Settlor all of the income and so much of the principal thereof as the Trustees determine to be required from time to time for the support, education and medical care of such descendant of a child of Settlor."

- Distribution Patterns to underage beneficiaries

TRUST DISTRIBUTIONS

- "Beneficiary shall have the power in each calendar year to withdraw from the principal of the trust an amount not to exceed the greater of $5,000 or five percent of the value of the principal of the trust determined as of December 31 of the calendar year. This power may be exercised in whole or in part each year by a written notice delivered to the Trustee. The power of withdrawal is non-cumulative, so that he the power of withdrawal with respect to a particular calendar year can only be exercised during the calendar year."

- 5x5 Power.

TRUST DISTRIBUTIONS

- "The Trustee may distribute income to all of my sons who are over the age of 30 and married to a Catholic girl."
- "No distributions shall be made to any beneficiary the Trustee reasonably believes has a drug or alcohol dependency and that the resources of the Trust, if distributed, would facilitate continued abuse."

- Distribution limitations.

MATERIAL PURPOSE OF TRUST

- "It is my intent in the establishment of this Trust to provide for the care, maintenance, support, health, enjoyment, and education of my daughter."

- Declaring the purpose of the Trust.

MATERIAL PURPOSE OF TRUST

- "I intend that the beneficiaries of the separate trusts created by my Trustee upon my death under the terms of this Agreement with respect to the trusts interests in any Qualified Retirement Plan qualify as Designated Beneficiaries after my death under the minimum distribution rules contained in Section 401(a)(9) of the Internal Revenue Code and applicable regulations."

- Declaring the purpose of the Trust as a conduit

MATERIAL PURPOSE OF TRUST

- "I intend that the beneficiaries of the separate trusts created by my Trustee upon my death under the terms of this Agreement with respect to the trusts interests in any Qualified Retirement Plan qualify as Designated Beneficiaries after my death under the minimum distribution rules contained in Section 401(a)(9) of the Internal Revenue Code and applicable regulations."

- Declaring the purpose of the Trust.

MATERIAL PURPOSE OF TRUST

- I transfer to my Trustee the property listed in Schedule A, attached to this agreement, to be held on the terms and conditions set forth in this instrument. I retain no right, title or interest in the income or principal of this trust or any other incident of ownership in any trust property. My Trustee shall have no right, power, privilege, or authority to invade or distribute income or principal of the trust to or for my benefit, under any circumstances. Notwithstanding any provision of this agreement to the contrary, under no circumstances may I serve as Trustee at any time.

- Declaring the purpose of the trusts as asset protection from creditors

MATERIAL PURPOSE OF TRUST

- 'Settlor is creating this trust as part of her estate plan to ensure efficient management, administration, and protection of the trust assets for her beneficiaries. In order to maximize the benefit to the trust beneficiaries, Settlor gives the Trustee broad discretion with respect to the management, distribution, and investment of assets in the trust. The objective is that the assets in this trust will not be subject to the claims of any beneficiary's creditors. All provisions of this agreement shall be construed so as to accomplish Settlor's objectives. Any beneficiary has the right at any time to release, renounce, or disclaim any right, power, or interest that might be construed or deemed to defeat Settlor's objectives."

- Declaring purpose of Trust for estate planning/tax considerations

MATERIAL PURPOSE OF TRUST

- My Trustee may not participate in the exercise of a power or discretion conferred under this agreement that would cause the Trustee to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code. Specifically, the Trustee may not use such powers for his or her personal benefit, nor for the discharge of his or her financial obligations.
- Asset protection for tax purposes

SPENDTHRIFT CLAUSE

- "No interest of a beneficiary in the principal or income of this trust may be anticipated, assigned, or encumbered, or subjected to any creditor's claims or legal process prior to the actual distribution to the beneficiary"

- Spendthrift clause for asset protection.

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- Donald Duck and Daisy Duck have been designated as the Trustees under this Trust Agreement. If either Donald Duck or Daisy Duck fail or cease so to serve for any reason, then Settlor's children Huey and Louie shall be appointed as Successor Co-Trustees. If both Donald Duck and Daisy Duck shall fail or cease so to serve for any reason, then Huey and Louie shall continue so to serve (or, if applicable, be appointed as Successor Co-Trustees). If either Huey or Louie shall fail or cease so to serve for any reason the other shall continue so to serve as a Successor Trustee. If both Huey and Louie shall fail or cease so to serve as Co-Trustees for any reason, then an individual or institution designated in a written instrument executed by the Trustees then serving which is witnessed shall be appointed as Successor Trustee. If no such written designation can be discovered, then such designation of Successor Trustee shall be made by majority vote of the Recipients (non-charitable beneficiaries hereunder).

- Standard trustee succession language

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "Any individual designated (either in Paragraph 1 of this Article or in accordance with this paragraph) as a Trustee or successor Trustee of a trust created or to be created under this agreement, may from time to time designate any individual or bank, wherever situated, as a successor Trustee of such trust to succeed the individual making such designation, for the balance of the term of such trust (and may designate an alternate successor or successors if the successor first designated shall be unable to commence acting as Trustee), and prior to the time such individual or bank so designated as a successor Trustee commences to act, may revoke such designation."

- Power to substitute or change individual or non-corporate Trustees.

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "Any corporate fiduciary serving under this agreement as a Trustee must be a bank, trust company, or public charity that is qualified to act as a fiduciary under applicable federal and state law and that is not related or subordinate to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code."

- Language appointing a bank or corporate Trustee

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "The validity and construction of this will and of the trusts created under this will shall be determined by the laws of the state of New Jersey; except that any sole Trustee who resides in a state other than New Jersey may, by a written instrument, elect to have the situs of the trust administered by such Trustee and the assets of such trust changed to the state in which such Trustee resides and have the laws of the state in which such Trustee resides apply to the construction and administration of such trust."

- Power to change situs of Trust

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "Settlor has the limited testamentary power to appoint the remaining principal and the accrued or accumulated income of the trust to or for the benefit of Settlor's descendants and their spouses. Settlor may not exercise this power of appointment for the benefit of herself, her creditors, her estate, or the creditors of her estate. Upon Settlor's death, the Trustee will administer any unappointed remaining trust property as provided in the Articles that follow."

- Limited Power to Appoint in a testamentary instrument

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "The Trustees shall have the power to sever any trust on a fractional basis into two or more separate trusts for any reason; to allocate to a separate trust a specific amount in order to reflect a partial disclaimer or differences in federal tax attributes, satisfy any federal tax requirement or election, or reduce potential generation-skipping transfer tax liability; and to consolidate two or more trusts having substantially similar terms into a single trust."

- Power to split trusts.

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "Grantor reserves the right to transfer to the Trustee any additional property and the right to substitute other property for that at any time held by the Trustee, provided that the property so substituted shall be of equal value to the property so replaced and such additional property shall be subject in all respects to the terms of this Trust Agreement."

- Power of Substitution of Assets.

NON-JUDICIAL
ALTERING OR AMENDING TRUSTS

- "Grantor appoints ABC in a non-fiduciary capacity, to serve as Trust Protector of all trusts created hereunder. ABC, or any successor Trust Protector, shall have the authority to remove any Trustee serving hereunder, appoint a successor Trustee, including himself, to fill vacancies in the office of Trustee, not otherwise filled by specific direction hereunder, by an instrument in writing delivered to the then acting Trustees of such trusts, if any, and the current beneficiaries who are over the age of 21 and not under a legal disability."

- Appointment of a Trust Protector.

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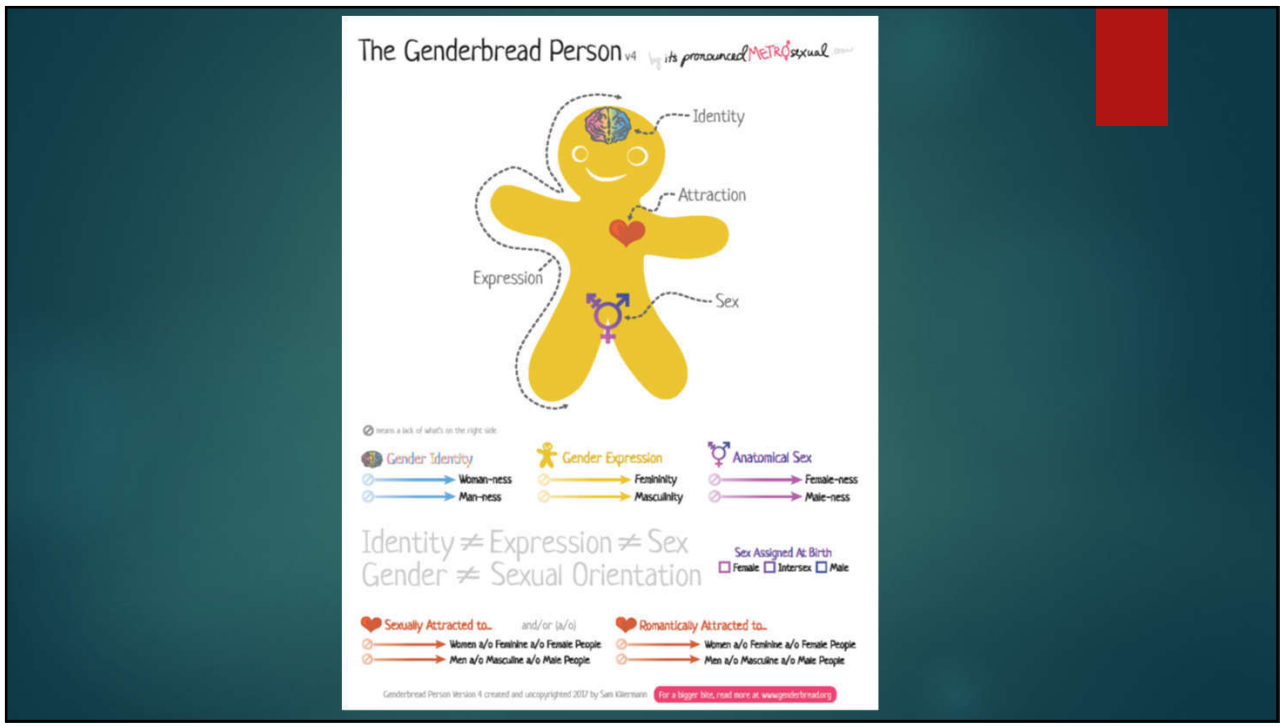
1

How Many Letters are there?

- LGBT became
- LGBTQ became
- LGBTQI became
- LGBTQIA, but
- LGBTQ+ is sufficiently inclusive in writing

- L stands for "Lesbian"
- G stands for "Gay"
- B stands for "Bisexual"
- T stands for "Transgender"
- Q stands for "Queer" (an umbrella term for any non-heterosexual or non-cis-gender person)
- I stands for "Intersex" (many of whom don't want to be associated with the LGBT grouping)
- A stands for "Asexual"

2


The Genderbread Person v4
it's pronounced METROsexual
Identity
Attraction
Expression
Sex
Gender Identity
Woman-ness
Man-ness
Gender Expression
Femininity
Masculinity
Anatomical Sex
Female-ness
Male-ness
Identity ≠ Expression ≠ Sex
Gender ≠ Sexual Orientation
Sex Assigned At Birth
Female Intersex Male
Sexually Attracted to..
and/or (a/o)
Women a/o Feminine a/o Female People
Men a/o Masculine a/o Male People
Romantically Attracted to..
Women a/o Feminine a/o Female People
Men a/o Masculine a/o Male People
Genderbread Person Version 4 created and uncopyrighted 2017 by Sam Killermann
For a bigger bite, read more at www.genderbread.org

3

GENDER IDENTITY

GENDER – an identity tied to expectations and assumptions tied to sex. Gender is a spectrum, and people identify broadly as male, female, or non-binary.

CIS-GENDER – a gender identity that conforms to sex identified at birth

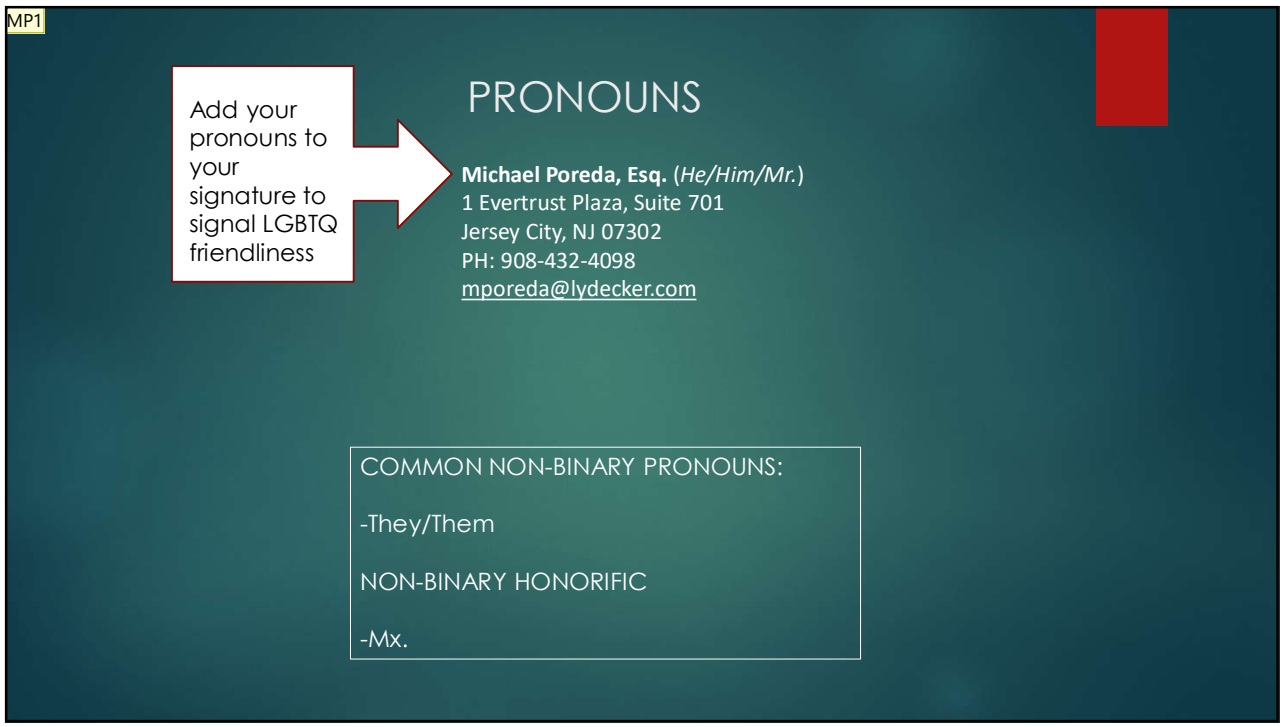
TRANS-GENDER – a gender identity that does not conform to sex identified at birth

TRANS MAN – A man identified as female at birth

TRANS WOMAN – A woman identified as male at birth

NON-BINARY – a blanket term for a people who identify as neither (or both) male or/and female. Sub-categories include: genderqueer, gender fluid, agender, transmasculine, transfeminine

4


MP1
Add your pronouns to your signature to signal LGBTQ friendliness
PRONOUNS
Michael Poreda, Esq. (He/Him/Mr.)
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Jersey City, NJ 07302
PH: 908-432-4098
mporeda@lydecker.com
COMMON NON-BINARY PRONOUNS:
-They/Them
NON-BINARY HONORIFIC
-Mx.

5

Outdated Terminology

- Sexual Preference (use "sexual orientation")
- Preferred Pronouns (just use "pronouns")
- Preferred Name (use "chosen name")
- Homosexual or Gay "Lifestyle"
- Transsexual (use "transgender")
- Transvestite (use "transgender")

6

Persistence of the "Dead Name"

- Transgender clients typically call a former name a "dead name"
- New Jersey permits a person to change their name simply by assuming that name.
- Make sure the client goes through a judicial name change.
- Make sure the name has been changed with Social Security.
- Make sure all estate-planning documents are updated to reflect the "chosen name."
- Be cognizant that dead names tend to persist long after judicial name changes.

7

Complex Family Issues that May Require Estate Planning

- Client has a previous family and then moves on to a new family relationship.
- Non-Genetic Parentage
  - Second-Parent adoption
  - In NJ, there is simplified process for couples who are married/in a civil union at the time a child genetically-related to other parent is born to get a judgment of parentage.
- Polyamorous families.
- Unmarried partners.

8

Why More LGBT Elders are Unmarried

- Historical Stigma of LGBT identity
- Beliefs about marriage as an institution
- Civil Union or Domestic Partnership may have been utilized and deemed adequate by the couple
- Polyamorous family arrangements

9

NJ Marriage Equality

2003 – Domestic Partnership Act

2006 – Lewis v. Harris – NJ Supreme Court finds domestic partnership are an inadequate substitute for marriage

2006 – Civil Union Act

2012 – Chris Christie vetoes Marriage Equality Bill

2013 – U.S. Supreme Court over-rules Defense of Marriage Act in *Windsor v. United States*

2013 - Garden State Equality v. Dow finds NJ Civil Unions are inadequate under the N.J. Constitution in light of *Windsor v. United States*

2015 – U.S. Supreme Court guarantees marriage equality nationally in *Obergefell v. Hodges*

2020 – Justices Alito and Thomas suggest they would overturn *Obergefell* if given the opportunity in a decision denying certiorari to the case *Ermold v. Davis*

2022 – NJ Marriage Equality legislation signed into law

2023 – Federal Respect for Marriage Act (not a codification of *Obergefell v. Hodges)*

2024 WL 730342
Only the Westlaw citation is currently available.

THOMAS A. FREDELLA and KELLY A. KEARNY, Plaintiffs-Appellants,
v.
TOWNSHIP OF TOMS RIVER, STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, and STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY-FLEET MANAGEMENT, Defendants-Respondents.

DOCKET NO. A-3196-21
|
Argued January 31, 2024
|
Decided February 22, 2024

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3198-17.

Attorneys and Law Firms

Phillip C. Wiskow argued the cause for appellants (Gelman Gelman Wiskow & McCarthy, LLC, attorneys; Phillip C. Wiskow, on the briefs).

Thomas E. Monahan argued the cause for respondent Township of Toms River (Dasti, McGuckin, McNichols Connors Anthony & Buckley, attorneys; Thomas E. Monahan, of counsel; Patrick F. Varga, on the brief).

Before Judges Firko, Susswein, and Vanek.

Opinion

PER CURIAM

This appeal arises out of a negligence lawsuit filed by plaintiffs Thomas A. Fredella (plaintiff)[1] and his now ex-wife, Kelly A. Kearney, against defendants Township of Toms River (the Township), State of New Jersey Department of Transportation (DOT), and State of New Jersey Department of the Treasury-Fleet Management arising out of a motor vehicle accident. On November 5, 2016, at 9:10 p.m., plaintiff struck a parked DOT truck that was responding to a call from the Toms River Police Department to remove a deer carcass from Route 37.

Plaintiff drove into the back of the DOT truck, resulting in severe injuries to his right leg. When emergency medical technicians (EMTs) arrived and had difficulty locating a vein to administer medication to plaintiff, he told them that he had used heroin earlier that day. The Township claimed plaintiff was contributorily negligent and a proximate cause of the accident because he was inattentive while driving and was under the influence of heroin.

Prior to trial, plaintiff and Kearny reached a settlement with the DOT and the Department of the Treasury (the DOT settlement). A jury returned a verdict finding that all parties were responsible for the accident, allocating fault as follows: plaintiff sixty percent responsible; the Township twenty percent responsible; and the DOT twenty percent responsible. Based upon this verdict, plaintiff did not receive any award of damages.[2]

On appeal, plaintiff primarily challenges two trial court rulings, including the admission of the testimony of the Township's medical expert, Lawrence Guzzardi, M.D., without first holding a Frye/Daubert[3] hearing to determine whether the expert employed a reliable methodology. Dr. Guzzardi is an emergency room doctor and a toxicologist. Plaintiff filed three pre-trial motions objecting to Dr. Guzzardi testifying based on his expertise, arguing his opinion was an improper net opinion, and that the expert lacked the requisite expertise to offer testimony on the effect that heroin allegedly had on plaintiff's vision at the time of the accident. The trial court denied all of plaintiff's motions, finding Dr. Guzzardi had the requisite knowledge, training, and expertise to opine plaintiff was under the influence of heroin at the time of the accident. Plaintiff also contends the trial court erred in providing the Model Jury Charge on settling defendants.

For the reasons that follow, we remand for further proceedings and more detailed findings by the trial court addressing each of the discrete factors set forth in Daubert, as adopted with

certain conditions by our Supreme Court in the matter of In re Accutane Litig., 234 N.J. 340 (2018). We affirm, however, the trial court's decision to use the Model Jury Charge to instruct the jury on settling defendants.

I.

We summarize the facts from the record most significant to the issues plaintiff has raised on appeal.

A. The Accident

A motorist struck a deer while driving on Route 37 at approximately 7:00 p.m. on the day of plaintiff's accident. After the accident, its carcass lay across the right lane, with some innards and organs strewn into the center lane of the roadway. Officer Justin Lammer responded to the scene within five minutes, at 7:10 p.m. Lammer did not recall any details about the accident or seeing the deer and left the scene at approximately 7:54 p.m. At 8:12 p.m., DOT received a call from dispatch to remove the deer carcass.

At trial, Lammer agreed that per department policy, he was required to move animal carcasses to the side of the road if he could safely do so. Lammer stated if an officer could not move a carcass or any other type of obstruction from the road, the officer had to wait on the scene until the carcass was removed.

At 8:41 p.m. three DOT workers arrived—two in a pick-up truck with flashing lights and one in a safety truck with flashing lights and an arrow board—to direct traffic. The record is unclear as to whether the arrow board was lit at the time of the accident. The DOT workers did not set up any additional safety precautions, such as cones or signs. The DOT trucks were initially parked on the shoulder lane of Route 37, but about a minute before the accident, they moved off the shoulder and parked in the right lane to begin the carcass removal process.

Plaintiff drove onto Route 37 from an exit ramp off the Garden State Parkway. He recalled seeing taillights driving about "two football fields" ahead of him. After merging onto Route 37, plaintiff moved to the center lane, then back to the right lane, when he struck the rear of the DOT safety truck.[4] Plaintiff testified he did not see any vehicles ahead of him before he hit the truck and did not see any lit signs or flashing lights.

Plaintiff sustained a severe open fracture in his lower right leg and had multiple breaks in the bone. Between November 2016 and February 2018, he underwent more than a dozen surgeries due to complications arising from infections and bone alignment. Ultimately, due to reoccurring risk of infection, plaintiff planned to have his leg amputated based on his doctor's recommendation.

B. Heroin Evidence

Plaintiff testified he told the EMTs he had used two bags of heroin the day of the accident, either late that morning or early that afternoon, because they had difficulty finding a vein to inject medication. According to plaintiff, the amount of heroin was the equivalent of drinking three beers and affected him for no more than thirty to forty-five minutes. Neither the police reports nor the EMT records noted plaintiff as being under the influence of any substance, but the EMT records noted that plaintiff had "pinpoint" pupils, measuring at two millimeters.[5] There were no laboratory tests confirming the levels of heroin in plaintiff's system at any time relevant to this matter.

On March 30, 2021, plaintiff and Kearny reached the DOT settlement. That same day, plaintiff moved in limine to preclude Dr. Guzzardi from testifying that plaintiff was under the influence of heroin at the time of the accident, that the heroin impaired his vision and contributed to the accident. Plaintiff contended that Dr. Guzzardi's opinion should not be presented to the jury because he did not establish that plaintiff's heroin use was a substantial contributing factor to the accident.[6] Plaintiff also moved to bar the Township from advising the jury that he, Kearny, and DOT reached a settlement. The trial court denied both motions, finding Dr. Guzzardi's reports did not constitute a net opinion and that the Model Jury Charges expressly required such instruction.

Subsequently, Dr. Guzzardi was deposed. Dr. Guzzardi opined that at the time of the accident, plaintiff was "under the influence of heroin." The expert based his opinion on plaintiff's admission he had injected heroin earlier the day of the accident and the EMT's notation that he had pinpoint pupils, meaning his pupils measured only two millimeters. When assessing if someone is under the influence of heroin,

Dr. Guzzardi explained he looks at the patient's history, their clinical presentation, and laboratory tests.

Dr. Guzzardi testified that here, two of the three factors were satisfied because plaintiff had admitted to using heroin and presented with pinpoint pupils at the scene of the accident. Dr. Guzzardi stated morphine had a "half life of two to four hours," and that if plaintiff took heroin in the morning or early afternoon, it "would still be present in his body at the time of his accident and affecting the central nervous system." Dr. Guzzardi explained that heroin could affect alertness, judgment, reaction time, and night vision.

Dr. Guzzardi acknowledged there were unknown variables regarding plaintiff's level of intoxication, such as the exact time of the heroin injection, and whether any amount was in his system at the time of the accident, because no drug test was administered. A critical facet of Dr. Guzzardi's analysis was he did not know plaintiff's level of intoxication at the time of the accident and to what extent it had impacted his driving. However, Dr. Guzzardi stated that plaintiff's pinpoint pupils sufficiently demonstrated that he remained "adversely affected by heroin" and that his pupil size negatively impacted his vision, which "adversely affected" his driving.

Dr. Guzzardi testified there are four potential causes for pinpoint pupils: severe brain hemorrhage; pilocarpine —a drug used to treat glaucoma; exposure to high levels of organophosphate toxins (like insecticides); and narcotics. Dr. Guzzardi stated pupils can measure from two millimeters to eight-and-a-half millimeters, and that the average pupil measured from three-and-a-half millimeters to seven millimeters. [7]

The size of plaintiff's pupils recorded at the scene of the accident—two millimeters—was significant to Dr. Guzzardi because he felt it restricted plaintiff's ability to see light and limited his peripheral vision. Because the accident occurred at night, Dr. Guzzardi elaborated that regardless of whether the safety truck had its lights on, "if your eyes are made small, pinpoint, your eyes cannot get enough light in." Dr. Guzzardi stated that narcotics impact the eye's ability to adjust, and with pinpoint pupils, "you don't get enough light in." Dr. Guzzardi opined that the heroin impacted plaintiff's peripheral vision and might have been the reason why he did not notice the DOT truck directly ahead of him, especially in light of the fact plaintiff was changing lanes at the time. [8]

Although Dr. Guzzardi offered an opinion, he conceded that he is not an ophthalmologist and could not explain or quantify to what extent plaintiff's vision was impacted. And without bloodwork, Dr. Guzzardi could not determine whether plaintiff's heroin use adversely impacted his judgment or reflexes at the time of the accident.

Following Dr. Guzzardi's deposition, plaintiff again moved to bar his testimony at trial because plaintiff's expert—who did not testify—disputed Dr. Guzzardi's opinion that two-millimeter pupils qualify as pinpoint pupils. In addition, plaintiff argued that under New Jersey caselaw, a party's intoxication could not be introduced without supplementary evidence that the party's intoxication had contributed to the accident. The trial court denied plaintiff's motion, finding that any disagreement between the experts was a matter of weight, not admissibility, Dr. Guzzardi's testimony was sufficient to link plaintiff's admitted heroin use to his impaired driving, and the proffered testimony was not unduly prejudicial.

At his deposition, Dr. Guzzardi did not cite to any articles or studies in support of his opinion, which he stated was based on his clinical experience and review of plaintiff's medical records. When pressed on cross-examination on his failure to cite to any authority about heroin use and pupil size, Dr. Guzzardi answered this was "well known" to toxicologists and emergency physicians, and that "[e]very emergency physician knows that two-millimeter pupils are myotic pupils compatible with morphine abuse." When questioned whether this information was contained in a learned treatise, Dr. Guzzardi responded it was "such common knowledge that [he] did not cite it." Dr. Guzzardi added that he had "published ... on the effect of morphine and opiates on pupil size" and had "testified about this [issue] before our Supreme Court."

In his second motion, plaintiff again argued that his expert disputed Dr. Guzzardi's definition of pinpoint pupils as measuring two millimeters. And, plaintiff asserted that regardless, his heroin use could not be introduced without supplemental evidence that he was intoxicated at the time of the accident, and his intoxication impaired his driving. The trial court denied the motion and again held that any dispute about pupil size went to the weight of the testimony, not its admissibility. In addition, the trial court disagreed with plaintiff's interpretation of the caselaw, holding Dr. Guzzardi's testimony was sufficient to link plaintiff's admitted heroin use to his impaired driving. The trial court reiterated its prior finding that Dr. Guzzardi's opinion was not a net opinion

and determined his testimony was not excludable under N.J.R.E. 403 because its probative value was not substantially outweighed by the risk of undue prejudice.

On April 21, 2022, plaintiff sent a letter to the trial court making his third motion requesting a Frye/Daubert hearing to ascertain the admissibility of Dr. Guzzardi's testimony. The trial court heard oral argument on the request that day and reserved decision. A week later, on April 28, 2022, the trial court issued an order accompanied by a written decision denying plaintiff's request for a Frye/Daubert hearing and concluding a pre-trial hearing was unnecessary because Dr. Guzzardi had the requisite knowledge, training, or expertise to opine that plaintiff was under the influence of heroin at the time of the accident, which impaired his ability to operate a motor vehicle.

The trial court found Dr. Guzzardi had the "appropriate credentials to offer the opinions expressed in his report," and he provided "sufficient 'whys and wherefores' in support of his opinion." The trial court noted plaintiff could raise timely objections at trial about Dr. Guzzardi's "qualifications, foundation, scope," and the court's N.J.R.E. 403 ruling. The trial court further stated that an expert's opinion need not be based on "treatises or any type of documentary support but may include what the witness has learned from personal experience." The trial court did not make findings about Dr. Guzzardi's ability to testify as to the impact of opioids on vision. However, during trial, the trial court ruled, consistent with its prior decision, that Dr. Guzzardi's inability to quantify the extent to which plaintiff's pinpoint pupils impacted his vision went to the weight of his testimony, not its admissibility. This appeal followed.

II.

Our Supreme Court has instructed that in determining the admissibility of scientific expert testimony in civil, and now criminal cases, our trial courts must utilize a "methodology-based test for reliability" similar to the standard set forth by the United States Supreme Court in Daubert. In re Accutane, 234 N.J. at 397. This standard is as follows:

> Our view of proper gatekeeping in a methodology-based approach to reliability for expert scientific testimony requires the proponent to demonstrate that the expert applies his or her scientifically recognized methodology in the way that others in the field practice the methodology. When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable.
>
> [Id. at 399-400.]

Applying this standard, our courts must consider "whether an expert's reasoning or methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to facts in issue." Id. at 397 (citing Daubert, 509 U.S. at 591, 594-95; Rubanick v. Witco Chem. Corp., 125 N.J. 421, 449 (1991)).

The trial court's role is not to "substitute its judgment for that of the relevant scientific community," but "to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." Id. at 414. Thus, experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." Id. at 417. Moreover, when an expert relies on scientific or medical studies, "the trial court should review the studies, as well as other information proffered by the parties, to determine if they are of a kind on which such experts ordinarily rely," and if they are "derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." Ibid.

When applying this standard, our judges should now address the multiple Daubert factors, a "'helpful—but not necessary or definitive—guide' for trial courts in New Jersey" to follow when assessing the reliability of scientific or technical expert testimony. State v. Olenowski, 253 N.J. 133, 149 (2023) (quoting In re Accutane, 234 N.J. at 398). These factors are as follows:

> (1) Whether the scientific theory can be, or at any time has been, tested;
>
> (2) Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a "sine qua non";

(3) Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique's operation; and

(4) Whether there does exist a general acceptance in the scientific community about the scientific theory.

[In re Accutane, 234 N.J. at 398 (citing Daubert, 509 U.S. at 593-95).]

The first enumerated Daubert factor—testability—relates closely to the dual components of the third factor, error rate and standards. Testability is "a key question" that entails whether a theory or technique "can be (and has been) tested." Daubert, 509 U.S. at 593.

The second Daubert factor—peer review and publication—is significant because submission of a methodology "to the scrutiny of the scientific community is a component of 'good science'" and "increases the likelihood that substantive flaws in methodology will be detected." Ibid.

The third Daubert factor concerns both the known or potential rate of error in testing the methodology as well as any standards for maintaining or controlling the methodology's operation. Id. at 594. As the Court noted in Daubert, a trial court "ordinarily" should account for the "known or potential rate of error" of a methodology. Ibid. In addition, a methodology is more reliable if it is governed by well-established standards for operation. Ibid. See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 154-57 (1999) (rejecting as inadmissible an expert who had not consistently adhered to a protocol with appropriate standards).

Lastly, the fourth Daubert factor—general acceptance—(the former test of Frye is no longer the dispositive test since the Court has adopted the multifactor Daubert approach) is still pertinent. Daubert, 509 U.S. at 594-96; In re Accutane, 234 N.J. at 398.

As the Supreme Court stated in In re Accutane, 234 N.J. at 398, and again in Olenowski, these specific factors are not a rigid set of considerations for ascertaining the reliability of a proffered expert's methodology. 253 N.J. at 149. Nonetheless, they provide an important framework for guiding the analysis. The trial court's consideration of each of these factors is integral to the appellate court's review of whether the trial court abused its discretion in concluding whether an expert's methodology was sufficiently reliable to be admitted to a jury. In re Accutane, 234 N.J. at 391.

In the matter under review, plaintiff contends that the trial court erred in admitting Dr. Guzzardi's testimony without first determining whether his opinion satisfied the Frye standard. Plaintiff also challenges the accuracy of the measurement of his pupils—and the definition of pinpoint pupils—arguing that this undermines Dr. Guzzardi's basis for concluding the pupil size meant plaintiff was under the influence of heroin at the time of the accident.

Plaintiff maintains an evidentiary hearing was necessary first to establish that Dr. Guzzardi correctly defined pinpoint pupils as measuring two millimeters, and second to determine whether there was scientific support for the proposition that pinpoint pupils are a sign the person is under the influence of opiates. Relatedly, plaintiff argues that Dr. Guzzardi's testimony was inadmissible because he could not quantify plaintiff's level of impairment and, thus, could not determine whether his impairment was a substantial contributing factor for the accident.

In reviewing a trial court's decision on admission of expert testimony in a civil action, we apply an abuse of discretion standard. In re Accutane Litig., 234 N.J. at 392. This standard extends to the decision to conduct a pre-trial evidentiary hearing. Kemp by Wright v. State, 174 N.J. 412, 432 (2002). The trial court's ruling should be reversed "only if it 'was so wide off the mark that a manifest denial of justice resulted.'" Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (quoting Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016)).

The admission of expert testimony is generally governed by N.J.R.E. 702, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." To satisfy this standard, the proponent of expert testimony must establish that: (1) the subject matter of the testimony is "beyond the ken of the average juror"; (2) the field of inquiry is "at a state of the art such that an expert's testimony could be sufficiently reliable"; and (3) the witness has "sufficient expertise" to

offer the testimony. In re Accutane Litig., 234 N.J. at 349 (quoting State v. Kelly, 97 N.J. 178, 223 (1984)). This is "the baseline for the admissibility of expert testimony." Ibid.

Here, the first prong of N.J.R.E. 702 is satisfied because there is no dispute that the impact of opiates on vision is beyond the ken of the average juror. The third prong of N.J.R.E. 702 was addressed by the trial court's finding that Dr. Guzzardi had sufficient expertise to opine that plaintiff was under the influence at the time of the accident. But the trial court did not address the second prong of N.J.R.E. 702—whether Dr. Guzzardi's opinion was based on a reliably sound methodology—and instead focused on whether his testimony amounted to an impermissible net opinion.

On appeal, plaintiff does not dispute that heroin use causes pinpoint pupils but rather he challenges the definition of pinpoint pupils, whether his presentation fit this definition, whether the presence of pinpoint pupils was an accurate estimator that he remained under the influence of heroin, and whether his pinpoint pupils impacted his vision. Our review of the record reveals the trial court did not consider these arguments, all of which challenge the reliability of Dr. Guzzardi's opinion.

We have an overarching concern that the trial court's analysis failed to sufficiently adhere to the Daubert standard and the principles set forth by our Supreme Court more recently in Accutane and Olenowski. Put succinctly, Dr. Guzzardi opined that because plaintiff had admitted to using heroin earlier in the day, and because he presented with pinpoint pupils at the time of the accident, he was still under the influence of heroin at the time of the accident.

Dr. Guzzardi did not claim that plaintiff's heroin use impaired his judgment or reaction time; he conceded that he could not make those determinations because he did not know how much heroin was in plaintiff's system. Nonetheless, Dr. Guzzardi opined that plaintiff's pinpoint pupils impaired his peripheral vision and ability to see at night. This conclusion is salient because the only adverse effect of plaintiff's heroin use according to Dr. Guzzardi, was its impact on plaintiff's vision. The trial court never determined that Dr. Guzzardi was qualified to testify about vision under N.J.R.E. 702.

Moreover, there is no real dispute that heroin can cause pinpoint pupils, and that Dr. Guzzardi, having expertise in toxicology, can opine as to that fact. But, Dr. Guzzardi's opinion went beyond this point, opining about how pinpoint pupils, in turn, impact one's peripheral vision and ability to see at night. While our Supreme Court has taken a liberal approach when assessing an individual's qualifications to testify on a topic as an expert witness, State v. Jenewicz, 193 N.J. 440, 454 (2008), the trial court did not address whether Dr. Guzzardi's expertise—as a toxicologist and emergency room physician—extended to how opioids impact one's vision, despite his lack of qualifications as an ophthalmologist. In this respect, Dr. Guzzardi's lack of expertise in the area of ophthalmology may constitute a flawed analysis, and the trial court failed to properly assess Dr. Guzzardi's qualifications to testify on this point. We add that Dr. Guzzardi's testimony to the jury that plaintiff's heroin use adversely impacted his vision, without being able to quantify to what extent it impacted plaintiff's vision, may constitute speculation and a net opinion.

The net opinion rule "is a 'corollary of [N.J.R.E. 703] ... which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). It "mandates that experts 'be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Id. at 55 (quoting Landrigan, 127 N.J. at 417). An expert's conclusion may be excluded "if it is based merely on unfounded speculation and unquantified possibilities." Ibid. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)). Such an opinion is excluded because "when an expert speculates, 'he [or she] ceases to be an aid to the trier of fact and becomes nothing more than additional juror." Ibid. (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), overruled on other grounds, Jerista v. Murray, 185 N.J. 175 (2005)). The net opinion rule also "focuses upon 'the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.'" Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001) (quoting Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)).

Plaintiff also maintains that Dr. Guzzardi's opinion should have been excluded because he could not conclusively determine whether plaintiff's heroin use was a significant

contributing factor for the accident. In Gustavson v. Gaynor, 206 N.J. Super. 540, 545-46 (App. Div. 1985), we addressed admissibility of intoxication evidence and its potential for prejudice in a personal injury action where a party purportedly drank alcohol prior to his car accident. We held that a party's consumption of alcohol could not be admitted unless there was "supporting evidence" that the driver was unfit to drive due to his or her intoxication at the time of the accident. Id. at 545. Such evidence may include proof of excessive drinking or erratic driving. Ibid. Similarly, our Supreme Court recently commented that where a driver's ingestion of drugs is alleged to have caused the driver's impairment, the impairment "must be proven by the State with independent evidence." State v. Olenowski, 255 N.J. 529, 609 (2023) (Olenowski II) (citing State v. Bealor, 187 N.J. 574, 577 (2006)). Such independent evidence may include factual observations of intoxication by the arresting officer, a driver's admission, or drug paraphernalia found in the car. Id. at 610. Plaintiff also questions whether there is medical support for Dr. Guzzardi's opinion that pinpoint pupils mean one is still under the influence of heroin and whether the probative value of the heroin evidence is outweighed by the potential for undue prejudice. [9]

Although we do not resolve these questions here, we are persuaded the best course is to remand this matter to the trial court for a more fulsome analysis of the Dauber factors. We accordingly remand this matter to the trial court to conduct a Daubert hearing and to provide a more detailed and complete factorby-factor Daubert analysis.

For the benefit of the trial court, the parties shall provide the trial court, within twenty days of this opinion, their appellate briefs, and appendices. The trial court has the discretion to require supplemental briefing. If the trial court determines that Dr. Guzzardi offered a proper expert opinion, and that the heroin evidence was not unduly prejudicial, the verdict should stand, otherwise, a new trial will be necessary. The remand shall be concluded by April 26, 2024. We intimate no views on the appropriate outcome.

III.

Next, plaintiff argues the trial court erred in following the Model Jury Charge on settling defendants. Plaintiff contends the trial court should have rejected use of the Model Jury Charge, as the trial court did in the case of Hernandez v. Chekenian, 447 N.J. Super. 355 (Law Div. 2016), because the settlement was irrelevant to the jury's deliberations. We disagree.

Appropriate and proper jury instructions are essential for a fair trial. Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015). "A jury is entitled to an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Ibid. (quoting Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002)). Thus, "[j]ury charges 'must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them[.]'" Ibid. (quoting Velazquez v. Portadin, 163 N.J. 677, 688 (2000)).

Instructions given in accordance with the Model Jury Charges, or which closely track the Model Jury Charges, are generally not considered erroneous. Mogull v. CB Com. Real Estate Grp., Inc., 162 N.J. 449, 466 (2000). "As a general matter, [appellate courts] will not reverse if an erroneous jury instruction was 'incapable of producing an unjust result or prejudicing substantial rights.'" Prioleau, 223 N.J. at 257 (quoting Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div. 2013)).

At trial, plaintiff moved to exclude any mention of the DOT settlement to the jury, arguing it was irrelevant and would result in undue speculation by the jury as to the amount of the settlement, and thus adversely influence any award to him. The trial court disagreed, stating the jury would learn of DOT's role in the accident during trial, and during deliberations would consider whether DOT was negligent and a proximate cause of the accident, making it "the elephant in the room with the jury free to speculate in any direction to the unfair detriment to either party because ... DOT was not a participant at trial."

At the start of trial and following counsels' summations, the trial court instructed the jury that DOT was a named defendant in this case, but "[b]efore the trial started, ... plaintiff and ... DOT ... resolved their differences." The trial court directed the jury "not to speculate as to the reasons why ... plaintiff and ... DOT settled this dispute," or what amount, if any, was paid to resolve the claim. The trial court then instructed the jury to consider whether the Township was negligent, and if

it was, whether its negligence was a proximate cause of the accident. Next, the trial court instructed the jury to consider whether DOT was negligent, and if so, whether its negligence was a proximate cause of the accident.

On appeal, plaintiff reprises the argument he made before the trial court that it should have followed the holding in Hernandez, 447 N.J. Super. at 358-59, and departed from the Model Jury Charge because the charge contains irrelevant information regarding a settlement and highlighting the settlement invited speculation. Plaintiff further argues that since the jury had to consider DOT's level of culpability anyway, the settlement terms were irrelevant, comparing the situation to cases where parties are barred from addressing a related worker's compensation claim in a third-party lawsuit based on the theory the jury may be influenced to give the plaintiff's claim less consideration if it thinks plaintiff has other avenues of redress. We are unpersuaded.

Pertinent here is the language contained in Model Jury Charges 1.11G and 1.17 on "Settling Defendants," given by the trial court at the beginning and end of the trial. The preliminary charge advises the jury that the plaintiff had raised a claim against another party, and before the trial started, the other party and plaintiff had settled and the other party "will no longer be involved in this trial." Model Jury Charges (Civil), 1.11G, "Settling Defendants" (rev. Apr. 2018).

The Model Jury Charge given before deliberations is more detailed, notifies the jury that there was another defendant in the case; that plaintiff and the other defendant reached a settlement; and instructs the jury not to speculate as to the reasons for the settlement or the amount, if any, of the settlement. Model Jury Charges (Civil), 1.17, "Instructions to Jury in Cases in Which One or More Defendants Have Settled with the Plaintiff" (rev. Apr. 2018). The charge continues that the jury must first determine if the remaining defendant was negligent and the proximate cause of the accident, and then if the settling defendant also was negligent and a proximate cause of the accident. Ibid.

However, the Model Jury Charges include a "Note to Judge," which reads as follows:

> In Hernandez v. Chekenian, 447 N.J. Super. 355 (Law Div. 2016), Judge Rea held that Model Civil Jury Charges 1.11G and 1.17 should only be used in cases where the defendant settles during trial. It should not be given when defendants settle before the trial begins because it is irrelevant and unduly prejudicial. In dicta, he questioned the use of the terms "settlement" and "settled" as being irrelevant as well as prejudicial. This case, while published, has not been the subject of appellate review. The Supreme Court Committee for Model Civil Jury Charges is providing this for informational purposes for the trial judge.
>
> [Model Jury Charges (Civil), 1.11G; Model Jury Charges (Civil), 1.17.]

Plaintiff relies on the holding in Hernandez, 447 N.J. Super. at 357, where the trial court held that the settling defendant jury charge should not be given if the party in question settled the case before trial began. The case involved a three-car accident, where one of the defendants settled with the plaintiff through his insurance carrier. Id. at 356. There, the trial court declined to read the settling defendants jury charge, finding that there was "no legitimate reason that a jury needs to be told that there was another defendant(s) who settled their dispute(s) by paying an amount of money." Id. at 357.

The trial court in Hernandez questioned the language of the Model Jury Charge, stating that it raised an issue that was not relevant to the deliberations process, and then immediately told the jury to disregard it. Id. at 358. The trial court there noted that the settling defendant charge was combined with the language about comparative negligence, where a settling party appears on the verdict sheet to determine the percentage of negligent conduct attributable to that party. Id. at 358-59. The trial court added that this does not mean, however, that the jury should also be told that the settling party paid money to the plaintiff. Id. at 359. We note the trial court's decision in Hernandez did not result in any substantive changes to Model Jury Charges (Civil) 1.116 and 1.17. The "Note to Judge" specifies the Hernandez decision is provided for informational purposes for the trial judge and has not been the subject of appellate review.

Here, the trial court's jury instructions correctly adhered to the Model Jury Charges. "[A] jury charge is presumed to be proper when it tracks the [M]odel [J]ury [C]harge because the process to adopt [M]odel [J]ury [C]harges is 'comprehensive and thorough.'" State v. Cotto, 471 N.J. Super. 489, 543 (App. Div. 2022) (quoting State v. R.B., 183 N.J. 308, 325 (2005)). See also Mogull, 162 N.J. at 44 ("It is difficult to find that a charge that follows the Model Jury Charge so closely constitutes plain error."). However, the Model Jury Charges "are not binding authority," State v. Bryant, 419 N.J. Super. 15, 28 (App. Div. 2011), and may be reviewed on appeal.

Morlino v. Med. Ctr., 152 N.J. 563, 590 (1998) (although the Court concluded that the disputed Model Jury Charge did not have the capacity to mislead the jury, it nevertheless remanded the charge to the Supreme Court Committee on Model Jury Charges, Civil, to reconsider and rework the charge in consideration of the Court's findings).

The jury in this case was advised in a straightforward manner that plaintiff and DOT "resolved their differences" prior to trial, and the jury was not to speculate about what the resolution was. Moreover, it has long been the practice in New Jersey that,

> where multiple tort-feasors are or may be jointly responsible for an individual's injuries and losses, and one or more of them effect a settlement in exchange for a covenant not to sue, the fact of the settlement, but not the amount paid, is generally brought to the attention of the jury at the trial.
>
> [Theobold v. Angelos, 40 N.J. 295, 303-04, 191 A.2d 465 (1963).]

Essentially, jurors have to be told the facts of a settlement in order to avoid juror speculation. Theobold, 40 N.J. at 304. The danger of this speculation arises whenever a jury is asked to make a liability determination regarding an absent party, regardless of whether that party appeared for any portion of the trial.

Finally, a reviewing court is concerned with the "overall effect" of a jury charge rather than allegedly erroneous words "in isolation." State v. Savage, 172 N.J. 374, 387 (2002). In this case, the trial court was not bound to follow the dicta in Hernandez, and it clearly was appropriate to use the Model Jury Charges as given, which complied with well-established precedent, and in these circumstances, did not create prejudice.

Affirmed in part, and remanded in part for a Daubert hearing. We do not retain jurisdiction.

All Citations

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Footnotes

1 In our opinion, "plaintiff" refers to Thomas A. Fredella.

2 Pursuant to New Jersey's comparative negligence statute, as set forth in N.J.S.A. 2A:15-5.1, "a plaintiff who is found to be more than fifty percent at fault is entitled to no recovery." Brodsky v. Grinnel Haulers, 181 N.J. 102, 109 (2004).

3 Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

4 Plaintiff presented testimony from an accident reconstruction expert who testified that regardless of plaintiff's lane changes or whether the arrow board was on, he did not have sufficient time to stop his vehicle and avoid the collision.

5 The EMT records are contained in plaintiff's appendix but are difficult to read due to the poor quality of the copy. Thus, our summary of the EMT's findings is based on Dr. Guzzardi's testimony. Dr. Guzzardi testified that plaintiff's pupil size gradually increased to four millimeters when measured at the hospital.

6 While plaintiff requested a Frye/Daubert hearing, his arguments on appeal center on the Frye standard for admissibility, i.e., that of general acceptance by the relevant scientific community. Frye, 293 F. at 1013-14. Regardless, now on appeal and at the time of trial, New Jersey utilizes a "methodology-based

test for reliability" similar to the standard set forth by the United States Supreme Court in Daubert. In re Accutane Litig., 234 N.J. at 397.

7 Plaintiff's counsel cross-examined Dr. Guzzardi with the American Ophthalmological Society's definition of pinpoint pupils as measuring less than two millimeters, and normal pupils as measuring between two and eight millimeters.

8 Plaintiff testified that he used mirrors to change lanes because he drove a van for years and came to rely on mirrors when driving. Dr. Guzzardi commented that he did not know if plaintiff used mirrors out of habit or because he was a "chronic heroin user" and relied on mirrors because he always had pinpoint pupils.

9 As discussed in Olenowski II, 255 N.J. at 549, under the influence means "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." (quoting State v. Tamburro, 68 N.J. 414, 420-21 (1975)). Yet in terms of criminal liability, unlike with alcohol consumption, there is no designated blood level that constitutes a "per se violation" of driving under the influence of drugs. Id. at 545, 548. Consequently, while a toxicology report can corroborate the presence of drugs in the driver's system, it "cannot prove that the driver was actually impaired by drugs while behind the wheel," and it is unclear what "drug level ... establishes impairment per se." Id. at 608. While this language refers to criminal culpability, it also relates to the lack of clarity as to what constitutes drug-impaired driving.

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About the Panelists…

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Admitted to practice in New Jersey and New York, Mr. Cheslow has been a member of the New Jersey State Bar Association's Elder and Disability Law, Real Property Trust and Estate Law, and Taxation Law Sections. He also served as an Executive Committee Member of the NJSBA's Young Lawyers Division and has been New Jersey State Coordinator for Wills for Heroes, a not-for-profit organization which provides free estate planning documents to first responders in New Jersey, including policemen, firefighters and first aid workers. Mr. Cheslow is a member of the Monmouth Bar Association's Chancery Practice Committee and lectures frequently for attorney groups. He has been published in peer-reviewed journals and authored several articles on topics ranging from trust accounting to special needs trusts, and in 2014 was the recipient of the Young Lawyers Service to the Bar Award bestowed by the NJSBA Young Lawyers Division.

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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 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 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.

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Admitted to practice in New Jersey and New York, Mr. Friedman is Past Chair and former Roundtable Coordinator and Legislative Coordinator of the New Jersey State Bar Association Elder and Disability Law Section. He was Somerset County representative to and Executive Committee member of the NJSBA Young Lawyers, and served on the NJSBA Blue Ribbon Commission on Unmet Legal Needs. Prior to joining the firm Mr. Friedman was a Contributing Editor for The FCPA Blog in Singapore, ROS, where he provided analysis on compliance, corruption and the *Foreign Corrupt Practices Act* (FCPA). He is the author of articles including "Modern Estate Planning for Same-Sex Couples" (*New Jersey Law Journal*, October 14, 2013).

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Mr. Poreda is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey, the Southern and Eastern Districts of New York and the Eastern District of Pennsylvania. Chair-Elect of the New Jersey State Bar Association LGBTQ Rights Section, he has served as adjunct faculty at Rutgers University and prior to attending law school taught high school history in New Jersey.

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Stacey M. Valentine is a Partner in Avelino Law, LLP with offices in Morristown, New Jersey, and New York City, and co-leads the Trusts and Estates Practice Group. With a practice encompassing all aspects of trusts and estates law, she handles income, estate, inheritance, gift, and generation-skipping transfer tax issues, and helps clients maximize the benefits of charitable giving. Ms. Valentine assists estate and trust beneficiaries and fiduciaries in enforcing their rights and adhering to their obligations in the event of a dispute, and serves as legal counsel to numerous financial institutions and corporate trustees, assisting those entities in the implementation of their fiduciary duty while addressing the risks inherent to the role of executor or trustee. She also advises clients in general corporate matters arising in closely-held family businesses and has experience working with individuals with special needs.

Ms. Valentine is admitted to practice in New Jersey and New York. She has been a member of the New Jersey State, New York State and Morris County Bar Associations, and the Board of the Estate Planning Council of Northern New Jersey. She has also sat on the Board of the Women's Association for the Morristown Medical Center and the Young Professionals Board of Eva's Village.

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The Uniform Trust Code

Timothy M. Ferges

On January 19, 2016, New Jersey enacted its version[1] of the Uniform Trust Code (the "Trust Code"). The model Uniform Trust Code (the "UTC"), which was adopted by the National Conference of Commissioners on Uniform State Laws, is the basis of New Jersey's Trust Code. The model UTC was adopted to both codify common law principles of trusts and to create uniformity of law among the states.

Many of the UTC's statutes were modified by our legislature in it adoption of New Jersey's Trust Code. It contains many provisions that should be considered by estate planners in preparing trusts. (In addition, its provisions should be noted in administering trusts and can also be relevant in litigated disputes involving trusts.) Of course, there is also extensive law that preexisted the 2016 adoption of the Trust Code and that continues to be relevant, including New Jersey's probate code codified under Title 3B of the New Jersey statutes and our extensive common law governing trusts. *See* N.J.S.A. 3B:31-6 ("the common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State").

As under our common law, the Trust Code makes it clear that a settlor's intent is paramount. N.J.S.A. 3B:31-2 (providing "terms of a trust" means "the manifestation of the

[1] The Trust code is cited as N.J.S.A. 3B:31-1 et seq.

settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding"). Thus the initial provisions of the Trust Code mandate that the trust terms generally prevail over the Trust Code itself. *N.J.S.A.* 3B:31-5(b).

Despite this great emphasis on settlor intent, there are certain default provisions under the Trust Code that a settlor is unable to supersede. Those default requirements include, for example, provisions governing formation of a trust; a trustee's duty to act in good faith and in accordance with the trust terms; the requirements that the trust terms be for the benefit of a beneficiary; the requirement that the trust not be contrary to public policy; and the court's ability to modify, in accordance with the Trust Code, the limits of exculpatory language in a trust agreement; and other specified exceptions. *Id*. Most of these provisions seem to be aimed at preventing a trustee's abuse or violation of essential fiduciary obligations.

1. CREATION OF TRUSTS

The Trust Code imposes requirements for the creation of a trust – many of which preexisted the adoption of the Trust Code. Of course, a trust cannot be created if the settlor lacks the capacity to do so. *N.J.S.A.* 3B:31-19(a)(1). The Trust Code seems to treat a revocable trust as a will substitute. It provides that the capacity required to execute a *revocable* trust is the same as that for a will. *N.J.S.A.* 3B:31-42. New Jersey common law defines the "testamentary" capacity required to execute a will. *Gellert v. Livingston*, 5 N.J. 65, 71 (1950).

Under the Trust Code, the settlor must also indicate the intention to create the trust. *N.J.S.A.* 3B:31-19(a)(2). As a general matter, a trust must also have "definite beneficiaries" (however, exceptions may exist where the trust is charitable, where the trust is established for the

care of animals, or under other limited circumstances). *N.J.S.A.* 3B:31-19(a)(3). "A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to the provisions of [N.J.S.A.] 46:2F-10 or any other applicable rule against perpetuities." *N.J.S.A.* 3B:31-19(b). Finally, the trustee must have duties to perform and a sole trustee cannot be the sole beneficiary of the trust. *N.J.S.A.* 3B:31-19(a)(4)-(5).

The Trust Code recognizes a trust may not be valid if its creation was illegally procured by one other than the settlor. Thus "a trust is void to the extent its creation was induced by fraud, duress, or undue influence." *N.J.S.A.* 3B:31-23. This is in conformity with extensive New Jersey common law that preexisted the adoption of the Trust Code. Those cases address circumstances in which inter vivos transfers (if the trust was created during the settlor's lifetime) or testamentary transfers (if created at death) may be set aside on those grounds. *See, e.g., Pascale v. Pascale*, 113 N.J. 20 (1988) (setting forth grounds for challenge to inter vivos transactions as products of undue influence and distinguishing them from challenges to testamentary transfers).

Thus the common law and other New Jersey statutory law must still be considered in advising clients with respect to the creation of trusts. As recognized under the Trust Code, the "common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State." *N.J.S.A.* 3B:31-6 (emphasis added).

2. TYPES OF TRUSTS GOVERNED BY THE TRUST CODE

The Trust Code governs a wide range of trusts. It includes provisions that specifically govern revocable trusts (*see, e.g., N.J.S.A.* 3B:31-42) as well as irrevocable trusts (*see, e.g., N.J.S.A.* 3B:31-27). The Trust Code also contains provisions governing trusts established for

charitable purposes (*see, e.g., N.J.S.A.* 3B:31-22), noncharitable purposes (*see, e.g., N.J.S.A.* 3B:31-25), and the care of animals (*see, e.g., N.J.S.A.* 3B:31-24).

With respect to charitable trusts, the Trust Code describes what constitutes a valid "charitable purpose" under New Jersey law. *N.J.S.A.* 3B:31-22(a) ("a charitable trust is one that is created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purpose the achievement of which is beneficial to the community"). The code also addresses situations in which the settlor did not name a specific charitable beneficiary. That scenario will not cause a charitable trust to fail (despite the general requirement of the Trust Code that a trust have a "definite beneficiary"). Instead if a trust either does not specify a particular charitable purpose or beneficiary, the court can select a charitable purpose or beneficiary so long as its selection is consistent with the settlor's intent. *N.J.S.A.* 3B:31-22(b).

The Trust Code recognizes the standing of a broad range of individuals and entities to enforce the terms of a charitable trust. Under *N.J.S.A.* 3B:31-22(c), "a proceeding to enforce a charitable trust may be brought by the settlor, by the Attorney General, by the trust's beneficiaries or by other persons who have standing." While the New Jersey Attorney General has long had an interest in enforcing the terms of charitable trusts, the Trust Code apparently will allow a grantor standing to enforce a charitable trust he or she created, even if the trust is irrevocable.

Despite the general requirement that a trust have a "definite beneficiary," the Trust Code also specifically allows for the creation of certain "noncharitable trusts without ascertainable beneficiar[ies]." *N.J.S.A.* 3B:31-25. Such trusts may be created for (i) a "noncharitable but otherwise valid purpose without a definite or definitely ascertainable beneficiary" or (ii) "a

noncharitable but otherwise valid purpose to be selected by the trustee." An example of such a trust might be a trust created for the care of a cemetery plot. *See* NCCUSL comments on UTC 409. As with charitable trusts, the Trust Code also grants the settlor standing to enforce the terms of a trust governed by N.J.S.A. 3B:31-25. In the alternative, another person designated under the trust instrument or the court can supervise the trust's administration. *N.J.S.A.* 3B:31-25(b). Under this provision, trust property must generally be applied to its "intended use." *N.J.S.A.* 3B:31-25(c). To the extent, however, property is "not required for its intended use," it is to be distributed back to the settlor or the settlor's estate." *Id*.

3. TRUSTEE DUTIES

a. Duty of Disclosure

A trustee's duty of disclosure to his or her beneficiaries has long existed under New Jersey law. Pursuant to our common law, if the trustee wishes to be absolved of liability, he has a duty to disclose all material facts pertaining to the trust administration. As stated in *Liberty Title & Trust Co v. Plews*, 6 N.J. 28, 39 (1950), the

> trustee, as a fiduciary, is under a duty to make full and complete disclosure of all transactions in relation to his trust. He is permitted neither to conceal nor to misrepresent, and if he fails in his duty to disclose the true facts so as to give notice to interested parties of any illegal or improper investments, it amounts to fraud such as will permit a decree approving his account to be opened.

To fulfill this obligation, a trustee, of course, may be required to account to the beneficiaries – either informally or formally via a court proceeding. *See N.J.S.A.* 3B:17-1 et seq; *Rule* 4:87-1 et seq.

The Trust Code imposes additional specific obligations of disclosure upon a trustee. Those obligations include the obligation to "keep the qualified beneficiaries[2] of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." *N.J.S.A.* 3B:31-67(a). The Trust Code provides that a trustee must respond promptly to a beneficiary's request for information relating to the trust administration. *Id*. In addition, if the beneficiary requests a copy of the trust instrument, the trustee now has an affirmative obligation to produce it. *N.J.S.A.* 3B:31-67(b).

On the other hand, where certain information is supplied, the Trust Code now offers the trustee certain protections against beneficiary claims. If the trustee provides the beneficiary "a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding," a six month statute of limitations is imposed for the beneficiary to assert a claim of breach of trust against the trustee. *N.J.S.A.* 3B:31-74(a). Under that statute, a "report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence." *N.J.S.A.* 3B:31-74(b). Absent such a report, a five year statute of limitations runs from the date of the first to occur of "(1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust." *N.J.S.A.* 3B:31-74(c).

b. **Duty of Loyalty**

Under our preexisting law, trustees have likewise owed a duty of loyalty. Thus transactions of a trustee affected by a conflict of interest of the trustee are subject to scrutiny. *N.J.S.A.* 3B:14-36. "[T]he legal principle that undivided loyalty is of the very essence of a trust

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[2] The "qualified beneficiary" is a concept introduced under the Trust Code. It is described in further detail below.

relationship and that a trustee may not place itself in a position where its interest is or may be in conflict with its duty is firmly entrenched in our jurisprudence. . ." *In re Carter's Estate*, 6 N.J. 426, 436 (1951). Consequently,

> (m)any forms of conduct permissible in a workaday world for those acting at an arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior. [*Id* (quoting *Meinhard v. Salmon*, 294 N.Y. 458, 465 (1928)).]

The Trust Code confirms that transactions involving trust property that benefit the trustee or are otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary unless the transaction was authorized by the trust terms; the transaction was approved by the court; a claim challenging the transaction is time-barred; the beneficiary consented or ratified the transaction; or the transaction was performed before the individual or entity became trustee. *N.J.S.A.* 3B:31-55(b); *see also N.J.S.A.* 3B:31-55(c) (explaining when a transaction is presumed to be affected by such a conflict of interest).

c. **Duty to Prudently Invest and Manage Trust Assets**

It has been the law of New Jersey since before the adoption of the Trust Code that a trustee, in investing and managing the trust's assets, must act prudently. Under New Jersey's Prudent Investor Act,

> (a) fiduciary shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill and caution. [*N.J.S.A.* 3B:20-11.3(a)].

Included among the requirements of the Prudent Investor Act, is the general obligation to diversify the trust investments. *N.J.S.A.* 3B:20-11.4 ("a fiduciary shall diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without

diversifying"). The Act states "[t]he prudent investor rule expresses a standard of conduct, not outcome." *N.J.S.A.* 3B:20-11.9. Thus the statute focuses on the manner in which the trustee makes investment decisions, as opposed to the results obtained. Moreover, it operates only in default of express provisions in the Trust agreement to the contrary. *N.J.S.A.* 3B: 20-11.2(b) ("the prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions in the trust instrument"). Therefore where a trust agreement mandates or permits the trustee not to diversify the trust holdings and contains provisions exculpating her from investing the trust assets in that manner, the trustee may not be held liable for acting contrary to the Prudent Investor Act so long as he or she acts in conformity with the trust terms. *Matter of Post*, 2018 WL 3862756 (App. Div. August 15, 2018) (finding that a trustee was not permitted to diversify the trust holdings, despite the provisions of the Prudent Investor Act because the trust terms specifically forbade diversification).

The Trust Code recognizes the enforceability of exculpatory provisions, but with exceptions. *N.J.S.A.* 3B:31-77. No provision of a trust agreement can exculpate a trustee from acting in bad faith or with indifference of the trust terms or a beneficiary's interests. *N.J.S.A.* 3B:31-77(a). As stated *supra* and under N.J.S.A. 3B:31-5(b)(8), this limitation on exculpatory language cannot be trumped by the trust terms.

New Jersey's Prudent Investor Act provides that in fulfilling her role,

> a fiduciary may delegate investment and management functions that a prudent fiduciary of comparable skills could properly delegate under the circumstances. The fiduciary shall exercise reasonable care, skill and caution in: (1) selecting an agent . . . (2) establishing the scope and terms of the [agency] . . . : and (3) periodically reviewing the agent's actions . . . . [*N.J.S.A.* 3B:20-11.10(a)].

The Trust Code defines the manner of delegation in a similar manner. It likewise requires the trustee to participate prudently in selecting an agent, defining in writing the scope of delegation,

and reviewing periodically the agent's actions. *N.J.S.A.* 3B:31-60(b). Thus under New Jersey law, it continues to be imperative that a trustee secure sufficient professional advice in fulfilling his or her obligations.

d. **Duty of Impartiality**

Under the Trust Code, if a trust has more than one beneficiary, the trustee is under a fiduciary duty to act impartially when dealing with each of their respective interests. *N.J.S.A.* 3B:31-56 ("the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests"). This is consistent with existing common law as well as other statutory law, such as New Jersey's Prudent Investor Act. *See* N.J.S.A. 3B:20-11.6 ("If a trust has two or more beneficiaries, the fiduciary shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries"). Thus, unless the trust terms provide otherwise, the trustee is to treat all beneficiaries equitably in her administration of the trust unless the trust terms provide otherwise.

4. BENEFICIARIES

The Trust Code requires that a trust be established "for the benefit of its beneficiaries." N.J.S.A. 3B:31-21. The Trust Code broadly defines a "beneficiary." A beneficiary, of course, includes any person with a "present or future interest, vested or contingent" in the trust. N.J.S.A. 3B:31-3. It also, however, includes a person who holds a power of appointment, "the owner of an interest by assignment or other transfer," and in the case of a charitable trust, "any person who is entitled to enforce the trust."

a. "Qualified Beneficiaries"

The Trust Code describes the role of a "qualified beneficiary" – a concept that is unique to the Trust Code. A "qualified beneficiary" is "a beneficiary who, on the date the beneficiary's qualification is determined:

> (1) is a distributee or permissible distributee of trust income or principal;
>
> (2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date; or
>
> (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Put another way, a "qualified beneficiary" is one who could currently receive a distribution from the trust or is likely to receive trust property when the current beneficiaries die or when the trust terminates. The class of "qualified beneficiaries" is determined at the time of the inquiry.

Under the Trust Code, there are scenarios in which the trustee must notify the "qualified beneficiaries" of certain issues that might arise. When "qualified beneficiaries" are to receive notice under the Trust Code, however, "the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice." *N.J.S.A.* 3B:31-10(a). Thus, for example, if a contingent remainderman seeks notice, that remainderman must be given the same notice provided to the "qualified beneficiaries." Moreover, a charitable organization designated to receive distributions under a charitable trust or one who is appointed to enforce a trust established for the care of an animal or another noncharitable purpose also has the rights of a qualified beneficiary. *N.J.S.A.* 3B:31-10(b). Finally, the New Jersey Attorney General has the rights of a qualified beneficiary in connection with a charitable trust. *N.J.S.A.* 3B:31-10(c).

Qualified beneficiaries, and those with the right to receive notice under N.J.S.A. 3B:31-10, must be notified of a change of the principal place of administration of the trust or the termination of an uneconomic trust. *N.J.S.A.* 3B:31-8(d); 3B:31-30(a). In addition, as a general

matter, a trustee is required 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." *N.J.S.A.* 3B:31-67(a).

In addition to the right to receive notice, the Trust Code empowers the "qualified beneficiaries" with certain authority. For example, in the event of a vacancy in the trusteeship of a noncharitable trust, if the trust terms do not name a successor or provide a procedure for the appointment of a successor, the Trust Code now allows a successor to be appointed by unanimous agreement of the qualified beneficiaries. *N.J.S.A.* 3B:31-49(c). Therefore if the trust terms cannot fill a vacancy, the trustee or beneficiaries need not resort to a court proceeding to fill a vacancy if the "qualified beneficiaries" can come to such an agreement.

b. Representation

The Trust Code adopts many of the virtual representation principles contained in Rule 4:26-3. It also supplements and expands upon those principles. For example, N.J.S.A. 3B:31-16 authorizes one to represent a minor or incapacitated person who has a "substantially identical interest." (A similar concept exists under Rule 4:26-3(c), which allows the court to designate a member of a class to represent the other members of a class in a court action.) Of course, principles under our existing court rules, such as the "vertical virtual representation" under Rule 4:26-3(a) still govern court proceedings involving trusts.

Under Rule 4:26-3(b), "where a party to an action is the donee of a power of appointment of any type, it shall not be necessary to join the potential or permissible appointees of the powers or takers in default." The Trust Code contains its own provision allowing representation by a holder of a power of appointment, but it seems to be narrower in scope than the principle under our court rules. *See N.J.S.A.* 3B:31-14(a) (providing a holder of a *general testamentary* power of

appointment can represent and bind "persons whose interests, as permissible appointees, takers in default, or otherwise are subject to the power").

The Trust Code also allows a guardian of the property to appear and represent a minor or incapacitated person in an action, and a guardian of the person to represent his or her interest if there is no guardian of the property. *N.J.S.A.* 3B:31-15(a)-(b). If no guardian has been appointed, a parent may appear and represent the minor. *N.J.S.A.* 3B:31-15(f). In addition, an agent may represent a principal (if the agent has authority to act with respect to the particular issue), a trustee may represent and bind beneficiaries of a trust, and a personal representative may represent those interested in an estate. *N.J.S.A.* 3B:31-15(c)-(e). Of course, no conflict of interest can exist between the representative and the person represented. *N.J.S.A.* 3B:31-15.

5. DIRECTED TRUSTS

In recent years, jurisdictions have been adopting legislation that recognize trusts in which a grantor can divide trust administration roles between the trustee and a third party decision maker. Put another way, the various roles and responsibilities of a trustee (i.e., the trustee's roles as custodian, administrator, investment manager, distribution director, accountant and other various roles) can be divided between different parties. This legislation has also allowed grantors to assign new protective roles to third party decision makers outside the scope of the trust administration. All of these trusts are typically referred to as "Directed Trusts."

To put it very simply, a "Directed Trust" is a trust under which a designated third party decision maker, who is not the trustee, is assigned a role in connection with the trust's administration.

That third party decision maker (who I will refer to as a "Trust Director") may be assigned a designated aspect, or aspects, of the trust administration that would otherwise be handled by the trustee[3] (a "Power of Direction," discussed in more detail below). In that case, responsibility for the administration of the trust is bifurcated. That third party decision maker may also be assigned an entirely different role that falls outside the scope of a trustee's duties (a "Power of Protection," also discussed in more detail below).

Directed trusts have been long recognized under New Jersey common law. *Ames v. Bank of Nutley*, 178 A. 363, 364 (N.J. Ch. 1935) (grantor retained power to direct trustee's investments), *aff'd per curiam*, 183 A. 172 (1936); *Ditmars et al. v. Camden Trust Co. et al.*, 10 N.J. Super. 306 (Ch. Div. 1950), modified, 10 N.J. 471 (1952) (trustee not required to seek court instruction regarding proposed sale of trust securities, where life beneficiary, whose consent to sale was required under will, did not consent to such sale). That older case law, however, did not shed much light on the nature or roles of Trust Directors and Directed Trustees nor did it extensively address the governance of directed trusts. Thus Trust Directors and Directed Trustees were forced to act without much law to guide them in navigating their powers and obligations.

The majority of states in the United States have now adopted directed trust statutes. One of those states is New Jersey, which has in fact adopted two such statutes under the Trust Code. The first statute -- N.J.S.A. 3B:31-61 (New Jersey's "Power to Direct" statute) -- is a modified adaptation of the Uniform Law Commission's UTC 808. [A redlined comparison showing how UTC 808 was modified to form N.J.S.A. 3B:31-61 is attached to these materials as

[3] I will refer to the trustee of a directed trust as a "Directed Trustee."

Exhibit "A."] New Jersey's Power to Direct statute governs the role of Trust Directors and Directed Trustees in general. *See* N.J.S.A. 3B:31-61.

The second statute -- N.J.S.A. 3B:31-62 (New Jersey's "Powers to Direct Investment Functions") -- is not based on any statute found in the Uniform Trust Code. That second statute is instead a modified adaptation of Delaware's own directed trust statute (12 Del. Code 3313). [A redlined comparison showing how 12 Del. Code 3313 was modified to form N.J.S.A. 3B:31-62 is attached to these materials as Exhibit "B."] New Jersey's Power to Direct Investment Functions statute governs the roles of Trust Directors and Directed Trustees only to the extent the Trust Director can direct investment of trust assets.

Put another way, while New Jersey's Power to Direct statute (N.J.S.A. 3B:31-61) seems to be a statute of general application to directed trusts, New Jersey's Powers to Direct Investment Functions statute (N.J.S.A. 31-62) is more limited in scope as it only governs directed trusts that empower a Trust Director to control trust investments.

a. <u>Directed Trust Statute #1: New Jersey's "Powers to Direct" Statute Based on UTC 808 [N.J.S.A. 3B:31-61]</u>

N.J.S.A. 3B:31-61 modifies UTC 808 in two significant ways. First, with respect to a trustee's obligation to comply with the direction of the Trust Director, the statute provides as follows:

> (i)f the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with a <u>written</u> exercise of the power unless the attempted exercise is contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. [N.J.S.A. 3B:31-61(b) (emphasis added)]

Accordingly, while New Jersey legislature adopted the mandate that the trustee act in accordance with directions of the Trust Director under UTC 808(b), that obligation to comply is

limited to the written directions of the Trust Director. *See N.J.S.A.* 3B:31-61(b). [*See* Exhibit A attached to these materials.]

The second significant modification made by the New Jersey legislature is to UTC 808(d)'s categorization of a Trust Director as "presumptively a fiduciary." New Jersey deleted the reference to the Trust Director as "presumptively a fiduciary." *See N.J.S.A.* 3B:31-61(d). Accordingly, it also deleted reference to the Trust Director's liability for a loss resulting from a "breach of fiduciary duty." *See id*. [*See* Exhibit A attached to these materials.] New Jersey's statute provides as follows:

> A person[4], other than a beneficiary, who holds a power to direct is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from the holder's failure to act in good faith. [N.J.S.A. 3B:31-61(d) (emphasis added)]

N.J.S.A. 3B:31-61 (b) (discussed above), however, states that the Directed Trustee cannot act in accordance with a Trust Director's written exercise of the Trust Director's power if "the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." *N.J.S.A.* 3B:31-61(b) (emphasis added). Thus while the New Jersey legislature apparently deliberately deleted the Uniform Law Commission's recognition that the Trust Director is "presumptively a fiduciary", it continues to reference fiduciary duties owed by the Trust Director.

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[4] While it is not specifically explained within N.J.S.A. 3B:31-61, the "person" who may hold a power to direct might include an individual or an entity, such as a bank. *See N.J.S.A.* 3B:1-1 (providing that as used under Title 3B, the term "Person" means an "individual or an organization").

b. Directed Trust Statute #2: New Jersey's "Powers to Direct Investment Functions" Statute Based on Delaware's Directed Trust Statute [N.J.S.A. 3B:31-62]

In addition, under its Trust Code, New Jersey adopted a second directed trust statute -- N.J.S.A. 3B:31-62 (New Jersey's "Powers to Direct Investment Functions" statute) -- which works in conjunction with N.J.S.A. 3B:31-61. This second New Jersey directed trust statute is not found anywhere in the Uniform Law Commission's Uniform Trust Code. It is instead based on Delaware's directed trust statute -- 12 Del. Code 3313.

Delaware's directed trust statute unambiguously provides that, as a general matter, a Trust Director is a fiduciary. 12 Del. Code 3313. New Jersey adopted Delaware's statute, but only with respect to Trust Directors who have authority to direct trust investments. *N.J.S.A.* 3B:31-62.[5]

New Jersey refers to this Trust Director as an "Investment Adviser." *N.J.S.A.* 3B:31-62(a). Under this statute,

> (w)hen one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, such persons shall be considered to be investment advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides."[6] [*Id* (emphasis added).]

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[5] To the extent a Trust Director is given authority to direct other aspects of the trust administration (for example, the trust's distributions), it would seem that Trust Director's actions would be governed by N.J.S.A. 3B:31-61 (not N.J.S.A. 3B:31-62).

[6] In contrast, Delaware's Directed Trust statute provides that "(w)hen one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity." 12 Del. Code 3313.

N.J.S.A. 3B:31-62 includes substantial exculpatory provisions that protect a Directed Trustee who must follow the directions of an Investment Adviser. It confirms that if the trustee acts in accordance with the Investment Adviser's instructions regarding trust investments, "then except in cases of willful misconduct or gross negligence[7] on the part of the [Directed Trustee] so directed, the [Directed Trustee] shall not be liable for any loss resulting directly or indirectly from any such act." *N.J.S.A.* 3B:31-62(b). Moreover, "except in cases of willful misconduct or gross negligence" by the Directed Trustee, the Directed Trustee is not "liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser's failure to provide such consent[8] after having been requested to do so by the [Directed Trustee]." *N.J.S.A.* 3B:31-62(c).

The statute also specifies that if the Directed Trustee must follow the direction of an Investment Adviser regarding investment decisions, unless "the governing instrument provides otherwise, the Directed Trustee shall have no duty to:

> (1) Monitor the conduct of the investment adviser;
>
> (2) Provide advice to the investment adviser or consult with the investment adviser; or
>
> (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the [Directed Trustee] would or might have exercised the [Directed Trustee's] own discretion in a manner different from the manner directed by the investment adviser." [N.J.S.A 3B:31-62(e) (emphasis added).]

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[7] The words "gross negligence" are absent from the Delaware statute. *See* 12 Del. Code 3313. Under Delaware law, the directed trustee is not liable "except in cases of willful misconduct." *Id*.

[8] Under Delaware law, the Directed Trustee is also not liable for "any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's objection to such act." 12 Del. Code 3313.

While the Directed Trustee has no duty to engage in such actions, should the trustee choose to engage in certain actions, the trustee is granted substantial protections. The statute provides that

> (a)bsent clear and convincing evidence to the contrary, the actions of the [Directed Trustee] pertaining to matters within the scope of the investment adviser's authority, such as confirming that the investment adviser's directions have been carried out and recording and reporting actions taken at the investment adviser's direction, shall be presumed to be administrative actions taken by the [Directed Trustee] solely to allow the [Directed Trustee] to perform those duties assigned to the [Directed Trustee] under the governing instrument. Such administrative actions shall not be deemed to constitute an undertaking by the [Directed Trustee] to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser's authority. [N.J.S.A. 3B:31-62(e) (emphasis added).]

Thus, while a Directed Trustee has no obligation to monitor the Investment Adviser or otherwise participate in the investment of the trust assets, should the trustee choose to do so, the trustee will not become liable for investment decisions.

6. NONJUDICIAL SETTLEMENT AGREEMENTS

The Trust Code provides a mechanism to address certain trust administration matters and avoid court proceedings in the process. *N.J.S.A.* 3B:31-11. To some degree, nonjudicial agreements have always existed to resolve potential disputes – for example, approval of informal trust accountings by beneficiaries, outside of court, have long been recognized as enforceable under our law. *See*, *e.g.*, *Estate of Lange*, 75 N.J. 464 (1978).

A nonjudicial settlement agreement, however, can be entered "with respect to any matter involving a trust." *N.J.S.A.* 3B:31-11(b). The only limitations are that it cannot "violate a material purpose of the trust", it must include "terms and conditions that could be properly approved by the court under this act or other applicable law", and it cannot create a result

"contrary to other sections of Title 3B of the New Jersey statutes, including, but not limited to, terminating or modifying a trust in an impermissible manner." *N.J.S.A.* 3B:31-11(c), (f).

To achieve a nonjudicial settlement agreement under the Trust Code, all "interested persons" – all "persons whose consent would be required in order to achieve a binding settlement to be approved by the court" – must be parties to the agreement. *N.J.S.A.* 3B:31-11(a). N.J.S.A. 3B:31-11 describes examples of matters that may be resolved by nonjudicial settlement, such as, for example, the construction of a trust agreement or resolving the liability of a trustee. *N.J.S.A.* 3B:31-11(d).

7. MODIFICATION OR TERMINATION OF TRUSTS

Traditionally, as estate planners, we have advised our clients that in establishing an irrevocable trust, the grantor cannot later modify or reform the agreement without a (potentially expensive and lengthy) court proceeding. New Jersey has long recognized the doctrine of probable intent, established under our common law, as a tool to reform trusts. *See Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962). New Jersey courts will apply that common law or statutes under our probate code (N.J.S.A. 3B:3-34 through 48) to reform a trust so that it will conform to the grantor's probable intent. .

In adopting the Trust Code, our legislature has made the modification process much simpler. New procedures now exist under which one can modify or terminate an irrevocable trust without resorting to a court proceeding. This is an important development as even the most carefully and thoughtfully drafted instruments can warrant a revision where changed circumstances arise in the future. For example, tax laws, the personal circumstances or financial

circumstances of a beneficiary, or the administrative requirements imposed on fiduciaries may change.

The Trust Code incorporates multiple trust modification statutes. For example, the Trust Code now allows a noncharitable irrevocable trust to be modified or terminated by consent of the trustee and all beneficiaries (without the involvement of the court) "if the modification or termination is not inconsistent with a material purpose of the trust." N.J.S.A. 3B:31-27(a). In addition, all of the beneficiaries of a noncharitable irrevocable trust can agree to modify the trust (apparently without the participation of a trustee) "if the court concludes that modification is not inconsistent with a material purpose of the trust." *Id.* Likewise, all beneficiaries can agree to terminate a trust "if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." N.J.S.A. 3B:31-27(b).

If not every beneficiary consents to the modification or termination under N.J.S.A. 3B:31-27(a) or (b), the modification or termination may nonetheless "be approved by the court if the court is satisfied that (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected." *N.J.S.A.* 3B:31-27(e).

The Trust Code further codifies certain common law provisions allowing the court to reform a trust. For example, under the cy pres doctrine, a court may alter a particular charitable purpose designated in an instrument if the purpose becomes impossible or impracticable to fulfill. *See Howard Savs. Inst. of Newark v. Peep*, 34 *N.J.* 494, 500-01 (1961). That doctrine was adopted and expanded under the Trust Code. *See N.J.S.A.* 3B:31-29. Under that statute, if the charitable trust becomes "unlawful, impracticable, impossible to achieve, or wasteful", the court may modify or terminate the charitable trust "by directing that the trust property be applied

or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes." N.J.S.A. 3B:31-29(a).

The doctrine of equitable deviation has also long been recognized under New Jersey common law and governs charitable trusts as well as noncharitable trusts. Under that doctrine, a court can alter an administrative provision of a trust where compliance has become "impossible, illegal or in conflict with the essential purpose of the trust." *Howard Savs. Inst. of Newark*, 34 *N.J.* at 502. In conformity with that doctrine, under N.J.S.A. 3B:31-28, the court may "modify the administrative or dispositive terms of a [charitable or noncharitable] trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." *N.J.S.A.* 3B:31-28(a). The statute mandates, however, that to the extent possible, such modification or termination be in accordance with the settlor's probable intent. *Id*. In addition, the court may modify the administrative terms "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *N.J.S.A.* 3B:31-28(b).

The Trust Code includes other provisions that reinforce the court's power to reform a trust to conform to the settlor's probable intent in specific circumstances. For example, *N.J.S.A.* 3B:31-33 specifically permits a court to modify a trust to achieve the grantor's tax objectives. That issue was previously addressed in cases such as *In re Estate of Branigan*, 129 N.J. 324 (1992) and *In re Estate of Ericson*, 74 N.J. 300 (1977). The Trust Code also adopts a provision allowing for termination of uneconomical trusts (law that already exists in other jurisdictions, such as New York). *N.J.S.A.* 3B:31-30 (authorizing a trustee to terminate a trust having a value of less than $100,000 without court approval after notice to qualified beneficiaries).

Exhibit A
Comparison of UTC 808 to N.J.S.A. 3B:31-61

~~UTC 808~~N.J.S.A. 3B:31-61. Powers to Direct.

a. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

b. If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with ~~an~~a written exercise of the power unless the attempted exercise is ~~manifestly~~ contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a ~~serious~~ breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

c. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

d. A person, other than a beneficiary, who holds a power to direct is ~~presumptively a fiduciary who, as such, is~~ required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from ~~breach of a fiduciary duty~~the holder's failure to act in good faith.

Exhibit B
Comparison of 12 Del. Code 3313 to N.J.S.A. 3B:31-62

~~12 Del. Code 3313. Advisers~~N.J.S.A. 3B:31-62. Powers to Direct Investment Functions.

~~(~~a~~) Where 1~~.When one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, ~~distribution decisions or other decision of the fiduciary,~~ such persons shall be considered to be investment advisers and fiduciaries when exercising such authority ~~provided, however, that~~unless the governing instrument ~~may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity~~otherwise provides.

~~(~~b~~).~~If a governing instrument provides that a fiduciary is to follow the direction of an ~~adviser or is not to take specified actions except at the direction of an~~investment adviser, and the fiduciary acts in accordance with such a direction, then except in cases of ~~wilful~~willful misconduct or gross negligence on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

~~(~~c~~).~~If a governing instrument provides that a fiduciary is to make decisions with the consent of an investment adviser, then except in cases of ~~wilful~~willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser's ~~objection to such act or~~ failure to provide such consent after having been requested to do so by the fiduciary.

~~(~~d~~).~~For purposes of this section, ~~unless the terms of the governing instrument provide otherwise,~~ "investment decision~~""~~ means with respect to ~~all of the trust's investments (or, if applicable, to investments specified in the governing instrument)~~any investment, the retention, purchase, sale, exchange, tender or other transaction ~~or decision~~ affecting the ownership thereof or rights therein ~~(including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers,~~ and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

~~(~~e~~).~~Whenever a governing instrument provides that a fiduciary is to follow the direction of an investment adviser with respect to investment decisions~~, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser~~, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1)Monitor the conduct of the investment adviser;

(2)Provide advice to the investment adviser or consult with the investment adviser; or

(3)Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the investment adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the investment adviser's authority ~~(~~, such as confirming that the investment adviser's directions have been carried out and recording and reporting actions taken at the investment adviser's direction~~)~~, shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument ~~and such~~. Such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser's authority.

~~(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:~~

~~(1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;~~

~~(2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and~~

~~(3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.~~

WORKING WITH LGBTQ+ CLIENTS

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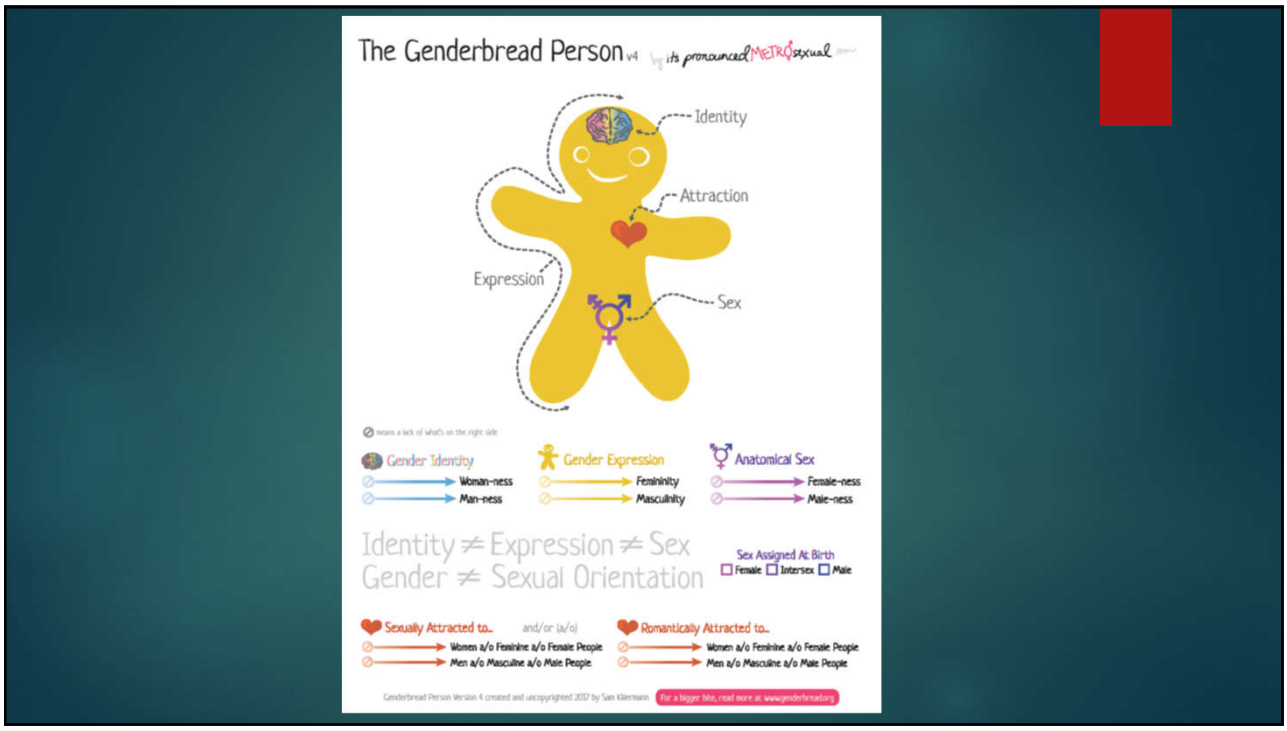
How Many Letters are there?

- **LGBT** became
- **LGBTQ** became
- **LGBTQI** became
- **LGBTQIA**, but
- **LGBTQ+** is sufficiently inclusive in writing

- **L** stands for "Lesbian"
- **G** stands for "Gay"
- **B** stands for "Bisexual"
- **T** stands for "Transgender"
- **Q** stands for "Queer" (an umbrella term for any non-heterosexual or non-cis-gender person)
- **I** stands for "Intersex" (many of whom don't want to be associated with the LGBT grouping)
- **A** stands for "Asexual"


The Genderbread Person v4
by its pronounced METRO sexual
Identity
Attraction
Expression
Sex
means a lack of what's on the right side
Gender Identity
Woman-ness
Man-ness
Gender Expression
Femininity
Masculinity
Anatomical Sex
Female-ness
Male-ness
Identity ≠ Expression ≠ Sex
Gender ≠ Sexual Orientation
Sex Assigned At Birth
Female Intersex Male
Sexually Attracted to... and/or (a/o)
Women a/o Feminine a/o Female People
Men a/o Masculine a/o Male People
Romantically Attracted to...
Women a/o Feminine a/o Female People
Men a/o Masculine a/o Male People
Genderbread Person Version 4 created and uncopyrighted 2017 by Sam Killermann
For a bigger bite, read more at www.genderbread.org

GENDER IDENTITY

GENDER – an identity tied to expectations and assumptions tied to sex. Gender is a spectrum, and people identify broadly as male, female, or non-binary.

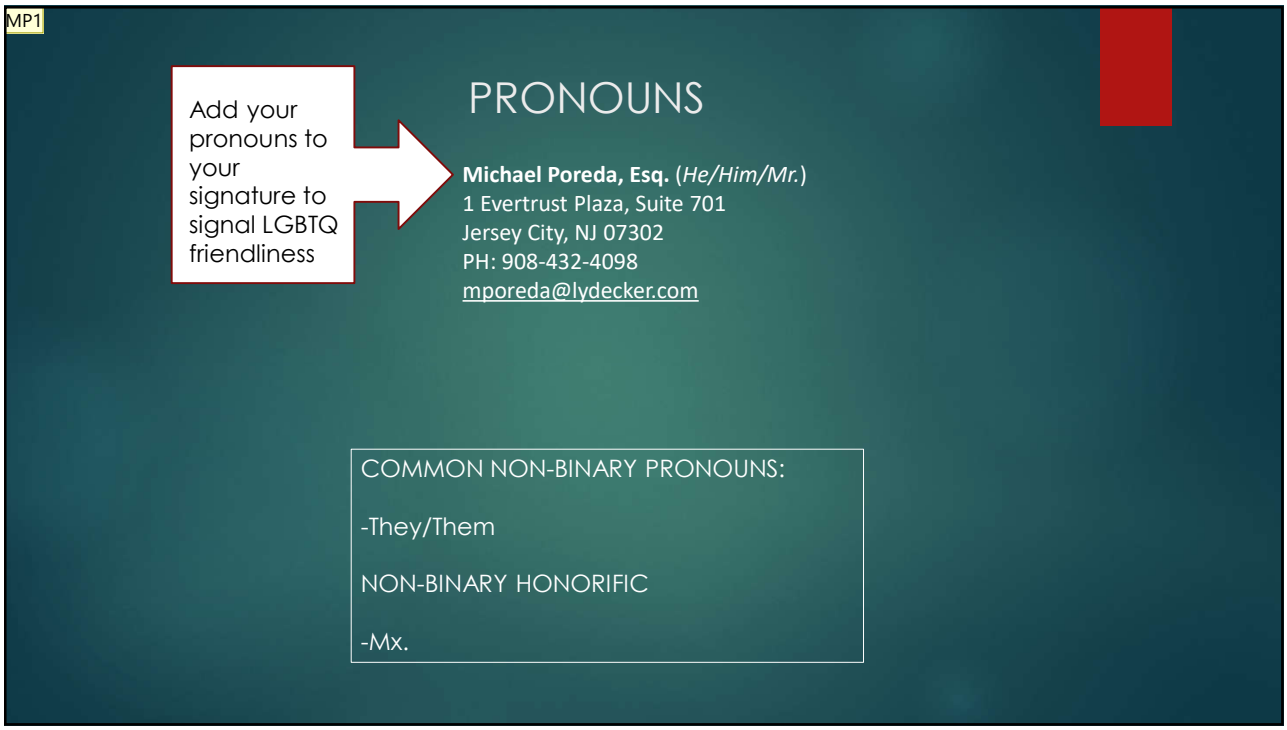
CIS-GENDER – a gender identity that conforms to sex identified at birth

TRANS-GENDER – a gender identity that does not conform to sex identified at birth

TRANS MAN – A man identified as female at birth

TRANS WOMAN – A woman identified as male at birth

NON-BINARY – a blanket term for a people who identify as neither (or both) male or/and female. Sub-categories include: genderqueer, gender fluid, agender, transmasculine, transfeminine


MP1
Add your pronouns to your signature to signal LGBTQ friendliness
PRONOUNS
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COMMON NON-BINARY PRONOUNS:
-They/Them
NON-BINARY HONORIFIC
-Mx.

Outdated Terminology

- Sexual Preference (use "sexual orientation")
- Preferred Pronouns (just use "pronouns")
- Preferred Name (use "chosen name")
- Homosexual or Gay "Lifestyle"
- Transsexual (use "transgender")
- Transvestite (use "transgender")

Persistence of the "Dead Name"

- Transgender clients typically call a former name a "dead name"
- New Jersey permits a person to change their name simply by assuming that name.
- Make sure the client goes through a judicial name change.
- Make sure the name has been changed with Social Security.
- Make sure all estate-planning documents are updated to reflect the "chosen name."
- Be cognizant that dead names tend to persist long after judicial name changes.

Complex Family Issues that May Require Estate Planning

- Client has a previous family and then moves on to a new family relationship.
- Non-Genetic Parentage
  - Second-Parent adoption
  - In NJ, there is simplified process for couples who are married/in a civil union at the time a child genetically-related to other parent is born to get a judgment of parentage.
- Polyamorous families.
- Unmarried partners.

Why More LGBT Elders are Unmarried

- Historical Stigma of LGBT identity
- Beliefs about marriage as an institution
- Civil Union or Domestic Partnership may have been utilized and deemed adequate by the couple
- Polyamorous family arrangements

NJ Marriage Equality

2003 – Domestic Partnership Act

2006 – Lewis v. Harris – NJ Supreme Court finds domestic partnership are an inadequate substitute for marriage

2006 – Civil Union Act

2012 – Chris Christie vetoes Marriage Equality Bill

2013 – U.S. Supreme Court over-rules Defense of Marriage Act in *Windsor v. United States*

2013 - Garden State Equality v. Dow finds NJ Civil Unions are inadequate under the N.J. Constitution in light of *Windsor v. United States*

2015 – U.S. Supreme Court guarantees marriage equality nationally in *Obergefell v. Hodges*

2020 – Justices Alito and Thomas suggest they would overturn *Obergefell* if given the opportunity in a decision denying certiorari to the case *Ermold v. Davis*

2022 – NJ Marriage Equality legislation signed into law

2023 – Federal Respect for Marriage Act (not a codification of *Obergefell v. Hodges)*