THE PAST YEAR'S MOST SIGNIFICANT, CURIOUS, OR DOWNRIGHT FASCINATING FIDUCIARY CASES (2017 Edition)*
*At least it seems to me. Your mileage may vary.

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I. CHARITABLE MATTERS

A. **Cohen v. The Minneapolis Jewish Federation, 2017 U.S. Dist. LEXIS 205570 (W. D. Minnesota 2017)**. Trustees of supporting organization do not have the right to direct specific charities to receive trust assets through supported organization, and cannot amend trust to eliminate supported organization contrary to trust terms.

1. In 1980, the Melvin Cohen Foundation created a Minnesota trust to benefit and carry out the charitable, educational, and religious purposes of the Minneapolis Jewish Federation. The trust expressed the intent that the trust qualify as an I.R.C. Section 509(a)(3) supporting organization. The trust directs the trustees to make distributions to the support the purposes of the Federation, and allows the trustees to designate “a particular function, activity, or grant program of the Federation” to receive the distribution. Absent a designation, the Federation can treat a distribution as an unrestricted gift. The trust held assets of $70 million, which the trustees invested very conservatively in treasury bills, CDs, and other fixed-income investments.

2. Melvin Cohen was one of the initial three trustees, and served until his death in 1981 when his daughter Maryjo replaced him. Starting in 1981 and continuing until 2015, Melvin (or all three trustees) sent letters to the Federation with “requests” about how to allocate the trust assets.

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distributions, including requests for specific charities to receive distributions (one of which was the Middle East Media & Research Institute (MEMRI). Through 2015, the Federation made all the distributions requested by Melvin or the trustees.

3. Two other successor trustees were appointed in 2015. One new trustee, appointed by a resigning trustee with ties to the Federation, was appointed only because of Maryjo’s request. Maryjo became trustee in her father’s in 2008 and is a libertarian.

4. In 1980, the Federations purposes and objects focused on Jewish organizations, welfare, causes, and communities. In 2006, the Federation broadened its purposes to include additional Jewish causes around the world, and cooperation with other denominations for the benefit of the Twin Cities community. In addition to distributions for Jewish causes, the Federation contributed (but not from trust assets) to Planned Parenthood, the Minnesota Center for Environmental Advocacy, and Minnesota Public Radio.

5. In 2015, the trust provides the Federations with a check designated for MEMRI. The Federation did not comply with the trustee’s distribution request because it had questions. The trustees and the Federation disagreed about their relative authority over trust distributions. The trustees then sent the trust’s annual gift with a letter directing a large majority distribution to the Donor’s Trust, Inc. for the Jewish Education and Support Fund – a fund “committed to supporting the principles of liberty” that makes grants “to charities that do not rely on government funding but do promote the foundations of civil society: limited government, personal responsibility, and free enterprise”. All grants by Donor’s Trust, Inc. are subject to board approval, and Maryjo was a board member. Maryjo and the Federation exchanged letters arguing about their relative authority over distributions, during which time the Federation held the disputed gift funds in reserve (and distributed the rest), and informed the trustees. The Federation’s repeated requests for a meeting were met with additional letters.

6. In 2016, the trustees voted secretly (without informing the Federation) to amend the trust to: (a) allow the trustees to select other charities to receive distributions; (b) removed the Federation’s right to appoint a successor trustee if the resigning trustee did not make a designation; (c) allow the trustees to elect private foundation status; (d) remove the requirement that trust amendments be made only with unanimous approval of the trustees. Thereafter, the trustees met with the Federation but did not disclose the amendment. The trustees then made another annual gift to the Federation, again designating specific charities, and the Federation again held those funds in reserve while the dispute was pending.
7. The Federation’s CFO became concerned about the trust’s extremely conservative investment strategy causing a precipitous decline in the grants to the Federation. The Federation also objected to a trust employee providing personal services for Maryjo’s family (allegedly receiving compensation of $80,000 but only providing trust related services valued at $20,000). The Federation was concerned about $200,000 in legal fees paid to one trustee’s firm from the trust, where the billing records indicate that the services related to numerous other Cohen family charities and not just the trust. In return, the trustees commissioned an accounting firm to provide a report that the Federation failed to properly distribute funds directed to the United Jewish Communities, or had used trust assets to discharge the Federation’s own obligations to the UJC, although the UJC confirmed it had received all the amounts designated by the trustees.

8. The trustees and the Federation filed claims asking the court to determine the trustees’ authority, the validity of the amendment, the validity of the trustee appointments. Both parties sued the other for breach of duty, and the trustees sought to modify the trust to replace the Federation as beneficiary.

9. **Trustee authority.** On cross motions for summary judgment, the court held that the trustee did not have the authority to direct the charities to receive the trust distributions on the following grounds:

   a. The terms unambiguously state that the trust is for the benefit of the Foundation, and cannot be amended in any way to alter this intent. The trust terms make clear that the Federation is not simply a conduit through which the trustees can make donations of their choosing. The tax laws related to qualification of the trust as a supporting organization (which was directed by the trust terms) also place important limitations on the trustees’ discretion – these laws reinforce and emphasize the duties imposed on the trustees in the trust agreement to serve the interests of the Federation.

   b. The trust is a charitable trust, but unlike a trust for the benefit of the public generally, this trust has a beneficiary to which the trustees owe duties.

   c. The trustees may, under the unambiguous trust terms, designate funds to go to any of the Federation’s functions, activities, or grant programs, but this does not expand the authority of the trustees to choose third-party charities. Because the trust is unambiguous, extrinsic evidence of Melvin Cohen’s statement is in admissible, and the UTC definition of the “terms of the trust” (which contemplates extrinsic evidence of intent that is admissible in a
judicial proceeding) does not make those statements admissible where the trust is unambiguous.

d. The Federation’s prior agreement to charities requested by the trustees is not a valid amendment to the trust because: (i) the UTC modification statutes require court action, not mere course of conduct; (ii) contract modification principles have not been applied to the course of conduct between trustees and beneficiaries; and (iii) there was no instance of the Federation agreeing to a trustee request over its own objection, as supported by the fact that the Federation researched all requests before approving them. For the same reasons, the Federation has never waived its right to object to any request.

10. **Reserves.** The court held that the Federation could properly reserve funds during a dispute with the trustees, since the trust terms were silent on the issue, and terms about the trustee’s ability to select another charitable recipient where the Federation is “not then in existence or unwilling to accept the funds” do not apply in these circumstances.

11. **Replacement of beneficiary.** The court held that the trustees could not modify the trust to replace the Federation as beneficiary because: (a) the UTC allows modification to carry out the settlor’s intent, not to frustrate the clear intent to benefit the Federation; (b) the trust terms do not restrict the use of trust assets for only Jewish organizations, so the expansion of the Federation’s mission does not undermine its right to be the beneficiary, and there is no allegation that the Federation has turned its back on any of the charities it funded at the time the trust was created; and (c) if the trustees did not agree with the purposes of particular charities the Federation funds, it was free under the trust terms to earmark gifts for particular purposes within the Federation with which the trustees agree (but could not select specific charities).

12. **Trust amendment.** The purported trust amendment by the trustees is invalid on the grounds that: (a) it was drafted in secret without consulting the Federation in violation of the trustees’ duty under trust and tax law to keep the Federation informed; (b) its purpose and effect are to undermine the Federation and limits its influence over the trust, and are thereby inconsistent with the trust terms that prohibit amendments that alter the intent to benefit the Federation; (c) the amendments are inconsistent with the trustees’ duty of loyalty; and (d) the amendments violate the trust terms that prohibit amendments that adversely impact the trust’s qualification as a supporting organization for federal tax purposes.
13. **Trustee appointment.** The trust terms do not require that a successor trustee be a “Federation trustee” or have a connection to the Federation, but the trustee’s duty of loyalty applies to the designation of a successor trustee. The duty of loyalty required a trustee, when designating a successor, to choose a trustee that would act for the benefit of the Federation. Here, a trustee was chosen only on Maryjo’s request, and Maryjo provides no justification for her choice – Maryjo alleges only that this trustee “agrees with some libertarian ideas and principles”. The designation of this successor trustee was therefore a breach of trust, in the absence of evidence that an effort was made to select a trustee that would serve the Federation’s interests. The one-year short UTC statute of limitations does not apply here to bar the Federation’s claim, because the trustees never sent the Federation a report describing their process for choosing the trustee.

14. **Trust investments.** The Federation claims about the trustee’s investments were barred by the statute of limitations because the investment decisions complained of were outside the limitations period and the Federation did not allege any new actions not barred by limitations.

15. **Trustee claims against Federation.** The Federation acknowledged it might owe a fiduciary duty to the trustees where it received a restricted gift. The trustee’s claims about failure to distribute to the UJC are not barred by the doctrine of merger, and the Federation is not free to do whatever it chooses with money it receives in a restricted gift. The state attorney general is not an indispensable party to the claims just because the Federation is accountable to the attorney general, and the Federation did not identify any relief the court cannot grant without the attorney general. The report of the accountant retained by the trustees is admissible. The letters from the UJC do not, however, require summary dismissal because the UJC letter does not address whether any funds were used to discharge the Federation’s own obligation to the UJC, and trial is necessary to resolve the disputed evidence.

16. **Claims against the trustees.** The trustees do not breach their duties merely by bringing claims in this case. However, the conduct of the trustees may be relevant at trial on the issue of whether the trustees should be removed (along with allegations that Maryjo attempted to use trust assets to make a gift to a synagogue in her own honor). The claims about personal use of the trust employee’s time, and over-billing the trust for legal work, require trial due to disputed evidence.
II. DIRECTED TRUSTS, PROTECTORS & SPECIAL FIDUCIARIES


1. In 1970, George McDonald created in irrevocable Illinois trust for the benefit of his daughters, Eelen and Abby, that held the 1,250 voting shares of A.Y. McDonald Industries, Inc. The trust terms provided for two trust advisors, each with the power to vote half of the shares acting in a fiduciary capacity. Sarah, the company vice president and a board member, was one of the advisors, with Robert McDonald as the other.

2. Robert informed Sarah that he was eliminating her position as an officer. She wrote to the board and requested a special meeting. At the meeting the next month, Robert and the board removed her as vice president. Sarah wrote to the board again and complained about the actions of the executive committee, and the next month Robert asked for her board resignation, which she refused. A special meeting was called to remove her from the board. On advice of counsel and to avoid the appearance of a conflict, Sarah did not attend to vote her half of the shares as advisor, but there was still a quorum with enough votes without hers to remove her from the board. Sarah similarly refused to attend the annual shareholder’s meeting where a new slate of directors that included Eelen but not Sarah was still approved.

3. The same month, Eelen asked Sarah to resign as trust advisor and appoint Eelen as successor. Sarah refused, and the beneficiaries sued to remove her as advisor, alleging that she had failed to perform her duties by missing the meetings and not voting the shares. The trial court ordered her removal and replacement on summary judgment on the grounds that she was acting impermissibly in her own self-interest, and appointed Eelen as successor (and not allowing Sarah to appoint her successor as set forth in the trust terms), and Sarah appealed.

4. On appeal, the Iowa court of appeals, applying Illinois substantive law, reversed the trial court and remanded the case on the following grounds:

   a. The beneficiaries do not have to prove that they were harmed to support claim for removal of an advisor, which is similar to removal of a trustee (unlike a claim for breach of trust). The court has the inherent authority to remove a trustee for just cause such as conflicts of interest.

   b. However, under Illinois, where the settlor intended to have trustees who are officers or employees of the company held in trust, the
general fiduciary rules are modified. Where a testator places his business in trust with an officer or employee as trustee, it would be a strange rule of law to find bad faith, self-dealing, or other improper conduct, if they failed to resign their corporate positions and thus discontinue the very reason for their selection. Here, the court will not interfere on the basis of conflicts of interest unless the trustee’s act constitutes fraud, bad faith, or an abuse of discretion. A trustee may occupy conflicting positions where the trust instrument contemplates, creates, or sanctions the conflict, and the settlor can waive the duty of loyalty by expressly conferring on the trustee the power to act in a dual capacity, or by implication by knowingly placing the trustee in the position.

c. Whether this modified standard applies here should be resolved at trial. Arguably the trust contemplates potential conflicts because the trust contemplates that the advisors would be part of the company. It has also been a practice for the advisors to be actively employed by and involved in company management.

d. Summary judgment was not appropriate where nothing in the trust instrument required Sarah to vote the shares allotted to her, her choice not to vote did not affect the outcome, and while her refusal to vote was against the wishes of the beneficiaries, there is no evidence that her refusal was against the interests of the beneficiaries. A beneficiary’s wish is not equivalent to an interest. There are genuine issues of material fact whether her actions were against the interests of the beneficiaries.

III. DECANTING

A. Hodges v. Johnson, No. 2016-0130 (New Hampshire Supreme Court December 12, 2017). New Hampshire Supreme Court affirms voiding of trust decanting on the grounds that the trustees violated their UTC duty of impartiality by not properly considering the interests of the beneficiaries removed by the decanting.

1. Trust creation. David Hodges Sr. created a large and successful real estate holding and development company. In 2004, David Sr. created, through decanting that was not challenged, an irrevocable GST exempt trust and an irrevocable GST non-exempt trust with a long-time non-family employee, Alan, as sole trustee. A lawyer that represented David Sr. and the company, William, was added as a co-trustee. The trusts were funded with all of the company non-voting stock (representing 98% of the total company interests). David Sr. retained the 2% voting stock.
2. **Trust terms.** The trusts were for the benefit of David Sr.’s wife, Joanne, his three children, his two step-children, and their descendants. The paramount trust purposes were the continuation of the company and avoiding estate taxes. The trusts gave the beneficiaries “Crummey” withdrawal rights that were not a factor in the court’s analysis. All trust distributions were subject to the trustees’ discretion, and the permissible distributees were Joanne, the five children and their descendants, or “any trust established by the settlor under another trust instrument for the benefit of any one or more, but not necessarily all, of the members of such group”. Upon the death of both the settlor and Joanne, the trust assets would be divided into separate trusts for the five children (also with fully discretionary distributions). The trust terms also included guidance to the trustee on making distributions that was “not intended to limit or direct the exercise of the trustee’s discretion in any way”, including: (a) that there was no duty to equalize among the beneficiaries; and (b) that Joanne should be the primary and paramount beneficiary during her lifetime. The trusts also included a forfeiture clause in the event of a contest.

3. **Business interests.** With respect to the company interests, the trust terms appointed a committee of advisors with the exclusive power, after the settlor’s death or incapacity, to make all business decisions for the company. The settlor had the power to change committee members and modify the terms, and in 2012, David Sr. exercised his right to: (a) name Alan, David Sr.’s personal attorney Joseph, William, his daughter Nancy, and Diane Benoit as members; and (b) name his other daughter Janice to have the sole power to vote any voting interests (but not be involved in company management). The trust terms also stated: (a) David Sr.’s desire that the business interests be retained in trust and not distributed to any beneficiary, and a direction that a distribution of interests to a beneficiary could only be made on approval of the committee; and (b) his desire that the businesses retain enough cash to reinvest in the company and preserve it.

4. **First decanting.** In 2009, David Sr. retained his personal attorney Joseph to assist with estate planning, and he was reconsidering his prior generosity to his son Barry and daughter Patricia. The attorney advised that the trusts could be decanted by the trustees to remove those two children as beneficiaries, the attorney advised the trustees of their power to decant, and offered to draft the new trusts and serve as decanting trustee. In October 2010: (a) Alan resigned as co-trustee and the attorney was appointed; (b) William delegated his decanting power to the attorney; (c) the attorney as trustee decanted the trusts; (d) the attorney resigned as trustee; and (e) Alan was reappointed as co-trustee. Under the decanting, Barry and Patricia were removed as trust beneficiaries. The assets were not moved at the time because the
decanting documents provided that assets should be moved only after the settlor’s death.

5. **Family friction.** David’s son Barry worked in the company for 36 years before he was terminated in 2012 following friction with his father about his underemployment. David’s son David Jr. also worked in the company, but was fired in 2012 after family friction following his being passed over for president in favor of Alan. In the course of that family friction, David Sr. moved out of the family home and divorced Joanne, Barry had a heart attack, and David and Alan hired armed guards for their protection from David Jr. and Barry. David Sr.’s daughter Patricia never worked in the company, but as of 2015 had not spoken with her father in several years.

6. **Second and third decanting.** In 2012, following David Sr.’s request, the same decanting process was used to also remove David Jr. as a trust beneficiary. In 2013, following David Sr.’s request, the same decanting process was used to also remove Joanne as a trust beneficiary. The assets were not moved at the time because the decanting documents provided that assets should be moved only after the settlor’s death. (The parties agreed that the decantings took place in the year the papers were signed and that the failure to transfer assets did not render the decantings void).

7. **Litigation and trial court decision.** In April of 2014, David Jr., Barry, and Patricia (but not Joanne) petitioned the court to void the decantings and to remove the trustees. The trial court granted the petition and declared the decantings void and removed the trustees on the following grounds:

   a. Their personal and harsh nature, along with the attorneys’ testimony, suggests that the decanting were undertaken and completed at the request, with the blessing, and at the direction of David Sr.

   b. The decantings were accomplished without considering the beneficial interests of David Jr., Barry, and Patricia. David Sr. died in August of 2015 (citing to the UTC duty of the trustees to act in good faith, in according with the trust terms and purposes, and in the interests of the beneficiaries); the trial court construed the UTC phrase “interests of the beneficiaries” as meaning the statutory and common law duties of impartiality.

   c. To consider their interests, the trustees had to give due regard for the diverse beneficial interest created by the trust terms.
d. Giving due regard required the trustees to consider the effect of the decantings on the interests of the beneficiaries, and specifically their financial interests, and to adjust their actions as to how to modify those interests.

e. While the trustees gave consideration to the trusts’ business purposes, they did not give due consideration to the interests of the beneficiaries.

8. Appeal to the New Hampshire Supreme Court. On appeal, the New Hampshire Supreme Court, over one dissenting justice, affirmed the trial court on the following grounds:

a. The trial court erred by construing the UTC phrase “interests of the beneficiaries” as meaning the statutory and common law duties of impartiality. As used in the New Hampshire UTC section that requires the trustee to act in accordance with the “interests of beneficiaries”, the trustee is only required to act in accordance with the trust provisions that define those interests. That same UTC statute, by requiring the trustee to act in accordance with the UTC, also incorporated the UTC statutory duty of impartiality. Therefore, the trial court’s ruling will be construed as a ruling that the trustees violated the statutory duty of impartiality when they decanted the trusts. The trial court’s phrase “due regard for the diverse beneficial interests created by the terms of the trust” denotes the duty of impartiality.

b. The duty of impartiality requires equitable, but not necessarily equal, treatment. The trust code allows unequal distributions among beneficiaries and permits a trust decanting that could exclude a beneficiary. The exercise of these powers do not necessarily violate the trust code’s statutory duty of impartiality. To rule otherwise would render the grant of trustee distribution and decanting powers superfluous. A trustee, who makes unequal distributions among beneficiaries and/or eliminates a beneficiary’s non-vested interests in an irrevocable trust through decanting violates the statutory duty of impartiality only when the trustee fails to treat the beneficiaries equitably in light of the purposes and terms of the trust. (Note – the UTC duty of impartiality is a duty that is subject to override in the governing instrument).

c. While the trusts were created to preserve the company and save taxes, another “evident purpose” of the trusts (from the presence of withdrawal rights and distribution provisions) was to support the beneficiaries. The trial court’s finding that the trustees failed to consider this trust purpose was supported by the record, including the attorney-trustee’s agreement that he did not consider the
financial interests of the beneficiaries. Also, the record does not include any consideration of alternatives to complete disenfranchisement of the beneficiaries.

d. The contingent or non-vested nature of the interests of the beneficiaries is not dispositive of whether the trustees complied with their statutory duty of impartiality, because the statutory duty is owed to all beneficiaries.

e. The trial court was not required to believe the assertions that eliminating the beneficiaries was needed to eliminate family conflict and protect the company, because: (i) the company was controlled by the committee and the beneficiaries were excluded by the settlor from serving on the committee; (ii) by eliminating the beneficiaries through decanting, the risk of litigation was increased not decreased; and (iii) by eliminating the beneficiaries, the trust forfeiture clause could no longer serve as a check against possible disputes (since the beneficiaries would have nothing to lose by litigating).

f. The trial court did not abuse its discretion by removing the trustees because the court could have reasonably concluded that the trustees committed a serious breach of trust when they violated their duty of impartiality.

9. *Dissenting opinion.* One dissenting justice would have vacated the trial court and remanded the cases on the following grounds: (a) the majority affirmed the trial court on alternate grounds that the trial court did not reach and the parties did not brief (the statutory duty of impartiality); (b) the trial court never held that the trustees violated the statutory duty of impartiality; (c) deciding issues that have not been briefed undermines adversary process and increases the possibility of error; (d) as a case of first impression, the court should have proceeded with caution, and the court has undermined the goal of the legislature to make New Hampshire the best and most attractive legal environment for trusts and fiduciary services; and (e) without briefing, the court could not properly hold that the duty of impartiality was actually breached, and the majority ignored the primary trust purposes of company preservation in favor of an “evident purpose” selected by the court.

IV. AMENDMENT, REVOCATION, REFORMATION, MODIFICATION & TERMINATION OF NON-CHARITABLE TRUSTS

A. *In re Passarelli Family Trust, 2017 Pa. Super. LEXIS 935 (2017).* Failure to specifically identify the underlying assets of company placed in trust is not adequate proof of fraud to void a trust.
1. In 2015, Margaret was diagnosed with breast cancer, and that same year agreed with her husband, John, to meet with an attorney to discuss estate planning. She did not know her husband had already met with the lawyer, and only learned this shortly before a meeting to sign documents, including an irrevocable trust drafted by the attorney. In May 2015, John and the attorney presented the trust to her, which was to be funded with all of the marital assets totaling $13.9 million, including two family business entities holding marital property with a combined value of $4.2 million. Margaret did not ask about the inventory of assets to be placed into the trust and did not read the trust. She asked what happened to the trust in the event of divorce, and was advised by the attorney that the trust would survive divorce. Margaret signed the trust, naming her husband as trustee. The trust provided for discretionary income to her, her husband, and their two children, with the children as remainder beneficiaries after their deaths.

2. Margaret then learned that John had purchased two Florida properties through the family business entities without her knowledge, was having an extramarital affair, and that John’s girlfriend was living in one of the Florida properties. Margaret filed for divorce and petitioned to terminate the trust on the basis that John purchased the Florida properties with marital assets, and failed to disclose this at the time the trust was executed. The trial court dissolved the trust on the grounds of fraud because John did not disclose the property addresses in the trust schedule of assets, and John appealed.

3. On appeal, the Pennsylvania Superior Court reversed the trial court and preserved the trust on the following grounds:

   a. Evidence to support trust rescission for fraud must be clear, precise, and convincing. Unsubstantiated testimony of an alleged mistake is insufficient. Voiding a donative transfer for fraud requires a showing that the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not have otherwise made.

   b. Irrevocable trusts are intended to be irrevocable, and are not easily rescinded so as to provide stability and security and to ensure property will be available to the beneficiaries. Margaret testified that she wanted the money to stay in the family.

   c. The omission of the addresses of the Florida property from the schedule of trust assets is not adequate to establish that John committed fraud in the execution of the trust because: (i) the schedule does not include any of the assets of the family companies, and the companies are accurately valued on the
schedule; (ii) even if the properties were included, it is unlikely that Margaret would have known about their significance to the marriage at the time of the trust execution; (iii) no false statement was made, since the companies were included on the trust asset schedule and were accurately valued; (iv) Margaret has not identified any duty to fully disclose a company’s assets when that company is added to a trust; (v) the duty to disclose marital assets arises only upon the filing of divorce proceedings, which had not been filed at the time the trust was created; (vi) Margaret cannot show harm, since she has not parted with property which is still held in trust the benefit of her and her children and John; and (vii) her argument that she cannot access the property in a divorce settlement is misplaced because, during the trust signing, she specifically wished to ensure the security of the assets in the event of a divorce.

4. One dissenting judge would more heavily defer to the trial court’s factual findings about Margaret’s intentions, and expressed concerned about the majority’s expansion of the role of intermediate appellate review.

B. D’Acquisto v. Lococo, 2017 Wisc. App. LEXIS 913 (2017). UTC cannot be applied retroactively to validate a purported trust amendment that was not valid at the time executed under pre-UTC law.

1. Four months before her death, Kathleen created irrevocable trusts for the benefit of her two daughters funded with combined assets worth $2 million, with her husband Anthony as trustee. The trust terms provided for mandatory distributions to each daughter of half the trust assets at age 35 and all of the trust assets at age 40. The trustee did not make the age 35 distributions or the first age 40 distribution, and still held all of the assets in trust in 2013.

2. The trustee received an offer to purchase one of the trust commercial properties for $10 million. Because of the mandatory principal distributions, the trustee did not have the authority to complete the sale, so he had his lawyer draft a “Directive to Continue as Trustee” that he and his daughters signed. The directive acknowledged the trustee’s prudent management of the trust, appointed the trustee to serve until death or resignation, and stated the intention to leave the trust assets intact and under the trustee’s control.

3. Thereafter, the trustee remarried without informing his daughters or inviting them to the wedding, the trustee withdrew from communicating with his daughters, and the trustee stated that he resented the trust and it was his intention that the daughters not receive anything from the trust. The next year the daughters petitioned to
terminate trust, and the trial court ordered the termination of the trusts on the basis that the directive was not a valid trust modification under pre-UTC Wisconsin law (because the settlor was not alive to consent to the modification), and was not a valid stand-alone contract. The trustee appealed.

4. On appeal, the Wisconsin Court of Appeals affirmed the termination of the trusts on the following grounds:

a. The new Wisconsin UTC, which would allow a court to modify a trust after the death of the settlor on the consent of all of the beneficiaries, and would also allow for nonjudicial settlement agreements, cannot be applied retroactively to the directive. The changes to the trust law with respect to trust modification made by the UTC are substantive. While the UTC by its terms applies to trusts that were in effect on the date of UTC enactment, nothing in the UTC states that it should be applied retroactively to pre-enactment events related to existing trusts. Therefore, the general rule of prospective only application of the new law applied.

b. The directive was not a valid trust amendment under pre-UTC law because the settlor was not alive to participate. The trust terms allowing merger with other trusts do not apply, because the directive does not merge trusts but refers to only continuing the existing trusts. Also, the merger provisions only allowed merger with a trust with substantially the same terms, and the elimination of the mandatory distributions would not meet this standard.

c. Equitable doctrines of estoppel, waiver, laches, or unclean hands do not require a difference result. There is no authority cited for applying an equitable defense to cause a court to modify a trust. The court’s equitable powers are used to carry out the settlor’s intent, and not to modify a trust contrary to that intent. The doctrine of “ratification” by beneficiaries cannot be applied to modify a trust contrary to the trust terms and applicable law. The equitable defenses do not validate the directive because equity follows the law, and equitable defenses do not change the requirements for a valid trust amendment. Estoppel does not apply because: (i) the trustee’s enjoyment in managing the trust does not give rise to a legally protectable interest in remaining as trustee after it should be terminated; (ii) the trustee’s success in serving as trustee does not give a trustee a legally protected interest in remaining as trustee after termination; and (iii) there can be no detrimental reliance on the directive where no party is seeking to void the transaction, and the daughters did not derive their benefits from the directive, but rather from being trust beneficiaries.
d. The directive is not enforceable as a stand-alone agreement to create a trust because: (i) there is no authority that a trustee and beneficiaries can use a stand-alone agreement to modify a trust; (ii) the daughters did not make any promises that would be consideration for a binding contract since they merely stated their “intention” to leave assets under the trustee’s control; and (iii) the directive did not create a new trust under the UTC provision validating oral trusts, because the directive was written and the UTC does not apply to the directive.

V. SPOUSAL RIGHTS & CLAIMS

A. In re Trust under Deed of Kulig, 2017 Pa. LEXIS 3741 (2017). Enactment of trust code statute that applies rules of will construction to revocable trusts does not bring assets of funded revocable trust into the estate for application of the pretermitted heir statute.

1. David executed and funded a revocable trust while married to his first wife. After her death, David married Mary Jo, and then died one month later. He had not amended his revocable trust to include Mary Jo before his death, and the trust terms would pass the assets to his children. The Pennsylvania pretermitted spouse statute would grant Mary Jo one-half the probate estate (valued at $2.1 million not including the trust assets), and she also received David’s ERISA assets valued at $1.5 million. The trust assets were valued at $3.2 million. While the elective share statute would specifically include the trust assets, but subject them to only a one-third share claim with certain offsets, the pretermitted spouse statute did not expressly mention revocable trusts.

2. The children petitioned to declare that the trust assets should be excluded from the pretermitted spousal share as assets that were “effectively disposed of by will or otherwise” under the statute, and not part of the intestate estate subject to the pretermitted spouse share claim. The Orphans’ Court and Superior Court found in Mary Jo’s favor and held that the trust assets were subject to the claim as a result of the 2006 enactment of a trust code statute providing that “the rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts”, and the 2005 Joint State Government Committee Comments to this section that made reference to the pretermitted heir statute in a list of sections with rules of construction, but without additional comments about any legislative intent to change the scope of the pretermitted spouse claim. The children appealed.

3. On appeal, the Pennsylvania Supreme Court, over one dissent, revised the lower courts and held that the new trust code provision on applying
rules of construction did not bring revocable trust assets within the pretermitted spouse claim, on the following grounds:

a. The parties correctly agree that until 2006 the pretermitted spouse claim applied only to the intestate estate, and did not reach the assets of revocable trusts. Before 2006, the parties agree that the only way to reach revocable trust assets was through an elective share claim. This is a status quo that existed for 60 years.

b. The other courts erred by finding the statutes unambiguous. The pretermitted spouse statute is a rule of construction that imputes a will modification based on presumed intent not to disinherit. Viewing the new rule of construction statute in its full context, including the express reference to revocable trusts in the elective share statutes but not the pretermitted spouse statute, there are competing reasonable readings of the intent and content of the new statute, and it is therefore ambiguous.

c. The pretermitted spouse and elective share statutes cannot be read in isolation. Neither the new construction statute, nor its commentary, express any specific legislative intent to change the pre-2006 framework for applying the spousal protection statutes. Elsewhere in the UTC, the comments specifically mention where the existing law is being changed, rather than codified.

d. The new statute is consistent with common law precedent, also suggesting it is a codification rather than a change in the law. However, the bare reference to the pretermitted spouse statute, and acknowledgment that revocable trusts are used as probate substitutes, are not sufficient evidence of intent to change the law. Also, there is no compelling policy rationale, and it would be absurd, to treat one financial device (a revocable trust) differently than another (such as POD and TOD accounts, which are clearly outside the spousal claim). Mary Jo’s position would also place heretofore sacrosanct irrevocable trusts at risk.

e. The legislature has determined that the contours of the presumed intent to include a pretermitted spouse are those that define the intestate estate. It cannot be reasonable inferred from the enactment of the new rule of construction statute that General Assembly intended to substantially revise this long-standing distributive scheme, absent clear indication to that effect.

VI. TORTS, SLAYERS, AND BAD ACTORS

preclude the court from determining whether, under a preponderance of the evidence standard, whether the potential heir would be found criminally accountable for the felonious and intentional killing of the decedent.

1. Timothy admitted that, while upset and intoxicated, he went to the basement of the home he shared with his mother and lit a cigarette with knowledge that the propane tank was leaking, and ignited a house fire that killed his mother. A neighbor present at the scene testified that Timothy: (a) was upset, ranting, and throwing objects because his mother would not go to the store and purchase more beer; (b) attempted to attach a nozzle to a propane tank to that he could “burn his mother’s face off”; (c) when unable to attach the nozzle, started striking the tank on the cement floor, refused to stop, and caused an explosion that threw the neighbor and the mother into the living room upstairs; and (d) refused to leave the house despite the resulting fire. The neighbor left the house. The mother was found deceased at the bottom of the basement stairs, and the autopsy listed the cause of death as a homicide.

2. Timothy was charged with first-degree arson and open murder, pleaded guilty to involuntary manslaughter and second-degree arson, and was sentenced to 20-60 years and 15-30 years prison respectively. His brother, Scott, as executor petitioned to determine the application of the slayer statute. The statute provided that “with respect to a claim of felonious and intentional killing, in the absence of a conviction” the court could determine, under a preponderance of the evidence standard, whether the potential heir would be found criminally accountable for the felonious and intentional killing of the decedent.

3. The trial court applied the slayer statute to bar Timothy from inheriting, and Timothy appealed. On appeal, the Michigan Court of Appeals affirmed on the grounds that pleading guilty and conviction of involuntary manslaughter and second-degree arson (combined with the statutory phrase “in the absence of a conviction”) do not preclude the court from determining whether under a preponderance of the evidence standard, whether the potential heir would be found criminally accountable for the felonious and intentional killing of the decedent.

VII. THIRD PARTY LIABILITY

A. Bennett v. Carter, 2017 S. C. LEXIS 147 (2017). Claim against accountant for aiding and abetting a fiduciary in a breach of trust supported by proof that accountant wrote the checks for improper distributions from trusts.
1. Jacquelin was the sole lifetime beneficiary of two trusts created under her deceased husband’s will. The remainder beneficiaries were her two sons and two daughters, and the sons served as trustees.

2. In 1997, Jacquelin’s accounting and the accounting firm began preparing the income tax returns for Jacquelin and the trusts. Jacquelin’s personal bookkeeper provided the accountant with information for the returns. In 2001, the accountant noticed loans from the trusts to one of the trustees, and contacted Jacquelin’s attorney. At a 2001 meeting, the account and attorney informed the trustees that the transactions were improper and advised the brothers to inform the sisters, but they did not. After the meeting, the brothers continued to withdraw money from the trusts.

3. The bookkeeper died in 2003, and the accounting firm took over bookkeeping for Jacquelin and the trusts. The accounting firm wrote the checks for the trusts at the direction of the brothers, and the brothers signed the checks. The accounting firm knew the brothers were withdrawing trust assets, including writing checks to one of the brothers’ companies. The accounting firm knew that one of its partners was personally investing in one of the companies and sitting on its board.

4. At a 2006 meeting with the brothers, the attorney, and the accountant, one of the sisters learned about the withdrawals for the first time. Jacquelin died in 2007. The sisters sued the brothers in 2008, resulting in a settlement with one brother and a judgment against the other.

5. In 2009, the sisters sued the accountant and the accounting firm for professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty. The circuit dismissed the claims as beyond the applicable limitations period, and the court of appeals reversed. The accounting firm appealed to the South Carolina Supreme Court on the issues of (a) whether the daughters presented sufficient evidence to allow the aiding and abetting claim and (b) whether the aiding and abetting claim survived Jacquelin’s death.

6. On appeal, the South Carolina Supreme Court affirmed and allowed the aiding and abetting claims to proceed on the following grounds:

   a. The elements for aiding and abetting a breach of fiduciary duty are (i) breach of duty owed to the plaintiff, (ii) the defendant’s knowing participation in the breach, and (iii) damages.

   b. By having possession of the trust checkbooks and writing checks to the brothers, a jury could find that the accounting firm knowingly participated in the brothers’ breach of duty.
c. Contrary to the court of appeals decision, the accounting firm did not have a duty to disclose the breach by the brothers to the sisters because: (i) the accounting firm was prohibited by 26 U.S.C Section 7216 from making any disclosure to a third party of information furnished in connection with the preparation of tax returns; (ii) there are criminal sanctions for violation of this section; (iii) the related-taxpayer exception does not apply because the accounting firm was not preparing the sisters’ returns.

d. The accounting firm did not breach duty by failing to disclose to sister as Jacquelin’s named agent under a power of attorney, because notice was given to Jacquelin’s attorney and that was sufficient to notify Jacquelin, and Jacquelin was competent at the time of the disclosure. While the firm could have disclosed to the agent, the power of attorney did not create a separate obligation of disclosure to the agent.

e. The aiding and abetting claim survived Jacquelin’s death because, while there is a general exception to the survivability of claims for fraud claims, the alleged fraudulent non-disclosure is not a valid part of the aiding and abetting claim (the check writing is the valid part of the claim), and the fraudulent conduct of the brothers, while related to the aiding and abetting claim, are not the basis for the claim.