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Arkansas's Trust Code and Trust Planning: A Ten-Year Perspective

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ARKANSAS'S TRUST CODE AND TRUST PLANNING: A TEN-YEAR PERSPECTIVE

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I. INTRODUCTION

In 2001, the Uniform Law Commission adopted the Uniform Trust Code, which regulates certain aspects of trusts.[1] One impetus for the trust code was the ever-increasing popularity of revocable trusts as part of standard estate planning packages. Another was the fact that few states—including Arkansas—had well-developed common law trust rules, let alone any statutory trust codes. In 2005, the Arkansas legislature enacted a slightly modified version of the Uniform Trust Code (UTC), titled the Arkansas Trust Code (ATC).[2] At that time, the *University of Arkansas at Little Rock Law Review* published my article summarizing the most important features of the new Trust Code, compared and contrasted with the then-current Arkansas common law of trusts.[3] Since then, over ten years have passed, rendering further commentary timely. This update addresses two broad themes. Part II examines how the ATC has fared in Arkansas courts. Part III discusses some recent aspects of Arkansas trust law not covered by the ATC. Overall, the cases and statutes discussed herein are examined in the context of how they affect estate planning and administration.

II. THE ARKANSAS TRUST CODE AND INTERPRETIVE CASE LAW

The cases in this section deal with the ATC, in rough order by the numerical order of ATC provisions. Since 2005, Arkansas cases have interpreted an array of ATC sections dealing with the common law of trusts and rules of construction; transfers of property into and out of trusts; cy pres and equitable deviation; modification and termination of trusts; revocability of joint trusts by a surviving settlor; duties of trustees; and attorney's fees.

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1. UNIF. TRUST CODE, 7C U.L.A. 1 (UNIF. LAW COMM'N 2006 & Supp. 2015) [hereinafter UTC]. The act is also available at http://www.uniformlaws.org/shared/docs/trust_code/UTC_Final_rev2014.pdf.
2. ARK. CODE ANN. §§ 28-73-101 to -1106 (Repl. 2012 & Supp. 2015).
3. Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191 (2005).

A. The Common Law of Trusts and Rules of Construction

Section 106 of the ATC, a type of section occurring in many uniform laws, states that both the common law of trusts and principles of equity supplement the trust code.[4] The Supreme Court of Arkansas invoked this section of the ATC when deciding a case of first impression that could have served as a final exam question in a course on wills and trusts: whether a remainder interest created by a revocable trust is contingent, or whether it is vested subject to divestment.[5] In 2000, William and Annie Fowler created a joint revocable trust, funded by both their separate and joint property.[6] When the first spouse died, the trust was to become irrevocable.[7] On the death of the second spouse, the jointly owned property and William's property was to be distributed to his two stepchildren and ten of his nieces and nephews.[8] Annie's property was to be distributed to her three children.[9] Annie died in 2001.[10] During the following ten years before William died in 2011, his two stepchildren died (both survived by issue) and his nephew died without issue.[11] The trustee contended that the interests of all three beneficiaries lapsed, but the surviving issue disagreed.[12] The trial court ruled that the beneficiaries' interests did not vest until both settlors died, citing a provision of the Restatement (Second) of Trusts.[13]

The Supreme Court of Arkansas reversed.[14] Considering case law from other states, it found that the "great weight of authority" holds that a beneficiary's interest under any inter vivos trust (even a revocable trust) is vested (although not possessory) at the time the trust is created.[15] Thus, instead of a remainder beneficiary's interest being a contingent interest, dependent on surviving the settlor, the remainder beneficiary's interest in a revocable trust is vested, subject to divestment only if the trust is revoked or amended.[16] In

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4. ARK. CODE ANN. § 28-73-106 (Repl. 2012).
5. Tait v. Comty. First Trust Co., 2012 Ark. 455, at 5, 425 S.W.3d 684, 686.
6. *Id.* at 2, 425 S.W.3d at 685.
7. *Id.*, 425 S.W.3d at 685.
8. *Id.*, 425 S.W.3d at 685.
9. *Id.*, 425 S.W.3d at 685.
10. *Id.*, 425 S.W.3d at 685.
11. *Tait*, 2012 Ark. 455, at 2, 425 S.W.3d at 685.
12. *Id.* at 2–3, 425 S.W.3d at 685.
13. *Id.* at 6, 425 S.W.3d at 687. The Restatement section relied on by the circuit court is RESTATEMENT (SECOND) OF TRUSTS § 112m cmt. f (AM. LAW INST. 3d ed. 1967). As the Supreme Court of Arkansas noted, however, this section concerns testamentary trusts, and not inter vivos trusts. *See Tait*, 2012 Ark. 455, at 6–7, 425 S.W.3d at 687.
14. *Tait,* 2012 Ark. 455, at 8, 425 S.W.3d at 689.
15. *Id.* at 7, 425 S.W.3d at 688.
16. *See id.*, 425 S.W.3d at 688.

this case, the trust was irrevocable by the time the remaindermen died, so they would have held indefeasibly vested remainders at their deaths.[17]

The court noted that the ATC is silent on this issue, but it does authorize reliance on the common law of trusts.[18] The court relied on its language in *Sutter v. Sutter*, where it stated that an inter vivos trust "passed an interest in the res to the beneficiaries during the life of the settlor, even though possession . . . thereof was postponed until the death of the settlor."[19] Finally, the court stated that it was not deciding here whether Arkansas's anti-lapse statute for wills would also apply to inter vivos trusts.[20]

One issue remains after this decision, however, which the court did not discuss explicitly. If the interest of the remaindermen is vested, then it would pass to the probate estates of the remaindermen, not necessarily to their heirs.[21] To illustrate, if one of the remaindermen here had devised his entire estate to a charity, the charity would ultimately receive the trust assets. On the other hand, if the remainderman died intestate, the trust assets would pass to his heirs. In this case, it was the issue of the remaindermen who sued so presumably the remaindermen died intestate.[22]

This rule of future interests is different from the Arkansas antilapse statute applicable to expectancies in wills, which distributes a devise to a predeceased descendant of a testator to the descendant's issue.[23] The difference in the law exists for a reason: future interests are not the equivalent of expectancies. Future interests are enforceable property interests, unlike expectancies. *Tait* reminds us that default rules of will construction—here the rule of lapsed devises—do not necessarily carry over to inter vivos trusts. Planners should heed this case and be sure to provide alternative dispositions, if desirable, to be made should a remainderman fail to survive the settlor. In fact, even if the intended alternative taker is the default taker, it does not hurt to include the gift-over expressly; the provision will be evi-

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17. *See id.* at 2, 7, 425 S.W.3d at 685, 688.

18. *See id.* at 5, 425 S.W.3d at 686; ARK. CODE ANN. § 28-73-106 (Repl. 2012). The Uniform Law Comment to this section explains that the UTC only codifies those portions of the common law of trusts "most amenable to codification." UTC, *supra* note 1, § 106 cmt.

19. Sutter v. Sutter, 345 Ark. 12, 18, 43 S.W.3d 736, 740 (2001) (citing United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460, 465 (1946)).

20. *Tait*, 2012 Ark. 455, at 10, 425 S.W.3d at 689.

21. *See* SHELDON KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 161 (5th ed. 2011).

22. *See Tait*, 2012 Ark. 455, at 2–5, 425 S.W.3d at 685–86.

23. ARK. CODE ANN. § 28-26-104(2) (Repl. 2012). Arkansas's anti-lapse statute distributes property devised to a predeceased descendant of the testator to the descendant's issue. *Id.* If the descendant has no issue, the devise lapses into the residue. *See id.* If the descendant was the sole devisee of the residue of the estate and left no heirs, the residue passes intestate. *See id.* If there were additional devisees of the residue and the descendant died heirless, the other devisees of the residue receive the descendant's share pro rata. *See id.*

dence of intent. It should also be noted that the Supreme Court of Arkansas's decision is in line with the traditional common law, and not the Uniform Probate Code (UPC), which in its highly controversial section 2-707 has tried to extend the law of antilapse to trust remainder interests.[24]

The ATC states "[t]he rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property."[25] The rationale for the UTC provision is that a revocable trust is a will substitute; therefore, the rules for interpreting the disposition of property at death should be the same.[26] In *Tait*, the court cited this provision but declined to follow it, in refusing to apply the wills anti-lapse doctrine to revocable trusts.[27]

B. Children Can be Left Behind, or Pretermitted by Inter Vivos Trusts

Like Arkansas's anti-lapse statute, the pretermitted child statute is another statutory rule of construction applying to the interpretation and disposition of property by will. It gives a child unmentioned in a will, either expressly or as a member of a class, the share of the testator's estate that the child would have received had the testator died intestate.[28] In *Kidwell v. Rhew*, the decedent created a revocable trust but no will, and so died intestate, but with effectively no property outside of the trust.[29] Kidwell, a pretermitted heir, sought to enjoin Rhew, the successor trustee and decedent's daughter, from disposing of some of the trust assets, arguing that Arkansas's pretermitted child statute should apply also to inter vivos trust dispositions.[30] The court denied the request, interpreting the statute to apply only to property passing by will.[31] Kidwell, effectively disinherited by the trial court's

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24. For articles critical of the UPC approach, see, for example, David M. Becker, *Eroding the Common Law Paradigm for the Creation of Property Interests and the Hidden Costs of Law Reform*, 83 WASH. U. L. Q. 773 (2005); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 2309 (1996). For a brief discussion of *Tait* and a helpful comparison of the traditional contrast between the antilapse law of wills and the law of remainders, see Eloisa Rodriguez-Dod, *"I'm Not Quite Dead Yet!" Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift*, 61 CLEVE. STATE L. REV. 1017 (2013).

25. ARK. CODE ANN. § 28-73-112 (Repl. 2012). *See generally* Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523 (2008), for discussion of where the law of wills is, and is not, an appropriate fit for revocable trusts.

26. UTC, *supra* note 1, § 112 cmt.

27. Tait v. Cmty First Trust Co., 2012 Ark. 455, at 5, 425 S.W.3d 684, 686.

28. ARK. CODE ANN. § 28-39-407(b) (Repl. 2012).

29. Kidwell v. Rhew, 371 Ark. 490, 491, 268 S.W.3d 309, 310 (2007).

30. *Id.*, 268 S.W.3d at 310. Apparently there were no assets because the court closed the probate estate without an administration. *See id.*, 268 S.W.3d at 310.

31. *Id.*, 268 S.W.3d at 310.

ruling, appealed.[32] The Supreme Court of Arkansas affirmed, noting the plain meaning of the statute, "if, *at the time of the execution of a will. . . .*"[33]

The Supreme Court of Arkansas, did not cite the ATC "rules of construction" provision in its decision, but rather focused on the plain meaning of the statute, emphasizing the differences between wills and trusts.[34] The court chose to apply the plain meaning of the narrower pretermitted child statute over the general statute calling for application of the rules of will construction to trusts. In the choice between a general statute and the plain meaning of a specific statute, it is probably too much to expect that a court will ignore the plain meaning of the specific, narrower statute.

Is it necessarily a bad thing that omitting a child's name from an inter vivos trust means the child will get nothing? An argument against the pretermitted child statute is that a testator drafting her own holographic will or inter vivos trust, unaware of the law, would assume that by not mentioning her child she would disinherit the child. Instead, by one of the law's ironies, she has now given him an intestate share of her probate estate. Indeed, some states do not allow an omitted child a share unless the child was born after the execution of the will.[35] On the other hand, an argument for the pretermitted child statute is that in cases of undue influence, the procurer of the will, also unaware of the law, would omit the child's name thus dooming the procurement. This case calls attention to the importance during drafting of a tactful question about the existence of other children, or wording that explicitly excludes any unnamed children—as long as there is no possibility of after-born marital children.

C. Trust Property, Yes or No?

Several appellate decisions issued since the enactment of the ATC concern whether property was transferred into a trust at its creation, or into or out of a trust at some later point in time. The ATC provides that a settlor may create a trust by "declaration by the owner of property that the owner holds identifiable property as trustee."[36] In such cases, where a settlor wishes to be the trustee of her trust (as is usually the case with revocable trusts), the settlor's trust instrument is traditionally known as a declaration of trust. It is common practice to attach a schedule listing the trust assets. Is this

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32. *Id.*, 268 S.W.3d at 310.

33. *Id.* at 492, 268 S.W.3d at 311 (emphasis in original).

34. It should be noted that testamentary trusts are subject to the pretermitted child statute because a testamentary trust is part of a will. *See* Alexander *ex rel.* Alexander v. Estate of Alexander, 351 Ark. 359, 93 S.W.3d 688 (2002) (declining to apply the pretermitted child statute to a testamentary trust, but for another reason).

35. *See, e.g.*, HAW. REV. STAT. ANN. § 560:2-302 (West 2016).

36. ARK. CODE ANN. § 28-73-401 (Repl. 2012).

schedule sufficient to transfer assets, even if the assets are real property? Even if it is sufficient, is it the best practice? The law is willing to give settlors some leeway. The UTC Comment states:

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust . . . . A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.[37]

Arkansas cases have followed the spirit of this comment, beginning with *Sutter v. Sutter*, a pre-ATC case in which the Supreme Court of Arkansas upheld the transfer of real property to an inter vivos trust despite the fact that the settlor quitclaimed the real estate in question from himself as an individual to himself as an individual and not as a trustee.[38] In *Ashley v. Ashley*, decided in 2012, the decedent had executed a family limited partnership (FLP) agreement, a pour-over will, and a revocable trust all on the same day in 1997.[39] The decedent and his four children by a previous marriage were the partners of the FLP, which held real estate.[40] In 1998, the decedent's percentage share as limited partner was amended to be 96.3188%.[41] A 2004 amendment to the partnership agreement provided that the decedent's wife would receive this interest at his death, and that the partnership would purchase the interest from her for $5 million, unless either party did not believe the interest was worth that amount.[42]

The trust provided that at the decedent's death the trust assets were to be divided into five shares for the wife and children, with the wife's share to be held in a marital deduction trust.[43] A schedule of trust assets was attached, but was left blank.[44] In 2003, the first trust amendment upped the wife's share from one-fifth to one-half, and added a share for the wife's daughter, who was also made the remainderman of her mother's marital deduction trust.[45] A 2004 amendment provided the wife with $5 million of the settlor's FLP interest and eliminated the marital-deduction trust.[46]

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37. UTC, *supra* note 1, § 401 cmt.
38. Sutter v. Sutter, 345 Ark. 12, 17, 43 S.W.3d 736, 739 (2001).
39. Ashley v. Ashley, 2012 Ark. App. 236, at 1–2, 405 S.W.3d 419, 421.
40. *Id.*, 405 S.W.3d at 421.
41. *Id.*, 405 S.W.3d at 421.
42. *Id.* at 2–3, 405 S.W.3d at 421.
43. *Id.* at 3, 405 S.W.3d at 421.
44. *Id.*, 405 S.W.3d at 421.
45. *Ashley*, 2012 Ark. App. 236, at 3, 405 S.W.3d at 421–22.
46. *Id.*, 405 S.W.3d at 422.

After the decedent's death in 2010, his widow elected to take against the will.[47] When the personal representatives filed the inventory of the decedent's probate assets, it listed no real estate or interest in the FLP, and reflected a total value of only about $250,000.[48] The widow asserted that real property valued in excess of $1 million had been left off of the list, as well as the interest in the FLP, which she claimed was worth $15 million.[49] In response, the personal representatives argued that the decedent had transferred the FLP interest to the trust prior to his death.[50] The circuit court held that there was clear and convincing evidence that the decedent's interest in the FLP had been so transferred.[51]

On appeal, the widow argued that no transfer to the trust had occurred because the trust schedule was left blank, and that by ruling that a transfer had occurred, the trial court was allowing extrinsic evidence to vary the terms of the trust.[52] However, the trust gave the settlor the power to add or remove property from the trust at his discretion, and the court noted he could have done so.[53] The Court of Appeals of Arkansas held that parol evidence of the decedent's estate planning attorneys was relevant as to the decedent's intent.[54] One attorney testified that a blank schedule of assets was not uncommon.[55] He acknowledged that there was no document expressly transferring the FLP interest into the trust, but the 1997 written estate plan and a 2003 exchange of emails both evidenced the settlor's intent that the FLP interest be included in the trust assets.[56]

Ashley is two degrees of connection from UTC section 401. Not only was the multi-million dollar FLP interest not transferred in a writing, it was not even listed on the schedule of trust assets. Best practices would dictate not only that valuable assets be titled to the trust, but also that the trust contain clear and easy procedures for removing property, if the settlor has that power.

Ashley concerned the issue of whether property in the hands of the settlor at the time of the creation of the trust was actually transferred into the trust. In *Cason v. Lambert*, one of the issues considered by the court of appeals was whether a home purchased with joint trust assets was itself a trust asset.[57] The trust was executed and funded in California by two spouses, but

47. *Id.* at 4, 405 S.W.3d at 422.
48. *Id.*, 405 S.W.3d at 422.
49. *Id.*, 405 S.W.3d at 422.
50. *Id.*, 405 S.W.3d at 422.
51. *Ashley*, 2012 Ark. App. 236, at 5, 405 S.W.3d at 422.
52. *Id.* at 6, 405 S.W.3d at 423.
53. *Id.* at 9, 405 S.W.3d at 424–25.
54. *Id.* at 10, 405 S.W.3d at 425.
55. *Id.*, 405 S.W.3d at 425.
56. *Id.* at 10–11, 405 S.W.3d at 425.
57. Cason v. Lambert, 2015 Ark. App. 41, at 7–8, 454 S.W.3d 250, 256.

they later moved to Arkansas and purchased a home with trust assets.[58] The deed conveyed the home to J. Donald Eackles and A. Marie Eackles, with no mention of their trust.[59] The court held that the home was not a trust asset, relying on two points to reach this conclusion: first, a deed to two spouses, absent express words of title, conveys a tenancy by the entirety; and second, just as in *Ashley*, the trust gave the settlors the power to withdraw money from the trust for any reason.[60] Thus, when the husband died, the widow became the sole owner of the home.

Contrasting these cases, in *Sutter*, the court considered the deeds but not the actual wording of them, as well as extrinsic evidence of the settlor's intent. In *Ashley*, there was no written evidence of transfer, only indirect evidence comprising an estate plan, emails and testimony of counsel as to intent. In *Cason*, on the other hand, where the question was whether the property remained in the trust or had been removed, the court accepted the actual wording of the deed as dispositive. Do courts apply a different standard as to whether property is a trust asset if the property was allegedly transferred after the creation of the trust, as opposed to whether property was transferred to a trust at its creation? In all these cases, intent seems to be the most important factor, divined from instruments, writings, and testimony of counsel. The moral of these cases, if there is one, is that consistency across instruments and correct titling on deeds may keep the trust out of court.

Best practices require listing the property to be transferred into the trust on an attached schedule. Attaching a bill of sale for personal property is desirable, as is conveying real property by deed to the trustee, as trustee of the named trust.[61] If the client insists on making the transfers himself, it is wise to obtain a waiver.

D. Cy Pres and Equitable Deviation—Warning to Drafters

Cy pres is the common law doctrine that allows courts to change the purpose of a charitable devise or trust provision to carry out a transferor's general charitable intent.[62] Under the common law, the requirement of "general charitable intent" was often a sticking point. Arkansas has recognized the cy pres doctrine since at least 1922.[63] Under traditional common law cy

58. *Id.* at 1, 454 S.W.3d at 252.

59. *Id.* at 7–8, 454 S.W.3d at 256.

60. *Id.*, 454 S.W.3d at 256.

61. For more information on this see ARK. BAR ASS'N, REVOCABLE TRUST HANDBOOK FOR ARKANSAS PRACTITIONERS (2007).

62. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 431, Westlaw (database updated Sept. 2016).

63. *See* McCarroll v. Grand Lodge, Indep. Order of Odd Fellows, 154 Ark. 376, 243 S.W. 870 (1922).

pres, there must be a gift in trust for a charitable purpose that is impossible or impracticable.[64] In addition, the settlor must have "general" charitable intent[65]—this is the justification for a court's power to redirect the gift. If the settlor has supplied a valid gift-over, or alternate disposition, then application of the cy pres doctrine would not be warranted.

A recent case in which a trial court used the doctrine, only to be reversed on appeal, was *Presbytery v. First Baptist Church*, which concerned the testamentary trust of a decedent that provided equal shares of income from farm land to four family members during their lives.[66] At the death of the last beneficiary, the residue was to be divided between two Osceola churches, the First Presbyterian and the First Baptist.[67] As family members passed away, the trustee began to divide the undistributed income equally between the two churches.[68] However, in 2004, the Presbyterian church dissolved.[69] Its assets became the property of Covenant Presbytery, which was not an Osceola church.[70] First Baptist questioned the distribution to Covenant Presbytery, and the trustee petitioned the circuit court for direction.[71] The court ruled that all income originally destined for First Presbyterian should now be paid to First Baptist under the cy pres doctrine.[72] The court denied First Baptist's counterclaim against the trustee, and First Baptist appealed.[73] The Court of Appeals of Arkansas reversed and remanded, and First Baptist petitioned for review.[74]

Although on original appeal the court of appeals held that cy pres did not apply because the trust was not completely charitable (because it contained gifts to individuals as well as to the two churches),[75] the Supreme Court of Arkansas properly did not reject the application of cy pres on that ground, noting that under the ATC, a charitable trust is "a trust, *or portion of*

64. 14 C.J.S. *Charities* § 46, Westlaw (database updated Sept. 2016).

65. *Id.*

66. Presbytery v. First Baptist Church, 2016 Ark. 138, at 1, 489 S.W.3d 153, 155. The Court of Appeals of Arkansas originally decided the case, Covenant Presbytery v. First Baptist Church, 2015 Ark. App. 417, 467 S.W.3d 190, but on review the Supreme Court of Arkansas vacated the court of appeals decision. *Presbytery*, 2016 Ark. 138, at 2, 489 S.W.3d at 155.

67. *Presbytery*, 2016 Ark. 138, at 2, 489 S.W.3d at 155.

68. *Id.* at 2–3, 489 S.W.3d at 155–56.

69. *Id.* at 3, 489 S.W.3d at 156.

70. *Id.*, 489 S.W.3d at 156.

71. *Id.*, 489 S.W.3d at 156.

72. *Id.*, 489 S.W.3d at 156.

73. *Presbytery*, 2016 Ark. 138, at 4, 489 S.W.3d at 156.

74. *Id.* at 4, 489 S.W.3d at 156.

75. Covenant Presbytery v. First Baptist Church, 2015 Ark. App. 417, at 8, 467 S.W.3d 190, 196.

a trust, created for a charitable purpose."[76] Instead, however, the supreme court focused on "created for a charitable purpose," and held that cy pres did not apply because the testamentary trust did not include a charitable purpose in the devises to the two churches.[77] Charitable purposes listed in the ATC are "the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community."[78] Here, the will "neither provided that the devise was to serve a charitable purpose nor restricted the churches from using the farm's proceeds for noncharitable purposes."[79] Nor did it direct the trustees to ensure that the property would be used for a charitable purpose.[80] The supreme court relied on its precedent from a 1984 case stating that "in creating a charitable trust the settlor must describe a purpose of substantial public interest."[81] However, in quoting its past precedent, the court ignored other provisions of the ATC.

The dissent noted that "the advancement of . . . religion" is a charitable purpose under the ATC.[82] It argued that there is no requirement that a will or trust set out a charitable purpose, as long as it is "clear" that the settlor's intent was purposeful.[83] And by naming two churches as beneficiaries, the devise clearly indicated the purpose of advancing religion.[84] The dissent further noted ATC section 405(c), which allows a court to select a charitable purpose or charitable beneficiary if one is not named.[85]

In view of both the law's encouragement of charities and the wording of ATC section 405(c), it would seem that the dissent has the better argument here. However, the prudent course for drafters will be to insert an express charitable purpose in a charitable will or trust provision, even if the beneficiary is a charitable entity.

The doctrines of cy pres and equitable deviation are closely related. Equitable deviation, as codified in the ATC, allows a court to either modify a trust with regard to its administrative and dispositive terms or to terminate the trust, because of unanticipated circumstances or an inability to adminis-

76. *Presbytery*, 2016 Ark. 138, at 6, 489 S.W.3d at 157 (emphasis added); ARK. CODE ANN. § 28-73-103(4) (Repl. 2012).

77. *Presbytery*, 2016 Ark. 138, at 7, 489 S.W.3d at 158.

78. ARK. CODE ANN. § 28-73-405(a) (Repl. 2012).

79. *Presbytery*, 2016 Ark. 138, at 7, 489 S.W.3d at 158.

80. *Id.*, 489 S.W.3d at 158.

81. *Id.*, 489 S.W.3d at 158 (quoting Kohn v. Pearson, 282 Ark. 418, 420, 670 S.W.2d 795, 796 (1984)).

82. *Id.* at 10, 489 S.W.3d at 159 (Danielson, J., dissenting) (quoting ARK. CODE ANN. § 28-73-405(a)).

83. *Id.* at 11, 489 S.W.3d at 160.

84. *Id.*, 489 S.W.3d at 160.

85. *Presbytery*, 2016 Ark. 138, at 11, 489 S.W.3d at 160; ARK. CODE ANN. § 28-73-405(c).

ter the trust effectively.[86] Equitable deviation applies to both charitable and private trusts, and so if the trial court had applied it in *Covenant Presbytery* the supreme court would not have been able to reverse on the ground that the trust provision did not have a charitable purpose.

The doctrine of equitable deviation does not appear by that name in any Arkansas appellate case law prior to the enactment of the ATC. Since then, one trustee has sought to use the doctrine, unsuccessfully, in a Court of Appeals of Arkansas case. In *In re Ruby G. Owen Trust ex rel. Owen,* the settlor grandmother created a trust for the benefit of her nine grandchildren, including a granddaughter, Kristian.[87] The trust was discretionary, with both income and principal available for distribution, although preservation of principal was a priority.[88] A year after the trust was created, and a month before the death of the settlor, Kristian was diagnosed with schizophrenia.[89]

The Arkansas bank serving as trustee petitioned to convert the trust to a special-needs trust, so that Kristian, an Alaska resident, could qualify for public benefits.[90] The trial court ruled that such a conversion of the trust would violate Arkansas public policy, citing Arkansas Code Annotated sections 20-77-101 and 28-69-102, which state the public policy that recipients of Medicaid be indigent and not have other means, and prohibit grantors from sequestering assets in a trust in order to qualify for medical assistance.[91] This ruling did not address several factors: first, Kristian's grandmother, and not Kristian, created the trust, and had the grandmother not died she would almost certainly have attempted to modify it;[92] second, medical assistance in Alaska was the issue, not medical assistance in Arkansas; and third, both Arkansas and Congress authorize special-needs trusts.

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86. ARK. CODE ANN. § 28-73-412 (Repl. 2012).

87. *In re* Ruby G. Owen Trust *ex rel.* Owen, 2012 Ark. App. 381, at 1, 418 S.W.3d 421, 422.

88. *Id.*, 418 S.W.3d at 422.

89. *Id.* at 2, 418 S.W.3d at 422.

90. *Id.* at 1, 2, 418 S.W.3d at 422. The terms "special-needs trust" and "supplemental-needs trust" are sometimes used interchangeably. Such a trust provides a disabled beneficiary with comfort and medical support that she would not receive from government assistance. Such a trust may not disqualify the beneficiary from Medicaid benefits. Here, I will use the term to refer to both self-settled trusts and third-party settled trusts. The requirements for the former are stricter; typically any trust assets remaining at the death of the beneficiary must be used to reimburse the state. *See generally* LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT ¶ 17.03 (2d ed. 2007).

91. *Ruby*, 2012 Ark. App. 381, at 6–7, 418 S.W.3d at 424.

92. If the grandmother had been alive, under the ATC, in a major change from common law, if the settlor and all beneficiaries agree, an irrevocable trust can be modified without court approval. ARK. CODE ANN. § 28-73-411 (Repl. 2012). Here, the grandchild most likely lacked the capacity to agree, although a guardian ad litem could have been appointed to represent her. *See* ARK. CODE ANN. § 28-73-305 (Repl. 2012).

The trustee argued on appeal that the trial court should have exercised the equitable deviation power and modified the trust.[93] The court disagreed, noting several cases in which trusts created for the benefit of disabled beneficiaries with the purpose of providing assistance in addition to medical benefits were held void as against public policy.[94] However, these cases involved trusts not subject to the provision covering special-needs trusts.[95] Congress allows the establishment of special-needs trusts by persons other than the beneficiary (including courts), authorizes such trusts, and restricts states from counting their assets for Medicaid purposes.[96] In fact, Arkansas even authorizes self-settled special-needs trusts under certain conditions and has established a revolving fund for such trusts.[97] In its decision, the court applied its public policy analysis incorrectly to third-party special-needs trusts.

Do the trustees have another course of action? If Alaska had friendlier law,[98] the principal place of administration of the trust could perhaps be transferred there. The ATC imposes a duty on a trustee to administer the trust in a place appropriate to its purposes, administration, and beneficiaries' interests.[99] The relevant ATC section presumes the existing trustee or a successor trustee will be able to operate in the new jurisdiction, which probably would not have been the case here with the existing trustee, as Pine Bluff National Bank was the trustee. A trustee may resign and a new trustee accept without court approval, if the new trustee has the unanimous agreement of the qualified beneficiaries, but here the life beneficiary was incapacitated.

93. *Ruby*, 2012 Ark. App. 381, at 3, 418 S.W.3d at 422.

94. *Id.* at 7, 418 S.W.3d at 424 (citing Thomas v. Ark. Dep't of Human Servs., 319 Ark. 782, 894 S.W.2d 584 (1995); Ark. Dep't of Human Servs. v. Walters, 315 Ark. 204, 866 S.W.2d 823 (1993)). *Thomas* involved a third-party trust established for the benefit of an injured disabled beneficiary that would not meet today's requirements for a special-needs trust. The trust in *Walters* was self-settled and also did not meet validity requirements set out by the federal law enacted in 1993. These decisions involved trusts that would not be valid special-needs trusts today.

95. 42 U.S.C. § 1396p(d) (2012). The legislation authorizing special-needs trusts was enacted in 1993 as part of an attempt by Congress to close Medicaid loopholes but at the same time allow for additional income for disabled persons through the vehicle of special-needs trusts, so long as they are structured in a particular way. The United States Court of Appeals for the Eighth Circuit has ruled that 42 U.S.C. § 1396p(d) is mandatory. Ctr. for Special Needs Tr. Admin., Inc. v. Olson, 676 F.3d 688, 703 (8th Cir. 2012).

96. *See* 42 U.S.C. § 1396p(d)(4)(A) (2012); *see also* Op. Ark. Att'y Gen. No. 2008-165, discussing how special needs trusts impact eligibility for Medicaid and the UTC's effect on special-needs trusts, and opining that the UTC should have no effect on an otherwise-valid third-party settlor special-needs trust.

97. ARK. CODE ANN. §§ 20-77-701 to -710 (Repl. 2014).

98. It seems that Alaska law is friendlier. *See* ALASKA ADMIN. CODE tit. 7, § 100.606 (West 2016).

99. ARK. CODE ANN. § 28-73-108(b) (Repl. 2012).

Another line of argument here might have been that Alaska law should govern.[100]

A recently adopted uniform law would have solved the trustee's problem in this case. The Uniform Trust Decanting Act, discussed briefly below, [101] allows a fiduciary to "decant" or convert a trust to a special-needs trust if the beneficiary is disabled.[102] This court decision points out the need for a trust decanting statute in Arkansas.

E. Spendthrift Trust Termination—An Uphill Battle

Spendthrift provisions are popular additions to trusts, but are not always viewed fondly by the trust beneficiaries who are limited in their freedom to use trust assets. Fern Stafford established a trust that would terminate at Fern's death.[103] Its assets would then be used to form a spendthrift trust administered by Arvest Bank for the benefit of Kathy Buckalew, Fern's daughter.[104] Buckalew would not receive any trust assets from either principal or income until she reached the age of sixty unless, in the meantime, she suffered a significant medical hardship or disability.[105] At age sixty, Buckalew would receive a distribution equal to her average earned income for the three years prior to her sixtieth birthday, although not less than $50,000 and not more than $75,000 annually (and adjusted for inflation).[106] At Buckalew's death, the remainder would be paid to the heirs of Fern's sister-in-law.[107]

At Fern's death, Buckalew and the heirs agreed on a family settlement agreement to terminate the trust.[108] Buckalew next petitioned to terminate the Fern Trust, relying on a trust termination statute predating the ATC and still in force.[109] The trustee, Arvest, responded and opposed the termination,

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100. Unless the trust stated otherwise, the law of the jurisdiction with the greatest relationship to the matter governs. ARK. CODE ANN. § 28-73-107 (Repl. 2012). Here, the trustee argued that Alaska law should apply. Unfortunately, the argument was made for the first time on appeal, so it went unaddressed. *In re* Ruby G. Owen Trust *ex rel.* Owen, 2012 Ark. App. 381, at 4 n.1, 418 S.W.3d at 423.

101. *See infra* text accompanying notes 453–57.

102. UNIF. TRUST DECANTING ACT § 13 (UNIF. LAW COMM'N 2015), available at http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf.

103. Buckalew v. Arvest Trust Co., 2013 Ark. App. 28, at 2, 425 S.W.3d 819, 821.

104. *Id.*, 425 S.W.3d at 821.

105. *Id.*, 425 S.W.3d at 821.

106. *Id.*, 425 S.W.3d at 821.

107. *Id.*, 425 S.W.3d at 821.

108. *Id.* at 3, 425 S.W.3d at 821.

109. *Buckalew*, 2013 Ark. App. 28, at 3, 425 S.W.3d at 821; ARK. CODE ANN. § 28-69-401 (Repl. 2012).

citing the ATC modification and termination statute.[110] This statute codifies the common law "*Claflin* doctrine," that if a settlor has died or does not agree, a trust may be modified or terminated only if: (i) all beneficiaries agree, and (ii) the modification or termination would not defeat a material purpose of the trust.[111] The original UTC stated that a spendthrift clause was not presumed to be a material purpose of a trust.[112] The Arkansas enactment is the opposite—a spendthrift provision *is* presumed to be a material purpose.[113]

Arkansas Code Annotated section 28-69-401, the statute on which Buckalew relied, conflicts to some extent with the corresponding ATC provision. The former states that if a settlor is deceased and a trust's purposes are not being fulfilled or are frustrated by unanticipated circumstances, a court can terminate a trust if the court finds there is "general family benefit" to the beneficiaries and their families, and either the settlor's personal representative can consent or acquiesce, or a court can consent standing in the shoes of the settlor's estate.[114] This statute expressly states that modification or termination may be had regardless of a spendthrift provision.[115] In other words, it is a less strong statement of the *Claflin* doctrine and not as supportive of spendthrift trusts.

The circuit court found that Buckalew had not presented evidence proving changed circumstances or frustration of the trust's purposes.[116] On appeal, Buckalew argued that the court erred by (1) applying the ATC modification/termination provision, (2) finding no change in circumstances, (3) finding no rebuttal of the presumption that the spendthrift clause was a material purpose, and (4) refusing to terminate the trust.[117] The court dodged the question of which statute should apply and noted that the court below ruled that Buckalew was not successful by the measure of either.[118] It noted that neither statute purports to be exclusive, and they overlap to a large extent.[119]

The evidence of changed circumstances was that Buckalew stated that she provided for Fern's care, which interfered with Buckalew's employ-

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110. *Buckalew*, 2013 Ark. App. 28, at 3, 425 S.W.3d at 821; ARK. CODE ANN. § 28-73-411 (Repl. 2012).

111. ARK. CODE ANN. § 28-73-411; UTC, *supra* note 1, § 411 cmt.

112. UTC, *supra* note 1, § 411.

113. ARK. CODE ANN. § 28-73-411. Arkansas is not the only state that changed the UTC in this way. Montana, Nebraska, and North Dakota made the same modification. *See, e.g.*, MONT. CODE ANN. § 72-38-411 (West 2016).

114. ARK. CODE ANN. § 28-69-401.

115. *Id.*

116. Buckalew v. Arvest Trust Co., 2013 Ark. App. 28, at 3–4, 425 S.W.3d 819, 821–22.

117. *Id.* at 4, 425 S.W.3d at 822.

118. *Id.* at 6, 425 S.W.3d at 823.

119. *Id.*, 425 S.W.3d at 823.

ment, and in turn limited the return she would receive from the trust.[120] The court was not sympathetic, noting that this development and the possibility of inadequate distribution levels, were not unforeseen while the settlor was still alive.[121]

The continued existence of Arkansas Code Annotated section 28-69-401 leads to confusion and "statute-shopping" by plaintiffs seeking to modify or terminate a trust. It was not repealed when the ATC was enacted. It should be.

One way that the ATC has rendered trustees' work easier is by providing many tools with which to modify or terminate trusts.[122] The ATC allows a court to reform the terms of a trust if there is clear and convincing evidence of a mistake by the settlor, either of law or fact, and whether in expression or in inducement.[123] This provision of the ATC was intended to mirror a corresponding Restatement section that changes the common law rule and allows reformation of wills when there is clear and convincing evidence of mistake.[124] It was applied successfully in *Anthony v. Turner*.[125] In this case, Susan Anthony, a trustee and beneficiary of the Wirth Living Trust, appealed from a trial court ruling denying her complaint for reformation of the trust.[126] Anthony alleged that Wirth's attorney had drafted a codicil to Wirth's will rather than an amendment to her trust, as Wirth had intended.[127] The trust amendment would have given Wirth sole discretion over all of the trust property, rather than having to distribute some of it to another beneficiary.[128] In support of her argument Anthony offered her testimony and a letter from Wirth that indicated Wirth wanted Anthony to have everything except for two small bequests.[129]

The attorney for Wirth testified that Wirth sent a letter, delivered by Anthony, directing him to draft a codicil to her will rather than an amendment to her trust, that he did so, and that Wirth was satisfied.[130] He testified

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120. *Id.* at 7, 425 S.W.3d at 823.

121. *Id.*, 425 S.W.3d at 823.

122. See Beth A. Wood, *Making Misfit Trusts Work When Planning Goes Awry*, PROB. & PROP., Mar.–Apr. 2016, at 55, for a helpful discussion of Article 4 of the UTC, particularly reformation under UTC § 415 and modification to accomplish tax objectives under UTC § 416.

123. ARK. CODE ANN. § 28-73-415 (Repl. 2012).

124. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. a (AM. LAW INST. 1999).

125. Anthony v. Turner, CA 08-427, 2008 WL 4735903 (Ark. Ct. App. Oct. 29, 2008).

126. *Id.* at *1.

127. *Id.*

128. *Id.* at *2.

129. *Id.*

130. *Id.*

that Wirth was aware of what property of hers was passing via the will as opposed to the trust, and that she knew what she was doing.[131]

The trial court did not think the evidence justified applying Arkansas Code Annotated 28-73-415 and reforming the trust, and granted the appellees' motion to dismiss.[132] However, viewing the evidence in the light most favorable to Anthony, the Court of Appeals of Arkansas held that Anthony's testimony and Wirth's typewritten pages made a prima facie case that the settlor's intent and trust terms were affected by a mistake of fact.[133] The case was remanded for determination on the merits.[134]

A second attempt to reform a trust using the same ATC section was shot down by the court of appeals in 2012. In *Eft v. Rogers*, a joint revocable trust of a husband and wife provided that on the death of the surviving settlor, their son John would become the successor trustee.[135] He would distribute $10,000 to his cousin and the remainder would go to John or his issue.[136] After the husband died, John died as well.[137] His mother, Mary Jane, amended the trust several times, at first making John's widow a co-trustee and executor and leaving the trust residue to her.[138] By the time of Mary Jane's death, she had appointed or nominated her niece to be the successor trustee, agent under a power of attorney, and executor of her estate.[139] And although Mary Jane had removed her daughter-in-law from all fiduciary roles, she nonetheless left the residue of her estate to her.[140]

The niece sought reformation of the trust.[141] As evidence, she introduced hearsay testimony of a housekeeper and hairdresser as to the intent of Mary Jane to change the disposition of the residue.[142] On the other hand, the drafting attorney testified that at no time did Mary Jane communicate any such intent to him—she wanted the daughter-in-law removed from fiduciary positions but indicated no intent to remove her as a beneficiary.[143] Noting the clear and convincing standard required by Arkansas Code Annotated section 28-73-415, the court agreed with the circuit court that the high standard had not been met by the evidence.[144]

131. *Anthony*, 2008 WL 4735903, at *2.
132. *Id.* at *3.
133. *Id.*
134. *Id.*
135. Eft v. Rogers, 2012 Ark. App. 632, at 1–2, 425 S.W.3d 1, 2.
136. *Id.* at 2, 425 S.W.3d at 2.
137. *Id.*, 425 S.W.3d at 2.
138. *Id.*, 425 S.W.3d at 2.
139. *Id.* at 3, 425 S.W.3d at 3.
140. *Id.*, 425 S.W.3d at 3.
141. *Eft*, 2012 Ark. App. 632, at 4, 425 S.W.3d at 3.
142. *Id.* at 7–8, 425 S.W.3d at 5.
143. *Id.* at 11, 425 S.W.3d at 7.
144. *Id.* at 12–13, 425 S.W.3d at 8.

An attorney for the appellant testified as an expert witness as to some best practices for estate planners: taking and keeping notes of discussions with clients; transmitting documents accompanied by letters of explanation; and following up with discussion between the transmission of drafts and the execution.[145] Some additional suggestions from a recent article on estate planning include the following practices. First, keeping a diary system will ensure that communications with clients are frequent and timely. Second, standard operating procedures that include documenting, dating, and sometimes even including witnesses to recommendations to a client, and including the reasoning behind the plans and specific mechanisms, can minimize exposure to malpractice and professional responsibility claims. Finally, a memo in the client file summarizing why a client has disregarded planning advice can also minimize exposure.[146]

F. Creditors' and Surviving Spouses' Rights

Subchapter Five of the ATC deals with creditors' claims. Arkansas made several significant changes to this subchapter during enactment. First, it omitted Section 503, which removed alimony, child support, and attorney's liens from being subject to spendthrift provisions. Second, it omitted Section 505(a)(3), which allows creditors of a deceased settlor to attach revocable trust assets if probate assets are insufficient. The rest of the subchapter was enacted, and in 2015 Section 505 was amended to further limit creditors' access to trust assets. The amendments are discussed below, preceded by cases dealing with creditors' rights of attachment and spendthrift trusts.

Section 501 is the first of six sections of the ATC that deal with creditors' rights.[147] It states generally that "a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means."[148] The comment qualifies the statute by explaining that some beneficiaries' interests may be "too indefinite or contingent for the creditor to reach . . . ."[149] Arkansas Code Annotated section 28-73-501 was an issue

145. *Id.* at 11–12, 425 S.W. at 7.

146. Lauren Rocklin, *How Estate Planners Can Avoid Malpractice Claims*, 39 EST. PLAN., Jul. 2012, at 26, 29.

147. ARK. CODE ANN. §§ 28-73-501 to -507 (Repl. 2012 & Supp. 2015). Arkansas did not enact section 503, which allows the following claims as exceptions to a spendthrift provision in a trust: a child for child support; a spouse or ex-spouse for maintenance; an attorney judgment creditor who has protected the beneficiary's trust interest; and a claim of Arkansas or the United States. *See* UTC, *supra* note 1, § 503.

148. ARK. CODE ANN. § 28-73-501.

149. UTC, *supra* note 1, § 501 cmt.

in *J.B. Hunt, LLC v. Thornton*.[150] In this case, debtors Robert and Frieda Thornton were the trustees and life beneficiaries of five charitable remainder trusts.[151] The trusts provided for the Thorntons to receive quarterly annuity distributions from the trusts until their deaths.[152] J.B. Hunt, apparently the last in a line of multiple creditors that had already received judgments against the Thorntons, sought to jump to the head of the line by filing a "creditors' bill," under Arkansas Code Annotated section 16-66-418 that would enable it to create an equitable lien against the trusts.[153] It argued that Arkansas Code Annotated section 28-73-501 permits attachment of present or future distributions if authorized by a court, and Arkansas Code Annotated section 16-66-418 was an "appropriate mechanism" for obtaining attachment.[154]

J.B. Hunt had won a $12.7 million judgment against the Thorntons.[155] Its attachment action under Arkansas Code Annotated section 16-66-418 was consolidated by the Benton County Circuit Court with a case already pending involving other judgment creditors and the priority of their claims.[156] In a subsequent letter opinion, the circuit court explained that various creditors had competed in a "race to serve," obtaining writs of garnishment on the trustees.[157] The court stated that their respective garnishments had been determined by "winning the race."[158] It dismissed J.B. Hunt's attempt to attach the trust assets.[159] On appeal, the Supreme Court of Arkansas agreed with the trial court.[160] It characterized the Thorntons' life interest in annuities as "contingent" on their survival and, relying on *Thompson v. Bank of America*, cited its past precedent that payment contingent on an individual's survival is not certain (or "vested") until a payment becomes due.[161] The court reviewed its case law, although not citing any cases in support of its position, and stated that an action under Arkansas Code Annotated section 16-66-418(a) is not the "typical procedure" used by judgment creditors.[162] The court noted that the creditors' bill only works if a beneficial

150. 2014 Ark. 62, 432 S.W.3d 8.
151. *Id.* at 2, 432 S.W.3d at 10.
152. *Id.*, 432 S.W.3d at 10.
153. *Id.*, 432 S.W.3d at 10.
154. *Id.* at 5, 432 S.W.3d at 11.
155. *Id.* at 2, 432 S.W.3d at 10.
156. *Thornton*, 2014 Ark. 62, at 3, 432 S.W.3d at 10.
157. *Id.*, 432 S.W.3d at 10.
158. *Id.*, 432 S.W.3d at 10.
159. *Id.* at 4, 432 S.W.3d at 10.
160. *Id.* at 2, 432 S.W.3d at 10.
161. *Id.* at 7, 432 S.W.3d at 12.
162. *Thornton*, 2014 Ark. 62, at 8, 432 S.W.3d at 13.

interest cannot be reached by regular process of law.[163] Here, the interest could be reached, as each payment came due.

It is difficult to comment on this opinion because so many questions are unanswered. First, what kind of trusts were these? Robert Thornton was a former WalMart executive who participated in real estate development and airline schemes that went bust.[164] Was the establishment of the trusts a fraudulent transfer? If so, then they could be set aside.[165] If not, these were presumably self-settled trusts, in which case, creditors would have the right to reach whatever assets the settlor-beneficiaries could.[166] All of the five trusts were charitable remainder trusts, so presumably they were irrevocable and the Thorntons had no right to invade the principal.

The UTC is slightly less protective of debtors than is the ATC, although neither allows debtors to shield assets through the creation of "asset protection trusts"—self-settled trusts that are formed by settlors with their own protection from creditors being a foremost concern.[167] Section 505 of the UTC gives creditors access to both all of the trust assets of a self-settled revocable trust, and the maximum assets of an irrevocable trust that can be distributed to a settlor-beneficiary under any conditions.[168] If the Thornton trusts were self-settled and the Thorntons could have access to more than their quarterly annuity under any circumstances, however farfetched, the creditors would have access to them as well.

Arkansas Code Annotated section 28-73-505 figured in a federal bankruptcy case in 2011. It is settled law that spendthrift trusts benefitting debtors are not counted as part of the debtor's bankruptcy estate.[169] A variation on this fact pattern occurred in *Wetzel v. Regions Bank*, where a husband's will created a testamentary trust for his wife, who also served as the execu-

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163. *Id.* at 10, 432 S.W.3d at 14.

164. *See Former Partners Foreclose on Schwyhart's Home*, NORTHWEST ARKANSAS DEMOCRAT GAZETTE, May 7, 2011, http://www.nwaonline.com/news/2011/may/07/former-partners-foreclose-schwyharts-home/; Worth Sparkman, 7 Bill Schwyhart Compnaies File Chapter 11 Bankruptcy, ARKANSAS BUSINESS, Apr. 21, 2010, http://www.arkansasbusiness.com/article/37111/7-bill-schwyhart-companies-file-chapter-11-bankruptcy?page=all; *see also* Schwyhart v. J.B. Hunt, LLC, 2014 Ark. App. 324, 436 S.W.3d 173; Pinnacle Point Props., LLC v. Metro. Nat'l Bank, 2012 Ark. App. 268, 2012 WL 1328995; Ctr. Capital Corp. v. JR Lear 60-099, LLC, C.A. No. 08–508–LPS–MPT, 2010 WL 3719062 (D. Del. Sept. 10, 2010) (adopting report of magistrate in Ctr. Capital Corp. v. JR Lear 60-099, LLC, C.A. No. 08–508–JJF–MPT, 2010 WL 3000188 (D. Del. June 23, 2010)).

165. *See* ARK. CODE ANN. § 4-59-204 (Repl. 2011).

166. *Id.* § 28-73-505 (Supp. 2015).

167. Asset protection trusts arose in other countries, some of which are traditionally regarded as tax havens, like the Bahamas, Bermuda, and the Cayman Islands. At this time, sixteen states have enacted domestic asset protection trust legislation. *See generally* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 703 (9th ed. 2013).

168. ARK. CODE ANN. § 28-73-505.

169. 11 U.S.C. § 541(c)(2) (2012).

tor.[170] The will directed her to fund the trust with stock.[171] Regions was to be the trustee.[172] At the husband's death, his estate was valued at $20 million.[173] The widow, Cheryl, did not fund the trust; instead she used proceeds from the sale of the stock to "finance a series of unsuccessful business ventures."[174]

More than four years after the husband's death, one of his sons filed a petition and the circuit court froze the remaining estate assets (now greatly reduced).[175] The widow filed for Chapter Eleven bankruptcy.[176] The court removed her as executor.[177] It ordered the new personal representative to fund the trust, which the court ruled contained a spendthrift provision, with an initial amount of $2.4 million and appointed Regions the trustee.[178] As the new trust began to generate income, Regions asked whether the widow or the bankruptcy trustee should get the income.[179] The personal representative, a creditor of the estate, intervened and argued for a third alternative, that a claim assigned to him should be collected from the trust distributions.[180]

The personal representative and bankruptcy trustee argued that the widow's behavior made the spendthrift clause unenforceable.[181] The bankruptcy court disagreed, ruling that the property was to be distributed to Cheryl and that it was not part of the bankruptcy estate.[182] On appeal, the United States Court of Appeals for the Eighth Circuit agreed with the bankruptcy court.[183]

Appellants argued that *Hartsfield v. Lescher* was controlling.[184] In *Hartsfield*, a spendthrift trust created by a father for his sons contained a provision allowing the sons to extend the lifetime of the trust.[185] One of the beneficiaries owed forty percent of any inheritance or similar property for

170. Wetzel v. Regions Bank, 649 F.3d 831, 833 (8th Cir. 2011).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Wetzel*, 649 F.3d at 833.
177. *Id.*
178. *Id.* The court noted that because the trust prevented both voluntary and involuntary alienation of the beneficiary's interest, it was a spendthrift trust under ARK. CODE ANN. § 28-73-505. *Id.*
179. *Id.* at 833–34.
180. *Id.* at 834.
181. *Id.*
182. *Wetzel*, 649 F.3d at 834.
183. *Id.* at 833.
184. *Id.* at 836.
185. Hartsfield v. Lescher, 721 F. Supp. 1052, 1057 (E.D. Ark. 1989).

his children's support under the terms of his divorce decree.[186] He and his brother extended the trust termination date "for an indefinite period of time" to be determined by them.[187] The court found that this gave the beneficiaries the benefit of the spendthrift provision but control over trust assets, as they controlled the termination date.[188] The court allowed the trust to stand, but minus the spendthrift provision.[189]

In *Wetzel*, the Eighth Circuit distinguished *Hartsfield* because in that case the beneficiary of the spendthrift trust had the power to revise the terms of the trust.[190] Here, Cheryl had no such power; thus, *Hartsfield* did not apply.[191] Appellants then argued that as executor she exercised power over the assets before they were transferred into the trust.[192] Because this power was in her capacity as executor and not as beneficiary, the court was unpersuaded.[193] The appellants also argued that Cheryl invalidated the spendthrift trust when she acted as executor and improperly handled assets earmarked for the trust.[194] The court noted that because she acted improperly while an executor and not as a beneficiary, her conduct did not violate the spendthrift provision.[195] The appellants also made an estoppel in pais argument,[196] which the court rejected, finding no reliance.[197]

On the second issue, the appellants argued that because Arkansas allows a creditor to execute on income from a spendthrift trust the moment the income reaches the beneficiary's hands, the same right exists in bankruptcy.[198] The Eighth Circuit clarified the bankruptcy court's conclusion, which was simply that the spendthrift trust income was not part of the bankruptcy estate, whether in the hands of the trustee or of the beneficiary.[199] The

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186. *Id.* at 1055.
187. *Id.* at 1055.
188. *Id.* at 1057–58.
189. *Id.* This case predates the ATC but the result is harmonious with it. *See* ARK. CODE ANN. § 28-73-505 (Supp. 2015).
190. Wetzel v. Regions Bank, 649 F.3d 831, 836 (8th Cir. 2011).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 837.
195. *Id.* at 836.
196. *Wetzel*, 649 F.3d at 836. Under the doctrine of estoppel in pais, a party who by acts "induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so misled." *Id.* (quoting Rogers v. Hill, 217 Ark. 619, 621–22, 232 S.W.2d 443, 444 (1950)).
197. *Id.* at 837.
198. *Id.* at 837–38.
199. *Id.* at 838.

court's holding did not limit rights outside of bankruptcy that might permit attachment of the distributions.[200]

The same section of the ATC cited in *Wetzel* was amended by the Arkansas legislature in 2015, marking the only major amendment to the ATC since its adoption in 2005,[201] and expanding the situations in which protection from creditors applies. First, if a trust has more than one settlor, the amendment allows creditors of one settlor access only to the assets attributable to that settlor.[202] Second, if a person (such as a settlor or beneficiary) holds a power of withdrawal, the ATC treats that person as a settlor with respect to a creditor's claim.[203] As amended, the ATC now states that on the lapse, release, or waiver of such a power, the holder of a power is not treated as a settlor.[204] In addition, property transferred to one of the following is not deemed to be property of a settlor: (1) an irrevocable qualified terminable interest property (QTIP) trust (under § 2523(f) of the Internal Revenue Code), if the settlor is a beneficiary after the death of the settlor's spouse; (2) an irrevocable general power of appointment trust (under § 2523(e) of the Internal Revenue Code), if the settlor is a beneficiary after the death of the settlor's spouse; or (3) an irrevocable trust for the benefit of a person, to the extent that the property of the trust was subject to a general power of appointment in another person.[205] This amendment will weaken creditors' rights against settlors' assets typically distributed to a surviving spouse and descendants.[206]

G. Evil Stepmoms? Revocation and Amendment by the Surviving Spouse

Joint revocable trusts, in which a husband and wife typically serve as co-trustees, are common estate planning tools. Issues often arise as to the power of the surviving spouse (usually the wife) over trust assets. Can she revoke or amend the trust? When the surviving spouse is a second spouse and the remainder beneficiaries are children from a first or multiple former marriages, the probability of a dispute increases. Other than attorney's fees,

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200. *Id.*

201. Act of Mar. 12, 2015, No. 396, 2015 Ark. Acts 1863, 1863–65 (codified at ARK. CODE ANN. § 28-73-505 (Supp. 2015)). This is not a Uniform Law Commission amendment; Arkansas appears to be the only state to have amended section 505 in this way.

202. ARK. CODE ANN. § 28-73-505.

203. *Id.*

204. *Id.*

205. *Id.*

206. For more, see Christopher Brockett, *Comment*, 2015-1 ARK. PROB. & TRUST L. REV. 3–4. The Arkansas Probate & Trust Law Review is published online by the Arkansas Bar Association as a member benefit for Probate and Trust Section members (on file with the author).

this has been the most-litigated trust question in Arkansas, in terms of appellate decisions, since the enactment of the UTC.

In *Holbrook v. Freeman*, a husband and wife created a joint revocable trust, naming a daughter as the trustee but later transferring the trusteeship to themselves.[207] The trust provisions called for the trust to terminate after the death of both spouses and the remainder to be distributed mostly to their children.[208] However, after the husband died the widow revoked the termination provision of the trust, remarried and later allegedly informed her children that she was retitling the trust property and spending it herself.[209] The trust instrument stated "[s]ettlors specifically reserve the right and power to alter, delete, modify, change and/or revoke any paragraph of this Trust Agreement and all provisions thereof at any time; provided, however, that this right is personal to Settlor and may not be exercised by a personal representative."[210]

One of the children sued for a temporary restraining order and an accounting, arguing that, among other things, because "settlor" was singular rather than plural the widow did not have the right to revoke after her husband's death.[211] The court disagreed, finding no restrictions on revocation.[212] The child next argued that the ATC limits revocation by one settlor to apply only to the property that settlor contributed to the trust.[213] The court noted that the trust property seemed to be all tenancy by the entirety, and thus owned by the widow.[214]

Holbrook points out the futility of a beneficiary suing the trustee or settlor of a revocable trust while it is revocable. The ATC states that while a trust is revocable and the settlor has the capacity to revoke, "rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[215] Non-settlor beneficiaries have no enforceable rights because of a settlor's ability to revoke the trust.

In *Jaynes v. Citizens Bank of Batesville*, two settlors created a joint revocable trust of which they were co-trustees.[216] The trust stated that "[e]ither Grantor may, from time to time, may [sic] revoke or amend this instrument, in whole or in part, but only by an instrument in writing other

207. Holbrook v. Freeman, No. CA 08-181, 2008 WL 4493587, at *1, *2 (Ark. Ct. App. Oct. 8, 2008).

208. *Id.* at *1

209. *Id.* at *2.

210. *Id.* at *1.

211. *Id.* at *2.

212. *Id.* at *3.

213. *Holbrook*, 2008 WL 4493587, at *3–4; ARK. CODE ANN. § 28-73-602 (Repl. 2012).

214. *Holbrook*, 2008 WL 4493587, at *4.

215. ARK. CODE ANN. § 28-73-603 (Repl. 2012).

216. Jaynes v. Citizens Bank of Batesville, 2009 Ark. App. 378, at 1, 2009 WL 1362850, at *1.

than a Will' signed and delivered to the trustee during the lives of the Grantors."[217] After the first settlor died, the second amended the trust and added a second remainder beneficiary.[218] The first remainder beneficiary sued, arguing that the trust could not be amended after the death of the first settlor.[219]

The court disagreed. It first noted that use of singular and plural forms varied throughout the trust.[220] The trust clearly authorized the surviving settlor to act as trustee and granted successor trustees all powers of the original trustee.[221] Because there was no express wording prohibiting the surviving trustee from amending the trust, the court interpreted the trust to allow amendment.[222] Although the court did not cite the ATC in its opinion, the ATC makes silent trusts revocable by default.[223]

In 2013 and 2014 two cases were decided illustrating some of the "down sides" of joint revocable trusts and outcomes that the settlors who die first perhaps do not anticipate. In *Hartsfield v. Blann*, the settlors of the joint trust originally left the remainder to Robert Blann's three children and Robena Blann's three nieces.[224] After Robert died, Robena amended the trust to remove her husband's children as beneficiaries, effectively disinheriting them.[225] After Robena died the children sued to set aside the amendment.[226] The circuit court so ordered, and Robena's nieces appealed.[227]

The trust paragraph at issue stated: "REVOCABILITY: The Donors, Robert F. Blann and Robena P. Blann, may, by signed instruments delivered to the Trustee during the Donors' life: . . . (3) change the beneficiaries, their respective shares and the plan of distribution . . . . "[228] The circuit court found this paragraph to be ambiguous, but the Court of Appeals of Arkansas disagreed.[229] It ruled that the relevant trust provisions could only be amended or revoked while both settlors were alive, bolstering its decision with authority from other states.[230]

On the other hand, the opposite outcome was reached in *Erwin v. Frost*.[231] In this case, Donald had three daughters from a previous marriage,

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217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1, 2.
222. *Jaynes*, 2009 Ark. App. 378, at 1–2, 2009 WL 1362850, at *1.
223. *See* ARK. CODE ANN. § 28-73-602 cmt. (Repl. 2012).
224. Hartsfield v. Blann, 2013 Ark. App. 487, at 1, 2013 WL 4854491, at *1.
225. *Id.*
226. *Id.*
227. *Id.* at 1–2.
228. *Id.* at 2.
229. *Id.*
230. *Hartsfield*, 2013 Ark. App. 487, at 2–3, 2013 WL 4854491, at *1.
231. Erwin v. Frost, 2014 Ark. App. 51, 2014 WL 244999.

and Shelby and Donald had one child of their marriage.[232] Although Donald allegedly led his daughters to believe he had a will and would be taking care of them at his death, instead he and Shelby created a joint revocable trust less than a year before his death, after he had begun chemotherapy treatments.[233] Four months after Donald's death, Shelby amended the trust and effectively disinherited her three stepdaughters, explaining on the witness stand that the daughters were asking about the disposition of certain items in the house and the disposition of Donald's estate.[234] She testified that some of her personal files had been gone through and that one daughter (an accountant and financial analyst) had inquired at the bank about beneficiaries on Donald's accounts.[235] She testified that Donald had told her (Shelby) that "if the girls did not treat me right to cut them loose."[236]

What child would not wonder what would happen to her father's estate, having been told that there was a will and he would take care of her? No one testified that the daughters had been informed of the existence of the trust. The daughter who sued alleged lack of capacity and undue influence, but the trial court found the evidence insufficient. Testimony at trial was conflicting but more witnesses seemed to testify for the daughters than against them. On appeal the court of appeals affirmed.[237]

These cases illustrate that wording precise enough to carry out the settlors' intent is essential. Settlors should be interviewed at the time of drafting to make sure they understand the implications either way—whether the surviving spouse will have the unlimited power to amend or revoke, or will not have the power, or will have something in between. Parties should also discuss whether to share the trust with their children, especially if one or more children will be successor trustees or co-trustees after the death of the first parent. In blended family or stepchildren situations, perhaps spouses should be advised to execute separate trusts. If not, it may be advisable to insert a provision that the beneficiary designations will become irrevocable after the death of the first spouse. On the other hand, drafters should also be aware that if a joint trust becomes irrevocable after the death of the first spouse there can be unexpected tax implications, as remainder interests may become taxable.

With more and more individuals serving as trustees in situations with inherent conflicts of interest, courts will be faced with an increasing number of cases in which they will have to decide whether conduct constitutes breach of trust. A recent case involving peculiar and inconsistent analysis is

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232. *Id.* at 2, 2014 WL 244999, at *1.
233. *Id.* at 4–5, 2014 WL 244999, at *2–3.
234. *Id.* at 2–3, 2014 WL 244999, at *1–2.
235. *Id.* at 3, 2014 WL 244999, at *2.
236. *Id.* at 2–3, 2014 WL 244999, at *1.
237. *Erwin*, 2014 Ark. App. 51, at 1, 2014 WL 244999, at *1.

Rose v. Rose.[238] In this case, in 1994 Woody and Ruth Rose created a joint revocable trust whose only asset was their home.[239] The trust provided it would become irrevocable after the death of the first settlor.[240] At the death of the surviving spouse, the home was to be sold and the assets distributed three-fifths to Woody's three children and two-fifths to Rose's two children.[241] If, however, the surviving spouse did not wish to live in the home, it could be sold and the proceeds distributed one-fifth to each child of the deceased settlor and the remainder to the surviving settlor.[242] The trust did not address carrying costs of the residence.[243] An attorney, Thomas Stone, was appointed trustee, and a second attorney as successor trustee.[244]

Over the next eleven years, the Roses purchased several homes, each subject to a mortgage.[245] Although the mortgages were conveyed by the Roses individually, the residences were conveyed to the trust.[246] Until 2003, Thomas Stone was identified as the grantee trustee.[247] Beginning with the penultimate purchase in 2005, the deed identified Woody and Ruth as the trustees, although no one notified Thomas Stone that he was no longer the trustee.[248]

Woody died in 2007 and afterward Ruth conveyed the home first to herself as an individual, and then to a third party for consideration of $310,000, depositing the money in her personal checking account.[249] Woody's children sued, alleging that the trust was not revoked and the attorney was still the trustee.[250] They alleged that Ruth failed to keep trust funds separate from her own and to report to them after Woody's death in compliance with the ATC.[251] They also argued that she could not convey the home to herself as an individual. They sought an injunction and damages, and imposition of a constructive trust.[252]

Ruth contended the trust had been amended by handwritten notes and strikethroughs.[253] The trial court found that the amendments were invalid,

238. Rose v. Rose, 2013 Ark. App. 256, 427 S.W.3d 698.
239. *Id.* at 1, 427 S.W.3d at 700.
240. *Id.*, 427 S.W.3d at 700.
241. *Id.* at 2, 427 S.W.3d at 700.
242. *Id.*, 427 S.W.3d at 700.
243. *Id.*, 427 S.W.3d at 700.
244. *Rose*, 2013 Ark. App. 256, at 2, 427 S.W.3d at 700.
245. *Id.*, 427 S.W.3d at 700.
246. *Id.*, 427 S.W.3d at 700.
247. *Id.*, 427 S.W.3d at 700.
248. *Id.*, 427 S.W.3d at 700.
249. *Id.* at 2–3, 427 S.W.3d at 701.
250. *Rose*, 2013 Ark. App. 256, at 3, 427 S.W.3d at 701.
251. *Id.*, 427 S.W.3d at 701.
252. *Id.*, 427 S.W.3d at 701.
253. *Id.*, 427 S.W.3d at 701.

that Ruth had incurred $78,000 worth of expenses reimbursable from the trust, and that each of the children was entitled to $30,000 from the sale.[254] On appeal, the court of appeals declared that Woody and Ruth were "de facto" trustees, introducing a new doctrine to Arkansas case law.[255] Although it decided that Ruth was a trustee, it contradictorily held that she did not breach the trust, even though her acts violated several ATC provisions.

The ATC section allows trustees to resign or to be removed, but here the original, independent trustee did not resign and was never notified that he had been removed, which must be ordered by a court.[256] The comment to the relevant section makes clear that while a trust is revocable, the rights of the beneficiaries are subject to the settlor's absolute control, and that the terms of the trust may regulate removal.[257] Here, Ruth testified that she and Woody simply decided they were going to become the trustees.[258] The majority seems to find that this would be accomplished by a modification of the trust.[259] The ATC provides that a settlor can modify a trust according to its terms (the *Rose* opinion does not include the relevant trust terms) or, if the terms of the trust do not provide a method or if the method provided is not exclusive, by another method that manifests clear and convincing evidence of the settlor's intent.[260] As the dissent noted, the circuit court made no finding that Ruth was a trustee. There was no clear and convincing evidence of modification here.

As regards de facto trustees, the UTC does not mention them. The *Rose* majority cites one federal and five state cases in support of the doctrine. On examination of these decisions, the facts are significantly different and do not support the argument that Woody and Ruth were de facto trustees. In all of the cases, the de facto trustees were either (defectively) appointed trustees or volunteered in the absence of a trustee.[261]

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254. *Id.* at 4, 427 S.W.3d at 701.

255. *Id.* at 6, 427 S.W.3d at 702.

256. *Rose*, 2013 Ark. App. 256, at 15, 427 S.W.3d at 707 (Harrison, J., dissenting). ARK. CODE ANN. § 28-73-706 (Repl. 2012) deals with the removal of a trustee. The majority states that it was "undisputed that Thomas Stone knew that he was not the trustee and failed to act as such for several years." *Id.* at 5, 427 S.W.3d at 702 (majority opinion). However, the dissent contains quotations from the record that reveal that on direct examination Stone testified that he neither resigned nor received any written notification that he had been removed. *Id.* at 15–16, 427 S.W.3d at 707 (Harrison, J., dissenting).

257. UTC, *supra* note 1, § 706 cmt.

258. *Rose*, 2013 Ark. App. 256, at 6, 427 S.W.3d at 702–703.

259. *Id.* at 3–4, 427 S.W.3d at 702.

260. ARK. CODE ANN. § 28-73-602 (Repl. 2012).

261. *See In re* Bankers Trust, 403 F.2d 16 (7th Cir. 1968) (recognizing business trustees as de facto, who were defectively appointed after prior trustees resigned); Creel v. Martin, 454 So. 2d 1350 (Ala. 1984) (recognizing a church as de facto trustee after prior trustee died and church had acted in that capacity for over fifty years); *In re* Dakin's Will, 296 N.Y.S.2d 742 (Surr. Ct. 1968) (recognizing a co-trustee who had been defectively appointed by the two

The first element necessary for a ruling that a de facto trusteeship exists is that the person has assumed the office of trustee under color of right or title.[262] "Color of right or title" means "an authority that was derived from an election or appointment, no matter how irregular the election or appointment might be."[263] Here, viewing the evidence and decision most favorably toward Ruth, she and Woody decided that they would be co-trustees. They marked up the trust (the decision does not tell us how), but the children alleged that the markups did not qualify as modifications under the terms of the trust. Ruth and Woody did not notify the trustee of their decision. The trial court did not make an express finding that Ruth became a trustee, but later implied that she was when it ordered her to be reimbursed for her expenses.[264] A decision by settlors that they want to be co-trustees, marking up the trust in some way that does not conform to its terms, and not notifying the current trustee of his removal, does not constitute color of right or title.

The second element of a de facto trusteeship is "exercising the duties of the office."[265] This is exactly what Ruth did not do. She breached the trust in multiple ways, by commingling the sale proceeds with her own funds,[266] by not distributing the proceeds to the children,[267] and by not reporting to them.[268] The conduct of the trustee in this case is closer to that of a *trustee de son tort*—a person not the trustee who has nonetheless exercised control and may be liable as a constructive trustee[269]—than a de facto trustee. In fairness, it may be that Ruth never really understood what conduct her trusteeship of an irrevocable trust would require. She might have been more

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other co-trustees and had administered the trust for many years); *In re* Trust of Daniel, 466 P.2d 647 (Okla. 1970) (recognizing as de facto trustees men who became co-trustees by virtue of offices they held and continued on as co-trustees after their terms ended); Allen Trust Co. v. Cowlitz Bank, 152 P.3d 974 (Or. Ct. App. 2007), clarified by 159 P.3d 319 (Or. Ct. App. 2007) (adopting the de facto trustee doctrine in the case of a trust company appointed by a purported trustee who thought she had the power to so appoint); *In re* Irrevocable Trust of McKean, 183 P.3d 317 (Wash. Ct. App. 2008) (recognizing a court-appointed trustee as a de facto trustee, where the order appointing the trustee was later vacated).

262. *Rose*, 2013 Ark. App. 256, at 6, 427 S.W.3d at 702.

263. *Bankers Trust*, 403 F.2d at 20.

264. *Rose*, 2013 Ark. App. 256, at 5, 427 S.W.3d at 702.

265. *Id.*, 427 S.W.3d at 702.

266. A trustee has a duty to keep trust property separate from her own. ARK. CODE ANN. § 28-73-810(b) (Repl. 2012).

267. A trustee has a duty to administer a trust in accordance with its terms, and not to sell trust property for the trustee's personal account (such a sale is voidable). ARK. CODE ANN. §§ 28-73-801, 802(b) (Repl. 2012).

268. A trustee has a duty to inform qualified beneficiaries within 60 days of when the trustee knows that a trust has become irrevocable, and must provide them with information at that point. ARK. CODE ANN. § 28-73-813(b)(3) (Repl. 2012).

269. *Trustee de son tort*, BLACK'S LAW DICTIONARY (10th ed. 2014).

successful (at retaining the proceeds) by arguing that she and her husband decided to revoke the trust before his death.

This case points out in particular the need to instruct clients on how creating a revocable trust changes how they own their property. They are entering into a new legal relationship with their spouse, their property, and the beneficiaries. Typically, they now own the property as trustees and life beneficiaries, and have fewer rights, especially if a joint trust becomes irrevocable after the death of the first spouse. In *Rose*, the settlors did not even convey to themselves as co-trustees, they appointed an independent trustee, which caused them trouble as time went on. Cases where settlors and settlor-trustees act inappropriately are increasing in number as the number of revocable trusts continues to grow.

H. How Should a Nominated Trustee Decline? Very Carefully

In re Hamilton Living Trust illustrates the potential liability for custodial banks who are designated trustees but decline the trusteeship.[270] The Hamiltons created a revocable trust.[271] Some of their assets were on deposit with the Bank of the Ozarks (Bank).[272] The trust provided that when the first spouse died, the Bank would become a co-trustee with the survivor.[273] When both died, the Bank would serve as the successor trustee.[274] The first element of the plan that went awry was when Susan Cossey, the Hamiltons' daughter, requested the Bank to provide an accounting of the trust and the Bank responded that it had never served as co-trustee or trustee.[275] The daughter eventually sued, and at a subsequent hearing, the president of the trust department testified and produced six letters sent between 2009 and 2011, each one containing the Bank's refusal to serve as successor trustee.[276]

Nonetheless, the Supreme Court of Arkansas ruled in favor of the Hamiltons' daughter for several reasons.[277] The court agreed with the Bank that it rejected the trusteeship when it sent Larry, the Hamiltons' son, six letters within a year's time declining to serve.[278] Yet the funds remained in the Bank, and the Bank did three things.[279] First, it reimbursed Larry, whom it characterized as the personal representative even though no probate estate

270. *In re* Hamilton Living Trust, 2015 Ark. 367, 471 S.W.3d 203.
271. *Id.* at 1, 471 S.W.3d at 205.
272. *Id.* at 2, 471 S.W.3d at 205.
273. *Id.* at 1, 471 S.W.3d at 205.
274. *Id.*, 471 S.W.3d at 205.
275. *Id.* at 2, 471 S.W.3d at 206.
276. *Hamilton*, 2015 Ark. 367, at 2, 471 S.W.3d at 206.
277. *Id.* at 1, 471 S.W.3d at 205.
278. *Id.* at 5, 471 S.W.3d at 207.
279. *Id.* at 6–7, 471 S.W.3d at 208.

was ever opened, for utility and auto expenses.[280] In doing so, it did not inquire as to whether the home or auto were trust assets (the court thought they were not).[281] Second, it reimbursed Larry for funeral expenses, thereby complying with trust provisions to distribute funds to the personal representative, and to pay for funeral expenses.[282] Third, it liquidated securities at his direction, "another clear function of a trustee."[283]

The Bank argued these acts fell within the ATC provision that allows a person rejecting a trusteeship to act to preserve the trust property, as long as the person sends a rejection to a qualified beneficiary after taking such action.[284] The court disagreed because first, there was no evidence that the property the Bank acted to preserve was actually trust property.[285] Second, the reimbursement for funeral expenses and liquidation of securities at the direction of a beneficiary went beyond preservation of trust property, and thus was not protected by the "safe harbor" provision.[286] Instead, the Bank "exercised powers or performed trustees' duties," and thereby accepted the trusteeship.[287] Thus, it owed Susan Cossey an accounting. Commenting on this decision in the *Arkansas Probate and Trust Law Review*, a trust officer wondered whether if the Bank had been an individual trustee the court would have held it to this standard.[288]

I. Duty and Breach

The duty of loyalty—the duty not to self-deal—is perhaps the most "fundamental" of a trustee's duties.[289] A very recent Court of Appeals of Arkansas decision sheds light on how this duty applies to family members who are co-trustees. In *Pulliam v. Murphy*, a couple created a joint revocable trust which became irrevocable at their deaths.[290] Four of their children were successor co-trustees of the trust whose assets included over a thousand acres of farmland.[291] Before the parents died, they sold 1.5 acres to a son, Carter, who also leased other farm acreage.[292] The trust offered the

280. *Id.* at 6, 471 S.W.3d at 208.
281. *Id.*, 471 S.W.3d at 208.
282. *Hamilton*, 2015 Ark. 367, at 6, 471 S.W.3d at 208.
283. *Id.* at 7, 471 S.W.3d at 208.
284. ARK. CODE ANN. § 28-73-701(c) (Repl. 2012).
285. *Hamilton*, 2015 Ark. 367, at 6, 471 S.W.3d at 208.
286. *Id.*, 471 S.W.3d at 208.
287. ARK. CODE ANN. § 28-73-701.
288. *See* L. Dee Davenport, *Comment,* 2015 ARK. PROB. & TRUST L. REV. 16 (raising additional questions about the implication of this decision for trustees) (on file with author).
289. UTC, *supra* note 1, § 802 cmt.
290. Pulliam v. Murphy, 2016 Ark. App. 133, at 1, 485 S.W.3d 711, 713.
291. *Id.*, 485 S.W.3d at 713.
292. *Id.* at 2, 485 S.W.3d at 713.

same "privilege" of purchase to any of the other children, for the same consideration.[293] Rikka, a daughter and co-trustee, wished to buy 1.5 acres on the highway, but Carter, also a co-trustee, objected because he used the area to park equipment and provide access to grain silos on his adjacent 1.5 acres.[294] Rikka and another brother voted for the sale to her, but the other two siblings voted against the sale, resulting in an unfavorable vote because the trust required a majority vote for actions.[295] After the winning co-trustees sent Rikka a letter containing their reasons for opposing the sale, she sued.[296] The co-trustees maintained that they were administering the trust according to its terms.[297] The circuit court granted summary judgment in favor of the denial, finding that no beneficiary was entitled to purchase a particular tract of land, and that if Rikka wanted a tract she would have to select one that the co-trustees agreed to sell to her.[298]

The court of appeals disagreed. It found that the plain meaning of the trust required the trustees to allow Rikka to purchase 1.5 acres, and that Rikka presented material issues of fact by arguing in relevant part that her brother's conflict of interest affected his vote.[299] The court cited the ATC provision rendering the sale or management of trust property voidable by a beneficiary if it is entered into for the trustee's own account or otherwise affected by a conflict.[300] Seemingly, this would apply to the requested sale to Rikka. However, the court noted a relevant exception—if the trust expressly allows such sales.[301] The general rule is that a trustee has a duty to act solely for the benefit of the trust and not to act in his own interest by participating in a transaction relating to the trust if his interest is adverse to the beneficiary.[302] The court noted a limitation on this rule, however, that "coincidental benefits" to a trustee-beneficiary resulting from the dual status are not enough to establish a breach of fiduciary duty.[303] On remand, the trial court would have to review the trustees' actions in light of the ATC and case law

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293. *Id.*, 485 S.W.3d at 713.
294. *Id.*, 485 S.W.3d at 713.
295. *Id.* at 2, 485 S.W.3d at 713. *See also* ARK. CODE ANN. § 28-73-703(a) (Repl. 2012) (providing that only a majority of trustees may act, unless the terms of the trust provide otherwise).
296. *Pulliam*, 2016 Ark. App. 133, at 3, 485 S.W.3d at 713.
297. *Id.*, 485 S.W.3d at 714.
298. *Id.* at 4, 485 S.W.3d at 714.
299. *Id.* at 7–8, 485 S.W.3d at 716.
300. *Id.* at 6, 485 S.W.3d at 715; ARK. CODE ANN. § 28-73-802(b) (Repl. 2012).
301. *Pulliam*, 2016 Ark. App. 133, at 6, 485 S.W.3d at 715; ARK. CODE ANN. § 28-73-802.
302. *Id.* at 6–7, 485 S.W.3d at 715.
303. *Id.* at 6, 485 S.W.3d at 715; Clement v. Larkey, 314 Ark. 489, 493, 863 S.W.2d 580, 582 (1993).

cited by the court.[304] This case points out the inherent conflicts involved with family members serving as trustees of the trusts that benefit them. The terms of the trust that allowed family members to purchase trust land for themselves almost guaranteed that disagreement would arise.

Trustees have a default duty to account on at least an annual basis.[305] The *Bell v. Bank of America* case gives guidance to institutional fiduciaries as to how detailed they must be in accounting for attorney's fees.[306] In this case, beneficiaries (one of whom later became a successor trustee) sued to terminate a trust and also sued the trustee, Bank of America, alleging mismanagement.[307] Bank of America successfully defended itself and the trust.[308] After resigning as trustee and turning the trust funds over to its successor, it later accounted for an eleven-month period, showing receipts, disbursements and distributions, including more than $22,000 in attorney's fees incurred in the litigation.[309] The Bells sought an itemized list of the attorney's fees.[310] The court viewed the itemization in chambers and approved payment of the fees and the accounting but denied the Bells access to the itemization.[311] The court of appeals agreed, noting the general rule that beneficiaries are entitled to information reasonably necessary to allow them to enforce their rights under the trust.[312] Here, there was no finding of mismanagement and the Bells had been reasonably informed of the fees.[313]

An often-difficult question arises in the case of discretionary support trusts, where a trustee has the discretion as to how much to distribute to beneficiaries within the guidelines of some type of standard. Beneficiaries may also have assets of their own, which raises the issue of whether the trustee should take the beneficiaries' own assets into account when making distributions. Although not addressed by the ATC, this issue is covered by both the Restatement (Second) and (Third) of Trusts. Arkansas law on this issue arguably changed in 2008 in *Carmody v. Betts*.[314] In *Carmody*, a testamentary trust for the benefit of the settlor's sister provided that during her life she was to receive any part of the trust income "necessary to provide for her care, welfare, and maintenance."[315] The settlor expressed his intent, twice, to provide for the sister from the trust income if possible, but also directed the

304. *Pulliam*, 2016 Ark. App. 133, at 8, 485 S.W.3d at 716.
305. ARK. CODE ANN. § 28-73-813(a) (Repl. 2012).
306. Bell v. Bank of America, N.A., 2012 Ark. App. 445, 422 S.W.3d 138 (2012).
307. *Id.* at 2, 422 S.W.3d at 140.
308. *Id.* at 2, 422 S.W.3d at 140.
309. *Id.* at 6, 422 S.W.3d at 142.
310. *Id.* at 2–3, 422 S.W.3d at 140.
311. *Id.* at 3, 422 S.W.3d at 140.
312. *Bell*, 2012 Ark. App. 445, at 4, 422 S.W.3d at 141.
313. *Id.* at 5, 422 S.W.3d at 141.
314. Carmody v. Betts, 104 Ark. App. 84, 289 S.W.3d 174 (Ark. App. 2008).
315. *Id.* at 85, 289 S.W.3d at 176.

trustees to invade the principal if necessary.[316] Undistributed income was to become part of the principal, and the bulk of the remainder was to be paid to the Metropolitan Opera Company and to Georgetown University.[317]

After the beneficiary's death, her estate sued the trustees, alleging that the trustees breached the trust by taking the beneficiary's own interests into account.[318] The circuit court construed the will to mean that the beneficiary's own interests must be taken into account. On appeal, the court of appeals explained prior law:

> Prior Arkansas cases construing trust language about the distribution of income and principal for the support of a beneficiary have held that phrases such as "necessary for support" were presumed to mean that the trustee was to use the money for that purpose regardless of the beneficiary's ability to pay unless the trust contained language indicating a contrary intent.[319]

But the Restatement (Third) of Trusts has reversed the presumption:

> It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is required to take account of the beneficiary's other resources, (ii) is prohibited from doing so, or (iii) is to consider the other resources but has some discretion in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.
>
> Specifically . . . the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.[320]

The Restatement drafters believe the new presumption more accurately reflects settlors' intent.[321] However, the *Carmody* court did not apply the

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316. *Id.*, 289 S.W.3d at 176.

317. *Id.*, 289 S.W.3d at 176.

318. *Id.* at 85–86, 289 S.W.3d at 176.

319. *Id.* at 89, 289 S.W.3d at 178 (citing Cross v. Pharr, 215 Ark. 463, 221 S.W.2d 24 (1949) (relying on the RESTATEMENT OF TRUSTS § 128, cmt. e (AM. LAW INST. 1935)); Bailey v. Delta Trust & Bank, 359 Ark. 424, 198 S.W.3d 506 (2004); Estate of Wells v. Sanford, 281 Ark. 242, 663 S.W.2d 174 (1984); Martin v. Simmons First Nat'l Bank, 250 Ark. 774, 467 S.W.2d 165 (1971)).

320. *Carmody*, 104 Ark. App. at 89, 289 S.W.3d at 179 (quoting RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e (AM. LAW INST. 2003)).

321. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e (AM. LAW INST. 2003) (reporter's note).

new Restatement section, instead relying on the express trust language that indicated the settlor wished if possible to limit distributions to income.[322]

J. Attorney's Fees

"In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."[323] This section will briefly summarize decisions that have awarded attorney's fees in connection with ATC issues.

1. Fees Paid by the Trustee

Where a custodial bank named as a successor trustee attempted to decline the position and refused to account for trust assets, but was ruled to be the trustee because it had acted as one, the bank individually was ordered to pay almost $10,000 worth of attorney's fees.[324] The Court of Appeals of Arkansas affirmed because had the bank performed the accounting, no fees would have been incurred.[325]

2. Fees Paid by the Executor

Taylor v. Woods involved a factually complicated case wherein a widow will and trust beneficiary sued the co-executors, two children of the deceased husband, and the attorney who had drafted the will and five testamentary trusts.[326] She asked for an accounting, removal of the executors, a determination of which property passed by will and which through the trusts, and attorney's fees.[327] The court of appeals affirmed the award of fees against two of the co-executors individually.[328] The ATC gives a court discretion to award attorney's fees against any party in a case involving the administration of a trust.[329] Deciding whether property passed under the will or under the testamentary trust involved administration of the trust and so the ATC applied.[330]

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322. *Carmody*, 104 Ark. App. at 90, 289 S.W.3d at 179.
323. ARK. CODE ANN. § 28-73-1004 (Repl. 2012).
324. *In re* Hamilton Living Trust, 2015 Ark. 367, at 7, 471 S.W.3d 203, 208. For more discussion of the facts of this case, see *supra* text accompanying notes 270–88.
325. *Id.* at 7–8, 471 S.W.3d 208–09.
326. Taylor v. Woods, 102 Ark. App. 92, 95, 282 S.W.3d 285, 287 (2008).
327. *Id.*, 282 S.W.3d at 287.
328. *Id.* at 95, 282 S.W.3d at 287–88.
329. *Id.* at 106, 282 S.W.3d at 295; ARK. CODE ANN. § 28-73-1004 (Repl. 2012).
330. *Id.* at 107, 282 S.W.3d at 295.

3. Fees Governed by Other State's Law

In *Calvert v. Estate of Calvert*, the son of a trust beneficiary sued the trustees alleging that he was a beneficiary of the trust and that the trustees had breached the trust.[331] The trust's governing law was that of Texas and the court of appeals held that the circuit court erred in applying Arkansas law regarding the trustees' petition for attorney's fees rather than Texas law.[332]

4. Reasonableness of Fees

A post-ATC decision that addresses fees in a trust case in more detail than any other is *Shula v. Bank of America*, an unpublished federal district court order.[333] In this case, the plaintiff beneficiary and decedent had divorced.[334] The divorce agreement ordered the plaintiff's alimony and maintenance to be paid via a trust funded by the decedent.[335] Prior to his death, the decedent's business went bankrupt and the financing of the trust was changed in several ways.[336] After the decedent's death, the plaintiff sued the trustee, Bank of America, for breach of contract, breach of fiduciary duty, and declaratory relief, alleging that the changes breached the trust agreement and damaged her.[337] The federal district court ruled her claim to be premature and ordered summary judgment against her.[338] Bank of America asked for $275,000 in attorney's fees.[339] The district court reduced the fees, but applied Arkansas Code Annotated section 16-22-308 rather than Arkansas Code Annotated section 28-73-1004.[340] The Eighth Circuit affirmed the summary judgment but remanded on the issue of fees.[341]

Applying the ATC fees provision, the district court approved hourly rates for two of the defense counselors because they were in line with rates of other Little Rock attorneys with similar experience.[342] It noted the simple issues at the core of the case, although it acknowledged that the attorneys'

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331. Calvert v. Estate of Calvert, 99 Ark. App. 286, 286, 259 S.W.3d 456, 457 (2007).
332. *Id.* at 289–290, 259 S.W.3d at 459.
333. Shula v. Bank of America, N.A., No. 4:07-CV-00922 BSM, 2010 WL 348256 (E.D. Ark. Jan. 22, 2010) [hereinafter Shula I]
334. Shula v. Bank of America, N.A., No. 4:07-CV-00922 BSM, 2008 WL 2783434, at *1 (E. D. Ark. Jul. 16, 2008).
335. *Id.*
336. *Id.*
337. *Id.* at *2.
338. *Id.* at *3.
339. *Shula I*, 2010 WL 348256, at *1.
340. *Id.*
341. *Id.*
342. *Id.*

difficulty was increased because of the distrust between the parties.[343] It deemed entries for phone calls and conferences unreasonable if they did not explain the nature of the calls and conferences.[344] It reduced claims for tasks that seemed redundant, such as multiple retrievals and reviews of court records.[345] It struck the bill for one of two attorneys flying to Florida to take the plaintiff's deposition.[346] It struck the fees for a "defense counsel who attended another trial in order to determine the policies and procedures of this court."[347] Finally, after reviewing the records, the hourly rates of the lawyers (thirteen lawyers and paralegals worked on the case), and complexity of the case, the court arrived at $150,000 for fees and $9,300 in expenses.[348] This was billed to the plaintiff and not the trust.[349]

The takeaway from this detailed opinion is to be sure to document all tasks sufficiently, be mindful of providing such documentation, in particular if tasks appear to be duplicative or unnecessary, be conservative in assigning multiple attorneys to the same tasks, especially if it involves out-of-town travel, and do not charge for unreasonable expenses like sending an attorney to observe the judge in another trial.

III. OTHER SIGNIFICANT TRUST LAW

Trust law issues arising during the last decade that are not within the scope of the ATC, yet are of importance to those who practice in the trust and estates area, are discussed below. First is one of the most important decisions in the last decade, enabling spouses defrauded of their elective share to include revocable trust assets in the decedent's estate for elective share purposes. Second is a discussion of the growing number of cases involving "in terrorem," or no-contest, clauses. Third is a case that affected real estate transfers far more than estate planners, by construing the homestead exemption to be included in revocable trusts. Fourth are cases involving "trusts" that are not really trusts at all—constructive trusts and resulting trusts. The section concludes with a brief discussion of issues for potential legislation.

A. Spousal Elective Share Extended to Revocable Trusts

The most significant change in Arkansas trust law in the last decade, outside of the enactment of the ATC, concerns the spousal elective share. At

343. *Id.*
344. *Id.*
345. *Shula I*, 2010 WL 348256, at *2.
346. *Id.* at *3.
347. *Id.* at *2.
348. *Id.* at *2–3.
349. *Id.* at *3.

the beginning of the American republic, surviving spouses were entitled to dower or curtesy depending on their sex, unless they lived in a community property state. As time went on and more wealth was held in personal property, virtually all non-community property states enacted elective share statutes, entitling the surviving spouse to a share of the decedent's probate estate if the surviving spouse chose to take against the will.[350] As inter vivos trusts became more popular, some states, by case law or statute, began to include inter vivos trust assets within the pool of assets that would be subject to the elective share.[351] Theories relied on were that the transfer to a trust was "illusory" or a "fraud on the elective share."[352] The most complicated scheme, the UPC's "augmented estate," allows the surviving spouse a share of the trust assets, the size of which depends on the length of the marriage and the percent of pooled assets owned by the surviving spouse. Assets potentially subject to the elective share include the probate estate, survivorship property, payable upon death (POD) property and transfer on death (TOD) property, and proceeds of insurance.[353]

Arkansas steadfastly held to its elective share, which is identical to the intestate share of a surviving spouse: statutory dower or curtesy (a percentage of what is in the probate estate), homestead, if applicable, and the statutory allowance.[354] Arkansas lawyers studied the dictum from *Richards v. Worthen Bank* and wondered when, if ever, the courts would decide that by transferring the bulk of one's assets into an inter vivos trust, fraud had occurred, thereby allowing a surviving spouse to elect against the trust assets

350. Georgia was the lone holdout. There, spouses and minor children are entitled to one year of support from the decedent's estate. GA. CODE ANN. § 53-3-1 (West 2016).

351. *See, e.g.*, Johnson v. Farmers & Merchants Bank, 379 S.E.2d 752 (W. Va. 1989) (holding a husband's transfer of property to inter vivos trusts shortly before death illusory as to the elective share of his widow); TENN. CODE ANN. § 31-4-105 (West 2016) (rendering voidable any fraudulent conveyance to children or others intended to defeat the elective share).

352. *See Johnson*, 379 S.E.2d at 758.

353. UNIF. PROB. CODE §§ 2-202 to -207 (amended 2010), 2 pt. 8 U.L.A. 186 (2016) [hereinafter UPC], also available at http://www.uniformlaws.org/shared/docs/probate%20code/UPC_Final_2016aug1.pdf.

354. ARK. CODE ANN. § 28-39-401 (Repl. 2012). The spouses must have been married continuously for more than a year. *Id.*

as well as the probate estate.[355] That day finally came with the decision in *In re Estate of Thompson.*[356]

In *Thompson*, the decedent executed a revocable trust in 2002 that made his wife a co-trustee and at his death gave her income for life (from a trust valued at $6 million), the right to invade the principal in case of extraordinary circumstances, and annual "five by five" powers.[357] The widow testified that she gave up her nursing career after marriage at the decedent's request because he promised to take care of her.[358] By 2008, the couple had decided to live apart temporarily while their home was being repaired.[359] The widow was suffering from cancer at the time, and after they moved apart, she suffered a stroke.[360] The decedent had serious health problems, and so his spouse moved him to an assisted-living facility, where he stayed until he died in 2010.[361]

The court noted that at first when they were together, he "showered her with gifts of great value."[362] Over time, he provided less support, until when they lived separately she had to file for separate maintenance.[363] In the last trust amendment, executed a few months before the decedent died, she was no longer a co-trustee; in fact, she was not even given a copy of the trust instrument.[364] Out of the estate of over $6 million, she would receive a devise of $100,000, but only if she did not contest the will or trust.[365] The trial court found that the decedent intended to defraud her of her spousal elective share.[366] Key factors here were the great difference between Thompson's share under the first two trusts contrasted with her share under the final trust, the loss of her status as co-trustee, the execution of the last trust while the decedent was in a nursing home, and its execution so close to his

355. In *Richards*, the husband devised the home to his wife for life, and also left her inter vivos and testamentary trust assets. The wife attempted to elect to take against the inter vivos trust, alleging fraud or an illusory scheme. The court stated whether the wife would receive more at the outset was not the test as to whether there was fraud. "The important consideration is the testator's intent." Richards v. Worthen Bank, 261 Ark. 890, 894, 552 S.W.2d 228, 230 (1977).

356. 2014 Ark. 237, 434 S.W.3d 877. For more discussion of the case, see Lucy Holifield, Note, *Upending the Familiar Tools of Estate Planning: Equity Renders Revocable Trusts Subject to the Arkansas Spousal Election*, 38 U. ARK. LITTLE ROCK L. REV. 75 (2015).

357. *See Thompson*, 2014 Ark. 237, at 13, 434 S.W.3d at 884. "Five by five powers" are the right to withdraw the greater of $5,000 or 5% of the principal annually.

358. *Id.* at 2, 434 S.W.3d at 879.

359. *Id.* at 4, 434 S.W.3d at 880.

360. *Id.*, 434 S.W.3d at 880.

361. *Id.*, 434 S.W.3d at 880.

362. *Id.* at 13, 434 S.W.3d at 885.

363. *Thompson*, 2014 Ark. 237, at 13–14, 434 S.W.3d at 885.

364. *Id.* at 14, 434 S.W.3d at 885.

365. *Id.* at 13, 434 S.W.3d at 884.

366. *Id.*, 434 S.W.3d at 884.

death,and the fact that Thompson received copies of the earlier wills and trusts but not of the last set.[367] The circuit court noted that these were evidence of the decedent's intent to deprive Thompson of her statutory rights and keep her uninformed.[368] The Supreme Court of Arkansas agreed with both the circuit court's ruling and its analysis.[369] On appeal the estate argued that the surviving spouse had not argued the elements of common-law fraud.[370] The court responded that "fraud in the classic sense" was not at issue here.[371] The effect of the fraud was to include the trust assets in the probate estate for purposes of calculating the amount of the elective share (in this case because there were no children the surviving spouse would get half).[372] Otherwise, the disposition of the trust would remain the same.[373]

Some of the questions raised by *Thompson* are whether future decisions might extend property subject to the elective share to other non-probate transfers, like POD and TOD accounts or survivorship property. The decision should lead to more reliance on prenuptial agreements and less reliance on revocable trusts in estate planning. This is an issue on which legislation codifying the supreme court's decision and setting some agreed-on parameters would be helpful to estate planners and clients.

B. The Terror of a No-Contest Clause

"In terrorem" or "no-contest" provisions of wills and trusts are intended to discourage contests. Almost all states recognize them.[374] The UPC states that such provisions are enforceable unless "probable cause" otherwise exists.[375] Arkansas recognizes them, and during the last ten years, several decisions interpreting no-contest clauses have been decided, leading one to wonder if litigation over them is increasing because of increased use, or simply because with (1) more and more blended marriages and (2) surviving second or third spouses and children from prior marriages, the potential for contests is increasing. This section discusses cases involving both wills and

367. *Id.* at 13–14, 434 S.W.3d at 885.
368. *Id.* at 14, 434 S.W.3d at 885.
369. *Thompson*, 2014 Ark. 237, at 15, 434 S.W.3d at 885.
370. *Id.* at 17, 434 S.W.3d at 886.
371. *Id.*, 434 S.W.3d at 886 (quoting White v. Sargent, 875 A.2d 658, 666 (D.C. 2005)).
372. *Id.* at 18, 434 S.W.3d at 887.
373. *Id.*, 434 S.W.3d at 887.
374. Florida and Indiana prohibit them by statute. FLA. STAT. ANN. § 732.517 (West 2016); IND. CODE ANN. § 29-1-6-2 (West 2016). For a recent law review article addressing no-contest clauses in trusts, how they differ from those in wills, and how to draft and enforce them, see generally Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455 (2015).
375. UPC, *supra* note 353, § 3-905.

trusts because Arkansas courts' analysis of the two does not differ in any way.

An example of a simple no-contest clause is "in the event any beneficiary under this trust should challenge the validity of any provision of this trust for any reason, then the share of such beneficiary will be forfeited and added to the shares of the remaining beneficiaries pro rata." Some testators and settlors include additional penalties. For example, one testator stated that "I direct if any court shall invalidate the above referenced disinheritance provision, said Judge should be removed from any determination regarding the interpretation of this Will and its validity and from the probate of my Estate."[376]

Some testators and settlors expand the scope of prohibited acts beyond the act of just a contest. For example, in *Hamm v. Hamm*, the no-contest clause additionally prohibited will beneficiaries from "[refusing] to execute a waiver of inventory and accounting."[377] Six years after opening the estate, Lynda, the personal representative, residual beneficiary and sister of the decedent, petitioned to disinherit the decedent's brother, Jerry, who was to receive five acres, a metal shop building, and grain bins under the will.[378] The petition alleged that Jerry had proffered another will, failed to file a waiver of inventory and accounting, and filed a claim against the estate.[379] Three days later, Jerry filed the waiver.[380]

In denying Lynda's petition to disinherit, the court explained that Jerry proffered a 2000 will because he did not know about the later, subsequently probated, 2005 will. Jerry did file the waiver and, although late, the failure to file earlier resulted in no prejudice. Finally, Jerry withdrew the claim against the estate, even though the trial court questioned whether that action would trigger the no-contest clause at all.[381]

On appeal, the Court of Appeals of Arkansas noted that the will did not set a time limit for the filing of the waiver.[382] It then cited the standard rule of construction for no-contest clauses: that they are to be narrowly construed, because applying such a clause will result in a forfeiture.[383] The appellate court affirmed the trial court's refusal to apply the no-contest clause.[384]

376. Hamm v. Hamm, 2013 Ark. App. 501, at 5, 429 S.W.3d 384, 387. The court made no comment on this unusual language.

377. *Id.*, 429 S.W.3d at 387.

378. *Id.* at 2, 429 S.W.3d at 385.

379. *Id.*, 429 S.W.3d at 385–86.

380. *Id.*, 429 S.W.3d at 386.

381. *Id.* at 3, 429 S.W.3d at 386.

382. *Hamm*, 2013 Ark. App 501, at 5, 429 S.W.3d at 387.

383. *Id.* at 6, 429 S.W.3d at 387.

384. *Id.*, 429 S.W.3d at 388.

The no-contest clause in *Peterson v. Peck* was even broader. In *Peterson*, the decedent's trust, which nominated his second wife Hannah as his successor trustee, cancelled gifts to any of his children (from a previous marriage) or their issue who challenged any trust provisions, attacked the validity of the trust, or attempted to remove or questioned any of the actions of his widow as trustee.[385] The decedent's daughter Capi alleged that Hannah (1) sold a multi-million dollar Calder mobile in which the decedent had given a remainder to Capi during his lifetime; (2) asked for an accounting; and (3) requested damages to restore funds to the trust that were allegedly lost by Hannah's investment in a Ponzi scheme (which Hannah acknowledged).[386]

Although Capi proffered a letter conveying the mobile to her, the trial court found that no gift had been given. Further, there was no evidence that Hannah had acted recklessly or in bad faith. The trial court ruled that Capi had forfeited her interest in the trust, by triggering the no-contest clause.[387]

On appeal, the Court of Appeals of Arkansas noted the strict-construction rule and, citing cases from other states as authority, first decided that Capi's claim of ownership of the Calder mobile was independent of the trust, and did not trigger the no-contest clause.[388] Second, and somewhat disturbingly, the court then went on to state that "[Capi's] complaint sought to have Hannah Peck provide accountings and to pay damages to replenish the trust. Clearly, these allegations questioned Hannah Peck's actions as trustee and asked the court to control her actions as trustee, triggering the share-cancellation [no-contest] provision."[389]

This statement by the court raises some concerns. The court characterizes requesting an accounting, an act that was not expressly forbidden by the no-contest provision, as an act questioning a trustee's actions. But a trustee has a duty to account.[390] Asking a trustee to carry out a duty should not be characterized as an action adverse to a trustee. Would a provision in a no-contest clause expressly forbidding beneficiaries from requesting an accounting be enforced by a court? After all, the duty to account (now called

385. Peterson v. Peck, 2013 Ark. App. 666, at 8, 430 S.W.3d 797, 802.

386. *Id.* at 3, 430 S.W.3d at 799.

387. *Id.* at 9, 430 S.W.3d at 802.

388. *Id.*, 430 S.W.3d at 802.

389. *Id.* at 10, 430 S.W.3d at 803.

390. ARK. CODE ANN. § 28-73-813(c)(1) (Repl. 2012) (requiring trustees to report to beneficiaries at least annually as to "a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values"); Bell v. Bank of America, N.A., 2012 Ark. App. 445, at 4, 422 S.W.3d 138, 141.

"inform and report") is not mandatory under the ATC.[391] However, a trustee has a common-law duty to account reasonably to beneficiaries. After all, rendering a trustee completely free from any duty to account whatsoever effectively destroys the trust. As Bogert states, "there is a fundamental and irreconcilable contradiction to a settlor purporting to create a trust with respect to which the trustee is not accountable."[392] In other words, drafters and courts should be aware that the common law of trusts may provide a "floor" under which an extremely broad no-contest clause cannot fall. A no-contest clause cannot make duties like loyalty and accounting completely disappear. "Even if the terms of a trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard."[393]

Furthermore, a consideration courts should make in this context is that a no-contest clause in a trust, much more so than in a will, functions as a type of exculpatory clause for the trustee. By including a laundry list of triggering acts, a drafter can insulate a breaching trustee from scrutiny by a court. Before drafting such no-contest clauses, clients should be advised as to their potential effects, and courts should not enforce them if the effect is to vitiate the trust itself.

The most recent decision discussing no-contest provisions in detail is *Seymour v. Biehslich*.[394] This case and *Sharp v. Sharp*,[395] discussed below, clarify to some extent what "contest" can and cannot mean in the context of a no-contest provision. In *Seymour*, the no-contest provision prohibited only a "contest" of the testator's will.[396] A month and a half after probate was initiated and the court accepted the decedent's will, one of his daughters, Seymour, filed a second petition for probate and offered a handwritten attested will, although the handwriting was that of Seymour and not the decedent, and the will named Seymour as the remainder beneficiary, giving small devises to her siblings.[397] The daughter who had filed the original will and been appointed personal representative, Beihslich, moved to exclude Seymour from receiving any distribution.[398] Seymour argued that she had not contested the will, but the trial court found that she had triggered the

391. *See* ARK. CODE ANN. § 28-73-105 (Repl. 2012) (listing the mandatory sections of the ATC). ARK. CODE ANN. § 28-73-813 is a default section. *See id.* It governs unless expressly overridden by the terms of a trust. *See id.*

392. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 965, Westlaw (database updated Sept. 2016).

393. UTC, *supra* note 1, § 1008 cmt.

394. Seymour v. Biehslich, 371 Ark. 359, 266 S.W.3d 722 (2007).

395. Sharp v. Sharp, 2014 Ark. App. 645, 447 S.W.3d 622.

396. *Seymour*, 371 Ark. at 360, 266 S.W.3d at 724.

397. *Id.*, 266 S.W.3d at 724.

398. *Id.*, 266 S.W.3d at 724.

clause.[399] She argued on appeal that she had not contested the will, noting that Arkansas statutory law describes a contest as "stating in writing the grounds of . . . objection and filing them with the court."[400] She claimed she was ignorant of the first will.[401]

The Supreme Court of Arkansas next summarized two previous no-contest cases beginning with *Lytle v. Zebold*.[402] Here, the court held that a lawsuit challenging the validity of a testamentary trust triggered the no-contest clause by challenging the validity of the testamentary scheme.[403] In *Jackson v. Braden*, a probate petition challenging the executor's failure to obtain appraisals or confirmations of leases and sales of mineral interests did not trigger the no-contest clause (a much narrower clause than that in *Peterson*), because it was filed after the time for filing a contest had expired, and moreover the beneficiaries acknowledged the will's validity and were merely questioning the executor's noncompliance with the probate code.[404]

The UPC renders no-contest provisions in wills and trusts unenforceable if "probable cause" exists for institution of a contest.[405] Without citing the Probate Code, the *Seymour* court next cited Oklahoma authority stating that the "consensus rule" is that no-contest provisions should not be enforced if the contestant has "probable cause" to contest because of forgery or subsequent revocation.[406] A "good faith" attempt to probate a later will should not trigger the clause.[407] However, a "bad-faith" attempt to probate a will known not to be genuine should trigger the clause.[408] Could the bad-faith offer of a fraudulent will trigger the no-contest clause of a second will that is *later* offered to probate, and cause the no-contest clause in the latter to relate back?

Examining the facts of the instant case, here the court noted that Seymour procured the will and the witnesses were her friends.[409] Citing the uneven distribution that favored Seymour, the court noted "ample evidence" in the record that Seymour was not acting in good faith when she proffered the

399. *Id.*, 266 S.W.3d at 724.
400. *Id.* at 362, 266 S.W.3d at 725; ARK. CODE ANN. § 28-40-113(a) (Repl. 2012).
401. *Seymour*, 371 Ark. at 362, 266 S.W.3d at 725.
402. Lytle v. Zebold, 235 Ark. 17, 357 S.W.2d 20 (1962).
403. *Seymour,* 371 Ark. at 362, 266 S.W.3d at 725; *Lytle*, 235 Ark. at 19, 357 S.W.2d at 21.
404. *Seymour*, 371 Ark. at 363, 266 S.W.3d at 726; Jackson v. Braden, 290 Ark. 117, 717 S.W.2d 206 (1986).
405. UPC, *supra* note 353, § 2-517.
406. *Seymour*, 371 Ark. at 364, 266 S.W.3d at 726–27.
407. *Id.*, 266 S.W.3d at 726 (quoting *In re* Estate of Westfahl, 674 P.2d 21, 25 (Okla. 1984)).
408. *Seymour*, 371 Ark. at 364, 266 S.W.3d at 726–27 (quoting *Westfahl*, 675 P.2d at 25).
409. *Id.* at 366, 266 S.W.3d at 728.

later will.[410] Thus, *Seymour* represents a bad-faith attempt to probate a will known not to be genuine. The court also mentions that the Court of Appeals of Colorado notes as a factor bearing on the existence of probable cause whether the proponent has relied on the advice of disinterested counsel, after full disclosure of the facts.[411]

In a later case, *Sharp v. Sharp*, a father died, survived by one son who lived close by, James, and another son who lived in Texas, Gary.[412] The father's original 2007 will divided his estate equally between the sons.[413] In 2010, the father executed a new will that left furniture and $100,000 to Gary, and farm equipment, automobiles, all real property (several hundred acres of farmland) and the residue to James.[414] The 2010 will also contained a no-contest clause.[415] At the same time, the father changed several financial accounts that would pass outside of probate.[416] Most went to James or his sons, but a certificate of deposit for $100,000 would go to Gary.[417] At the father's death, James petitioned to probate the 2010 will and to be appointed executor of the estate.[418] Gary filed a will contest, alleging a confidential relationship, procurement and undue influence.[419]

James admitted to a confidential relationship, but denied the procurement.[420] The trial court concluded that there was no procurement or undue influence, and that the 2010 will was valid.[421] Gary subsequently petitioned, inter alia, for the court to find the no-contest provision unenforceable because he "pursued the will contest in good faith with probable cause," relying on *Seymour v. Biehslich* as authority.[422] The *Sharp* court characterized the introduction of another will in *Seymour* as an "indirect" contest, and Gary's action as a "direct" contest.[423] The court noted nothing in Gary's action to distinguish it from the "myriad" of cases enforcing no-contest clauses.[424]

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410. *Id.* at 367, 266 S.W.3d at 728.
411. *Id.* at 364–65, 266 S.W.3d at 727 (citing *In re* Estate of Peppler, 971 P.2d 694, 697 (Colo. App. 1998)).
412. Sharp v. Sharp, 2014 Ark. App. 645, at 1, 447 S.W.3d 622, 623.
413. *Id.* at 2, 447 S.W.3d at 623.
414. *Id.* at 3, 447 S.W.3d at 624.
415. *Id.*, 447 S.W.3d at 624.
416. *Id.* at 4, 447 S.W.3d at 624.
417. *Id.*, 447 S.W.3d at 624.
418. *Sharp*, 2014 Ark. App. 645, at 4, 447 S.W.3d at 624.
419. *Id.*, 447 S.W.3d at 624.
420. *Id.* at 4–5, 447 S.W.3d at 624.
421. *Id.* at 6, 447 S.W.3d at 625.
422. *Id.*, 447 S.W.3d at 625.
423. *Id.* at 7–8, 447 S.W.3d at 626.
424. *Sharp*, 2014 Ark. App. 645, at 9, 447 S.W.3d at 627.

These two cases, taken together, lay out some sound rules. A proponent of a will that is clearly the product of undue influence or procurement will trigger a no-contest clause in a valid will. A contest of a will later ruled to be valid will trigger a no-contest clause, no matter the good faith of the contestant. What is the contestant to do? One course of action might be to obtain a declaratory judgment from the court as to whether an action will trigger the no-contest clause. Another might be, as suggested in *Seymour*, to obtain the advice of a disinterested attorney.

C. The Homestead in the Trust

In 2010, real estate practitioners were surprised by the Supreme Court of Arkansas's decision in *Fitton v. Bank of Little Rock*, which intersects the topics of estate planning, conveyancing, and mortgage law.[425] In *Fitton*, a man owned a home in Little Rock.[426] Before he married, he conveyed it to himself and his wife-to-be as joint tenants with right of survivorship.[427] After their marriage, they each transferred their undivided joint tenancy interests into their own revocable trusts (thus severing the joint tenancy and rendering them owners as trustees of tenancy in common interests).[428] Seven years later they separated, and two days later the husband, both individually and as the trustee of his revocable trust, mortgaged his interest in the home to the Bank of Little Rock.[429] The wife did not know about the mortgage.[430] The divorce settlement awarded her the husband's interest in the home.[431] He conveyed it to her and she conveyed it to herself as trustee.[432] The husband then defaulted on the mortgage loan and the bank attempted to foreclose against the home, arguing that as a trust beneficiary she could not claim homestead and that she had abandoned her homestead exemption by transferring the husband's interest into her trust.[433] She argued that she had no knowledge of the mortgage, and that under Arkansas Code Annotated section 18-12-403 a homestead mortgaged without the consent of the spouse renders the mortgage void.[434] The trial court ruled that the statute voiding a transfer of a homestead by one spouse if the other does not release her inter-

425. Fitton v. Bank of Little Rock, 2010 Ark. 280, 365 S.W.3d 888.
426. *Id*. at 1, 365 S.W.3d at 889.
427. *Id*. at 1–2, 365 S.W.3d at 889.
428. *Id*. at 2, 365 S.W.3d at 890.
429. *Id*., 365 S.W.3d at 890.
430. *Id*., 365 S.W.3d at 890.
431. *Fitton*, 2010 Ark. 280, at 2, 365 S.W.3d at 890.
432. *Id*., 365 S.W.3d at 890.
433. *Id*., 365 S.W.3d at 890.
434. *Id*., 365 S.W.3d at 890.

est requires the home to be owned by a married person, and here the home was owned by the trustees for two trusts.[435]

Noting the goals of the homestead exemption—to protect the family and preserve the homestead—the court relied on a decision from the United States Court of Appeals for the Eighth Circuit that stated in dictum that beneficiaries of a trust should hold a homestead exemption; the homestead property tax discount, which applies to homesteads that are revocable trust assets; and the oft-repeated rule that the homestead exemption is to be construed liberally.[436]

D. The Edges of Trust Law—Constructive Trusts and Resulting Trusts

Around the edges of trust law are hazy relationships, formed by poorly drafted instruments or no instruments at all, just oral agreements and understandings between parties. A declaration of trust or trust agreement should always be written, and yet the ATC allows the existence of an oral trust to be established by "clear and convincing evidence" unless another statute requires otherwise.[437] The Statute of Frauds conceivably is such a statute. It requires all conveyances of real property and transfers of trust in real property to be in writing to be enforceable.[438]

On the other hand, a "constructive trust" is not really a trust at all, but a remedy that equity imposes on property.[439] In order to avoid unjust enrichment, or if there has been a breach of fiduciary duty or abuse of a confidential relationship, the law creates the fiction that the defendant holder is a "constructive" trustee, subsequently ordering the holder to convey the disputed property to the plaintiff.[440] One of the most helpful explanations of the constructive trust can be found in Scott's treatise, quoted in *Brasel v. Brasel*.

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435. *Id*. at 3, 365 S.W.3d at 890.

436. *Id*. at 5–8, 365 S.W.3d at 891–93.

437. ARK. CODE ANN. § 28-73-407 (Repl. 2012).

438. "All leases, estates, interests of freeholds, or lease of years . . . not put in writing and signed by the parties or their agents lawfully authorized by writing so making or creating the leases, estates, interests of freehold, lease of years, or any uncertain interests, shall have the force and effect of leases or estates at will only, and shall not. . . be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one (1) year." ARK. CODE ANN. § 4-59-102 (Repl. 2011). "All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare the trusts, or by his or her last will in writing, or else they shall be void." ARK. CODE ANN. § 4-59-103 (Repl. 2012).

439. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 471, Westlaw (database updated Sept. 2016).

440. "The constructive trust may be defined as a device used by equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 471, Westlaw (database updated Sept. 2016).

> It is not infrequently said that where a person would be unjustly enriched if he were permitted to retain property, a court of equity "converts him into a trustee." The expression is misleading. *The defendant is not converted into a real trustee. He is not even treated as though he were a real trustee, except that he is not permitted to retain the property for his own benefit.* One would hardly say that where a quasi-contractual obligation is imposed the court converts the defendant into a contractor, or converts the obligation into a contract.[441]

For example, parents often entrust their property to their children as a gift, intending to receive its benefit or return in the future. The better practice is to memorialize such an arrangement in the appropriate instrument so that both sides have a record of their rights and responsibilities, but sometimes the parties do not create an instrument, leading to problems if litigation subsequently ensues. In *Launius v. Beasley*, parents transferred a certificate of deposit and two tracts of real property to their daughter, with the desire that the property would not be counted as their assets should they later move to a nursing home.[442] All parties agreed that the daughter was a good manager, and that she did not claim ownership of the property.[443] After their relationship deteriorated, the parents asked the daughter to transfer the real property back to them and she refused.[444] The parents then sought to impose a constructive trust on the property.[445]

The trial court found that the "appellants voluntarily chose to transfer their assets to appellee, rather than create an express trust, but that it was understood by the parties that the transfers to appellee 'were in trust for the primary benefit of the [appellants] and their son.'"[446] The trial court found that the parents had created an oral trust.[447]

On appeal, the parents argued alternatively that either a constructive trust should be imposed, in which case they would regain their property, or, that if an oral trust had been created, they had revoked it, and their revocation should be enforced by the court.[448] Clear and convincing evidence is necessary to prove either an oral trust or the need for a constructive trust.[449] The Court of Appeals of Arkansas remanded the case because the trial court's opinion was inconsistent, although the court of appeals did not ex-

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441. Brasel v. Brasel, 313 Ark. 337, 339, 854 S.W.2d 346, 347 (1993) (emphasis in original) (quoting WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 462.1, at 312 (4th ed. 1989)).

442. Launius v. Beasley, 2013 Ark. App. 42, 2013 WL 361135.

443. *Id.* at 2, 2013 WL 361135, at *1.

444. *Id.* at 1.

445. *Id.*

446. *Id.* at 2.

447. *Id.* at 3, 2013 WL 361135, at *2.

448. *Launius*, 2013 Ark. App. 42, at 2, 2013 WL 361135, at *1.

449. *Id.* at 3, 4, 2013 WL 361135, at *2.

plain the nature of the inconsistency, noting only that the trial court had held there was insufficient evidence of a constructive trust, yet found the existence of an oral trust.[450] The trial court's finding of an oral trust seems unjustified from the facts given. The court of appeals did not discuss how, if at all, a settlor could create an express oral trust of real property. In fact, Arkansas statutory law states that a deed to a grantee conveying to simply "John Doe, Trustee" without other language showing a trust (typically the name of the trust) vests title in the grantee and gives no notice to any third parties of the existence of a trust.[451] It would seem, then, that under Arkansas law a fee simple conveyance to a grantee, without more, is not sufficient to create an express oral trust, contrary to the trial court's finding.[452] The facts were conducive to the imposition of a constructive trust, however.

Constructive trusts are often classified as one of the two types of "implied trusts," although it was noted in Scott on Trusts, quoted above, that to call a constructive trust a trust at all is extremely misleading. The other type of implied trust is the "resulting trust," which has three meanings, encompassing three very different sets of facts. A resulting trust is formed (1) where a private or charitable trust fails in whole or in part; (2) where property is purchased and the purchase price is paid by one person and, at his direction, the vendor transfers the property to another person; or (3) where a private or charitable trust is fully performed without exhausting the trust estate.[453] The first two types of resulting trusts featured in two 2014 Court of Appeals of Arkansas cases.[454] Many commentators label the second type a "purchase-money resulting trust."[455] For clarity's sake I will do so here, although oftentimes Arkansas courts do not.

The first type of resulting trust arose in *In re Estate of Kemp*.[456] In this case, a son's revocable inter vivos trust made his parents' trusts the beneficiaries.[457] However, the parents predeceased the son, and at his death he was survived by no readily ascertainable heirs (although twenty were later located, eight of whom retained counsel and became parties to the suit).[458] Bank of America was the trustee of the son's trust and it filed in Craighead County (where the decedent neither lived nor owned property) to terminate the

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450. *Id.*

451. ARK. CODE ANN. § 18-12-604 (Repl. 2015).

452. Although conceivably the personal property could have been the asset of an oral trust.

453. Bottenfield v. Wood, 264 Ark. 509, 573 S.W.2d 309 (1978).

454. McNeill v. Robbins, 2014 Ark. App. 222, 2014 WL 1396655; *In re* Estate of Kemp, 2014 Ark. App. 160, 433 S.W.3d 911.

455. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 467, Westlaw (database updated Sept. 2016).

456. 2014 Ark. App. 160, at 7, 433 S.W.3d 911, 915.

457. *Id.* at 2, 433 S.W.3d at 913.

458. *Id.* at 2 n.3, 433 S.W.3d at 913.

trust and distribute the assets to the heirs.[459] However, First National Bank, the special administrator of the estate, filed a motion in Randolph County seeking a probate court order to Bank of America to pay the trust assets to the probate estate.[460] Bank of America disagreed, arguing that it could pay the heirs directly.[461] The Randolph County court and the court of appeals agreed with First National Bank.[462]

According to the Restatement (Third) of Trusts, one authority cited in the opinion, a resulting trust is "a reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as trustee for the transferor or the transferor's successors in interest."[463] For example, if Settlor were to create an inter vivos trust that failed, because some or all of the beneficial interest could not be effectively transferred, a resulting (or "reverting") trust would be created and the trustee would then convey the property back to Settlor. Here, if the son had left a will, the trust assets would have passed through probate under the residue. Instead, because the son died intestate, the assets would go via probate to the heirs, as First National Bank argued.[464]

In the second decision, *McNeill v. Robbins*, involving what the court deemed a purchase-money trust, a mother transferred property to herself and her son as joint tenants with right of survivorship.[465] She later purchased an additional tract that was titled in the same way.[466] Her intention for these transfers changed over time; originally she had intended the transfers to assist her son in building capital and procuring other property.[467] Later when those plans did not materialize, she intended the properties to pass to him at his death.[468] At no time did she intend her son to have a present legal interest in the properties.[469] The son later attempted to partition the property and the mother counterclaimed.[470] The trial court found either a constructive trust existed, ordering the son to convey all necessary deeds to his mother, or a resulting trust existed, ordering the deeds to be set aside.[471]

After an appeal by the son, the court of appeals gave a somewhat misleading definition of resulting trust: one that arises when "one disposes of

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459. *Id.* at 2, 433 S.W.3d at 913.
460. *Id.*, 433 S.W.3d at 913.
461. *Id.*, 433 S.W.3d at 913.
462. *Kemp*, 2014 Ark. App. 160, at 2, 433 S.W.3d at 913.
463. RESTATEMENT (THIRD) OF TRUSTS § 7 (AM. LAW INST. 2003).
464. *Kemp*, 2014 Ark. App. 160, at 6, 433 S.W.3d at 915.
465. McNeill v. Robbins, 2014 Ark. App. 222, at 1, 2014 WL 1396655, at *1.
466. *Id.*
467. *Id.* at 4, 2014 WL 1396655, at *2.
468. *Id.*
469. *Id.*
470. *Id.* at 1.
471. *McNeill*, 2014 Ark. App. 222, at 2, 2014 WL 1396655, at *1.

property under circumstances raising an inference that he or she does not intend that the putative grantee should have a beneficial interest in the property."[472] This definition comes from *Edwards v. Edwards*, which then goes on to clearly define a purchase-money resulting trust as one that "arises where property is purchased and the purchase price is paid by one person and at his/her direction the vendor converts the property to another person."[473] A purchaser pays the consideration but the property is conveyed to a third party who is a stranger. The law presumes the conveyance to be in trust to the third party for the benefit of the actual purchaser. But if (as in *McNeill*) the third party is a natural object of the bounty of the purchaser, then a gift rather than a trust may have been intended.[474]

Not only did the *McNeill* court not include the specific definitions and explanations of a purchase-money resulting trust, but also it applied the rule to a situation where there was no purchase. Six of the seven parcels already belonged to the mother, so the purchase-money resulting trust doctrine could not be applied to them. Also, somewhat confusingly, the court of appeals agreed with the trial court's finding that the mother had no intent to transfer present title, *either legal or equitable*, to the son.[475] It affirmed the trial court's ruling that a resulting trust had been created, which the son breached when he sued for partition.[476]

The doctrines of "constructive trust" and "purchase money resulting trust" are helpful arguments to make when trying to enforce a transferor's intent, if the transferor has not used the appropriate instrument or if subsequent developments have thwarted a plan. Rather than a deed or oral agreement, a parent should consider a beneficiary deed, will, or inter vivos trust, any one of which will cost less than litigation. Such an instrument, which transfers either an expectancy or a vested remainder subject to divestment, will usually not have potentially expensive tax consequences, because it will afford the transferee the step up in basis, which will result in less income tax if the transferee sells the property after the transfer. On the other hand, if an inter vivos transfer has the potential to remove significant appreciation from the estate and avoid the consequential estate tax on the appreciation, and the beneficiaries intend to keep the property rather than sell it, an inter vivos transfer may be advisable.

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472. *Id.* at 3, 2014 WL 1396655, at *2 (citing Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 (1992)).

473. *Edwards*, 311 Ark. at 343, 843 S.W.2d at 849.

474. *See id.* at 344, 843 S.W.2d at 849.

475. *McNeill*, 2014 Ark. App. 222, at 4–5, 2014 WL 1396655, at *2–3. That would actually mean that nothing had been transferred to the son, in terms of trust analysis, because the trustee holds legal title and the beneficiary holds equitable title.

476. Although, if the son was a purchase money resulting trustee he would have present legal title.

E. On the Horizon—Legislative Reforms

As the number of trusts continues to increase, interest is growing in legislation to deal with problem areas in trust law. As mentioned above, interest by trustees in trust decanting has grown. Decanting gives a trustee (not a beneficiary) discretion to modify an existing irrevocable trust or create a new trust that receives the funds of the old.[477] Reasons for decanting will typically be variations on mistake or changed conditions—a case in point was the need to change a trust to a special-needs trust in the *Owen* case.[478] A successful decanting is intended to avoid adverse federal estate, generation-skipping transfer, and income tax consequences.[479] The source of decanting authority may be case law, statutes, or a specific trust provision that allows it.[480] A detailed description of decanting is outside the scope of this article, but those interested in it are encouraged to view the Uniform Trust Decanting Act and comments, and the growing body of articles on the topic.[481]

With the ability to delegate trust duties afforded by the UTC and the increased use of trust advisors and protectors, there is much uncertainty about the duties and liability of specialized trustees and nontrustees. The Uniform Law Commission is currently drafting the Uniform Divided Trusteeship Act, which will adequately address this issue.[482]

One issue that regularly arises in Arkansas trust law is divorce. A divorce revokes a devise to a spouse by operation of law.[483] Yet there is no parallel provision in Arkansas law for trusts. Thus, if a husband named his wife as a successor trustee and beneficiary of a revocable trust and later divorced, and if by chance the trust was not mentioned in the property settlement or later expressly revoked, when the ex-husband died the ex-wife would at least be a trust beneficiary, although probably she could be removed as trustee. There is a current need for a parallel revocation statute for inter vivos trusts.

Some legislative fleshing out of the precedent from the *Estate of Thompson* decision would also render more certainty for estate planners. Is the decision to be limited to revocable trusts? Will it be extended to other

477. Brandon A.S. Ross, *Practical Considerations for Decanting,* PROB. & PROP., Mar.–Apr. 2016, at 36.

478. *Id.*

479. *Id.*

480. *Id.* at 37–38.

481. *See* UNIF. TRUST DECANTING ACT (UNIF. LAW COMM'N 2015), available at http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf.

482. For current drafts and discussion documents see http://www.uniformlaws.org/shared/docs/divided%20trusteeship/2015mar_DTA_Mtg%20Draft.pdf.

483. ARK. CODE ANN. § 28-25-109(b) (Repl. 2012).

types of nonprobate transfers, like POD bank accounts? Will the factors for fraud be clarified?

IV. CONCLUSION

After ten years, the ATC has become a familiar part of the landscape of trust planning, administration, and litigation. The number of revocable trust cases has steadily grown and will continue to do so. Frequently litigated issues are attorney's fees, revocation and amendment powers of a surviving spouse over a joint trust, and modification and termination of trusts. As more and more surviving spouses and children become trustees of formerly revocable trusts, the number of disputes between family members, and between families and institutional trustees, will increase. Clients should be counseled thoroughly on the responsibilities resulting from acceptance of a trusteeship of an irrevocable trust (or a trust that will later become irrevocable). Should explicit differing standards for professional and non-professional trustees be set forth?[484] Hopefully this guide to how courts are interpreting the ATC and making new trust law will be of use to drafters as they seek to carry out their clients' wishes without triggering disputes and litigation.

484. For an interesting article in which Professor Melanie Leslie argues that certain trustee duties should differ for non-professional trustees, see *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713 (2006).