# The Cannon Estate Planning Teleconference Series

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# Avoiding the Future Disruption of an Estate Plan

**Cannon Financial Institute, Inc.**

**Presents**

**The 2025 Estate Planning Webinar Series**

**Tuesday, August 19, 2025**

**By:**

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# CHARLES A. REDD

Charles A. Redd is a partner in the St. Louis, Missouri, office of the law firm of STINSON LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now Bank of America Private Bank).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar, the Illinois State Bar Association, The Bar Association of Metropolitan St. Louis and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as a member of the Advisory Committee for the Heckerling Institute on Estate Planning and is Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils and, in 2023, was named Distinguished Estate Planner of the Year by the Estate Planning Council of St. Louis. In 2024, Mr. Redd was identified among the top 100 lawyers in Missouri and Kansas by Missouri & Kansas Super Lawyers. Mr. Redd is listed in the 2025 edition of The Best Lawyers in America as the St. Louis "Lawyer of the Year" in "Litigation-Trusts and Estates," and is nationally "Band 1" ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

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Turney P. Berry concentrates his practice in the areas of estate planning, fiduciary matters, and charitable planning. Mr. Berry is the leader of Wyatt, Tarrant & Combs' Trusts, Estates & Personal Planning Service Team and a past member of the firm's Executive Committee. Mr. Berry is active in the American College of Trust and Estate Counsel (ACTEC), and served as President of the ACTEC Foundation, Regent of the College, State Chair for Kentucky, Chair of the Estate & Gift Committee, and Chair of the Charitable and Tax-Exempt Committee. Currently he serves as Chair of the State Laws Committee, and a member of the Long Range Planning Committee.

As a Uniform Law Commissioner, Mr. Berry currently serves as Chair of the Study Committee on Transfers to Minors Act, Vice-Chair of the Drafting Committee on Conflicts of Laws in Trusts and Estates, Member of the Electronic Estate Planning Documents Committee, Member of the Joint Editorial Board for Uniform Trust and Estate Acts, and Member of the Drafting Committee on Uniform Determination of Death Act. He has served as chair of the Uniform Fiduciary Income and Principal Act (UFIPA), chair of the Uniform Power of Appointment Act, Vice Chair of the Drafting Committee on Electronic Wills Act, Co-Chair of the Drafting Committee on Uniform Cohabitants' Economic Remedies Act, and as a member of the drafting committees for the Directed Trust Act, the Revised Fiduciary Access to Digital Assets Act, the Trust Decanting Act, the Insurable Interests in Trusts Act, the Premarital and Marital Agreements Act, the Transfer on Death Deeds Act, the Revised Disposition of Community Property Rights at Death Act, and the Uniform Probate Code Artificial Reproductive Technology provisions, and an adjunct member of the Fundraising Through Public Appeals Act.

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Mr. Berry has been certified as an Accredited Estate Planner® (AEP®) by the National Association of Estate Planners & Councils and is a member of its Estate Planning Hall of Fame [Kentucky does not recognize legal specialties]. He is listed in Woodward/White's The Best Lawyers in America® and in the Kentucky Super Lawyer Magazine in the area of Trusts and Estates.

A native of Tennessee, Mr. Berry received his B.A. and B.L.S. in 1983 from the University of Memphis and his J.D. in 1986 from Vanderbilt University.

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# TABLE OF CONTENTS

**Page**

# Avoiding the Future Disruption of an Estate Plan

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## I. INTRODUCTION

A provision in a trust instrument saying the trust is irrevocable, or the irrevocable nature of a trust because of the death of the settlor, may, in 2025, be a mere minor impediment to making changes to the trust. Furthermore, a surviving spouse or beneficiaries who are unhappy with the terms of a decedent's estate plan may launch a frontal assault on the plan. There are steps that can be taken to prevent or dissuade frivolous or vengeful actions by disgruntled parties and to help ensure a client's carefully constructed estate plan is preserved intact.

## II. TRUST INSTRUMENT PROVISIONS DESIGNED SPECIFICALLY TO LIMIT DECANTING AND CHANGES UNDER THE UNIFORM TRUST CODE AND SIMILAR LAWS

### A. The Pursuit of Flexibility

Flexibility in estate planning is becoming more prevalent for most estate planning clients and their professional advisors. Contemporary estate planning professionals seem consistently to accept and promote the use of techniques and strategies that can be and sometimes are used to eviscerate a trust. Of course, changes to irrevocable trust instruments are often objectively desirable or necessary. Errors need to be corrected. Antiquated, obsolete provisions need to be updated. Unanticipated changes in applicable law and beneficiaries' circumstances need to be addressed. Sometimes, though, the motivation to make changes, and the changes themselves, may transcend that which is desirable or necessary. Beneficiaries may simply decide they don't care for the terms of a trust established by an ancestor and want to relax the rules or eliminate restrictions altogether. Indeed, a determined coalition of beneficiaries who are willing to expend sufficient time, effort and money may well be able to effectuate virtually any change in trust provisions they desire.[1]

#### 1. *Uniform Trust Code*

The Uniform Trust Code ("UTC") -- enacted in thirty-six states[2] and the District of Columbia -- provides several avenues through which the terms of a trust can be changed.

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[1] However, there may be gift tax consequences for beneficiaries who participate or acquiesce in changing dispositive provisions. *See*, *e.g.*, Chief Counsel Advice 202352018 (Release Date: December 29, 2023) and Treas. Reg. Section 26.2601-1(b)(4)(i)(E), *Example 7*.

[2] Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

- UTC § 111 authorizes the use of nonjudicial settlement agreements with respect to any matter involving a trust so long as a material purpose is not violated.[3]

- UTC § 411(a) authorizes the settlor and all beneficiaries to modify or terminate a noncharitable irrevocable trust, even if the modification or termination is inconsistent with a material purpose of the trust.

- UTC § 411(b) provides that the court may order a modification or termination of a noncharitable irrevocable trust if all beneficiaries consent to the modification or termination and the court concludes that, in the case of modification, such action is not inconsistent with a material purpose of the trust or, in the case of termination, continuance of the trust is not necessary to achieve any material purpose of the trust.

Other portions of the UTC permit a court to modify the terms of a trust for various purposes.[4]

### 2. *Decanting*

In addition, "decanting" statutes have been enacted in forty-one states[5] and the District of Columbia. The term "decanting," when used in the context of trust administration, refers to a transaction whereby a Trustee exercises discretionary distribution authority set forth in an existing trust instrument by distributing not outright to the beneficiary to or for whom the Trustee is empowered to distribute but, rather, to a new trust for the benefit of the target beneficiary and perhaps one or more others.[6] "Decanting" may also refer to a modification of a trust instrument, carried out unilaterally by the Trustee, having fundamentally the same end result as a decanting without actually moving trust property to a new trust.[7] Depending on the state, the new trust, as compared to the trust out of which the distribution was made, may have different standards for distribution, may permit or direct distributions at a different time or times, may create a new power of appointment and may include different beneficiaries.

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[3] *But see* Mo. Rev. Stat. § 456.1-111.6, which states "A nonjudicial settlement agreement may not be used to terminate or modify a trust [to reduce or eliminate the interests of some beneficiaries and increase those of others, change the times or amounts of payments and distributions to beneficiaries or provide for termination of the trust at a time earlier or later than that specified by its terms].

[4] *See* Uniform Trust Code ("UTC") §§ 412(a), 415, 416.

[5] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Washington, Wisconsin, Wyoming.

[6] Uniform Trust Decanting Act, Section 2(10).

[7] *Ibid*.

### B. Achieving Balance Between Flexibility and Certainty

Achieving an appropriate balance between flexibility and certainty in an estate plan is a delicate exercise and varies from one client to another. A client could consider including in his Will or trust instrument a strong statement regarding his dispositive desires and his overriding wish that, notwithstanding what may be possible under applicable state trust law, his dispositive plan not be disturbed except in the most compelling of circumstances. Additionally, a client could include an explicit statement in his or her Will or trust instrument regarding the client's "material purposes" (thereby making it more difficult to change provisions that would implement such purposes). Yet another approach would be to include "*in terrorem*" language in the Will or trust instrument (discussed in more detail below) that would remove as a beneficiary anyone who initiates or participates in any process or proceeding to alter specified provisions or types of provisions. Still further, many decanting statutes can be used only if the trust's governing instrument does not provide otherwise,[8] so a client who is concerned about the potential for decanting may be able to eliminate that potential by including a provision prohibiting decanting. Finally, although under UTC § 105(b) a court would always have authority to modify or terminate a trust under UTC §§ 410 through 416 regardless of any provision in the governing instrument, a governing instrument could limit or prohibit using a nonjudicial settlement agreement under UTC § 111 to modify a trust without court involvement or transferring the trust's principal place of administration to another state under UTC § 108.

Whether any of the prophylactic provisions suggested above should be included in a client's estate planning documents and, if so, specifically how they should be designed may be debatable. Moreover, given the wide variety of state trust laws, whether or to what extent such provisions would be enforceable would have to be considered carefully on a case-by-case basis. What seems beyond debate, however, is that estate planning clients deserve to know of the potential that their estate plans could be turned upside down and what the possible preventative remedies are.

## III. MARITAL AGREEMENTS

### A. In General

Marital agreements have become increasingly popular, in part because of high divorce rates, and the financial obligations that often flow from divorce It's not unusual for a client (particularly a wealthy one) to seek to have his or her spouse or intended spouse waive, in a premarital or postmarital agreement, his or her statutory rights to help ensure that the wealthy client's tax-driven and non-tax-driven goals will not be disrupted.

Under the Uniform Premarital Agreement Act ("UPAA") § 3, parties to a premarital agreement may contract with respect to:

[8] *See*, *e.g.*, Del. Code tit. 12, § 3528(a); Mo. Rev. Stat. § 456.4-419.1; Alaska Stat. § 13.36.157.

- The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

- The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

- The disposition of property upon separation, marital dissolution, death or the occurrence or nonoccurrence of any other event;[9]

- The modification or elimination of spousal support;

- The making of a Will, trust, or other arrangement to carry out the provisions of the agreement;

- The ownership rights in and disposition of the death benefit from a life insurance policy;

- The choice of law governing the construction of the agreement; and

- Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.[10]

Additionally, it's fairly common for marital agreements to contain provisions waiving rights (if) any to serve in certain fiduciary roles, *e.g.*, executor, administrator, personal representative, guardian, conservator. However, the agreement must be voluntary and not unconscionable when signed (and, in some jurisdictions, when implemented), and there must be certain financial disclosures between the parties.[11]

### 1. *Lack of Voluntariness*

A premarital or postmarital agreement may be challenged on the basis that a spouse didn't enter into the agreement voluntarily because of fraud, duress or undue influence. Because neither the UPAA nor the Uniform Premarital and Marital Agreements Act ("UPMAA") defines

[9] Presumably, this component of UPAA § 3 would encompass the waiver of an elective share (in non-community property jurisdictions) and other property interests otherwise conferred on spouses under applicable state law.
[10] The UPMAA (*see* note 11) has no provision comparable to UPAA § 3.
[11] *See* Uniform Premarital Agreement Act ("UPAA") § 6. The UPAA was promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), now known as the Uniform Law Commission, in 1983. In 2012, NCCUSL approved and recommended the UPMAA. The UPMAA was intended to supersede the UPAA, but, practically, that hasn't happened. The UPMAA has been enacted in two states, Colorado and North Dakota, and introduced in Michigan's 2025 legislative session. By contrast, the UPAA (or some variation of it) is in force in 26 states (Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia) and the District of Columbia.

the term "voluntary," courts look to case law and a variety of factors to determine whether a marital agreement was entered into voluntarily. Numerous cases are cited in the comment to UPAA § 6.

The risks of undue influence may be greater with a premarital or postmarital agreement than with a Will because of the nature of the fiduciary relationship between spouses-to-be in negotiating and executing this type of contract.[12].

### 2. *Unconscionability and Failure to Disclose*

"In the context of negotiations between spouses as to the financial incidents of their marriage, [unconscionability] includes overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.[13]

The financial disclosures requirement is satisfied if, before execution of the agreement, the spouse seeking enforcement: (a) was provided a fair and reasonable disclosure of the property or financial obligations of the other party; (b) voluntarily and expressly waived in writing any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; or (c) had, or reasonably could have had, adequate knowledge of the property or financial obligations of the other party.[14] The UPAA does not define "fair and reasonable" disclosure. The UPMAA replaces "fair and reasonable disclosure" with "reasonably accurate and good faith estimate of value."

## B. Minimizing Risks of Litigation Regarding the Validity of Marital Agreements

### 1. *Separate Counsel*

If each party agrees to separate representation (and the wealthier spouse should insist that the less wealthy spouse have separate counsel), include in the agreement the name of each lawyer and have both lawyers sign the agreement indicating they explained the agreement to their respective clients and believe their clients understand the agreement they are making.[15] Neither lawyer should be required to endorse the agreement. There are occasions when a client wants to make an agreement against the advice of counsel.

### 2. *Timing of the Agreement*

The lawyer should plan the negotiations and other meetings related to the agreement, as well as its execution, well in advance of the wedding. A claimant will then have more difficulty proving duress or undue influence.

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[12] *See* Ravdin, 849-2nd T.M., *Marital Agreements*.
[13] UPAA § 6, comment.
[14] UPAA § 6; UPMAA § 9(d).
[15] Notably, the UPAA doesn't require, as a condition of enforcement, that the party against whom enforcement is sought was represented by separate counsel. However, UPMAA § 9 does require that the party against whom enforcement is sought had access to independent legal representation.

### 3. *Disclosures*

The lawyer should assist the client in completing a comprehensive list of the client's assets (with corresponding values), financial obligations of the client and the client's income.[16] That list should be attached as an Exhibit to (or at least explicitly referred to in) the agreement. The client should review the list carefully to ensure its accuracy, and the other party to the agreement should be required to sign it signifying his or her receipt of and satisfaction with it.

### 4. *Specific Reference to Rights and Interests Being Waived*

To the extent the agreement is not specific as to the marital rights being waived, they may not be waived.[17]

### 5. *Recitals*

Recitals are useful because each spouse (and counsel) will have read the recitals before execution, making it more difficult to claim later that the facts and circumstances described in the recitals were untrue or didn't exist. Particularly helpful recitals include:

- Each party understands he or she would have substantial rights, under applicable state law, in the property of the other in the absence of the agreement.
- Each party has had ample opportunity to review and discuss the agreement with his or her own counsel.
- Each party acknowledges he or she has received and accepted from the other party what the acknowledging party believes to be a full and accurate disclosure by the disclosing party of all property owned by, the liabilities of and all matters pertinent to the net worth and income of the disclosing party.
- The parties accept that certain assets disclosed in the Exhibits are difficult to value, that the values assigned to those assets are good faith estimates

[16] *See* UPMAA § 9(d)(1).

[17] *See*, *e.g.*, *Bauer v. Piercy*, 912 S.W.2d 457 (Ky. App., December 22, 1995). A surviving spouse renounced her predeceased husband's Will. The spouses had contracted not to revoke or change their Wills. In holding the surviving spouse hadn't breached the contract, the Court said: "The study and practice of law, perhaps more than any other profession or art, depends on precision and clarity in language. The terms revocation and renunciation, while perhaps holding the same meanings for the layperson, have unique and specific meanings for attorneys. Language is the medium through which the parties' intentions are expressed and the "meeting of the minds" accomplished. Thus, specificity and clarity of the words employed are of utmost importance." *Cf. In re Estate of Sharpe*, 814 S.E.2d 595 (N.C. App., March 6, 2018), in which the Court held a surviving spouse had waived her right to an elective share in a premarital agreement that didn't specifically address the elective share but stated: "each party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]" and "[e]ach party specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state."

and understand that the non-owning party may take steps to verify the accuracy of those values.

- The parties acknowledge that the agreement has been under negotiation for a sufficient period of time, they have freely and voluntarily entered into the agreement without any duress or coercion and with full knowledge and understanding of each and every provision.

#### 6. *Provide Incentives to Avoid Litigation*

Consider including a provision requiring the party who breaches the agreement to pay the attorney's fees incurred by the other party in seeking enforcement of the agreement.

## IV. DRAFTING AND ENFORCING NO CONTEST CLAUSES

### A. Generally

No contest clauses—sometimes known as *in terrorem* or forfeiture clauses—seek to prevent contest of a Will or trust instrument by removing any individual who challenges the provisions of the applicable instrument as a beneficiary. Beneficiaries are motivated to challenge a Will or trust instrument because they stand to gain economically if successful in the challenge. A successful attack on the validity of a document will cause the decedent's estate or trust to pass intestate or pursuant to an earlier document that was not contested (or was not contested successfully). In some instances, a beneficiary may assert the invalidity of only a portion of a document. If the beneficiary is successful, only that provision is eliminated, and the remainder of the Will or trust instrument continues in effect.

By using a no contest clause, testators and settlors seek to discourage beneficiaries from bringing challenges. If, however, a testator or settlor has completely removed as a beneficiary a child or other individual whom the testator or settlor believes would challenge the Will or trust instrument, a no contest clause will not serve its purpose.[18] In such a case, that child or other individual has nothing to lose by initiating a challenge. The use of a no contest clause is effective only when there is a sizeable enough gift to make the target beneficiary think twice about a challenge. Language removing as beneficiaries all descendants of a potential challenger may add further disincentive to challenge by making the potential contestant consider whether the attack is worth the potential loss both to him or her, individually, and to his or her descendants.

### B. Types of No Contest Clauses

While the goal of all no contest clauses is to dissuade those who would challenge the Will or trust instrument, there are different types of challenges that might be targeted by a given type of no contest clause.

[18] *See* Beyer, "How to Draft Wills to Prevent and Diminish Contests," 48 TAX MGMT. EST., GIFTS & TR. J. NO. 3 (May 11, 2023); Flubacher and Kanyuk, "Where There's a Will, There's Family," TRUSTS & ESTATES, March 2019.

### 1. *To Prevent Challenge Regarding Validity of a Document*

Clauses relating to validity often encompass challenges to the document as a whole as well as challenges to specific provisions therein. The clause may be broad, excluding a beneficiary who contests, or cooperates with any other beneficiary who contests, any Will, trust instrument, exercise of a power of appointment or any transfer of property by the testator or settlor.[19] Alternatively, the clause may be narrow, providing, for example, that "any action or proceeding…for the purpose of modifying, varying, setting aside or nullifying any provisions hereof relating to my Louisiana estate" shall disqualify such individual from taking the testator's Louisiana estate under the provisions of the document.[20] A challenge to the disposition of real estate owned by the decedent in a state other than Louisiana may trigger the application of the former clause, but not the latter, resulting in different outcomes.

### 2. *To Prevent Challenge to Acts or Omissions of Fiduciaries*

Many clients are concerned that, while beneficiaries may not disagree with the dispositive terms of the Will or trust instrument, they may develop a confrontational attitude toward the fiduciaries chosen by the client. Consequently, such clients sometimes insert provisions stating that, if any beneficiary should challenge or attack the actions of an Executor or a Trustee, such beneficiary and his or her descendants shall forfeit their share of the estate or trust. That said, it's contrary to the notion of a trust to give unqualified insulation from liability to a fiduciary – whether by way of an exculpatory provision or an *in terrorem* clause.[21]

## C. Common Challenges and Impact on No Contest Clauses

Only one state, Florida, renders no contest clauses void by statute.[22] The courts of many other states strictly construe no contest clauses, while others simply look to the plain language of the clause to determine whether the action at issue triggers the clause. Additionally, under the law of many states, a no contest clause won't be enforced if the contestant had probable cause for bringing the contest.[23] Good faith may also be a requirement for avoiding enforcement.[24] Georgia courts won't enforce a no contest clause unless the governing instrument provides for the disposition of the property if the clause is triggered.[25]

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[19] *See* Baker, "You *Can* Take It With You – Ensuring Compliance With Decedent's Wishes in an Era of Litigation and Flexibility," ACTEC ANNUAL MEETING (2016).
[20] *See Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. Ct. App. 2006).
[21] *See Capobianco v. DiSchino*, 150 N.E.3d 1148, (Mass. Ct. App. 2020); *Callaway v. Willard*, 739 S.E.2d 533 (Ga. Ct. App. 2013).
[22] Fla. Stat. §§ 732.517, 736.1108.
[23] See, e.g., Colo. Rev. Stat. §§ 15-11-517, 15-12-905; 20 Pa. Cons. Stat. § 2521; *Key v. Tyler* 34 Cal. App. 5th 505, 510 (2019); *Hamel v. Hamel*, 299 P.3d 278 (Kan. 2013); *Bridgeford v. Estate of Chamberlin*, 573 P.2d 694, 696 (Okla. 1977); *Whitmore v. Smith*, 221 P. 775, 777 (Okla. 1923); *In re Massey* 964 P.2d 238, 240 (Okla. Civ. App. 1998); *Matter of Estate of Westfahl*, 674 P.2d 21, 24 (Okla., 1983); RESTATEMENT (THIRD) OF THE LAW OF PROPERTY: DONATIVE TRANSFERS §8.5 (2003); Uniform Probate Code §§ 2-517 and 3-905.
[24] *See Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 855 (N.C. 1952); *Griffin v. Sturges*, 40 A.2d 758, 760-61 (Conn. 1944); *Thompson v. Estate of Thompson*, 1999 WL 311241, *4 (Conn. Super. 1999).
[25] Ga. Code. Ann. § 53-4-68 (wills) and § 53-12-22 (trusts).

### 1. *Suits to Construe as Contests*

A suit to construe is widely viewed as a way of carrying out a testator's intent and should not be considered or treated as a violation of a no contest clause.[26] A suit to construe is a "search for the true meaning of a will" and is not a way to side step the testator's intention.[27] In contrast, a no contest clause is triggered where a beneficiary is "attempting to set aside, contest or appeal from a decision sustaining the validity of an instrument."[28] Furthermore, no contest clauses were enforced in a case in which a beneficiary petitioned for a court order modifying and reforming dispositive provisions of a trust instrument[29] and in a case in which a beneficiary participated in an effort to decant a trust to change the Trustee qualification rules.[30]

Suits that determine rightful ownership of property are typically deemed suits to construe and, accordingly, not triggering actions.[31] Claims by beneficiaries that indirectly request construction of a Will or trust instrument have also been found to be suits to construe and, therefore, outside the scope of a no contest clause.[32]

### 2. *Declaratory Judgment Actions as Contests*

Claimants most commonly bring declaratory judgment or declaratory relief actions seeking either an interpretation of the Will or trust instrument or a determination of whether a proposed action would trigger the no contest clause.

#### a. <u>Declaratory Judgment Action Seeking Interpretation</u>

Not surprisingly, declaratory judgment actions seeking interpretation or construction of a Will or trust instrument, even in states with strict construction rules, are generally not deemed attacks on the document because they do not "challenge [] the will or any part of it."[33]

#### b. <u>Declaratory Judgment Action Seeking Determination Regarding Proposed Action</u>

Statutes in Missouri, New Hampshire, Delaware and Tennessee expressly provide that no contest clauses are unenforceable against actions to determine whether a pending

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[26] *See, e.g.*, *Hicks v. Rushin*, 185 S.E.2d 390 (Ga. 1971); *Marx v. Rice*, 65 A.2d 48 (N.J. 1949).
[27] *Upham v. Upham*, 200 S.W.2d 880 (Tex. Ct. App. 1947); *Hicks v. Rushin*, *supra*.
[28] *In re Ervin's Estate*, 79 A.2d 264 (Pa. 1951).
[29] *Taylor, et al. v. Credille*, No. 1 CA-CV 17-0690 (unreported) (Ariz. Ct. App. 2018). *But see In re Baldwin*, 667 S.W.3d 199 (Mo. App. S.D. 2023), wherein the court held that filing a reformation action under Mo. Rev. Stat. § 456.4-415, Missouri's version of UTC § 415, wasn't a "contest."
[30] *Gowdy v. Cook*, 455 P.3d 1201 (Wyo. 2020).
[31] *See, e.g.*, *Meyer v. Benelli*, 415 P.2d 415 (Kan. 1966) *George v. George*, 141 S.W.2d 558 (Ky. 1940) (request to determine ownership in real estate brought by son not direct attempt to contest but to determine meaning of the Will and interest in the property).
[32] *See In the Matter of Estate of Ikuta*, 639 P.2d 400 (Haw. 1981).
[33] *Mazzola v. Myers*, 296 N.E.2d 481 (Mass. 1973); *see Di Portanova v. Monroe*, *supra* (finding clause not triggered where guardian sought clarification regarding scope of trust distribution provisions).

or proposed proceeding would constitute a contest that triggers the clause.[34] Case law in other states has held that no contest clauses are unenforceable against such actions.[35]

## V. MEDIATION AND ARBITRATION PROVISIONS

Alternative dispute resolution ("ADR"), such as mediation and arbitration, is generally available to parties if all parties consent or pursuant to a court order once a dispute is initiated. If implemented successfully, such procedures can help avoid the often extreme costs and delays of litigation.[36]

A Will or trust instrument may include a provision prescribing a procedure for mediation or arbitration to be used by interested parties if disputes arise. Statutes enacted by lawmakers in ten states provide that these provisions may be enforceable.[37] Florida, Nevada, Ohio and South Dakota's statutes address the use of arbitration clauses only. Case law in Texas validates enforcement of arbitration provisions in trust instruments.[38] In the absence of an enabling statute or case law, a testamentary or trust instrument provision mandating mediation or arbitration may not be enforceable.[39]

The applicable statutes of Florida, New Hampshire, Colorado, Kansas, Nevada, Ohio and South Dakota prohibit the use of ADR if the dispute regards the validity of the instrument. By contrast, Missouri's statute allows for the use of ADR for a dispute regarding the validity of a trust if all interested parties consent. New Hampshire's statute provides that ADR cannot be used to determine a trust's material purpose or to resolve any matter involving a charitable trust unless the director of charitable trusts expressly consents. The statutes in Arizona, Missouri, New Hampshire, Colorado, Kansas and Ohio deal only with clauses in trust instruments and not Wills.

## VI. LIMITATIONS ON REQUIREMENTS TO DISCLOSE INFORMATION TO BENEFICIARIES

Trustees have many duties to provide information and notices to beneficiaries. The failure to disclose can expose the Trustee to liability. Some settlors wish to limit the availability of information to beneficiaries. In such cases, the governing instrument must achieve the right balance between the necessity for beneficiaries to have sufficient information to protect their

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[34] *See* Del. Code Ann. tit. 12 § 3329(b); N.H. Rev. Stat. Ann. §§ 551:22(III); 564-B:10-1014(c); Mo. Rev. Stat. §§ 456.4-420 and 474.395; Tenn. Code Ann. § 35-15-1014(c).

[35] *See, e.g.*, *Hunter v. Hunter*, 838 S.E.2d 721 (Va. 2020); *In re Miller Osborne Perry Trust*, 831 N.W.2d 251 (Mich. Ct. App. 2013); *Krause v. Tullo*, 835 S.W.2d 488 (Mo. App. S.D. 1992).

[36] *See* Donovan & Martinsen, "Bridges to Peace When There is a Fight Over the Crystal," ACTEC HEART OF AMERICA REGIONAL MEETING (2017).

[37] Mo. Rev. Stat. § 456.2-205; Fla. Stat. § 731.401; A.R.S. § 14-10205; N.H. RSA § 564-B:1-111A; Colo. Rev. Stat. § 15-5-113; Kan. Stat. Ann. § 58a-205; Nev. Rev. Stat. § 164.930; Ohio Rev. Code Ann. § 5802.05; S.D. Codified Laws § 55-1-54; Utah Code Ann. § 75-1-312 (West).

[38] *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)

[39] *See*, *e.g.*, *Schoeneberger v. Oelze*, 96 P.3d 1078, 208 Ariz. 591 (Ariz. Ct. App. 2004); *Burgess v. Johnson*, 835 F. App'x. 330, 333 (10th Cir. 2020); *Glassman v. Cohen,* 213 A.D.3d 850, 184, N.Y.C.3d 108 (2d Dept. 2023); *In re Calomiris*, 894 A.2d 408, 410 (D.C. 2006).

interests and hold the Trustee accountable and a settlor's privilege to establish rules governing the disposition of his or her property at death.

## A. Uniform Trust Code Section 813

### 1. *In General*

UTC § 813 codifies and expands the Trustee's common law duty to keep beneficiaries informed. It imposes an affirmative obligation to keep "qualified beneficiaries" reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.[40] The Trustee must also meet several specific notice requirements and provide annual reports. "Nonqualified beneficiaries," an undefined term, are entitled to information from the Trustee only upon their specific request.

### 2. *Specific Rules*

Within sixty days after accepting a trusteeship, the Trustee must notify the qualified beneficiaries of the acceptance and of the Trustee's contact information. In addition, within sixty days after the date the Trustee acquires knowledge of the creation of an irrevocable trust, or that a formerly revocable trust has become irrevocable, the Trustee must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument and of the right to a Trustee's report. The obligation to provide the notices described in UTC § 813(b)(2) and (3) is determined at a single point in time – when the Trustee accepts the trust, when the irrevocable trust is created or when a formerly revocable trust becomes irrevocable.

In addition to annual reporting requirements, the Trustee must promptly respond to any beneficiary's (not just a qualified beneficiary's) request for information, unless such request is unreasonable under the circumstances.

## B. State Variations of Uniform Trust Code Sections 813, 103 and 105

Numerous jurisdictions that have enacted the UTC have done so with modifications, especially with regard to UTC §§ 813 and 103 (the provision of the UTC containing definitions of certain terms used in UTC § 813 and other UTC sections). For example, the Kansas definition of "qualified beneficiary" means only a beneficiary who either is eligible to receive mandatory or discretionary distributions of trust income or principal or would be so eligible if the trust terminated on the date qualified beneficiary status is determined.[41] Utah's definition includes the current mandatory and permissible distributees, and the presumptive remainder beneficiaries but excludes the UTC's intermediate class of successor beneficiaries who would become distributees

[40] A "qualified beneficiary" includes current beneficiaries, presumptive remainder beneficiaries and those beneficiaries who would be current beneficiaries if the interests of the current beneficiaries, but not the trust, terminated. UTC § 103(13).

[41] Kan. Stat. Ann. § 58a-103(12).

or permissible distributees if the interests of the current beneficiaries, but not the trust, terminated.[42]

With regard to which beneficiaries are entitled to information, the Kansas statute provides that the duty to inform and report is owed only to the surviving spouse so long as the surviving spouse is a qualified beneficiary or holds any power of appointment over the entire trust estate and where all other qualified beneficiaries are issue of the surviving spouse.[43] In Oregon, the duty to provide information is owed only to a settlor's surviving spouse if the surviving spouse is financially capable, the surviving spouse is the only permissible distributee of the trust and all of the other qualified beneficiaries of the trust are descendants of the surviving spouse.[44] These statute would apply, for example, to a trust created for the benefit of a surviving spouse, with the remainder to the descendants of the settlor and the settlor's spouse and would work to the benefit of a settlor who does not want his or her children or other descendants to know about the trust until after the deaths of both spouses. Ohio law seems to have the same effect because the Trustee's affirmative duties under its version of UTC § 813 are limited to only "current beneficiaries."[45]

In Missouri, a settlor may designate one or more permissible distributees to receive notification of the existence of the trust and of the right to request Trustee's reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee.[46]

### C. Extent of Latitude to Limit Certain Disclosures to Beneficiaries

Like most provisions of the UTC, those setting forth the Trustee's duty to inform and report may be restricted in their effect, or in some instances eliminated, by appropriate provisions in the trust instrument. For example, a trust provision can validly waive the requirement that a beneficiary be furnished with a copy of the entire trust instrument.

Among the provisions that cannot be waived, however, are the Trustee's obligation, under UTC § 813, to notify the qualified beneficiaries who are age twenty-five or older of the existence of an irrevocable trust, of the identity of the Trustee and their right to request Trustee reports.[47] Also, regardless of the beneficiary's age, the trust instrument may not waive the Trustee's obligation to respond to a request of a beneficiary of an irrevocable trust for a Trustee's report and other information reasonably related to the trust's administration.[48] Thus, the settlor may, by the terms of the trust, modify or waive the duty to provide annual reports to the qualified beneficiaries. The settlor may also waive the duty to advise a beneficiary under the age of twenty-five of the existence of the trust, the identity of the Trustee and his or her right to request Trustee's reports.

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[42] Utah Code § 75-7-103(h); *see, also*, Wyo. Stat. § 4-10-103(a)(xv).
[43] Kan. Stat. Ann. § 58a-813.
[44] ORS § 130.710.
[45] Ohio Rev. Code Ann. § 5808.13.
[46] Mo. Rev. Stat. § 456.1-105.3.
[47] UTC § 105.
[48] *Ibid*.

The laws of some jurisdictions essentially follow the UTC in making non-waivable the specific duties referenced in the first two sentences of the preceding paragraph.[49] Note, however, that, although these statutes allow for the trust terms to waive the duty to give notice in certain circumstances, the trust terms cannot waive the Trustee's duty to *respond* to requests for Trustee reports. Pennsylvania law goes so far as to provide that the entire section of its "Uniform Trust Act" dealing with a Trustee's duty to inform and report (20 Pa. C.S.A. § 7780.3) is non-waivable.[50] Lawmakers in several other jurisdictions, however, including Kansas, Tennessee, North Carolina, Utah and Wyoming, deleted one or both of the UTC provisions that made non-waivable the duties referenced in the first two sentences of the preceding paragraph.[51] Thus, apparently, a settlor who creates a trust governed by the law of one of these states is free to modify or entirely waive the duty to inform and report.

UTC § 1006 provides that a Trustee who acts in "reasonable reliance" on the terms of a trust instrument is not liable for a breach of trust to the extent the breach resulted from the reliance. This release from liability should protect a Trustee from being held in breach of fiduciary duty solely for failing to provide information to beneficiaries when the trust instrument waives or restricts, within the parameters allowed under the UTC, the duty to inform or report but clearly would not enable a Trustee to avoid liability with respect to any other acts or omissions. Thus, relying on UTC § 1006 is a double-edged sword.

Regardless of the provisions of a trust instrument, a beneficiary's rights to receive information from the Trustee aren't unlimited. Those rights may be curtailed to the extent the information sought is covered by the attorney-client privilege,[52] is irrelevant to administration of the trust,[53] is another beneficiary's private information,[54] and/or is unreasonable in terms of the extent of information demanded or the frequency of demands.[55]

[49] *See, e.g.*, D.C. Code 19-1301.05; N.M. Stat. § 46A-1-105.B; Mo. Rev. Stat. § 456.1-105.
[50] 20 Pa. C.S.A. § 7705.
[51] Kan. Stat. Ann. § 58a-105; Tenn. Code § 35-15-105; Utah Code § 75-7-105; Wyo. Stat. § 4-10-105; NCGSA § 36C-1-105.
[52] RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 82, Comment f (2007).
[53] *See Bell v. Bank of America, N.A.*, 422 S.W.3d 138, 2012 Ark. App. 445 (2012).
[54] RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 82, Comments e and f (2007).
[55] *See State v. Taylor*, 362 P.2d 247, 58 Wash.2d 252 (1961).

CANNON
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# *Certificate of Attendance*

_____
(Participant Name)

_____
(Attorney Bar Number)

Has successfully completed the Cannon Financial Institute, Inc. course:

## Avoiding the Future Disruption of an Estate Plan

**August 19, 2025**

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Sebestyen
Professional Education Coordinator

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Continuing Legal Education Credits for this course are as follows:
**The following states have been approved for 1.5 hours of General Credit:** (Course number is indicated in parenthesis): Alabama, Arkansas (TWE105762), California, Delaware, Georgia, Idaho, Illinois, Iowa (417686), Kentucky (270697), Louisiana, Maine, Minnesota (515198), Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (174257745), Utah, Vermont, Virginia, Washington, Wisconsin, & Wyoming

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**Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 353-3346.**
**Fax (706) 353-3994, Email lsebestyen@CannonFinancial.com**
**355 Oneta St. Bldg D 500, Athens, Georgia 30601**

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## Avoiding the Future Disruption of an Estate Plan

**August 19, 2025**

Laurie Sebestyen
Professional Education Coordinator

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  NASBA #103655; Field of Study-Specialized Knowledge
  Knowledge Level-Intermediate
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CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

## To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Avoiding the Future Disruption of an Estate Plan

Date and Time of Activity: August 19, 2025, 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,

10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics:

Elimination of Bias in the Legal Profession:

Competence:

## To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: _____

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:_____

Elimination of Bias in the Legal Profession:_____

Competence: _____

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

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_____

(Participant Name)

_____

(Colorado Attorney Registration Number)

Has successfully completed the Cannon Financial Institute, Inc. course:

## Avoiding the Future Disruption of an Estate Plan
## (850985)

## August 19, 2025

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Sebestyen
Professional Education Coordinator

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Continuing Legal Education Credits for this course are as follows:

Colorado – 2.0 General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

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**Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 389-7645**
**Email lsebestyen@CannonFinancial.com**
**355 Oneta St. Building D 500, Athens, Georgia 30601**

# Virginia MCLE Board

Certification of Attendance (Form 2)

**Report attendance online at www.vsb.org. Keep this form for your records.**

**Name:** _____ **VSB ID#:** _____

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**City** **State** **Zip**

**Course ID:** NMM1754

**Sponsor:** Cannon Financial Institute

**Title:** Avoiding the Future Disruption of an Estate Plan

**Type:** Live

**Format:** Webcast

| **Credits:** | 1.50 | 0.00 | 0.00 |
|---|---|---|---|
| | **CLE** | **(Ethics)** | **Well-being** |

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## Credit Certification

**Date completed:** _____ **Location:** _____

**Do not leave blank or form will not be processed.**

**By my signature below I certify:**

1. I attended a total of _____ (hrs/mins) of approved CLE of which (_____) (hrs/mins) were approved Ethics and _____(hrs/mins) were approved Well-being. (Claim credit for actual time in attendance. Round to the nearest half hour. E.g. 75 min=1.5 CLE hours.)
2. The sessions for which I am claiming credit had written instructional materials to cover the subject matter.
3. I participated in this program in a setting physically suitable for the course.
4. I was given the opportunity to interact with the presenter (in real time if the program was live or by some other means if the program was pre-recorded).
5. I understand I may not claim credit for any course/segment for which credit has already been claimed in the current or preceding CLE periods.
6. I understand that a materially false statement shall be subject to appropriate disciplinary action.

_____ _____

**Date** **Signature**

MCLE requirement: Paragraph 17, Section IV, Part Six of the Rules of the Supreme Court of Virginia and MCLE Board Regulations. Completion deadline: October 31. Reporting deadline: December 15. Fees are assessed for failure to comply with MCLE deadlines.

Virginia MCLE Board | Virginia State Bar | 1111 East Main Street, Suite 700 | Richmond, VA 23219-0026
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