

THE STATE OF THE TRUST PROFESSION

Mark R. Parthemer, AEP

GLENMEDE



Welcome!



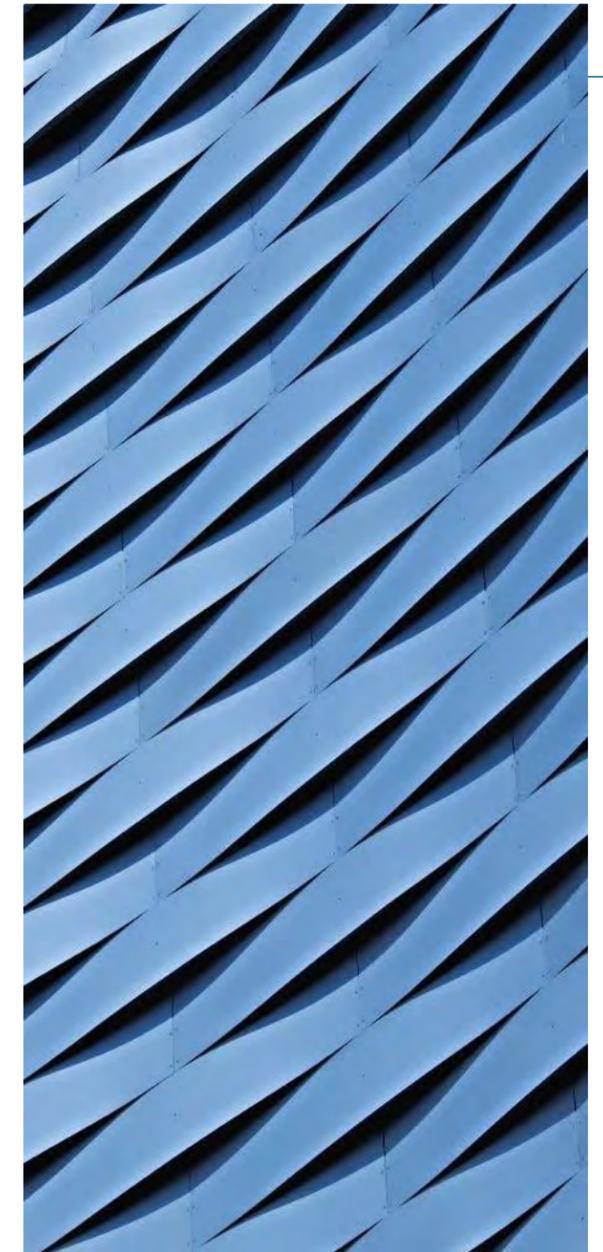
FIRMA 36th National Risk Management Training Conference

San Antonio, TX
May 1 - 4, 2023

Themes

Three:

1. Modernization of Trust Law
2. Volume of Rules and Regulations
3. Compliance = ?



Modernization of Trust Law



PROLIFERATION OF UNIFORM LAWS

1. Significant volume of Uniform Acts
2. Examples since 2016 include:
 - a. UTC – trust code update
 - b. UFIPA – income and principal rewrite
 - c. UEWA – electronic Wills
 - d. UEEPDA – electronic trusts and powers of attorney
 - e. UDTA – directed trusts
 - f. UTDA – decanting
 - g. RUFADAA – fiduciary access to digital assets

The Uniform Law Commission, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

- ULC website

Power to Adjust

UPAIA (2008)

SECTION 104. TRUSTEE'S POWER TO ADJUST.

- (a) A trustee may adjust between principal and income to the extent the trustee considers necessary **if the trustee invests and manages trust assets as a prudent investor**, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 103(a), **that the trustee is unable to comply with Section 103(b).**

Note:

103(a) follow terms of will or trust, then Act.

103(b) Unless terms state otherwise, trustee to be impartial, defined as fair and reasonable to all beneficiaries.

UFIPA (2018)

SECTION 203. FIDUCIARY'S POWER TO ADJUST.

- (a) Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal **if the fiduciary determines** the exercise of the power to adjust **will assist the fiduciary to administer the trust or estate impartially.**
- ...

Digital Asset “Opt in”

Without Consent

1. On-line tool controls.
2. Second is the TOSA (terms of service agreement).
3. Unless prohibited by the user, custodian to deliver **catalog** of electronic communications.

“Catalog of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

With Consent

1. On-line tool controls.
2. Second is the TOSA (terms of service agreement).
3. Unless prohibited by the user, custodian to deliver **content** of electronic communications.

5) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

- (a) Has been sent or received by a user;
- (b) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
- (c) Is not readily accessible to the public.

Modernization of Trust Law



UPDATED STATE LAWS

State trends include:

A. Statutory community property trusts

- i. Alaska, Tennessee, South Dakota, Kentucky & Florida

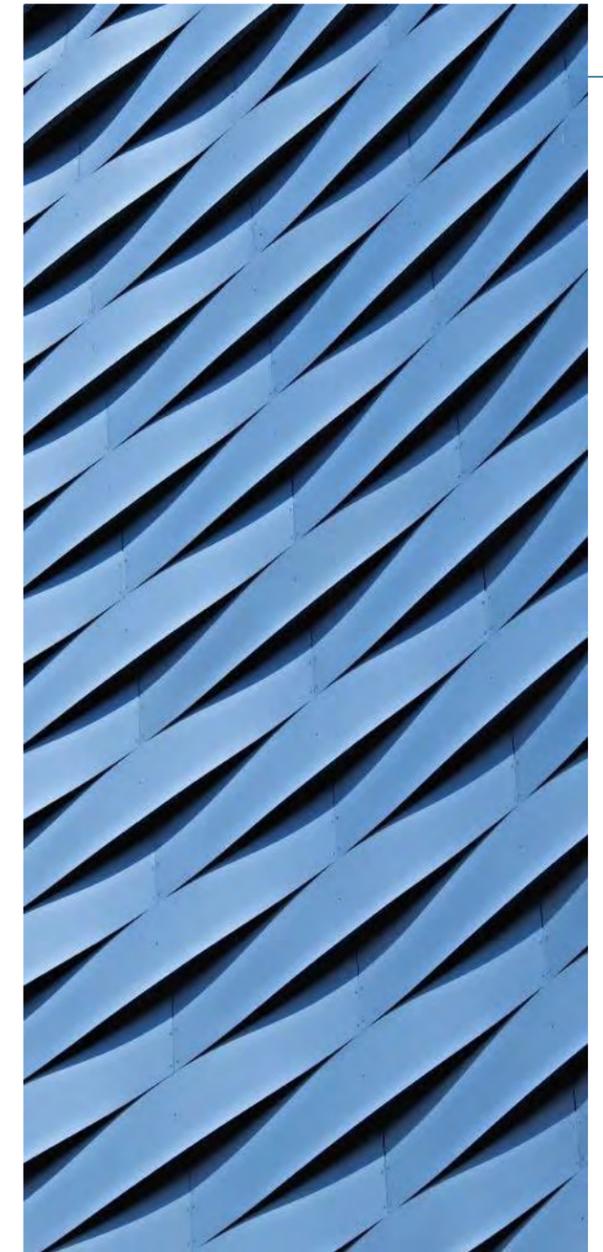
B. Asset protection

C. Rules against perpetuities

Rules and Regulations

2022 highlights - arguably more were Treasury issued rules or regulations than cases or Federal law

1. GRAT disqualification – CCA 202152018 (Dec. 30, 2021)
2. “Sprinkling” CRUTs - CCA 202233014
3. Exceptions from anti-clawback rules (Prop. Reg. §20.2010-1(c)(3))
4. Syndicated easements (Prop. Reg. §1.6011-9(b))
5. Present value concepts for estate tax deductions (Prop. Reg. §20.2053)
6. SECURE Act 1.0 RMD proposed regs (Prop. Reg. §1.401(a)9) and Notice 2022-53



SECURE Act: Proposed Regs

Released
February 24, 2022

Biggest surprise?
RMD for certain
inherited IRAs subject to
both “at least as rapidly”
and 10-year rules.

Notice 2022-53

Released October 7, 2022, promises that Final Regs will be issued soon



Also, no penalties for missed Section §401(a)(9) 2021 or 2022 RMD for IRAs inherited from a decedent who had passed their RMD beginning date



Did not waive the RMD requirement, so two problematic areas:

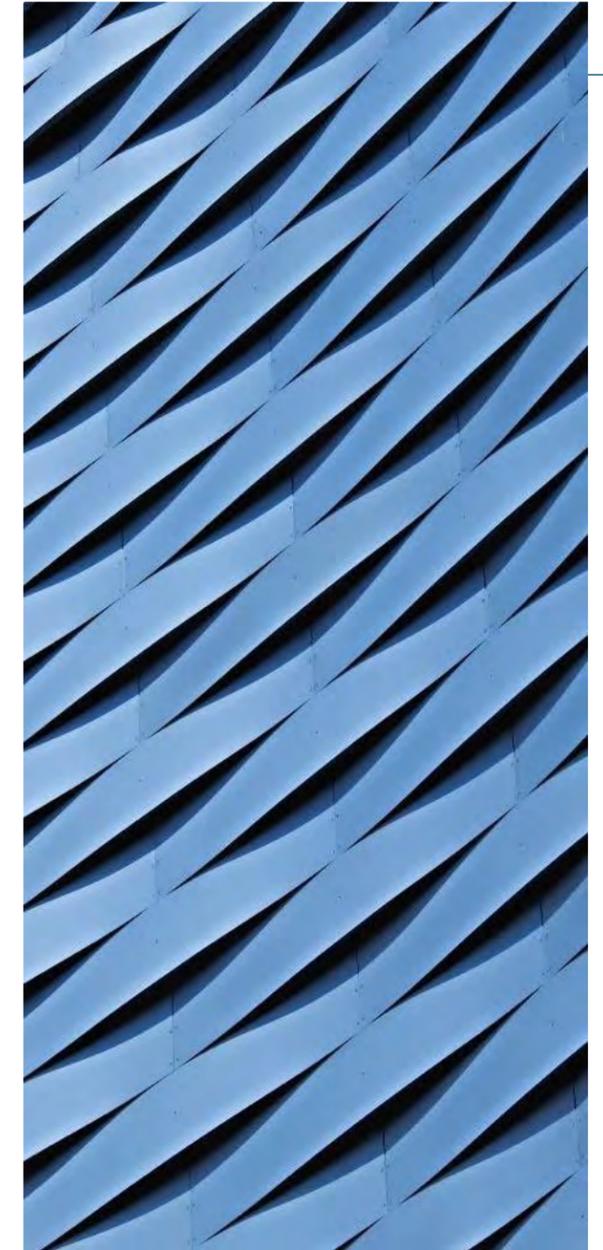
1. Rollovers ensnared

2. Fiduciary issue for trustees over simple trusts in UPIA states

Cases

Two select:

1. Levine v. Commissioner – intergenerational split dollar
2. Smaldino v. Commissioner – step-transaction



Intergenerational Split Dollar Taxpayer Victory

Levine v. Comm, 158 T.C. 2 (Feb 28, 2022)

- *Victory: §§2036 and 2038 avoided due to full and adequate consideration exception*
- *Victory: §2703 avoided as restrictions were on the insurance policy, not the note receivable*
- *Victory: Note receivable valued at \$2.28MM versus CSV of \$6.1MM*
- *Victory: No 40% underpayment penalty warranted*

Income tax implication

IRS pursued CSV as value of note

IRS stipulated to a 65% discount

Thus, the note now has a basis of \$2.2MM

Amounts received in excess of basis subject to tax under §1278

WARNING: Tax Court entertained IRS linked attribution argument.

Step-transaction IRS Victory

Smaldino v. Comm, No. 5437-18; T.C. Memo 2021-127

- Gifts of LLC interests from H to W
- Next day, same interests from W to dynasty trust
- Designed to use W's exemption
- Also, H formula to use his exemption
- IRS step-transaction victory, treating all transfers as from H

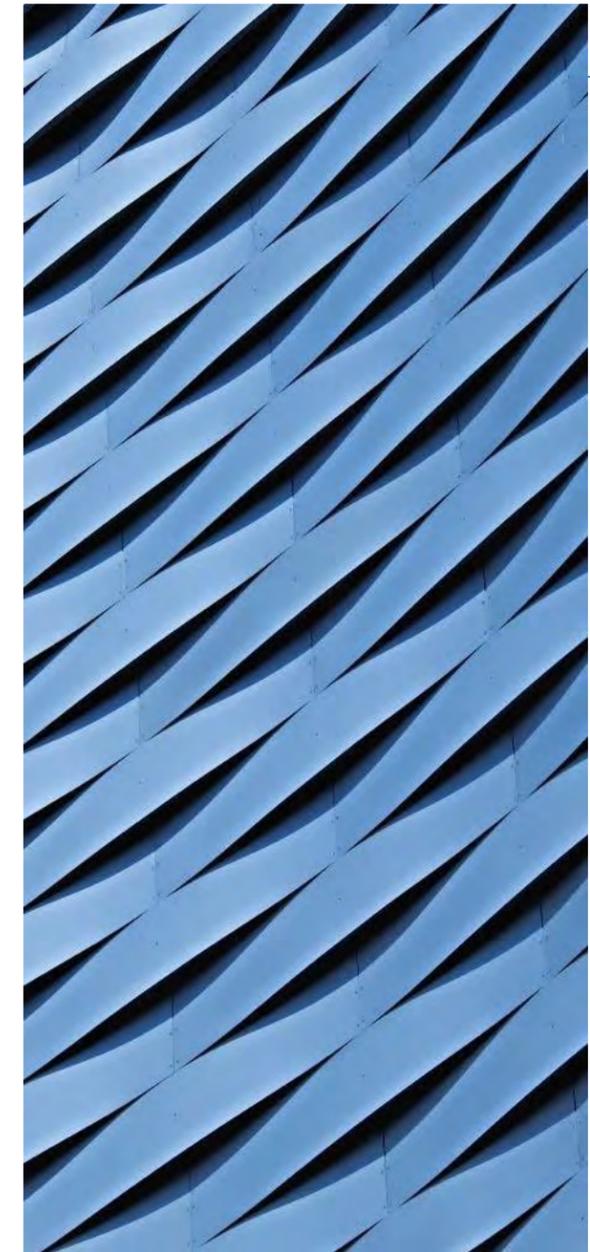
Bad Facts:

- Several key documents undated (did have effective dates)
- Document details only determinable after valuation (August 22nd)
- Books never reflected change of ownership
- W never admitted as a member (remained assignee, and Operating Agmt permitted only members to transfer interests)
- April 15th H as trustee signed Operating Agmt amendment as "sole member"
- W's testimony not consistent with relinquishment of dominion and control, but a pre-arrangement

Contrast with taxpayer victory in *Holman v. Commissioner*, 105 AFTR 2d Section 2010-721 (8th Cir. April 7, 2010) aff'g 130 T.C. 170 (2008) (six days was enough for "a real risk of economic change in value")

Two select:

1. Inflation Reduction Act
2. Consolidate Appropriations Act



Inflation Reduction Act, August 16, 2022

Two Interesting Highlights

1. Eighty billion dollars of long-term IRS funding
 - A. Originally proposed, but not passed, in the American Families Plan
 - B. The response to the original AFP reflected Treasury's appetite to hire 87,000 new IRS personnel

2. Budget Reconciliation
 - A. First Established in 1974
 - B. 27 passed; 23 enacted
 - C. Obviates "Byrd" rule that requires 60 votes for Senate cloture

SECURE Act 2.0

Five Interesting Highlights

1. Required Minimum Distributions:
 - a. Starting age increased to 73 in 2023 and to 75 in 2033
 - b. Failure to withdraw penalty decreased to 25% (from 50%), and 10% for IRAs if timely corrected
 - c. No longer be required from Roth accounts in employer retirement plans
2. \$50,000 of Qualified Charitable Distributions can be made to charitable remainder trusts and charitable gift annuities
3. Employers can opt to “match” qualified student loan payment with retirement account contributions
4. 529 plans can transfer of up to \$35,000 into a Roth IRA when the plan is over 15 years old
5. Retirement Savings Lost and Found searchable database for 401(k) and pension plans

Cryptocurrency

Use in certain retirement accounts?

- IRA's
 - Cannot be funded with cryptocurrency, except via rollover
 - Can invest in cryptocurrencies
- 401(k)'s
 - Funded with cash only
 - Cryptocurrencies are a potential investment to be included in the menu offered by the employer...
 - There must be three options (excluding employer stock)
 - Each must be diversified and materially different risk/return characteristics
 - Employer fiduciary duty to select and monitor investment allocations

Tax loss harvesting

- Section 1091 (wash sale rule) does not apply to many forms of cryptocurrency when neither a stock or security
- Algorithm for loss harvesting implemented
- Hot topic for IRS, Congress and SEC

Compliance = ?



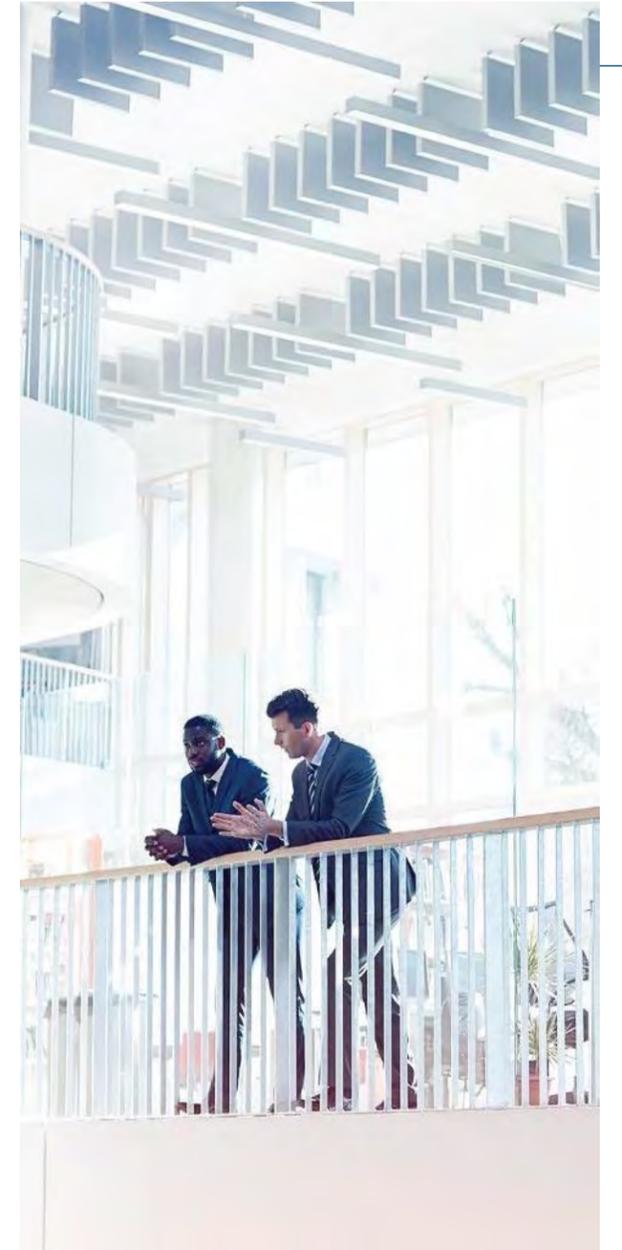
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Compliance = (not so) Secret Service



“Only the noble of heart are called to difficulty.”
Soren Kierkegaard



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Thank You

GLENMEDE



Biography



Mark R. Parthemer, AEP

Chief Wealth Strategist
and Florida Regional
Director

Mark Parthemer, AEP, is Glenmede's Florida Regional Director and Chief Wealth Strategist. He is responsible for cultivating the growth and operations of the Florida region and for developing and communicating Glenmede's position and strategy concerning tax, estate planning and fiduciary matters pertinent to clients and their advisors.

Mr. Parthemer joins Glenmede with over three decades of experience in trust, estate and tax planning. Prior to joining Glenmede, Mr. Parthemer served as Managing Director for TIAA, working with ultra-high-net-worth clients to deliver sophisticated tax and estate planning advice to understand client goals, provide tailored guidance and ensure clients' wealth management objectives are fulfilled. He held previous roles including Managing Director and Senior Fiduciary Counsel at Bessemer Trust Company and Senior Tax professional at PricewaterhouseCoopers.

Mr. Parthemer is a Fellow of the American College of Trusts Estates Counsel. He is a member of the Florida Bankers Association Executive Council, Past Chair of the Legislation Committee and Incoming Board Chair. He is also Group Vice Chair for the American Bar Association, RPTE Trusts and Estate Practice Group, and often faculty for the University of Miami's prestigious Heckerling Institute. He earned a Bachelor of Arts and Bachelor of Science from Franklin & Marshall College and Juris Doctor from The Dickinson School of Law, Penn State University.

Mr. Parthemer is a nationally recognized speaker and a frequently published author. He is an Associate Editor and columnist for the Journal of Financial Services Professionals and is frequently quoted on tax and estate planning matters in publications such as The Wall Street Journal, The New York Times and The Washington Post.