Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis

Reid Kress Weisbord[*]

This Article presents an empirical analysis of testamentary preferences pertaining to the selection, compensation, appointment, powers, and liability of executors. Often an after-thought in the will-drafting process, such administrative terms deserve careful attention because the executor's central role in the transfer of property at death is so often a source of posthumous conflict. Prior research has shown that executor-related objections are the most frequently asserted claims in probate litigation. This Article surveys the history of estate fiduciary law and summarizes major reforms in the twentieth century that established modern rules governing the appointment, powers, and liability of executors. It then presents empirical findings from a sample of wills probated in New Jersey in 2015. Major findings from this dataset reveal new information about: (1) who testators nominate to serve as executor, (2) how often nominees agree to serve as executor, (3) what testators say about executor compensation, (4) which fiduciary powers testators grant or withhold from the executor, and (5) whether testators exculpate their executors from liability or otherwise modify the default fiduciary duties of care and loyalty. The Article provides examples of executor-related will provisions extracted from the dataset of probate files.

TABLE OF CONTENTS

 Professor of Law and Judge Norma L. Shapiro Scholar, Rutgers Law School. The author is grateful to Jane Baron and David Horton for helpful feedback, to Sussex County Surrogate Gary Chiusano for facilitating access to public records, and to the Philip Shuchman Fund for Empirical Research for financial support.

> "[W]ith great power there must also come — great responsibility!"
>
> — *Spider-Man*, 1962[1]

INTRODUCTION

The task of estate administration is a major undertaking. Probating a decedent's estate is a complex legal process that usually takes more than a year even in smaller estates,[2] though some matters can carry on for much longer. For instance, Marilyn Monroe's estate notoriously slogged through probate for as long as Moses wandered the desert in search of the Promised Land.[3] With the passage of four decades, perhaps it is understandable that Monroe's executor did not live long enough to complete the administration of her estate.[4] But, then again, Moses did not reach his final destination either, despite living to the age of 120.[5] In the profane realm of probate, executors shoulder the lion's share of administrative burden in testate estates. They are responsible for winding down the testator's affairs, settling estate debts and taxes, and distributing property to beneficiaries.[6] As court-appointed fiduciaries, executors are obliged to obey the duties of care and loyalty, and, in exchange, they may (or may not) receive gratitude from the decedent's survivors plus a commission.[7] Executors serve a pivotal function because, without a responsible party to supervise estate administration,

---

[1] Stan Lee et al., *Introducing Spiderman*, AMAZING FANTASY 15, at 11 (Marvel Comics, Aug. 10, 1962); *see also* 9 COLLECTION GÉNÉRALE DES DÉCRETS RENDUS PAR LA CONVENTION NATIONALE 72 (chez Baudouin 1793) (ebook) [https://perma.cc/GAT9-JU9Q] ("Ils doivent envisager qu'une grande responsabilité est la suite inséparable d'un grand pouvoir.") Translated to English, the statement reads, "Great responsibility follows inseparably from great power."

[2] *See* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 648 (2015) [hereinafter *In Partial Defense*] (empirical study reporting a median probate case length of 436 days and an average of 507 days).

[3] *See* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 987 (9th Cir. 2012) (describing the "forty-year probate proceedings" of Monroe's estate).

[4] *See id.* at 986-87 ("In 2001, the Surrogate's Court decreed the estate settled and authorized the estate to transfer all remaining assets to Marilyn Monroe LLC . . . ."); Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 312 (S.D.N.Y. 2007) (noting that Monroe's executor died in 1989).

[5] *See Deuteronomy* 34:5 to 34:7. Moses died in Jordan just before reaching the Israeli border.

[6] *See, e.g.*, *In re* Estate of Greenberg, 146 N.E.2d 404, 410 (Ill. App. Ct. 1957) ("The function of an executor is to administer the assets of an estate to the end that all debts and obligations are paid, and all beneficiaries and heirs receive their just and proper benefits from the estate in an orderly and expeditious manner.").

[7] *See infra* Part II.

probate law could not fulfill its core mission of implementing testamentary intent.[8] In the estate planning process, however, considerations pertaining to the executor are often overshadowed by more sensational aspects of the will such as bequests and devises. This Article contends that the office of the executor should not be an afterthought in the will-drafting process. To better understand the role of executors in probate administration, this Article presents an empirical analysis of will provisions that deal with the selection, compensation, authority, and liability of executors in a sample of testate estates.

The office of the executor deserves greater attention because so many things can go wrong in estate administration, and executors are often the focal point of conflict in probate matters. In fact, according to a recent empirical study, litigation involving the appointment or conduct of an executor was the most common category of probate litigation, surpassing litigated claims about will validity and interpretation.[9] Some conflicts arise when an executor engages in careless, disloyal, or fraudulent conduct.[10] Other times, disputes happen when an executor properly discharges her fiduciary responsibilities but is wrongly or frivolously accused of misconduct.[11] Fortunately, most probate matters are not litigated.[12] But the high concentration of executor-related disputes among litigated estates highlights the importance of fiduciary considerations in the estate planning process, which seeks to minimize the potential for posthumous litigation. With careful planning, testator preferences concerning the appointment, powers, and responsibilities of the executor can play a role in preventing fiduciary conflict.

Under modern probate law, testators enjoy broad autonomy to customize many aspects of estate administration, including the work of the executor.[13] That freedom, however, is a relatively new development.

---

[8] *Cf.* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 877-78 (2012) ("The polestar of American inheritance law, testamentary freedom is a right protected by the U.S. Constitution, and once it is exercised, courts go to great lengths to implement the decedent's intent by closely honoring and interpreting testamentary instructions.").

[9] *See* David Horton, *Partial Harmless Error for Wills: Evidence From California*, 103 IOWA L. REV. 2027, 2059 (2018) [hereinafter *Partial Harmless Error for Wills*] (in a recent empirical study of estates probated in Alameda County, California, 204 of 368 (55%) litigated claims involved a breach of fiduciary duty, an objection to the personal representative, or a petition to remove the personal representative).

[10] *See infra* notes 36–46.

[11] *See id.*

[12] *See* Horton, *Partial Harmless Error for Wills*, *supra* note 9, at 2058 (noting that "litigation occurred in 12.5% of all estates").

[13] *See infra* Part II.

For most of the nineteenth and twentieth centuries, probate courts strictly regulated estate administration by applying an extensive body of mandatory rules and procedural requirements.[14] It was only in the 1960s that probate reforms shifted away from compulsory court supervision and relaxed many of the rigid procedural mandates.[15] In most jurisdictions, the default fiduciary powers are now very broad and allow executors to perform most routine administration functions without direct court supervision.[16] To protect estates from negligence and wrongdoing, the default rules of probate law still impose stringent fiduciary duties to hold executors personally liable for damages arising from their misconduct.[17] Thus, to paraphrase the Spider-Man quote in the epigraph above, executors possess great power and responsibility unless the testator modifies the default rules.

The default rules of inheritance law are generally designed to capture majoritarian preferences.[18] Sometimes, however, testators with unique personal preferences or circumstances choose to tinker with the fiduciary defaults. Such tinkering, however, can pose a risk of unintended consequences because fiduciary preferences that seem sensible during the estate planning process may prove unworkable after death. By way of example — and with the benefit of hindsight bias — consider two high-profile probate cases, the estates of Doris Duke and Joseph Pulitzer.

Doris Duke, the billionaire heiress who died in 1993,[19] appointed Bernard Lafferty, her personal butler, as her executor.[20] Duke vested Lafferty with sweeping administrative powers that were broader than the statutory defaults, including "absolute discretion" to appoint and remove co-executors.[21] After Duke's death, several contesting parties almost immediately objected to Lafferty's appointment as executor and his fiduciary conduct, alleging that he had commingled and wasted

---

[14] *See infra* Part I.

[15] *See infra* Part II.

[16] *Id.*

[17] *Id.*

[18] *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1061 (2004) (describing "majoritarian defaults as the exclusive means of achieving public policy within the arena of gratuitous transfers").

[19] *See* Eric Pace, *Doris Duke, 80, Heiress Whose Great Wealth Couldn't Buy Happiness, Is Dead*, N.Y. TIMES, Oct. 29, 1993, at B11, *available at* https://www.nytimes.com/1993/10/29/obituaries/doris-duke-80-heiress-whose-great-wealth-couldn-t-buy-happiness-is-dead.html [https://perma.cc/66JW-NZVD].

[20] *See* Last Will and Testament of Doris Duke (on file with author).

[21] *See id.*

estate assets, engaged in lavish personal spending, was functionally illiterate, and had a serious substance abuse problem.[22] They also alleged that the corporate co-executor that Lafferty selected had enabled his misconduct.[23] However, all of the problems alleged by the contesting parties were foreseeable by Duke during her lifetime. As one judge observed, "none of [Lafferty's] alleged shortcomings, from his alcoholism to his extravagance, is purported to have been unknown to the testatrix when she appointed him executor in her will."[24] Lafferty died in 1996 at age fifty-one,[25] but litigation arising from his role as Duke's executor continued for the next fourteen years until the matter was finally settled in 2010.[26] Perhaps Doris Duke should have anticipated the possibility that Lafferty's absolute discretion to appoint and remove co-executors would undermine the independence of professional fiduciaries whose expertise could have otherwise compensated for Lafferty's shortcomings.[27]

Joseph Pulitzer, the newspaper tycoon and New York congressman, died in 1911. Pulitzer is often remembered today for his philanthropy that continues to support excellence in journalism and literature more than a century after his death.[28] To estate planning attorneys, however, Pulitzer's will is widely known as a cautionary tale. For Pulitzer, it was important that his survivors maintain publication of "The New York World" in perpetuity, so he permanently prohibited his estate fiduciaries from selling shares of his newspaper company.[29] By 1931, the paper had been unprofitable for five consecutive years, so Pulitzer's testamentary trustees wanted to protect the estate against further losses.[30] Since the will prohibited liquidating the asset, the fiduciaries

[22] *See In re* Duke, 663 N.E.2d 602, 604 (N.Y. 1996).

[23] *Id.*

[24] Estate of Duke, 220 A.D.2d 241, 245 (N.Y. App. Div. 1995) (Rubin, J., dissenting), *rev'd sub nom.* 663 N.E.2d 602 (N.Y. 1996).

[25] David Stout, *Bernard Lafferty, the Butler for Doris Duke, Dies at 51*, N.Y. TIMES, Nov. 5, 1996, at B8, *available at* https://www.nytimes.com/1996/11/05/nyregion/bernard-lafferty-the-butler-for-doris-duke-dies-at-51.html [https://perma.cc/E96A-QHQE].

[26] *See* Lafferty v. Duke, No. 4440/93, 2010 WL 8732303, at *6 (N.Y. Sur. Ct. Jan. 12, 2010) (decree approving final accounting of settlement between the Lafferty and Duke estates).

[27] *See* Estate of Duke, 220 A.D.2d at 242 (describing conflict of interest created by the co-executor's unsecured personal loans to Lafferty during the estate administration).

[28] *See Extracts from the Will of Joseph Pulitzer: From the Will Dated April 16, 1904*, PULITZER PRIZES, https://www.pulitzer.org/page/extracts-will-joseph-pulitzer [https://perma.cc/U6MQ-YUGD].

[29] *See In re* Estate of Pulitzer, 139 Misc. 575, 578 (N.Y. Sur. Ct. 1931).

[30] *See id.* at 582.

found "themselves in a crisis where there [was] no self-help available to them."[31] Their only option was to seek leave of court to override Pulitzer's prohibition.[32] Ruling on the trustees' petition, the probate court found that a financial exigency warranted setting aside Pulitzer's restriction[33]: "A man of his sagacity and business ability could not have intended that from mere vanity, the publication of the newspapers, with which his name and efforts had been associated, should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution."[34] The Pulitzer estate is now cited as a lesson about the importance of anticipating changed circumstances and the risk of overly restricting fiduciary powers.[35]

Could the litigation in *Duke* and *Pulitzer* have been prevented by more careful estate planning? Anyone willing to indulge in hindsight bias would be tempted to answer in the affirmative. To minimize the likelihood of posthumous fiduciary conflict, an estate planning attorney could review court records to identify which types of executor-related disputes tend to generate probate litigation. In recent years, such cases have included alleged failures to properly invest estate assets,[36] insure estate property,[37] appraise or allocate estate assets,[38] dispose of estate

[31] *See id.* at 583.

[32] *See id.* ("A judicial declaration is necessary, not only as to their general authority, but as to the effect of the words of Mr. Pulitzer contained in his will.").

[33] *See id.*

[34] *Id.* at 580.

[35] *See* Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 223-26 (2011) (calling *Pulitzer* "a leading case on administrative deviation"); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1118-19 (2004) [hereinafter *Mandatory Rules*] (describing *Pulitzer* as the "leading case" on the doctrine of equitable deviation).

[36] *See, e.g.*, Estate of Beach, 542 P.2d 994, 997-98 (Cal. 1975) (affirming dismissal of contest challenging executor's failure to sell stock as negligent); *In re* Estate of McGee, 982 So. 2d 428, 430-31 (Miss. Ct. App. 2007) (affirming judgment for executor alleged to have invested estate assets imprudently); Lee v. Lee, 47 S.W.3d 767, 784-85 (Tex. App. 2001) (affirming judgment for executor alleged to have imprudently failed to accept offer for sale of estate assets).

[37] *See, e.g.*, Lawyers Sur. Corp. v. Snell, 617 S.W.2d 750, 753 (Tex. App. 1981) (reversing judgment against executor held liable for negligently failing to maintain fire insurance on estate property).

[38] *See, e.g.*, *In re* Estate of Bittner, No. 1847 WDA 2014, 2016 WL 266443, at *3-4 (Pa. Super. Ct. Jan. 21, 2016) (affirming denial of exceptions challenging valuation of estate property as breach of fiduciary duty); Heisinger v. Cleary, No. X04HHDCV126049497S, 2015 WL 1589152, at *12 (Conn. Super. Ct. Mar. 16, 2015), *aff'd*, 150 A.3d 1136 (Conn. 2016) (granting summary judgment for executors who relied on erroneously high appraisal of closely held corporate stock in overpaying estate taxes).

assets,[39] settle creditor claims against the estate,[40] distribute estate property,[41] account for estate expenses,[42] recover debts legally owed to the estate,[43] and maximize the value of estate assets.[44] Executors have also been held liable for engaging in self-dealing and conflicted

[39] *See, e.g.*, Matter of Billmyer, 37 N.Y.S.3d 330, 332 (App. Div. 2016) (affirming surcharge against executor who sold decedent's residence for less than half its fair market value to a personal acquaintance of the executor); *In re* Estate of Vendsel, 891 N.W.2d 750, 756 (N.D. 2017) (affirming dismissal of claim against executor for selling the estate's farmland below its market value where two independent appraisals supported the sale price obtained by executor); Guerra v. Guerra, No. 04-10-00271-CV, 2011 WL 3715051, at *5 (Tex. App. Aug. 24, 2011) (affirming summary judgment for executor accused of improperly failing to liquidate shares of closely held family business from the estate).

[40] *See, e.g.*, Ertel v. O'Brien, 852 S.W.2d 17, 21 (Tex. App. 1993), *writ denied*, (Sept. 29, 1993) ("The failure to pay the claims on an estate, or to pay the claims of creditors on a pro rata basis, subjects the executor to individual liability for such failure [as a breach of 'statutory and fiduciary duties'].").

[41] *See, e.g.*, Dunlap v. First Nat'l Bank of Danville, 76 F. Supp. 2d 948, 958 (C.D. Ill. 1999) (granting summary judgment for executor who distributed estate assets in "utmost good faith" to individuals who were not heirs of the decedent after diligent search for rightful heirs and retention of genealogical services firm to assist in identifying decedent's true heirs).

[42] *See, e.g.*, Godette v. Estate of Cox, 592 A.2d 1028, 1035 (D.C. 1991) (holding that exculpatory clause did not relieve executor of liability for failing to comply with nondiscretionary duties to account for and preserve all receipts from estate administration).

[43] *See, e.g.*, Camper v. Manning, No. 2:11cv157, 2011 WL 2550820, at *5-6 (E.D. Va. June 27, 2011) (denying motion to dismiss claim against executor for "failure to recover all debts legally due to the estate").

[44] *See, e.g.*, *In re* Estate of Vayda, No. P-191-01, 2005 WL 2266620, at *2 (N.J. Super. Ct. Ch. Div. Sept. 15, 2005) ("Peter, having qualified as executor, proceeded to do virtually nothing to administer the estate for more than a year. The residence of the late Ms. Vayda remained empty and off-the-market. Peter failed to pursue his mother's having been maneuvered by a home health-care worker to 'gift' to her over $60,000 in securities some 2½ years before her death.").

transactions,[45] and for wrongfully converting assets from the estate.[46] Probate litigation of this sort is notoriously ugly. For instance, in the long-running dispute involving the estate of civil rights icon Rosa Parks, the two executors appointed by will were removed by the probate judge for alleged misconduct, then later reinstated after appealing their removal to the Michigan Supreme Court, whereupon they sought disqualification of the probate judge who they claimed had conspired with Rosa Parks's heirs.[47]

A study of administrative provisions in uncontested wills can also provide valuable information about testator preferences regarding the executor. Since most fiduciary laws are now comprised of default rules, there is much to learn from observing testamentary patterns that either modify or retain the probate law default. To date, however, few empirical projects have investigated will-drafting patterns concerning the executor. This void in the literature has left some of the most important questions unanswered or understudied: Do most wills appoint an executor? Do most executors appointed by will actually serve as an estate fiduciary? Who do testators tend to select as executor? What portion of nominated executors are closely related to the testator?

---

[45] *See, e.g.*, *In re* Aiello, 533 B.R. 489, 502 (Bankr. W.D. Pa. 2015) (finding that executor engaged in numerous transactions that were self-dealing at the pain of the decedent's wife who spoke little English), *aff'd sub nom.* Aiello v. Aiello, 550 B.R. 83 (W.D. Pa. 2016), *aff'd sub nom. In re* Aiello, 660 F. App'x 179 (3d Cir. 2016); *In re* Estate of Rothko, 372 N.E.2d 291, 319 (N.Y. 1977) (affirming surcharges against executor who initiated conflicted transactions with estate property); *In re* Estate of Harrison, 745 A.2d 676, 677 (Pa. Super. Ct. 2000) (affirming surcharge against executor who accepted referral fees from the estate's legal counsel as a percent of legal fees charged to the estate without disclosing the payment to the beneficiaries); Estate of Kuhling v. Glaze, 196 A.3d 1125, 1129 (Vt. 2018) (reversing judgment against executor who failed to obtain second appraisal for house owned by estate before personally purchasing the property for an amount below fair market value).

[46] *See, e.g.*, Lintgeris v. Lintgeris, No. UWYCV0850088465, 2009 WL 1815058, at *1, *6-7 (Conn. Super. Ct. June 3, 2009) (entry of judgment and award of damages against executor who converted assets from the estate); *In re* Estate of Carter, 912 So. 2d 138, 150 (Miss. 2005) (affirming judgment of liability against executor for defrauding estate of approximately $300,000); *In re* Estate of McFadden, No. A-2484-15T1, 2018 WL 1004045, at *2 (N.J. Super. Ct. App. Div. Feb. 22, 2018) (affirming damage award against executor where, "in his obvious quest to loot his aunt's estate and to leave the cupboard bare for those nephews and nieces and other beneficiaries entitled to recover under the last will and testament of the decedent . . . [defendant] did his very best to intentionally hide the terms of his aunt's will from the siblings and other cousins") (alteration in original); *In re* Estate of Walter, 191 A.3d 873, 881 (Pa. Super. Ct. 2018) (affirming surcharge against executor who accepted a bank's mistaken distribution of $205,271 in estate funds as a distribution to herself).

[47] *See In re* Rosa Louise Parks Tr., No. 310948, 2014 WL 702359, at *2-3 (Mich. Ct. App. Feb. 20, 2014).

How often do testators opt for professional or corporate fiduciaries? Do wills typically address the issue of executor compensation? Do most wills contain a recitation of express fiduciary powers? How often do wills restrict the executor's default fiduciary authority? Is it common for wills to modify the executor's fiduciary duties? How common are provisions that exculpate the executor?

This Article begins to answer these questions. Written for the American College of Trust and Estate Council Symposium on the Empirical Analysis of Wealth Transfer Law at the University of California, Davis, this Article examines probate law and testator preferences governing the appointment, compensation, powers, and liability of executors. The empirical findings of this study are based on an analysis of actual will provisions drawn from a dataset of 249 uncontested wills probated in 2015 in Sussex County, New Jersey. The Article will proceed as follows: Part I surveys the historical development of estate fiduciary law from medieval England law to probate law in the United States up to roughly 1960. Part II describes the major fiduciary law reforms of the 1960s and summarizes the current state of probate law governing executor powers and duties. Part III sets the stage for empirical analysis by reviewing relevant provisions of estate fiduciary law in New Jersey, the jurisdiction that produced the dataset of wills for this study. Part IV describes the Sussex County probate dataset and then reports the Article's key findings with respect to the appointment, compensation, authority, and liability of executors.

I. HISTORICAL DEVELOPMENT OF ESTATE FIDUCIARY LAW

The powers and duties of executors supplied by modern probate law build upon nearly a millennium of Anglo-American legal development and custom. Over time, the powers of the executor have waxed and waned. Beginning in the 1300s, for instance, medieval English rules strictly restricted executor authority in a regime that empowered ecclesiastical courts to supervise estate administration and enforce primitive remedies for disloyal fiduciary conduct.[48] In the 1500s,

[48] *See* Earl Finbar Murphy, *Early Forms of Probate and Administration: Some Evidence Concerning Their Modern Significance*, 3 AM. J. LEGAL HIST. 125, 129-30 (1959) ("In England, the executor at first did no more than compel the heir to pay the legacies in the will . . . ."); *Historical Sketch: The Position of the Executor and Administrator in the Law*, 1 FIDUCIARY L. CHRON. 9 (1930) [hereinafter *Position of Executor and Administrator*] ("During the 13th and 14th centuries [the executor's] powers were limited and his activities were closely supervised."); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2152-53 (2016).

English probate law began to expand the scope of fiduciary authority and, indeed, gave executors a favored status above other stakeholders in the estate.[49] Some courts even construed the executor's appointment as an implied residuary devise.[50] When the ecclesiastical courts were eventually divested of probate jurisdiction, English law allowed executors to probate a will in common form without notice or legal process aside from the executor's own oath.[51] In the 1700s and 1800s, however, the regulatory pendulum swung in the opposite direction and began to reign in executor power.[52] English law clarified that, with respect to property not bequeathed to the executor, the executor's interest was "temporary," "qualified," and custodial in nature.[53] And the chancery courts held executors personally liable for fiduciary misconduct because "equity consider[ed] an executor as a trustee for the legatee in respect to his legacy."[54]

In the United States, the history of estate fiduciary law likewise shows that executor powers have also fluctuated. Early American probate law endowed local courts with broad jurisdiction over decedents' estates and, over time, local probate courts developed elaborate rules to regulate the process of estate administration.[55] Most probate procedures

[49] *See Position of Executor and Administrator*, *supra* note 48, at 10 ("By the 16th century he has gained almost complete mastery over succession to personal property; he pays himself in preference to other creditors, his debt to the deceased becomes extinguished, he retains the residuary estate, the rights of widow and children to two-thirds of the personal property have disappeared.").

[50] *See* Murphy, *supra* note 48, at 129-30 ("The executor's powers grew to overwhelming proportions . . . [and] came to be spoken of as the heir of the decedent. It became sufficient to avoid intestacy merely to appoint an executor to make distribution and he would thereby have the widest latitude."). Professor Peter Nicolas explains one reason for the empowerment of executors in the ecclesiastical courts: "Although the ecclesiastical courts had previously administered estates themselves and made the distributions, because their conduct in doing so had been negligent and in fact fraudulent — clergy as executors and administrators converted goods to their own use — Parliament limited their powers of administration to appointing an administrator from among the relatives of the deceased and delegating powers to that person." Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1509 (2001).

[51] *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 969 (1944). Contested estates were probated in solemn form and supervised by the chancery court. *See id.*

[52] *See* Horton, *In Partial Defense*, *supra* note 2, at 615-16.

[53] SIR SAMUEL TOLLER, THE LAW OF EXECUTORS AND ADMINISTRATORS 133 (1829) ("He is not entitled in his own right, but *in auter droit*, in right of the deceased. He is intrusted merely with the custody and distribution of the effects.").

[54] *Id.* at 479.

[55] *See* Horton, *In Partial Defense*, *supra* note 2, at 615-16.

served the apparent purpose of safeguarding the estate against wrongdoing, especially fiduciary misconduct. Four of those protections, described more fully below, included: (1) the probate court's discretionary review of executor appointments, (2) a bonding requirement securing the executor's faithful performance, (3) judicial micromanagement of the executor's transactional authority, and (4) the imposition of stringent fiduciary duties.

The first safeguard authorized probate courts to exercise discretionary review of executor appointments. A person was generally qualified to serve as an executor upon reaching the age of majority, typically twenty-one years of age for probate purposes.[56] But courts had broad discretion to disqualify an executor for a laundry list of reasons such as illiteracy,[57] improvidence,[58] habitual drunkenness,[59] insolvency (but not poverty),[60] and criminal conviction.[61] In the archaic language of an 1897 probate treatise, "idiots, lunatics, and insane persons" were generally incompetent to administer an estate.[62] Married women were not automatically disqualified, but in many states, the appointment of a married woman required her husband's consent because he would be liable for her conduct as executor.[63]

---

[56] A person was generally qualified to serve as an executor upon reaching the age of majority, typically twenty-one years of age for purposes of probate administration. *See* SIMON GREENLEAF CROSWELL, HANDBOOK OF THE LAW OF EXECUTORS AND ADMINISTRATORS 97 (1897).

[57] *See* Act of April 25, 1867, ch. 782, 1867, N.Y. Laws § 5 (1867); *see, e.g.*, *In re* Hahlin, 1877 WL 10598, at *1 (N.Y. Sur. Ct. 1877) ("[A]pplications for letters testamentary and of administration by any person unable to read and write should be refused, unless specially ordered by the surrogate.").

[58] *See, e.g.*, Coope v. Lowerre, 1845 WL 4286, at *2 (N.Y. Ch. 1845) ("The improvidence which the framers of the revised statutes had in contemplation, as a ground of exclusion, is that want of care or foresight, in the management of property, which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person.").

[59] *See, e.g.*, *In re* Estate of Manley, 12 Misc. 472, 475 (N.Y. Sur. Ct. 1895) (qualifying executor whose alcohol abuse did not rise to the level of "habitual drunkenness").

[60] *See, e.g.*, Levan's Appeal, 3 A. 804, 807 (Pa. 1886) ("As an insolvent person, in his desperation may be driven to apply the property of the estate in his own relief, public policy provides that he shall not be placed in a position of such peril; but a poor man, if he provide the requisite security, and is sober, honest, and capable, cannot be denied the right to administer simply because he is poor.").

[61] *See, e.g.*, Tit. 2, Ch. 6, pt. 2, § 32, 1842 N.Y. Rev. Stat. ("No letters of administration shall be granted to a person convicted of an infamous crime . . . .").

[62] CROSWELL, *supra* note 56, at 103.

[63] *See* ALA. CODE tit. 4, ch. 3, §§ 2342, 2355 (1876); REV. STAT. IND. ch. 6, art. 3, § 2230 (1881). In Maryland, the executor's husband had to give bond, REV. CODE. MD.

The second safeguard imposed a surety requirement to be satisfied by the executor before proceeding with estate administration. Once appointed, executors were required by most states to post bond to secure their faithful performance unless the testator's will waived the surety obligation.[64] The purpose of the bond was to insure the estate against losses caused by the executor's negligence or misconduct. That insurance, however, was not without cost, and the executor was generally entitled to recover the expense of the bond from the estate.

The third safeguard gave probate courts the ability to micromanage executors by severely restricting their transactional powers.[65] Executors generally lacked contractual authority to bind the estate or its beneficiaries.[66] Contracts executed for the benefit of the estate were treated as a personal liability of the executor for which the probate court might (or might not) award reimbursement.[67] Thus, the estate was not directly liable for attorney's fees incurred on the estate's behalf because probate law treated the executor, not the estate itself, as the client.[68] The executor could seek leave of court for reimbursement of attorney's fees from the estate's assets, but not for work that the executor should have performed himself.[69] Similarly, unless expressly authorized by will, the executor could not continue the decedent's trade or business — the executor was personally liable for all losses from posthumous business

tit. 24, art. 50, §§ 66, 74 (1878), and in New York, the executor's husband had to provide written consent. REV. STAT. N.Y. Vol. 2, ch. 6, tit. 2, art. 1, §§ 3, 32 (1867).

[64] *See* CROSWELL, *supra* note 56, at 183 ("[I]n most states[,] the executor must give bond . . . although the rule is not invariable.").

[65] *See* Horton, *In Partial Defense*, *supra* note 2, at 615-16. However, some jurisdictions retained the less formal process of probate in common form. *See* Lewis M. Simes & Paul E. Basye, *Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 117 (1944). And, in simple estates, the decedent's beneficiaries could completely circumvent the burdens of probate procedure through an informal family settlement. *See* PETER V. ROSS, PROBATE LAW AND PRACTICE: A TREATISE ON WILLS, SUCCESSION, ADMINISTRATION AND GUARDIANSHIP 328 (1908).

[66] CROSWELL, *supra* note 56, at 260.

[67] *Id.*; *see also* Doolittle v. Willet, 31 A. 385, 386 (N.J. 1895); Thomas v. Moore, 39 N.E. 803, 804 (Ohio 1894) ("The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, . . . do not bind the estate, notwithstanding the services rendered, or goods or property furnished, or other consideration moving from the promise, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts.") (internal quotation marks omitted).

[68] ROSS, *supra* note 65, at 763.

[69] *Id.* at 763, 765.

operations and, of course, all gains were payable to the estate.[70] Robust probate court oversight was thought to protect estates from abuse and misuse of fiduciary authority,[71] but it also imposed significant procedural burdens.[72] For example, it was sometimes necessary for executors to sell, mortgage, or lease real property when the estate's liquid assets were insufficient to satisfy outstanding debts, but without an express power drafted into the will, land transactions almost always required leave of court and they were usually governed by special rules and procedures.[73] The common law did authorize executors to exercise some limited powers without court approval, such as the power to compromise claims for and against the estate,[74] and the power to sell personal property when necessary to repay the decedent's debts.[75] But

[70] *See, e.g.*, Stedman v. Feidler, 20 N.Y. 437, 446 (1859). Even as recently as the early twentieth century, "[m]ost of the statutes [authorizing continuation of the decedent's business] empower[ed] the probate court to authorize the personal representative to carry on the business, [but made] court approval necessary." Harry Adelman, *Power to Carry on the Business of a Decedent*, 36 MICH. L. REV. 185, 191 (1937).

[71] *See* Horton, *In Partial Defense*, *supra* note 2, at 615 ("These cautious procedures . . . were designed to flush out and resolve conflict before distributing the estate.").

[72] *See* Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1454 (2007) (listing twenty-four types of probate documents found in a typical testate record in a sample of wills probated in 1964 in San Bernardino County, California); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 406 n.19 (1950) (listing forty filing requirements for testate estates and fifty-four filing requirements for testate estates containing real property in Wisconsin probate court in 1950). By one account, "[n]early every action a personal representative took . . . required some order by the [probate] court, when initiating the action or when obtaining approval for it or both . . . . [E]ven more of a hindrance to efficient administration was the lack of broad powers necessary to administer an estate." Lawrence H. Jr. Averill, *An Introduction to the Administration of Decedents' Estates Under the Uniform Probate Code*, 20 S.D. L. REV. 265, 276 (1975).

[73] *See, e.g.*, Stow v. Schiefferly, 52 P. 1000, 1001 (Cal. 1898) (reviewing an application for mortgage approval); Picard v. Montross, 17 So. 375, 375 (Miss. 1895) ("Before any man's realty can be taken from him under the decree of a court, there must, as the very first steps to that end, be presented to the court a bill or petition showing the grounds relied upon, and the right to have such sale, and timely notice must be given those whose lands are sought to be thus affected."); Melton v. Fitch, 28 S.W. 612, 612-13 (Mo. 1894) (discussing administrative procedure for the sale of real estate); State *ex. rel.* Shields v. Second Judicial Dist. Court, 60 P. 489, 491 (Mont. 1900) (reviewing application for lease approval).

[74] *See* Willard L. Boyd, *Some Suggestions for a Model Estates Code*, 47 MINN. L. REV. 787, 808 n.99 (1963).

[75] Hutchins v. President, Dirs., etc. of State Bank, 53 Mass. 421, 425 (1847).

in some jurisdictions, even those narrow powers were modified by statute to mandate prior court approval.[76]

The fourth safeguard imposed stringent fiduciary duties of loyalty and care to hold executors legally accountable for mishandling estate assets. The duty of loyalty required that the executors act solely in the best interests of the estate and its beneficiaries.[77] To protect estates from entering into conflicted transactions with or involving the executor, several states specifically prohibited executors from purchasing estate property.[78] The duty of care required executors to exercise prudence in the management of the estate,[79] including the investment of estate assets.[80] Estate investments were generally restricted to presumptively

[76] Citizens' St. Ry. Co. v. Robbins, 26 N.E. 116, 118 (Ind. 1891) ("The common-law right of the administrator to sell and dispose of personal property does not exist in this state. Sales of such property must be made in the manner prescribed by our statutes upon the subject."). *But see* Chadbourn v. Chadbourn, 91 Mass. 173, 174 (1864) ("By the well settled rule of the common law, administrators have full authority to submit any disputed matter relating to the estate of a deceased person in their hands to arbitration. This authority is not repealed or in any way impaired by the provision in [a state probate statute] . . . .") (citations omitted).

[77] *See, e.g.*, *In re* Heinrich's Will, 195 Misc. 803, 809 (N.Y. Sur. Ct. 1949) ("[T]he fiduciary is under a duty of absolute loyalty to all beneficiaries and of fairness and impartiality to all. If in dealing with the respective beneficiaries their interests are so conflicting that the fiduciary cannot deal fairly with respect to them, he cannot properly act without applying to the court for instructions.").

[78] CAL. CIV. PROC. CODE § 1576 (1872) ("No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale."); NEV. COMP. L. § 2949 (cited in ROSS, *supra* note 65, at 593 n.14). Today, however, such transactions are permissible under court supervision or with court approval. *See* CAL. PROB. CODE § 10501 (2019); NEV. REV. STAT. § 143.170 (2019).

[79] As one court explained, "[t]he measure of an administrator's duty is to act with fidelity and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." Elizalde v. Murphy, 87 P. 245, 246 (Cal. Ct. App. 1906).

[80] However, when the estate's inception assets included uninvested funds, the common law did not impose an affirmative duty on executors to invest estate assets because, unlike trust law, the primary goal of estate administration is to accelerate (rather than postpone) the distribution of property. ROSS, *supra* note 65, at 703-05 ("[I]t ordinarily is no part of the duty of an executor . . . to invest funds of the estate . . . . His duty in the management of the estate is usually confined to collecting and preserving the assets."); *see also* Philip E. Peterson, *Idaho Uniform Probate Code: Time for Some Changes*, 13 IDAHO L. REV. 11, 23 (1976). Some jurisdictions required executors to invest estate moneys that could not be distributed to beneficiaries within six months of final settlement of estate debts. *See* King v. Berry, 3 N.J. Eq. 261, 263 (N.J. Ch. 1835) ("As a general rule, it is the duty of executors and trustees not to suffer money of others to be idle in their hands."); *see also* CROSWELL, *supra* note 56, at 269.

safe assets with low default risk, such as federal and state bonds.[81] The same fiduciary investment rules applied to trustees,[82] who were also generally prohibited from investing trust assets in corporate stock.[83]

From the small body of historical empirical probate research, it appears that for most of the nineteenth and twentieth centuries, wills contained few if any terms that addressed the executor's fiduciary powers and duties. For instance, in a study of Essex County, New Jersey, testate estates probated between 1850 and 1900, Professor Lawrence Friedman found that very few wills expressly authorized specific any fiduciary powers at all, although wills "sometimes made clear that the testator reposed great confidence in his chosen personal representatives."[84] Similarly, a sample of wills probated in the 1950s in Chicago revealed that the majority of testators did not expressly authorize the sale of real property.[85] That finding was notable because,

[81] *See* Lathrop v. Smalley's Ex'rs, 23 N.J. Eq. 192, 196 (Ch. 1872) ("It is the duty of the trustee to invest this money on bond and mortgage, or in securities of this state or of the United States . . . ."); Tucker v. Tucker, 33 N.J. Eq. 235, 236 (Prerog. Ct. 1880) (executor "had no authority from the orphans court [sic] to invest . . . in city bonds and bank stock").

[82] N.Y. DECEDENT ESTATE LAW § 111 (1909) ("An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon."); *In re* Estate of Kohler, 47 P. 30, 31 (Wash. 1896) ("The uniform holding of courts has been that executors, administrators, and guardians are bound by no greater or higher responsibility than that which is imposed upon any . . . trustee . . . .").

[83] In the 1800s, some courts deemed corporate stock too speculative for fiduciary investment even when expressly authorized by the governing instrument. *See* King v. Talbot, 40 N.Y. 76, 87-88 (1869). *But see* Harvard Coll. v. Amory, 26 Mass. 446, 461 (1830). Until the twentieth century, most U.S. jurisdictions followed the English model of restricting the investment power of trustees to minimize the risk of default for trust assets. Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314, 317 (2010). As Professor Lawrence Friedman explains, after the South Sea Company's sudden collapse caused a widespread financial crisis and led to devastating trust investment losses in the early 1700s, "[t]he established English rule on trust investment was admittedly quite narrow and courts did not allow trustees to invest in 'trading companies' without specific authorization from settlors. Under English law, trustees were required to invest trust money in 'public funds,' that is, in government securities." Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 553 (1964).

[84] Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 45 (1964).

[85] Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 284 (1963).

at the time, Illinois law still did not permit executors to sell real property without court approval unless authorized by the terms of the will.[86] Thus, from the little that we know of will-drafting patterns before the 1960s, it appears that administrative provisions related to fiduciary powers and duties were largely uncommon. If true, then the rules and requirements of probate courts served as the primary source of law governing executors.

II. FIDUCIARY LAW REFORMS: 1960S TO PRESENT

In the mid-twentieth century, new economic and political trends began to plant the seeds of probate law reforms that would significantly alter the scope of fiduciary authority. One economic catalyst was the rise of sophisticated capital markets that would eventually lead financial investments to displace land as the primary form of wealth. [87] In a market mostly comprised of intangible assets, fiduciaries — particularly trustees but also executors — needed broader transactional powers to efficiently manage modern investment portfolios without the direct, intimate involvement of courts.[88] Another new development was the political backlash against the old rules and practices of probate administration, a sentiment captured by Norman Dacey's excoriation of the probate system in his 1965 best-selling book, *How to Avoid Probate*.[89] Dacey denounced probate courts for creating an expensive patronage system run by incompetent probate judges.[90] And he criticized probate attorneys who he claimed marketed will-drafting services as bait for the purpose of recommending themselves as executors and then collecting lucrative fiduciary commissions after the client's death.[91]

---

[86] *Id.*

[87] John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?* , 58 ALA. L. REV. 1069, 1072 (2007) (quoting ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922)) ("Wealth, in a commercial age, is largely made up of promises.").

[88] *Id.* at 1073.

[89] *See generally* NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965) (discussing the development of probate law in the United States).

[90] NORMAN F. DACEY, HOW TO AVOID PROBATE — UPDATED! 21 (1980) [hereinafter UPDATED] ("Next to *being* a probate judge, the best thing is to have one in the family or as a friend.").

[91] As Dacey explained:

> It is common practice for lawyers drawing wills to ensure fat future fees by writing themselves in as executors, co-executors, or trustees of client's estates. Often, too, they insert clauses specifically directing that they or their law firms be hired to attend to probating the wills . . . . Law school students are taught

By the mid-1960s, momentum for fiduciary law reform reached full speed. State legislatures enacted new statutes to broaden, organize, and catalog the default fiduciary powers that executors and trustees could exercise without prior court approval. The New York Fiduciaries' Powers Act of 1965, for instance, enumerated twenty-five specific default powers, including powers to invest and reinvest assets; to sell, manage, lease, and mortgage real property; and to sell securities to pay debts or liquidate assets for distribution, among many others.[92] The new fiduciary default powers were vastly broader than under prior law, but stopped short of conferring absolute transactional authority — the New York State Assembly had considered but rejected twenty-one additional specific powers.[93]

Contemporaneously, a cohort of national law reform projects followed the trend of fiduciary empowerment to its logical conclusion: by giving executors and trustees nearly complete transactional authority. The Uniform Trustees Power Act (1964), for example, granted trustees with "the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust . . . ."[94] The Uniform Probate Code (1969) ("UPC") followed a similar approach:

> [A] personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others

> to build a 'will file,' although . . . there is no money in drawing wills. The big money . . . is in settling the estate after the death of the client.

Id. at 15 (some quotation marks omitted).

[92] N.Y. Dec. Est. Law § 127, L. 1965, c. 681; now codified at N.Y. EST. POWERS & TRUSTS LAW § 11-1.1, eff. Sept. 1, 1967; *see* Homer I. Harris, *Fiduciaries' Powers Act*, 33 BROOK. L. REV. 479, 479-86 (1967).

[93] *See* Harris, *supra* note 92, at 486-87 (summarizing the powers excluded from the legislation, including authority to exchange, abandon, alter, or demolish real property; to borrow from the estate or trust; to employ agents; to delegate authority; to continue operation of a business; to keep funds uninvested; to engage in self-dealing; and to relieve a fiduciary of liability).

[94] UNIF. TR. POWER ACT § 3(a) (1964). The Uniform Trust Code (2000), now adopted in thirty-five states plus the District of Columbia, vests trustees with "all powers over the trust property which an unmarried competent owner has over individually owned property" and "any other powers appropriate to achieve the proper investment, management, and distribution of the trust property." UNIF. TR. CODE §§ 815, 816 (amended 2010) (outlining the general powers of trustee and the specific powers of trustee, respectively); *see 2000 Trust Code*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d [https://perma.cc/9HU3-3CJD] (last updated 2005) (compiling state legislation adopting the Uniform Trust Code).

> interested in the estate. This power may be exercised without notice, hearing, or order of court.[95]

In addition, UPC section 3-715 authorized twenty-seven specific powers and transactions, including several powers excluded from the New York statute, such as the authority to abandon property (§ 3-715(11)), to borrow money (§ 3-715(16)), to employ agents (§ 3-715(21)), and to continue the decedent's business (§ 3-715(24)).[96] The UPC also exempted most estates from court supervision by establishing informal probate (traditionally known as probate in "common form") as the default procedure for uncontested matters.[97] The UPC also repealed the bond requirement for most informal administrations.[98] The collective impact of the UPC's reforms gave executors the ability to exercise nearly unsupervised, autonomous power in uncontested estates.[99] By deregulating the routine aspects of probate administration, the fiduciary duties of care and loyalty became the primary safeguard against executor negligence and misconduct. The UPC emphasized this

---

[95] UNIF. PROB. CODE § 3-711 (amended 2010).

[96] *Id.* § 3-715.

[97] *See id.* § 3-301 (establishing informal probate for uncontested estates); *id.* § 3-401 (establishing "formal testacy" as a litigation "proceeding . . . to determine whether a decedent left a valid will"). Unsupervised probate was a bold innovation for a national law reform project like the UPC, but it was not a novel procedure. Texas, for example, has permitted a version of unsupervised probate known as "independent administration" since 1848. Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1112 (1984).

[98] UNIF. PROB. CODE § 3-603 (amended 2010) ("No bond is required of a personal representative appointed in informal proceedings . . . .").

[99] Richard Wellman, the project's chief reporter, described the powerful autonomy of estate fiduciaries under the UPC:

> After securing letters, a personal representative under the Code becomes in effect a statutory trustee with the necessary powers and protections to permit him to accomplish the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor. If desired, all of these steps can be handled without further court orders.

Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 199 (1969); *see also* Stein & Fierstein, *supra* note 97, at 1146 ("The U.P.C. treats the estate administration process as a judicial proceeding but provides the option of eliminating court involvement unless there is an actual or potential dispute. The probate court assumes a passive role unless and until an interested person seeks the court's intervention.").

point by expressly subjecting executors and administrators to the exacting fiduciary standards of trusteeship.[100]

Another aspect of probate law reform ushered in a gradual formalization of default rules.[101] Recall that, for most of the twentieth century, estate administration was largely governed by heavy-handed probate law mandates and procedural requirements. To critics like Norman Dacey, however, those mandates contradicted the majoritarian preferences of testators who wanted a simpler process and less court involvement.[102] Indeed, estate planning attorneys had started to experiment with will-drafting techniques that sought to privatize routine tasks of probate administration to the greatest possible extent. They did so by inserting will provisions that expressly authorized the executor to perform specified transactions. As one commentator noted in 1963, "a major portion of estate planning [was] devoted to the drafting of powers clauses that [would] enable the fiduciary to cope with the complex problems of contemporary administration."[103] When

[100] *Compare* UNIF. PROB. CODE § 3-703(a) (amended 2010) ("A personal representative is a fiduciary who shall observe the standards of care applicable to trustees."), *with* UNIF. TR. CODE §§ 801-805, 809-813 (amended 2010) (outlining trustee fiduciary duties). As one court explained, the duty of loyalty imposes a high standard of good faith: "The executors are charged with the utmost and sincere good faith in dealing with the estate and the property of others and are held to an extremely high standard of conduct. Their loyalty to the estate must be of the highest and their actions must be above suspicion or reproach." *In re* Estate of Martin, 215 N.Y.S.2d 278, 280 (Sur. Ct. 1961) ("The execution of their duties and obligations is subject to the stringent application of diligence and good faith, and their actions must be for the best interests of the estate and those beneficially interested therein and will be judged in that light.").

[101] *See generally* Hirsch, *supra* note 18, at 1039-42. However, as Professor Hirsch notes, "It is a credo of estate planning that a well-drafted will should anticipate contingencies and *never* rely on default rules." *Id.* at 1039 (emphasis added). For an overview of default rule theory in wills law, see Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 671-73 (2018).

[102] DACEY, UPDATED, *supra* note 90, at 15 ("The probate system, conceived generations ago as a device for protecting heirs, has now become their greatest enemy. Almost universally corrupt, it is essentially a form of private taxation levied by the legal profession upon the rest of the population.").

[103] Boyd, *supra* note 74, at 809. In New York, for example, it was customary for estate planning practitioners to insert boilerplate expressly authorizing the following powers: to "(a) exchange, re-exchange, subdivide, develop, improve, dedicate to public use, make or obtain the vacation of public plots, partition real property and adjust boundaries; (b) abandon, alter or demolish real property; (c) make payment to the parents of infants; (d) borrow; (e) employ agents; (f) continue a business; (g) keep funds uninvested, except in a marital deduction trust or a trust for a surviving spouse;

the fiduciary empowerment reforms of the 1960s expanded the transactional authority of executors, the same reforms also expressly endorsed the right of testators to modify the default powers.[104]

In subsequent reforms, probate and trust law extended the formalization of default rules to traditional fiduciary duties of care and loyalty.[105] In 1994, for example, the Uniform Prudent Investor Act expressly declared that "[t]he prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument."[106] Likewise, in 2000, the Uniform Trust Code ("UTC") expressly authorized trust settlors to modify all rights, powers, and duties of the trust relationship except for fourteen mandatory rules of trust law.[107] Under the UTC, settlors could opt out of the fiduciary duty to diversify investments[108] and override the bright-line rule against self-dealing transactions.[109] However, the UTC did impose some limits: A settlor cannot completely override the trustee's liability for intentional misconduct, nor can a trustee enforce an exculpation clause procured by the abuse of a confidential relationship with the settlor.[110] The enforceability of exculpation provisions proved

(h) create reserves for depreciation and obsolescence; (i) create reserves for wasting assets." Harris, *supra* note 92, at 488.

104 For example, UPC § 3-715 enumerates transactions authorized for personal representatives "[e]xcept as restricted or otherwise provided by the will . . . ." UNIF. PROB. CODE § 3-715 (amended 2010).

105 *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 76 (2005) [hereinafter *Trusting Trustees*] ("Although the argument that trusts are a species of contract has existed for at least a century, the precise characterization of fiduciary duties as mere 'default rules' crystalized only in the past fifteen years.").

106 N.J. STAT. ANN. § 3B:20-11.2(b) (2019); *see also* UNIF. PRUDENT INV'R ACT § 1(b) (1994).

107 UNIF. TR. CODE § 105 (amended 2010) (establishing default and mandatory rules). UTC § 105(b)(2), for example, imposes a mandatory "duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." *Id. But see* Langbein, *Mandatory Rules*, *supra* note 35, at 1124 ("The mandatory rule against bad faith trusteeship can be understood to operate as a presumption that trust terms authorizing bad faith must have been improperly concealed from the settlor or otherwise misunderstood by the settlor when propounded, because no settlor seeking to benefit the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship.").

108 *See* UNIF. PRUDENT INV'R ACT § 3 (1994) ("A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.").

109 *See* UNIF. TR. CODE § 802(b) (1994).

110 The UTC, for instance, generally enforces trustee exculpation unless the term "(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

to be one of the more controversial developments in recent decades.[111] When the fiduciary empowerment reforms established default rules that gave executors and trustees virtually absolute transactional authority, the fiduciary duties of care and loyalty became the only remaining safeguards against fiduciary misconduct. Exculpation poses a danger for estates and trusts because it dismantles that last line of defense.

The decision of whether to exculpate a fiduciary belongs to the client, but when an instrument is drafted by the fiduciary who may later seek exculpation, the interests of the client and fiduciary pose a conflict.[112] The client may not fully understand the fiduciary's stake in the matter or that the legal advice rendered may not be entirely impartial.[113] Nonetheless, many professional trustees have come to regard exculpation as a standard term in professionally managed trusts.[114]

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." UNIF. TR. CODE § 1008(a) (1994). However, the Restatement (Third) of Trusts takes a more restrictive approach to enforcing exculpatory clauses by excluding waivers of liability for the trustee's "indifference to the fiduciary duties of the trustee." RESTATEMENT (THIRD) OF TRUSTS: GENERAL PRINCIPLES § 96(1)(a) (2012); *see* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1729 (2009) [hereinafter *Unconscionability*] (describing the UTC's rule as aligned with the unconscionability doctrine).

111 *See, e.g.*, Adam S. Hofri-Winogradow, *Contract, Trust, and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1710 (2017) (describing the ineffectiveness of disclosure mandates on the prevalence of exculpation provisions in trusts); Leslie, *Trusting Trustees*, *supra* note 105, at 116 ("Characterizing fiduciary duties as default rules ignores their important norm-enforcing function."); Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIPIAC PROB. L.J. 261, 307 (2016) ("Exculpatory clauses can leave beneficiaries without recourse not only for losses occasioned by trustees' negligence, but also by their gross negligence.").

112 *Cf.* Louise Lark Hill, *Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?* , 45 U. MICH. J.L. REFORM 829, 849 (2012) ("While the Model Rules of Professional Conduct allow an attorney to serve as a fiduciary for a client, they do not address the matter of incorporating exculpatory clauses into an instrument drafted by the lawyer.").

113 Scholars concerned about trustee overreach in this context have proposed more stringent fiduciary standards for professional trustees who could otherwise exploit their specialized knowledge of trust law when negotiating with lay settlors. *See* Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2748 (2006) [hereinafter *Common Law*]. By contrast, the exculpation of a non-professional trustee is more likely to represent the true shared preferences of both the settlor and trustee. *See* Leslie, *Trusting Trustees*, *supra* note 105, at 101.

114 Professor Horton explains:

> Exculpatory clauses became common in the early twentieth century, as trust companies emerged and the nature of the trust shifted from a mechanism for

According to a recent empirical study, "71.1% of trusts include a trustee exculpatory term of some kind."[115] The same study also found that most trust settlors receive nothing in return for exculpating the trustee.[116] Scholars have speculated that executor exculpation terms were widely used in wills,[117] but to date, no empirical study has investigated the question.

III. ESTATE FIDUCIARY LAW IN NEW JERSEY

In New Jersey, the primary focus of this empirical study, an executor who is nominated by will is generally entitled to serve unless "the position was acquired as the result of fraud, misconduct or a breach of trust."[118] A New Jersey treatise still maintains that "idiots and lunatics" may be disqualified, but the only cited common law authority dates back to 1849.[119] More in line with modern standards, the statutory grounds for removal narrowed the scope of judicial discretion to factors that are demonstrably related to the executor's misconduct.[120] Once appointed, an executor typically administers the estate without court supervision because New Jersey permits informal probate for

> the conveyance of land to one for holding and investing financial assets. Corporate trustees began to draft instruments or refer the settlor to a law firm that would do so, and trusts began to feature terms that exonerated the trustee from liability for poor decisions.

Horton, *Unconscionability*, *supra* note 110, at 1728.

115 Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931, 984 (2017).

116 *Id.* at 985.

117 *See* Hill, *supra* note 112, at 834 (noting that "exculpatory clauses were widely used in wills").

118 *In re* Estate of Margow, 390 A.2d 591, 596 (N.J. 1978).

119 6 N.J. PRAC., WILLS AND ADMINISTRATION § 688 (Rev. 3d ed., 2018).

120 N.J. STAT. ANN. § 3B:14-21 (2019). In the estate of Doris Duke, who died a citizen of New Jersey but requested that her estate be administered in New York, the New York Court of Appeals held that, despite allegations of illiteracy, substance abuse, and misconduct of the executor, the Surrogate abused its discretion by summarily removing him as a fiduciary without a hearing or proven factual predicate for removal. Matter of Duke, 663 N.E.2d 602, 605 (N.Y. 1996).

uncontested estates.[121] New Jersey also repealed the bonding requirement for executors appointed by will.[122]

New Jersey's major fiduciary power reforms did not initially embrace the UPC's comprehensive empowerment model. The New Jersey fiduciary powers statute, enacted in 1968, replicated the New York Fiduciaries' Powers Act of 1965 by enumerating twenty specific default powers.[123] A decade later, New Jersey broadened those powers by adopting UPC section 3-711's "absolute owner" provision.[124] A handful of later amendments added additional authority, including powers to employ and compensate accountants, and to continue the decedent's business.[125] New Jersey's estate fiduciary liability rules are fairly standard: Executors are bound by duties of loyalty[126] and prudence.[127] Those duties are governed by the same standards as trust fiduciaries,[128] and executors are personally liable for damages caused by the

[121] In New Jersey, the filing of inventories and accounts are optional in the absence of an actual dispute. N.J. STAT. ANN. § 3B:16-2 (2019) ("A personal representative may or, if required by the court . . . shall make and file a true and perfect inventory of the real and personal property of his decedent . . . ."); N.J. STAT. ANN. § 3B:17-2 (2019) ("A personal representative may settle his account or be required to settle his account in the Superior Court."). Court supervision usually ends upon issuance of letters testamentary because, absent an objection, the personal representative does not need to obtain a formal discharge from the Surrogate upon completing administration of the estate.

[122] N.J. STAT. ANN. § 3B:15-1 (2019).

[123] N.J. Pub. L. 1968, c. 270, §§ 2-3 (codified at N.J. STAT. ANN. §§ 3A:6-16.2 to .3 (2019)). Under the New Jersey statute, fiduciaries have twenty specifically enumerated powers. N.J. STAT. ANN. § 3A:6-16.2 (2019). The statute provides further that its enumerated powers govern "[i]n the absence of contrary or limiting provisions . . . in the will," and that they "are in addition to the powers granted . . . by the will . . . ." *Id.* §§ 3A:6-16.2 to .3.

[124] N.J. Pub. L. 1977, c. 412, § 3A:2A-55 (recodified in 1981 at N.J. STAT. ANN. § 3B:10-30 (2019)).

[125] N.J. STAT. ANN. § 3B:14-23(v), (x) (2019).

[126] Matter of Duke, 702 A.2d 1008, 1023 (N.J. Ch. 1995), *aff'd*, 702 A.2d 1007 (N.J. Super. Ct. App. Div. 1997) ("Standards of utmost fidelity required of a fiduciary forbid the fiduciary to occupy a position in which its interests conflict with the estate."); Hartman v. Hartle, 122 A. 615, 615 (N.J. Ch. 1923) (surcharging executors for self-dealing transaction).

[127] N.J. STAT. ANN. § 3B:10-26 (2019) ("Except as otherwise provided by the terms of a decedent's will, the personal representative shall observe the standards in dealing with the estate assets that would be observed by a prudent man dealing with the property of another, and if the personal representative has special skills or is named personal representative on the basis of representations of special skills or expertise, he is under a duty to use those skills.").

[128] N.J. STAT. ANN. § 3B:14-35 (2019) ("If the exercise of power concerning the estate is improper, the fiduciary is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust.").

commission of unauthorized acts.[129] However, with respect to executor commissions, New Jersey did not adopt the UPC's rule of "reasonable compensation."[130] By statute, unless the will provides otherwise, fiduciaries are entitled to compensation according to a fixed commission schedule.[131]

In New Jersey, will provisions that exculpate an executor are strictly construed against the fiduciary who invokes the protection.[132] The 1950 case of *Blauvelt v. Citizens Trust Company*, for instance, involved a testamentary trust beneficiary who sued the trustee for negligent retention of shares in a closely held business after they had become worthless following the testator's death.[133] The will expressly authorized the trustees to retain the stock indefinitely and contained an exculpation clause relieving the executor of liability. The court explained that exculpation clauses are strictly construed, and "they do not relieve a trustee of liability where a loss results from negligence in the administration of the trust."[134] Nevertheless, the court concluded that the trustees were not liable because their decision to retain the stock was not negligent.[135]

In cases decided after *Blauvelt*, some New Jersey courts enforced exculpatory provisions while other courts set them aside.[136] In 2016, however, New Jersey adopted the UTC's rule on trustee exculpation.[137] That statute enforces trusts that relieve the trustee of liability unless the

---

[129] *See In re* Estate of Lange, 383 A.2d 1130, 1132 (N.J. 1978).

[130] *See* UNIF. PROB. CODE § 3-719 (amended 2010).

[131] N.J. STAT. ANN. § 3B:18-13 to -14 (2019).

[132] *See, e.g.*, Blauvelt v. Citizens Tr. Co., 71 A.2d 184, 188 (N.J. 1950).

[133] *Id.* at 188-89.

[134] *Id.* at 188.

[135] *Id.* at 189.

[136] *Compare* Behrman v. Egan, 95 A.2d 599, 601 (N.J. Super. Ct. Ch. Div. 1953) (exculpatory clauses "do not relieve a trustee of liability where a loss results from negligence in the administration of the trust"), *with In re* Nuese's Estate, 96 A.2d 298, 301 (N.J. Super. Ct. Essex Cty. Prob. Div. 1953), *aff'd*, 104 A.2d 281 (1954) ("[T]he court declines to surcharge the trustee . . . in view of the exculpating clause in the will."). In New York, fiduciary exculpation is unenforceable as contrary to public policy: "The attempted grant to an executor, testamentary trustee, or inter vivos trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy: (1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence." N.Y. EST. POWERS & TRUSTS LAW § 11-1.7(a)(1) (2019); *see In re* Shore, 854 N.Y.S.2d 293, 295 (Sur. Ct. 2008) ("Section 11-1.7(a)(1) of the EPTL clearly recognizes that an attempt to render a fiduciary entirely unaccountable is inconsistent with the nature of a trust and void as against public policy.").

[137] N.J. STAT. ANN. § 3B:31-77 (2019) (effective July 17, 2016).

provision "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." Exculpation is also unenforceable for acts "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries."[138] The new trustee exculpation rule applies to executors as well because, under an older probate statute, an estate fiduciary "is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust."[139] It remains to be seen how New Jersey's adoption of this UTC provision will alter the law of fiduciary exculpation. Arguably, the new rule merely gives greater structure and formality to New Jersey's prior doctrine of strict construction for fiduciary exculpation provisions.

New Jersey has specific rules governing the fiduciary's duty with respect to inception assets. As a general rule, the New Jersey Prudent Invest Act mandates that "[a] fiduciary shall diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[140] Although the rule's plain language refers to trusts, probate law generally applies the fiduciary standards of trust law to executors as well.[141] But the investment objectives of trust administration and estate administration are often quite distinct: The purpose of many trusts is to postpone the transfer of property whereas the objective of estate administration is to distribute the decedent's assets as quickly as possible. Thus, the traditional view has been that the fiduciary duty to diversify inception assets applies with lesser force to executors than trustees.[142] Nevertheless, some New Jersey courts have held that estate assets should be invested rather than idled.[143] Liability for negligent retention is more likely to arise when the inception assets are already invested and retained for an unreasonable period of time without regard for risk of loss.[144] Mere authorization to

[138] *Id.*

[139] *Id.* § 3B:14-35.

[140] *Id.* § 3B:20-11.4.

[141] *See id.* § 3B:14-35.

[142] *See, e.g.*, ROSS, *supra* note 65, at 704-05; Peterson, *supra* note 80, at 23.

[143] *See* King v. Berry, 3 N.J. Eq. 261, 263 (N.J. Ch. 1835) ("As a general rule, it is the duty of executors and trustees not to suffer money of others to be idle in their hands. The balance of assets remaining, after the payment of debts, should either be paid to those interested, or be put out at interest for their benefit.").

[144] *See In re* Bayles' Estate, 261 A.2d 684, 688-89 (N.J. Super. Ct. App. Div. 1970) ("[A]n executor is not ordinarily held responsible for the mere depreciation of assets, nor for a loss due to a decline in the market merely because he does not make an immediate sale even though the nature of the security mandates that a sale eventually

retain inception assets does not modify the duty to invest estate assets prudently.[145] New Jersey's default duty of loyalty is also narrower than under the UPC. UPC section 3-715(1) authorizes the personal representative to retain inception assets "in which the representative is personally interested."[146] That provision partially modifies the duty of loyalty to permit certain conflicts of interest between the executor and estate with respect to inception assets. However, New Jersey did not adopt that UPC provision, so an executor is not authorized to retain such inception assets unless expressly permitted by will.

IV. EMPIRICAL RESULTS

This Part presents the empirical findings of my study. It begins with a brief description of the probate sample, followed by data extracted from will provisions concerning the appointment, powers, and liability of executors.

A. Description of the Sussex County Probate Dataset

This study analyzes a sample of hand-collected wills probated in Sussex County, New Jersey, during the six-month period from February 1, 2015 to July 31, 2015. Sussex County is a rural area in the state's rural northwestern corner with a population of roughly 150,000.[147] All wills collected for this study were produced by the Sussex County Surrogate, whose jurisdiction is limited by statute to uncontested and uncomplicated matters.[148] The dataset therefore excludes the twenty estate administration matters that were filed in the Sussex County Superior Court during the same six-month period.[149] The excluded

be made. As a corollary to this proposition, however, he may be held liable for loss if he retains stock or other securities beyond a reasonable time for sale.").

[145] *See* Robertson v. Cent. Jersey Bank & Tr. Co., 47 F.3d 1268, 1274 (3d Cir. 1995) ("Generally, if the terms of a trust instrument authorize a trustee to retain investments that originally passed to it from the settlor of a testamentary trust, the trustee may retain them without liability. Nevertheless, a trustee may not rely on a power to retain investments when circumstances make retention imprudent.") (citations omitted).

[146] UNIF. PROB. CODE § 3-715(1) (amended 2010).

[147] For a more detailed description of this dataset and the demography of Sussex County, New Jersey, see Weisbord & Horton, *supra* note 101, at 685-88.

[148] N.J. STAT. ANN. § 3B:2-5 (2019) ("In the event of any dispute or doubt arising before the surrogate or in the surrogate's court, neither the surrogate nor the court shall take any further action therein, except in accordance with the order of the Superior Court.").

[149] *See* Email from Jeanne Woodhouse, Deputy Surrogate, Sussex Cty. Surrogate Court, to Jordan Doppelt, Rutgers Univ. (Aug. 26, 2015) (on file with author).

contested and complicated matters represent approximately 7% of estate administrations processed in Sussex County during this period. This exclusion poses a potential selection bias that could be investigated in a future study of contemporaneous contested and complicated probate matters.

The original Sussex County dataset contained 260 wills. No documents in the original dataset were holographic wills. I then excluded wills drafted to comply with another state's probate law because they did not anticipate the application of New Jersey law. I also excluded wills in which fiduciary provisions were illegible, incomplete, or not produced in their entirety. Those exclusions reduced the final dataset to 249 wills.[150] Each probate file included a probate application, letter testamentary, will, and death certificate. I reviewed every probate file contained in the final dataset and coded each will to capture information about the appointment, compensation, power, and liability of the executor. The findings reported in this Article build upon the empirical scholarship of Professor David Horton, with whom I collaborated in collecting the underlying dataset, and whose own empirical work has profoundly influenced the last decade of academic research in the area of probate law.[151]

B. Empirical Findings

This Section presents empirical findings from my review of will provisions governing: (1) the nomination, appointment, and compensation of executors; (2) the powers and transactional authority of executors; and (3) the liability and exculpation of executors.

---

[150] A prior study of the same dataset excluded "pour-over" wills in which the testator devised the estate to the trustee of a revocable trust rather than to individual beneficiaries. Pour-over wills were excluded because that study examined distributive provisions that could not be obtained from the public record from pour-over wills. Weisbord & Horton, *supra* note 101, at 686. However, the current study includes pour-over wills because it examines administrative provisions that are typically recited in such instruments and their inclusion provides a more complete account of testator preferences. *See* Mark Glover, *Boilerplate in Pour-Over Wills*, 103 IOWA L. REV. ONLINE 138, 143-45 (2018).

[151] David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447 (2018); Horton, *In Partial Defense*, *supra* note 2; Horton, *Partial Harmless Error*, *supra* note 9; David Horton, *Wills Without Signatures*, 99 B.U. L. REV. 1623 (2019); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015); David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016); Weisbord & Horton, *supra* note 101.

1. Nomination, Appointment, and Compensation

The appointment of an estate fiduciary is arguably the most important administrative term in a will because, as noted above, the position comes with great power and responsibility. In prior empirical studies, researchers found that most testators nominated executors who were close members of their family, such as a surviving spouse or adult child.[152] Prior studies reported that executor nominations were largely in line with the default rules of fiduciary appointment, which give priority to surviving spouses and close relatives.[153] Consistent with prior studies, wills in Sussex County reflect similar preferences.

All 249 wills in the Sussex County sample contain a term that nominates at least one executor to serve as the testator's chosen personal representative. The unanimous preference of testators to nominate at least one executor underscores the vital importance of including a fiduciary appointment clause. As in prior studies, most wills in the Sussex County dataset nominate an adult lineal descendant or surviving spouse:

Table 1. Relationships Between Executor and Decedent in Wills in Sussex County Sample

Executor's Relationship to Decedent	**Number of Wills**	**Percentage**
Child or Grandchild	140	56.22%
Spouse	72	28.92%
Sibling	10	4.02%
Niece or Nephew	9	3.61%
Friend	6	2.41%
In-Laws	5	2.01%
Unknown	4	1.61%
Former Spouse	2	0.80%
Lawyer	1	0.40%

[152] *See* Dunham, *supra* note 85, at 275-76 (reporting that 37% of executors were the surviving spouse, 30% were children of the decedent, 16% were strangers, 8% were corporate fiduciaries, and 4% were siblings or descendants of siblings); Friedman et al., *supra* note 72, at 1469 (68.9% of executors were related to the decedent and 13% were financial institutions).

[153] *See* UNIF. PROB. CODE § 3-203 (amended 2010); N.J. STAT. ANN. § 3B:10-2 (2019).

Since most executors were related to the decedent by blood or marriage, it is unsurprising that the vast majority of executors were also beneficiaries under the will. The executor's dual role as estate fiduciary and beneficiary can be a source of contention in probate administration, but such conflicts are not visible in the Sussex County dataset because the sample excludes contested matters.

In 247 of 249 estates (99.20%), at least one person who was nominated by the testator to serve as executor was actually appointed as the estate's personal representative. In only two estates, the probate court appointed a personal representative other than the testator's nominee because the executor nominated by will renounced the appointment and there was no surviving contingent nominee.[154] In 214 of 249 estates (85.94%), the testator's first choice of executor accepted the appointment. In 33 of 249 estates (13.25%), the testator's second or third choice of executor accepted the appointment. In twenty-two of the thirty-three estates (66.67%) in which the testator's second or third choice of executor accepted the appointment, the testator's first-choice nominee had predeceased. These data show that, in the Sussex County sample, executors chosen by the testator almost always accepted the appointment as estate fiduciary, provided that they lived long enough to survive the testator.

The Sussex County dataset shows that the drafting attorneys in this sample did not abuse their position as legal advisor to procure fiduciary appointments. Recall that in the 1960s, Norman Dacey had famously denounced lawyers for inserting themselves into their client's will as an executor and then, after the client's death, Dacey claimed that the lawyers would drain the client's estate by charging outrageously high fees for professional administration.[155] Dacey's claim was sensational, but it lacked empirical support. A study of estates probated in Chicago in the 1950s found that most executors were relatives of the decedent who did not receive a fee for estate administration.[156] More recently, in a study of wills probated in Alameda County, California, Professor David Horton found that personal representative commissions amounted to only 1.0% of the gross value of all estates.[157] Attorney's fees

[154] *See* Will of Kathleen Rizzi (Sussex County Sur. Ct. Apr. 24, 1990) (on file with author); Will of George Uniss at 3 (Sussex County Sur. Ct. Oct. 10, 1995) (on file with author).

[155] DACEY, UPDATED, *supra* note 90, at 15.

[156] *See* Dunham, *supra* note 85, at 275-76 (reporting that 2% of surviving spouses and 12% of children who served as personal representative received a fee).

[157] Horton, *In Partial Defense*, *supra* note 2, at 640.

represented 1.5% of the gross value of estates in the Alameda sample.[158] In the Sussex County dataset, there is only one testate estate in which a lawyer served as executor.[159] Two wills express a preference of attorney for legal advice in connection with the estate.[160] Wills in this dataset do not suggest that testators were alarmed about the possibility of exploitative fiduciary compensation: only 5 out of 249 wills (2.01%) expressly state that the executor should serve without commission. By contrast, 225 out of 249 wills (90.36%) are completely silent with respect to executor compensation, and 18 out of 249 wills (7.23%) defer to the statutory commission rate or authorize "reasonable" compensation.

2. Executor Powers and Transactional Authority

Will-making patterns have changed drastically over the last two centuries with respect to executor powers. Recall that Professor Friedman's study in Essex County, New Jersey, found that most wills probated between 1850 and 1900 said nothing at all about fiduciary authority. In contrast, the Sussex County dataset from 2015 shows that the vast majority of wills, 227 out of 249 (91.16%), expressly grapple with executor powers in one way or another.[161] Some wills refer to executor powers only briefly or in passing,[162] while others extensively

158 *Id.*

159 Will of Martin J. Bedell Jr. at 3 (Sussex County Sur. Ct. July 31, 2013) (on file with author).

160 Will of Lucy Ciufo at 6-7 (Sussex County Sur. Ct. Oct. 1, 2013) (on file with author) ("Any Executor needing legal advice in the settlement of my estate may feel free to consult with [attorney name], he having knowledge of my desires and wishes in matters which may arise . . . ."); Will of Robert Caton at 3 (Sussex County Sur. Ct. Oct. 7, 2010) (on file with author) ("While it is the choice of my Executor to choose the law firm it is my desire and request that the law firm of [firm name] be selected to assist with the probate of my Will and administration of my Estate.").

161 Wills that say nothing about executor powers tend to be extremely short and simple. *See, e.g.*, Will of Bessie Gould (Sussex County Sur. Ct. May 20, 1972) (on file with author) (containing two pages of double-spaced typewritten text, with all of the dispositive and administrative provisions appearing on the first page).

162 Will of Henry F. Benson (Sussex County Sur. Ct. Sept. 24, 2014) (on file with author), for example, provides:

> FOURTH: I hereby nominate, constitute and appoint DIANE SCALA as Executrix of this, my Last Will and Testament, to serve without bond in this or any other jurisdiction in which it may be necessary for her to act, *with full fiduciary power as provided by existing law at the time of the execution of this*, my Last Will and Testament.

Id. at 2 (emphasis added).

enumerate a broad array of specific powers.[163] Among wills that explicitly address executor powers, 154 out of 227 (67.84%) expressly acknowledge the default fiduciary powers provided by state law[164] or incorporate the default rules by reference.[165] Notably, none of the wills in the dataset expressly withholds or restricts any of the statutory default powers. Several fiduciary power provisions contain identical or similar language indicative of boilerplate draftsmanship, but on the whole, executor powers in this dataset tend to differ from one will to the next.

Roughly one-fifth of wills in the overall dataset, 52 out of 249 (20.88%), entrust the executor with the broadest possible fiduciary authority. Some wills do so by expressly granting "all powers as an absolute owner of property."[166] Other wills grant the executor with broad authority without specifically invoking the "absolute ownership" concept of property law:

> My . . . Executor . . . is hereby authorized and empowered to do all things necessary to carry out my intentions as set forth in this Will.[167]

---

[163] *See, e.g.*, Will of George McDonough at 16-24 (Sussex County Sur. Ct. Aug. 12, 1997) (on file with author) (devoting nearly nine single-spaced pages to the enumeration of thirty-four specific executor powers).

[164] Many wills that enumerate specific powers expressly state that such powers are "in addition to and not in limitation of" the powers conferred by state law. Will of Walter G. Gutowski (Sussex County Sur. Ct. Aug. 2, 2010) (on file with author), for example, provides:

> Powers of Fiduciary. I confer upon all fiduciaries from time to time acting hereunder, . . . the powers hereinafter set forth, all of which are intended to be in addition to and not in limitation of the powers set forth in N.J.S. 3B:14-23 and all other powers conferred by New Jersey or other applicable law . . . .

Id. at 3-4.

[165] Will of Margaret T. Kovach (Sussex County Sur. Ct. Apr. 26, 1999) (on file with author), for example, provides:

> SEVENTH: I give to my Executor, including any substitute successors hereof, those powers from time to time granted to Executors by the laws of the State of New Jersey during the course of administration of my estate.

Id. at 4.

[166] *E.g.*, Will of Irene Kane at 3 (Sussex County Sur. Ct. Apr. 14, 2011) (on file with author).

[167] Will of Helen Philip at 3 (Sussex County Sur. Ct. Sept. 3, 2013) (on file with author).

> I hereby give my said Personal Representative(s) . . . the fullest power and authority in all matters and questions and to do all acts which I might or could do if living . . . .[168]
>
> I direct my executor to take all actions legally permissible to have the probate of my will done as simply and as free of court supervision as possible under the laws of the state having jurisdictions over this will, including filing a petition in the appropriate court for the independent administration of my estate.[169]

Sometimes, wills enumerate fiduciary powers that relate solely to the estate's real property.[170]

The Sussex County wills reveal several miscellaneous, if not curious, considerations and provisions concerning fiduciary powers. First, in a handful of wills, testators anticipate the possibility that courts or the legislature might amend the default fiduciary powers between the time of execution and the testator's death. Those wills expressly incorporate by reference the state law's default fiduciary powers as of the date of will execution[171] or the testator's death.[172] The former approach is more sensible: By expressly incorporating state law effective at the time of will execution, the testator enjoys the certainty of granting a known corpus of fiduciary powers without drafting a will that needlessly repeats the entire text of a lengthy statute. In contrast, the latter approach is risky because it expressly incorporates future changes in the law without the testator's ability to predict the enactment of future laws.

Second, nineteen wills specifically grant the executor with "full power to disclaim any interest in property or power without court approval"

---

168 Will of Timothy Devine at 2 (Sussex County Sur. Ct. Oct. 28, 2006) (on file with author).

169 Will of Donald G. Aldridge at 3 (Sussex County Sur. Ct. Jan. 25, 2008) (on file with author).

170 *See* Will of Dolores D. Bush at 2 (Sussex County Sur. Ct. Sept. 26, 2012) (on file with author).

171 Will of Richard Bourgoin at 1-2 (Sussex County Sur. Ct. June 5, 2014) (on file with author) (granting the executor "full fiduciary power as provided by existing law *at the time and place of the execution* of this, my Last Will and Testament") (emphasis added); Will of Irvin W. Keidel at 2 (Sussex County Sur. Ct. Feb. 5, 2010) (on file with author) (same).

172 Will of Betty Howell at 2 (Sussex County Sur. Ct. May 2, 2014) (on file with author) (granting "the executor all of the powers conferred upon fiduciaries under the laws of the State of New Jersey in force and effect *at the time of my death* without limitation") (emphasis added); Will of Robert Lee Wright at 1 (Sussex County Sur. Ct. Dec. 3, 2014) (on file with author) (same).

with respect to property received by the estate.[173] In New Jersey, disclaimer by a fiduciary requires court approval unless "the governing instrument expressly authorizes the fiduciary . . . to disclaim."[174] If the testator intends to grant the executor with the broadest possible scope of fiduciary authority, then it would be logical for the will to include a power to disclaim property received by the estate without court approval.[175] The inclusion of such a power is notable, however, because a disclaimer of property on the estate's behalf seems exceptionally remote for two reasons. First, living donors rarely make inter vivos gifts to dead people or the estates of dead people. Second, under the default rules of inheritance law, to inherit property by will or intestacy, a person must survive the decedent by 120 hours.[176] This means that the estate of one dead person is unlikely to inherit from the estate of another dead person.

Third, a couple of wills incorrectly describe the executor's fiduciary powers as an "executor power of appointment"[177] or an "executory power of appointment."[178] "Power of appointment" is a term of art that refers to a particular form of donative transfer,[179] not to the executor's fiduciary authority to transact on behalf of the estate. In wills that contain this error, the "power of appointment" heading is followed by an enumeration of the executor's fiduciary powers. Such errors are benign because they are unlikely create ambiguity or cause confusion, but they are notable because at least one of them appears on a pre-printed form will that was presumably intended for mass market distribution and sale.[180]

Fourth, and perhaps most significantly, nearly half of the wills, 118 out of 249 (47.39%), expressly grant the executor power to retain the

---

173 *E.g.*, Will of Dolores H. Parrott at 3 (Sussex County Sur. Ct. Sept. 27, 2011) (on file with author).

174 N.J. STAT. ANN. § 3B:9-4 (2019).

175 A New Jersey statute explains the following effect of a disclaimer: "A disclaimer acts as a nonacceptance of the disclaimed interest, rather than as a transfer of the disclaimed interest. The disclaimant is treated as never having received the disclaimed interest." *Id.* § 3B:9-8.

176 *Id.* § 3B:3-32 (survival requirement for inheritance by will); *id.* § 3B:5-1 (survival requirement for inheritance by intestacy).

177 *E.g.*, Will of Nicholas Verduin at 5 (Sussex County Sur. Ct. Dec. 2, 2008) (on file with author).

178 *E.g.*, Will of Deborah Ann Miller at 4 (Sussex County Sur. Ct. Aug. 9, 2004) (on file with author).

179 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (AM. LAW INST. 2011) (Power of Appointment Defined).

180 Will of Deborah Ann Miller (Sussex County Sur. Ct. Aug. 9, 2004) (on file with author).

estate's inception assets. The examples below are representative of such clauses in the Sussex County dataset:

> To retain any investments or property which may form a part of my estate at the time of my death.[181]
>
> [W]ithout authorization of court, to . . . retain . . . any and all property, real or personal, comprising my estate . . . .[182]
>
> Invest, reinvest, and retain [or] abandon assets as long as shall seem prudent, without restriction to investments authorized by law . . . .[183]
>
> To retain as investments, or otherwise, any property owned by me at the time of death, and to increase the investment in any such property.[184]

The power to retain inception assets, standing alone, is already implied by the statutory default powers, which treat the executor as an absolute owner of the estate's property.[185] An absolute owner of property must have the power to retain such property and, under the Prudent Investor Act, fiduciary investments are no longer restricted to legal lists of safe assets: "[A] fiduciary may invest in any kind of property or type of investment."[186]

As noted in Part III, a fiduciary power *not* implied by New Jersey's default law is the power to retain inception assets in which the executor has a personal interest. Retention of such inception assets in New Jersey, therefore, requires express authorization by will. However, most wills

---

[181] Will of Myron J. Varn at 2 (Sussex County Sur. Ct. Mar. 26, 2013) (on file with author).

[182] Will of Marion C. Cassidy at 1 (Sussex County Sur. Ct. Apr. 3, 2012) (on file with author).

[183] Will of William E. Delaney at 5 (Sussex County Sur. Ct. Sept. 30, 2014) (on file with author).

[184] Will of Antoinette T. Claudio at 3 (Sussex County Sur. Ct. Mar. 25, 1994) (on file with author).

[185] N.J. STAT. ANN. § 3B:10-30 (2019). Provisions that authorize retention of property "without resection to investments authorized by law" are likely based on UPC § 3-715(1), which authorized the executor to "retain assets owned by the decedent pending distribution or liquidation . . . which are otherwise improper for trust investment." UNIF. PROB. CODE § 3-715(1) (amended 2010). That provision of the UPC was promulgated before the Uniform Prudent Investor Act (1994).

[186] *See* N.J. STAT. ANN. § 3B:20-11.3 (2019) ("A fiduciary's investment and management decisions respecting individual assets shall not be evaluated in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.").

in the Sussex County sample that expressly authorize retention of inception assets, 110 out of 118 wills (93.22%), do not modify the duty of loyalty with respect to such conflicts. Furthermore, fewer than one-third of the wills that expressly grant a power to retain inception assets, only 37 out of 118 wills (31.36%), contain an express[187] or strongly implied[188] waiver of the duty to diversify.[189] Thus, the vast majority of will provisions in the Sussex County dataset that expressly authorize the retention of inception assets do nothing more than restate the default fiduciary investment rules under New Jersey law.

3. Executor Liability and Exculpation

Broad fiduciary empowerment can reduce the transactional and procedural costs of probate administration, but it can also expose estates to potential harm caused by the executor's misconduct.[190] Probate law's primary safeguard against fiduciary misconduct is to hold executors personally liable for breach of fiduciary duty.[191] Thus, it is significant when a will modifies the default fiduciary duties or relieves the executor of liability for breach. However, two notable findings from the Sussex County dataset suggest that a large majority of testators want to hold executors legally accountable for their conduct.

Most wills in the dataset do not modify any aspect of the duties of care or loyalty, a finding that suggests that Sussex County testators strongly favor New Jersey's default fiduciary duties. In fact, some wills affirmatively emphasize the default law for certain fiduciary sub-rules.

187 *See, e.g.*, Will of Lorraine J. Wandling at 3 (Sussex County Sur. Ct. Nov. 15, 2013) (on file with author) ("To retain any and all investments and property, real or personal, that I may own at my decease or that thereafter shall become a part of my estate and/or trust without regard to any principal [of] diversification . . . ."); Will of Donald R. Wilkins at 2 (Sussex County Sur. Ct. Dec. 3, 2014) (on file with author) ("To retain, temporarily or permanently, any property owned by me at the time of my death in the form in which it then exists . . . without being under any duty to diversify the property and without being limited to investments authorized by law for trust funds.").

188 *See, e.g.*, Will of Viola Hammann at 8 (Sussex County Sur. Ct. Dec. 2, 1994) (on file with author) ("To retain and continue for any period of time without limitation, and without liability for loss or depreciation and value, any and all investments that I may own at my death . . . ."); Will of Walter G. Gutowski at 4 (Sussex County Sur. Ct. Aug. 2, 2010) (on file with author) ("Retain any or all property at anytime received or acquired for so long as shall seem fit although such property may not be such as is authorized by law for investment, and although such retention may leave a disproportionately large amount invested in one type of property . . . .").

189 No wills in the sample contain an express or strongly implied waiver of the executor's diversification duty without an express power to retain inception assets.

190 *See supra* Part II.

191 *See supra* Part II.

The prudent investor rule appears to be especially popular among Sussex County testators. Recall that, in New Jersey, an executor who is generally authorized to retain inception assets may still be liable for retention if doing so would be imprudent.[192] Testators may expressly override that default by waiving the diversification duty or by modifying the prudent investment standard. In the Sussex County dataset, however, only 37 out of 249 wills (14.86%) waive the diversification duty with respect to inception assets. In contrast, the vast majority of wills, 210 out of 249 wills (84.34%), do not explicitly or implicitly alter the diversification duty. Additionally, of the 210 wills that retain the diversification duty, twenty-two wills go a step further by expressly mentioning the executor's obligation to invest estate assets prudently.[193] Likewise, in the vast majority of wills, 212 out of 249 (85.14%), testators did not expressly modify the duty of loyalty or authorize the executor to transact personally in the estate's assets. In contrast, only seven wills generally authorize the executor to enter into conflicted transactions.[194] An additional twenty-nine wills partially modify the duty of loyalty by authorizing the estate to borrow money from the executor.[195]

Additionally, most wills do not exculpate the executor for fiduciary negligence or misconduct. Recall again that, in New Jersey (and elsewhere), probate law does not permit the complete exculpation of an

---

[192] *See* Robertson v. Cent. Jersey Bank & Tr. Co., 47 F.3d 1268, 1274-75 (3d Cir. 1995).

[193] *See, e.g.*, Will of Joseph Christino at 5 (Sussex County Sur. Ct. Apr. 23, 2013) (on file with author) (granting executor power to "[i]nvest, reinvest and retain, abandon assets as long as shall seem prudent, without restriction to investments authorized by law").

[194] Will of Irene Duffy (Sussex County Sur. Ct. Aug. 16, 2011) (on file with author), for example, authorized the executor:

> To act or refrain from acting in all respects as if financially uninvolved, regardless of any connection with or investment in any business or any conflict of interest between any fiduciary hereunder and my estate or any Trust. No Executor or Trustee shall be disqualified or barred from exercising any power or discretion conferred by law or under this Will because such fiduciary may be a shareholder, officer, director, member, partner, or person in any way interested in a corporation, partnership or other person or entity affected by the exercise of such power or discretion. My Executor or Trustees may contract, in any manner that my Executor or Trustees shall deem advisable, with any such corporation, partnership, person or entity.

Id. at 13-14.

[195] *See, e.g.*, Will of Vincent Aluzzo at 4 (Sussex County Sur. Ct. Apr. 1, 2012) (on file with author) (authorizing executor to "[b]orrow money from themselves or others").

executor because an estate fiduciary must be governed by at least some modicum of accountability.[196] Thus, most exculpation clauses in Sussex County do not relieve the executor of liability for fraudulent or willful misconduct.[197] In fact, in the Sussex County dataset, the vast majority of wills do not relieve the executor of *any* liability: 208 out of 249 wills (83.53%) are completely silent with respect to executor exculpation. Only 25 out of 249 wills (10.04%) contain a broad, express exculpation clause. In addition, two wills implicitly relieve the executor of liability,[198] and a handful of other wills partially exculpate the executor in specific circumstances, such as the operation of the decedent's business or the estimation of tax payments.

The stark difference between the prevalence of fiduciary exculpation in trusts versus wills is notable: Most trusts exculpate the trustee whereas most wills do not. There are at least five factors that might explain this divergence. First, a fiduciary's relationship to the transferor might affect whether the fiduciary insists upon exculpation. A fiduciary who is appointed because of a close personal relationship with the transferor may have intrinsic reasons for accepting the appointment regardless of exculpation. Such a fiduciary might be willing to rely on her personal relationship with beneficiaries to resolve potential disputes amicably. By contrast, an unrelated fiduciary who is appointed solely to provide professional administration services has neither the personal motivation nor special standing to quell conflict. Second, professional fiduciaries also may be more likely than non-professional fiduciaries to possess and exploit specialized knowledge for the purpose of procuring liability waiver.[199] This factor suggests that exculpation may be more common in trusts than wills because trusts usually appoint professional

196 *See* Behrman v. Egan, 95 A.2d 599, 601 (N.J. Super. Ct. Ch. Div. 1953); N.J. STAT. ANN. § 3B:31-77 (2019).

197 A typical exculpation clause declares the following: "No fiduciary shall be liable for acts or omissions in administering my estate or any Trust created under this Will, except for that fiduciary's own actual fraud, gross negligence or willful misconduct." *See, e.g.*, Will of Charles Kopcsik at 11 (Sussex County Sur. Ct. Nov. 8, 2012) (on file with author).

198 *See* Will of Raymond Haddad at 3 (Sussex County Sur. Ct. Jan. 4, 1996) (on file with author) (stating that "no action taken by my Executor pursuant to this power shall be subject to question by any beneficiary"); Will of Viola Hammann, *supra* note 188, at 6 ("The exercise by any fiduciary of the discretionary powers herein granted with respect to any property . . . shall be final and conclusive upon all person[s] interested hereunder and shall not be subject to any review whatsoever.").

199 *See* Leslie, *Common Law*, *supra* note 113, at 2748.

trustees,[200] whereas wills typically appoint a close family relative to serve as executor.[201] Third, an exculpation is more likely to be inserted into a donative instrument when the fiduciary has an opportunity to negotiate her terms of service. Such negotiations are more likely to occur in trusts compared to wills: In an inter vivos trust, the relationship between the settlor and the trustee typically begins while the settlor is still alive, so the trustee usually has an opportunity to discuss the terms of service before accepting the trusteeship. In a will, however, the executor's official appointment begins after the testator's death, when it is too late to negotiate for exculpation. Fourth, trusts and wills tend to operate on different time horizons — trust settlors often seek to postpone the transfer of gifted property whereas testators usually hope their estate will be administered as quickly as possible. The duration of a trustee appointment, therefore, is usually longer than the duration of an executor appointment. A trustee who anticipates a long-term fiduciary appointment may be less willing to accept the trusteeship without exculpation. Fifth, the Sussex County dataset contains wills probated in 2015, just before New Jersey adopted the UTC's rule on exculpation in 2016.[202] A comparison of wills drafted before and after New Jersey's adoption of the UTC might reveal the impact of the new rule on executor exculpation provisions, but such analysis lies beyond the scope of this project.

The benefits of fiduciary exculpation are enjoyed mostly by the fiduciary, whereas the costs are typically borne by the transferor and beneficiaries. Relieving the executor of liability may encourage careless or bad faith performance that can ultimately lead to fiduciary litigation. Moreover, when problems with the executor do arise, the inclusion of an exculpation clause does not prevent the beneficiaries from suing the executor or reduce the likelihood of fiduciary litigation. Litigation of such disputes will inevitably focus on the scope or enforceability of the exculpation clause. Thus, from the perspective of testators, the primary reasons to exculpate the executor are to increase the likelihood that the testator's chosen fiduciary will accept the appointment or to lower the commission amount demanded by the fiduciary. However, there are reasons to believe that exculpation is not necessary to induce executors

[200] John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638 (1995) ("Private trustees still abound, but the prototypical modern trustee is the fee-paid professional, whose business is to enter into and carry out trust agreements.").

[201] Most executors in the Sussex County dataset (and prior empirical studies) are family relatives or friends of the testator and not professional fiduciaries. *See* Dunham, *supra* note 85, at 275-76; Friedman et al., *supra* note 72, at 1469.

[202] *See supra* Part III.

to serve. Recall that, in the Sussex County dataset, at least one executor appointed by the testator was willing to serve as personal representative in 247 of 249 (99.20%) of estates, all but two in the sample. In 214 out of 249 (85.94%) of estates, the testator's first choice of executor accepted the fiduciary appointment. In twenty-two out of the thirty-three estates in which the testator's second or third choice served as executor, the testator's first-choice nominee predeceased. And more than 97% of wills are silent regarding executor compensation, defer to the statutory commission schedule, or authorize "reasonable" compensation. These findings suggest that, in contrast to trusts, fiduciary exculpation in wills is not generally necessary to induce executors to serve as a personal representative in probate administration or to reduce the compensation demanded by the executor for her service.

CONCLUSION

This Article examined administrative will provisions concerning the appointment, compensation, powers, and liability of the executor. Historically, aside from the nomination of an executor, most administrative considerations related to the estate fiduciary were governed by mandatory rules or subject to close probate court supervision. Thus, such details were not addressed expressly in the text of many wills. Under modern probate law, however, the default rules grant executors broad power and great responsibility, as well as the option to customize the default fiduciary powers and liability rules. Yet administrative terms have always played second fiddle to distributive terms in will drafting because bequests and devises are usually more salient to testators than the nitty gritty details of fiduciary authority. For this reason, many practitioners probably have heard some form of the following question from clients regarding the appointment, compensation, powers, and liability of the executor: "What terms do most testators select?" This Article provides empirical evidence to help answer that question.

For practitioners, this study provides an empirical account of testator preferences concerning the executor, including the following findings: First, all wills in the Sussex County sample nominate at least one executor. More than 90% of testators nominated a spouse or blood relative to serve as the executor. Indeed, the dataset contains only one professional fiduciary (a lawyer) and zero corporate fiduciaries. This finding refutes claims about the supposedly widespread practice of estate planning attorneys who exploit their influence over the will-drafting process to procure a lucrative executor appointment. Second,

more than 99% of wills nominate at least one executor who, after the testator's death, actually accepted the appointment as estate fiduciary. In more than 86% of estates, the testator's first-choice executor accepted the appointment. In a majority of estates where the testator's second- or third-choice executor served as personal representative, the first-choice nominee predeceased the testator. Third, testators in Sussex County seem almost entirely unconcerned about the possibility that an executor might excessively overcharge their estate for fiduciary services. The vast majority of wills are completely silent regarding executor compensation and therefore opt into the default rules governing fiduciary commissions. Fourth, none of the wills in this sample expressly restrict the default fiduciary powers, but almost all wills attempt to tinker with the default executor powers in some way or another. However, most fiduciary power provisions accomplish little more than restate or incorporate selected portions of the statutory default powers. Fifth, the vast majority of wills in the Sussex County dataset (83.53%) do not modify the fiduciary duties of care or loyalty, or contain an exculpation clause for the executor. This observation suggests that testators largely agree with the default fiduciary duties and want to hold the executor personally liable for negligence and other forms of fiduciary misconduct.

For inheritance law scholars, this study reveals an important contrast between fiduciary appointments in wills versus trusts. Prior empirical work has demonstrated that a majority of trusts contains a fiduciary exculpation clause, presumably for the purpose of inducing the trustee's agreement to accept the appointment. By contrast, in the Sussex County dataset, nearly every person nominated by will to serve as executor accepted the appointment even though only 10% of wills contain a broad, express fiduciary exculpation clause. This finding suggests that testators generally agree with probate law's default fiduciary liability principles and that fiduciary exculpation is not necessary to induce a person nominated as executor to accept the appointment.