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# Revocable Trusts and the Law of Wills: An Imperfect Fit

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# REVOCABLE TRUSTS AND THE LAW OF WILLS: AN IMPERFECT FIT

Alan Newman\*

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## I. Introduction

Over the centuries that wills have been used to dispose of testators' property at death, the law of wills has developed to address issues that arose.<sup>1</sup> Similarly, over the centuries that trusts have been used for non-testamentary purposes, the law of trusts has developed to resolve resulting issues.<sup>2</sup>

In recent decades revocable trusts have become the most commonly used trust in the United States.<sup>3</sup> To avoid estate administration, particularly in states in which administration involves cumbersome, time-consuming, and expensive court supervision, settlors make inter vivos transfers of assets that otherwise would be subject to administration on their deaths in trust.<sup>4</sup> Typically, the trust instrument provides that the settlor may revoke the trust at any time, in which case its assets are to be returned to the settlor, and designates beneficiaries to whom the trust assets are to be distributed, or held for the benefit of in one or more now irrevocable trusts, following the settlor's death.

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<sup>1</sup> See generally, THOMAS E. ATKINSON, *LAW OF WILLS* (2<sup>nd</sup> ed. 1953).

<sup>2</sup> See generally, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* §§ 2 - 7 (3rd ed. \_\_\_\_).

<sup>3</sup> See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MISSOURI L. REV. 143, 186 (2002). Note that with inter vivos trusts being used so commonly as will substitutes in recent years, the fundamental question of whether a trust is revocable or irrevocable is being answered differently than it was in the past. Under the UTC, unlike at common law, trusts are revocable unless expressly made irrevocable. See UNIF. TRUST CODE § 602(a) & cmt. (2005).

<sup>4</sup> "Pour over" wills that devise part or all of the testator's probate estate to the revocable trust usually also are part of the plan.

In short, revocable trusts have become increasingly popular as substitutes for wills.<sup>5</sup> Not surprisingly, issues that traditionally have arisen in connection with the use of wills frequently also are arising when revocable trusts are used as will substitutes. Because revocable trusts are, to a significant extent, the functional equivalent of wills, the trend in both statutory and case law is to subject such trusts, and persons interested in them, to the same law that would apply if the settlor had instead used a will to provide for the disposition of her property at her death.<sup>6</sup> In examining that trend, this article demonstrates that, while there are many revocable trust issues that are being, and should be, resolved by reference to the law of wills,<sup>7</sup> there are many others for which that is not the case.<sup>8</sup>

## II. Will Execution and Trust Creation

For centuries, Wills Acts have required that wills be “(1) in writing; (2) signed by the testator; and (3) signed by a specified number of attesting witnesses in accordance

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<sup>5</sup> Revocable trusts also serve a number of other purposes, such as providing for the management of assets without the need for a guardianship if the settlor becomes incapacitated, securing privacy with respect to the settlor’s dispositive plan and assets, and, in some states, avoiding the ongoing judicial supervision to which a trust created under the property owner’s will would be subject. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003).

<sup>6</sup> Looking to the law of wills to resolve issues that arise in connection with the non-testamentary but gratuitous transfer of property at death is appropriate not only for revocable trusts, but also for other nonprobate transfers. As noted by Professor Langbein:

Transferors use will substitutes to avoid probate, not to avoid the subsidiary law of wills. The subsidiary rules are the product of centuries of legal experience in attempting to discern transferors’ wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills.

John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV., 1108, 1136-37 (1984). *See also* UNIF. PROB. CODE Prefatory Note (1990) (stating that in the 1990 revisions to the UPC: “The proliferation of will substitutes and other inter-vivos transfers is recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison.”) Note, however, a fundamental limitation on the ability to use a revocable trust to dispose of a decedent’s property similarly to a will. A will can dispose of property the testator owned at death, even if it was acquired after the testator executed her will. By contrast, the terms of a revocable trust instrument will apply only to assets in the trust at the settlor’s death. Assets acquired by the settlor after the creation and funding of the trust will not pass under its terms at the settlor’s death unless they had been acquired by, or transferred to, the trust (or pass to it under the terms of a pour over will). In many jurisdictions, transfers to a settlors revocable trust, however, need not be accomplished by formal transfers of title. While not advisable, if the settlor serves as trustee, a declaration by the settlor that she holds specified assets subject to the terms of the trust is sufficient to accomplish that result. *See, e.g.*, UNIF. TRUST CODE § 401 cmt. (2005).

<sup>7</sup> For the sake of simplicity, this article uses the phrase “law of wills” to refer to law that would be applicable if the settlor of the revocable trust had not created it, but had instead used a will as her principal dispositive instrument or been intestate.

<sup>8</sup> Significant tax and non-tax issues can arise when a joint revocable trust is used by two or more settlors that do not arise when wills are the primary dispositive instruments. Joint revocable trusts are beyond the scope of this article. For recent discussions of their use, and issues they raise, see John H. Martin, *The Joint Trust: Estate Planning in a New Environment*, 39 REAL PROP. PROB. & TR. J. 275 (2004); MELINDA S. MERK, JOINT REVOCABLE TRUSTS FOR MARRIED COUPLES DOMICILED IN COMMON-LAW PROPERTY STATES, 32 REAL PROP. PROB. & TR. J. 345 (1997).

with procedures provided by applicable law.”<sup>9</sup> Depending on the jurisdiction, compliance with many more specific formalities may be required. For example, a few statutes require that the testator’s signature be at the end of the will.<sup>10</sup> Typically, the testator must sign the will, or acknowledge her signature, in the presence of the witnesses,<sup>11</sup> and it may be necessary for the witnesses to be in each other’s presence when the testator does so.<sup>12</sup> Many Wills Acts further require that the witnesses sign the will in the testator’s presence<sup>13</sup> and some also require that the witnesses sign in each other’s presence.<sup>14</sup> In some jurisdictions, the testator must declare to the witnesses that the instrument is her will and request them to sign it.<sup>15</sup> The unsurprising result of requiring compliance with such formalities is that many writings that are signed by the testator and two witnesses, and clearly intended by the testator to be her will, do not satisfy all of the formalities and are denied probate.<sup>16</sup> By contrast, inter vivos trusts, including those as to which the settlor has retained such extensive rights as the power to revoke, may be validly created in almost all jurisdictions without compliance with formalities.<sup>17</sup>

Motivated by the desires to uphold wills that reflect their testators’ testamentary intent and to make the law of wills more consistent with that of nonprobate transfers,<sup>18</sup> the Uniform Probate Code (“UPC”) has reduced considerably the gulf between the requirements for executing a will and creating a valid inter vivos trust. This has been accomplished, in part, by the UPC’s not requiring many of the formalities required by various Wills Acts.<sup>19</sup> More important, if there is clear and convincing evidence of the testator’s intent that the instrument be her will, the UPC provides that compliance with

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<sup>9</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f (1999). Exceptions exist for each of these fundamental formalities. In limited circumstances, oral wills are valid by statute in many states. *See id.*, § 3.2 cmt. h. In most states, a testator may have someone else sign the will on her behalf, if done at her direction and in her presence. *See id.*, § 3.1 cmt. j. In many states, if the will is in the testator’s handwriting (or, in some of those states, if the material portions of the will are in the testator’s handwriting), the will is valid as a holograph even though not witnessed. *See id.*, § 3.2.

<sup>10</sup> *See, e.g.*, OHIO REV. CODE § 2107.03 (West 2007).

<sup>11</sup> *See, e.g.*, R.I. STAT. §33-5-5 ( ).

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g.*, W. VA. CODE § 41-1-3 ( ).

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.*, 84 OKLA. STAT. ANN. § 55 ( ).

<sup>16</sup> *See, e.g.*, *Stevens v. Casdorph*, 508 S.E.2d 610 (W. Va. 1998).

<sup>17</sup> *See* RESTATEMENT (THIRD) OF TRUSTS § 25(1) (2003). For lists of the methods and requirements for creating trusts, see UNIF. TRUST CODE §§ 401 and 402 (2005). In most jurisdictions, an express trust of land is not valid unless created or proved by a writing. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 20-24 (2003). For a case starkly illustrating the unforgiving nature of wills formalities in many jurisdictions, and their inapplicability to revocable trusts, see *Smith v. Wharton*, 78 S.W.3d 79 (Ark. 2002) (holding that decedent’s revocable trust instrument had been validly executed by mark, but that decedent’s simultaneously executed will was not valid, as the decedent had not complied with statutory requirements for the execution of a will by mark).

<sup>18</sup> *See* UNIF. PROB. CODE, Part 5, gen. cmt. and § 2-503 cmt. (1990).

<sup>19</sup> For example, under the UPC witnesses need not sign the will in the testator’s or each other’s presence, the will need not be signed at the end, the testator need not sign the will or acknowledge it or the testator’s signature in the collective presence of the witnesses, and the testator need not declare the instrument to be her will or request the witnesses to sign it. *See* UNIF. PROB. CODE § 2-502(a) (1990).

formalities may be dispensed with altogether.<sup>20</sup> In jurisdictions that have not enacted legislation to excuse noncompliance with wills formalities, non-complying wills nevertheless may be admitted to probate under the substantial compliance doctrine.<sup>21</sup> The result is a trend not towards subjecting revocable trusts that serve as will substitutes to the law of wills, but towards determining the validity of wills in accordance with the law applicable to nonprobate transfers.<sup>22</sup>

Another issue with respect to the rules governing the execution of wills and the creation of inter vivos trusts is whether the testator or settlor may authorize an agent under a power of attorney to make a will or create a trust for the principal. Generally, an agent may not execute a will on behalf of a principal.<sup>23</sup> Similarly, if the terms of a power of attorney do not expressly authorize the agent to create a trust for the principal, the agent may not do so.<sup>24</sup> By contrast, if expressly authorized, in many jurisdictions an agent may create a trust for a principal, even if the trust is revocable and serves as a will substitute.<sup>25</sup> The holding in a recent Vermont case decided by its Supreme Court, based in

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<sup>20</sup> *Id.* § 2-503. *See generally*, John H. Langbein, *Excusing Harmless Error in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). For a significantly more limited harmless error will execution statute, see OHIO REV. CODE 2107.24 (West 2007).

<sup>21</sup> *See, e.g.*, *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991); *Wade v. Wade*, 195 S.E.2d 339 (W. Va. 1938).

<sup>22</sup> A prominent exception to the general rule that revocable trusts need not be executed in compliance with wills formalities is that under Florida law, a trust created by a Florida resident on or after October 1, 1995 must comply with the formalities required for a will in order for its testamentary provisions to be valid. FLA. STAT. ANN. § 737.111(1) ( ).

<sup>23</sup> *See* RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b. (1958). The basis for the prohibition is that Wills Acts require wills to be executed by their testators. *Id.* The comparable provision of the new Third Restatement on acts that may not be delegated makes no reference to the execution of wills. Rather, it provides: "A person may delegate performance of an act if its legal consequences for that person are the same whether the act is performed personally or by another. If personal performance is required, performance by an agent does not constitute performance by the principal." RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. c (2006). While most Wills Acts allow a third party to execute a will for a testator, that typically is the case only if the third party does so at the testator's direction and in her presence. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j. (1999). Thus, unless those requirements are satisfied, under most Wills Acts an authorized agent under a power of attorney presumably can not execute a will for the principal. Note that many state statutes expressly prohibit agents under powers of attorney from executing wills for their principals. *See, e.g.*, IND. CODE § 35-5-5-15 ( ); WASH. REV. CODE § 11.94.050 ( ); FLA. STAT. ANN. § 709.08(7)(b)(4) ( ); MO. REV. STAT. § 404.710-7 ( ).

<sup>24</sup> *See* *Stafford v. Crane*, 382 F.3d 1175 (10th Cir. 2004); UNIF. POWER OF ATTORNEY ACT § 201(a)(1) (2006).

<sup>25</sup> *See* UNIF. POWER OF ATTORNEY ACT § 201(a)(1) (2006); *Estate of Kurrelmeyer*, 895 A.2d 207 (Vt. 2006). Note, however, that it is not entirely clear whether, under the UTC, an authorized agent may create a trust for a principal. Neither section 401, describing methods for creating trusts, or section 402, listing the requirements for doing so, mention an agent acting on behalf of a principal, and section 402(a) expressly requires that the settlor have capacity and indicate an intention to create the trust. UNIF. TRUST CODE §§ 401 and 402 (2005). The section 401 list of methods for creating trusts, however, is not an exclusive list, *see id.* § 401 cmt., and section 402 does not specify that the settlor must have capacity and express the intention to create the trust at the time it is created. *Id.* at § 402(a)(1) and (2). For existing revocable trusts, the UTC includes a provision allowing an agent to exercise the settlor's rights if expressly authorized to do so in either the terms of the trust or the power of attorney. *Id.* at § 602(e). The absence of a similar provision in the trust creation statutes arguably indicates that trusts may not be created by agents of settlors. It would be inconsistent, however, to allow an authorized agent to amend a revocable trust, as section

part on the fundamental difference between a will and a revocable trust, is illustrative. In *Estate of Kurrelmeyer*,<sup>26</sup> the decedent's children challenged the validity of a revocable trust his wife had created under a power of attorney that expressly authorized her to "execute and deliver...trust instruments."<sup>27</sup> In rejecting arguments that the power to create a trust is personal and nondelegable,<sup>28</sup> and that the agent's creation and funding of a revocable trust was "an invalid usurpation of the principal's last will and testament,"<sup>29</sup> the court acknowledged the Restatement (Second) of Agency rule against agents executing wills for principals.<sup>30</sup> It nevertheless upheld the agent's creation of the trust, in part because of the significant lifetime, non-testamentary advantages revocable trusts offer.<sup>31</sup>

In contrast to *Kurrelmeyer*, a recent lower court decision in New York raises the possibility that, because of the testamentary nature of revocable trusts, an agent may not create one for a principal.<sup>32</sup> In *Matter of Goetz*, an agent's attempted amendment of the principal's revocable trust instrument was held invalid. A rationale for the court's decision was:

Further, revocable inter vivos trusts are commonly employed as estate planning tools and are coordinated with the grantor's will, functioning in much the same manner as a will...Because the Goetz revocable trust was created as a part of the decedent's overall estate planning at the same time as his will, the trust can be deemed to "function[s] as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property"...Because an amendable trust remains ambulatory, alterations to it can affect the testator's estate plan in substantial ways, in the same manner as a codicil. Were the court to recognize the second amendment to the Goetz trust as valid, it could logically be compelled to recognize the validity of a codicil executed by the testator's agent under a power of attorney, a result not permitted under present law...<sup>33</sup>

The decision in *Goetz*, however, was "more substantially" based on the fact that neither the power of attorney nor the trust instrument expressly authorized the agent to amend the

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602(e) does, but not to allow an authorized agent to create such a trust. Further, authorized agents may give the principal's property away, *see* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (2006), and at common law authorized agents can create trusts for principals. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(5) (2003). As a result, the better argument is that under the UTC, which is supplemented by the common law, *see* UNIF. TRUST CODE § 106 (2005), trusts can be created by agents if they are expressly authorized to do so.

<sup>26</sup> 895 A.2d 207 (Vt. 2006).

<sup>27</sup> *Id.* at 212.

<sup>28</sup> *Id.* at 213.

<sup>29</sup> *Id.* at 214.

<sup>30</sup> *Id.* at 213.

<sup>31</sup> *Id.* at 213-14. Because the agent was a trustee and beneficiary of the trust, the appellate court remanded the case for a determination of whether the wife's creation of the trust under the power of attorney constituted a breach of her fiduciary duty. *Id.* at 215.

<sup>32</sup> *Matter of Goetz*, 793 N.Y.S.2d 318 (2005).

<sup>33</sup> *Id.* at 322.

terms of the trust.<sup>34</sup> Had the agent been expressly authorized to amend the trust instrument, it is likely that the court would have upheld the amendment.<sup>35</sup>

Similar to the issue of whether an authorized agent may execute a will or create a trust for a principal is whether a conservator or guardian may do so. Statutes in some jurisdictions allow conservators or guardians to execute wills on behalf of wards,<sup>36</sup> while statutes in others expressly prohibit such representatives from doing so.<sup>37</sup> The new Restatement of Trusts provides that even in jurisdictions that do not allow conservators to execute wills on behalf of wards, it is proper for the court to authorize such a representative to create, modify or revoke a revocable trust when doing so will be beneficial to the incapacitated person's estate.<sup>38</sup>

If a conservator or guardian is able to create, amend, or revoke a revocable trust for a principal or ward, difficult issues relating to the effect such an action would have on the disposition of the principal's or ward's property at death are raised. Generally, in jurisdictions in which a conservator or guardian may make a will for a ward, the court applies the substituted-judgment doctrine to grant the conservator or guardian the authority to execute a will that would effect the disposition that the ward probably would have made if competent.<sup>39</sup> Thus, the disposition that will result from the will may differ from the disposition that would have resulted had such a will not been executed. A similar result may be reached in jurisdictions in which a conservator or guardian may not execute a will for a ward, if the conservator or guardian is allowed to create, amend, or revoke a trust.<sup>40</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> The court noted: "The petitioner has not cited any New York law or precedent which supports the proposition that an agent may use a power of attorney to modify a trust instrument which does not explicitly authorize that method of amendment. Other states have found attempted amendments not expressly authorized in the trust document or the power of attorney itself to be void and ineffective..." *Id.*

<sup>36</sup> See, e.g., UNIF. PROBATE CODE § 5-411(a)(7) (2003). Under the original UPC, conservators could not execute wills for wards. See UNIF. PROBATE CODE § 5-407(b)(3) (1969).

<sup>37</sup> See, e.g., OHIO REV. CODE ANN. § 2111.50 (West 2007).

<sup>38</sup> See RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. f (2003). A lower court opinion in Ohio to the contrary viewed the proposed amendment to the ward's revocable trust instrument as the equivalent of a codicil to his will, which by statute it could not approve. In the Matter of Rosenbaum Trust, 2003 WL 1849141. *Contra* Matter of Jones, 401 N.E.2d 351 (Mass. 1980).

<sup>39</sup> See UNIF. PROBATE CODE § 5-411(c) (2003); RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. f, rptr. notes (2003).

<sup>40</sup> As noted by the new Restatement, the underlying policy of a statute that prohibits conservators or guardians from making a will:

may reflect a narrow purpose (based on efficiency and tradition) of precluding the use of a particular device (a will) that relies on the safeguards of probate and of specific, well-established statutory formalities; or the will-making prohibition may instead manifest a more general, substantive policy against post-death dispositions by these fiduciaries that would alter the plan of disposition established by intestate succession or by an existing will executed by a person who has subsequently become incompetent...[P]rohibitions against will making are generally to be strictly construed to prevent only the use of a particular device, the will, and not as reflecting a more general, substantive policy that extends to and prohibits the use of other methods of planning and accomplishing properly justified post-death disposition of estates of persons under disability. RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. f (2003). For a case allowing a conservator to create revocable and irrevocable trusts for a ward, see Matter of Jones, 401 N.E.2d 351 (Mass. 1980).

### III. The Interest of a Non-Settlor Beneficiary in a Revocable Trust While the Settlor is Living

Generally, during the lifetime of a testator, a devisee under the testator's will has a mere expectancy with respect to, and not an interest in, the testator's property.<sup>41</sup> By contrast, traditionally a remainder beneficiary of a revocable trust<sup>42</sup> was viewed as receiving a beneficial interest in trust property upon creation of the trust.<sup>43</sup> Because revocable trusts are used primarily to avoid estate administration and provide for the management of property in the event of the settlor's incapacity without the need for a court supervised conservatorship, the trend increasingly is to treat the interest of a remainder beneficiary in a revocable trust during the lifetime of the settlor as an expectancy.<sup>44</sup>

**A. Duties of the Trustee to Remainder Beneficiaries.** A fundamental issue raised is whether the remainder beneficiary is entitled to information about the trust, and able to enforce it, while the settlor is living. If the settlor is competent, as a practical matter it often will be of little consequence whether a remainder beneficiary is owed enforceable duties. Often, a remainder beneficiary will not know of the trust or her interest in it, or will consider the trust and its assets as belonging solely to the settlor and not seek information about the trust or to enforce its terms. If a remainder beneficiary demanded information or otherwise attempted to enforce the trust over the objection of the settlor, the settlor could amend the terms of the trust to eliminate the remainder beneficiary's interest. If the settlor agreed with the remainder beneficiary's position with regard to the enforcement of the trust against a non-settlor trustee, the settlor could enforce the trust herself. Presumably, such reasons explain why there appear to be few cases in which a remainder beneficiary has attempted to enforce the terms of a revocable

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<sup>41</sup> See, e.g., *Meeks v. Kirkland*, 187 S.E.2d 296 (Ga. 1972).

<sup>42</sup> Non-settlor beneficiaries of a revocable trust sometimes are permissible, or less frequently mandatory, distributees of income, principal, or both during the settlor's lifetime. Because of the settlor's retention of complete ultimate control over the trust through the power to revoke or amend, however, and for the sake of simplicity, non-settlor beneficiaries of revocable trusts generally are referred to in this article as remainder beneficiaries.

<sup>43</sup> See GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 104 (2d ed. 1983); *First Nat. Bank of Cincinnati v. Tenney*, 138 N.E.2d 15 (Ohio 1956).

<sup>44</sup> See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984) (stating "[t]he owner who retains both the equitable life interest and the power to alter and revoke the beneficiary designation has used the trust form to achieve the effect of testation. Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will."). Consistent with that position, under the Restatement creditors of a remainder beneficiary of a revocable trust may not reach her interest in the trust during the settlor's lifetime. RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. b (2003). Note, though, that in a recent Colorado case, a remainder beneficiary's interest in the revocable trust of a living settlor was considered in determining the division of property of the beneficiary and the beneficiary's spouse in their divorce. *In re Marriage of Gorman*, 36 P.3d 211 (Colo. Ct. App. 2001). Shortly after *Gorman* was decided, however, it was effectively overruled legislatively. See COLO. REV. STAT. § 14-10-113(7)(b) ( ).



trust while the settlor is living.<sup>45</sup> More fundamentally, given that the settlor of a revocable trust has complete ultimate control over the trust and its assets, the right to enforce the trust, at least while the settlor has capacity, should belong only to the settlor.<sup>46</sup> For that reason, the general rule under the Uniform Trust Code (“UTC”) is that during the settlor’s lifetime, the trustee of a revocable trust owes no duties to remainder beneficiaries, who thus may not enforce the trust.<sup>47</sup>

That result is consistent with viewing revocable trusts as the functional equivalent of wills and subjecting them to the law of wills. During a testator’s lifetime, devisees under her will have no interest in her assets and thus no enforceable rights with respect to their management. That is the case even if the testator has become incapacitated. If the settlor of a revocable trust becomes incapacitated, however, the analogy to a testator and devisees with mere expectancies breaks down.

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<sup>45</sup> For one such case, holding that remainder beneficiaries lacked standing to sue the trustee of a revocable trust for breach of duty during the settlor’s lifetime, see *Hoelscher v. Sandage*, 462 N.W.2d 289 (Iowa App. 1990). In *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006), remainder beneficiaries whose interests were eliminated by the settlor amending the terms of a revocable trust challenged the validity of the amendment by alleging that the settlor lacked capacity and acted under undue influence. In upholding the lower court’s granting of the successor trustee’s motion to dismiss, the Nevada Supreme Court held that remainder beneficiaries of a revocable trust have only contingent interests that do not vest until the settlor’s death, and thus do not have standing to challenge the trust during the settlor’s life. Similarly, in *Moon v. Lesidar*, 230 S.W.3d 800 (Tex. App. 2007), a remainder beneficiary of a revocable trust was held to lack standing to sue, after the settlor’s death, a non-settlor cotrustee of the trust with respect to a sale of stock by the settlor to the cotrustee. See also *Lewis v. Star Bank, N.A.*, 630 N.E.2d 418 (Ohio App. 1993) (holding that remainder beneficiaries of a revocable trust could not sue the trustee after the settlor’s death with respect to conduct of the trustee before the settlor’s death).

<sup>46</sup> In a Florida case, a competent settlor’s revocation of her revocable trust was challenged by the trustee on the ground that the settlor was acting under undue influence. *Florida Nat. Bank v. Genova*, 460 So.2d 895 (Fla. 1984). In upholding the revocation, the Florida Supreme Court held that undue influence cannot bar a competent settlor from revoking a revocable trust. *Id.* Relying, in part, on *Genova*, a lower court in a subsequent Florida case rejected the attempt of the guardian of an incompetent settlor of Totten trust accounts to disaffirm the trusts. *Ullman v. Garcia*, 645 So.2d 168 (Fla. App. 1994). For criticism of broad dictum in *Ullman* arguably indicating that a conservator of an incompetent settlor of a revocable trust could not pursue a breach of trust claim against the trustee of a traditional revocable trust, see RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) and e (2003).

<sup>47</sup> UNIF. TRUST CODE § 603(a) (2005). See *Stanton v. Wells Fargo Bank*, 152 P.3d 115, 122 (Mont. 2007) (applying a Montana statute similar to § 603(a) of the UTC). For a discussion of whether, under the UTC, the trustee owes duties to remainder beneficiaries during the settlor’s incapacity, see *infra* notes \_\_-\_\_ and accompanying text. In *re Malasky*, 736 N.Y.S.2d 151 (2002), a case not decided under the UTC, involved a joint revocable trust the decedent and his wife had created and of which they served as cotrustees. Children of the decedent from a prior marriage were remainder beneficiaries. *Id.* at 152. Following the decedent’s death, the children objected to the surviving spouse/trustee’s accounting for the period from the creation of the trust until the decedent’s death. The court held that the children, “having no pecuniary interest in the revocable trust until decedent’s death, lack[ed] standing to object to the account...” *Id.* at 153. By contrast, a Florida court, applying New York law, held that remainder beneficiaries of a revocable trust could pursue a claim against the trustee of the trust, who was not the settlor, with respect to the administration of the trust during the settlor’s lifetime. See *Siegel v. Novak*, 920 So.2d 89 (Fla. App. 2006). Similarly, in *Cloud v. U.S. Nat’l Bank of Oregon*, 570 P.2d 350 (Or. 1977), remainder beneficiaries were able to bring a claim against the trustee of a revocable trust after the settlor’s death for disbursements that allegedly were improperly made to the settlor after she had become incapacitated, or that were made to her as a result of requests she made while under undue influence.

For example, assume that the terms of a revocable trust provide that if the settlor becomes incapacitated, the trustee shall make distributions to one or more other beneficiaries. A settlor who creates and funds such a trust is attempting to accomplish more than providing for the management of her property without the need for a guardianship, if she becomes incapacitated, and disposing of her property at death without an estate administration. Accordingly, section 603(a) of the UTC, as initially promulgated, provided that the trustee's duties are owed exclusively to the settlor only while the settlor has capacity.<sup>48</sup> Section 603(a), however, has not been well received.<sup>49</sup> As a result, in 2004 it was amended to place brackets around its language making its rule applicable only while the settlor has capacity to revoke the trust.<sup>50</sup> The accompanying comment notes that enacting jurisdictions are free to strike the incapacity limitation on the section's general rule, in which case the trustee's duties would be owed exclusively to the settlor regardless of whether the settlor had capacity to revoke the trust.<sup>51</sup> At least when the terms of the trust provide for others to be current beneficiaries of trust income or principal if the settlor becomes incapacitated, and particularly if distributions to others are mandated in that circumstance, the UTC's original approach to section 603(a) is the appropriate one. If the trustee's duties in such a case are owed exclusively to the settlor, the trustee apparently could ignore the settlor's clear intent that others be current beneficiaries of the trust, and such other beneficiaries not only would be unable to enforce the trust, they might not even know of their interests in it.<sup>52</sup>

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<sup>48</sup> See UNIF. TRUST CODE § 603(a) (2000).

<sup>49</sup> From a review of four charts collectively titled, "*Significant Differences in States' Enacted Uniform Trust Codes*," prepared as an unofficial in-house National Conference of Commissioners on Uniform State Laws (NCCUSL) document, it appears that of the first 20 jurisdictions to have enacted a version of the UTC, 12 provide that the duties of the trustee of a revocable trust are owed exclusively to the settlor even if the settlor lacks capacity (Kansas, Nebraska, Maine, Virginia, South Carolina, Oregon, North Carolina, Florida, Alabama, Ohio, Pennsylvania, and North Dakota); seven provide that the trustee's duties also are owed to other beneficiaries if the settlor lacks capacity (Wyoming, New Mexico, Utah, Tennessee, New Hampshire, Missouri, and Arkansas); and one provides that the trustee's duties are owed only to the settlor, but allows other beneficiaries to enforce the settlor's intent to benefit them (the District of Columbia). The charts may be accessed through links on a NCCUSL UTC website:

<http://utcproject.org/utc/DesktopDefault.aspx>.

<sup>50</sup> UNIF. TRUST CODE § 603(a) (2004).

<sup>51</sup> *Id.* cmt. In explanation, the comment noted not only the desire to treat revocable trusts similarly to wills, but also the issue of how to determine the settlor's capacity, or lack thereof, if the trustee's duties are owed to other beneficiaries if the settlor becomes incapacitated. That issue has been addressed by Missouri's version of the UTC, which provides, in relevant part:

1. While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

2. A settlor is presumed to have capacity for the purposes of subsection 1 of this section until either the settlor is adjudicated totally incapacitated or disabled or the trustee has received an affidavit of incapacity...

5. In this section, an "affidavit of incapacity" means a written certificate furnished by at least one licensed medical doctor that states that the settlor lacks capacity to revoke the trust.

MO. STAT. ANN. § 456.6-603 ( ).

<sup>52</sup> For further discussion of this issue, see Alan Newman, *The Ohio Trust Code and Revocable Trusts: Duties of the Trustee While the Settlor is Living*, 17 PROB. L. J. OF OHIO 103 (Jan./Feb. 2007).

Moreover, if the settlor becomes incapacitated and the trustee's duties are owed exclusively to the settlor, presumably the trustee would be accountable only to the settlor's guardian, or agent under a durable power of attorney, for a breach. If the guardian or agent recovered damages from the trustee, the recovery often should belong to the trust for ultimate distribution of any amounts remaining at the settlor's death to the trust's remainder beneficiaries. If the trustee's duties are owed exclusively to the settlor, however, arguably any such recovery would belong to the settlor to be managed by the guardian or agent during the settlor's life, with what remains at the settlor's death distributed under the terms of the settlor's will. While this issue may be of little or no consequence if the settlor's will pours over the residuary estate to the trust, settlors of revocable trusts do not always employ pour over wills, but occasionally provide for different dispositions of their probate estates and trust assets.<sup>53</sup>

If the settlor becomes incapacitated and the trustee thereafter owes duties to the trust's remainder beneficiaries as well as to the settlor, a breach by the trustee while the settlor was incapacitated would be actionable by both the settlor's conservator or agent and by the remainder beneficiaries. Less clear is whether the remainder beneficiaries could hold the trustee accountable for breaches that occurred while the now incapacitated settlor had capacity. Under the UTC, arguably they could not, as it provides that "[w]hile a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."<sup>54</sup> If no duties are owed to remainder beneficiaries while a settlor has capacity to revoke the trust, a breach of the trustee's duty that occurs while the settlor has capacity would seem to be actionable only by the settlor (or her conservator or agent). A UTC comment, however, indicates otherwise:

Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee.<sup>55</sup>

Because the comment's implicit assumption – that after the settlor has become incapacitated, remainder beneficiaries may maintain an action against the trustee for

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<sup>53</sup> Ohio's recently enacted version of the UTC addresses this issue by providing that the allocation of such a recovery between the settlor, if living, the settlor's estate, if the settlor is not living, and the revocable trust is left to the discretion of the court. OHIO REV. CODE ANN. § 5806.03(A) (West 2007). The comments to the UTC address it by noting that an action brought by the conservator or agent of an incapacitated settlor would be to have property restored to the trust. UNIF. TRUST CODE § 603 cmt. (2005). That may not always be the case, however. To illustrate, if the trustee breached its duty by not making payments on mortgage indebtedness of an incapacitated settlor on property specifically devised by the settlor's will to a non-trust beneficiary, the recovery should not belong to the trust.

<sup>54</sup> UNIF. TRUST CODE § 603(a) (2005). As discussed in note \_\_, *supra*, § 603(a) was amended in 2004 to place brackets around the language limiting its general rule to settlors who have capacity to revoke their trusts.

<sup>55</sup> UNIF. TRUST CODE § 603 cmt. (2005).

breaches that occurred while the settlor had capacity – arguably is inconsistent with the UTC itself, a court might reject its position.<sup>56</sup>

**B. Revocation or Amendment.** With the proliferation in the use of revocable trusts in recent years have come many cases in which the issue was whether the settlor had effectively exercised her reserved power to revoke or amend.<sup>57</sup> Generally, wills law is not applied in resolving such issues.

Two recent Utah Supreme Court decisions illustrate the extent to which some courts will strictly apply trust law to the issue of whether a revocable trust, used as a will substitute, has been revoked or amended. In *Banks v. Means*,<sup>58</sup> the trust instrument, which named the settlor's children as joint beneficiaries following her death,<sup>59</sup> provided that the settlor "reserves the right to amend, modify or revoke this Trust in whole or in part...On the revocation of this instrument in its entirety, the Trustee shall deliver to the [settlor]...all of the Trust property."<sup>60</sup> The instrument further provided that: "The interests of the beneficiaries are presently vested subject to divestment which shall continue until this Trust is revoked or terminated other than by death."<sup>61</sup> Years after creating the trust, the settlor executed an amendment to its terms that provided for the trust assets to be distributed to her sister on her death.<sup>62</sup> If the settlor's sister predeceased her, the trust assets were to be distributed to the settlor's children.<sup>63</sup>

When the settlor died, her children's challenge to the validity of the amendment was upheld.<sup>64</sup> The court acknowledged that the settlor had reserved the power to revoke or amend the trust, but found that not only had she created vested interests in her children, she had specifically provided that while those interests could be divested, they were to continue until the trust was revoked or terminated.<sup>65</sup> Thus, the court concluded that "a complete revocation was required to divest the beneficiaries of their vested

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<sup>56</sup> See *American Ins. Co. v. Cuyahoga Community College District*, 774 N.E.2d 802 (Ohio Ct. Cl. 2002).

<sup>57</sup> See generally, RESTATEMENT (THIRD) OF TRUSTS § 63 cmts. h and i and rptr. notes thereto (2003) (characterizing the case law in this area as "somewhat unclear and troublesome"); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. e (2003); Annotation, Exercise by Will of Trustor's Reserved Power to Revoke or Modify Inter Vivos Trust, 81 A.L.R.3d 959 (1977). Note that action taken by a settlor to revoke a revocable trust in accordance with the terms of the trust will be effective to do so even if title to trust assets is not formally transferred back to the settlor before her death. See *State Bank of Parsons v. First Nat. Bank in Wichita*, 504 P.2d 156 (Kan. 1972).

<sup>58</sup> 52 P.3d 1190 (Utah 2002).

<sup>59</sup> *Id.* at 1191.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* In an earlier decision, *In re Estate of Groesbeck*, 935 P.2d 1255 (Utah 1997), Utah's Supreme Court had held that "a revocable trust can be created, without being deemed illusory, as long as title to the property passes to the trustee and vested interests are created in the beneficiaries, even if these interests are subject to divestiture." *Banks*, at 1193. In *Banks*, the settlor's sister unsuccessfully argued that the provision in the trust instrument specifying that vested interests were created in the children was intended to establish that the trust was not illusory, not to restrict the settlor's ability to divest the children's interests. *Id.*

<sup>62</sup> *Id.* at 1192.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1191.

<sup>65</sup> *Id.* at 1193-94.

interests.”<sup>66</sup> Because the amendment did not revoke the trust, it was ineffective to affect the children’s interests. The rationale for the court’s holding emphasizes the traditional distinction between revocable trusts, under which remainder beneficiaries have vested interests (though subject to divestment by exercise of the settlor’s power of revocation) during the settlor’s lifetime, and wills, under which devisees have expectancies rather than interests in the testator’s property during her lifetime:

Once the settlor has created the trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument. Thus, a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust. Furthermore, the creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries. These interests cannot be taken from [the beneficiaries] except in accordance with a provision of the trust instrument.<sup>67</sup>

The Utah Supreme Court is not alone in limiting the ability of settlors of revocable trusts to revoke or modify them on the ground that remainder beneficiaries of such trusts have interests defined by, and subject to change only in accordance with, the terms of the trust instrument.<sup>68</sup> Such decisions, while supported by traditional trust law doctrine, not only are intention defeating, but also exalt form over substance in ignoring the practical reality that settlors of revocable trusts commonly use them as will substitutes and consider the trust assets as their own, without limitation. For such reasons, the UTC relaxes considerably the rules followed in some jurisdictions under which, if the terms of the trust prescribe a method for revoking or amending it, the settlor may do so only by employing the method so specified.<sup>69</sup>

Under the UTC,<sup>70</sup> a revocable trust may be revoked or amended by “any...method manifesting clear and convincing evidence of the settlor’s intent,”<sup>71</sup> unless the terms of the trust not only specify a method, but also expressly make it exclusive.<sup>72</sup> Further, even

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<sup>66</sup> *Id.* at 1193.

<sup>67</sup> *Id.* at 1192-93 (citations and quotation marks omitted). The court’s decision in *Banks* created significant concern among Utah estate planners. See Charles M. Bennett, *Can You Amend that Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary*, 17 UTAH BAR J. 32 (Aug./Sept. 2004) (speculating that “there may be tens of thousands of trusts extant in Utah with language identical to that found in *Banks*”). A year after *Banks*, the Utah Supreme Court, while not overruling *Banks*, limited its effect significantly. See *In the Matter of the Estate of Flake*, 71 P.3d 589 (Utah 2003) and its discussion in Mr. Bennett’s Utah Bar Journal article cited above. See also *Hoggan v. Hoggan*, 169 P.3d 750 (Utah 2007).

<sup>68</sup> See, e.g., *In re Estate and Trust of Pilafas*, 836 P.2d 420, 423 (Ariz. App. 1992) (stating that “[e]ven a revocable trust vests the trust beneficiary with a legal right to enforce the terms of the trust... The terms of the trust also limit the powers of the settlor and trustee over the trust corpus, even when the settlor declares himself trustee...”).

<sup>69</sup> See, e.g., *In re Reid*, 46 P.3d 188 (Okla. App. 2002); *Salem United Methodist Church v. Bottorff*, 138 S.W.3d 788 (Mo. 2004). If a trust may be revoked or amended, but its terms do not provide a method for doing so, the settlor may revoke or amend by any method that sufficiently evidences the settlor’s intent. See RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i (1959).

<sup>70</sup> The new Restatement’s rules are similar to the UTC’s. See RESTATEMENT (THIRD) OF TRUSTS § 63 cmts. h & i (2003).

<sup>71</sup> UNIF. TRUST CODE § 603(c)(2)(B) (2005).

<sup>72</sup> UNIF. TRUST CODE § 603(c)(2) (2005).

if the trust terms expressly provide an exclusive method of revocation or amendment, substantial, rather than strict, compliance will be sufficient.<sup>73</sup> Specifically authorized (unless the terms of the trust expressly provide an exclusive alternative method) is a revocation or amendment by a later will or codicil, but only if it “expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust.”<sup>74</sup>

The UTC’s trust revocation and amendment rules, while clearly intent furthering, do not track those applicable to wills. For example, while the UTC recognizes the right of a settlor to specify an exclusive method of revocation or amendment, the methods of revoking or revising a will are set by statute. Further, the UTC is silent on the effect, if any, of the inability to find the original trust instrument on the death of a settlor of a revocable trust. In most jurisdictions, if a testator had possession of the original will and it cannot be located at her death, a presumption arises that the testator destroyed it intending to revoke it.<sup>75</sup> Application of that presumption to revocable trusts would be problematic. Because a will generally has no legal effect until the testator’s death, it can be presumed to have been revoked when it was in the testator’s possession and cannot be located at her death without affecting property rights during the testator’s lifetime. By contrast, if the original instrument creating a funded revocable trust was in the settlor’s possession and cannot be located at her death, treating the trust as having been revoked would raise such questions as when it was revoked and what effect its revocation had on transactions the trustee had engaged in with respect to its property.<sup>76</sup>

Another revocation issue that differs for wills and revocable trusts is the effect of a divorce on provisions in the instrument in favor of the testator’s or settlor’s spouse.

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<sup>73</sup> UNIF. TRUST CODE § 603(c)(1) (2005).

<sup>74</sup> UNIF. TRUST CODE § 603(c)(2)(A) (2005). Thus, a residuary clause in a will that disposes of the estate differently than does the trust instrument will not effect a revocation or amendment of the terms of the trust. *See* UNIF. TRUST CODE § 603 cmt. (2005). Many non-UTC cases have addressed the issue of whether a revocable trust can be revoked or amended by will or codicil. The decisions typically turn on such issues as whether the trust instrument specified the means by which the settlor could revoke or amend; if so, whether the specified means was followed; or whether the subsequent will or codicil simply made a general disposition of the decedent’s estate without making a specific reference to the trust or its assets. *See, e.g.,* In re Last Will and Testament of Tamplin, 48 P.3d 481 (Alaska 2002) (not allowed); In re Estate of Furst, 55 P.3d 664 (Wash. App. 2002) (not allowed); One Valley Bank, Nat. Ass’n v. Hunt 516 S.E.2d 516 (W. Va. 1999) (not allowed); In re Estate of Davis, 671 NE 2d 1302 (Ohio Ct. App. 1996) (allowed); Estate of Sanders, 929 P.2d 153 (Kan. 1996) (not allowed); In re Estate of Lowry, 418 N.E.2d 10 (Ill. App. 1981) (allowed); Conn Gen’l Life Ins Co, 262 N.W.2d 403 (Minn. 1977) (not allowed); Estate of Kovalyshyn, 343 A.2d 852 (N.F. 1975) (not allowed). *See also* RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. h (2003); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt e (2003); John P. Ludington, Annotation, *Exercise by Will of Trustor’s Reserved Power to Revoke or Modify Inter Vivos Trust*, 81 A.L.R. 3d 959 (1977).

<sup>75</sup> *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j. (1999). For a statute reversing that common law presumption, see OHIO REV. CODE ANN. § 2107.26 (West 2007).

<sup>76</sup> For a case in which the argument was made that the lost will presumption should be applied to a revocable trust, see In re Estate and Trust of Pilafas, 836 P.2d 420 (Ariz. App. 1992). In *Pilafas*, the court held that because the settlor had reserved the right to revoke the trust by a written instrument delivered to the trustee, he could not revoke it by physical act. *Id.* at 425. Consequently, the court did not decide whether the lost will presumption could be applied to a revocable trust. *Id.*

Most, if not all, jurisdictions have statutes under which provisions in a will for a spouse are revoked by a divorce or annulment of the marriage.<sup>77</sup> Such statutes are based on the assumption that a testator most likely would not intend for her former spouse to take under her will. If she did not revoke or revise her will to delete provisions in favor of her former spouse, the assumption is that the reason she did not do was oversight, inadvertence, or procrastination. Consistent with that rationale being equally applicable to revocable trusts, at least two courts have applied such wills statutes to revocable trusts.<sup>78</sup> Neither court, however, broadly held that the jurisdiction's revocation-by-divorce wills statute applied to revocable trusts.<sup>79</sup> While the preferable approach clearly is for legislation specifically applying to revocable trusts (and other will substitutes),<sup>80</sup> under the Restatement wills revocation-by-divorce statutes ordinarily should be applied to revocable trusts.<sup>81</sup>

**C. Lapse; Antilapse Statutes.** In the absence of a statute to the contrary, if a will devisee predeceases the testator, the gift lapses (i.e., fails).<sup>82</sup> Thus, unless the will provides otherwise, the devisee's gift is conditioned on the devisee surviving the testator. If the jurisdiction's antilapse statute applies, generally the gift will pass to the predeceased devisee's descendants, by representation.<sup>83</sup> By contrast, generally, at common law, a condition of survivorship is not implied on a gift of a future interest in trust.<sup>84</sup> Rather, upon creation of a trust, its remainder beneficiaries receive interests that, unless the instrument provides otherwise,<sup>85</sup> pass as a part of the remainder beneficiary's estate to her intestate heirs or will devisees.<sup>86</sup> When a revocable trust is used as a will substitute and a remainder beneficiary dies before the settlor, the question is thus raised

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<sup>77</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1, rptr. notes (1999).

<sup>78</sup> *Miller v. First Nat. Bank & Trust Co.*, 637 P.2d 75 (Okla.1981); *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985).

<sup>79</sup> In *Miller*, the court found that a pour over provision in favor of the trust in the decedent's will incorporated the trust by reference into the will. *Miller*, at 77-78. In *Clymer*, the court relied on the fact that the trust was unfunded (other than by being designated as the beneficiary of an insurance policy on the settlor's life and as the beneficiary of the settlor's retirement plan interest) in finding that the legislative intent with respect to the revocation-by-divorce wills statute was equally applicable to the trust. *Clymer*, at 1093. See generally, Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83 (2004).

<sup>80</sup> See, e.g., UNIF. PROBATE CODE § 2-804 (1990).

<sup>81</sup> RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e(1) (2003).

<sup>82</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. a (1999).

<sup>83</sup> See, e.g., UNIF. PROBATE CODE § 2-603 (1990).

<sup>84</sup> See JESSE DUKEMINIER, STANLEY M. JOHANSON, et. al., WILLS, TRUSTS, AND ESTATES, at 638 (7<sup>th</sup> ed. 2005).

<sup>85</sup> In *Burkett v. Capovilla*, 5 Cal.Rptr.3d 817 (Cal. App. 2003), a revocable trust instrument, on a form prepared by a paralegal service, provided that upon the settlor's death, certain trust assets were to be distributed to the settlor's daughter. *Id.* at 818-19. A subsequent provision in the instrument provided that: "For all gifts under this instrument, the beneficiary must survive for sixty (60) days before entitlement to such gifts." *Id.* at 819. Applying a California statute under which the same rules of interpretation are applied to wills and trusts, the court rejected the argument that because trust beneficiaries acquire an interest in the trust immediately on its creation, the 60 day period should run from the date the trust was created. *Id.* at 820-21. Rather, the court construed the survivorship condition to require that the daughter survive the settlor by 60 days. *Id.* at 821.

<sup>86</sup> See, e.g., *First Nat'l Bank v. Anthony*, 557 A.2d 957 (Me.1989).

whether the lapse doctrine and antilapse statute from the law of wills should apply, or whether the traditional, common law of future interests should apply.

The traditional approach is to not apply the doctrine of lapse and antilapse statutes to transfers by revocable trust.<sup>87</sup> Its rationale is that a will does not create property interests in named devisees until the testator's death (when the will is said to "speak").<sup>88</sup> By contrast, at common law a revocable trust creates property interests in remainder beneficiaries when the trust is created. If a will devisee does not survive the testator, the devisee never receives an interest in the testator's property and the devise lapses. By contrast, if a remainder beneficiary of a trust does not survive the settlor, the remainder beneficiary owned an interest in the trust when she died, and, unless the instrument provides otherwise, that interest thus passes as a part of her estate.<sup>89</sup>

Section 2-707 of the UPC reverses the no-survivorship common law rule of future interests by requiring, again unless the instrument provides otherwise, remainder beneficiaries to survive to the date of distribution.<sup>90</sup> If the remainder beneficiary does not do so, an antilapse inspired gift to the remainder beneficiary's descendants who do so survive is substituted.<sup>91</sup> If the remainder beneficiary does not have descendants, the remainder fails and passes to the settlor's heirs or devisees.<sup>92</sup> Thus, for example, if Parent created a revocable trust for Parent for life, remainder to Child, and Child died before Parent, under the UPC the trust assets would pass to Child's descendants (or to Parent's heirs or devisees, if no descendants of Child's survived Parent), unless the instrument provides otherwise. By contrast, under the common law of future interests, the remainder instead would have passed through Child's estate to her will devisees or intestate heirs.

Section 2-707 of the UPC has been controversial.<sup>93</sup> To date, it or a modified version of it, has been adopted in at least eleven jurisdictions.<sup>94</sup> While there is some

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<sup>87</sup> See, e.g., *First Nat. Bank of Cincinnati v. Tenney*, 138 N.E.2d 15 (Ohio 1956).

<sup>88</sup> *Id.*

<sup>89</sup> See generally, Rochelle A. Smith, *Why Limit a Good Thing? A Proposal to Apply California's Antilapse Statute to Revocable Living Trusts*, 43 HASTINGS L. J. 1391, 1408-09 (1992).

<sup>90</sup> UNIF. PROBATE CODE § 2-707(b) (1990). See generally, Edward C. Halbach and Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALBANY L. REV. 1091 (1992). Note that § 2-707 of the UPC applies to irrevocable as well as revocable trusts.

<sup>91</sup> UNIF. PROBATE CODE § 2-707(b)(1) (1990). Generally, antilapse statutes apply only if the predeceased devisee was related to the testator, with the precise relationship required determined by the applicable antilapse statute. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. c (1999). Thus, for example, the UPC's antilapse statute does not apply unless the predeceased devisee was a grandparent, descendant of a grandparent, or a stepchild of the testator (or of a donor of a power of appointment exercised by the testator's will). UNIF. PROBATE CODE § 2-603(b) (1990). By contrast the UPC's substitute gift to the descendants of a deceased remainder beneficiary of an interest in trust is not dependent on the remainder beneficiary having been related to the settlor. See UNIF. PROBATE CODE § 2-707(b) (1990).

<sup>92</sup> UNIF. PROBATE CODE § 2-707(d) (1990).

<sup>93</sup> See, e.g., Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995). For a response by one of the architects of § 2-707, see Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996).



support for applying wills antilapse statutes to revocable trusts in the absence of a statute like section 2-707 of the UPC,<sup>95</sup> it appears that courts from only two jurisdictions have done so,<sup>96</sup> and in one of them, the legislature responded with a statute that effectively overruled the court's decision.<sup>97</sup> By contrast, there are a number of cases applying the common law, no-implied-condition-of-survivorship rule to revocable trusts when a remainder beneficiary predeceases the settlor.<sup>98</sup>

In a jurisdiction that has enacted the UTC (but not section 2-707 of the UPC), the argument that the wills doctrine of lapse and the antilapse statute should apply to revocable trusts is stronger.<sup>99</sup> As discussed above, the general rule under the UTC is that during the lifetime of the settlor of a revocable trust, the trustee owes duties exclusively to the settlor.<sup>100</sup> If a remainder beneficiary of a revocable trust is owed no duties during the lifetime of the settlor, the remainder beneficiary's interest with respect to the trust more closely resembles an expectancy than an interest in property. If a remainder beneficiary's status with respect to the trust during the settlor's lifetime is in the nature of a holder of an expectancy, the argument that her gift should be conditioned on surviving the settlor, as it would have been if the settlor had used a will instead of a revocable trust to make the gift, and that the antilapse statute should apply, is stronger. While such an

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<sup>94</sup> See ALASKA STAT. § 13.12.707 ( ); ARIZ. REV. STAT. § 14-2707 ( ); COLO. REV. STAT. § 15-11-707 ( ); HA. REV. STAT. § 560: 2-707 ( ); IOWA CODE § 633 A.4701 ( ); MICH. § 700.2713 ( ); MONT. CODE. § 72-2-717 ( ); N.M. STAT. § 45-2-707 ( ); N.D. STAT. § 30.1-09.1-07 ( ); S.D. STAT. § 29A-2-707 ( ); and UTAH CODE § 75-2-707 ( ).

<sup>95</sup> See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e (2003); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. p (1999); RESTATEMENT SECOND, PROPERTY (DONATIVE TRANSFERS) § 27.1 cmt. e, and § 27.2 cmt. f ( ).

<sup>96</sup> Dollar Savings & Trust Co. v. Turner, 529 N.E.2d 1261 (Ohio 1988); Estate of Button, 490 P.2d 731 (Wash. 1971).

<sup>97</sup> See OHIO REV. CODE ANN. § 2107.01 (West 2007).

<sup>98</sup> See First Nat'l Bank v. Anthony, 557 A.2d 957 (Me.1989); Estate of Capocy, 430 N.E.2d 1131 (Ill. App. Ct. 1981); Hinds v. McNair, 413 N.E.2d 586 (Ind.Ct.App.1980); Detroit Bank & Tr. Co. v. Grout, 289 N.W.2d 898 (Mich.Ct.App.1980); First Nat. Bank of Cincinnati v. Tenney, 138 N.E.2d 15 (Ohio 1956). *Tenney* illustrates the traditional approach, along with the difference in result it yields in cases involving gifts by will and by revocable trust, and the traditional rationale for such differing results. There, the decedent's will and revocable trust instrument named her sister as the beneficiary of her estate and revocable trust upon her death. *Tenney*, at 16. Neither provided for the contingency of her sister predeceasing her, which in fact occurred. *Id.* The probate court held that the trust assets passed through the sister's estate to her devisee. *Id.* at 16. By contrast, the devise to the sister under the decedent's will lapsed, causing the estate assets to pass to the decedent's intestate heirs. *Id.* The appellate court affirmed, explaining:

The distinction between a remainder such as the one involved here and one created by will is obvious. A will speaks from the date of death of the testator...But a trust speaks from the date of its creation...

From the very nature of an inter vivos trust it must so speak. In order for a trust to be a trust, the legal title of the res must immediately pass to the trustee, and the beneficial or equitable interest to the beneficiaries. It has been said many times that the radical idea of a trust is the coexistence of the legal title and the equitable interest, and that perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time.

*Id.* at 18-19.

<sup>99</sup> See UNIF. TRUST CODE § 112 (2005) and its discussion in text accompanying notes \_\_ - \_\_, *infra*.

<sup>100</sup> See *supra* notes \_\_-\_\_ and accompanying text.

argument would be more difficult to make in UTC jurisdictions in which the trustee owes duties to remainder beneficiaries if the settlor becomes incapacitated, a number of jurisdictions that have enacted versions of the UTC limit the trustee's duties during the lifetime of the settlor to the settlor regardless of whether she has capacity.<sup>101</sup>

**D. Ademption.** Generally, at common law, if the subject of a specific devise by will is not in the testator's estate at her death, the gift adeems (i.e., fails), and the specific devisee receives nothing with respect to the gift.<sup>102</sup> Curiously, there appears to be very little law that addresses the issue of whether the ademption doctrine applies to the equivalent of a specific devise to a remainder beneficiary of a revocable trust.<sup>103</sup> In *Wasserman v. Cohen*,<sup>104</sup> the settlor's revocable trust instrument provided for a specifically described apartment building to be distributed to a named individual.<sup>105</sup> Prior to her death, however, the settlor sold the building.<sup>106</sup> In applying the ademption doctrine to the revocable trust gift, the court focused on the trust instrument having been executed as a part of a comprehensive estate plan (which included a pour over will) and cited other Massachusetts cases in which wills law had been applied to revocable trusts.<sup>107</sup>

The court's decision in *Wasserman* has been well received,<sup>108</sup> but it may be particularly difficult for courts in jurisdictions that have enacted the UPC to follow it. Part 6 of Article II of the UPC is entitled "Rules of Construction Applicable Only to Wills," while Part 7 of Article II is entitled "Rules of Construction Applicable to Wills and Other Governing Instruments."<sup>109</sup> Ademption and its exceptions are included in Part 6.<sup>110</sup> Thus, the argument that the legislature in a UPC jurisdiction intended ademption to apply only to wills is a strong one.

Furthermore, applying the ademption doctrine to revocable trusts could raise issues that do not arise in its traditional wills context. If the settlor is serving as the trustee of her revocable trust and, as such, sells or gives away the subject of a specific gift, presumably the remainder beneficiary to whom the specific gift was to be made would not have a claim. In such a case, the disposition would have been made by the settlor, thus presumably indicating the settlor's intent that the beneficiary's gift fail. By contrast, if a third party were serving as trustee and disposed of the property (and there was not

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<sup>101</sup> See *supra* note \_\_\_\_.

<sup>102</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 5.2 (1999). In some jurisdictions, ademption is not applied if the evidence establishes that doing so would be inconsistent with the testator's intent. *Id.* cmt. b.

<sup>103</sup> For a recent California case applying the doctrine to a gift under a revocable trust instrument, see *Brown v. Labow*, 157 Cal. App. 795 (2007).

<sup>104</sup> 606 N.E.2d 901 (Mass. 1993).

<sup>105</sup> *Id.* at 902.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 903-04.

<sup>108</sup> See RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 5.2 cmt. i, rptr. notes (1999), and § 7.2 (2003); UNIF. TRUST CODE § 112 cmt. (2005); Brian Layman, *The Traditional Wills Doctrine of Ademption and Its Exceptions Should be Extended to Revocable Trusts*, 13 PROB. L. J. OF OHIO 119 (July/Aug. 2003).

<sup>109</sup> UNIF. PROBATE CODE Parts 6 and 7 (1990).

<sup>110</sup> See UNIF. PROBATE CODE § 2-606 (1990).

evidence that the settlor had consented to or ratified the transaction), ademption arguably would not apply and the beneficiary of the specific gift would be entitled to receive the value of the property at the time of its disposition.<sup>111</sup> Moreover, in a jurisdiction in which the trustee's duties are not owed exclusively to the settlor during the settlor's lifetime, the remainder beneficiary might have a breach of duty claim against the trustee.<sup>112</sup> While the remainder beneficiary in such a case should be entitled to relief, she should not be entitled to receive both the value of the property disposed of under an ademption exception, and an award from the trustee.

#### IV. Protection of the Family

Jurisdictions employ a variety of means for protecting members of a decedent's family from being disinherited by a decedent's will. The extent to which such protections apply to property in a trust that was revocable by the decedent immediately prior to death varies considerably.

**A. Elective Share.** The historic, common law protection a surviving spouse had against disinheritance was dower or curtesy, under which a widow (dower) or widower (curtesy) received a life estate in part or all of the deceased spouse's lands.<sup>113</sup> Those rights, which attached during the marriage, encumbered titles, interfered with the alienability of land, and, in more recent times, often provided inadequate protection because all or a significant portion of the decedent's wealth was personal property to which dower and curtesy did not apply.<sup>114</sup> As a result, during the twentieth century most states abolished dower and curtesy<sup>115</sup> and replaced them with elective share statutes.<sup>116</sup>

Traditional elective share statutes typically apply only to the deceased spouse's probate estate, thus excluding nonprobate property passing by will substitute from the surviving spouse's elective share.<sup>117</sup> They operate to provide the surviving spouse with outright ownership of a specified fraction, typically one-third, of the decedent's real and

<sup>111</sup> See, e.g., UNIF. PROBATE CODE § 2-606(A)(6) (1990).

<sup>112</sup> See *supra* notes \_\_-\_\_ and accompanying text.

<sup>113</sup> See 1 AMERICAN LAW OF PROPERTY §§ 5.1 – 5.76 (Casner ed. 1952).

<sup>114</sup> See W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 61 (1960).

<sup>115</sup> See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 34.1, Statutory Note (1986).

<sup>116</sup> All noncommunity-property states except Georgia have spousal elective-share statutes. Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate, published in 1994 by The American College of Trust and Estate Counsel (ACTEC), 3415 South Sepulveda Blvd., Suite 460, Los Angeles, CA 90034. Many commentators have argued that elective share statutes are unneeded. See, e.g., Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose At My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L. J. 737 (2006); Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 INST. ON EST. PLAN. P 900 (1998); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 140-48 (1994); Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). In community-property states, an elective share is not necessary because the surviving spouse has a vested half interest in the couple's community property from the time of its acquisition, without regard to how title to such property is held. W. S. MCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 11.4 (1982).

<sup>117</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt. i (2003).

personal property.<sup>118</sup> The UPC,<sup>119</sup> and some non-UPC elective share statutes,<sup>120</sup> subject a decedent's revocable trust (and many other nonprobate) assets to the surviving spouse's elective share.

Other jurisdictions' elective share statutes continue to provide that the surviving spouse's elective share applies to the decedent's probate estate.<sup>121</sup> In jurisdictions with such statutes, much litigation has resulted over surviving spouses' claims that their elective shares nevertheless apply to assets in the deceased spouse's revocable trust, with mixed results.<sup>122</sup> While the trend in the case law in jurisdictions with such narrowly drawn elective share statutes appears to be to allow the surviving spouse's claim to reach the deceased spouse's revocable trust,<sup>123</sup> cases in some jurisdictions have held to the contrary.<sup>124</sup>

While it is arguable whether elective share statutes are needed,<sup>125</sup> in jurisdictions that choose to have them, clearly they should be applicable to decedents' revocable trusts. Otherwise, the policy underlying such statutes – implementing the partnership theory of marriage, providing support for the surviving spouse, or both<sup>126</sup> – is easily avoided by using a revocable trust rather than a will to dispose of property at death.<sup>127</sup>

**B. Pretermitted Heirs.** Many states protect a surviving spouse whose deceased spouse's will was executed prior to the marriage from inadvertent disinheritance by giving the surviving spouse a share of the decedent's estate even though he or she is not provided for in the will.<sup>128</sup> Similar statutes in most jurisdictions protect after born or adopted children,

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<sup>118</sup> *Id.* cmt. d.

<sup>119</sup> See UNIF. PROBATE CODE §§ 2-203 and 2-205(1)(i) (1990).

<sup>120</sup> See, e.g., FLA. STAT. ANN. § 732.2035(4) ( ); N.Y. EST. TR. LAWS § 5-1.1A(b)(1)(F) ( ).

<sup>121</sup> See, e.g., OHIO REV. CODE ANN. 2106.01 (West 2007); CONN. STAT. ANN. § 45a-436(a) ( ).

<sup>122</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt. j, rprr. notes (2003).

<sup>123</sup> See, e.g. Schoukroun v. Karsenty, 937 A.2d 262 (Md. App. 2007); Sieh v. Sieh, 713 N.W. 2d 194 (Iowa 2006) (predating the enactment of legislation to allow the elective share to reach revocable trust assets, see IOWA STAT. ANN. § 633.238 ( )); Seifert v. Southern Nat'l Bank, 409 S.E.2d 337 (S.C. 1991); Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984).

<sup>124</sup> See, e.g., Dumas v. Estate of Dumas, 627 N.E.2d 978 (Ohio 1994); Cherniack v. Home Nat'l Bank & Tr. Co., 198 A.2d 58 (Conn. 1964). Efforts in two such jurisdictions, Oregon and Ohio, to reform their elective share statutes to, among other things, allow a surviving spouse's elective share claim to reach a deceased spouse's revocable trust assets have, so far, been unsuccessful. See Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, \_\_ WILLAMETTE L. REV. \_\_ ( ); James R. Bright & Jeffrey L. Weiler, *Ohio Spouse's Right of Election and Augmented Estate*, 13 OHIO PROB. L.J. 87 (2003).

<sup>125</sup> See *supra* note \_\_ (114).

<sup>126</sup> See UNIF. PROBATE CODE Part 2, gen. cmt. (1990).

<sup>127</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt. i (2003); RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d (2003).

<sup>128</sup> See, e.g., UNIF. PROBATE CODE § 2-301 (1990). Such statutes protect the surviving spouse only against inadvertent disinheritance because they do not apply if the decedent's will expressed an intent not to provide for the surviving spouse. See, e.g., *id.* § 2-301(a). They are based on the presumption that a decedent with a premarital will would have intended to provide for the surviving spouse. See, e.g., *id.* § 2-301 cmt. While the original UPC omitted spouse statute gives the surviving spouse an intestate share of the decedent's estate, the revised UPC provision limits the spouse to an intestate share of the portion of the deceased spouse's estate that is not devised to descendants of the decedent from an earlier relationship. Cf.

and sometimes other descendants, from inadvertent disinheritance by will by providing for them to receive a share of the decedent's estate regardless of the terms of the decedent's will.<sup>129</sup> The question raised is whether those protections also should apply to property in a decedent's revocable trust that is to be distributed to others under the terms of the trust.

Although an important policy of the UPC is to unify the law applicable to probate and nonprobate transfers,<sup>130</sup> both its pretermitted spouse and pretermitted child statutes apply only to property passing by will.<sup>131</sup> Similarly, non-UPC statutes addressing pretermitted spouses and other heirs generally apply only to property passing by will.<sup>132</sup> Because will substitutes such as life insurance policies, individual retirement accounts, other payable on death contractual arrangements, and joint tenancies typically apply to single assets, the UPC's approach of not subjecting them to claims of pretermitted heirs is a reasonable one.<sup>133</sup> With respect to revocable trusts that routinely are used as will substitutes to dispose of a decedent's residual assets without a probate administration, however, it is difficult to defend the implicit rationale for the UPC's pretermitted heir statutes that a decedent's failure to revise her testamentary plan after marriage, or the birth or adoption of a child, was inadvertent, but a failure to revise her revocable trust plan was not.<sup>134</sup> Nevertheless, the few cases that have addressed the issue have held that wills pretermitted heir statutes do not apply to revocable trusts.<sup>135</sup>

While not applying a pretermitted spouse statute to a deceased spouse's revocable trust presumably will most often disadvantage the surviving spouse, it may work to her benefit. In a recent Nevada case, a settlor of a revocable trust, who also had a pour over will, amended the terms of the trust to provide his former wife, who was living with and caring

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UNIF. PROBATE CODE § 2-301(a) (1990) *with* UNIF. PROBATE CODE § 2-301(a) (1969). The rationale for the revision is that to the extent the premarital will devised the decedent's estate to descendants from an earlier relationship, the failure to revise the will after the marriage to provide for the surviving spouse was not inadvertent.

<sup>129</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.6(a) (2003). Some such statutes apply to children living when the will is executed, as well as those born or adopted after its execution. See, e.g., N.H. STAT. ANN. § 551:10 ( ). Some pretermitted heir statutes protect a child of a testator who was omitted from the will because the testator believed the child was dead. See, e.g., OHIO REV. CODE ANN. § 2107.34 (West 2007).

<sup>130</sup> See *supra* note \_\_ (4).

<sup>131</sup> See UNIF. PROBATE CODE §§ 2-301 and 2-302 (1990). The comments to these sections do not address the applicability of such protections to revocable trusts and other will substitutes.

<sup>132</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 9.5 and 9.6 (2003). At least one jurisdiction's pretermitted spouse and other heirs statutes expressly apply to revocable trusts. See CAL. PROB. CODE §§ 21601 and 21620-21623. ( ). See also MO. STAT. ANN. § 461.059 ( ).

<sup>133</sup> See Grayson M. P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOKLYN L. REV. 1123, 1179-80 (1993).

<sup>134</sup> The new Restatement of Trusts acknowledges that there may be good reasons for not generally applying a pretermitted heirs statute to nonprobate transfers, but asserts that such statutes should be applicable to revocable trusts. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e, rppt. notes (2003). That is the case under California's omitted spouse statute, CAL. PROB. CODE §§ 21601, 21610 ( ), and under Iowa's pretermitted child statute, IOWA CODE ANN. § 633A.3106 ( ).

<sup>135</sup> See, e.g., *Kidwell v. Rhew*, \_\_\_ S.W.3d \_\_\_ (Ark. 2007); *Robbins v. Johnson*, 780 A.2d 1282 (N.H. 2001); *Matter of Estate of Cayo*, 342 N.W.2d 785 (Wis. App. 1983); *Estate of Allen*, 16 Cal. Rptr.2d 352 (1993) (Totten trust account).

for him, a life estate in his condominium.<sup>136</sup> They remarried shortly thereafter, and the settlor died less than a year later.<sup>137</sup> Nevada's pretermitted spouse statute did not apply if the decedent's will provided for the surviving spouse.<sup>138</sup> The decedent's son argued, unsuccessfully, that the trust amendment providing the surviving spouse with a life estate in the condominium constituted a provision for the spouse under the decedent's will so as to bar application of the pretermitted spouse statute.<sup>139</sup> According to the court:

We are cognizant of the fact that modern estate planning regularly utilizes revocable inter vivos trusts with pour-over wills. This approach to estate planning usually results in amendments, if any, being made to the revocable trust and not the pour-over will. Given the clear and unambiguous language of [the pretermitted spouse statute], we caution that a testator must modify his or her will in order to avoid the consequences resulting from the unintentional omission of a surviving spouse pursuant to [the pretermitted spouse statute].<sup>140</sup>

## V. The Rights of Creditors of a Decedent

With limited exceptions, creditors of a decedent have a prior claim on the decedent's assets than do beneficiaries.<sup>141</sup> Because the settlor of a revocable trust has similar control over, and access to, trust assets as does the owner of property that will pass by will or intestate succession, in most jurisdictions revocable trust assets also are subject to claims of the deceased settlor's creditors.<sup>142</sup>

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<sup>136</sup> *In re Estate of Prestie*, 138 P.3d 520, 521-22 (Nev. 2006).

<sup>137</sup> *Id.* at 522.

<sup>138</sup> *Id.* at 523.

<sup>139</sup> *Id.* at 523-24.

<sup>140</sup> *Id.* at 524. Similarly, a recent Oklahoma case held that a disinheritance provision in an amendment to a revocable trust instrument did not bar a child's claim for a pretermitted heir's share under a statute requiring intent to disinherit to be evident from the face of the will. *See In re Estate of Richardson*, 50 P.3d 584 (Okla. App. 2002). Unlike the trust instrument, the amendment was not in existence when the will was executed and thus was not incorporated by reference into the will. *Id.* at 587-88.

<sup>141</sup> In most states, statutes provide limited rights for specified family members of a decedent that have priority over the rights of a decedent's unsecured creditors. *See, e.g.*, UNIF. PROBATE CODE §§ 2-402 (homestead), 2-403 (exempt property), and 2-404 (family allowance) (1990).

<sup>142</sup> *See, e.g.*, UNIF. PROBATE CODE § 6-102 (1990); UNIF. TRUST CODE § 505(a)(3) (2005); RESTATEMENT (THIRD) OF TRUSTS § 25(2) cmt. e (2003). As noted by the Restatement, this rule "is based on the sound public policy of basing the rights of creditors on the substance rather than the form of the debtor's property rights." *Id.* Not all states agree. *See, e.g.*, *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939). (Although Ohio recently enacted a version of the UTC, it did not enact § 505(a)(3), or codify the result from *Schofield*, thus leaving *Schofield* as the law in Ohio unless and until it is changed by subsequent legislation or judicial decision. *See OHIO REV. CODE* § 5805.06 (West 2007). In a recent intermediate appellate court decision, the court allowed a creditor of a deceased settlor of a revocable trust to pursue the trust assets, distinguishing *Schofield* by noting that, unlike in *Schofield*, the creditor asserted her claim against the settlor before the settlor died. *See Sowers v. Luginbill*, 2008 WL 836017 (Ohio. App.)) Assets in a decedent's revocable trust also have been held subject to claims for Medicaid estate recovery, *see Belshe v. Hope*, 38 Cal.Rptr.2d 917 (Cal. Ct. App. 1995), and for child support, *see In re Marriage of Perry*, 68 Cal.Rptr.2d 445 (Cal. Ct. App. 1997).

To say that, generally, creditors of a deceased settlor of a revocable trust can reach trust assets, as creditors of a decedent can reach estate assets that are subject to probate administration, however, is not to say that the results in the two situations are the same for the decedent's successors and creditors. With respect to the decedent's successors, it is not uncommon for a person to die with some assets in a revocable trust and others that will pass by will or intestate succession.<sup>143</sup> In such circumstances, if the beneficiaries of the estate assets differ from the beneficiaries of the trust assets, the question is whether creditors' claims will be paid from the estate, the trust, or both. In the absence of a provision in the decedent's will addressing that issue, in most jurisdictions, trust assets are subject to creditors' claims only to the extent that estate assets are insufficient to satisfy them.<sup>144</sup> The result is that trust beneficiaries' interests are not subject to creditors' claims unless and until the shares of estate devisees and heirs are exhausted.

With respect to the decedent's creditors, a threshold question is whether a trust with respect to which the decedent had rights was "revocable" within the meaning of the rule allowing creditors to reach its assets. As noted by Professor Gagliardi, different jurisdictions address this issue differently.<sup>145</sup> For example, for a trust to be treated as "revocable" for this purpose under the UPC, the decedent must have had the sole power to revoke it.<sup>146</sup> Thus, under the UPC a settlor desiring to insulate trust assets from creditors' claims can do so by having the terms of the trust require the consent of a third party for the settlor to revoke the trust. By contrast, under the UTC a trust will be treated as "revocable" even if the settlor can not unilaterally revoke it, if it is revocable by the settlor "without the consent of the trustee or a person holding an adverse interest."<sup>147</sup>

A creditor seeking to collect a claim from the assets of a decedent's revocable trust must also overcome procedural obstacles that creditors who seek to reach assets subject to estate administration do not face.<sup>148</sup> For example, a creditor seeking to reach revocable trust assets may be required to initiate an administration proceeding, if one is not already pending, because the creditor may be required to begin an action to reach the revocable trust assets by presenting the claim to the personal representative of the estate.<sup>149</sup> If the creditor's claim is not paid through the administration proceeding, the creditor's path to recovery from revocable trust assets under the UPC is not an easy one:

The unpaid creditor must first make a written demand on the personal representative to bring a proceeding to enforce the liability as against nonprobate

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<sup>143</sup> For a case involving such facts, see *In re Estate and Trust of Pilafas*, 836 P.2d 420 (Ariz. App. 1992).

<sup>144</sup> See, e.g., UNIF. PROBATE CODE § 3-1004 (1990).

<sup>145</sup> Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 855-57 (2007).

<sup>146</sup> UNIF. PROBATE CODE § 6-102(a) (1990).

<sup>147</sup> UNIF. TRUST CODE §103(14) (2005).

<sup>148</sup> See generally, Gagliardi, *supra* note \_\_ at 868-70. Because a nonclaim statute may apply only to claims asserted against a decedent's probate estate, and not to claims against assets in her revocable trust, a creditor whose claim against the estate is barred by such a statute may nevertheless be able to pursue recovery from the revocable trust. See *Cundall v. U.S. Bank*, \_\_ N.E.2d \_\_ (Ohio App. 2007).

<sup>149</sup> See, e.g., UNIF. PROBATE CODE § 6-102(g) (1990).

transferees. The personal representative may choose to bring such a proceeding or may decline to do so. Section 102 absolves the personal representative from any liability provided she declines in good faith...

Should the personal representative decline to pursue nonprobate transferees, the creditor may choose to do so. In that event, the creditor would do so in the name of the decedent's estate. The creditor would bear all expenses associated with bringing the action. Although not specifically provided for in the statute, the comment to Section 102 indicates, "Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding." This process could be exceedingly costly if several nonprobate transferees needed to be involved. [Footnotes omitted]<sup>150</sup>

## VI. Challenges after the Settlor's Death

Following the death of a testator or settlor of a revocable trust, persons disappointed with the will or revocable trust may want to contest them.<sup>151</sup> Many questions are raised with respect to whether, and if so, how, the law applicable to will contests should apply to revocable trust contests.<sup>152</sup>

**A. Access to the Will or Trust Instrument and Information about the Estate or Trust.** Generally, following the death of a decedent who died testate, her will is filed for probate and thus is available for inspection by heirs and devisees (as well as by the public at large).<sup>153</sup> While wills may be probated in some states without notice to heirs and devisees,<sup>154</sup> generally, the heirs and devisees will be notified of the administration proceedings<sup>155</sup> and entitled to receive a copy of an inventory and

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<sup>150</sup> Gagliardi, *supra* note \_\_ at 869-70.

<sup>151</sup> They may also pursue a malpractice claim against the decedent's attorney. For a case holding that, because revocable trusts are used as will substitutes, the rule rejecting lack of privity as a defense to a claim with respect to a will is equally applicable to claims with respect to a revocable trust, see *Bullis v. Downes*, 612 N.W.2d 435 (Mich. App. 2000).

<sup>152</sup> Recently, the United States Supreme Court narrowed considerably the probate exception to federal court jurisdiction:

the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

*Marshall v. Marshall*, 547 U.S.293, 311-12 (2006). Prior to *Marshall*, federal courts had applied the probate exception to cases involving revocable trusts operating at the settlor's death as will substitutes. *See, e.g., Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839 (6<sup>th</sup> Cir. 2006). As of this writing, there appear to be no post-*Marshall* cases addressing the issue.

<sup>153</sup> *See, e.g., UNIF. PROBATE CODE* §§ 3-301(a)(2)(i) (informal probate) and 3-402(a) (formal probate) (1990). For estates of less than \$5,000 in value, the UPC provides an affidavit procedure for a decedent's successors to collect her personal property from third parties without need to probate her will. *Id.* at § 3-1201.

<sup>154</sup> *See, e.g., UNIF. PROBATE CODE* § 3-301 (1990).

<sup>155</sup> *See, e.g., id.* § 3-705.



appraisal of the estate's assets.<sup>156</sup> Armed with knowledge of the terms of the decedent's will and the administration of the estate, heirs or devisees who believe the will is invalid, in whole or in part, or otherwise are dissatisfied with the administration of the decedent's estate, have a ready forum in which to protect their interests.

The situation is very different following the death of the settlor of a revocable trust. In almost all states, the only persons entitled to information about the trust are its beneficiaries,<sup>157</sup> and the information to which they are entitled may not even include a copy of the entire trust instrument and information about the trust's assets and liabilities.<sup>158</sup> Lacking knowledge of the terms of the trust and its assets, persons who are not trust beneficiaries or whose interests are limited face significant difficulties in trying to determine whether they may have a claim with respect to the establishment of the trust, its terms, or its administration and, if so, whether it is worth pursuing.<sup>159</sup>

**B. Standing.** Surprisingly, there appears to be little law on the question of who has standing to contest a decedent's revocable trust.<sup>160</sup> The UTC does not directly address the issue, although the comment discussing its provision for a three-year maximum period to contest a revocable trust notes that three years "should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust..."<sup>161</sup> Because contesting a revocable trust after a decedent's death is analogous to contesting a will, and because the UTC treats revocable

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<sup>156</sup> See, e.g., *id.* § 3-706.

<sup>157</sup> See, e.g., UNIF. TRUST CODE § 813 (2005). California is an exception. There, when a settlor of a revocable trust dies and the trust thus becomes irrevocable, the decedent's heirs as well as the beneficiaries of the trust are entitled to receive a copy of the trust instrument. CAL. PROB. CODE § 16061.5 ( ).

<sup>158</sup> Default rules under the UTC require that the trustee promptly furnish a copy of the entire trust instrument to any beneficiary who requests it, and that the trustee provide reports about the trust's assets, liabilities, receipts, and disbursements at least annually to current beneficiaries and other beneficiaries who request them. UNIF. TRUST CODE §§ 813(b)(1) and (c) (2005). Whether the settlor may waive those duties of the trustee will depend on the facts and circumstances of the particular case, because the UTC's mandatory rules allow the settlor to waive both of those specific § 813 duties, but do not allow the settlor to waive the trustee's duty to respond to a beneficiary's request for information reasonably related to the administration of the trust. *Id.* § 105(b). As noted by a UTC comment:

Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument..., and the requirement that the trustee provide annual reports to the qualified beneficiaries... The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

*Id.* cmt.

<sup>159</sup> For excellent, thorough analyses of how privacy concerns are widening the differences between the law of wills and the law applicable to revocable trusts with respect to access to information about the will or trust, and whether the advantages of trust privacy are worth the costs, see Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 AZ. STATE L. J. 713 (2006) and Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555 (2008). For a case applying the common law exception to the attorney client privilege that allows attorneys to testify in will disputes to a dispute involving a revocable trust, see *Morgan v. Pendleton*, 27 Conn. L. Rptr. 39 (Conn. Super. 2000).

<sup>160</sup> For cases holding that a remainder beneficiary of a revocable trust does not have standing to enforce the trust during the settlor's lifetime, or after the settlor's death but with respect to occurrences prior to the settlor's death, see *supra* note \_\_\_\_.

<sup>161</sup> UNIF. TRUST CODE § 604 cmt. (2005).

trusts as the functional equivalent of wills,<sup>162</sup> presumably standing issues in UTC jurisdictions will be resolved by reference to the law of wills.<sup>163</sup> Generally, under those rules the “contestant must have a present, substantial interest in the breaking of a will, i.e., the party will have something to gain if the will is broken, or something to lose if it stands.”<sup>164</sup>

Two recent cases involving revocable trusts directly address standing. In the first, from New York, the issue was whether an heir of a deceased settlor of a revocable trust could contest the trust as well as the settlor’s pour over will that devised her estate to the trust.<sup>165</sup> Allowing the disinherited heir to proceed, the court emphasized the testamentary nature of the revocable trust:

[R]evocable trusts – used increasingly as devices to avert will contests – function essentially as testamentary instruments (i.e., they are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalents of wills in the eyes of the law...[T]he rights and remedies of the parties interested in a revocable trust must be consistent with the rights and remedies of the parties interested in a decedent's will... Thus, a distributee who is entitled to file objections to probate should also be accorded standing to commence an action to set aside a revocable trust, since the latter is but another part of the decedent's testamentary plan.<sup>166</sup>

The second, from the Virgin Islands, illustrates that when a decedent dies with a revocable trust and pour over will, it may be necessary to contest the will as well as the trust. In *Hendricks v. Belardo*,<sup>167</sup> the decedent’s daughter, proceeding *pro se*, contested the revocable trust (under which she was to receive five dollars), but neglected to also contest the will.<sup>168</sup> The will included a devise of the residue of the decedent’s estate to the trust for distribution under its terms, but further provided that if that gift failed, the residue was to be distributed under the will in the same manner as set forth in the trust instrument.<sup>169</sup> As a result, if the daughter was allowed to proceed with her contest of the trust and it were successful, she still would receive only the five dollars provided for her under the terms of the trust and thus lacked standing to contest it.<sup>170</sup>

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<sup>162</sup> *Id.* at Art. 6, gen. cmt.

<sup>163</sup> *See id.* at § 106. *See also* EUNICE L. ROSS AND THOMAS J. REED, WILL CONTESTS § 3.2 (2<sup>nd</sup> ed. \_\_) (stating that “[s]tanding to contest a revocable living trust is handled much like standing to contest a will.”)

<sup>164</sup> *Id.*

<sup>165</sup> *See* Matter of Estate of Davidson, 677 N.Y.S.2d 729 (1998).

<sup>166</sup> *Id.* at 730-31.

<sup>167</sup> 2001 WL 1230609 (D.V.I. 2001).

<sup>168</sup> *Id.* at \_\_.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \_\_. By contrast, in *Holzemer v. Urbanski*, 712 N.E.2d 713 (Ohio 1999), the decedent’s will left his probate estate equally to his three children, but the terms of his revocable trust left most of its assets to two of them. The third child was allowed to contest the trust, without having raised her claims in the probate proceeding, because under applicable law her claim with respect to the trust was fundamentally different than the claims she might have brought in the probate case.

**C. Limitations Period.** Prior to the widespread enactment of versions of the UTC, many states did not have a limitation period for contesting a revocable trust.<sup>171</sup> While case law on the question of whether the limitation period for contesting a will applies to a contest of a revocable trust is sparse, at least two courts have held that it does.<sup>172</sup>

Under the UTC, as a general rule, a contestant has three years from the death of a settlor of a revocable trust within which to file a contest.<sup>173</sup> The trustee, however, may shorten the period during which a contest may be filed to 120 days by sending the potential contestant “a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding.”<sup>174</sup> Under the UTC, giving such a notice is optional and, if given, is not required to be in any particular form.<sup>175</sup>

If the trustee does not give such a 120 day notice, the relatively long limitations period for contesting a trust may nevertheless be shortened, as a practical matter, to the will contest period if the settlor died testate with a probated pour over will that the contestant did not successfully contest. Those were the facts in an Ohio case, *Hageman v. The Cleveland Trust Company*,<sup>176</sup> in which the court held that the pour over provision of the decedent’s will incorporated the trust terms into the will (even though the will did not expressly do so).<sup>177</sup> Consequently, if the contestant successfully attacked the validity of the trust after the period for contesting the will had expired, the decedent’s estate nevertheless would pass to the trust beneficiaries under the terms of the will. As a result,

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<sup>171</sup> Exceptions included California, Illinois, Ohio, and Delaware. See CAL. PROB. CODE § 16061.7 (West 1991 & Supp. 2002); ILL. REV. STAT. c. 110 § 13-223 ( ); OHIO REV. CODE § 2305.121(A) (West 2007); 12 DEL. CODE § 3546 ( ).

<sup>172</sup> *DiSabatino v. Diferdinando*, 2001 WL 812014 (Del. Ch. 2001); *Estate of Palmer v. World Gospel Mission*, 189 P.3d 230 (Wash. App. 2008)..

<sup>173</sup> UNIF. TRUST CODE § 604(a)(1) (2005).

<sup>174</sup> *Id.* at § 604(a)(2). Both the 120 day limitation period of § 604(a)(2) and the three year period of § 604(a)(1) are bracketed in the UTC to signify to enacting jurisdictions that if their will contest limitation periods differ from three years from the date of death or 120 days from notice, they should substitute those periods in their version of § 604. *Id.* cmt. A trustee in a UTC jurisdiction ordinarily need not even wait 120 days from giving notice to potential contestants to safely make distributions to beneficiaries in accordance with the terms of the trust. Such distributions will not subject the trustee to liability, if the trust is later successfully contested, unless the trustee either knows of a pending judicial proceeding contesting the validity of the trust, or is notified by a potential contestant of the possibility of such a contest being commenced and a contest is commenced within 60 days after the contestant sent the notice. *Id.* at § 604(b). If the trustee makes distributions to persons named as beneficiaries of the purported trust and it is later successfully contested, however, the distributees will be liable for amounts incorrectly distributed to them. *Id.* at § 604(c).

<sup>175</sup> By contrast, notice is required in California and must contain a separate paragraph, in the reasonable equivalent of 10-point boldface type, notifying the recipient of the 120 day limitation period. CALIF. PROBATE CODE § § 16061.7(g) and 16061.8 ( ). In *Harustak v. Wilkins*, 100 Cal.Rptr.2d 718 (2000), notice of the 120 day limitation period that was given in 12 point non-boldface type was held insufficient to trigger the 120 day limitation period.

<sup>176</sup> 343 N.E.2d 121 (Ohio 1976).

<sup>177</sup> *Id.* at 124.

the contestant's status with respect to the disposition of the estate would not be improved by a successful attack of the trust and he therefore lacked standing to pursue a trust contest.<sup>178</sup>

**D. Grounds.** After the death of the settlor of a revocable trust, the trust may be contested on grounds similar to those available to a will contestant.<sup>179</sup> Generally, contest grounds in an action to invalidate a revocable trust following the settlor's death will be applied in the same manner as in contests of wills.<sup>180</sup>

**E. Right to a Jury Trial.** States' laws vary on the question of whether will contests may be tried to a jury.<sup>181</sup> In jurisdictions in which they may, the question raised is whether a revocable trust contestant will have the same opportunity. After several New York cases reached different conclusions on that question,<sup>182</sup> its legislature responded in 2003 by amending the statute granting the right to a jury trial in a will contest to also allow jury trials in contests of revocable trusts.<sup>183</sup> Presumably the rationale for the legislature's action was similar to that of the surrogate's court in one of the cases allowing a jury trial of a revocable trust contest before the amendment:

[A revocable trust] functions as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property. While alive, a settlor may amend his or her revocable trust...just as he or she may change his or her will, without resort to the courts for equitable relief. Significantly, judicial proceedings with respect to a revocable trust would occur only after the settlor's death at the instigation of the settlor's distributees, exactly the situation that arises

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<sup>178</sup> *Id.* See also *Hendricks v. Belardo*, 2001 WL 1230609 (D.V.I. 2001), discussed *supra* notes \_\_-\_\_ and accompanying text.

<sup>179</sup> Under the UTC:

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 402), that undue influence, duress, or fraud was involved in the trust's creation (see Section 406), or that the trust had been revoked or modified (see Section 602). A contest is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee.

UNIF. TRUST CODE § 604 cmt. (2005). Note that in many jurisdictions, the same test applied to determine if a testator has capacity to make a will is applied to determine if a settlor has capacity to create a revocable trust. See UNIF. TRUST CODE § 601 (2005); RESTATEMENT (THIRD) OF TRUSTS § 11(2) (2003); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (2003); *Maimonides School v. Coles*, 881 N.E.2d 778 (Mass. App. Ct. 2008); *Kelly v. First State Bank of Princeton*, 401 N.E.2d 247, 261 (Ill. App. 1980); *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003); *contra*, *Estate of Bernard Edson*, 7/14/97 NYLJ 31.

<sup>180</sup> See, e.g., *Russell v. Wachovia Bank, N.A.*, 578 S.E.2d 329 (S.C. 2003); *Ramsey v. Taylor*, 999 P.2d 1178 (Or. App. 2000); *Upman v. Clarke*, 359 Md. 32, 753 A.2d 4 (2000); *Mercado v. Trujillo*, 980 P.2d 824 (Wyo.1999); *Matter of Estate of Dean*, 967 S.W.2d 219 (Mo. App. 1998); *Raimi v. Furlong*, 702 So.2d 1273 (Fla.App.1997); *In re Estate of Tisdale*, 171 Misc.2d 716, 655 N.Y.S.2d 809 (Sur. Ct. 1997); *Haynes v. First National State Bank*, 87 N.J. 163, 432 A.2d 890 (1981).

<sup>181</sup> See WILL CONTESTS, *supra* note \_\_, § 14:5. The UPC allows will contests to be tried to a jury, but does not address the question with respect to revocable trusts. See UNIF. PROB. CODE § 1-306 (1990).

<sup>182</sup> See, e.g., *Matter of Estate of Tisdale*, 655 N.Y.S.2d 809 (Sur. Ct. 1997) (allowing jury trial); *Matter of Estate of Aronoff*, 653 N.Y.S.2d 844 (Sur. Ct. 1996) (denying jury trial).

<sup>183</sup> N.Y. Surr. Ct. Proc. Act § 502.

in a will contest. Furthermore, the factual issues presented in such a proceeding are the same as those presented in a proceeding to set aside a will.<sup>184</sup>

**F. No-Contest Clauses.** Generally, a no-contest clause conditions a beneficiary's gift on the beneficiary not challenging the validity of the document under which the gift is made.<sup>185</sup> Typically, such clauses in revocable trust instruments are enforceable to the same extent as they are in wills.<sup>186</sup> Nevertheless, issues arise when no-contest clauses and revocable trusts are used in a settlor's estate plan. For example, in a recent New York case, after the settlor's death, a beneficiary of a now irrevocable trust sought a ruling that the institution of a construction proceeding would not trigger a no-contest clause.<sup>187</sup> A New York statute protected actions to construe a will from doing so, but no similar statutory protection existed for trust construction proceedings.<sup>188</sup> Finding that the no-contest clause did not apply to an action to construe the terms of the trust, the court found it unnecessary to address the applicability of the will construction statute to a trust construction proceeding.<sup>189</sup> In a California case, the decedent's pour over will devised her estate to the trustee of her revocable trust and included a no-contest clause that did not refer to the trust or its beneficiaries.<sup>190</sup> Despite evidence that the decedent considered her trust to be part of her will, the court refused to apply the no-contest clause to the unsuccessful will contestants' interests in the trust.<sup>191</sup>

## VII. Interpretation, Construction, and Reformation

The interpretation, construction,<sup>192</sup> and reformation of wills and will substitutes have received considerable attention in recent years.<sup>193</sup> Generally, the same principles

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<sup>184</sup> See, e.g., *Matter of Estate of Tisdale*, 655 N.Y.S.2d 809 (Sur. Ct. 1997).

<sup>185</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003).

<sup>186</sup> See *id.*; GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 181 (2nd ed.1979; 2007 Supp). In many jurisdictions, a no-contest clause will not be enforced if there was probable cause for the contest. See, e.g., *id.*; UNIF. PROB. CODE § 3-905 (1990). In others, they are enforceable without regard to probable cause. See, e.g., *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200 (D.C. 2006). In a few jurisdictions, no-contest clauses are not enforceable at all. See, e.g., FLA. STAT. ANN. 732.517 ( ); IND. CODE § 29-1-6-2 ( ).

<sup>187</sup> *Matter of Estate of Stralem*, 695 N.Y.S.2d 274 (Sur. Ct. 1999).

<sup>188</sup> *Id.* at 278-79.

<sup>189</sup> *Id.*

<sup>190</sup> *Estate of Lindstrom*, 236 Cal.Rptr. 376 (1987).

<sup>191</sup> *Id.* Subsequent to the court's decision in *Lindstrom*, California enacted legislation under which a no-contest clause in a will or trust instrument will not be triggered by a challenge to another document, unless the no-contest clause expressly provides otherwise. CAL. PROB. CODE § 21305(a)(3) ( ).

<sup>192</sup> Traditionally, "interpretation" and "construction" are distinct processes by which courts interpret language in an instrument to determine the maker's intent and resort to rules of construction to determine the meaning of language only when the maker's intent cannot be ascertained through interpretation. See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 809 – 10 (2d ed. 1953); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE WESTERN L. REV. 65, 80 - 82 (2005). The position of the new Restatement (Third) of Property: Wills and Other Donative Transfers acknowledges that rules of construction are not applicable when intent can be ascertained, but takes a different approach to the process of ascertaining the meaning of language in a document:

that apply to determine the meaning of language in a will apply to determine the meaning of language in a trust instrument,<sup>194</sup> although at least for irrevocable trusts that is not always the case.<sup>195</sup>

Section 112 of the UTC broadly, but with bracketed language and a significant qualification, codifies that principle: “The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply *as appropriate* to the interpretation of the terms of a trust and the disposition of the trust property.”<sup>196</sup> Section

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Interpretation and construction are not completely distinct processes, however, nor are they applied sequentially. Interpretation and construction are part of a single process. Distinguishing between actual and attributed intention is useful in determining which governs if the two conflict. Actual intention, when sufficiently established, always overcomes attributed intention. The key notion, however, is “when sufficiently established.” Although constructional preferences and rules of construction are sometimes referred to as “default rules,” this does not mean that they only govern in default of evidence of actual intention. The term, properly understood, means that they govern in default of sufficiently persuasive evidence of contrary actual intention.

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (2003). For criticism of the new Restatement’s approach, see Storrow, *supra*.

<sup>193</sup> See, e.g., Storrow, *supra* note \_\_; John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 524 (1982); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and Atypical Testator*, 80 NEB. L. REV. 387 (2001); Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. T. J. 357 (2004); Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. T. J. 811 (2001); Jane B. Baron, *Essay: Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 663-64 (1992); Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners’ Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 1-3 (1990); Clifton B. Kruse, Jr., *Reformation of Wills: The Implications of Restatement (Third) of Property (Donative Transfers) on Flawed but Unambiguous Testaments*, 25 ACTEC Notes 299 (2000); Clark Shores, *Reforming the Doctrine of No Reformation*, 26 GONZ. L. REV. 475 (1990/91); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, PROB. & PROP., Jan./Feb. 2004, at 28.

<sup>194</sup> The Bogert treatise describes the process as follows:

The process of construction of trust provisions is the same as that used in the construction of wills and essentially involves three steps. The premise is that the intent of the settlor or testator controls. That intent is first sought by careful examination of the trust clause in question, giving the words in that clause their ordinary meanings. If the construction question cannot be resolved by reference to the clause alone, the court will examine the entire trust instrument to determine the creator’s intent and purposes, in some cases applying statutory or court rules of construction or presumptions. The third step becomes necessary when the intent or meaning of the settlor or testator cannot be determined by reference to the provisions of the trust instrument itself. Extrinsic evidence will be admitted by the court to assist it in determining the meaning and effect of the particular clause. (Footnotes omitted.)

GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 182 (\_\_\_ ed. \_\_\_\_). See also AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.2.4, p.49 (5th ed. 2006); UNIF. TRUST CODE § 112 (2005).

<sup>195</sup> In *National City Bank of Cleveland v. Ford*, 299 N.E.2d 310 (Ohio Com. Pl. 1973), an irrevocable inter vivos trust provided for successive life estates, after which the principal was to be distributed in accordance with Ohio’s laws of intestate succession. Noting that while a will speaks at death, an inter vivos trust speaks from the date of its creation, the court held that the settlor’s heirs would be determined under Ohio’s intestacy laws when the trust was created. See also *Fifth Third Bank v. Harris*, 127 Ohio Misc.2d 1 (2003).

<sup>196</sup> UNIF. TRUST CODE § 112 (2005) (emphasis added). The Restatement (Third) of Property: Wills and Other Donative Transfers agrees: a will substitute “is, to the extent appropriate, subject to...rules of construction and other rules applicable to testamentary dispositions.” RESTATEMENT (THIRD) OF PROPERTY:

112 is bracketed to emphasize that it is optional and that an enacting jurisdiction might choose instead to separately enact specific rules on the construction of trust instruments.<sup>197</sup> Doing so would be preferable to enacting section 112. Its scope is uncertain, as by its terms it does not uniformly apply wills rules of construction to trusts, but instead does so “as appropriate.”<sup>198</sup> As noted by Professor English, the UTC Reporter, that “phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Even those that should apply may require modification due to the legal distinctions between wills and trusts.”<sup>199</sup>

Although the law of wills and the law of trusts operate similarly to determine the meaning of language in a will or trust instrument, they have differed significantly on the question of whether the instrument can be reformed to correct a mistake of its maker.

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WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003). Relying on that section of the new Restatement, an Illinois court recently held that Illinois’ abatement statute, which by its terms applies to wills, also applies to revocable trusts used as will substitutes. *See Handelsman v. Handelsman*, 852 N.E.2d 862, 869 (Ill. App. 2006). Interestingly, the lower court had reformed the trust instrument based on its finding, supported by extrinsic evidence, that the settlor had not intended the result dictated by the abatement statute. *Id.* at 867. Without discussing or citing the Restatement’s rule that wills and will substitutes may be reformed to correct mistakes established with clear and convincing evidence, *see infra* notes \_\_\_ - \_\_\_ and accompanying text, the court held that revocable trust instruments, like wills, could not be reformed on such grounds. *Id.* at 870-73.

Section 112 of the UTC was adopted by Kansas as part of the Kansas Uniform Trust Code. K.S.A. § 58a-112. Applying that statute, a Kansas Court of Appeals recently applied the same seven factors used in Kansas to determine whether a joint and mutual will was intended to be contractual to find that a joint and revocable trust was contractual and that its terms could not be amended by the surviving settlor spouse. *See Mangels v. Cornell*, 189 P.3d 573 (Kan. Ct. App. 2008).

<sup>197</sup> UNIF. TRUST CODE § 112 (2005) cmt.

<sup>198</sup> *Id.*

<sup>199</sup> David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MISSOURI L. REV. 143, 162-63 (2002). As an example, the comment to § 112 indicates that the ademption doctrine is a rule of construction, but as discussed *supra* notes \_\_\_ - \_\_\_ and accompanying text, ademption is expressly limited to wills in the UPC. With respect to the apportionment of estate taxes, the most recent uniform act on the subject provides that directions given by the decedent in her will govern if inconsistent directions are given in her revocable trust instrument. UNIF. ESTATE TAX APPORTIONMENT ACT, §3a (2003). For a thorough discussion of the disparities in the treatment of wills and revocable trust instruments in the context of federal estate tax apportionment, suggesting that they be treated comparably with respect to changing default apportionment rules, see Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 62 U. OF MIAMI L. REV. 767 (2008). For a brief discussion of the issue of how estate taxes should be apportioned when a pour over will directs that they be paid from the residue, and the revocable trust instrument directs that they be paid from the nonmarital share, see Virginia F. Coleman, *Selected Issues in Planning for the Second Marriage*, in PLANNING TECHNIQUES FOR LARGE ESTATES 1 (ALI-ABA Course of Study, Nov. 12-16, 2007), available at WL, SN028 ALI-ABA 1 (citing *Patterson v. U.S.*, 181 F.3d 927 (8th Cir. 1999) and *McKeon v. U.S.*, 151 F.3d 1201 (9th Cir. 1998), holding that estate taxes are apportioned to the nonmarital share, and *Estate of Lillian J. Lewis*, 69 T.C.M. 2396 (1995), *Estate of Fagan*, 77 T.C.M. 1427 (1999) (involving a fractional share charitable bequest), and PLR 199918003, holding that the taxes are paid from the residue before allocation of the residue between the marital and nonmarital shares. *See also* Howard M. Zaritsky, *Revocable Inter Vivos Trusts*, Tax Management Portfolio 860, A-25 – A-27; Pamela O. Price, *Determination of Beneficiaries and Their Interests*, in PRACTICE UNDER FLORIDA PROBATE CODE (2002), available at WL, PPC FL-CLE 11-1.

With respect to wills, in the absence of a patent or latent ambiguity,<sup>200</sup> the traditional plain meaning rule is that the will can not be reformed to correct a mistake to give effect to what extrinsic evidence would show to be the testator's true intent.<sup>201</sup> By contrast, with sufficient evidence, trust instruments, though unambiguous, whether revocable or irrevocable, may be reformed to correct mistakes.<sup>202</sup> Consistent with limited case law<sup>203</sup> and strong and widespread criticism of many commentators,<sup>204</sup> the Restatement (Third) of Property adopts the reformation doctrine for wills as well as for trust instruments and other donative documents.<sup>205</sup> Its doing so illustrates that uniformity in the treatment of wills and revocable trusts used as will substitutes may be achieved not only by applying the law of wills to revocable trusts, but also by applying the law of trusts to wills.<sup>206</sup>

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<sup>200</sup> Patent ambiguities are those that are apparent from the face of the instrument. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 cmt. b (2003). Latent ambiguities are discovered only through extrinsic evidence. *Id.* cmt. c. While some jurisdictions limit or refuse to consider extrinsic evidence to resolve patent ambiguities, the trend is to consider extrinsic evidence if there is an ambiguity, regardless of whether it is patent or latent. *See* Cornelison, *supra* note \_\_ at 819–24. Many have noted the liberties courts that purport to follow the rule that extrinsic evidence may not be considered in the absence of an ambiguity take in finding an ambiguity. *See, e.g.,* AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.2.4, p.48 (5th ed. 2006); WILLIAM M. MCGOVERN, JR. AND SHELDON F. KURTZ, WILLS, TRUSTS, AND ESTATES §\_\_ at 262 (3d ed. \_\_\_\_). In a Wisconsin case, the court determined that a will was not ambiguous, but nevertheless considered extrinsic evidence to correct an apparent mistake. *See* Estate of Gibbs, 111 N.W.2d 413 (Wis. 1961). The new Restatement (Third) of Property's analysis is that there was an ambiguity, because the testator did not know the person the will named as a devisee. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 cmt. j, rptr. notes (2003).

<sup>201</sup> *See, e.g.,* Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000). If an action can be successfully characterized as one for construction, rather than reformation, the no reformation rule can be avoided. *See, e.g.,* In re Estate of Reese, 622 So.2d 157 (Fla. App. 1993). For a recent case in which the court's refusal to allow provisions in a will for a testamentary trust to be reformed led to a malpractice action against the drafting lawyer and his firm, see *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 868 N.E.2d 4 (Ind. App. 2007).

<sup>202</sup> The standard of proof for a reformation of a trust instrument under both the UTC and the new Restatement (Third) of Property: Wills and Other Donative Transfers is clear and convincing evidence. UNIF. TRUST CODE § 415 (2005); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003). For a discussion of numerous cases in which the required evidentiary showing to reform a trust instrument was or was not made, see MARY F. RADFORD, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 991 (3rd ed. \_\_\_\_). For a recent case holding that revocable trusts, as will substitutes, are subject to the no reformation rule of the law of wills, see *Handelsman v. Handelsman*, 852 N.E.2d 862, 869 (Ill. App. 2006).

<sup>203</sup> *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. c, rptr. notes (2003).

<sup>204</sup> Many of the articles cited in note \_\_, *supra*, include such criticisms.

<sup>205</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003). Similarly, the UTC trust reformation doctrine applies to testamentary as well as inter vivos trusts. *See* UNIF. TRUST CODE § 415 cmt. (2005). In jurisdictions that follow the plain meaning rule for wills, adoption of the UTC would thus lead to the somewhat anomalous result of the terms of a will being subject to reformation if they pertain to a trust created by the will, but not otherwise. As has been suggested by Professor Volkmer, that result might lead to the abandonment of the plain meaning rule for wills. Ronald R. Volkmer, *The Nebraska Uniform Trust Code: Nebraska Law in Transition*, 37 CREIGHTON L. REV. 61, 91 (2003).

<sup>206</sup> Of course, wills will not be subject to trust law's reformation doctrine simply because the Restatement adopts it. For an explicit and emphatic rejection of the Restatement's wills reformation doctrine, see *Flannery v. McNamara*, 738 N.E.2d 739 (Mass. 2000).



### VIII. Other Contexts

Issues related to whether assets in a revocable trust will be treated as owned by the settlor arise in a variety of contexts in addition to those discussed above. Many are addressed in the new Restatement: whether a transfer of real estate to the trustee of a revocable trust qualifies for an exemption from a recording tax when the grantors of the deed and the beneficiaries of the trust are the same persons, the effect on title insurance coverage of conveying real property to the trustee of a revocable trust, the effect on protection from a deficiency judgment following foreclosure of a loan having been made to a revocable trust and personally guaranteed by its settlors, whether a statutory homestead exemption should apply to a settlor's personal residence held in a revocable trust,<sup>207</sup> and whether statutory or constitutional restrictions on the devise of a homestead should apply when the homestead is owned by the trustee of a revocable trust.<sup>208</sup>

An interesting question as to which there appears to be little law is whether the holder of a power of appointment that was created under the terms of a revocable trust instrument can exercise the power if the holder dies before the settlor of the revocable trust who created the power. For example, assume that (a) A and B are spouses, (b) A creates a revocable trust, (c) the terms of the trust provide for it to continue for B's benefit upon A's death, (d) the trust terms also give B a power of appointment over the trust assets, (e) the trust terms do not address whether B must survive A in order to exercise the power, (f) B dies before A with a will that purports to exercise the power in favor of X, (g) A dies thereafter without having revoked the trust or amended its terms, and (h) the taker in default of an exercise of the power is Y. If B validly exercised the power, X takes; if not, Y takes.

If A had created the power in B by A's will, B's death before A would have precluded B's exercise of the power, because a power created by will does not come into existence until the testator's death.<sup>209</sup> A revocable trust, however, is created during life and a power created by its terms also is created during the settlor's life.<sup>210</sup> Further, the scope of a holder's power that determines when and under what circumstances the holder may exercise it is unlimited, "except to the extent the donor effectively manifests an intent to impose limits."<sup>211</sup> The question is thus whether using a revocable trust to create the power manifests an intention to condition the holder's exercise of the power on the

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<sup>207</sup> Compare *In re Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001) (holding that Florida's homestead exemption was not available for a home owned by a debtor as trustee of her revocable trust) with *In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006) (expressly declining to follow *Bosonetto*) and *Engelke v. Estate of Engelke*, 921 So.2d 693, 696 (Fla. 4th DCA 2006).

<sup>208</sup> See RESTATEMENT (THIRD) OF TRUSTS § 25, rptr. notes (2003). A recent bankruptcy case held that a California statute precluding use of language in a will of a living testator to determine whether there had been a transmutation of separate property into community property did not apply to language in a revocable trust instrument. *In re Cecconi* 366 B.R. 83 (N.D. Cal. 2007). For a thorough discussion of income, gift, estate, and generation skipping tax issues involving revocable trusts, see Howard M. Zaritsky, *Revocable Inter Vivos Trusts*, Tax Management Portfolio 860, A-55 – A-80.

<sup>209</sup> See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 18.4 (date).

<sup>210</sup> *Id.* cmt.

<sup>211</sup> *Id.* § 12.2.

holder surviving the creator of the power. An argument that it should not could include the fact that since the trust was revocable, the settlor could have amended its terms after the holder's death if the settlor had not wanted B's exercise of the power to be effective. An argument to the contrary is that A used the revocable trust as a will substitute and that A assumed that if B did not survive A, B would have no further interest in the trust and would be unable to exercise the power.

The Restatement addresses this issue not by saying that because revocable trusts are used primarily as will substitutes, the law of wills should apply,<sup>212</sup> but by inferring that the settlor of the trust intended that the holder could only exercise the power if the holder survived the settlor.<sup>213</sup> The Restatement's position is supported by the fact that the primary purpose of using powers of appointment in wills and trust instruments is to build flexibility into estate plans.<sup>214</sup> While the settlor of a revocable trust is living, the flexibility available through the use of powers of appointment is not necessary, because if circumstances change, the settlor can amend the terms of the trust accordingly.<sup>215</sup> It is true that the settlor could not do so if she became incapacitated. However, absent evidence to the contrary, the likelihood that the settlor had intended that the holder of the power could exercise it even if the holder predeceased the settlor – because of the possibility that the settlor might become incapacitated – is low.

## IX. Conclusion

The Prefatory Note to the UTC states that the “basic policy [of the Code] *in general* is to treat the revocable trust as the functional equivalent of a will (emphasis added).”<sup>216</sup> Similarly, its section 112 provides that rules of construction applicable to

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<sup>212</sup> For a case applying wills law to resolve a different power of appointment issue arising in connection with the use of a revocable trust, see *Dollar Savings & Trust Co. v. First National Bank of Boston*, 285 N.E.2d 768 (Ohio Com. Pl. 1972).

<sup>213</sup> *Id.* § 18.4 cmt. a. See *Wetherill v. Basham*, 3 P.3d 1118, 1124 (Az. App. 2000) (citing favorably § 18.4 of the Restatement, but not having to address the issue because the holder of the power survived the settlor). The emphasis properly is on the intent of the creator of the power, as the creator of the power is the owner of the property who may determine the scope of a power over it. See *RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS* § 12.2 (date); *Murstein v. Central National Bank of Cleveland*, 25 Ohio App. 3d 6, 495 N.E.2d 37 (1980).

<sup>214</sup> The introduction to the Restatement volume on powers of appointment provides:

Powers of appointment are the means by which flexibility is introduced into an estate plan that involves successive enjoyment of interests in property. What would otherwise be a fixed and rigid plan of successive enjoyment of beneficial rights in property can be turned into a plan for successive enjoyment to be determined from time to time in the light of current conditions through the availability of powers of appointment.

*RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS* Intro. (date).

<sup>215</sup> See *Stewart's Estate v. Caldwell*, 271 So.2d 754 (Fla. 1972) (stating, in a different context, that “[t]he recognized practical use of powers of appointment in testamentary dispositions is to provide flexibility in an estate so as to allow for change of conditions which may occur after the death of the owner of the property.”)

<sup>216</sup> UNIF. TRUST CODE Prefatory Note (2005).

wills also apply “as appropriate” to trusts.<sup>217</sup> While revocable trusts clearly are commonly used as will substitutes, fundamental differences between revocable trusts and wills support the UTC’s qualification of the basic doctrine that wills law should apply to revocable trusts and preclude a simple blanket rule to that effect.

Revocable trusts, unlike wills, are property management arrangements that offer significant benefits unavailable from wills during the settlor’s lifetime. In part on that basis, a recent Vermont case held, appropriately, that an authorized agent under a durable power of appointment may create a revocable trust for the principal, even though revocable trusts operate as will substitutes and an authorized agent can not execute a will for an incapacitated testator.<sup>218</sup> With respect to the possibility of a settlor of an existing revocable trust becoming incompetent, as a matter of traditional trust doctrine, funded inter vivos revocable trusts create property interests in their remainder beneficiaries to whom fiduciary duties are owed. Such interests and duties may appropriately be ignored while the settlor is living and competent, as a will devisee’s expectancy is ignored during the testator’s life. But in the event of the settlor’s incapacity, her intent may be defeated by failing to recognize and protect the interests of other beneficiaries of the trust.<sup>219</sup>

The use of a revocable trust with a pour over will unavoidably raises issues of potential inconsistencies between the two instruments that do not arise when a revocable trust is not used, and that are not resolvable by reference to the law of wills. Examples include questions of whether and to what extent a subsequent will or codicil can be treated as effecting an amendment or revocation of a revocable trust<sup>220</sup> and how to resolve conflicting provisions in a will and trust instrument on the apportionment of estate taxes.<sup>221</sup> Similarly, the rights of a decedent’s creditors to reach assets in the probate estate and in a funded revocable trust, and the corresponding effect of those rights on the decedent’s successors, raise a variety of issues not easily addressed by resort to the law of wills.<sup>222</sup>

Furthermore, even in the context of the UPC, an important goal of which is make more uniform the law applicable to probate and nonprobate gratuitous transfers at death, some wills doctrines are not applied to revocable trusts, or are applied differently to revocable trusts. Examples include the doctrines of lapse and antilapse<sup>223</sup> and ademption,<sup>224</sup> and the pretermitted heir protections afforded a surviving spouse or an after born or after adopted child.<sup>225</sup>

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<sup>217</sup> UNIF. TRUST CODE § 112 (2005). *See also* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003).

<sup>218</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>219</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>220</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>221</sup> *See supra* note \_\_\_.

<sup>222</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>223</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>224</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>225</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

Difficulties in attempting to apply the law of wills to revocable trusts used as will substitutes also arise after a decedent's death. While the substantive grounds for contesting a will or revocable trust instrument generally are the same and are consistently applied, other differences between the two, particularly with respect to the rights of potential contestants to information about the will or trust instrument, can be significant.<sup>226</sup> Finally, while the new Restatement (Third) of Property: Wills and Other Donative Transfers attempts to unify the law of wills and that of revocable trusts with respect to the interpretation, construction, and reformation of the governing instrument, the common law ability to reform a trust instrument to correct mistakes, and the lack of the ability to do so with a will, represent significant differences between how wills and revocable trusts are treated in most jurisdictions, despite their functional equivalence.<sup>227</sup>

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<sup>226</sup> See *supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>227</sup> See *supra* notes \_\_\_-\_\_\_ and accompanying text.