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The Ghostwritten Will

Ralph C. Brashier, University of Memphis

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The Ghostwritten Will

Ralph C. Brashier *

Abstract: Courts have long assumed, and sometimes explicitly stated, that one’s power to make a will is too personal to transfer to another person. This article demonstrates that such assumptions and statements are inaccurate and harmful. In showing that the ghostwritten will is and always has been a valid (though largely hidden) part of American law, the article frees legislators, judges, and scholars to consider ways in which direct authorization of the ghostwritten will can serve the needs of a rapidly aging society. In particular, the article demonstrates that new laws recognizing a principal’s power to grant her agent will-making authority would provide results far more transparent and efficient than those springing from older forms of ghostwritten wills.

Although the average lifespan of Americans is significantly longer than it was just three decades ago,¹ science and medicine have yet to moderate appreciably the incapacity brought on by various forms of dementia.² including

* Cecil C. Humphreys Professor of Law, The University of Memphis. I thank Lynda Wray Black, Donna Harkness, Janet Richards, and Nicholas White for their comments and suggestions on drafts of all or parts of this work. I also thank Leighann Ness and Emma Redden for their invaluable research assistance.

¹ See U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, DHHS PUB. NO. 2012-1232, HEALTH, UNITED STATES 2011: WITH SPECIAL FEATURE ON SOCIOECONOMIC STATUS AND HEALTH 10 (2012) [hereinafter HEALTH] (indicating that between 1980 to 2008, life expectancy at birth in the United States increased for females from 77 to 80 years and for males from 70 to 76 years). The remaining life expectancy of a 65-year-old American female increased by two years between 1980 and 2009, and the remaining life expectancy of a 65-year-old American male increased by more than three years during that time. Id. at 107 (Table 21, page 2) (indicating that in 2009, a 65-year-old female could expect to live an additional 20.3 years and a 65-year-old male could expect to live an additional 17.6 years).

Alzheimer’s disease, and other mental illnesses that often befall the elderly. In the absence of scientific and medical breakthroughs, it appears inevitable that an increasing number of us will live our final days in limbo: a place in which time alters the world about us while we are, to varying degrees, unaware of those changes and unable to account for them.

Among the most significant changes that may occur while an individual is incapacitated are those relating to her family structure and wealth. Such changes can fundamentally observing the growing burdens that will result from an aging population in the absence of new strategies for management and prevention).

3 For a discussion of the current status of research and knowledge concerning Alzheimer’s disease, see U.S. DEP’T OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, NATIONAL INSTITUTE ON AGING, ABOUT ALZHEIMER’S DISEASE: ALZHEIMER’S BASICS, www.nia.nih.gov/alzheimers/topics/alzheimers-basics (last visited March 2, 2013) [hereinafter ALZHEIMER’S] (indicating that time between diagnosis of Alzheimer’s and death typically ranges from three years to more than a decade).

4 See HEALTH, supra note 1, at 11 (Figure 3) (showing increasing numbers of deaths in the United States between 1998 and 2008 resulting from Alzheimer’s); Lauran Neergaard, U.S. Alzheimer’s Plan Looks for Prevention, COM. APPEAL (Memphis), May 16, 2012, at A1, A2 (noting that 5.4 million Americans currently have Alzheimer’s or related dementias and that the number is expected to reach 16 million by 2050).

5 See ALZHEIMER’S, supra note 3 (stating that “currently there is no cure” for Alzheimer’s disease).

6 See generally ALZHEIMER’S, supra note 3 (discussing progression of disease); DEMENTIA, supra note 2 (discussing long-term burden).

7 The limbo resulting from substantial mental incapacity is not limited to the elderly. Accidents, disease, and birth defects can cause permanent mental incapacity even in a young person. The legal problems of the incapacitated are largely the same regardless of their age when the incapacity occurs: who is the substitute decision-maker, what decisions are within the substitute decision-maker’s authority, and what standards govern the decision-making process? Nevertheless, America’s elderly population is disproportionately affected by the onset of dementia and Alzheimer’s.

8 This article in no way suggests that everyone who suffers from dementia, Alzheimer’s, or other mental illnesses is inevitably mentally incapacitated from the onset of the illness or the time of diagnosis. Capacity exists along a spectrum, and the law requires different levels of capacity for different kinds of legal decisions. A person diagnosed with Alzheimer’s or dementia may retain full legal capacity in the early stages of the illness. See, e.g., Jonathan Herring, Entering the Fog: On the Borderlines of Mental Capacity, 83 IND. L.J. 1619, 1620 (2008) (observing that with dementia and Alzheimer’s, individuals are likely to experience a gradual loss of capacity).
alter the distribution of her estate, yet in her incapacity she cannot rewrite her estate plan. \(^9\) Moreover, American law has never permitted an individual to delegate directly her will-making power to another. \(^{10}\)

Drawing on the common law of wills \(^{11}\) and modern statutory developments in conservatorship \(^{12}\) and durable power of attorney laws, \(^{13}\) this article explores the history and propriety of permitting a capable individual to designate a ghostwriter to alter her estate plan in the event of her incapacity. \(^{14}\) The central policy question of the article is a profound one for a rapidly aging society: Should a capable adult be able through a durable power of attorney to grant her agent specific authority to make, amend, or revoke her will?

I. Substitute Decision-Making: A Brief Overview

Who makes decisions for the person no longer capable of making them herself? \(^{15}\) In recent decades, the importance of

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\(^9\) Unless otherwise noted, the terms “capacity” and “incapacity” as used in this article refer to an individual’s ability to execute a valid will under state law. See, e.g., Miller v. Fischer (In re Estate of Oliver), 934 P.2d 144, 148-49 (Kan. Ct. App. 1997) (recognizing that different tests for capacity apply in various legal settings and concluding that person who is under a conservatorship may still have testamentary capacity).

\(^{10}\) See infra notes 51-57 and accompanying text (discussing the common view that an individual’s power of testation is non-delegable).

\(^{11}\) See infra notes 65-123 and accompanying text (discussing independent significance doctrine and powers of appointment).

\(^{12}\) See infra notes 124-64 and accompanying text (discussing Uniform Probate Code Section 5-411 and other conservatorship provisions concerning estate planning).

\(^{13}\) See infra notes 165-200 and accompanying text (discussing the Uniform Power of Attorney Act and recent developments in durable power of attorney laws).

\(^{14}\) See infra notes 87-97, 120-23, and accompanying text (comparing ways of circumventing existing restriction on delegating will-making power and questioning whether restriction is justified).

\(^{15}\) See infra notes 18-32 and accompanying text (discussing substitute decision-making for incapacitated person).
this question has become obvious.\textsuperscript{16} Ready or not, society has learned that with large numbers of elderly Americans increasingly unable to make various intensely private and personal decisions for themselves, the decision-making process will often end up in the hands of others.\textsuperscript{17}

When faced with complex questions of substitute decision-making, family members and those interested in the welfare of an incapacitated adult once commonly resorted to judicial proceedings.\textsuperscript{18} America had long recognized a state’s power to appoint through judicial process a guardian or conservator to make some decisions for an incapacitated ward or protected person.\textsuperscript{19} Nevertheless, even after their fiduciary appointment, guardians often had to return to court to obtain explicit authority to make specific decisions such as those relating to life-prolonging medical treatment.\textsuperscript{20} Conservators faced similar problems; they too were hardly free in the absence of explicit court approval to make many decisions that the protected person almost certainly would have made had she

\textsuperscript{16} See, e.g., David M. English, \textit{The UPC and the New Durable Powers}, 27 REAL PROP. PROB. \& TR. J. 333, 362 (1992) (noting in early article on durable powers of attorney that the growing numbers of elderly Americans without close family members was one reason behind the rush of state legislatures to adopt durable power of attorney statutes for health care).

\textsuperscript{17} See, e.g., Sally Hurme \& Erica Wood, \textit{Symposium Third National Guardianship Summit: Standards of Excellence, Introduction} 2012 UTAH L. REV. 1157, 1162 (observing estimates of 400,000 adults under guardianship in 1988 and 1.5 million guardianship cases in 2011).

\textsuperscript{18} See, e.g., Carolyn L. Dessin, \textit{Acting As Agent Under a Financial Durable Power of Attorney: An Unscripted Role}, 75 NEB. L. REV. 574, 575 (1996) (noting the importance of guardianship and conservatorship proceedings, particularly before the advent of the durable power of attorney).

\textsuperscript{19} Conservatorship and guardianship proceedings can be slow, burdensome, and expensive. See English, \textit{supra} note 16, at 362. (stating that a guardianship proceeding “may be a cumbersome alternative at best”). They can also reveal a great deal of intensely private information and potentially embarrass the respondent.

\textsuperscript{20} See, e.g., Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969) (holding after discussion of judicial power that court had power to grant fiduciary’s request that incapacitated ward undergo removal of kidney for transplantation into ward’s brother).
retained the capacity to do so. Modern statutes give court-appointed fiduciaries more detailed default powers and guidelines for substitute-decision making, but they still leave many questions unanswered.

In recent years, durable powers of attorney have significantly reduced the need for guardians and conservators and the judicial process through which those fiduciaries are appointed. By the end of the twentieth century, all states had flexible statutory schemes that recognize the authority of a duly-appointed agent to make most decisions that the principal has expressly empowered the agent to make.

21 See, e.g., Estate of Christiansen, 56 Cal. Rptr. 505, 511-12 (Cal. Ct. App. 1967) (reversing trial court and holding that California courts can authorize a fiduciary to make gifts from the incapacitated person’s estate, but noting holdings or judicial suggestions from other states to the contrary).


23 See Julia Calvo Bueno, Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly, 16 NAELA Q. 20, 20 (Fall 2003) (describing the durable power of attorney as “an omnipresent tool of estate planning” and noting its role in avoiding guardianship and other judicial proceedings). Evidence is indisputable that the durable power of attorney now holds a prominent place in the world of estate planning documents. A study conducted for AARP in late 1999 indicated that 45 percent of Americans fifty and older had prepared a durable power of attorney for financial matters and that this percentage had almost doubled since 1991. Interesting, only 60 percent of respondents in that age group indicated in 1999 that they had a will, and this percentage was similar to that reported in 1991. WHERE THERE IS A WILL...LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 1, 5 (April 2000), available at http://assets.aarp.org/rgcenter/econ/will.pdf [hereinafter WHERE THERE IS A WILL].


25 See, e.g., UNIF. POWER OF ATT’Y ACT §§ 201-217, 8B U.L.A. 97-116 (Supp. 2012) (providing detailed description of powers that principal can delegate to agent by default or by specific grant). For a list of citations to durable power of attorney laws across the United States, see A. KIMBERLY DAYTON ET AL., 3 ADVISING THE ELDERLY CLIENT § 33.6 (June 2012) (providing table with citations to durable power of attorney statutes in all fifty states and the District of Columbia). For a comparison of state power of attorney statutes with the Uniform Power of Attorney Act shortly
The durable power of attorney permits a capable principal—a person who is typically in a better position than a judge to know and anticipate her needs and wants—to designate who will act for her and to define the parameters of her agent’s authority in the event of her incapacity. As a part of the modern estate plan, principals can and often do grant very broad powers to an agent named in their durable power of attorney.

Unless the agent is unwilling to act, acts in bad faith, or cannot act because he is unauthorized to make an important decision under the power of attorney, the need for a guardian after the latter’s promulgation, see generally Lori A. Stiegel & Ellen VanCleave Klem, Power of Attorney Abuse: What States Can Do About It (A Comparison of Current State Laws with the New Uniform Power of Attorney Act) 17-79 (Nov. 2008) (comparing statutory provisions and listing reasons why states should adopt the Uniform Power of Attorney Act), available at http://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf.


The appointment of a successor agent in the power of attorney document can further reduce the likelihood that a conservator or guardian will be needed. See, e.g., Unif. Power of Att’y Act § 111(b), 8B U.L.A. 77 (Supp. 2012) (noting that even when an agent declines to serve, a successor agent may act if power of attorney document so provides). See also id. § 114(a)(1), (2) (imposing duty upon agent to act in accordance with principal’s reasonable expectations or best interest and in good faith).

Id. § 115(1) (permitting principal generally to exonerate agent, but not for breaches of duty committed dishonestly, with improper motive, or with reckless indifference to the purpose of the power of attorney or the principal’s best interest; also precluding exoneration when provision in power of attorney was included because of abuse of confidential or fiduciary relationship with principal). See also id. § 114(a)(1), (2) (imposing duty upon agent to act in accordance with principal’s reasonable expectations or best interest and in good faith).

Id. § 114(a)(3) (providing that an agent shall act “only within the scope of authority granted in the power of attorney”).
or conservator diminishes significantly. Thus, the power of attorney also reduces concerns about cost, delay, and privacy often associated with guardianship and conservatorship proceedings.

Like the literary ghostwriter authorized by the subject to draft her “autobiography,” the modern agent is authorized by a principal to carry on and perhaps complete her life story by fulfilling her wishes and serving her best interest. Today a principal can delegate to her agent decision-making authority on life’s most important personal and financial matters. She can authorize her agent to refuse or terminate life-prolonging nutrition and hydration for her; she can authorize her agent to

31 See id. § 108 & comment (noting that a later court-appointed fiduciary may be necessary when an agent performs inadequately or breaches his fiduciary duty; providing generally, however, that in other instances a later court-appointed fiduciary “should supplement, not truncate” the agent’s authority).
32 See, e.g., Hook & Johnson, supra note 27, at 285 (observing that durable power of attorney is cheaper and simpler than the alternatives of guardianship and conservatorship).
33 Celebrities, professional athletes, and well-known politicians publish “autobiographies” that are penned largely if not entirely by someone else. See generally Henry Hansmann & Marina Santilli, Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis, 26 J. LEGAL STUD. 95, 135-36 (1997) (discussing the use of ghostwriters for “autobiographies” and observing there is no serious misleading of the public by these efforts).
34 See, e.g., Herring, supra note 8, at 1638 (noting that “[a]dvance directives enable us to make plans for the future and make arrangements about how we will be remembered and live out the end of our lives”).
35 An agent under a durable power of attorney is like a literary ghostwriter in other ways, too. The principal typically chooses her agent with great care, recognizing the importance and difficulties of the agent’s task. The agent is someone in whom the principal places confidence and trust. Before the relationship begins or early in the relationship, the careful principal is likely to discuss in detail with the agent how she wishes the agent to proceed in acting for her.
36 See, e.g., UNIF. HEALTH-CARE DECISIONS ACT §§ 1(6), 2(b) & Prefatory Note, 9 U.L.A. 84 (2005) (recognizing right of individual to direct all aspects of medical treatment, including refusal of treatment leading to death; further recognizing individual’s right to provide agent with authority to make all decisions the individual herself could make).
37 See, e.g., UNIF. POWER OF ATT’Y ACT §§ 204-217, 8B U.L.A. 102-116 (Supp. 2012) (detailing wide-ranging authority over principal’s assets that principal may provide to agent through simple act of incorporation by reference).
38 See supra note 36 (noting individual’s right to make all medical treatment decisions, including refusal of treatment that is followed by death).
purchase and sell property;\(^{39}\) she can even authorize her agent to give her estate away during her period of incapacity.\(^{40}\) Nevertheless, there remains one important area in which states refuse to recognize a principal’s delegation of power to an agent: A principal cannot authorize her agent to make, amend, or revoke her will.\(^{41}\)

Why is this so?

II. The Will

A. A Non-delegable Testamentary Power

State probate laws zealously guard the right of the capable citizen to execute a will.\(^{42}\) Although few states afford


\(^{40}\) See, e.g., Unif. Power of Att’y Act § 217(b), 8B U.L.A. 97-98, 115-16 (Supp. 2012) (providing default rules about gift-making authority and setting limits on an agent’s gift-making authority unless the power of attorney provides otherwise).

\(^{41}\) See William J. Bowe & Douglas H. Parker, 1 Page on Wills § 6.20 (2003 & Supp. 2012) (observing that a principal cannot use a “power of attorney . . . to bestow upon the attorney-in-fact the power to create a will on [her] behalf”); Unif. Power Att’y Act § 201(a), 8B U.L.A. 97 (Supp. 2012) (listing acts that agent may undertake only if the principal has given him a specific grant of authority; creating, amending, revoking, or terminating an inter vivos trust is among them, but making, amending, or revoking a will is not). See also id. Article 2 General Comment, 8B U.L.A. 97 (Supp. 2012) (stating that specific grant is required for certain actions “because of the risk those acts pose to the principal’s property and estate plan”). See generally infra notes 51-55, 170 and accompanying text (discussing statutory and judicial refusal to permit will-making by an agent).

\(^{42}\) The reported opinions from many states recognize that the right to devise is extremely important. See, e.g., In re Dunson’s Estate, 141 So. 2d 601, 604 (Fla. Ct. App. 1962); Holland v. Holland, 596 S.E.2d 123, 127 (Ga. 2004), Root v. Morning View Cemetery Ass’n, 118 N.W.2d 633, 637 (Neb. 1962). Even when recognizing that in most states the right to devise ultimately may be restricted and regulated by the state legislature, some courts have nonetheless noted that the right to devise is not only extremely important, but also perhaps even fundamental. See, e.g., In re Fritschi’s Estate, 33 Cal. Rptr. 264, 267 (Cal. 1963) (noting that “the right to testamentary disposition of one’s property is a fundamental one,” but further noting
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citizens a constitutional right to devise, the irrefutable trend in American probate law is to simplify will execution statutes to encourage citizens to die testate. Testamentary freedom is oft-said to be a hallmark of American wills law, and indeed one finds that the American testator encounters few limitations in fashioning devises and bequests that satisfy his desires and whims.

that the right is “restricted by legislative and social controls”), superseded by statute on other grounds, CAL. PROB. CODE §§ 21350-21356 (West 2011 & Supp. 2013).

The text of this article does not explore state constitutional arguments that could require a state to recognize a principal’s delegation of her will-making power to her agent. For example, Justice O’Connor, in her concurring opinion in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 289 (O’Connor, concurring), suggested that in matters involving an individual’s liberty interest concerning medical treatment protected under the federal Constitution, the Constitution may require a state to recognize the individual’s duly-appointed surrogate. By analogy—at least in the rare state where the right to devise is protected by the state constitution—one could plausibly argue that the state is compelled to recognize the principal’s duly appointed will-making surrogate. This is especially so if the right to devise is deemed a natural or fundamental right. See, e.g., In re Ogg’s Estate, 54 N.W.2d 175, 178 (Wis. 1952) (stating that “[T]he right to make a will [is] a sacred right guaranteed by the constitution”), quoting Cowie v. Strohmeyer, 136 N.W. 956, 974 (Wis.), modified by In re Rice’s Estate, 137 N.W. 778 (Wis. 1912). See generally Arthur Scheller, Jr., The Right to Dispose of Property by Will, 37 MARQ. L. REV. 92 (1953) (discussing Wisconsin’s constitutional right to devise and the effect of statutes that relate to that right).

Although the right to devise is not protected under the federal Constitution or the great majority of state constitutions, one might plausibly assert an equal protection challenge when state law refuses to recognize a competent principal’s delegation of her will-making power to her agent. For example, the person with an early diagnosis of adult onset dementia who clearly still has testamentary capacity could argue that the state is treating her differently from other testators by denying her the future ability to amend or revoke her will through a carefully selected and duly-appointed agent.

See, e.g., UNIF. PROBATE CODE § 2-503, 8 U.L.A. PART I 141 (Supp. 2012) (providing “harmless error” rule under which a document failing to comply with the execution requirements of the Uniform Probate Code is nonetheless treated as a valid testamentary document if clear and convincing evidence demonstrates that the decedent intended it be so).

See, e.g., SUSAN GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND Estates 12-14 (2011) (describing testamentary freedom as both “a cornerstone of American trusts and estates law” and “a bedrock principle”).

All authors note that testamentary freedom is not unlimited, however. See, e.g., Melanie Leslie, The Myth of Testamentary Freedom, 38 ARIZ. L. REV. 235, 236
Moreover, the will is probably the most personal legal document that an individual will execute.\textsuperscript{47} Even when the will is as terse as that of the famously laconic United States president Calvin Coolidge,\textsuperscript{48} it inevitably reveals some information unique to the testator.\textsuperscript{49} Who was he? What did he value? Whom did he love? How did he view himself and his place in the world? Others might make reasonably well-informed guesses at how an individual without a will would answer these questions; however, only the individual himself can answer those questions with certainty.\textsuperscript{50}

Recognizing that each of us is shaped by his or her singular life experiences, state probate laws traditionally impose an obvious if unstated limitation on will execution: No one can make, amend, or revoke the will of another person, and this is so even when that person becomes incapacitated and unable to act for herself.\textsuperscript{51} State statutes permit a competent testator to

\textsuperscript{47} “It is, and for many centuries has been, a common thought in our economic system, that to execute a last will and testament is the most solemn and sacred act of a man’s life.” \textit{In re} Estate of Hartt, 295 P.2d 985, 1002 (Wyo. 1956).


\textsuperscript{50} Thus, the law of wills has long striven to respect a testator’s individuality. See, e.g., \textit{In re} Estate of Gorthy, 100 N.W.2d 857, 864 (Neb. 1960) (noting that “No right of a citizen is more valued than the power to dispose of his property by will”; further observing the freedom with which the testator is permitted to act).

\textsuperscript{51} See \textit{In re} Estate of Garrett, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003) (observing that will-making power cannot be delegated); Smith v. Snow, 106 S.W.3d 467, 470 (Ky. Ct. App. 2002) (stating that power of attorney to make a will is not permitted in Kentucky and citing 1899 case to the same effect); \textit{In re} Perosi, 948 N.Y.S.2d 629, 634 (App. Div. 2012) (observing that while principal may grant an agent a broad array of powers, one of the few exceptions is execution of a principal’s will); Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743, 749 & n.2
execute a will with a signature by proxy, or to revoke by physical act of a proxy, but they do not permit that testator to give a proxy the testator’s will-making power. A court may even state that a testator’s power to make a will is so inherently personal that it is necessarily inalienable.

The practical effect of this limitation appears to be that an individual without a will who permanently loses testamentary capacity is destined to die intestate; similarly, the testator who later permanently loses testamentary capacity is

See, e.g., CAL. PROB. CODE § 4265 (2009) (stating that “A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal’s will”).

See, e.g., UNIF. PROBATE CODE § 2-502(a)(2), 8 U.L.A. PART I 136 (Supp. 2012) (permitting testator’s signature to be written by another individual who is in the testator’s conscious presence and acting at the testator’s direction).

See, e.g., UNIF. PROBATE CODE § 2-507(a)(2), 8 U.L.A. PART I 146 (Supp. 2012) (permitting testator to revoke will by physical act through another individual who performs the revocatory act in the testator’s conscious presence and at the testator’s direction).

The Uniform Probate Code, which stands at the forefront of progressive probate schemes, contains no provision that permits a testator to delegate her will-making power to another. See supra notes 52-53 (describing the limited role of proxy participation under the UPC to assist the testator in signing the will or performing a physical act of revocation on the will). Similarly, the Uniform Power of Attorney Act similar has no provision permitting a principal to delegate her will-making power to her agent. See infra notes 169-92 and accompanying text (describing broad range of “risky” powers that principal may delegate by specific grant, but excluding the principal’s will-making power).

See, e.g., In re Estate of Garrett, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003) (stating that will-making requires “personal performance” and is a power that cannot be delegated); In re Estate of Runals, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) (observing that the “right to make a will is personal to a decedent” and “is not alienable or descendible”).

Compare In re Garbow, 591 N.Y.S.2d 754, 756-57 (Sur. Ct. 1992) (observing that, even in absence of statute, court could authorize apply substituted judgment doctrine to authorize conservator to establish trust for elderly intestate woman lacking testamentary capacity to accomplish her goals) and In re Estate of Runals, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) (observing that right to make a will is neither alienable nor descendible). See also THOMAS P. GALLANIS, FAMILY PROPERTY LAW 161 (5th ed. 2011) (observing that courts “have doubted that they have the power to authorize a conservator to make, amend, or revoke a will for a protected person” in the absence of express statutory authorization of that power).
destined to die with that will in effect at death, no matter how outdated the will has become during the period of the testator’s incapacity.\footnote{See infra notes 138-45 and accompanying text (discussing case in which neither court nor conservator could revoke or amend the will of the incapacitated testator).}

But, as the old saw would have it, appearances are not always what they seem.

\section*{B. Circumventing the Non-Delegability Rule}

On their face, will execution statutes support the conclusion that no one can make, amend, or revoke a will for another.\footnote{See supra notes 51-57 (discussing statutes of wills execution requirements).} Yet careful inquiry reveals that probate law has long provided ways of avoiding the rule of non-delegability.\footnote{See infra notes 65-123 and accompanying text (discussing the independent significance doctrine and powers of appointment as two possible ways a testator may indirectly circumvent the rule forbidding delegation of one’s testamentary power).} In fact, by using simple common-law principles, a knowledgeable, well-advised, or just plain lucky individual who wishes to do so can and always could—perhaps indirectly, but nonetheless quite effectively—grant another the power to make, amend, or revoke her will and determine the distribution of each and every part of her estate.\footnote{See infra notes 71-78 and accompanying text (discussing how one testator indirectly delegated her will-making power through a holographic codicil even though she was almost certainly unaware of the rules of will execution and the common-law exception she managed to satisfy).} Little-known modern statutory developments have also provided new ways around the rule of non-delegability.\footnote{See infra notes 124-64 and accompanying text (discussing modern developments in conservatorship law).}

The following discussion examines some specific settings in which a third party can write another person’s will even after that person becomes incapacitated.\footnote{This article does not purport to discuss all possible methods of indirectly circumventing the non-delegability rule. Moreover, since the central question of the article is whether modern laws should permit a testator to delegate her will-making power to someone who can act \textit{after she has become incapacitated}, the article intentionally ignores those methods that do not permit another to act at that time. For}
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used in these settings are easily accomplished, requiring nothing more than a simple statement of the wishes of the delegating party executed in compliance with the statute of wills.63

Because these methods effectively circumvent the non-delegability rule, one question that logically follows is whether permitting delegation of a principal’s will-making power in a properly-executed power of attorney would be an unwarranted departure from what an individual can already do or, alternatively, would be a more transparent and efficient way of furthering probate law’s fundamental goal of effectuating the decedent’s distributive intent.64

1. The Independent Significance Doctrine

If a testator’s will provides that her estate should be distributed pursuant to the terms of another person’s will, the testator is attempting to transfer her will-making power to that other person.65 Such an attempt seems to fly in the face of the non-delegability rule and current power of attorney laws, which purportedly view one’s will-making power as too personal to be alienable.66 Nevertheless, applying the universally-recognized doctrine of independent significance,67 courts have long enforced such provisions.68

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63 See infra notes 65-164 and accompanying text (discussing doctrine of independent significance, powers of attorney, and conservatorship laws).
64 See infra notes 191-200 and accompanying text (examining the propriety of permitting a principal to delegate her will-making power to her agent by express grant).
65 See infra notes 71-85 and accompanying text (discussing cases in which testator included such a provision in her will).
66 See supra notes 47-50 and accompanying text (discussing highly personal nature of will-making).
67 See Restatement (Third) of Prop.: Wills & Other Donative Transfers
The doctrine of independent significance permits a court to take into account acts or events that occur after the testator makes her will, as long as those acts or events have meaning separate and apart from the distribution contemplated by the testator’s will. The Uniform Probate Code explicitly recognizes the execution of another individual’s will as an event having independent significance.


See supra note 62 (observing that the doctrine of incorporation by reference is another means of avoiding the non-delegability rule, but such rule does not permit the incorporated document to be prepared after the testator executes her will). See infra notes 71-78 and accompanying text (discussing well-known case from Tennessee in which testator devised her estate pursuant to the terms of her husband’s will that was executed after testator executed her will).

Both the original and the revised Uniform Probate Code codify the doctrine of independent significance. Section 2-512 currently provides as follows:

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before of after the testator’s death.

The execution of revocation of another individual’s will is such an event.
The Ghostwritten Will

In In re Tipler’s Will,71 Gladys Tipler executed a holographic codicil providing that the will of her husband, Tippy, would control the disposition of her estate if he predeceased her.72 Tippy had no will at the time that Gladys executed her codicil;73 however, several years after Gladys executed her will and codicil, Tippy did execute his will.74 Tippy then predeceased Gladys.75 Upon Gladys’s death her heirs argued that the court could not distribute her estate pursuant to the terms of Tippy’s later-executed will.76 The court rejected the heirs’ argument, finding that it could indeed enforce

An external circumstance has independent significance if it is one that would naturally occur or be done for some reason other than the effect it would have on the testamentary disposition, notwithstanding that it might occur or be done, or did occur or was done, for the purpose of affecting the testamentary disposition. The rationale for the doctrine is that the independent significance of the external circumstance—its lifetime or nontestamentary character—substitutes for attestation even though the circumstance itself is not attested. The circumstance may occur or come into existence before or after the execution of the will or before or after the testator’s death

71 10 S.W.3d 244 (Tenn. Ct. App. 1998).
72 Id. at 246. Gladys’s formal will, executed two days prior to her execution of the codicil, left most of her estate to her husband Tippy if he should survive her. It did not indicate how her estate should be distributed if Tippy predeceased her. Apparently recognizing this potential problem, Gladys executed the holographic codicil. Id.
73 Id.
74 Id. The time at which Gladys’s codicil and Tippy’s will were executed is important. Had Tippy had a will in final form at the time Gladys executed her codicil, the court perhaps would have given effect to Gladys’s codicil provision using the doctrine of incorporation by reference. See supra note 62 (explaining incorporation by reference). As Gladys’s heirs correctly argued, however, the doctrine of incorporation by reference cannot apply to permit reference to an external document that is not in existence at the time the testator executes her will. See Tipler, 10 S.W.3d at 248 (discussing argument of Gladys’s heirs). Because the doctrine of incorporation by reference did not apply in the case, the court did not have to answer the question of whether a holographic will (such as Gladys’s codicil) could incorporate a non-holographic document (such as Tippy’s will) under Tennessee law.
75 Id. at 246.
76 Id.
the codicil because Tippy’s will was an event of independent significance. Why? Because Tippy’s will served to distribute his own estate, an event separate and apart from the distribution of Gladys’s estate.

Although modern courts and statutes refuse to allow a principal to delegate her will-making power to her agent in a durable power of attorney, the Tipler case demonstrates that a principal can nevertheless effectively circumvent the limitation by executing a will devising her estate pursuant to the terms of her agent’s will. As long as the agent has executed a will at the time of the principal’s death, the agent’s will governs the distribution of the principal’s estate.

Both the common law

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77 Id. at 249. Before applying the independent significance doctrine, the court had to determine whether under state law the court could use a non-holographic document (such as Tippy’s will) as guidance when the will in question (Gladys’s codicil) is holographic. The court concluded that the “material provisions” of Gladys’s will were indeed in her handwriting, and thus applied the doctrine to permit distribution pursuant to Tippy’s will. Id. at 248-50.

78 Id. at 249-50.

79 See infra notes 170, 174-92 (noting that power to make, amend, or revoke principal’s will is not included among the “risky” powers, including the power of gift-giving, that a principal may delegate by specific grant under the Uniform Power of Attorney Act).

80 For example, if Gladys had named Tippy her agent under a durable power of attorney and executed the same codicil, Tippy would have had the indirect power of writing her will. His power would continue even if he executed his will after Gladys became incapacitated.

81 Courts have made it clear that when a testator leaves assets in her will pursuant to the will of another, it matters not whether the testator actually knows the contents of that other person’s will. In First Nat’l Bank v. Klein, 234 So. 2d 42 (Ala. 1970), the testatrix Maude provided that if her son Clarence should predecease her, his share of her residuary estate should pass to the residuary devisees named under his will. Id. at 44. The trial court found that the doctrine of incorporation by reference could not apply, but the state high court noted that the trial court had failed to consider the doctrine of facts of independent significance. Id. at 45-46. The court stated as follows:

Maude Leslie, by the language of her second codicil, gave her son, Clarence, the privilege of naming the beneficiary of that part of her residuary estate which he would have taken outright but for the fact that he died first. The gift by Maude to the ‘residuary legatees and residuary beneficiaries’ of Clarence’s estate under his last will and testament can be upheld without regard to whether Maude knew who had been designated by Clarence in
The independence doctrine can similarly accomplish the wish of an individual that, in the event of her incapacity, another person be able to direct the distribution of her estate by will. Thus, if in the Tipler case Gladys had become incapacitated after executing her holographic codicil, Tippy’s later-executed will would still have served to direct the distribution of Gladys’s estate because his will would remain an event of independent significance.

his last will and testament as the ‘legatees and beneficiaries’ to succeed to that part of Maude's estate which Clarence would have taken but for the fact that he died first.

The principle of naming the ‘legatees’ and ‘beneficiaries’ to whom one-third of Maude's residuary estate should go was unlimited, and did not depend for its validity upon Clarence's choice being communicated to Maude. Condit v. DeHart, 62 N.J.L. 78, 40 A. 776 (1898).

Klein, 234 So. 2d at 46. The Klein court also noted that the scenario presented in the case is specifically contemplated in standard treatise law, quoting as follows:

Where A leaves property to such persons as may take the property of B under B’s will, the disposition of B’s property is a fact of independent significance. B’s disposition of his own property has significance quite apart from the effect which it may have on the disposition of A’s property. Accordingly it has been held in a number of cases that where A leaves property to such persons as may take under the will of B, whether B survives A or predeceases him, the disposition of A’s estate is valid and the persons who take under B’s will are entitled to A’s estate.

Klein, 234 So. 2d at 46, quoting SCOTT ON TRUSTS § 54.4 at 388. The treatise language later 1A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 54.4, at 46 (4th ed. 1987).

See supra note 70 (discussing provisions of the Uniform Probate Code and treatise commentary).

See generally note 70 (discussing Uniform Probate Code provision under which testator can devise assets pursuant to the will of another; making no exception that would invalidate the bequest if the testator should later become incapacitated).

See supra note 81 (observing from case law that testator’s knowledge of the contents of the later-executed document is not a requirement for the doctrine to apply).
The independent significance doctrine carries one inherent limitation that would not exist in a direct grant of a principal’s will-making power to her agent. An individual like Tippy, whose will determines the distribution of another person’s estate under the independent significance doctrine, can never be a beneficiary of that other person’s estate. To state the obvious, Tippy cannot be the beneficiary of his own will.\textsuperscript{85} In contrast, if a principal could delegate her will-making power, and if her durable power of attorney specifically granted her agent an unrestricted power to name any beneficiaries including himself, the agent would be able to include himself as a beneficiary under the principal’s will that he writes for her.\textsuperscript{86}

Despite the inherent limitation on direct self-dealing under the doctrine of independent significance, the doctrine itself imposes no duties upon the person whose will is to determine the distribution of the testator’s estate.\textsuperscript{87} In the absence of a fiduciary relationship between the testator and the other person\textsuperscript{88} or a contract between the two,\textsuperscript{89} the other person

\textsuperscript{85} Of course, the doctrine of independent significance can apply to any act or event of independent significance. Importantly, it could include a pour-over provision from the testator’s will into a trust over which another person has power to determine the identity of the beneficiaries and their distributions under the trust. In such an instance, the other person could himself be a beneficiary. The use of trusts as a way of circumventing the rule of non-delegability is important. The trust, however, is a separate legal entity with its own set of default rules. The textual discussion of common-law tools to circumvent the non-delegability rules here instead focuses on the simplest, most direct ways in which an individual can essentially place her probate assets in the hands of another without creating a separate legal entity.

\textsuperscript{86} State laws regarding powers of attorney currently permit a principal to authorize her agent to engage in gift-giving and even to include himself as a donee. See infra notes 174-92 and accompanying text. Thus, were a principal free to authorize her agent to make, amend, or revoke her will, the principal should also be free to authorize him through specific grant to include himself as the beneficiary of a will he executes for her.

\textsuperscript{87} See, e.g., supra notes 71-84 and accompanying text (discussing facts of independent significance doctrine and in no way indicating a confidential, fiduciary, or contractual relationship between a testator and another, second testator whose will terms are to govern the distribution of the first testator’s estate).

\textsuperscript{88} See UNIF. PROBATE CODE § 2-512, 8 U.L.A. 158 (1998 & Supp. 2012) (imposing no fiduciary obligations upon second testator when first testator bequeaths assets pursuant to the terms of the second testator’s will).
The Ghostwritten Will is generally free to execute a will in favor of whomever he wishes. He is not bound to act in the testator’s best interest, he has no duty to consider what the testator herself would have wanted, and he owes no duty of loyalty or good faith to the testator.

In contrast, an agent acting under a power of attorney is a fiduciary who owes certain duties to the principal. Even if the principal were to grant her agent an apparently unfettered, unlimited power to make, amend, or revoke her will, some of those fiduciary duties would still exist because neither the principal nor anyone else can waive them. In light of the fiduciary duties that limit an agent’s actions under a durable power of attorney, a direct transfer of will-making power under power of attorney laws would seem to be far superior to

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89 The inclusion of a devise to pass pursuant to the terms of another person’s will would not, of itself, entitle a court to presume the existence of an underlying will contract between the two testators. See Unif. Probate Code § 2-514, 8 U.L.A. 155 (1998 & Supp. 2012) (setting forth requirements to prove will contract).

90 See supra note 88 (noting absence of fiduciary obligations in independent significance setting).

91 See infra note 189 and accompanying text (discussing obligation of fiduciary to act in principal or protected person’s best interest).

92 See infra note 190 and accompanying text (discussing obligation of fiduciary to act under principles of substituted judgment).

93 For example, in Tipler Tippy was free to leave his assets in his later-executed will to anyone. If Gladys had become incapacitated after executing her codicil and Tippy had then entered into a relationship with someone Gladys had always loathed, Tippy would still have been free to execute his will in favor of his new friend—and Gladys’s estate would have passed to her, too!

Had Gladys been able to delegate her will-making power to Tippy as her agent, however, it is almost certain that he would not have been able to devise her assets to his new friend unless such a devise served Gladys’s best interest or comported with what she herself would have done. See infra notes 189-91 and accompanying text (discussing agents’ mandatory duties under Uniform Power of Attorney Act).

94 See supra note 29 and accompanying text (discussing agent duties and ineffectiveness of certain exoneration provisions).

95 See infra notes 189-91 and accompanying text (discussing agent’s obligation always to act in good faith, within his authority, and in conformity with the principal’s reasonable expectations).

96 See supra note 29 and accompanying text (discussing mandatory provisions of the Uniform Power of Attorney Act).
an indirect transfer through the common law doctrine of independent significance.  

2. Powers of Appointment

A testator has also long been able to have someone else decide the distribution of some or all of her probate estate by including a power of appointment in her will. As long the testator demonstrates her intent to create a power of appointment, the power can arise even though the will’s language is less than artful.

Powers of appointment can occur separate and apart from wills, of course. Any competent individual (a “donor”) can give another person (a “donee”) a power of appointment to determine the distribution of some or all of the individual’s property. The donee receives the power and can appoint the

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97 See supra notes 87-96 and accompanying text (discussing lack of fiduciary duty in independent significance scenario).

98 See generally RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. a & illustrations (1986) (stating and demonstrating that transferor must only manifest intent to create power of appointment in a transfer that is otherwise effective). For an excellent discussion of modern developments in the law of powers of appointment, see generally Ira Mark Bloom, Powers of Appointment Under the Restatement (Third) of Property, 33 OHIO N.U. L. REV. 755 (2007).

99 See generally RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. a & illustrations (1986) (indicating that manifestation of intent is key).

100 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.1 & cmt. b (2011) (requiring that donor have intent to create power of appointment, but noting that intent need not be manifested by any particular words or phrases).

101 Powers of appointment are very frequently encountered in conjunction with trusts. See supra note 85 (discussing generally the use of a pour-over provision in a will to a revocable trust as an alternative way to provide someone else with quasi-will-making power).

102 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.7 cmt. e (1999) (distinguishing powers of appointment from independent significance). Typically the donor owns the property over which he creates a power of appointment; however, in some instances the donor creates a power of appointment over property for which he was himself the donee of a power of appointment. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.2 cmt. c, 19.13, 19.14 (2011); WILLIAM J. BOWE & DOUGLAS H. PARKER, 5 PAGE ON WILLS § 45.1 (2005 & Supp. 2012) (providing definition of terms
property to the permissible recipients ("appointees") indicated by the donor.\textsuperscript{103} The donor may choose not to limit the class of permissible appointees.\textsuperscript{104} If the donee can appoint the property to himself, his estate, or to his creditors or his estate’s creditors, the power of appointment is deemed to be a general power of appointment;\textsuperscript{105} all other powers are considered nongeneral.\textsuperscript{106} If the donee fails to exercise the power of appointment, those persons who wind up with the property by default are called takers in default of appointment.\textsuperscript{107}

relating to powers of appointment).

\textsuperscript{103} See \textsc{Restatement (Third) of Prop.: Wills & Other Donative Transfers} § 17.5 (2011) (distinguishing exclusionary from nonexclusionary powers).

\textsuperscript{104} Id. If the donee can appoint to one or more members of a defined, limited group while excluding others, the power is deemed exclusionary. Id. An example would be a power that the donee could exercise in favor of “any or all” of the donor’s grandchildren. If the donee cannot exclude any group member when making an appointment, the power is nonexclusionary. See id. at cmt. d. An example would be a power that the donee could exercise in favor of “every one” of the donor’s grandchildren. See id. at cmt. e. If the language concerning appointment in favor of a defined, limited group is ambiguous, the presumption is that the power is exclusionary. See id. at cmt. f.

\textsuperscript{105} See \textsc{Restatement (Second) of Prop.: Donative Transfers} § 12.1 cmt. e & illustrations (1986) (noting also that whether the power is general or non-general depends upon the relationship of the executor and the testator and upon other circumstances).

\textsuperscript{106} See id.; see also \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.3 (2011) (defining general and nongeneral powers of appointment). Because the donee of a presently exercisable general power of appointment can choose to appoint the property to himself at any time, he will routinely be treated as the transferor-owner of that property. See id. § 17.4 cmt. f(1) (noting, for example, that property subject to presently exercisable general power of appointment is included in estate of donee if surviving spouse elects against his “estate”). In contrast, the donee is not treated as the owner-transferor of a nongeneral power of appointment; rather, the donor is treated as the owner-transferor. Id. at cmt. f(2). When the donee receives a general testamentary power of appointment—i.e., a power that can only be exercised by will—treatment of the donee is mixed. In some instances the law treats the donee as owner-transferor; in others it treats the donor as the owner-transferor. Id. at cmt. f(3).

\textsuperscript{107} See \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.2 (2011) (providing definitions of terminology commonly used when a power of appointment is created).
The power of appointment is a highly flexible estate planning tool. The donor can make the power presently exercisable by the donee or, instead, can make the power exercisable only by the donee’s will. Importantly, the donor can choose to create a “postponed” power of appointment—i.e., a deferred power that the donee can exercise only upon the occurrence of a stated event. For example, the donor could provide that the power would be postponed until the event of her mental incapacity to manage her estate.

A Pennsylvania testator, in a handwritten will riddled with misspelled words and incomplete sentences, provided that “Mrs. Hibbert has taking [sic] care of my business for four years and knows all about my estate so she can handle my estate as she sees fit.” The court concluded that the testator intended to create a general power of appointment, and thus Mrs. Hibbert

108 See generally Susan Gary et al., Contemporary Approaches to Trusts and Estates (2011) at 373-74 (discussing general principles relating to powers of appointment).
109 See supra note 106 (discussing presently exercisable powers of appointment).
110 Id. § 17.4 (a), (b) (defining presently exercisable power of appointment and testamentary power of appointment).
111 Id. § 17.4(c) & cmt. d (defining and describing postponed power of appointment). See, e.g., In re Chappell, 883 N.Y.S.2d 857, 860-64 (N.Y. Sur. 2009) (discussing scenario with a postponed power of appointment that had become a presently exercisable general power of appointment, which donee then failed to exercise).
112 In this scenario, the donor should of course provide a description of the manner in which her “mental incapacity to manage her estate” is to be determined and who is to make the determination. Failure to do so could itself result in squabbles and litigation among those potentially interested in the donor’s estate.

113 Estate of Stewart, 473 A.2d 572, 573 (Pa. Super. 1984). For a collection of additional cases finding a power of appointment in a will, see Restatement (Second) of Prop.: Donative Transfers § 12.1 cmt. e & Rptr.’s Note 7 (1986). Among these cases are In re Rowland’s Estate, 324 P.2d 624 (Cal. Ct. App. 1958); In re Estate of Schaaf, 312 N.E.2d 348 (Ill. App. Ct. 1974); In re Townsend v. Gordon, 14 N.W.2d 57 (Mich. 1944); Lundie v. Walker, 9 A.2d 783 (N.J. Eq. 1939); In re Lidston’s Estate, 202 P.2d 259 (Wis. 1949). See also 1 Austin Wakeman Scott, William Franklin Fratcher, & Mark L. Ascher, Scott and Ascher on Trusts § 7.1.4 (5th ed. 2006) (discussing disposition of testator’s assets in accordance with the directions of a third person).
114 Stewart, 473 A.2d at 575.
could appoint the property to herself to the exclusion of the testator’s relatives.\(^{115}\)

Although at one time scholars and judges often conceptualized the donee as the agent of the donor,\(^{116}\) Section 19.22(b) of the \textit{Restatement (Third) of Property: Wills and Other Donative Transfers} explicitly rejects this view.\(^{117}\) The donor’s conferral of a power of appointment upon the donee does not impose fiduciary obligations upon the donee.\(^{118}\) Moreover, modern judicial opinions routinely refuse to treat a power of attorney itself as a power of appointment.\(^{119}\)

Thus, a donee receiving a presently exercisable general power of appointment through a testator’s will has no obligations similar to those imposed upon an agent under a power of attorney.\(^{120}\) Like the independent significance doctrine discussed in the preceding section,\(^{121}\) a power of appointment of itself is accompanied by no constraints of loyalty or good faith and by no duty to act in the donor’s best interest.\(^{122}\)

\(^{115}\) \textit{Id.}  
\(^{116}\) \textsc{Stewart Sterk et al.}, \textit{Estates and Trusts} 753 (4th ed. 2011). Fiduciary powers do exist, however. For example, a trustee who is given the power to distribute among a specific group of individuals holds a fiduciary distributive power. See \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.1 cmt. g (2011).  
\(^{117}\) See \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.1 cmt. j (2011) (distinguishing a power of attorney from a power of appointment and stating that “A power of appointment does not create an agency relationship between the donor and the donee of the power”).  
\(^{118}\) See \textsc{Gary et al.}, supra note 45, at 402 (noting distinction between fiduciary powers, such as those held by a trustee, and nonfiduciary powers, such as those held by the donee of a power of appointment).  
\(^{119}\) See \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.1 cmt. j (2011); Bloom, supra note 98, at 760 n. 17. A principal may give her agent a power of appointment within the power of attorney, however.  
\(^{120}\) See \textsc{Gary et al.}, supra note 45, at 402 (noting distinctions between fiduciary and nonfiduciary duties imposed by law).  
\(^{121}\) See supra notes 65-97 and accompanying text (discussing independent significance).  
\(^{122}\) See supra notes 87-97 and accompanying text (discussing absence of fiduciary duty); see also infra notes 189-91 and accompanying text (discussing agent’s fiduciary duties under power of attorney).
Once again, permitting a direct transfer of will-making power from a principal to an agent whose actions are governed by fiduciary standards seems a far more reliable and less dangerous way to ensure that the substitute decision-maker will distribute the assets of an incapacitated individual in accordance with her known or probable wishes or best interest. \footnote{123}


In addition to the traditional ways in which an individual herself can choose a third person to determine, during the period of her incapacity, the distributive plan for her probate estate,\footnote{124} states permit conservators or guardians to amend an incapacitated person’s non-probate estate plan.\footnote{125} For example, statutes in many states permit a conservator to make, at least in some circumstances, inter vivos distributions from the estate of the protected person as outright gifts;\footnote{126} other statutes permit

\footnote{123} The testator’s inclusion of a presently exercisable general power of appointment such as that in the \textit{Stewart} case is the most direct way to give a donee the power to determine the distribution of the testator’s probate assets. \textit{See Stewart}, 473 A.2d at 575. A less direct way—but one that is encountered far more frequently—is for the testator to use powers of appointment in the context of trusts to have someone else eventually determine the distribution of her probate assets. For example, Section 2-511 of the Uniform Probate Code permits a testator to devise assets to an existing trust or to a trust created later during her lifetime or at her death, and the fact that the trust is revocable or amendable (or is in fact amended after the testator’s death) does not make the devise is invalid. \textit{Unif. Probate Code} § 2-511(a), 8 U.L.A. PART I 152 (Supp. 2012). Thus, if the testator devises her assets to a trust over which a third party has the power to determine the identity or distributive shares of beneficiaries, the third party will effectively also determine the distribution of the testator’s assets and indirectly engage in making her will.

\footnote{124} \textit{See supra} notes 65-123 and accompanying text (discussing independent significance doctrine and powers of appointment). \textit{See also} Brashier, \textit{supra} note 49, at 86-91 (discussing judicial use of substituted judgment even in the absence of statute to authorize non-testamentary estate planning for incapacitated individual).

\footnote{125} \textit{See, e.g., Unif. Probate Code} § 5-427, 5-411, 8 U.L.A. PART II 295, 277-78 (Supp. 2012) (providing list of distributions that conservator can make by default without further court approval and distinguishing those estate planning actions by conservator that require specific court approval).

\footnote{126} \textit{See, e.g., id.} § 5-427(b), 8 U.L.A. PART II 295 (Supp. 2012) (permitting conservator to distribute amounts as gifts that the protected person might have been
The Ghostwritten Will

distributions to reduce taxes that would otherwise be owed by the protected person’s estate.\textsuperscript{127} Focusing on the pre-eminent goals of conservatorship and using “best interest” principles and substituted judgment\textsuperscript{128} to accomplish those goals,\textsuperscript{129} courts have also authorized conservators to create trusts with the protected person’s assets, thereby changing the nature and amount of assets flowing through her will.\textsuperscript{130}

Perhaps recognizing these ways in which guardianship and conservatorship laws effectively permit courts to manipulate indirectly a testator’s will,\textsuperscript{131} the drafters of the Uniform Probate Code eventually began a quiet retreat from the traditional “rule” that no one can make, amend, or revoke the will of another.\textsuperscript{132}

\textsuperscript{127} See, e.g., id § 5-411(c)(2), 8 U.L.A. PART II 278 (Supp. 2012) (permitting court to authorize various facets of estate planning by conservator after taking into account the “possible reduction of income, estate, inheritance, or other tax liabilities”).

\textsuperscript{128} See generally Frolik & Whitton, supra note 22 (providing excellent discussion and reinterpretation of best interest and substituted judgment standards).

\textsuperscript{129} See id.; see also Brashier, supra note 49, at 87 (describing traditional interpretation of substituted judgment to accomplish the presumed or known intent of the incapacitated person).

\textsuperscript{130} See, e.g., infra notes 138-45 and accompanying text (discussing court approval of conservator’s proposed creation of inter vivos trust, even though trust would alter the assets that would otherwise have passed through the protected person’s will).

\textsuperscript{131} See infra notes 133-46 and accompanying text (discussing judicial authorization of inter vivos trusts as a means of indirectly controlling the effects of the will of an incapacitated testator).

\textsuperscript{132} For a general discussion of this topic, see Brashier, supra note 49, at 63-64, 91-101 (examining the remarkable lack of fanfare concerning the current version of Uniform Probate Code § 5-411(a)(7), which permits a court to authorize a conservator to “make, amend, or revoke the protected person’s will”).
a. Judicial approval of trust creation upon petition of conservator

For many years, the Uniform Probate Code conservatorship provisions stated that a court could invest a conservator with “all the powers over the estate and business affairs which the person could exercise if present and not under disability, except the power to make a will.” This language or similar restrictive language still exists in the conservatorship statutes of a number of states.

Despite this language, however, judges and conservators can find ways to alter the assets that will pass under the protected person’s will. If a conservator can convince the judge overseeing the conservatorship that the protected person’s interests or wishes are best served by an inter vivos trust or other will substitute, the judge can order the conservator to place the protected person’s assets in the trust or other will substitute arrangement, and those assets will then pass outside the will at the protected person’s death.


135 See infra notes 138-45 and accompanying text (discussing North Dakota case in which court authorized conservator to engage in non-testamentary estate planning).

136 For example, a will substitute could serve to avoid the application of the default provisions of antilapse, ademption and abatement statutes when those statutes would lead to results the protected person would not have wanted.

137 See infra notes 138-46 and accompanying text (discussing how court that is statutorily constrained from exercising the protected person’s will-making power may nonetheless authorize the creation of inter vivos trusts that effectively change the distribution of the protected person’s assets at probate).
In In re Conservatorship of Sickles, a court approved the conservator’s request to establish an inter vivos trust for Lloyd and Floyd, twin brothers who were both under conservatorship. Realizing that creation of the trust affected the assets that would otherwise pass through the brothers’ wills, a person interested in those wills challenged the court’s power to authorize creation of the trust. The court noted that while it had no power to make a will for a person under a conservatorship, it could clearly authorize creation of a revocable trust. Moreover, because serious questions existed about the efficacy of the wills in accomplishing the brothers’ known objectives, the court emphasized that authorizing the creation of the trust did not thwart the estate plan, but rather helped to ensure that the brothers’ known wishes were accomplished.

As in Sickles, judges authorizing conservators to make various forms of inter vivos transfers generally do so with a primary purpose of accomplishing the overriding goal of conservatorship law: to fulfill the protected person’s wishes or, when those wishes are unknown, to serve her best interests.

518 N.W. 2d 673 (N.D. 1994).
Id. at 675-76.
Id. at 676.
Id. at 678-79 (quoting state statute that gave court all powers over the protected person except the power to make a will). See infra notes 133-34 and accompanying text (noting that such language comes from an earlier version of the Uniform Probate Code and is still applicable in several states).
Id. at 678-80. The court observed, however, that it could not authorize the creation of a trust that would “effectively defeat a protected person’s estate plan” and “deplete[] the estate that would have otherwise passed to intended beneficiaries. Id. at 679.
Id. at 679-82 (discussing the uncertainty concerning whether the existing will would accomplish the intent of the protected person).
Id. at 679, 681 (noting that the trial court had found that creating the inter vivos trust “carried out, fulfilled, and preserved the goals and objectives of [the protected person’s] estate plan” and concluding that trial court did not abuse its discretion in authorizing the trust creation).
Id.
Id.
See, e.g., id. at 679 (observing lower court findings that trust creation protected assets for the protected person during his life, minimized taxes, and ensured that his charitable goals would be accomplished at death).
b. Judicial approval of will creation, amendment, or revocation upon petition of conservator

As the foregoing discussion demonstrates, judges constrained by the traditional rule that an individual’s will-making power is non-delegable can nonetheless use substituted judgment or best interest considerations to authorize alternative estate plans that circumvent that restriction. In a world with increasing numbers of individuals under a conservatorship for longer and longer time periods, the need to create or amend an estate plan—including a will—for a protected person is also likely to grow. If the prohibition on ghostwritten wills is easily circumvented and the rule itself may hinder the goals of conservatorship law to accomplish the probable wishes of the protected person and to serve her best interest, then why not drop the rule completely?

The current version of the conservatorship provisions of the Uniform Probate Code does exactly that. Under Section 5-411, a conservator can make, amend, or revoke the will of a protected person after obtaining judicial permission. To give courts and conservators such authority statutorily is a

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147 For a discussion of the best interest and substituted judgment standards as existing along a continuum, see Frolik & Whitton, supra note 22. See also Brashier, supra note 49, at 87-91 (discussing evolution of substituted judgment and best interest standards).

148 See supra notes 1-4 (providing statistics on America’s aging population).

149 See UNIF. PROBATE CODE § 5-411(a)(7), 8 U.L.A. PART II 277-78 (Supp. 2012) (providing that conservator may “make, amend, or revoke the protected person’s will” after giving notice to interested person and obtaining express court authorization).

150 Id. The comment to the section indicates that the will provision is based on statutory developments in California and South Dakota. UNIF. PROBATE CODE § 5-411 cmt., 8 U.L.A. PART II 278-79 (Supp. 2012)
remarkable departure from centuries of wills law. Not surprisingly, however, the statute does not give courts and conservators carte blanche to ignore the probable wishes of the protected person. The statute lists a number of factors that the court “shall” consider before approving a conservator’s request to make, amend, or revoke the will of the protected person. These factors are largely common-sense, objective factors that serve to ensure that the decision will further the best interests of a reasonable testator.

Of course, a particular testator may not share the same wishes or worldview of the objective reasonable person. In such a setting, the statute seems to mandate that, to the extent

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151 See supra notes 51, 55, and accompanying text (noting judicial opinions indicating that an individual’s will-making power is too personal to be alienable or delegable).
152 See Unif. Probate Code § 5-411(c), 8 U.L.A. Part II 278 (Supp. 2012) (listing considerations that court “shall” make before authorizing acts by conservator under 5-411(a)).
153 Id.
154 Unif. Probate Code § 5-411(c)(1)-(7), 8 U.L.A. Part II 278 (Supp. 2012) (mandating consideration of the following:

1. the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
2. possible reduction of income, estate, inheritance, or other tax liabilities;
3. eligibility for governmental assistance;
4. the protected person’s previous pattern of giving or level of support;
5. the existing estate plan;
6. the protected person’s life expectancy and the probability that the conservatorship will terminate before the protected person’s death; and
7. any other factors the court considers relevant.

Id.

155 For example, a testator may desire a particular distribution of her estate even though she knows it will have adverse tax consequences. See, e.g., In re Conservatorship of Hart, 279 Cal. Rptr. 249, 264 (Ct. App. 1991) (discussing evidence that wealthy protected person made her decisions “based entirely on non-tax considerations,” but minimizing effect of that evidence because of California’s unusual substituted judgment statute that focuses primarily on what a prudent person would do).
the wishes of the protected person can be ascertained, the conservator and court generally respect those wishes under the principle of substituted judgment, even when those wishes seem at odds with an objective view of her best interest. 156

A small but growing minority of states has adopted Section 5-411 or its approach. 157 In fact, despite its novelty, Section 5-411 has slipped into law without much fanfare. 158 Even in states where Section 5-411 has been adopted, possibly most conservators are unaware that the supervising court can authorize a conservator to make, amend, or revoke the will of a

156 This point is arguable. See Unif. Probate Code § 5-411(c), 8 U.L.A. Part II 278 (Supp. 2012). The first sentence of this subsection states that “The court, in exercising or in approving a conservator’s exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained.” Id. (emphasis added).


A very few states that generally adhere to the traditional rule prohibiting a fiduciary from making the will of an incapacitated person nevertheless empower a guardian to amend the will of the incapacitated person to accomplish tax objectives. See, e.g., Fla. Stat. Ann. § 744.441(18) (West 2010 & Supp. 2013) (permitting guardian to execute a codicil for ward when ward’s will demonstrates intent to obtain estate tax charitable deduction with split interest trust and objective would not be achieved without codicil); 755 Ill. Comp. Stat. Ann. 5/11a-18(a-5)(11) (West 2007 & Supp. 2012) (empowering court to authorize guardian to execute codicil in light of changes in tax laws). Article II of the Uniform Probate Code authorizes courts themselves to modify a will to accomplish the testator’s tax objectives in a manner not inconsistent with the testator’s probable intent. Unif. Probate Code § 2-806, 8 U.L.A. Part I 238 (Supp. 2012).

A New Hampshire statute appears to empower courts to authorize a guardian to engage in testamentary planning for the ward consistent with the ward’s wishes. N.H. Rev. Stat. Ann. § 464-A:26-a (LexisNexis 2007 & Supp. 2012) (permitting planning even for non-tax purposes as long as proposal is consistent with ward’s wishes or reflects what ward would likely do). Thus, the New Hampshire statute appears similar to the early statutes upon which Uniform Probate Code 5-411(a)(7) was based. See supra note 150 (mentioning origins of the approach).

158 See infra note 160 (observing that the conservatorship provision is not even cross-referenced in the will execution statute of the Uniform Probate Code itself).
protected person.\textsuperscript{159} Indeed, Section 5-411 is not cross-referenced by the will execution provisions of Article 2 of the Uniform Probate Code,\textsuperscript{160} and thus lawyers who regularly draft wills may similarly be unaware of the judicial power under the conservatorship provisions of Article 5.\textsuperscript{161}

Perhaps the most disturbing aspect of Section 5-411 is its failure to allow a capable individual to expressly opt out of its coverage.\textsuperscript{162} If a competent testator includes a will provision stating that “under no circumstances shall any court or any individual other than myself amend or revoke this will or make a new will for me,” it is not clear that the testator’s language would necessarily trump a conservator’s subsequent attempt to amend or revoke that will or to make a new will for the testator.\textsuperscript{163} If the conservator could convince the supervising

\textsuperscript{159} Although some casebooks in Decedents’ Estates now mention this development, apparently none explore it in detail. See, e.g., Dukeminier et al., Wills, Trusts, and Estates 455 (8th ed. 2009) (describing statute in one paragraph); Gallanis, supra note 56, at 161 (mentioning without examining statute); Sterk et al., supra note 116, at 941-42 (including text of statute in chapter on planning for incapacity).

\textsuperscript{160} See Unif. Probate Code § 5-411(b) & cmt., 8 U.L.A. Part II 278 (Supp. 2012). Subsection (b) provides that “A conservator, in making, amending, or revoking the protected person’s will, shall comply with [the state’s statute for executing wills].” Id. The statutory comment observes that it adopted this approach rather than amend the will execution statute itself to allow explicitly for will execution by a conservator.

\textsuperscript{161} See Brashier, supra note 49, at 98-99 (noting that no formal studies indicate whether most people would favor granting a court and conservator power to make her will after she becomes incapacitated, and the statute is silent on the ability of an individual to opt out). See generally Adam J. Hirsch, Text and Time: A Theory of Testamentary Obsolescence, 86 Wash. U.L. Rev. 609 (2009) (arguing that default rules should ordinarily be based on the view of the majority).

\textsuperscript{163} See supra note 156 and accompanying text (discussing the statutory directive that the court should consider primarily the decision that the protected person would have made, but also noting that the court is to consider other more objective factors).
court that the testator had failed to anticipate fully her present circumstances and would not want that provision to be enforced had she so anticipated those circumstances, then the supervising court might well authorize the conservator to revoke or amend her earlier will or to make a new will for her.\(^{164}\)

In contrast to Section 5-411, were durable power of attorney laws to permit a principal to delegate her will-making power to her agent, the principal would have complete control over whether or not to grant the power to her agent.

III. THE DURABLE POWER OF ATTORNEY

A. A Flexible Alternative to Conservatorship

Conservatorship proceedings can be cumbersome, expensive, and time-consuming; their intrusion into private matters can be humiliating and stigmatizing for the subject of the proceeding and her family.\(^{165}\) Ultimately, a judge selects the conservator for the protected person and determines the parameters of the conservator’s powers.\(^{166}\) In marked contrast to conservatorship, the durable power of attorney permits a principal herself to choose her substitute decision-maker and to


\(^{165}\) See English, supra note 16, at 362 (noting that, at best, conservatorship is a cumbersome alternative).

\(^{166}\) Today, across the country judges are ostensibly constrained by the “least restrictive alternative” principle when removing powers from the ward or protected person and placing them in the guardian or conservator. Thus, judges are not to impose a full guardianship or conservatorship when a limited one will suffice. Although reformers agree that the goals underlying the principle are laudable, many question whether it has significantly changed the way in which judges actually make guardianship and conservatorship decisions. See, e.g., Alison Barnes, The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim, 11 ELDER L.J. 1, 2-13 (2003) (citing studies and statistics to show that the recommendations from the 1988 Wingspread and 2001 Wingspan conferences have largely gone unfulfilled in guardianship cases involving the elderly).
define his decision-making power.\textsuperscript{167} Autonomy and privacy are maximized; cost is minimized.\textsuperscript{168}

Modern durable power of attorney statutes permit a principal to be quite generous in granting authority to her agent.\textsuperscript{169} Yet no state permits a principal to authorize her agent to make, amend, or create her will.\textsuperscript{170} Why do modern conservatorship laws permit a judge to authorize a conservator to make, amend, or revoke a protected person’s will while the

\textsuperscript{167} Courts have recognized that the agent personally chosen by the principal is generally considered to be in a better position than a court-appointed conservator to accomplish the incapacitated person’s wishes. See, e.g., Wendland v. Wendland, 110 Cal. Rptr. 2d 412, 433 (2001) (noting that principal has highest degree of confidence in her agent; in contrast, conservator selected by judge cannot be presumed to have special knowledge of a protected person’s wishes).

\textsuperscript{168} See Boxx, supra note 24, at 1-14 (discussing the “deceptively simple document” known as the durable power of attorney). See generally LAWRENCE A. FROLIK & ALISON MCCRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 409-33 (5th ed. 2011) (discussing power of attorney).

\textsuperscript{169} See infra notes 179-85 and accompanying text (discussing powers that principal may grant her agent by default under Uniform Power of Attorney Act).

\textsuperscript{170} See WILLIAM J. BOWE & DOUGLAS H. PARKER, supra note 41 (observing that principal cannot give agent the power to create the principal’s will). In In re Estate of Garrett, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003), the court stated as follows:

a power of attorney, durable or otherwise, cannot bestow upon the attorney-in-fact the power to create a will on behalf of a principal. A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon that agent the authority to perform certain specified acts or kinds of acts on behalf of the principal. Black’s Law Dictionary 1171 (6th ed.1990). Under a power of attorney, an agent is “authorized to act with respect to any and all matters on behalf of the principal with the exception of those which, by their nature, by public policy, or by contract require personal performance.” 3 AM.JUR. 2d Agency § 21 (2002). The decision of who, what, when, and how one’s property is to be distributed upon death is clearly personal and that of the principal alone, and thus falls within the exception.

Garrett, 100 S.W.3d at 76. Accord In re Estate of Runals, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) (stating that right to make will is personal, not alienable). In a few states, the prohibition is statutory. See, e.g., CAL. PROB. CODE § 4265 (West 2009) (stating that “[a] power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal’s will”); MO. ANN. STAT. § 404.710(7)(1) (West 2011 & Supp. 2013) (including prohibition); WASH. REV. CODE ANN. § 11.94.050(1)(West 2006 & Supp. 2013) (including prohibition).
most generous of durable power of attorney laws continue to withhold from a capable principal herself a power to delegate her will-making authority?\footnote{See supra note 170 (discussing case law and statutory restrictions on will-making by agent.)} It seems unlikely that a court is in a better decision than the individual to choose her substitute decision-maker; moreover, any actions an agent might take concerning the principal’s will would be subject to judicial review at probate.\footnote{See infra notes 198-200 (discussing probate authority if agent were permitted to make, amend, or revoke will for principal).} The difference is more puzzling when one notes that many scholars and estate planners generally consider the durable power of attorney a better means than conservatorship to further autonomy, privacy, and efficiency.\footnote{See, e.g., Dessin, supra note 18, at 584 (observing in early article on durable powers of attorney that they had become important in the world of estate planning in part because they are viewed as less costly and more flexible than trust and guardianship and conservatorship arrangements). Not everyone agrees. See, e.g., DukeMiner et al., supra note 159, at 449 (stating that “durable powers are useful for persons seeking a way of dealing with incompetency without creating a trust, but trusts are more flexible and satisfactory for most clients”).}

Indeed, one specific power that a principal can give her agent under existing durable power of attorney statutes seems far more dangerous than a power to make, amend, or revoke her will. That power is discussed in the next section.

**B. The Agent’s Authority to Make Gifts**

Under modern durable power of attorney statutes, a principal may authorize her agent to perform *almost* any act of estate planning or asset management that she herself could perform if capable.\footnote{See, e.g., UNIF. POWER OF ATT’Y ACT § 103 cmt., 8B U.L.A. 67 (Supp. 2012) (listing delegations of authority excluded from the statute); id. § 201, 8B U.L.A. 97(c)(Supp. 2012) (discussing power of attorney that grants agent authority to do all acts that principal could do).} Thus, a principal may grant her agent the authority to establish trusts and other will substitutes with the principal’s assets,\footnote{Id. § 201(a)(1), 8B U.L.A. 67 (Supp. 2012) (recognizing specific grant to “create, amend, revoke, or terminate an inter vivos trust”).} and she may also grant her agent the
authority to make gifts from her estate. When a principal wishes to grant her agent non-probate estate planning powers, however, state courts may refuse to recognize such powers unless the principal has given them by express language in the power of attorney document.

176 Id. § 2012(a)(2), 8B U.L.A. 67 (Supp. 2012) (recognizing specific grant to “make a gift”).


178 See UNIF. POWER OF ATT’Y ACT § 201(a), 8B U.L.A. 67 (Supp. 2012) (requiring principal to include express language in order to authorize agent to engage in certain forms of non-probate estate planning). In the absence of statutory guidance, courts have often used a rule of strict construction when a question arises concerning the agent’s powers. See Schock v. Nash, 732 A.2d 217, 227-30 (Del. 1999) (citing decisions from Alaska, Florida, Hawaii, Iowa, New York, North Carolina, South Carolina, Texas, and Washington adopting a bright-line approach in reviewing powers of attorney). Under a “bright line” or “flat” rule, courts refuse to consider extrinsic evidence or surrounding circumstances. See, e.g., King v. Bankerd, 492 A.2d 608, 611-12 (Md. 1985) (citing authorities indicating that courts usually strictly construe powers of attorney as granting only those powers explicitly stated); Bienash v. Moller, 721 N.W.2d 431, 435 (S.D. 2006) (observing that POA grants only those powers specified in the document); Kline ex rel. Kline v. Utah Dep’t of Health, 776 P.2d 57 (Utah Ct. App. 1989) (indicating that power of attorney must be strictly construed and that agent’s power to transfer property for nominal amounts must derive from the language or manifest intent of the document); Jones v. Brandt, 645 S.E.2d 312, 315 (Va. 2007) (noting that “powers of attorney have been strictly construed for over a century” and explaining that such construction is necessary to minimize the potential for agent abuse, which is particularly dangerous with a durable power of attorney). Strict construction is particularly likely on the matter of an agent’s authority to make gifts.

Not all courts agree, however, even when the power in question is an agent’s authority to make gifts to herself. See, e.g., In re Kislak, 808 N.Y.S.2d 174, 176 (App. Div. 2005) (stating that “even where a power of attorney does not explicitly grant the attorney-in-fact authority to make gifts of the decedent’s property to himself, courts permit the attorney-in-fact to present evidence of the principal’s donative intent’’); In re Estate of Kurrelmeyer, 992 A.2d 316, 318-19 (Vt. 2010). In Kurrelmeyer, the agent was the principal’s wife. The principal’s son from a prior marriage objected to his stepmother’s actions, arguing that they defeated the provisions of the principal’s will. By resorting to extrinsic evidence, the court concluded that the agent’s transfer of property into a trust under which she would benefit substantially did not violate her fiduciary duty or constitute an improper gift or self-dealing, even though the power of attorney did not explicitly grant the agent such authority to transfer the property. The extrinsic evidence indicated that the
Section 201 of the Uniform Power of Attorney Act 2006 (UPOAA) adopts this bright-line rule.\footnote{[179]} For example, the section provides that an agent must have specific authority in the power of attorney to make a gift\footnote{[180]} or to create, amend, revoke, or terminate an inter vivos trust.\footnote{[181]} Further, if the principal provides her agent with a specific grant of this authority without elaboration, the agent cannot create an interest in the property in himself or in any person to whom he owes a legal obligation of support;\footnote{[182]} however, this limitation does not apply if the agent is an ancestor, spouse, or descendant of the principal.\footnote{[183]}

Additional limitations apply under the UPOAA when a principal grants specific authority for her agent to make gifts.\footnote{[184]} If the power does not otherwise provide, then the limitations of Section 217 apply by default.\footnote{[185]} Section 217 generally limits the agent to gifts from the principal’s assets not exceeding, per agent’s actions under the power of attorney furthered the “overarching goal” of the principal’s estate plan. \textit{Id.}

A court’s refusal to limit its inquiry to the face of the power of attorney does not mean it will be liberal in recognizing an agent’s power to make gifts. \textit{See, e.g., Schock v. Nash, 732 A.2d 217, 227-31 (Del. 1999) (rejecting a “bright line” or “flat” rule, but nonetheless concluding that surrounding circumstances did not support agent’s assertion that she had the power to make unlimited gratuitous transfers). The Schock court noted that while use of the bright-line rule would have led to the same result, such a rule “in a future case might unduly restrict the traditional ability of the [court] to consider all the facts and circumstances.” Id. at 228.}

Unsurprisingly, courts have observed that state statutory language concerning powers of attorney may determine the propriety of the bright-line or flat rule, on the one hand, or a more expansive view, on the other. For example, in Blin v. Johnson, 2007 WL 110520 (D. Ky.), a federal district court concluded that while a 1999 Kentucky Supreme Court decision had refused to adopt the bright-line rule, statutory changes from the Kentucky legislature in 2000 implicitly did adopt the bright-line rule.\footnote{[179]} \textit{Unif. Power of Att’y Act § 201(a), 8B U.L.A. 97 (Supp. 2012)} (requiring express language for non-probate estate planning powers). \footnote{[186]} \textit{Id. § 201(a)(2), 8B U.L.A. 97 (Supp. 2012).} \footnote{[187]} \textit{Id. § 201(a)(1), 8B U.L.A. 97 (Supp. 2012).} \footnote{[188]} \textit{Id. § 201(b), 8B U.L.A. 97 (Supp. 2012).} \footnote{[189]} \textit{Id.} \footnote{[190]} \textit{Id. § 201(d), 8B U.L.A. 98 (Supp. 2012).} \footnote{[191]} \textit{Id.}
donee, the annual federal gift tax exclusion amount.\textsuperscript{186} Moreover, the statute requires the agent to determine that any gift he makes is consistent with the principal’s objectives known to him.\textsuperscript{187} If the principal’s objectives are unknown, then the agent must ensure that the gifts are consistent with the principal’s best interest.\textsuperscript{188}

Section 114 of the UPOAA imposes non-waivable obligations upon an agent to act in good faith,\textsuperscript{189} in conformity with the principal’s wishes or expectations,\textsuperscript{190} and within the scope of his authority.\textsuperscript{191} The specific sections pertaining to an agent’s power to make gifts from the principal’s assets, however, impose no limitations upon the size of a gift or the identity of a donee if the principal expressly grants the agent an unfettered right to make a gift of any size that he deems appropriate to anyone (including himself) that he deems appropriate.\textsuperscript{192}

\textbf{C. The Effect of an Agent’s Gifts from the Estate}

When an agent makes an improper gift from the principal’s estate innocently or knowingly, the end result is often the same: the assets are forever gone while the principal

\textsuperscript{186} Id. § 217(b)(1), 8B U.L.A. 115 (Supp. 2012). If, however, the principal’s spouse agrees to a split gift, the limit on the gift increases to twice the annual federal gift tax exclusion amount. Id.

\textsuperscript{187} Id. § 217(c), 8B U.L.A. 115 (Supp. 2012).

\textsuperscript{188} Id. (listing factors to be considered in determining best interest).

\textsuperscript{189} Uniform POWER OF ATT’Y ACT § 114(a), 8B U.L.A. 80-81 (Supp. 2012).

\textsuperscript{190} Id.

\textsuperscript{191} Id. These mandatory duties require that the agent act in conformity with the principal’s reasonable expectations (or, if those expectations are unknown, to the principal’s best interest); in good faith; and within the scope of his authority. Id.

\textsuperscript{192} Thus, despite the mandatory obligations of section 114(a), if the power of attorney grants an agent an unfettered right to make a gift of any size he deems appropriate to anyone he deems appropriate with no further direction, it would appear very difficult to second-guess or overturn an agent’s decision. See supra note ___ and accompanying text (discussing mandatory obligations of agent that principal cannot waive in power of attorney document).
Occasionally, an interested person may learn of the improper transfer and seek removal of the agent and recovery of the assets. Often, however, those parties who would be most interested in protecting the principal and her estate will have no knowledge of the improper distributions until long after they occur, because most powers of attorney impose no duty upon the agent to account for his actions. Even in those settings in which the improper distributions come to light quickly after they are made, frequently the assets are permanently lost. In sum, providing an agent with authority to make gifts carries some degree of risk.

193 See, e.g., Minnesota v. Columbus, 2001 WL 950097 (Minn. Ct. App. 2001) (involving agent’s improper transfer of $45,000 of principal’s assets under a durable power that permitted agent to transfer assets to herself, leaving principal destitute and unable to pay nursing home bills). In a relatively early article on financial abuse of the elderly, Carolyn Dessin correctly warned that when the agent has abused her financial powers by making transfers during the principal’s lifetime, the problem of proving that abuse can be exacerbated after the victim/principal is dead. See Carolyn L Dessin, Financial Abuse of the Elderly, 36 IDAHO L. REV. 203, 217 (2000) (stating this “important lesson: if abuse is not challenged until after the death of the victim, relief may be unavailable because the abusive nature of the transaction simply cannot be proven”).

194 If the principal is incapacitated and has no one other than her agent who is interested in her welfare, the agent may easily be able to deplete her estate improperly and “get away with it.” An unusual case in which the elderly respondent herself brought the defalcations of her agents to light is In re Guardianship of Mowrer, 979 P.2d 156 (Mont. 1999). In that case, the centenarian respondent herself objected to the petition of her niece and her niece’s husband seeking to be appointed her guardians and conservators. Id. at 158-59. During the proceedings, the court learned that the respondent had given her niece and her niece’s husband a power of attorney, Id. at 158. After being named the respondent’s agents, the couple had moved her to another state, isolated her, and transferred well over half a million dollars from the respondent to themselves. Id. The state supreme court concluded that the evidence supported a finding of undue influence on the part of the couple. Id. at 163.

195 UNIF. POWER OF ATT’Y ACT § 114(h) & cmt., 8B U.L.A. 81-82 (Supp. 2012) (imposing no affirmative duty upon agent to account “except as otherwise provided in the power of attorney”). The statute mandates an accounting only upon court order or at the request of the principal, other fiduciary of the principal, governmental agency with authority to protect the principal’s welfare, or her personal representative or successor in interest to her estate. Id.

196 If the assets remain in the agent’s name, they may be recoverable. In many instances, however, the agent will have already disposed of the assets. See, e.g., State v. Barendt, 740 N.W.2d 87, 91 (N.D. 2007) (noting that agent spent some of the
Indeed, the risk to the principal and her estate from an improper gift by agent is much greater than the risk from an improper will executed by an agent for the principal. Unlike an inter vivos gift, a will has no effect until the death of the testator. By definition, a will executed by agent could not diminish the estate of a living principal, and thus all of her assets would remain available to her if needed for her comfort or care. The risk that an agent’s violation of a will-making power would go undetected also pales in comparison to the risk that an agent’s wrongful inter vivos gifts will go undetected. Unlike an agent’s inter vivos gifts from the principal’s estate, an agent’s will executed on behalf of the principal would require court approval before the assets could be distributed. The probate process would ensure that interested parties receive notice of the will and have an opportunity to contest that will. Moreover, challengers who can prove that an agent with gift-giving power has breached his fiduciary duty nonetheless face the often considerable task of tracing the gift assets and, if the assets still exist, recalling them from the hands of their current holder. In contrast, challengers who could prove that an agent with a will-making power breached his duty would have neither to trace nor recall estate assets.

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197 See Dessin, supra note 193, at 217 (warning of the dangers of permitting an agent to make financial transfers during the principal’s lifetime).
198 See supra notes 193-97 and accompanying text (discussing the difficulty of tracing and recalling assets distributed by the agent having no duty to account to anyone other than an incapacitated principal).
199 Importantly, the agent as a fiduciary would have the burden of demonstrating that the devises in the will for the agent’s benefit reflected the principal’s known or probable wishes or furthered her best interests.
200 Of course the need to trace and recall assets can arise even when the agent has a will-making power. But that need would not arise from the will-making power. Instead, it would arise from the agent’s improper distributions during the principal’s lifetime.
CONCLUSION

Across the country, will execution provisions appear to validate a will only if that will was executed by the testator or someone acting in her presence at her direction and only if the testator possessed testamentary capacity at the time of will execution. In fact, however, individuals have long been able to use a ghostwriter—even one who can act after the individual has become incapacitated—to accomplish their testamentary goals.

This article has not suggested that every principal should use a power of attorney to grant her will-making power to her agent. Instead, it has presented substantial arguments that a principal should be able to grant that power if she so wishes. The continuing prohibition on will-making by agent seems not only illogical, but also patently inefficient, in light of well-established common-law tools that permit an individual to delegate her will-making power to a third party non-agent whose actions are unconstrained by fiduciary obligations.

The explicit authorization of ghostwritten wills in modern conservatorship statutes also weighs in favor of permitting a principal to grant her will-making power to her agent. It is patronizing indeed to permit a court to choose who can make, amend, or revoke a protected person’s will and yet deny that person herself the power, when competent, to choose her own substitute decision-maker to make, amend, or revoke her will.

Yet, perhaps modern durable power of attorney statutes themselves present the best argument for recognizing the right of a principal to grant her will-making power to her agent. These statutes currently permit a principal to grant her agent a virtually unfettered power to make gifts. Such a power puts the principal and her estate at substantial risk during the principal’s lifetime. By comparison, an agent with the principal’s will-making power would be far less dangerous to the principal and her estate, because distribution of assets under the will would occur only once the principal has died. Moreover, like the traditional will, the will ghostwritten by agent would still be
subject to the probate process and the possibility of a will contest.

The practical importance of ghostwritten wills is likely to grow as our elderly population continues to swell in number and more and more of us spend some part of our final years lacking capacity to amend our estate plan to account for the events that are changing around us. If states were to permit a principal to delegate her will-making power, she would not be likely to do so without great deliberation and without placing substantial restrictions on the agent’s use of the power. By permitting her to grant this power, however, the state would be providing her an additional tool for ensuring that her testamentary wishes are respected.