REVOCABLE TRUSTS AND FIDUCIARY ACCOUNTABILITY

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This Article explores the fiduciary relationship between the trustee and the beneficiaries of a revocable trust, with special emphasis on statutory provisions that limit the beneficiaries' standing to enforce the trust during the settlor's lifetime. The Article argues that Uniform Trust Code § 603 and its nonuniform counterparts do not necessarily prevent the beneficiaries from holding the trustee accountable for breaches of trust occurring during the settlor's lifetime. Indeed, the case law suggests a more flexible and pragmatic approach exists that allows the beneficiaries to sue the trustee for breaches committed without the settlor's knowledge or approval.

I. Introduction

The revocable inter vivos trust is widely recognized as a valid and effective will substitute. Like a will, a revocable trust allows the settlor to designate beneficiaries to receive property at the settlor's death while retaining lifetime control over the property. Unlike a will, however, the trust operates outside the probate system. By allowing the settlor to replicate the primary function of a will by directing distribution of property at death, while avoiding the expense, delay, and procedural complexity of court-supervised probate administration, the revocable trust has emerged as the central instrument in contemporary estate planning.

The functional similarities between a revocable trust and a will have prompted reform proposals for "unifying the subsidiary law of

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succession."[1] These proposals have not gone unheeded. During the past thirty years, the simple but powerful concept of unifying the rules governing wills, revocable trusts, and other will substitutes has emerged as a major theme of the Uniform Probate Code[2] and the Uniform Trust Code,[3] as well as the Restatements of Property and Trusts.[4] Specifically, the Uniform Trust Code announces a "basic policy . . . to treat the revocable trust as the functional equivalent of a will."[5] In pursuit of this policy, the Uniform Trust Code provides that, while a trust is revocable and the settlor has capacity, the beneficiaries' rights are subject to the settlor's control and the trustee owes duties "exclusively" to the settlor.[6] This provision has proved controversial because it fails to address the respective rights and duties of the settlor, the beneficiaries, and the trustee while the settlor is alive but incompetent.[7] In enacting this provision, many states have omitted the capacity limitation, implying that the remainder beneficiaries lack standing to enforce the trust even when the settlor lacks capacity. Unfortunately, this legislative tinkering has only exacerbated the lack of clarity, certainty, and uniformity in the treatment of revocable trusts.[8]

1. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1134 (1984); *id.* at 1137 ("Both as a matter of legislative policy and as a principle of judicial construction, we should aspire to uniformity in the subsidiary rules for probate and nonprobate transfers.").

2. UNIF. PROBATE CODE (UNIF. LAW COMM'N 2010). The 1990 revisions to the provisions concerning intestacy, wills, and donative transfers included "measures tending to bring the law of probate and nonprobate transfers into greater unison." *Id.* art. II prefatory note.

3. UNIF. TRUST CODE (UNIF. LAW COMM'N 2010).

4. *See* RESTATEMENT (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. (AM. LAW INST. 2003) ("This Restatement . . . moves toward the policy of unifying the law of wills and will substitutes."); RESTATEMENT (THIRD) OF TRUSTS § 25 & cmt. a (AM. LAW INST. 2003) ("[W]hatever the technicalities of concept and terminology, the interests the revocable-trust beneficiaries will receive on the death of the settlor should, generally at least, receive the same treatment and should be subject to the same rules of construction as the 'expectancies' of devisees.").

5. UNIF. TRUST CODE prefatory note (UNIF. LAW COMM'N 2010); *see also id.* art. 6 general cmt.

6. UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2010).

7. The provision also fails to provide a mechanism for determining whether a settlor has lost capacity. In keeping with traditional usage, the terms "incapacity" and "incompetence" and their cognates are used interchangeably unless the context clearly indicates a different meaning.

8. For an incisive critique of uniform and nonuniform statutory provisions governing access to information about revocable trusts, see Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 766 (2006) [hereinafter Foster, *Elusive Quest*] ("In direct conflict with the goal of uniform

The nonuniform statutory provisions are open to criticism on the ground that they emphasize the revocable trust's primary function as a will substitute but ignore its secondary function as a "conservatorship substitute."[9] One possible response would be to confer presumptive standing on the remainder beneficiaries to enforce the trust if the settlor loses capacity, in default of action by an agent or conservator.[10] This approach reflects the settlor's presumed desire to avoid a court-supervised conservatorship proceeding while allowing the settlor to delegate power over the trust to an agent under a durable power of attorney. The proposal is also narrowly targeted, in the sense that it implicitly accepts the Uniform Trust Code's premise that the remainder beneficiaries have no standing to enforce a revocable trust as long as the settlor has capacity.

This Article advances a different line of argument, premised on the traditional concept of a revocable trust as an inter vivos trust in which the beneficiaries' rights are subject to the settlor's control. Although a revocable trust undoubtedly serves to avoid probate administration at the settlor's death, it is not merely a "nonprobate will."[11] It

treatment of wills and will substitutes, recent reforms have introduced greater restrictions on access to revocable trusts by the general public, third parties, and trust beneficiaries alike."); *see generally* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555 (2008).

9. David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute*, 24 ELDER L.J. 1, 3–5 (2016); *cf.* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (AM. LAW INST. 2003) ("[F]or management of the trust estate, the relatively developed principles and processes associated with trust administration . . . are in general substituted for the heavily court-dependent concepts and procedures of conservatorship."); GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 964, at 94 (3d ed. 2010) (noting that a revocable trust can "avoid . . . the need for a conservatorship if the settlor should become incapacitated"). A durable power of attorney can also serve as a conservatorship substitute, either in conjunction with or in lieu of a revocable trust. By itself, however, a durable power of attorney cannot avoid probate because the agency terminates automatically at the principal's death. *See* William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 REAL PROP., PROB. & TR. J. 1, 25 (1992).

10. *See* Feder & Sitkoff, *supra* note 9, at 33–47.

11. *See* Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 763 (2008) ("The phrase ['nonprobate will'] neatly captures the functional similarities between a will and a will substitute, but it should not be allowed to obscure the formal distinction between the two."); *cf.* RESTATEMENT (THIRD) OF PROPERTY § 7.2 cmt. a (AM. LAW INST. 2011) ("A will substitute is in reality a nonprobate will.").

also serves as a vehicle for lifetime management of the settlor's property.[12] To fulfill this dual function, the trust must be funded with property during the settlor's life, and the trustee must hold the property for one or more beneficiaries subject to enforceable fiduciary duties.[13] During the settlor's lifetime, the trustee owes fiduciary duties primarily to the settlor (or to an agent or conservator if the settlor loses capacity) and secondarily to the other beneficiaries, subject to the settlor's overriding power to revoke or amend the trust.[14] On its face, the Uniform Trust Code and its nonuniform variants appear to curtail beneficiary standing to enforce the trust, without specifying an alternative mechanism for monitoring the trustee if the settlor loses capacity. Despite some unfortunate dicta, however, the case law suggests a more flexible and pragmatic approach exists that recognizes the settlor's primary role in enforcing the trust while allowing the other beneficiaries to protect their interests. A categorical bar on beneficiary standing is unsound as a policy matter and avoidable as a matter of statutory interpretation.

II. Revocable Trust as Will Substitute

Doctrinally, the validity of the revocable trust as a probate avoidance device rests on the classification of the arrangement as an inter vivos trust rather than a testamentary transfer. This may seem ironic, given the modern recognition of the revocable trust as a functional substitute for a will. However, the distinction between inter vivos and testamentary transfers reflects the traditional view that all property owned at death is subject to probate administration and that such property passes by intestacy unless it is disposed of by a valid will.[15] Conversely, if an inter vivos trust is validly created and funded before

12. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (AM. LAW INST. 2003) ("[T]he revocable trust has become well established in American law as a socially useful and successful device for property management, especially late in life, and for the disposition of property (outright or in further trust) following the settlor's death.").

13. *See id.* § 2 cmt. f ("In the strict, traditional sense, a trust involves three elements: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.").

14. *See id.* § 74; 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 16.5, at 1050–51 (5th ed. 2007).

15. *See* RESTATEMENT (SECOND) OF TRUSTS § 56 (AM. LAW INST. 1959); *cf.* Langbein, *supra* note 1, at 1129 (referring to "[t]he assumption that will-like results may

death, the trust property passes outside the probate system to the beneficiaries designated in the trust.[16] Accordingly, no matter how closely a revocable trust mimics the effect of a will, it must satisfy the definition of an inter vivos trust in order to avoid being struck down as a defective testamentary transfer.

In upholding the revocable trust as a valid will substitute, courts have traditionally emphasized the trust's compliance with the formal elements of an inter vivos trust. For example, if a settlor transfers property to another person as trustee to pay income to the settlor for life with remainder payable at death to a named beneficiary, the arrangement clearly satisfies the definition of an inter vivos trust.[17] It is not classified as testamentary merely because the beneficiary's remainder interest takes effect at the settlor's death or is contingent on the beneficiary's survival. The result is the same even if, in addition to a life income interest, the settlor retains powers to revoke or amend the trust and to control the trustee in administering the trust.[18] Indeed, the settlor may also act as sole trustee while alive and competent without jeopardizing the arrangement's status as an inter vivos trust.[19] In the aggregate, the settlor's retained interests and powers clearly approximate full beneficial ownership of the trust property, but technically the creation of the beneficiary's remainder interest and the imposition of enforceable fiduciary duties during the settlor's life support the classification of the transfer as inter vivos rather than testamentary.

be achieved only by instruments that are wills and that invoke the probate system" as the "probate monopoly theory").

16. Even if previously unfunded, the trust may be funded at the settlor's death by a pourover devise without jeopardizing its status as an inter vivos trust. *See* UNIF. PROBATE CODE § 2-511(a), (b) (UNIF. LAW COMM'N 2010). Of course, the pourover devise is subject to wills formalities and to probate administration.

17. *See* RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. LAW INST. 1959).

18. *See id.* § 57 & cmts. a, b. A settlor may retain "not only a power to revoke and modify the trust but also power to control the trustee as to the administration of the trust." *Id.* cmt. b. In contrast, an attempted gift of property fails if delivery does not occur during the donor's lifetime. *See id.* (distinguishing valid inter vivos trust from "mere agency"). This position reflects a liberalization of the older view that a revocable trust might fail if the settlor retained "such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor." RESTATEMENT OF TRUSTS § 57(2) & cmt. g (AM. LAW INST. 1935).

19. RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. h (AM. LAW INST. 1959).

A prominent example of the traditional analysis appears in the leading case of *Farkas v. Williams*.[20] In that case, a settlor (Farkas) executed several written declarations of trust, naming himself as sole trustee and life income beneficiary of mutual fund shares and directing that the shares be paid at his death to another beneficiary (Williams) if living, subject to Farkas' retained power to revoke the trust. After Farkas died intestate, the administrators of his estate argued successfully in the lower courts that the trusts failed because Williams acquired no enforceable interest during Farkas' lifetime and the trust declarations were not executed with wills formalities. On appeal, the Illinois Supreme Court framed the issue in terms of two subsidiary questions: (1) whether Williams acquired an interest in the trusts when Farkas executed the trust declarations; and (2) whether Farkas, in his capacity as trustee, owed enforceable fiduciary duties to Williams.[21] The court answered both questions in the affirmative and upheld the validity of the trusts.[22]

Commentators frequently criticize the *Farkas* court's analysis as unduly formalistic.[23] Indeed, the court's two-pronged test exemplifies the problem of circular reasoning. To say that an interest passed from Farkas to Williams upon execution of the trust instruments, or that Williams acquired enforceable rights against Farkas, seem merely alternative ways of stating the conclusion that the trusts were validly created during life. Moreover, because Farkas acted as sole trustee and no question of enforcement arose until his death, there was no occasion during his lifetime to determine whether an interest passed to Williams, or

20. 125 N.E.2d 600 (Ill. 1955); *see also* Investors Stock Fund, Inc. v. Roberts, 179 F.Supp. 185, 191–95 (D. Mont. 1959), aff'd, 286 F.2d 647 (9th Cir. 1961) (reaching an identical result on similar facts).

21. *Farkas*, 125 N.E.2d at 603–08.

22. In closing, the court noted "the formality of the transaction" as additional support for its conclusion. *Id.* at 608; *see also* RESTATEMENT OF TRUSTS § 57 cmt. g (AM. LAW INST. 1935) (noting "the formality of the transaction" as a factor to be considered in determining "whether the reserved powers are so great as to make the trustee an agent of the settlor").

23. *See* Langbein, *supra* note 1, at 1126–28 (noting that an "odor of legal fiction hangs heavily over the present-interest test" and criticizing courts for using "doctrinal ruses" "to reach right results for wrong reasons"); *see also* RESTATEMENT (THIRD) OF TRUSTS § 25 reporter's notes (AM. LAW INST. 2003) (describing *Farkas* as "fumbling for an explanation"); *Id.* ("[A]sking whether something is a 'trust' or a 'mere agency' is at best question begging."); *cf.* Kent D. Schenkel, *The Trust-as-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 58 (2013) (noting that *Farkas* has been "unfairly hailed as a kind of poster child of speciously instrumental legal reasoning").

whether Williams acquired enforceable rights. The artificiality of the analysis emerges most clearly if one tries to imagine how Williams might have fared had he sought to enforce his rights as a trust beneficiary against Farkas as trustee in the event of a hypothetical lifetime breach. As a practical matter, Farkas while living (or his estate, if Williams waited until his death to sue) would almost certainly escape liability for his actions as trustee by arguing that he constructively revoked the trust or ratified the breach in his capacity as settlor.[24] Even the *Farkas* court seems to recognize as much. Noting that Williams might have an enforceable claim for a lifetime breach of trust committed by Farkas, the court observed that "Williams has rights the same as any beneficiary, although it may not be feasible for him to exercise them."[25]

The critics' impatience with the *Farkas* court's analysis is understandable. Realistically, the trust declarations in *Farkas* functioned as thinly-disguised pay-on-death beneficiary designations, cast in the form of inter vivos trusts to avoid will formalities and probate administration.[26] The court's discussion of the beneficiary's hypothetical right to hold the trustee accountable for a breach that never occurred seems strained, and critics have eagerly fastened on the court's concluding reference to "the formality of the transaction" as a more satisfactory explanation for the result.[27] In cases like *Farkas* where a revocable trust functions exclusively as a will substitute, the question of whether an enforceable fiduciary relationship arises during the settlor's life may seem only tangentially relevant to the main issue of who succeeds to the property at the settlor's death. Accordingly, it may seem perverse to insist that the validity of the arrangement depends on its classification as an inter vivos transfer. Today, the Uniform Probate Code provides a statutory shortcut by declaring a broad range of nonprobate

24. *See* Langbein, *supra* note 1, at 1127–28.

25. *Farkas*, 125 N.E.2d at 608.

26. *See* SCOTT ET AL., *supra* note 14, § 16.5, at 1049 (noting "the dirty little secret that, in terms of trust theory, a revocable trust has always had but a tenuous claim to being a real trust"); *cf.* CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 8.11, at 1093 (2016) (noting that a revocable trust "is a real trust" and not "merely an invalid will that has been formatted to look like a trust"). The "tentative trust" served a similar function in the analogous context of savings bank accounts. *See* In re Totten, 71 N.E. 748, 752 (N.Y. 1904).

27. *See Farkas*, 125 N.E.2d at 608 (noting that the settlor "manifested his intention in a solemn and formal manner"); Langbein, *supra* note 1, at 1130 (describing the present-interest analysis as "disingenuous" and proposing "alternative formality" as a more "candid and functional" approach); *cf.* RESTATEMENT (THIRD) OF TRUSTS § 74 reporter's notes (AM. LAW INST. 2007) (observing that validity of self-declared trust reflects a "policy choice").

transfers, including revocable trusts, to be "nontestamentary"—meaning simply that such transfers are not subject to will formalities or to probate administration.[28]

Nevertheless, the acceptance of a revocable trust as a valid will substitute does not mean that the beneficiary's interest arises only at the settlor's death or that the trust has no operative effect during the settlor's life. The widespread use of revocable trusts underscores the need to distinguish trust property clearly from property owned outright by the settlor at death.[29] That distinction marks the boundary between probate and nonprobate transfers,[30] and serves an important function not only in ensuring that property passes to the settlor's intended beneficiaries but also in protecting the rights of spouses, creditors, and other third parties.[31] As long as the settlor of a revocable trust remains alive and competent, the fiduciary relationship may be tenuous or sharply limited in scope, especially if the settlor acts as sole trustee. The fiduciary relationship may have considerably more substance if, however, the settlor becomes incompetent or names another person as trustee for other reasons. In that case, it may seem perverse to deny the existence of enforceable fiduciary duties simply because the arrangement also functions as a will substitute.

28. UNIF. PROBATE CODE § 6-101 (UNIF. LAW COMM'N 2010); *see also id.* cmt. (noting "the benign experience with such familiar will substitutes as the revocable inter vivos trust"). The Code also declares pay-on-death designations in financial accounts and security registrations to be "nontestamentary." *See id.* §§ 6-214, 6-309.

29. Thus, the "estate" subject to probate administration may be understood as "a residual entity containing only the property not disposed of by will substitute." Langbein, *supra* note 1, at 1130 ("Such a reading would contradict the probate monopoly theory and make unnecessary the pretense that will substitutes are transfers completed in the lifetime of the transferor.").

30. *See* Grayson M.P. McCouch, *A Comment on Unification*, 43 REAL PROP., TR. & EST. L.J. 499, 504 (2008) (noting importance of "the boundary between wills and will substitutes, between probate and nonprobate transfers"); *id.* ("[T]he rationale for unification does not require the obliteration of all distinctions between wills and will substitutes.").

31. *See, e.g.*, Frederick-Conaway v. Baird, 159 A.3d 285 (Del. 2017) (treating decedent's right to proceeds of stock sale as probate asset subject to creditors' claims, resulting in abatement of pourover gift to revocable trust that provided specific gift of stock or proceeds).

III. Revocable Trust as Fiduciary Relationship

The dual aspect of the revocable trust, as both a will substitute and a lifetime property management arrangement, is well established in the case law. Often, as in *Farkas*, the only issue is whether the trust property is distributable at the settlor's death to the remainder beneficiary under the trust or to the settlor's testate or intestate successors as part of the probate estate. In such cases, questions concerning the existence and scope of the trustee's duties during the settlor's lifetime remain essentially hypothetical. Other cases, however, squarely raise questions concerning the effect of the settlor's retained powers on the fiduciary relationship between the trustee and the beneficiaries while the settlor is still alive.

A revocable trust, like any inter vivos trust, consists of "a fiduciary relationship with respect to property," which gives rise during the settlor's lifetime to enforceable duties owed by the trustee to one or more beneficiaries.[32] The distinctive feature of the revocable trust is the settlor's power to revoke, which is held in a nonfiduciary capacity and is typically unrestricted in scope.[33] The power to revoke allows the settlor not only to terminate the trust and recover absolute ownership of the property but also to modify the terms of the trust and to control the trustee in administering the trust. The trustee of a revocable trust is generally required to comply with the settlor's directions (even if contrary to the terms of the trust), and is protected from fiduciary liability for

32. RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2007). The fiduciary duties owed by the trustee to the beneficiaries generally include good faith, prudence, loyalty, and impartiality. *See id*. §§ 76–79. In addition, the trustee generally has a duty to provide basic information to the beneficiaries so that they can enforce their rights under the trust. *See id*. § 82 cmts. (a), (a)(2).

33. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a (AM. LAW INST. 2007); BOGERT, *supra* note 9, at 94. Technically, a power to revoke, like a power of appointment, is viewed as a power to acquire or designate beneficial ownership rather than as a beneficial interest in property. *See* RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. b (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 cmts. c, e (AM. LAW INST. 2011).

any actions taken with the settlor's express consent or approval.[34] Consequently, the trustee is accountable primarily to the settlor rather than to the other beneficiaries.[35] In effect, the settlor "calls the shots."[36]

As long as the settlor is alive and competent, it seems entirely appropriate that the settlor's right to enforce the trust preempts the rights of the other beneficiaries. The settlor, who is typically also the sole lifetime beneficiary, is in the best position to monitor the trustee's actions and to pursue remedies for any breach of trust. Accordingly, the trustee's duties (including the duty to disclose information concerning the trust) generally run exclusively to the settlor, and the other beneficiaries cannot question the trustee's administration of the trust. If the settlor learns of a breach and pursues an appropriate remedy, the beneficiaries have no ground for complaint; their interests are adequately protected. Alternatively, if the settlor condones the trustee's actions, the settlor's approval binds the other beneficiaries and protects the trustee from liability.[37] As a practical matter, since the settlor could extinguish the beneficiaries' interests by revoking or amending the trust, it would be pointless (and perhaps counterproductive) for the beneficiaries to second-guess the settlor's decision to hold the trustee accountable or approve the trustee's actions.

It is hardly surprising, then, that the beneficiaries rarely attempt to hold the trustee accountable while the settlor is alive and competent. If the beneficiaries attempt to do so, courts summarily dismiss their claims for lack of standing.[38] In most cases, the question of the beneficiaries' ability to enforce their rights arises only after the settlor's death

34. *See* RESTATEMENT (THIRD) OF TRUSTS § 74(1) & cmt. a. (AM. LAW INST. 2007). The relationship between the trustee and the settlor of a revocable trust is conceptually distinct from an agency, despite similarities in basic fiduciary duties. *See id.* § 5 cmt. c. *Cf.* ROUNDS & ROUNDS, *supra* note 26, § 8.11, at 1093 (noting that a revocable trust "legally is a trust, not an agency" but the trustee is the settlor's "constructive agent . . . as long as the [settlor] is of full age and legal capacity").

35. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. e (AM. LAW INST. 2007).

36. ROUNDS & ROUNDS, *supra* note 26, § 8.11, at 1095; *see also* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. i (AM. LAW INST. 1959) ("[W]here the settlor reserves power to revoke the trust, his consent to a breach of trust precludes the beneficiaries of the trust from holding the trustee liable for a breach of trust.").

37. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. d (AM. LAW INST. 2007).

38. In one case, two settlors sued the corporate trustee for fraud and breach of fiduciary duty. The settlors' children (remainder beneficiaries) attempted to join as plaintiffs, but the court dismissed the children's claims for lack of standing, observing that "regardless of whether the [children] have suffered injury to their rights as beneficiaries of the trusts as a result of the [trustee's] conduct, those rights were subject to the control of [the settlors] while the trusts were revocable." Ex parte Synovus Trust Co., 41 So. 3d 70 (Ala. 2009). In another case, the settlor, acting as trustee,

when the trust is no longer revocable. Of course, once the trust becomes irrevocable, the beneficiaries have standing to determine the trust's validity, to compel the trustee to comply with its terms, and to pursue a remedy for any breach occurring after the settlor's death.

The more troublesome question is whether after the settlor's death the beneficiaries can compel the trustee to account for actions taken while the trust was still revocable. If the settlor approved an accounting rendered by the trustee, the beneficiaries are barred from reopening matters adequately disclosed in the accounting.[39] The beneficiaries are similarly barred from challenging any action taken by the trustee at the settlor's direction or with the settlor's approval, and courts routinely dismiss their claims for lack of standing.[40] The beneficiaries' inability to prevent the settlor from modifying or eliminating their interests, or to hold the trustee liable for following the settlor's directions, follows logically from the settlor's unrestricted power to revoke and the trustee's duty to obey the settlor's directions. The preemptive effect of the settlor's power is most obvious where the settlor acted as trustee of his or her own revocable trust, since the settlor automatically approved his or her own actions as trustee, but the same result holds where another trustee followed the settlor's directions.

Courts occasionally suggest in dicta that the trustee owes no fiduciary duties to the beneficiaries and that the beneficiaries have no enforceable rights while the trust is revocable, implying that the beneficiaries' interests do not arise until the settlor's death.[41] This formulation

agreed to a bargain sale of trust property to her son. Before closing, the settlor resigned as trustee and her daughter, a successor trustee and remainder beneficiary, challenged the sale as a breach of the settlor-trustee's fiduciary duty. The court disagreed, observing that the settlor owed no fiduciary duties to the remainder beneficiaries, and ordered the daughter to execute the sale. Fulp v. Gilliland, 998 N.E.2d 204 (Ind. 2013). Although the result is sound, a better explanation would be that the trustee was required to comply with the settlor's direction, even if the sale would otherwise constitute a breach of trust. *See also* Holmes v. Potter, 523 S.W.3d 397 (Ark. Ct. App. 2017) (holding that beneficiaries lacked standing to challenge revocation of trust by settlor-trustee "because the terms of the trust gave him free rein to do as he pleased with the trust estate" and his "fiduciary duties as trustee . . . were owed exclusively to [himself] in his capacity as settlor").

39. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 74 cmt. d, 83 cmt. c, 97 cmt. c(2) (AM. LAW INST. 2007).

40. *See, e.g.*, In re Malasky, 736 N.Y.S.2d 151 (App. Div. 2002) (holding that remainder beneficiaries lacked standing to object to accounting for period when settlor and spouse acted as co-trustees of joint revocable trust); Moon v. Lesikar, 230 S.W.3d 800 (Tex. App. 2007) (holding that remainder beneficiary lacked standing to challenge bargain sale of trust property by settlor and son as co-trustees).

41. *See, e.g.*, *Malasky*, 736 N.Y.S.2d at 152–53; *Fulp*, 998 N.E.2d at 207–09.

seems unnecessarily broad. A better explanation for the beneficiaries' lack of standing in these cases is that there is no factual or legal basis for imposing fiduciary liability on a trustee who obeys the directions of a living and competent settlor.[42] This conceptual point, which is fully consistent with the results reached by the courts, explains why courts also recognize that beneficiaries have standing, at least in some circumstances, to challenge actions taken by a trustee during the settlor's lifetime without the settlor's knowledge or approval.[43] In discussing beneficiary standing, a leading treatise observes:

> [M]any courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct.[44]

In *Siegel v. Novak*,[45] for example, the settlor created a revocable trust, naming herself as sole lifetime beneficiary and her three children as remainder beneficiaries. During the settlor's lifetime, her daughter withdrew large amounts from the trust, and the corporate trustee approved the withdrawals despite their questionable nature.[46] After the settlor's death, her sons objected to the trustee's accounting, claiming

42. Indeed, not even the settlor can object to actions taken by the trustee in accordance with the settlor's directions. *See* McGinley v. Bank of Am., N.A., 109 P.3d 1146 (Kan. 2005).

43. *See, e.g.*, Williams v. N. Tr. Bank of Fla./Sarasota, N.A., 819 F. Supp. 1042 (M.D. Fla. 1993) (holding trustee of revocable trust accountable after settlor's death to beneficiary who was entitled to periodic distributions during settlor's lifetime); Davis v. Davis, 889 N.E.2d 374 (Ind. App. 2008) (holding trustee of revocable trust accountable after settlor's death to remainder beneficiary for unauthorized lifetime breaches of trust); Dixon v. Dixon, 905 N.W.2d 748 (N.D. 2018) (allowing beneficiary of revocable trust, who was expressly entitled to periodic accountings, to sue trustee for unauthorized lifetime breaches of trust). To make the point more explicit, suppose that a settlor creates a trust for the immediate benefit of other beneficiaries, retaining a power to revoke but no beneficial interest. As long as the settlor is alive and competent and has an unrestricted power to revoke, the trustee is accountable only to the settlor; if the trustee commits a breach of trust, the settlor is the only person with standing to pursue a remedy. However, if the trustee commits a breach that remains undetected until the settlor's death, the settlor's lack of knowledge cannot plausibly be treated as an implied ratification. After the settlor's death, the beneficiaries should have standing to protect their interests because the trustee committed a breach that harmed the beneficiaries' interests and was not ratified by the settlor.

44. BOGERT, *supra* note 9, § 964, at 103–05.

45. 920 So. 2d 89 (Fla. Dist. Ct. App. 2006).

46. The daughter requested the distributions as the settlor's agent under a durable power of attorney, although neither the trust instrument nor the power of attorney authorized her to do so. *See id.* at 92.

that at least some of the withdrawals were improper because they were neither authorized by the terms of the trust nor approved or ratified by the settlor. Without reaching the merits of the sons' claims, the court held that the sons had standing to challenge the withdrawals, noting that a denial of beneficiary standing would allow a trustee to violate its fiduciary duties with impunity if the wrongdoing remained undetected during the settlor's lifetime.[47] The court distinguished cases denying standing to beneficiaries who sought to challenge actions taken by a trustee with the settlor's approval.[48]

The trustee of a revocable trust is generally protected from fiduciary liability for actions taken at the settlor's direction or with the settlor's approval. That protection may be vitiated, however, if the settlor lacks capacity to authorize the trustee's actions.[49] Determining whether a settlor has capacity with respect to a particular transaction often raises difficult legal and factual issues,[50] and the resulting uncertainty creates a dilemma for the trustee who must decide whether to comply with instructions given by a settlor of doubtful capacity. If the trustee complies and it later turns out that the settlor lacked the requisite capacity, the trustee may be liable to the beneficiaries for a breach of trust (if the transaction was not otherwise authorized under the terms of the trust). On the other hand, if the trustee refuses to comply and it turns out that the settlor was in fact competent, the trustee may be liable to the settlor

47. *See id*. at 95–96 ("Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded.").

48. *See id*. at 94–95 (distinguishing *Malasky*).

49. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) (AM. LAW INST. 2007); *see also* Osborn v. Griffin, 865 F.3d 417, 445–46 (6th Cir. 2017) (holding purported ratification vitiated by settlor's inability to understand transactions and trustees' improper conduct in procuring settlor's consent); Cloud v. U.S. Nat'l Bank of Or., 570 P.2d 350, 356–57 (Or. 1977) (holding trustee of revocable trust liable to restore amounts withdrawn at direction of incompetent settlor, in action brought by remainder beneficiary after settlor's death).

50. As a factual matter, capacity depends on the settlor's ability to understand and make an informed decision about a particular transaction. The legal standard for capacity may also vary according to the nature of the transaction. For example, the requisite capacity to create a revocable trust is the same as to execute a will, but a higher standard may be required for actions that affect the settlor's interests during life. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (AM. LAW INST. 1999); RESTATEMENT (THIRD) OF TRUSTS § 11 (AM. LAW INST. 2003); *cf.* Unif. Trust Code § 601 (UNIF. LAW COMM'N 2010). Of course, the trust instrument may provide a method for determining incapacity (e.g., certification by one or more physicians) and specify the consequences of such a determination for the trustee and the beneficiaries.

for disobeying valid instructions.[51] In the absence of reason for a contrary belief, the trustee is entitled to assume that the settlor has the requisite capacity.[52]

Questions concerning the settlor's capacity may bear directly on the beneficiaries' standing to challenge the trustee's actions after the settlor's death. In *Siegel*, for example, at least some of the disputed withdrawals occurred while the settlor was incapacitated.[53] Similarly, in *Brundage v. Bank of America*,[54] after the settlor's death, the beneficiaries of a revocable trust challenged stock transfers executed by the trustees during the settlor's lifetime; although the transfers were made with the settlor's written consent, the beneficiaries claimed that the settlor was incompetent and her consent was therefore void.[55] The court held that the beneficiaries had standing to challenge the stock transfers.[56] In reaching this conclusion, the court assumed that the trustees owed fiduciary duties exclusively to the settlor during the settlor's lifetime, and accordingly recognized that the beneficiaries had standing not to enforce their own interests directly but rather to remedy harm to their interests flowing from the trustees' breach of a duty owed to the settlor.[57] This distinction seems conceptually questionable, since the beneficiaries' standing is clearly predicated on harm to their own interests resulting from a fiduciary breach occurring during the settlor's lifetime. The practical effect of the decision is to allow the beneficiaries to hold the trustees

51. *See Cloud*, 570 P.2d at 354.

52. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) (AM. LAW INST. 2007).

53. *See Siegel*, 920 So.2d at 92 (noting that trust terms specified power of revocation was exercisable only by settlor and not by agent under durable power of attorney).

54. 996 So.2d 877 (Fla. Dist. Ct. App. 2008).

55. *Id*. at 883. The trust provided for distribution, at the settlor's death, of specified stock to her nieces and nephews (plaintiffs) and the rest of the trust property to another niece who was also a co-trustee (defendant). The plaintiffs argued that the transfers improperly shifted value from their shares to the defendant's residuary share. *See id.* at 879–80.

56. *See id*. at 882. As in *Siegel*, the court did not reach the merits of the beneficiaries' claims. Had the beneficiaries not alleged a fiduciary breach, they would not have had standing to compel an accounting from the trustees for the period before the settlor's death. *See* Hilgendorf v. Estate of Coleman, 201 So.3d 1262, 1264–66 (Fla. Dist. Ct. App. 2016) (distinguishing *Brundage*).

57. *See Brundage*, 996 So.2d at 882 ("We have found no case which enforces on a trustee a duty owed to a contingent beneficiary of a revocable trust. However, once the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary.").

accountable, after the settlor's death, for breaches that occurred during the settlor's life without the settlor's knowledge or approval.[58]

A revocable trust does not become irrevocable merely because the settlor becomes incompetent.[59] Such a result would be nonsensical as a practical matter, given the difficulty of determining capacity, the problems of notifying the trustee and the beneficiaries, and the possibility (however slim) that the settlor might recover capacity in the future. Nevertheless, the settlor's loss of capacity does have potentially important effects on the fiduciary duties of the trustee. The settlor's unfettered, nonfiduciary power to revoke—the conceptual basis for treating the settlor as the only person with standing to enforce the trust—is personal to the settlor, in the sense that no other person can act with the same lack of accountability. If the settlor becomes incompetent, an agent under a durable power of attorney or a court-appointed conservator may be authorized to revoke or modify the trust, but only in a fiduciary capacity.[60] In exercising any powers on behalf of the incompetent settlor, the agent or conservator must act in the settlor's best interest and in good faith.[61] Thus, although the trust remains revocable, the scope of the power to revoke in the hands of the agent or conservator is materially limited by the power holder's fiduciary duties.

Once the settlor becomes incompetent, the rationale for requiring the trustee to comply with the settlor's directions (even if contrary to the terms of the trust) no longer applies, because no other person has

58. The court apparently recognized this point when it cited *Siegel* as support for "a similar result." *Id.* at 882–83. *See also* Spacek v. Taylor, 381 P.3d 428, 433 (Colo. App. 2016) ("[W]here a trustee's actions breach a fiduciary duty to a settlor, causing harm to the trust's beneficiaries, the beneficiaries ought to be able to recover for the harm caused to them.").

59. Of course, the settlor's power of revocation might automatically terminate upon loss of capacity if the trust so provides. *Cf.* Lee v. Lee, 982 P.2d 539, 541–42 (Okla. Civ. App. 1999) (assuming that settlor intended trust to become irrevocable upon appointment of guardian because power of revocation was "personal to the settlor"); Kline v. Utah Dep't of Health, 776 P.2d 57, 63 (Utah Ct. App. 1989) (holding that settlor's expressly retained power to revoke terminated upon incapacity, so trust property was not "available" asset in determining Medicaid eligibility).

60. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) (AM. LAW INST. 2007) (noting that a conservator or agent acts "in a fiduciary capacity" and generally "in accordance with principles of substituted judgment"); *see also id.* §§ 11 cmt. f, 63 cmt. *l*.

61. *See* UNIF. POWER OF ATTORNEY ACT § 114(a) (UNIF. LAW COMM'N 2006); UNIF. PROBATE CODE § 5-418(a) (UNIF. LAW COMM'N 2010).

the same degree of unfettered power over the trust.[62] An agent or conservator may have a more limited fiduciary power to protect the settlor's interests, but such a power—unlike the settlor's nonfiduciary power—does not necessarily preclude the other beneficiaries from protecting their own interests. Accordingly, upon the settlor's incapacity, whether or not an agent or conservator is appointed, the beneficiaries may become entitled to enforce their rights under the trust.[63] The argument to the contrary is that the settlor's power to revoke passes to an agent or conservator (subject, of course, to fiduciary constraints) and the trustee remains accountable solely to the agent or conservator on behalf of the incompetent settlor.[64] Under this argument, the beneficiaries would lack standing to enforce the trust directly, but they would have standing to object if the agent or conservator failed to hold the trustee accountable for any breach of trust.[65] This argument assumes, perhaps unrealistically, that an agent or conservator would effectively monitor the trustee and protect the interests of both the settlor and the other beneficiaries. There is no assurance, however, that an agent or conservator would actually be appointed, or that such a fiduciary, if appointed, would diligently monitor the trustee and effectively protect the beneficiaries' interests.[66] Moreover, it is not difficult to imagine cases

62. *See* RESTATEMENT (THIRD) OF TRUSTS, § 74 cmt. a(2) (AM. LAW INST. 2007); *cf.* id. § 75 cmt. e.

63. *See id*. § 74 cmt. e ("For as long as, and to the extent that, the trust is revocable by the settlor and the settlor is legally competent . . . , the settlor may enforce the trust on behalf of all beneficiaries, and the trustee's duties are owed primarily to the settlor, or solely to the settlor insofar as the rights of other beneficiaries are preempted by conduct of the settlor. . . . If, however, the settlor lacks this required capacity, the other beneficiaries are ordinarily entitled to exercise, on their own behalf, the usual rights of trust beneficiaries . . . .").

64. *See* Johnson v. Kotyck, 90 Cal. Rptr. 2d 99, 102–03 (Ct. App. 1999) (holding trustee accountable to court-appointed conservator and not directly to remainder beneficiary); In re Conservatorship of Loyd, 868 So.2d 363 (Miss. Ct. App. 2004) (holding trustee accountable to conservator); In re Estate of Roberts, 426 N.E.2d 269 (Ill. App. Ct. 1981) (requiring trustee to "account to and pay income to" conservator on behalf of incompetent settlor).

65. *See Johnson*, 90 Cal. Rptr. 2d at 103–05.

66. A conservator or guardian can exercise powers over a revocable trust on behalf of an incapacitated settlor only with court approval, which is often but not always granted. *See, e.g.*, In re Elsie "B," 707 N.Y.S.2d 695 (App. Div. 2000) (approving modification of trust by guardian); In re Mary XX, 822 N.Y.S.2d 659 (App. Div. 2006) (holding trustee accountable to personal guardian); In re Estate of Roberts, 426 N.E.2d 269 (Ill. App. Ct. 1981) (authorizing conservator to control trust income); In re Bo, 365 N.W.2d 847 (N.D. 1985) (refusing to authorize conservator to revoke trust). In contrast, an agent under a durable power of attorney can exercise control over a revocable trust without court approval, if authorized by the principal. Nevertheless, a judicial proceeding may be required if the scope of the agent's power is

in which a fiduciary acting on behalf of an incompetent or deceased settlor might overlook or fail to object to a breach that did not harm the settlor directly.[67] Thus, the better approach recognizes that an agent or conservator can represent the interests of an incompetent settlor but that in some circumstances the other beneficiaries should be allowed to protect their own interests. This is a corollary of the notion that the trustee's fiduciary duties run primarily to the settlor and secondarily to the other beneficiaries.[68]

A related problem arises when the creation, amendment, or revocation of a revocable trust is challenged on grounds of incapacity, fraud, or undue influence.[69] A trustee who mistakenly relies on a trust that has been amended or revoked or that turns out to be invalid for any other reason may be liable for a fiduciary breach, unless the trustee acted in good faith and had no reason to doubt the validity of the trust.[70] Even if the trustee is protected from fiduciary liability, the settlor (or an agent, conservator, or personal representative acting on behalf of an incompetent or deceased settlor) may disavow the invalid trust provisions and recover any improper distributions directly from the recipients. In the case of an invalid amendment or revocation, the trustee has standing to recover any improper distributions for the benefit of the trust and the

unclear or contested. *See, e.g.*, In re Mosteller, 719 A.2d 1067 (Pa. Super. Ct. 1998) (upholding trust revocation by agent under durable power).

67. In *Siegel*, for example, the court affirmed "without further comment" the lower court's ruling that the deceased settlor's personal representatives had no duty to attempt to recover amounts improperly withdrawn from the trust because the recovery would not increase the probate estate. Siegel v. Novak, 920 So.2d 89, 93 n.2 (Fla. Dist. Ct. App. 2006). In *Brundage*, a fiduciary acting on behalf of the settlor or her estate presumably would have had no incentive to challenge stock transfers that allegedly favored one beneficiary at the expense of the others but had no adverse effect on the value of the trust as a whole. *See* Brundage v. Bank of Am., 996 So.2d 877 (Fla. Dist. Ct. App. 2008).

68. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a(2) (AM. LAW INST. 2007) ("[I]t is the trustee who is normally to carry out the settlor's trust plan and to assume responsibility for the fiduciary duties that are owed to the settlor or donee and also, even if secondarily, to the settlor's other chosen beneficiaries.").

69. The grounds for contesting a revocable trust are generally the same as those for contesting a will or other donative transfer. *See id.* §§ 11, 12; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1, 8.3 (AM. LAW INST. 2003).

70. *See* RESTATEMENT (THIRD) OF TRUSTS § 76(1) & cmt. f (AM. LAW INST. 2007). The situation is analogous to that of a trustee who obeys the settlor's directions without having any reason to doubt the settlor's capacity. *See id.* § 74 cmt. a(2). In doubtful cases, the trustee can protect itself from potential liability by seeking judicial instructions. *See id.* § 71.

beneficiaries.[71] After the settlor's death, the personal representative (on behalf of the settlor's testate or intestate successors) generally has standing to contest the validity of the trust, while the trustee (on behalf of the beneficiaries) has standing to contest the validity of an amendment or revocation. Although the trustee is ordinarily responsible for pursuing claims against third parties on behalf of the beneficiaries, the beneficiaries may do so if they are entitled to immediate possession of the trust property or if the trustee is unable or unwilling to act.[72] In that case, they may proceed directly against the recipients who were unjustly enriched, typically by imposing a constructive trust.[73]

IV. Uniform Trust Code

The Uniform Trust Code expressly endorses a general policy of treating a revocable trust as "the functional equivalent of a will."[74] This policy, if taken to a logical extreme, might imply that as long as a trust is revocable, the settlor is the only person to whom the trustee owes any fiduciary duties, and that the other beneficiaries have no legally protected interests. Such an approach could seriously impair enforcement of the trust if the settlor becomes incompetent and is not represented by an agent or a conservator, since none of the other beneficiaries would have standing to hold the trustee accountable for a breach of trust. Recognizing that a revocable trust functions not only as a will substitute but also as a fiduciary arrangement for lifetime property management, the drafters of the Code opted for a different approach to enforcement during the settlor's lifetime.

Under § 603(a) of the Code, as long as the trust is revocable and the settlor has capacity, "rights of the beneficiaries are subject to the

71. *See id*. § 107(1).

72. *See id*. § 107(2).

73. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. *l* (AM. LAW INST. 2007); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 46, 55 (AM. LAW INST. 2011). If a constructive trust does not provide an adequate remedy, the intended beneficiaries may be able to recover damages in tort for intentional interference with a gift or inheritance. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. m (AM. LAW INST. 2007); RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979).

74. UNIF. TRUST CODE prefatory note (UNIF. LAW COMM'N 2010). This policy is reflected, for example, in the Code provisions concerning the settlor's capacity to create a revocable trust (*id*. § 601), the existence of an implied power of revocation and the manner of exercise (*id.* § 602), and the limitation period for contesting the validity of a revocable trust (*id.* § 604). *See also id.* § 406 (noting grounds for contest).

control of, and the duties of the trustee are owed exclusively to, the settlor."[75] Under § 603(b), as originally promulgated in 2000, if the settlor loses capacity, "rights of the beneficiaries are held by the beneficiaries."[76] The intended effect of these provisions, as explained in the original official comment, was not to deny the existence of the beneficiaries' interests during the settlor's lifetime but merely to "postpon[e] enforcement" of their rights "until the death or incapacity of the settlor."[77] In other words, the drafters contemplated that as long as the settlor had capacity to revoke the trust, the trustee would be accountable exclusively to the settlor for its administration of the trust. If the settlor lost capacity, however, the beneficiaries would have standing to enforce their rights under the trust, including the right to receive information and reports from the trustee.[78] The drafters apparently contemplated that the beneficiaries could hold the trustee accountable for actions taken by the trustee without the settlor's knowledge or approval before the settlor lost capacity, though evidently not for actions approved by the settlor while competent.[79] In addition, an agent or conservator rep-

75. UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2000) (as originally promulgated, prior to 2004 amendment).

76. *Id.* at § 603(b).

77. *Id.* at § 603 cmt.

78. *See* UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2010) (noting that upon settlor's incapacity, "the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust"). Section 603, however, is a default provision. Thus, as long as the trust is revocable, "a settlor is free to deny the beneficiaries [the right to information and reports], even to the point of directing the trustee not to inform them of the existence of the trust." *Id.*; *see also* Foster, *Elusive Quest*, *supra* note 8, at 750 ("[S]tate after state has enacted trust legislation or amendments that expressly recognize the settlor's right to waive trustee duties to inform and report to beneficiaries."). This reflects a "compromise" between competing views of the revocable trust as a pure will substitute and as a "lifetime management device." David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 188 (2002). When the trust becomes irrevocable—typically at the settlor's death—the trustee is generally required to notify the beneficiaries of the existence of the trust and to keep them informed about its administration. *See* UNIF. TRUST CODE § 813(a), (b) (UNIF. LAW COMM'N 2010).

79. *See* English, *supra* note 78, at 188 n.191 ("The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity. The trustee, however, may be required to account to the beneficiaries for transactions taken during such period."); *see also* UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2000) (as originally promulgated, prior to 2004 amendment) ("The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity."); UNIF. TRUST CODE

resenting an incompetent settlor may be authorized to exercise the settlor's power to revoke the trust.[80] The agent or conservator is also entitled to enforce the trust on the settlor's behalf and to pursue remedies for any breach of trust occurring before the settlor lost capacity.[81] In sum, the drafters of § 603 seem to have contemplated a lifetime enforcement scheme broadly consistent with the traditional approach developed in the case law and described in the Restatement (Third) of Trusts.[82]

Section 603 has been amended several times since 2000. Though not intended as substantive changes, two purportedly technical amendments have created confusion concerning the effect of the provision. In 2001, the provision confirming the beneficiaries' rights during the settlor's incapacity was deleted as "superfluous."[83] As the drafters explained:

> Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).[84]

This explanation is literally accurate, as far as it goes. Nevertheless, it fails to acknowledge that in confirming the beneficiaries' standing to enforce their rights while the settlor lacks capacity, subsection (b) also foreclosed a potential argument that an agent or conservator representing the incompetent settlor might have exclusive standing to enforce the trust.[85] Such an argument may seem far-fetched, since it implies that

§ 603 cmt. (UNIF. LAW COMM'N 2010) ("[W]ith respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent.").

80. An agent may exercise the settlor's powers "only to the extent expressly authorized by the terms of the trust or the power," and a conservator may do so "only with the approval of the court supervising the [conservatorship]." UNIF. TRUST CODE § 602(e), (f) (UNIF. LAW COMM'N 2010).

81. *See id.* § 603 cmt. ("Upon the settlor's incapacity, any right of action the [settlor] may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor's agent or conservator, who would succeed to the settlor's right to have property restored to the trust.").

82. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 (AM. LAW INST. 2007).

83. UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2010) ("No substantive change was intended by this amendment. Former subsection (b) was superfluous.").

84. *Id.*

85. Earlier drafts of § 603 provided that upon the settlor's loss of capacity, the beneficiaries held their own rights "unless the settlor is represented by an agent under a durable power of attorney, a [conservator], or a [guardian] who is someone other than the trustee." NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM TRUST ACT (Draft) § 603(b), at 87 (1999); NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM TRUST ACT (Oct. 1999 Draft) § 604, at 60–61 (1999); *cf.* NAT'L CONF.

the beneficiaries' standing might flicker on and off depending on the existence of an agent or conservator with authority to exercise an incompetent settlor's powers.[86] Nevertheless, a 2004 amendment to § 603(a)[87] brings the problem more clearly into focus.

From the outset, recognition of beneficiary standing during the settlor's incapacity proved controversial.[88] In enacting the Code, many states modified § 603(a) by omitting the limitation concerning the settlor's capacity.[89] The departure from the uniform statutory language seems to have been prompted partly by concern with the difficulty of determining capacity[90] and partly by preoccupation with the concept of the revocable trust as a pure will substitute.[91] In 2004, the Code drafters left the language of § 603(a) unchanged but placed the controversial capacity limitation in brackets,[92] abandoning the quest for uniformity and

OF COMM'RS ON UNIF. STATE LAWS, UNIFORM TRUST ACT (Feb. 9, 1999 Draft) § 603(b), at 70 (1999) (providing that if settlor lacks capacity, beneficiaries' rights are held by agent, guardian, or conservator, or if none "by the beneficiaries the same as if the trust were irrevocable").

86. *See* UNIF. TRUST CODE § 602(e), (f) (UNIF. LAW COMM'N 2010).

87. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, 2004 AMENDMENTS TO THE UNIFORM TRUST CODE (2000) at 47 (2004) [hereinafter 2004 UTC AMENDMENTS].

88. *See* Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP., TR. & EST. L.J. 523, 534 (2008) (noting that § 603 was "not well-received").

89. Based on charts compiled by the National Conference of Commissioners on Uniform State Laws, one commentator concluded that "of the first twenty jurisdictions to have enacted a version of the UTC, twelve provide that the duties of the trustee of a revocable trust are owed exclusively to the settlor even if the settlor lacks capacity . . . ; seven provide the trustee's duties also are owed to other beneficiaries if the settlor lacks capacity . . . ; and one provides that the trustee's duties are owed only to the settlor but allows other beneficiaries to enforce the settlor's intent to benefit them . . . ." *Id.* at 534 n.49. The statutory restrictions on trustees' fiduciary duties arguably reflect a broader trend in trust legislation to "undermine—sometimes intentionally and sometimes inadvertently—fiduciary accountability in the administration of trusts." Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIPIAC PROB. L.J. 261, 262 (2016) (discussing exculpatory clauses, fiduciary accounting, limitations periods, duty of loyalty, discretionary trust interests, and trust decanting).

90. *See* UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2010) ("[B]ecause determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the settlor's control of the beneficiary's rights have [sic] ceased.").

91. *See id.* ("[C]oncern has been expressed that [§ 603(a)] prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same.").

92. The revised provision reads as follows: "While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." *Id.*

signaling that enacting states were "free to strike the incapacity limitation."[93] After 2004, an increasing number of states enacted nonuniform statutes denying beneficiary standing during the settlor's incapacity.[94] Although § 603(a) remained substantially unchanged, the combined effect of the 2001 and 2004 amendments was to acknowledge the prevailing (nonuniform) rule that as long as the trust is revocable, the beneficiaries' rights are subject to the settlor's control and the trustee's duties are owed exclusively to the settlor, even if the settlor loses capacity. By extending the settlor's exclusive control during periods of incapacity, the nonuniform rule curtails beneficiary standing without specifying an alternative enforcement mechanism. Presumably, the only person with standing to exercise control on behalf of an incompetent settlor would be a duly authorized agent or conservator. If no agent or conservator is appointed, or if such a fiduciary lacks authority to exercise the settlor's powers over the trust, the nonuniform rule implies that the trustee might be accountable to no one. This is clearly not what the drafters of § 603 intended.

Quite apart from the controversial capacity limitation, the language of § 603 deserves a closer examination. Specifically, § 603(a) provides that the trustee's duties are owed "exclusively" to the settlor while the trust is revocable and the settlor has capacity to revoke the

§ 603(a) (brackets in original). The drafters also revised the official comment to § 603, but the changes appear to be stylistic rather than substantive. *See* 2004 UTC AMENDMENTS, *supra* note 87, at 47–49.

93. UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2010) (noting euphemistically that "uniformity among the states on this issue is not essential"). The 2004 amendments may signal a broader "retreat from uniformity" in the Code. Foster, *Elusive Quest*, *supra* note 8, at 761 ("In 2004, privacy triumphed over uniformity. NCCUSL approved amendments to the UTC that placed brackets within and around the most controversial beneficiary disclosure provisions.").

94. According to a recent nationwide statutory tally, "twenty-six states deny beneficiary standing during the settlor's incapacity, whereas only fourteen states recognize such standing. Four states have various idiosyncratic rules, and seven appear not yet to have addressed the issue." Feder & Sitkoff, *supra* note 9, at 37-38 (footnotes omitted). *See, e.g.*, ALA. CODE § 19-3B-603 (2006); ARIZ. REV. STAT. § 14-10603 (2008); COLO. REV. STAT. § 15-16-703 (2013); FLA. STAT. § 736.0603 (2006); KAN. STAT. ANN. § 58a-603 (2006); ME. STAT. TIT. 18-B, § 603 (2005); MINN. STAT. § 501C.0604 (2017); MISS. CODE § 91-8-603 (2018); MONT. CODE ANN. § 72-38-603 (2018); NEB. REV. STAT. § 30-3855 (2014); N.C. GEN. STAT. § 36C-6-603 (2018); N.D. CENT. CODE § 59-14-03 (2018); N.J. STAT. ANN. § 3B:31-44 (2016); OHIO REV. CODE ANN. § 5806.03 (2008); OR. REV. STAT. §130.510 (2010); PA. CONS. STAT. TIT. 20, § 7753 (2006); S.C. CODE ANN. § 62-7-603 (2014); VT. STAT. TIT. 14A, § 603 (2009); VA. CODE ANN. § 64.2-752 (2012); WASH. REV. CODE §11.103.040 (2012); WIS. STAT. § 701.0603 (2014).

trust.[95] The meaning of the exclusive-duty limitation is far from clear.[96] One possible reading acknowledges the exclusive standing of the settlor, while alive and competent, to enforce the trust but also leaves the beneficiaries free to pursue remedies after the settlor dies or loses capacity for any earlier breaches of trust that were not ratified by the settlor. This reading is consistent with the official comment and also finds support in the case law.

In *Tseng v. Tseng*,[97] for example, a settlor created a revocable trust, naming his wife and children as beneficiaries and two of his sons as trustees. After the settlor's death, three beneficiaries learned of substantial transfers made from the trust during the last year of the settlor's life and requested further information from the trustees. The trustees refused, arguing that the beneficiaries had no enforceable right to receive information concerning the administration of the trust during the settlor's lifetime.[98] Furthermore, the trustees argued that the applicable statute (based on § 603(a), without the capacity limitation) deprived the beneficiaries of standing after the settlor's death to challenge any transactions occurring during the settlor's lifetime.[99] The court emphatically rejected the trustees' position, explaining that the statutory bar on beneficiary standing to enforce the trust during the settlor's lifetime was not intended to prevent them from pursuing remedies after the settlor's death for breaches that occurred during the settlor's lifetime:

95. UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2010). The nonuniform counterparts are substantially identical, except for the omission of the limitation concerning the settlor's capacity.

96. Unlike the capacity limitation, which was "extensively debated" by the drafting committee, the exclusive-duty provision does not appear to have elicited comment or discussion. English, *supra* note 78, at 188; *cf.* NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM TRUST ACT: PROCEEDINGS IN THE COMMITTEE OF THE WHOLE 65–67 (1998) (not discussing exclusive-duty provision); NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM TRUST CODE: PROCEEDINGS IN THE COMMITTEE OF THE WHOLE 140–141 (2000) (same).

97. 352 P.3d 74 (Or. Ct. App. 2015).

98. *See id.* at 79. The applicable statute imposed a duty on the trustees to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for those beneficiaries to protect their interests," but also provided that the beneficiaries (other than the settlor) had no right to receive such information "while the settlor of a revocable trust is alive." OR. REV. STAT. § 130.710(1), (9) (2010); *cf.* UNIF. TRUST CODE § 813(a) (UNIF. LAW COMM'N 2010).

99. *See Tseng*, 352 P.3d at 79. The statute provided: "While the settlor of a revocable trust is alive, rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee are owed exclusively to the settlor. Beneficiaries other than the settlor have no rights to receive notice, information or reports under this chapter." OR. REV. STAT. § 130.510(1) (2010).

> To the contrary, the relevant statutory provisions and their comments indicate that, in the case of a revocable trust, a beneficiary's ability to take steps to protect and enforce the beneficiary's interest in the trust is simply deferred until the settlor's death, at which point the beneficiary is entitled to invoke the provisions of the [trust code] to protect the beneficiary's beneficial interest in the trust.[100]

Noting that the beneficiaries would not have standing to challenge actions taken by a settlor acting as trustee or actions taken by another trustee with the settlor's approval, the court remanded the case to determine whether the disputed transfers were authorized by the terms of the trust and, if not, whether they were "directed, consented to, or ratified" by the settlor.[101] The decision nicely illustrates how the exclusive-duty language of § 603(a) can be reconciled with the traditional view of beneficiary standing, even under a statute that omits § 603(a)'s controversial capacity limitation.

Some courts reach a similar result by a different analytical path. In *Giraldin v. Giraldin*,[102] a settlor created a revocable trust funded primarily with stock in a technology company founded by one of his sons. Another son (who also owned stock in the company) served as sole trustee. The settlor named himself as sole lifetime beneficiary, with his wife and their nine children as remainder beneficiaries. By the time the settlor died three years later, the trust's investment had "gone badly" and "the trust's interest in the company was worth very little,"[103] prompting several remainder beneficiaries to sue the trustee for breach of trust. The trial court surcharged the trustee for investment losses and for other "unsupported disbursements, distributions and loans."[104] The intermediate appellate court reversed, holding that the beneficiaries lacked standing to sue the trustee for breaches occurring while the trust was revocable and that the trustee's fiduciary duties ran only to the settlor, not the beneficiaries.[105] On appeal, the California Supreme Court

100. *Tseng*, 352 P.3d at 80; *see also id.* at 81 (noting that the legislature "viewed the beneficiaries of a revocable trust as having an interest in the trust during the settlor's lifetime" but "intended that the beneficiaries would not have the power to take steps to protect or enforce those interests as long as the settlor is alive").

101. *Id.* at 83; *see also id.* at 83 n.6 (noting that the beneficiaries would not have standing "if [the settlor] had served as trustee during his lifetime," since their interests would have been subject to the settlor's control and the beneficiaries "would not be entitled as a matter of right to any information about the transfers"). No issue arose concerning the settlor's capacity to approve the transfers.

102. 290 P.3d 199 (Cal. 2012).

103. *Id.* at 202.

104. *Id.*

105. *See id.* at 203.

agreed that the trustee owed no duty to the beneficiaries during the settlor's lifetime but nevertheless held that "after the settlor's death, the beneficiaries have standing to assert a breach of the fiduciary duty the trustee owed to the settlor to the extent that breach harmed the beneficiaries."[106] The court remanded the case to the lower court to determine disputed factual issues concerning the settlor's capacity.[107]

The *Giraldin* court viewed the applicable statute, which served as the original model for § 603(a),[108] as barring challenges to actions directed or approved by a competent settlor while merely postponing beneficiary standing to challenge actions taken without the settlor's knowledge or approval. To illustrate the distinction, the court offered two contrasting hypothetical examples: in one, the settlor of a revocable trust, competent but terminally ill, directs the trustee to expend trust property for a round-the-world cruise; in the other, the trustee dissipates the trust property without the settlor's knowledge or approval. Noting that the remainder beneficiaries would be deprived of standing to complain of the trustee's actions in the former case but not the latter, the court concluded that "[a] trustee . . . cannot loot a revocable trust against the settlor's wishes without the beneficiaries' having recourse after the settlor has died."[109] Although a deceased settlor's personal representative would also have standing to sue the trustee for unauthor-

106. *Id.* at 210.

107. The trial court found that the settlor lacked capacity to understand the investment risks or to authorize the trustee's actions. *See id.* at 202. On remand from the California Supreme Court, the appellate court reversed the trial court's surcharge order on evidentiary grounds and remanded for a new trial. *See* Giraldin v. Giraldin, 2013 WL 1633283 (Cal. Ct. App. 2013).

108. *See* CAL. PROB. CODE § 15800 (West 2018) ("Except to the extent that the trust instrument otherwise provides . . . , during the time that a trust is revocable and the person holding the power to revoke the trust is competent: [¶] (a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division. [¶] (b) The duties of the trustee are owed to the person holding the power to revoke."). This provision is the original source for § 603(a) of the Uniform Trust Code. *See* NAT'L CONF. OF COMM'RS ON UNIF. LAWS, TRUST ACT (Oct. 21, 1996 Draft) § 3-103 & cmt. at 28 (1996); *cf.* Giraldin, 290 P.3d at 209 (noting that § 603(a) is "similar to" the California statute).

109. *Giraldin*, 290 P.3d at 207 (noting different result if trustee follows direction of competent settlor); *cf.* Babbitt v. Superior Court, 201 Cal. Rptr.3d 353 (Ct. App. 2016) (holding that beneficiary lacked standing to compel accounting for period while competent settlor acted as co-trustee, distinguishing *Giraldin*). Other courts have reached a similar result. *See, e.g.*, Holmes v. Potter, 523 S.W.3d 397 (Ark. Ct. App. 2017) (holding that beneficiaries lacked standing to challenge revocation by settlor-trustee, citing *Giraldin*).

ized lifetime breaches of trust, the court saw no reason why the beneficiaries should not have concurrent standing, especially if the personal representative faced a potential conflict of interests.[110] It is not entirely clear whether the beneficiaries would have had standing to enforce the trust while the settlor was alive but incompetent. The court apparently assumed that in such a case the beneficiaries would not have had standing, at least if an agent or conservator had been appointed and authorized to exercise the settlor's powers,[111] but gave no indication whether the result might be different in the absence of a duly authorized agent or conservator.[112] In any event, the court evidently viewed its decision as consistent both with the traditional approach to beneficiary standing and with the text and purpose of the statute.[113]

The *Giraldin* decision was not unanimous. Two dissenting judges argued that "because the trustee of a revocable trust owes no duty to the beneficiary while the settlor is alive . . . , a trustee is not liable to a beneficiary for actions taken during the settlor's lifetime," and the beneficiary therefore can hold the trustee accountable only for "the trustee's conduct after the settlor's death, when the trustee owes the trust

110. *See Giraldin*, 290 P.3d at 209–10 (noting that the trustee was apparently also the deceased settlor's personal representative). Two judges dissented on the ground that after the settlor's death the settlor's personal representative should have exclusive standing to pursue remedies for any breach of trust occurring during the settlor's lifetime. *See id.* at 212–13 (Kennard, J., dissenting).

111. *See id.* at 207–08 (noting that "the conservator might be liable to the remainder beneficiary later, after the trust becomes irrevocable, for any malfeasance"); *cf.* Linthicum v. Rudi, 148 P.3d 746 (Nev. 2006) (denying beneficiary standing to contest revocable trust amendment during settlor's life, and noting that concerns about settlor's capacity were "more appropriately addressed under . . . guardianship statutes").

112. *Cf.* Drake v. Pinkham, 158 Cal. Rptr.3d 115, 121 (Ct. App. 2013) (noting in dicta that statute would not prevent beneficiary from contesting trust amendment while settlor was alive but incompetent). In one sense, *Giraldin* "leaves trust beneficiaries in a position roughly comparable to that enjoyed by beneficiaries challenging a wrongful transfer of decedent's assets by a person holding a power of attorney." Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 112 (2015). Nevertheless, as a practical matter, while the settlor of a revocable trust is alive but incompetent, the fiduciary liability of an agent under a durable power of attorney may be more limited than that of a trustee vis-à-vis the trust beneficiaries. For example, the beneficiaries may have standing to seek judicial review of the agent's conduct, but not to compel disclosure of information or to challenge a trust amendment made in good faith. *See* UNIF. POWER OF ATTORNEY ACT §§ 114(c), (h), 116(a)(6) (UNIF. LAW COMM'N 2006).

113. *See Giraldin*, 290 P.3d at 208 (citing Restatement (Third) of Trusts, Bogert, *Brundage*, *Siegel*, and the Uniform Trust Code).

beneficiary a fiduciary duty."[114] The problem stems from § 603(a)'s ambiguous provision that the trustee owes duties exclusively to the settlor "while" a trust is revocable and the settlor has capacity to revoke the trust. This provision might be interpreted to mean either that the settlor's power to revoke overrides the beneficiaries' legally recognized right to protect their interests during the specified period or that the beneficiaries have no legally protected interests until the trust becomes irrevocable. These alternative readings are reflected in the majority and dissenting opinions, respectively, in *Giraldin*.

Several other courts view § 603(a) as denying the existence of the beneficiaries' interests as long as the trust is revocable. In *In re Trust of Trimble*,[115] the settlor acted as sole trustee of her revocable trust until eight months before her death, when she substituted her niece as trustee. After the settlor's death, one of the eighteen remainder beneficiaries (another niece) sought a trust accounting from the trustee for the period before the settlor's death. In interpreting the "ambiguous" language of a statute similar to § 603(a),[116] the court expressed concern about "the expense and costs of accounting to multiple parties with potentially conflicting interests"[117] and concluded that "[a] trustee who owes no accounting to beneficiaries while the trust is revocable should not face retroactive accounting duties for the same period upon the settlor's death."[118] Instead, the court suggested that the trustee should be accountable to the settlor's personal representative for the "gap" period between the last lifetime accounting and the settlor's death.[119]

114. *Giraldin*, 290 P.3d at 213–14 (Kennard, J., dissenting).

115. In re Trust of Trimble, 826 N.W.2d 474 (Iowa 2013).

116. *Id.* at 485 ("[D]oes the temporal word 'while' define the time period that can be covered by a request for an accounting, or does it only limit when the request can be made?"). The applicable statute provided: "[W]hile a trust is revocable, all of the following apply unless the trustee actually knows the [settlor] is not competent: [¶] 1. The [settlor], and not the beneficiary, has the rights afforded beneficiaries. [¶] 2. The duties of the trustee are owed to the [settlor]." Iowa Code § 633A.3103 (2017).

117. *Trimble*, 826 N.W.2d at 486. The court also expressed concern about undermining the privacy of the settlor's financial information. *See id.* at 486–87.

118. *Id.* at 489; *see also* In re Gunther Revocable Living Trust, 350 S.W.3d 44 (Mo. Ct. App. 2011) ("Because the trustee owed no duty to the beneficiaries prior to the settlor's death, they are not entitled to an accounting of trust transactions prior to that date.").

119. *Trimble*, 826 N.W.2d at 486. If the trustee is also named as personal representative—as was the case in *Trimble*—it may be necessary to appoint a special fiduciary to hold the trustee accountable. *See id.* ("The temporary administrator is owed the same accounting to which the settlor was entitled before her death.").

In *Manon v. Orr*,[120] the settlor of a revocable trust, acting as trustee, sold trust property to her husband. While the settlor was still alive, the remainder beneficiaries objected, arguing that the settlor lacked capacity and that the sale was tainted by fraud. Under the applicable statute, which included no capacity limitation but was otherwise identical to § 603(a),[121] the court held that the beneficiaries lacked standing to challenge the sale because they had no legally protected interest but "only a mere expectancy" while the trust was revocable.[122] The court viewed the settlor, or perhaps a representative such as "a court, a guardian or conservator, or a next friend," as the only real party in interest with standing to enforce the trust during the settlor's lifetime.[123]

Trimble, *Manon*, and similar decisions have drawn criticism from several directions. Some commentators point out that limiting beneficiary standing to hold the trustee accountable for actions taken during the period of revocability "increases the potential for a faithless trustee to deplete [trust] assets without leaving any recourse for the [settlor's] intended beneficiaries."[124] This criticism has particular force where the settlor is unwilling or unable to monitor the trustee effectively and no agent or conservator is authorized to do so.[125] Other commentators object to the "formalistic reasoning" that leads courts to treat the revocable trust as a "pure will substitute" while ignoring its function as a "conservatorship substitute."[126] By creating and funding a revocable trust, a settlor arguably manifests an intent to rely on the trustee in lieu of a court-supervised conservator to protect the settlor's interests.[127] The conservatorship analogy implies that upon the settlor's loss of capacity,

120. 856 N.W.2d 106 (Neb. 2014).

121. The applicable statute provided: "While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." Neb. Rev. Stat. § 30-3855(a) (2017). The statute as originally enacted was identical to § 603(a) of the Uniform Trust Code, but was amended in 2005 to delete the capacity limitation. *See Manon*, 856 N.W.2d at 109–11.

122. *Manon*, 856 N.W.2d at 111; *see also* Ex parte Synovus Trust Co., 41 So. 3d 70 (Ala. 2009) (denying beneficiary standing during settlor's lifetime to challenge trustee's actions); Fulp v. Gilliland, 998 N.E.2d 204 (Ind. 2013) (holding that trustee owed no fiduciary duty to remainder beneficiary while trust was revocable).

123. *Manon*, 856 N.W.2d at 109.

124. Leslie & Sterk, *supra* note 112, at 113 (criticizing *Trimble*).

125. As a practical matter, aside from the difficulty of determining capacity, both the trustee and the beneficiaries may be reluctant (perhaps for different reasons) to raise the issue of the settlor's capacity during the settlor's lifetime.

126. Feder & Sitkoff, *supra* note 9, at 40–41 (criticizing *Manon*).

127. *See id.* at 42 ("In the absence of evidence to the contrary, the presumption . . . should be that a person who arranges to avoid probate by funding a revocable trust likewise would want to avoid conservatorship as regards the trust property.").

the other beneficiaries should have standing to receive information and monitor the trustee's administration of the trust.[128]

Although the Code drafters probably did not intend to work a radical change in the traditional view of beneficiary standing, the ambiguous language of § 603(a) has spawned confusion and inconsistency in the case law. Admittedly, in many cases the provision has little or no effect. As long as the settlor is alive and competent, § 603(a) codifies the traditional view that the beneficiaries lack standing to compel the trustee to disclose information about the trust or to pursue remedies for a potential breach of trust. This is equally true whether the settlor is acting as trustee or directing or ratifying the actions of another person acting as trustee. Confusion arises, however, in cases where a settlor of doubtful capacity continues to act as trustee, gives directions to another trustee, or ratifies actions that would otherwise constitute a breach of trust. Although the drafters of § 603(a) apparently contemplated that the beneficiaries would have immediate standing to enforce the trust upon the settlor's loss of capacity,[129] the provision may be read either as relegating the beneficiaries to a conservatorship proceeding[130] or, alternatively, as merely postponing their standing to sue the trustee directly until the settlor's death.[131] In any case, unless the trust instrument provides a specific method for determining the settlor's capacity, a judicial proceeding may be necessary.[132] Even if the settlor remains fully competent, further confusion arises when a settlor allows another person acting as trustee to manage the trust without active supervision or periodic

128. In the case of a court-supervised conservatorship, the beneficiaries would presumably qualify as "interested persons" entitled to receive notice of a proposed revocation or amendment, to request an accounting or other relief, and to examine the conservator's records. *See* UNIF. PROBATE CODE §§ 1-201(23), 5-411(a), 5-414(a), 5-419(b) (UNIF. LAW COMM'N 2010). Furthermore, a conservator is subject to the same standard of care as a trustee and is required to take account of the settlor's estate plan. *See id.* § 5-418(a), (d). Note, however, that the appointment of a conservator does not constitute a determination of incapacity. *See id.* § 5-409(d).

129. *See supra* note 79 and accompanying text.

130. *See* Manon v. Orr, 856 N.W.2d 106 (Neb. 2014), discussed *supra* notes 120–23 and accompanying text.

131. *See* Giraldin v. Giraldin, 290 P.3d 199 (Cal. 2012), discussed *supra* notes 102–114 and accompanying text.

132. Some commentators recommend including a provision in the trust instrument authorizing a physician to certify the settlor's incapacity in writing. *See* Feder & Sitkoff, *supra* note 9, at 31–32; *cf.* UNIF. CUSTODIAL TRUST ACT § 10(b) (UNIF. LAW COMM'N 1987). Such a provision might provide protection from liability for a trustee who relies in good faith on a certification affirming the settlor's capacity, but it raises additional problems in identifying a physician, obtaining a determination, and resolving disagreements between multiple physicians.

accountings. After the settlor's death, § 603(a) may be read either as relegating the beneficiaries to a probate proceeding[133] or as recognizing their standing to sue the trustee directly for breaches committed during the settlor's lifetime.[134] A trustee concerned with potential liability for actions taken during the settlor's lifetime can protect itself by submitting regular accounts for the settlor's approval.[135] Failure to do so invites requests for information, and possibly suits for breach of trust, by the beneficiaries (or by the settlor's personal representative) after the settlor's death.

Even courts that adopt a restrictive view of beneficiary standing under § 603(a) generally insist that the beneficiaries should have alternative remedies for breaches occurring while the trust is revocable. Specifically, the beneficiaries can protect their interests indirectly through a conservatorship proceeding during the settlor's lifetime or a probate proceeding after the settlor's death.[136] Aside from the additional delay and expense of a separate probate court proceeding (which the settlor presumably hoped to avoid by creating the revocable trust), this approach raises potential problems of conflicting interests.[137] A conservator representing an incompetent settlor owes fiduciary duties primarily to the settlor and not to the beneficiaries of the revocable trust. Even if authorized to exercise control over the trust, the conservator is likely to pay closer attention to managing the settlor's own property than to monitoring the trustee. Furthermore, the conservator is likely to pursue remedies for breaches of trust that harm the settlor's interest but not for

133. *See* In re Trust of Trimble, 826 N.W. 474 (Iowa 2013), discussed *supra* notes 115–19 and accompanying text.

134. *See* Tseng v. Tseng, 352 P.3d 74 (Or. Ct. App. 2015), discussed *supra* notes 97–101 and accompanying text.

135. Even if the settlor regularly approves the trustee's accountings, the trustee may still be required to account for the "gap" period between the last accounting and the settlor's death. *See Trimble*, 826 N.W.2d at 484.

136. *See* Manon v. Orr, 856 N.W.2d 106 (Neb. 2014); In re Trust of Trimble, 826 N.W.2d 474 (Iowa 2013); Linthicum v. Rudi, 148 P.3d 746 (Nev. 2006). Note that the *Trimble* court rejected the beneficiary's request for an accounting on the merits, without discussing standing, presumably because the trustee had complied with the probate court's order to produce an accounting. The court noted that the beneficiary had "no substantial objections" to the accounting and alleged neither a breach of trust by the trustee nor harm to the beneficiary's interest. *Trimble*, 826 N.W.2d at 481, 489 (distinguishing *Giraldin*); *cf.* Feder & Sitkoff, *supra* note 9, at 44 (noting potential "confusion between standing and merits").

137. In *Trimble*, because the trustee was also named as personal representative, it was necessary to appoint a temporary administrator to request an accounting from the trustee. *See Trimble*, 826 N.W.2d at 486.

those that affect only the beneficiaries.[138] Similarly, after the settlor's death, the interests of the beneficiaries may be at odds with those of the settlor's testate or intestate successors, and the personal representative owes fiduciary duties primarily to the latter. The personal representative may therefore have neither a practical incentive nor a legal duty to pursue remedies on behalf of the trust beneficiaries either individually or as a group.[139]

In sum, the ambiguous language of § 603(a) has generated considerable confusion concerning beneficiary standing. Nevertheless, despite conflicting and occasionally short-sighted reasoning in the reported cases, the results suggest that courts are generally reluctant to leave the beneficiaries of a revocable trust entirely without remedy for an unauthorized breach of trust that harms their interests. When a beneficiary seeks to hold the trustee accountable after the settlor's death for actions taken during the settlor's lifetime, some courts deny relief on the merits without addressing the issue of standing.[140] Although the courts explain these decisions on the ground that the trustee owed no duties to the beneficiary while the trust was revocable, perhaps a more realistic explanation is simply that the beneficiary failed to offer any substantial evidence of wrongdoing by the trustee or incapacity of the settlor.[141] Because the stated rationale is often broader than necessary to

138. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 reporter's notes (AM. LAW INST. 2007) (noting "risk of conflicts or lack of vigilance in monitoring the performance of the trustee" where conservator has exclusive standing to enforce trust on behalf of incompetent settlor). In *Brundage*, for example, the disputed transfer had no immediate effect on the aggregate value of the trust property but allegedly favored one beneficiary at the expense of others. *See supra* note 55.

139. *See* Siegel v. Novak, 920 So.2d 89, 93 n.2 (Fla. Dist. Ct. App. 2006) (noting that personal representatives with conflicting interests failed to pursue remedy on behalf of trust). Some courts cite the potential conflict of interests as a reason to deny beneficiary standing to challenge lifetime transactions. *See Trimble*, 826 N.W.2d at 488 ("[A]llowing beneficiaries to have an accounting for a time period during which the trustee owed the duty to someone else would open the door to beneficiary challenges to transactions that were beneficial to the settlor, but that may not have been beneficial to the future beneficiaries."); Giraldin v. Giraldin, 290 P.3d 199, 212–13 (Cal. 2012) (Kennard, J., dissenting) (noting that beneficiaries may have interests "at odds with what the [settlor] had in mind" and in conflict with each other).

140. *See, e.g.*, *Trimble*, 826 N.W.2d at 482–89; In re Gunther Revocable Living Trust, 350 S.W.3d 44, 45–47 (Mo. App. 2011); Stanton v. Wells Fargo Bank Montana, 152 P.3d 115, 122 (Mont. 2007).

141. *See, e.g.*, *Trimble*, 826 N.W.2d at 489 (noting that beneficiary "never alleged [trustee] breached her fiduciary duties or harmed the beneficiaries"); *Gunther*, 350 S.W.3d at 45–47 (holding beneficiaries not entitled to accounting for period before settlor's death; beneficiaries assumed breach of trust but apparently offered no substantial supporting evidence); *Stanton*, 152 P.3d at 122 (noting that beneficiary

support the result, these cases provide only weak support for a restrictive view of beneficiary standing under § 603(a). In other cases, courts have held that a beneficiary lacks standing to interfere with the administration of a revocable trust while the settlor is still alive.[142] Here again, although the result is consistent with the notion that the beneficiaries have no legally protected interest in the trust but only an expectancy, the outcome would probably be the same under a more flexible reading of § 603(a). If no question is raised concerning the settlor's capacity, the result can be explained on the narrower ground that the beneficiary's rights are preempted by the settlor's power to revoke the trust.[143] This alternative explanation is fully consistent with the traditional view that the settlor while living and competent has exclusive control over the trust.[144] Alternatively, if the settlor's capacity is in doubt, a court may reasonably conclude that the question of capacity should be determined in a conservatorship proceeding to ensure adequate protection of the settlor's interests.[145] Overall, the case law does not suggest that § 603(a) operates to shield careless or dishonest trustees from liability. When confronted with substantial evidence of a breach of trust, courts generally allow the beneficiaries to protect their interests, either

"failed to provide any evidence that [settlor] was not competent to amend her Trust Agreement"); *see also* Hilgendorf v. Estate of Coleman, 201 So.3d 1262, 1263 (Fla. Dist. Ct. App. 2016) (noting "no showing of any breach of fiduciary duty on the part of the trustee").

142. *See, e.g.*, Manon v. Orr, 856 N.W.2d 106, 109–11 (Neb. 2014); Ex parte Synovus Trust Co., 41 So.3d 70, 73–74 (Ala. 2009); *see also Giraldin*, 290 P.3d at 207 (noting "the difference between the beneficiaries' standing before and after the settlor's death"); *cf.* Fulp v. Gilliland, 998 N.E.2d 204, 208–10 (Ind. 2013) (enforcing bargain sale directed by settlor).

143. *See, e.g.*, Holmes v. Potter, 523 S.W.3d 397 (Ark. Ct. App. 2017); Ex parte Synovus Trust Co., 41 So.3d 70 (Ala. 2009); Fulp v. Gilliland, 998 N.E.2d 204 (Ind. 2013), discussed *supra* note 38.

144. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. e (AM. LAW INST. 2007) ("For as long as, and to the extent that, the trust is revocable by the settlor and the settlor is legally competent . . . , the settlor may enforce the trust on behalf of all beneficiaries, and the trustee's duties are owed primarily to the settlor, or solely to the settlor insofar as the rights of other beneficiaries are preempted by conduct of the settlor.").

145. *See, e.g.*, *Manon*, 856 N.W.2d at 109 (noting that the only person with standing to enforce a trust during the period of revocability would be the settlor "or perhaps one that represents the settlor's interests, for example, a court, a guardian or conservator, or a next friend"). The beneficiaries of a revocable trust presumably have standing to petition for the appointment of a conservator. *See* UNIF. PROBATE CODE § 5-403(a) (UNIF. LAW COMM'N 2010); *cf.* UNIF. CUSTODIAL TRUST ACT § 13(f) (UNIF. LAW COMM'N 1987). A conservator would owe fiduciary duties primarily to the settlor and could exercise control over the trust if authorized by the court. *See* UNIF. TRUST CODE § 602(f) (UNIF. LAW COMM'N 2010); UNIF. PROBATE CODE § 5-411(a), (c) (UNIF. LAW COMM'N 2010).

through a conservatorship proceeding during the settlor's lifetime or by enforcing their rights directly after the settlor's death.[146]

V. Conclusion

A revocable trust is a highly versatile instrument. If properly funded during the settlor's lifetime, it functions well as a will substitute. Often, the settlor's primary or even exclusive purpose in creating the trust is to distribute property at death to designated beneficiaries outside the probate system. At the same time, the trust also provides a standby arrangement for managing property during the settlor's lifetime. As long as the settlor remains alive and competent, the settlor's unrestricted power to revoke is functionally equivalent to absolute ownership, preempting the other beneficiaries' enforcement rights. If the settlor loses capacity, however, the relationship between the trustee, the settlor, and the other beneficiaries becomes more complex. Under the traditional view, the trustee's fiduciary duties run primarily to the settlor and secondarily to the other beneficiaries. The underlying premise is that even if the settlor is represented by an agent or conservator, the settlor's power to revoke is more circumscribed in the hands of the agent or conservator and the rights of the beneficiaries are correspondingly enhanced. The policy goal is to ensure that some interested party—the settlor, a duly authorized agent or conservator, or another beneficiary—has standing to enforce the trustee's fiduciary duties throughout the period of revocability.

In characterizing the revocable trust as functionally equivalent to a will, the drafters of the Uniform Trust Code apparently did not intend to upend the traditional view of beneficiary standing. Nevertheless, some courts have interpreted § 603(a) as curtailing the beneficiaries' substantive rights rather than merely postponing their standing while the trust is revocable. Moreover, many states have enacted § 603(a) without any limiting language concerning the settlor's capacity, resulting in confused and contradictory case law. Fortunately, other courts have interpreted the provision in a more flexible and pragmatic manner, allowing beneficiaries to hold the trustee accountable for breaches of trust occurring while the settlor lacked capacity, at least in the absence of a duly authorized agent or conservator. Notwithstanding the ambiguous language of § 603(a), courts should reject the simplistic and

146. *See, e.g.*, Tseng v. Tseng, 352 P.3d 74, 78–83 (Or. Ct. App. 2015); *Giraldin*, 290 P.3d at 203–10.

misleading notion that a revocable trust functions exclusively as a will substitute. Instead, they should recognize that in addition to avoiding probate at the settlor's death, a revocable trust also gives rise to enforceable fiduciary duties during the settlor's lifetime. A trustee who commits a breach of trust without the settlor's knowledge or approval should be accountable to someone—if not to the settlor or an agent or conservator, then to the beneficiaries whose interests have been harmed. The beneficiaries' interests may be subordinate to the settlor's power to revoke, but they are not entirely illusory.