

## REVOCABLE TRUSTS AND INCAPACITY PLANNING: MORE THAN JUST A WILL SUBSTITUTE

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*From its origins as a conveyancing device used to avoid feudal incidents, the donative trust has evolved into a device for fiduciary management of wealth down the generations (a management trust), for avoiding probate (a will substitute trust), and for avoiding conservatorship (a common secondary use of a will substitute trust). These contemporary uses of donative trusts have been facilitated by a variety of law reforms that, taken together, have effected a functional branching of American donative trust law. The law governing irrevocable and revocable trusts respectively has evolved to accommodate their different predominant uses as management trusts and will substitute trusts. At the same time, however, the law governing revocable*

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trusts has come to deny their additional conservatorship substitute function. We argue that this development was a doctrinal wrong turn. The central descriptive aim of this Article is to draw attention to the common use of a funded revocable trust not only as a will substitute but also as a conservatorship substitute. The central normative claim follows from the descriptive claim. To implement the actual or probable intent of the typical settlor, a funded revocable trust should be treated presumptively as both a will substitute and a conservatorship substitute. The most significant doctrinal implication is that the beneficiaries of a funded revocable trust should have presumptive standing to enforce the trust in the event of the settlor's incapacity.

## I. Introduction

"The purposes for which we can create trusts," says the leading treatise, "are as unlimited as our imagination."<sup>1</sup> Of the estate planning uses of the trust, perhaps the most familiar is an *irrevocable trust* for ongoing fiduciary administration of wealth within a family and down the generations—what has aptly been dubbed a *management trust*.<sup>2</sup> Another familiar estate planning use is a *revocable trust* for probate avoidance, that is, as a *will substitute*.<sup>3</sup> Without need for probate administration or other court involvement, at the settlor's death the property held in a revocable trust is distributed outright or is held in further trust—at that point, an irrevocable trust for property management—in accordance with the terms of the trust.

To facilitate these two routine but distinct estate planning uses of the trust, in certain respects the law has come to treat an irrevocable trust differently from one that is revocable. Modern law empowers a trustee of an irrevocable trust to undertake all manner of transactions, but the law also provides beneficiary safeguard by imposing on the trustee corresponding fiduciary duties owed to, and enforceable by, the beneficiaries. By contrast, a trustee of a revocable trust today presumptively owes fiduciary duties only to the settlor and not to the beneficiaries. The trustee "has a duty to comply with a direction of the settlor even though the direction is contrary to the terms of the

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1. 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 1.1, at 4 (5th ed. 2006).

2. See John H. Langbein, *Rise of the Management Trust*, 143 TR. & EST. 52 (Oct. 2004) [hereinafter Langbein, *Management Trust*]; see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 666 (1995) [hereinafter Langbein, *Contractarian*].

3. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 440 (9th ed. 2013).

trust or the trustee's normal fiduciary duties."<sup>4</sup> If the trustee is also the settlor, as is often the case, then no action by the settlor-trustee can be a breach of trust so long as the trust remains revocable.

These legal adaptations—in effect, a branching of American trust law<sup>5</sup>—are to the good so far as irrevocable trusts are used for fiduciary wealth management and revocable trusts are used as will substitutes. But revocable trusts are also commonly used for *incapacity planning* as a substitute for a court-appointed conservator (or guardian).<sup>6</sup> The central descriptive aim of this Article is to draw attention to the common use of a revocable trust not only as a will substitute but also as a conservatorship substitute in planning for incapacity. Even if the settlor is the sole trustee, upon the settlor's incapacity a named successor can assume fiduciary control of the trust property without court involvement. In this way the settlor, while still competent, can ensure unbroken property management by the settlor's preferred fiduciary in the event of the settlor's incapacity—and without a messy and public court fight.

But who should have standing to enforce a revocable trust with an incapacitated settlor? The answer to this question is not yet fully resolved in contemporary American law. If the will substitute model is followed to its logical conclusion, the beneficiaries should remain without standing to enforce the trust until the settlor's death. On this view, enforcement of the trust during the settlor's incapacity will require court appointment of a conservator or action by the settlor's agent, if any, under a durable power of attorney. This solution follows naturally from the will substitute model, as it treats the trust as if it were a will and the trust beneficiaries as if they were devisees under a will. In both situations, unless the settlor has named an agent under a durable power of attorney, a court-appointed conservator will be required. But because this solution requires court involvement, which a funded revocable trust is typically meant to avoid, there is reason to doubt the aptness of the will substitute model upon the incapacity of the settlor.

The alternative, which we will call the conservator substitute model, is to treat a funded revocable trust with an incapacitated settlor as a substitute for a court-appointed conservator, and presump-

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4. RESTATEMENT (THIRD) OF TRUSTS § 74(1)(a)(i) (AM. LAW INST. 2007).

5. See DUKEMINIER & SITKOFF, *supra* note 3, at 583.

6. See *id.* at 496.

tively to allow the beneficiaries other than the settlor to enforce the trust during the settlor's incapacity. Increased longevity has brought with it an increased chance that a person's last days, months, or even years will be spent in a state of mental or physical decay. Planning for this possibility is now as much a part of trusts and estates practice as is planning for property succession at death. And a funded revocable trust is a textbook solution for the problem of property management during incapacity.<sup>7</sup> Yet most states that have considered the question across the last fifteen years have adopted the will substitute model, rejecting the conservator substitute model.<sup>8</sup> In 2004, the Uniform Law Commission retreated from its initial support for the conservator substitute model in the Uniform Trust Code as originally promulgated just four years earlier in 2000.<sup>9</sup>

Bucking this trend, we argue in favor of the conservator substitute model. A settlor who funds a revocable trust during life has indicated an intent to minimize court involvement in her property succession and management. A rule of presumptive standing for revocable trust beneficiaries upon the settlor's incapacity, such as is prescribed by the Restatement (Third) of Trusts,<sup>10</sup> is therefore more likely to implement the typical settlor's actual or probable intent—the principal object of this area of the law.<sup>11</sup>

Distilled to its essence, our argument is that the settlor of a funded revocable trust typically intends more than just a will substitute. She also intends, actually or impliedly, for the trust to substitute for conservatorship. Accordingly, our central normative claim is that the law should adapt to accommodate this common secondary use of a will substitute trust as a substitute for conservatorship. To be sure, a settlor could provide expressly that the other beneficiaries would not have standing to enforce the trust during a period of the settlor's in-

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7. See, e.g., DUKEMINIER & SITKOFF, *supra* note 3, at 465, 496; LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* § 10.4 (6th ed. 2014); ALAN NEWMAN ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 964 (2014); see also *RESTATEMENT (THIRD) OF TRUSTS* § 74 reporter's notes (AM. LAW INST. 2007) (noting the "widespread use of revocable living trusts as substitutes for both wills and conservatorships").

8. See *infra* Part V.A.

9. See *infra* notes 166-168 and accompanying text.

10. See *infra* note 165 and accompanying text.

11. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L.J. 643 (2014). In the words of the Restatement, "The main function of the law in this field is to facilitate rather than regulate." *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 cmt. c (AM. LAW INST. 2003).

capacity. And either way, because the settlor's agent under a durable power of attorney or a conservator stands in the shoes of the settlor, such a fiduciary surrogate could override or moot a claim by the beneficiaries. But under our proposal, unless the settlor indicated a contrary intent, the other beneficiaries would otherwise have standing to enforce the trust during the settlor's incapacity.<sup>12</sup>

The remainder of this Article is organized as follows. Part II surveys the conveyancing origins of the trust, the rise of the irrevocable management trust, and the continuation of the conveyancing tradition by way of the modern revocable trust used as a will substitute. Part III examines more closely the adaptation of the law governing a revocable trust for service as a will substitute, including the rule of no standing for the beneficiaries while the trust remains revocable, situating those adaptations within the broader context of the nonprobate revolution. Part IV examines the additional use of a funded revocable trust in planning for incapacity as a substitute for a court-appointed conservator, situating such a trust among the other main planning techniques for property management during incapacity, most prominently the durable power of attorney. Part V examines the question of standing to sue the trustee of a funded revocable trust while the settlor lacks capacity. Part V thus develops our central normative claim, which is rooted in the misalignment between the will substitute model and the typical settlor's actual or implied intent for her funded revocable trust to substitute for conservatorship in the event of incapacity. A short conclusion follows in Part VI.

## II. From Conveyance to Management to Conveyance Again

### A. What Is a Trust?

In functional terms, a trust is a legal arrangement created by a *settlor* in which a *trustee* holds property as a *fiduciary* for one or more *beneficiaries*. A trust may be *testamentary*, created by will and arising in probate. The settlor of a testamentary trust is the testator of the will. A trust may also be *inter vivos*, created outside of probate during the settlor's life. In a *declaration of trust*, the settlor declares himself to be

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12. We address the primacy of the settlor's intent and the role of the trustee's fiduciary duty of impartiality in resolving tension between the interests of an incapacitated settlor and the interests of the other beneficiaries *infra* Part V.C.

trustee of certain property. In a *deed of trust*, the settlor transfers to a trustee the property to be held in trust. An inter vivos trust may be *revocable* or *irrevocable*, depending on the intent of the settlor. A testamentary trust, of course, is necessarily irrevocable.

The trustee takes *legal title* to the trust property, which allows the trustee to deal with third parties as owner of the property.<sup>13</sup> The beneficiaries receive *equitable title* to the trust property, which allows them to hold the trustee accountable for breach of trust. This separation of management (in the trustee) from beneficial ownership (in the beneficiaries) is the hallmark characteristic of a common law trust.<sup>14</sup> Since feudal times, settlors have taken advantage of this split in legal and equitable ownership to implement a host of estate planning purposes.

## B. The Conveyancing Origins of the Trust

The paradigmatic early use of a donative trust was as a will substitute for conveyance at death.<sup>15</sup> In the days of yore, when land was the chief form of wealth, an inter vivos trust avoided primogeniture and feudal death taxes (known as feudal incidents). By transferring legal title to property to a trustee during life, the settlor would no longer own it at death, hence there would be no transfer at the death of the settlor subject to primogeniture or taxation. But the settlor and his family would nonetheless retain beneficial ownership of the trust property.

In simplified form, here is how such a trust was structured. During life the settlor would transfer the property at issue, characteristically ancestral land, to a trustee, who would take legal title. Equitable title would be in the form of a life interest in the settlor and a remainder interest in the specified family members who were to take title upon the death of the settlor. Because the family would remain on the

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13. Formally speaking, outsiders transact not with the trust, which is not itself a juridical entity that has power to hold property or sue and be sued, but rather with the trustee acting in the trustee's fiduciary capacity as such. See Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in *THE WORLDS OF THE TRUST* 428, 435-36 (Lionel Smith ed., 2013).

14. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *CORNELL L. REV.* 621, 623 (2004); see also Daniel Clarry, *Fiduciary Ownership and Trusts in a Comparative Perspective*, 63 *INT'L & COMP. L.Q.* 901 (2014).

15. Our rendition draws primarily on Langbein, *Contractarian*, *supra* note 2, at 642, and Langbein, *Management Trust*, *supra* note 2, at 52.

land, managing it as before, the trustee's only function was to transfer legal title upon the death of the settlor.<sup>16</sup>

In accordance with the stakeholder role of these early trustees, under traditional law a trustee had only those powers granted expressly by the terms of the trust. The reason was beneficiary safeguard. A trustee who has only limited powers can work little harm upon the beneficiaries. To the extent that the trust was used mainly for conveying ancestral land from one generation to the next, without serious management responsibility in the trustee, this mode of beneficiary safeguard was sufficient.<sup>17</sup>

### C. The Shift to Fiduciary Management

As the nature of wealth evolved from land to liquid financial assets,<sup>18</sup> settlors began to look to the trust to facilitate professional management of such assets down the generations. For this application of the trust to be viable, however, the trustee would need broad transactional and administrative powers. "The modern trustee conducts a program of investing and managing financial assets that requires extensive discretion to respond to changing market forces."<sup>19</sup> Trust lawyers overcame the no-powers default rule of the common law by including an expansive schedule of trustees' powers in their trust instruments. For example, the trustee would be given powers to invest in any form of investment or to retain inception assets irrespective of otherwise applicable law, to borrow money or make loans, to divide the trust or to merge it with a similar trust, to make distributions in cash or in kind, to make elections and allocations under the tax laws, to vote proxies, and so on.

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16. See Langbein, *Contractarian*, *supra* note 2, at 633 ("The trustees of these early trusts were mere stakeholders, little more than nominees, with no serious powers or responsibilities of management. . . . [T]he trustees' only significant duty was to hold until the settlor's death, and then to put themselves out of business by conveying the freehold to the remainder beneficiaries.").

17. See Langbein, *Management Trust*, *supra* note 2, at 54 ("Trustee disempowerment . . . worked well enough as long as trustees had nothing much to do beyond standing as nominee owners of family land.").

18. See, e.g., John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

19. Langbein, *Management Trust*, *supra* note 2, at 54.

Eventually, as broad powers provisions became a customary drafting practice and standard boilerplate,<sup>20</sup> most states enacted statutes that broadened trustees' powers as a matter of default law.<sup>21</sup> Prevailing default law today gives a trustee "all of the powers over trust property that a legally competent, unmarried individual has with respect to individually owned property."<sup>22</sup> Even after this reform, however, it remains customary (on belt-and-suspenders grounds) to include expansive powers boilerplate in a trust instrument.<sup>23</sup>

The broadening of trustees' powers, first by drafting custom and then by default law, necessitated a new system of beneficiary safeguard. Trust fiduciary law evolved to fill that role, that is, to protect beneficiaries—commonly minor, incompetent, and unborn persons—from the newfound peril of mismanagement or misappropriation by empowered trustees. "Trustees with transactional powers necessarily have the power to abuse as well as to advance the interests of beneficiaries. To prevent abuse, trustees were subject to duties, protective in nature, which were elaborated into a new body of law that we now recognize as trust fiduciary law."<sup>24</sup> The duty of *loyalty* proscribes misappropriation and regulates conflicts of interest. The duty of *prudence* prescribes an objective standard of care that is informed by industry norms and practices. These core duties are elaborated and reinforced by a host of *subsidiary rules* that address recurring specific issues such as recordkeeping, disclosure, earmarking, and portfolio management.<sup>25</sup>

In contemporary practice, therefore, the trustee is given broad powers of administration to act without prior authorization, but the exercise (or nonexercise) of those powers is subject to after-the-fact

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20. See, e.g., WILLIAM D. ROLLISON, *ILLINOIS ESTATE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 126-29 (1952); JAMES P. JOHNSON, *A DRAFTSMAN'S HANDBOOK FOR WILLS AND TRUST AGREEMENTS* 469-72 (1961).

21. Much of this legislation traces to the UNIF. TRUSTEES' POWERS ACT (UNIF. LAW COMM'N 1964).

22. RESTATEMENT (THIRD) OF TRUSTS § 85(1) (AM. LAW INST. 2007); see also UNIF. TRUST CODE §§ 815-16 (UNIF. LAW COMM'N 2005).

23. See, e.g., NORTHERN TRUST COMPANY, FORM 201: REVOCABLE TRUST AGREEMENT 201-31 to 201-35 (2004), [https://www.northerntrust.com/documents/wealth-advisor/forms/pdf/Form\\_201.pdf?bc=24227413](https://www.northerntrust.com/documents/wealth-advisor/forms/pdf/Form_201.pdf?bc=24227413). The trustee might have dealings in another state, the trust situs might change, and even today third parties sometimes demand to see explicit authorization in the trust instrument.

24. Langbein, *Management Trust*, *supra* note 2, at 54.

25. See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 197 (Andrew Gold & Paul Miller eds., 2014).



scrutiny for compliance with the trustee's fiduciary duties. The Restatement (Third) of Trusts characterizes this point as "a basic principle of trust administration: that a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations."<sup>26</sup>

The twin legal adaptations of trustee empowerment and fiduciary duty have facilitated the use of an irrevocable trust for wealth management within a family and down the generations. By making a transfer in trust rather than outright, a settlor ensures that the property will be managed and distributed in accordance with the settlor's wishes as expressed in the terms of the trust rather than the whims of the beneficiaries. Such a trust allows the settlor to postpone important decisions about the investment and distribution of the trust property, leaving those decisions to the trustee to be made in view of changing market conditions and the beneficiaries' evolving circumstances, but within the framework established by the settlor in the terms of the trust, and subject to a fiduciary governance regime. In this way, the trust has become a powerful tool for implementing a settlor's freedom of disposition across time. Here is a stylized illustration:

*Case 1: Trust for Incompetent Person.* O's son, A, is mentally or physically impaired and is unable to manage property. O transfers property to X in trust to support A for life, remainder to A's descendants, but if A dies without descendants, to O's daughter, B, or her surviving descendants. By use of this trust O ensures fiduciary administration on behalf of A, the disabled beneficiary, in light of A's needs across time. O also ensures that, upon A's death, the remainder will pass to A's surviving descendants or, if there are no survivors in that line of descent, then to O's other line of descent (B and her descendants).

The trust in Case 1 is a management trust, that is, O has made "a gift[] projected on the plane of time and so subjected to a management regime."<sup>27</sup> Under modern law, X has broad powers over the trust property as if X were the outright owner of that property. But X's exercise or nonexercise of those broad powers is subject to X's fiduciary duties as trustee. And the beneficiaries hold legally enforceable pre-

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26. RESTATEMENT (THIRD) OF TRUSTS § 70 cmt. a (AM. LAW INST. 2007).

27. Bernard Rudden, Book Note, 44 MOD. L. REV. 610, 610 (1981) (reviewing GIFTS AND PROMISES, JOHN P. DAWSON (1980)).

sent or future interests such that they have standing to enforce the trust.<sup>28</sup>

#### D. Conveyancing Abides

Notwithstanding the rise of the management trust, the use of a trust as a will substitute abides. But instead of primogeniture and the feudal incidents, today the trust is used as a will substitute to avoid probate.<sup>29</sup> On the settlor's death, without probate administration or other court involvement, the trust property is distributed outright or is held in further trust in accordance with the terms of the trust. Even if the settlor had been the sole trustee, a named successor trustee may take over without court involvement and distribute the property or hold it in further trust per the terms of the trust. Here is a stylized illustration:

*Case 2: Revocable Trust as Will Substitute.* O declares herself trustee of certain property for the benefit of O for life, and then on O's death, to pay the principal to O's descendants. O retains the power to revoke the trust.

The trust in Case 2 is a will substitute. Unless O revokes the trust, her descendants will be entitled to the remainder of the trust property on her death independent of any probate administration of her estate. While alive, O as trustee has power to manage the trust property. And as settlor O has retained the power to revoke the trust and take back the trust property. So long as O remains alive and competent to revoke the trust, there is thus little discernable change in O's relationship with the trust property from when she held it in fee simple.

A professionally drafted revocable trust with a trustee other than the settlor will commonly include provisions confirming that the settlor may direct the trustee to distribute to the settlor so much or all of the income and principal as the settlor wishes and to invest the trust property as the settlor directs.<sup>30</sup> Because such provisions expressly

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28. See RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. b (AM. LAW INST. 2012) ("A suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue. The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent.").

29. See DUKEMINIER & SITKOFF, *supra* note 3, at 466-69.

30. See, e.g., NORTHERN TRUST COMPANY, *supra* note 23, at 201-1 ("During my lifetime the trustee shall pay so much or all of the income and principal of the trust estate to me or otherwise as I direct."); *id.* at 201-29 ("I shall have the power to direct

subject the trust property to the settlor's continued dominion and control, they confirm that the settlor intends a will substitute and not a management trust.

Even without express provision, however, under modern law a settlor of a revocable trust retains dominion and control over the trust property and its administration. On the assumption that the settlor of a revocable trust likely meant for the trust to be a will substitute, by default modern law imposes on the trustee "a duty to comply with a direction of the settlor even [if] the direction is contrary to the terms of the trust or the trustee's normal fiduciary duties."<sup>31</sup> So long as the trust remains revocable, "[t]he rights of the beneficiaries are exercisable by and subject to the control of the settlor."<sup>32</sup>

This reform, under which the beneficiaries of a revocable trust lack standing to enforce the trust while the trust remains revocable, is the most prominent of a cluster of reforms (to which we shall return below) that facilitate the typical settlor's intent for a revocable trust to substitute for a will.<sup>33</sup> Just as a beneficiary under a will has no rights until the testator's death, under prevailing trust law today a beneficiary of a revocable trust likewise has no rights while the trust remains revocable by the settlor. In both situations, the beneficiary holds a mere expectancy rather than a cognizable legal right.<sup>34</sup>

### III. The Nonprobate Revolution and Revocable Trusts

All of a decedent's property at death can be divided into probate and nonprobate property. *Probate property* is property that passes through probate under the decedent's *will* or by *intestacy*. *Nonprobate property* is property that passes outside of probate by way of a *will substitute*. In addition to the revocable trust, the other main will substitutes today are life insurance and the various pay-on-death or transfer-on-death bank, brokerage, and pension accounts offered by

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the retention or sale of any trust assets and the purchase of property with any principal cash in the trust.").

31. RESTATEMENT (THIRD) OF TRUSTS § 74(1)(a)(i) (AM. LAW INST. 2007).

32. *Id.* § 74(1)(b); *see also* UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2005).

33. *See infra* text accompanying notes 52-61 and Part III.D.

34. *See* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 342-43 (2013).

financial institutions to retail customers.<sup>35</sup> Taken together, the will substitutes constitute a nonprobate system of private succession—they are “free-market competitors” to the public probate system.<sup>36</sup> And private succession is winning. With most personal wealth held today in the form of liquid financial assets in the custody of financial intermediaries, much more property passes by way of these nonprobate modes of transfer than through probate.<sup>37</sup>

### A. The Nonprobate Revolution

The nonprobate system of private succession, and its multiple overlapping causes, has been considered in-depth elsewhere.<sup>38</sup> For present purposes, therefore, it will suffice to remark upon (i) the public demand for cheaper alternatives to probate; (ii) the connection between liquid financial assets and the role of institutional custodians in facilitating nonprobate transfers; and (iii) the state’s facilitation of the nonprobate system.

Across the decades, the probate system “earned a lamentable reputation for expense, delay, clumsiness, makework, and worse.”<sup>39</sup> The root of the problem is that, as traditionally conceived, probate operated within the normal Anglo-American litigation framework of an adversarial judicial proceeding. But the administration of most estates, in which a surviving family member serves as fiduciary and the decedent provides for a harmonious division among her surviving family, does not require the costly and time-consuming process safeguards of an adversarial proceeding.<sup>40</sup> In consequence, many people

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35. See John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 *ACTEC L.J.* 1, 10 (2012).

36. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *HARV. L. REV.* 1108, 1108 (1984); see also Langbein, *supra* note 35, at 15 (“In law-and-economics terms, your decision to use private transfer-on-death services is a Coasean determination to contract out of the state system of probate administration.”); Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 *U. MICH. J.L. REFORM* 855, 874-77 (2012) (discussing Coasean contracting around the probate system).

37. See *DUKEMINIER & SITKOFF*, *supra* note 3, at 435.

38. See, e.g., Langbein, *supra* note 35, at 11; Langbein, *supra* note 36, at 1115-25; see also Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 *BROOK. L. REV.* 1123 (1993).

39. Langbein, *supra* note 36, at 1116.

40. The benign experience with unsupervised nonprobate transfers helped drive the informal probate and unsupervised administration reforms of Article III of the Uniform Probate Code. See *DUKEMINIER & SITKOFF*, *supra* note 3, at 46-47; see

came to “view probate as little more than a tax imposed for the benefit of court functionaries and lawyers.”<sup>41</sup> This view was perhaps most famously advanced in *How to Avoid Probate!*, “a runaway bestseller” published by Norman Dacey in 1965.<sup>42</sup> Denouncing as “extortionate” the legal fees and other costs of probate, Dacey argued in favor of probate avoidance by way of a revocable trust, and his book included a variety of do-it-yourself forms to assist people to that end.<sup>43</sup>

The timing of Dacey’s book was propitious. It aligned not only with a receptive public but also with a shift in the nature of wealth accumulation from land to liquid financial assets such as “stocks, bonds, mutual funds, bank deposits, and pension and insurance rights.”<sup>44</sup> Generally speaking, such assets are held for their owners by custodial intermediaries—banks, brokerage houses, and other financial institutions. These intermediaries play an administrative and bureaucratic role that was easily extended to deathtime transfer.<sup>45</sup> Today a death beneficiary form is routinely included among the paperwork given to a customer to open a bank, brokerage, or pension account. By completing this form, the account owner specifies to whom the custodian should transfer the account at the death of the owner.<sup>46</sup> The validity of these pay-on-death (“POD”) and transfer-on-death (“TOD”) designa-

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also Richard Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 193 (1969).

41. Langbein, *supra* note 36, at 1116-17.

42. DUKEMINIER & SITKOFF, *supra* note 3, at 467 (discussing NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1965)). Real and perceived shortcomings of the probate system helped to stimulate the proliferation of will substitutes. Dacey’s book in particular helped to stimulate probate reform efforts such as the Uniform Probate Code. See David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and Estates*, 58 ST. LOUIS U. L.J. 689, 690 (2014).

43. Dacey publicized rather than invented the technique. By the time of his first edition the revocable trust was already “one of the widely employed vehicles for the avoidance of probate.” A. James Casner, *Estate Planning – Avoidance of Probate*, 60 COLUM. L. REV. 108, 109 (1960).

44. Langbein, *supra* note 36, at 1119. In the modern age, “wealth,” is now “made up largely of promises.” ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 236 (1922).

45. See Langbein, *supra* note 36, at 1119 (explaining that “only scant adaptation is necessary to extend” custodial bureaucracy “to include transfer of account balances on death”).

46. There is, however, good reason to doubt whether the account owner “full[y] appreciate[s] the[] importance or meaning” of the form or the need “to update those forms to account for significant life events.” Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 169 (2014); see also Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 75 (2015).

tions has been settled by statutes, typically modeled on Uniform Probate Code § 6-101 and the Uniform Transfer on Death Security Registration Act, enacted in nearly every state.<sup>47</sup>

Statutory validation of POD and TOD accounts is, however, only a part of the state facilitation of the nonprobate system.<sup>48</sup> Most obviously, the nonprobate system arose only because the state permitted it to do so, for example by validating nonprobate transfers without the formalities required for a will in probate.<sup>49</sup> In addition to the statutes that validate POD and TOD accounts, modern law recognizes as valid a revocable trust without the formalities of a will even if the trust “is intended to serve as a substitute for a will” and the settlor retains dominion and control over the trust property.<sup>50</sup>

Helped along by the uniform acts and Restatements, the law has also been reworked on multiple fronts to improve the nonprobate system and to coordinate it with the probate system.<sup>51</sup> For example, courts and legislatures have subjected nonprobate transfers to various intent-implementing rules of construction first developed in the law of wills.<sup>52</sup> Perhaps the most salient is the rule that a bequest to a spouse is presumptively revoked on divorce.<sup>53</sup> Because the intent-implementing logic of this rule is not limited to a transfer by will, by statute or judicial decision many states have extended it to a transfer by revocable trust.<sup>54</sup> The law of wills also includes some mandatory limits on testation, such as the forced spousal share and protections for creditors. Because these limits are rooted in policy judgments about the proper extent of freedom of disposition at death, it follows that they should apply also to a revocable trust—and indeed, the law

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47. See JEFFREY A. SCHOENBLUM, *MULTISTATE GUIDE TO ESTATE PLANNING* tbl. 5.01, Part 2 (2015).

48. See Langbein, *supra* note 35, at 10 (noting the ways in which the “state has been playing an important hand in encouraging the growth of the nonprobate system”).

49. See *infra* Part III.C-D.

50. RESTATEMENT (THIRD) OF TRUSTS § 25(1) (AM. LAW INST. 2003); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1(b) cmt. b (AM. LAW INST. 2003).

51. See Langbein, *supra* note 35, at 10-14; McCouch, *supra* note 38; Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 524-25, 568-69 (2008).

52. See DUKEMINIER & SITKOFF, *supra* note 3, at 440 (general point); *id.* at 461-63 (as regards revocable trusts); Langbein, *supra* note 35, at 5-6 (surveying such reforms).

53. See Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 90-102 (2004).

54. Newman, *supra* note 51, at 541.

in many states has been revised accordingly.<sup>55</sup> Application of rules of construction and mandatory limits on testation from the law of wills to will substitutes reflects a modern policy preference for “unifying the law of wills and will substitutes.”<sup>56</sup>

This is not to say, however, that relations between the probate and nonprobate systems are entirely harmonious or that the distinction is no longer meaningful.<sup>57</sup> Adoption of coordinating reforms has been halting and incomplete, in part owing to debate over the extent to which courts can implement these reforms in the absence of statutory warrant and the lack of political salience for the issue.<sup>58</sup> The preemptive force of federal law has stymied certain reforms in the context of life insurance and pension accounts offered as a benefit of employment.<sup>59</sup> Nonetheless, the overall trend in the law, strongly encouraged by the uniform acts and Restatements, is toward permitting nonprobate transfers without the execution formalities of a will or the procedures of probate, but otherwise treating those transfers like a bequest under a will.<sup>60</sup> The rationale is one of substance over form; the theory is that “a will substitute is in reality a nonprobate will.”<sup>61</sup>

## B. Revocable Trusts in Contemporary Practice

Of all the will substitutes, the revocable trust most resembles a will in nature and function. Like a will, a revocable trust may be drafted precisely to the donor’s liking. Like a will, a revocable trust is not inherently asset specific, but rather may be funded with any or even all of the settlor’s property. And like a will, a revocable trust is subject

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55. Regarding the forced share, see JEFFREY A. SCHOENBLUM, *MULTISTATE GUIDE TO TRUSTS AND TRUST ADMINISTRATION* tbl. 1, q. 20 (2012). Regarding creditor claims, see UNIF. TRUST CODE § 505(a)(3) (UNIF. LAW. COMM’N 2005), and RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e (AM. LAW INST. 2000).

56. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

57. See Grayson M.P. McCouch, *A Comment on Unification*, 43 REAL PROP. TR. & EST. L.J. 499, 504 (2008) (arguing against “obliteration of all distinctions between wills and will substitutes”).

58. See DUKEMINIER & SITKOFF, *supra* note 3, at 450-51, 524-25.

59. See, e.g., John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665 (2014); T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185 (2004); see also Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635 (2014).

60. See Langbein, *supra* note 35, at 17-18 (explaining the law reform efforts “to unify the rules of construction across the two transfer systems”).

61. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

to amendment or revocation—in the jargon, both a will and a revocable trust are “ambulatory.”<sup>62</sup> Relative to a will, however, a revocable trust offers several advantages that, taken together, explain the revocable trust’s displacement of the will as the centerpiece instrument in contemporary estate planning.

*Avoiding Probate.* To begin with, as we have seen a funded revocable trust avoids probate to the extent of the property held in the trust.<sup>63</sup> Because the trustee holds legal title to the trust property, there is no need to change title by probate administration or other court order after the death of the settlor. Moreover, because a revocable trust does not arise in probate, it is not subject to ongoing probate court supervision, as is a testamentary trust.

*Privacy.* Another benefit of avoiding probate is avoiding the public nature of a probate filing.<sup>64</sup> Unlike a will, which upon probate becomes a public record, a revocable trust need not be filed with a court unless a dispute arises.<sup>65</sup> So there is a privacy advantage to a revocable trust relative to a will, one that persists even in a state that has reformed probate to make it cheaper and faster.<sup>66</sup>

*Continuity in Property Management.* Still another advantage of a funded revocable trust is continuity in property management in the event of the settlor’s death. Even if the settlor had been acting as the sole trustee, at the settlor’s death a successor trustee can act immediately and without need for a court order. The trust property can be distributed to the beneficiaries right away if that is what the trust instrument provides. In contrast, property held by a decedent outright must be marshaled by the personal representative, whose appointment must be confirmed by the probate court, and then distribution of the property may be delayed until the conclusion of the probate proceeding.

*Multistate Estate Planning.* A revocable trust is often better suited to multistate estate planning than a will. Perhaps the most salient illustration is that a revocable trust can be used to avoid a second probate (an “ancillary probate”) for real property in another state. A set-

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62. Goldberg & Sitkoff, *supra* note 34, at 342.

63. See *supra* Part III.D.

64. See Bradley E.S. Fogel, *Trust Me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS U. L.J. 805, 815–16 (2014).

65. See Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555 (2008) [hereinafter Foster, *Trust Privacy*]; see also Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713 (2006).

66. See English, *supra* note 42, at 691.



tlor of a revocable trust also has broader freedom than a testator of a will to choose governing law, in particular if the trust is to be funded with personal property such as liquid financial assets.<sup>67</sup> There is abundant evidence, for example, of widespread use of out-of-state trusts to take advantage of some states' repeal of the Rule Against Perpetuities.<sup>68</sup>

*Coordinating Deathtime Transfer.* Yet another common use of a revocable trust is to consolidate for coordinated disposition at death all of the settlor's property, both probate and nonprobate. Given the proliferation of asset-specific will substitutes such as POD and TOD bank, brokerage, and pension accounts, this use of a revocable trust has become typical. A middle-class person who has changed jobs a few times is likely to have several different pension accounts in addition to multiple bank and brokerage accounts and life insurance policies.<sup>69</sup> "It would not be unusual for someone in mid-life to have a dozen or more will substitutes in force, whether or not he had a will."<sup>70</sup> To bring coherence to what would otherwise be a multitude of uncoordinated nonprobate transfers, all of these transfers can be consolidated for disposition under the person's revocable trust.

Coordination under a revocable trust is accomplished by naming the then-acting trustee as the death beneficiary of all the settlor's will substitutes and as the beneficiary under the settlor's will (a "pour-over will"). For example, *O* sets up a revocable trust with himself or a third party as trustee. *O* then executes a will devising his probate estate to the trustee of that trust,<sup>71</sup> and executes beneficiary designation

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67. See DUKEMINIER & SITKOFF, *supra* note 3, at 466, 468-69. The common law rule requires a "substantial relation" between the chosen state and the trust, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. LAW INST. 1971), which is typically achieved by naming an in-state trustee or co-trustee. See, e.g., Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1786, 1817 (2014).

68. See, e.g., Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

69. See Langbein, *supra* note 35, at 12.

70. Langbein, *supra* note 36, at 1109.

71. Here is a sample pour-over provision:

I give my residuary estate to the then acting trustee under the trust agreement executed by me on \_\_\_\_\_, 20\_\_\_, and known as the O 20\_\_ Revocable Trust, of which I am now trustee and X is named as successor trustee, to be added to the trust estate and held under that trust agreement as in effect at my death.

This example is adapted from NORTHERN TRUST COMPANY, FORM 110: WILL POUR OVER 110-5 (2004), [https://www.northerntrust.com/documents/wealth-advisor/forms/pdf/Form\\_110.pdf?bc=24227532](https://www.northerntrust.com/documents/wealth-advisor/forms/pdf/Form_110.pdf?bc=24227532).

forms for all of his POD, TOD, life insurance, and other nonprobate transfers naming the trustee as the death beneficiary. For O to change his estate plan later, he need only amend his revocable trust, rather than revise the beneficiary designations across all of his nonprobate transfers. In practice today, therefore, the will has yielded to the trust as the central instrument governing property transfer at death.

*Standby for Pour-Over Will.* A revocable trust need not be funded during life with a person's property for it to serve this coordinating function. Widespread legislation, such as the Uniform Testamentary Additions to Trust Act, permits a will to pour over into an unfunded revocable trust even if the trust was created or amended after the pour-over will was executed.<sup>72</sup> As such, it is possible (and not uncommon in practice) to create an unfunded revocable trust that has no purpose during the settlor's life, but that at the settlor's death will become the dispositive instrument for the settlor's probate estate (by way of a pour-over will) and for the settlor's various nonprobate transfers (by way of beneficiary designations that point to the trust). In this application, the trust is truly a nonprobate will, functioning much as a probate will did in the days before the proliferation of will substitutes.<sup>73</sup>

### C. Validity and the "Present Interest" Fiction

To be valid, a will must be executed with the formalities prescribed by the applicable Wills Act, which tend to require at a minimum that the will be in writing, be signed by the testator, and be attested by two witnesses.<sup>74</sup> The main reason for requiring these formalities is to enable a court easily and reliably to discern the authenticity of a purported act of testation given that, by the time the issue would arise in court, the testator would no longer be able to provide testimony of her intent—what has been called probate's "worst

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72. See DUKEMINIER & SITKOFF, *supra* note 3, at 463-65.

73. Because a revocable trust is so commonly the coordinating instrument in a donor's estate plan—with a pour-over will, the trust is the distributive arm of the donor's estate—it is typical to include in a revocable trust a provision directing the trustee to take instruction from the fiduciary of the settlor's estate in paying off the settlor's debts and in paying any transfer taxes arising by reason of the settlor's death. See, e.g., NORTHERN TRUST COMPANY, *supra* note 23, at 201-0, 201-2 (model language).

74. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999).

evidence" problem.<sup>75</sup> Although in recent years a movement has arisen to salvage botched executions if testamentary intent is shown by clear and convincing evidence,<sup>76</sup> the prevailing view across history has required strict compliance with the Wills Act.<sup>77</sup>

A declaration of trust, by contrast, requires no particular formalities, in most states not even a written instrument if the trust does not include real property.<sup>78</sup> A person may declare himself to be trustee of specified personal property for his own benefit during his life and direct that the property pass to designated others upon his death. Because the donor retains the power (as settlor) to revoke the trust and take back the trust property, and because the donor (as trustee) has control over management of the trust property, there is little discernable change in the donor's relation to the trust property during his lifetime. In function, then, there is little discernable difference between such a trust and a will, except that at death the trust operates outside of probate. In the words of Justice Holmes, in this application the trust has "a very testamentary look."<sup>79</sup>

For a time courts struggled with the question of whether a revocable trust, in particular one created by declaration of trust, should be effective to transfer property at the settlor's death without Wills Act formalities.<sup>80</sup> Probably the leading case toward settling the question in the affirmative is *Farkas v. Williams*, decided in 1955.<sup>81</sup> Here are the facts, in simplified form: Albert Farkas declared a trust of certain mutual fund shares for the benefit of himself during life. Farkas retained the right to all cash dividends; to sell or otherwise dispose of the stock and keep the proceeds, which would terminate the trust as to the stock sold; and to revoke the trust. If Farkas died without revoking the trust and without changing the remainder beneficiary (he retained this right too), then the remainder was to be paid to Richard Williams if Williams survived Farkas. Litigation ensued after Farkas died survived by Williams.

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75. Sitkoff, *supra* note 11, at 647 (quoting John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (1994) (book review)).

76. See DUKEMINIER & SITKOFF, *supra* note 3, at 182-96.

77. See *id.* at 153-71.

78. See UNIF. TRUST CODE § 407 (UNIF. LAW COMM'N 2005); RESTATEMENT (THIRD) OF TRUSTS § 20 (AM. LAW INST. 2003). The requirement of a writing for a trust of real property arises from the statute of frauds. See DUKEMINIER & SITKOFF, *supra* note 3, at 427.

79. *Bromley v. Mitchell*, 30 N.E. 83, 84 (Mass. 1892).

80. See DUKEMINIER & SITKOFF, *supra* note 3, at 440-41.

81. *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

The question presented was whether Farkas had created a valid trust, so that Williams would take the remainder, or if instead the trust was an “attempted testamentary disposition[] and invalid for want of compliance with the statute on wills.”<sup>82</sup> The court upheld the trust. Formally the court reasoned that the trust consummated an inter vivos gift because an “interest passed to Williams before the death of Farkas.”<sup>83</sup> This interest that Farkas passed to Williams at the creation of the trust, technically “a contingent equitable interest in remainder,”<sup>84</sup> differentiated the trust from a will. Under a will, nothing passes to a devisee until the testator’s death; the devisee has only an expectancy of receiving a future gift and not a cognizable legal interest.<sup>85</sup> Under the trust, by contrast, Williams took a future interest that, subject to a variety of conditions, would become possessory at the death of Farkas. On this view, the trust passed a property right—a contingent equitable interest in remainder—when created by Farkas.

The court bolstered this formal reasoning with a stab at some functional analysis. Unlike a testator, who retains full dominion and control over his property until death, Farkas owed fiduciary duties to Williams. Although Farkas had the power “to vote, sell, redeem, or otherwise deal in the stock,” this power was held as trustee, and “as trustee he must so conduct himself in accordance with the standards applicable to trustees generally.”<sup>86</sup> In consequence, “if, without hav-

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82. *Id.* at 602.

83. *Id.* at 603.

84. *Id.* at 604. As a matter of traditional future interests law, a settlor’s exercise of a power of revocation over a revocable trust is viewed as divesting the interest of a remainder beneficiary. See *DUKEMINIER & SITKOFF, supra* note 3, at 853. Thus, if *O* were to declare a revocable trust over certain property “for *O* for life, then to *A*,” we would say that *A* has a vested remainder subject to complete divestment by *O*’s exercise of her power of revocation. In *Farkas*, however, the settlor also conditioned the remainder beneficiary’s interest on the beneficiary surviving the settlor, making it a contingent remainder, as the court correctly identified. But as these examples show, whether under traditional law a future interest is “vested” or “contingent” is not determined by “the certainty or uncertainty of future possession.” *Id.* at 835; cf. *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 25.3 cmt. g illus. 18-19 (AM. LAW INST. 2011) (comparable illustrations). In consequence, the formal classification of a future interest as “vested” or “contingent” provides little guidance in resolving substantive questions about the donor’s intent. See, e.g., *Patterson v. Patterson*, 266 P.3d 828, 836 (Utah 2011) (reaffirming an earlier decision that “disavowed the requirement that a revocable trust create ‘vested interests’ in order to be deemed nonillusory”); see also Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 *HARV. L. REV.* 729, 732 (1972) (deriding “classificatory mystique,” that is, “the notion that classifying the interests created in a transfer solves most problems”).

85. See *DUKEMINIER & SITKOFF, supra* note 3, at 70.

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

ing revoked the trust, Farkas as trustee had given the stock away without receiving any consideration therefor," or if Farkas "had pledged the stock improperly for his own personal debt," then "Williams would have had an enforceable claim against Farkas'[s] estate for whatever damage had been suffered."<sup>87</sup> This right of Williams to sue Farkas for breach of trust was central to the court's reasoning that the trust gave rise to a lifetime rather than deathtime transfer and thus was distinguishable from a will.<sup>88</sup> "Contrast this with the rights of a legatee or devisee under a will. The testator could waste the property or do anything with it he wished during his lifetime without incurring any liability to those designated by the will to inherit the property."<sup>89</sup>

The weakness in the *Farkas* court's formalistic reasoning is that it did not come to grips with Farkas's retained power to revoke the trust and take back the trust property on a whim. In light of this absolute and unconditional power of revocation, it is difficult to imagine what Farkas could do that would give rise to a successful lawsuit by Williams for breach of duty.<sup>90</sup> This is not merely a practical point. Even the court acknowledged that a suit by Williams might not be "feasible" because "Farkas could then revoke the trust."<sup>91</sup> Rather the point is one of law. The "controlling consideration" in interpreting a donative instrument is the donor's intent.<sup>92</sup> If without first formally revoking the trust Farkas took an action that abridged Williams's (entirely defeasible) remainder interest, would not the more sensible interpretation—that is, the interpretation more in accord with Farkas's intent—be that the action constituted an implied revocation to that extent?

Consider again the court's examples of exchanging the stock for less than fair market value or pledging the stock to secure a personal debt. Professor John Langbein's response is apt:

The best way to see what is wrong with these examples is to imagine each as a two-step transaction in which the settlor first redeemed the shares and then used the proceeds to commit the act imagined. No liability would result, because the trust explicitly

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87. *Id.*

88. At the end of the opinion, the court also took notice of the "formality of the transaction," which included a written declaration of trust filed with the mutual fund company, a neutral intermediary. *Id.* "He thus manifested his intention in a solemn and formal manner." *Id.*

89. *Id.*

90. The classic criticism, which we follow, is Langbein, *supra* note 36, at 1126-28.

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

92. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

declares that redemption is a permitted mode of revocation; and once the transferor had revoked, he would, of course, be entirely free to be reckless with his property. I suggest that if one of the transactions imagined by the court were to occur, the court would treat the case as the analytical equivalent of such a two<sup>93</sup>-step transaction—revocation followed by dealings free of trust.

As we shall see, history has confirmed Langbein's prediction.<sup>94</sup> But for now what is important is to see the formal conceptualism by which courts came to accept the validity of a revocable trust for death-time transfer without Wills Act formalities. The theory was that upon creation of a revocable trust, the remainder beneficiary had a future interest—that is, a present property interest—that would become possessory at the settlor's death. The realness of this interest, which was proved by the beneficiary's standing to sue the trustee, confirmed that the trust effected an inter vivos gift that differentiated the trust from a will. The Restatement (Third) of Property summarizes this view thus:

[T]he traditional explanation for why will substitutes are not wills is the present-transfer theory. A will substitute need not be executed in compliance with the statutory formalities required for a will because a will substitute effects a present transfer of a nonpossessory future interest or contract right, the time of possession or enjoyment being postponed until the donor's death.

#### D. The No "Present Interest" Reforms

The real issue in *Farkas* was a question of policy in legal institutional design. Should a will substitute be subject to Wills Act formalities? After many years of benign experience with deathtime transfer by will substitutes lacking the formalities of a will, an alternative and more functional answer emerged. The starting point is the premise that a "donor is free to transfer wealth on death either in the probate system or in the nonprobate system or in both."<sup>96</sup> The requisite formalities follow from the donor's choice of form. The Restatement (Third) of Property explains:

When using the nonprobate system, the donor uses its forms, which typically arise from the commercial practice of financial intermediaries. When using the state-operated transfer system of probate administration, the donor uses the forms appropriate to

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93. Langbein, *supra* note 36, at 1127-28.

94. See *infra* Part III.D.

95. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. LAW INST. 2003).

96. *Id.*

that system (for testation) or allows that system to operate by default (in the case of intestacy). The statute of wills does not require wealth transfers on death to occur by probate; the statute merely requires that probate transfers comply with the statute's formalities. Because the statute of wills does not govern nonprobate transfers, wealth holders may use these alternative wealth-transfer systems on death by means of will substitutes.<sup>97</sup>

Under this line of reasoning, a revocable trust can be openly acknowledged as a will substitute. And under this will substitute model, the nature or extent of a beneficiary's rights during the settlor's life are not relevant to establishing the trust's validity. The trust's effectiveness in shifting possession and enjoyment of the trust property to the remainder beneficiary "is not affected by the fact that the interests of all beneficiaries other than the settlor are contingent or subject to conditions subsequent, including the exercise of a power of revocation, withdrawal, amendment, or appointment reserved to the settlor, whether exercisable during life or by will."<sup>98</sup> Even if the "settlor serves as sole trustee or co-trustee, or reserves the right to veto, direct, or otherwise control the acts of another trustee in the administration or distribution of the trust estate," the trust is valid and may effect a transfer of property to a remainder beneficiary at the death of the settlor.<sup>99</sup>

Acknowledging the will substitute nature of the typical revocable trust facilitates implementation of the typical settlor's actual or probable intent. Consider again the facts in *Farkas*. Given Farkas's power to revoke the trust and take back the trust property on a whim, the more sensible interpretation, meaning the one more likely to accord with Farkas's intent, is that any action by Farkas that impaired Williams's interest in the trust was an implied revocation to that extent. Fulfilling Langbein's prognostication,<sup>100</sup> the modern cases have reached precisely this result,<sup>101</sup> and the Uniform Trust Code and the Restatement (Third) of Trusts are in accord.<sup>102</sup>

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97. *Id.*

98. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. b (AM. LAW INST. 2003).

99. *Id.*

100. *See supra* text accompanying note 93.

101. *See, e.g., In re Stephen M. Gunther Revocable Living Tr.*, 350 S.W.3d 44 (Mo. Ct. App. 2011); *Brundage v. Bank of Am.*, 996 So.2d 877 (Fla. Dist. Ct. App. 2008); *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. Ct. App. 2007); *In re Malasky*, 736 N.Y.S.2d 151 (App. Div. 2002).

102. *See* UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2005); RESTATEMENT (THIRD) OF TRUSTS § 74(1) (AM. LAW INST. 2007).

*Fulp v. Gilliland*,<sup>103</sup> decided in 2013, almost sixty years after *Farkas*, illustrates this evolution in the case law. The settlor, Ruth Fulp, declared a trust of her family farm, naming herself as trustee and life beneficiary, with the remainder to pass to her three children upon her death. Some years later, she sold the farm to one of the children at a price below fair market value. One of the other children sued. *Farkas* had posited that this sort of conduct by a settlor-trustee would give rise to a claim for breach of trust. But the court in *Fulp* disagreed. Adopting the will substitute theory, the court held that “Ruth as trustee owed a duty to herself as the trust’s settlor and primary beneficiary,” but not also “to her children as remainder beneficiaries.”<sup>104</sup>

The problem with the claim posited in *Farkas* is that it imposes the fiduciary enforcement rights of a management trust on what the settlor meant to be a will substitute trust, hindering rather than implementing the settlor’s intent. The court in *Fulp* took notice of this point in the first sentence of its opinion: “Revocable trusts are popular substitutes for wills, intended to provide non-probate distribution of people’s estates after their deaths, allowing them to retain control and use of their assets during their lifetimes.”<sup>105</sup> The court’s analysis was functional and rooted in the intent of the settlor: “Holding that trustees also owe a duty to remainder beneficiaries would create conflicting rights and duties for trustees and essentially render revocable trusts irrevocable. [The settlor] was free to sell her farm as trustee for whatever price she desired, without breaching a duty to her children. . . . In sum, [the plaintiff child’s] argument fails because it would defeat, rather than implement, the settlor’s intent.”<sup>106</sup>

Once released from the formalism that a revocable trust necessarily gives the beneficiaries a fiduciary enforcement right against the trustee, the law governing revocable trusts (i.e., will substitute trusts) was free to branch off from the law governing irrevocable trusts (i.e., management trusts). The principle underlying this branching—the core insight of the will substitute model—is that the property of a

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103. 998 N.E.2d 204 (Ind. 2013).

104. *Id.* at 205.

105. *Id.*

106. *Id.* at 205, 209. The court was explicit in tying its analysis to the settlor’s intent as expressed in the trust instrument. “We must interpret the terms of the Trust to determine the duties it imposed upon Ruth as trustee, and to determine whether the sale of the farm breached any of those duties. Our primary purpose in construing a trust instrument is to ascertain and give effect to the settlor’s intention.” *Id.* at 207 (citations and quotation marks omitted).



revocable trust should be “treated as though it were owned by the settlor.”<sup>107</sup> The modern rule of no standing for the beneficiaries while the trust is revocable is an application of this principle. So too is the broader and more general rule that the trustee of a revocable trust “has a duty to comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties.”<sup>108</sup>

Other rules applicable to a revocable trust have likewise been updated to reflect the will substitute model. Under traditional law, an inter vivos trust was amendable or revocable only in the precise manner, if any, specified in the terms of the trust. “Courts reasoned that, because a beneficiary had a present interest in the trust, that interest could be divested only in accordance with the terms of the trust.”<sup>109</sup> Under this reasoning, a settlor who with intent to revoke put his revocable trust instrument into a paper shredder or set it on fire would not have revoked the trust unless the trust instrument specifically stated that shredding or fire were permissible modes of revocation.<sup>110</sup> Under modern law, by contrast, an inter vivos trust is presumptively revocable in any manner that clearly manifests the settlor’s intent to revoke.<sup>111</sup> Freed from the formalism that the remainder beneficiaries have a property interest that can be divested only in accordance with the terms of the trust, modern law instead implements the intent of the settlor, who is treated as though she still owns the trust property.<sup>112</sup>

Yet another benefit of treating the trust property as though it were still owned by the settlor is preventing the settlor from defeating public policy limits on freedom of disposition. For example, under traditional law the settlor’s creditors could not reach property in a revocable trust.<sup>113</sup> Nor could the settlor’s spouse by way of the spousal forced share.<sup>114</sup> Under modern law, by contrast, property held in a

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107. RESTATEMENT (THIRD) OF TRUSTS § 25 (AM. LAW INST. 2003).

108. *Id.*

109. DUKEMINIER & SITKOFF, *supra* note 3, at 452. For an example, see *Banks v. Means*, 52 P.3d 1190 (Utah 2002), *overruled by Patterson v. Patterson*, 266 P.3d 828 (Utah 2011).

110. See *Salem United Methodist Church v. Bottorff*, 138 S.W.3d 788 (Mo. Ct. App. 2004).

111. See UNIF. TRUST CODE § 602 (UNIF. LAW COMM’N 2005); RESTATEMENT (THIRD) OF TRUSTS § 63(3) (AM. LAW INST. 2003).

112. See, e.g., *Patterson*, 266 P.3d at 828.

113. RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. o (AM. LAW INST. 1959).

114. See, e.g., *Kerwin v. Donaghy*, 59 N.E.2d 299 (Mass. 1945), *overruled by Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

revocable trust is subject to claims by the settlor's creditors during life and death,<sup>115</sup> and increasingly such property is subject to the spousal forced share.<sup>116</sup>

The spousal share and creditors' rights reforms are rooted in substance-over-form reasoning in implementing a supervening public policy. To the extent that a settlor retains a power to revoke the trust and take back the trust property, that property remains in substance owned by the settlor, albeit in form legal title is held by the trustee. At any time and for any reason the settlor with a power to revoke is free to take back the trust property and do with it as he or she pleases. The sensible policy judgment of modern law, therefore, is that the formal transfer of the property to the trust should not defeat the claims of the settlor's spouse or creditors.

Other of the reforms just discussed, however, most prominently the rule of no standing in the beneficiaries of a revocable trust, are rooted not in a supervening public policy, but rather in a conjecture about the actual or probable intent of the settlor. The typical settlor of a revocable trust, we assume, means for the trust to be a will substitute. Whether these reforms are intent implementing, including especially the rule of no standing in the beneficiaries, depends on the extent to which that assumption is true. But what if the assumption is sometimes not true? What if in addition to a management trust and a will substitute trust a settlor might also intend a conservator substitute trust? Or more precisely, what if the settlor of a revocable trust intends *both* for the trust to substitute for a will at death *and* to substitute for conservatorship in the event of incapacity?

#### IV. Incapacity Planning and Revocable Trusts

Running in parallel with the nonprobate revolution has been what might be called a "gerontological revolution."<sup>117</sup> There have been "remarkable improvements in life expectancy over the past century," so much so that in just a few years "the number of people aged 65 or older will outnumber the children under age 5. . . . The limits to

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115. See UNIF. TRUST CODE § 505(a)(3) (UNIF. LAW COMM'N 2005); RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e (AM. LAW INST. 2003). For an example, see *Sowers v. Luginbill*, 889 N.E.2d 172 (Ohio Ct. App. 2008).

116. See DUKEMINIER & SITKOFF, *supra* note 3, at 520-36.

117. Langbein, *supra* note 35, at 5.

life expectancy and lifespan are not as obvious as once thought.”<sup>118</sup> This increase in longevity has brought with it an increased chance that a person’s last days, months, or even years will be spent in a state of mental or physical decay. Planning for this possibility is therefore as much a part of contemporary trusts and estates practice as is planning for property succession at death. And a funded revocable trust that is meant to be a will substitute at death is a common planning alternative to a court-appointed conservator or a durable power of attorney in the event of incapacity.

#### A. The Default Plan: Conservatorship

Much as intestacy is the default estate plan for a person who does not make a will or dispose of her property by will substitutes, in most states *conservatorship* is the default plan for managing the property of an incapacitated person who does not provide otherwise. A conservator for an incapacitated person has broad powers to manage the person’s property similar to those of a trustee.<sup>119</sup> And a conservator is subject to fiduciary duties of loyalty and care comparable to those of a trustee.<sup>120</sup> In states that use the older *guardianship* system, the powers of the guardian are more limited and judicial involvement is more substantial.

A conservatorship typically begins by an interested party filing a petition with the appropriate court. Under the Uniform Probate Code, which is fairly representative, the court may appoint a conservator if it finds by clear and convincing evidence that the person “is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions” and by a preponderance of the evidence that the person “has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the” person.<sup>121</sup> Priority for appointment as conservator is typically given, as under the Uniform Probate Code, to someone chosen in ad-

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118. NAT’L INST. ON AGING ET AL., GLOBAL HEALTH AND AGING 2-3 (2011), [https://d2cauhfh6h4x0p.cloudfront.net/s3fs-public/global\\_health\\_and\\_aging.pdf](https://d2cauhfh6h4x0p.cloudfront.net/s3fs-public/global_health_and_aging.pdf).

119. See, e.g., UNIF. PROB. CODE § 5-425 (UNIF. LAW COMM’N 2010).

120. See, e.g., *id.* §§ 5-418(a), 5-423.

121. *Id.* § 5-401; see also Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMPLE L. REV. 1, 6-9 (2014) (surveying conservatorship rules).

vance by the person, an agent under a durable power of attorney, or the person's spouse, adult child, or parent, in that order.<sup>122</sup>

The main drawback to conservatorship is that it imposes substantial private and social costs. To begin with, a conservatorship proceeding may be emotionally punishing, as it involves a formal allegation in court that a loved one is too mentally impaired to manage his property. Even if the petition is uncontested, it will be a public court document, which may invite unwanted publicity. In some cases, the alleged incompetent will resist the allegation. The ensuing litigation may air out unpleasant and embarrassing facts, and like any litigation, it is likely to be cumbersome and expensive.<sup>123</sup> Because imposition of a conservatorship is a deprivation of liberty that requires due process, even the modern Uniform Probate Code provides for an elaborate court procedure to protect the alleged incompetent.<sup>124</sup> Avoiding a conservatorship (or guardianship) by advance planning, which is in effect a waiver of that process, is preferable and today is a normal and customary part of estate planning practice.

## B. Durable Power of Attorney

Perhaps the most familiar tool for incapacity planning to avoid a conservatorship is a durable power of attorney. A *power of attorney* creates an agency relationship in which the agent, traditionally called an *attorney-in-fact*,<sup>125</sup> is given a written authorization to act on behalf of the principal subject to fiduciary obligation.<sup>126</sup> By evidencing the agent's authority to act for the principal, the written instrument induces third parties to deal with the agent on behalf of the principal.

But an ordinary power of attorney is of limited use in incapacity planning, because at common law an agent's authority terminates on the principal's incapacity.<sup>127</sup> Enter the *durable power of attorney*. Unlike an ordinary power of attorney, a durable power of attorney is effective during the incapacity of the principal and until the principal dies.<sup>128</sup> The power can be drafted to be effective immediately upon

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122. See UNIF. PROB. CODE § 5-413 (UNIF. LAW COMM'N 2010).

123. See Fogel, *supra* note 64, at 818.

124. See UNIF. PROB. CODE § 5-406 (UNIF. LAW COMM'N 2010).

125. The term *attorney* means agent; an attorney-in-fact can be contrasted with an attorney-at-law, that is, a lawyer.

126. See, e.g., UNIF. PROB. CODE § 5B-114 (UNIF. LAW COMM'N 2010).

127. See RESTATEMENT (THIRD) OF AGENCY § 3.08 cmt. b (AM. LAW INST. 2006).

128. A durable power is authorized by the Uniform Power of Attorney Act, see Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Au-*

signing or only upon the principal's incapacity (a springing durable power of attorney).<sup>129</sup> A durable power of attorney thus provides "a simple way to avoid guardianship [by] allowing an agent to manage a principal's assets when necessity or incapacity requires it."<sup>130</sup>

Relative to a revocable trust, an advantage of a durable power of attorney is that the agent can be authorized to act with respect to any of the principal's property, including property acquired after execution of the power. A principal may even empower an agent to revoke, amend, or create a revocable trust on behalf of the principal.<sup>131</sup> On a more basic level, a durable power of attorney allows a person "to retain full legal and equitable ownership of his assets while delegating to the agent a defined scope of authority to act in the principal's stead."<sup>132</sup> In this respect, a durable power of attorney is the incapacity planning analogue to a will, which may direct the disposition at death of property acquired after execution of the will. But unlike a will, a durable power of attorney is private; there is no need for judicial involvement.

On the other hand, banks and other financial institutions are notoriously resistant to directions from an agent under a power of attorney.<sup>133</sup> An agent can compel the institution to accept his directions, but this may necessitate judicial involvement or at least the hassle of involving more senior officers within the institution. Part of the resistance by financial institutions to directions from an agent under a power of attorney stems from worry that the agent may be acting beyond the scope of his authority or in violation of his fiduciary duties.<sup>134</sup>

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*tonomy and Protection*, 1 PHX. L. REV. 343 (2008) [hereinafter Whitton, *Striking a Balance*], which has been absorbed into the Uniform Probate Code, see UNIF. PROB. CODE §§ 5B-101 to 5B-302 (UNIF. LAW COMM'N 2010), and by statutes in all states, see Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 8 n.1 (2007) [hereinafter Whitton, *Durable Powers*].

129. See UNIF. PROB. CODE § 5B-109 (UNIF. LAW COMM'N 2010); see also John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. BALT. L. REV. 407, 413 (2015). A durable power of attorney usually must be in writing and in some states witnessed or notarized. See, e.g., UNIF. PROB. CODE § 5B-105 (UNIF. LAW COMM'N 2010).

130. Angela M. Vallario, *The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution*, 43 U. BALT. L. REV. 85, 86 (2014).

131. See, e.g., UNIF. PROB. CODE § 5B-201(a)(1)-(2) (UNIF. LAW COMM'N 2010); UNIF. TRUST CODE § 603(e) (UNIF. LAW COMM'N 2005).

132. Whitton, *Striking a Balance*, *supra* note 128, at 345-46.

133. See, e.g., *id.* at 353; Fogel, *supra* note 64, at 818.

134. See Vallario, *supra* note 130, at 86-87.

The broader point is that because an incapacitated principal cannot monitor the actions of an agent, making a power of attorney durable to survive incapacity gives rise to an increased risk of abuse by the agent. "The very lack of oversight and ease of use that make powers of attorney so attractive in planning for incapacity also make them easy to abuse."<sup>135</sup> An incapacitated principal lacks the ability to sue the agent for breach of fiduciary duty, necessitating appointment of a conservator or an action by the fiduciary of the principal's estate after the principal's death. To ameliorate this problem, the Uniform Power of Attorney Act and statutes in some states give standing to sue an agent also to a spouse, parent, descendant, presumptive death beneficiary of the principal, and to other persons interested in the principal's welfare.<sup>136</sup>

In spite of these shortcomings, the durable power of attorney remains "a staple of the modern estate plan."<sup>137</sup> Much as the will abides in property succession, if only to catch property not disposed of by revocable trust or otherwise, so too the durable power of attorney abides for "both the wealthy and non-wealthy for incapacity planning as well as convenience."<sup>138</sup> No other technique allows for a surrogate fiduciary to manage the property of an incapacitated person without court involvement while the property remains titled in the name of the person. And as noted above, an agent under a durable power of attorney is also commonly given priority for appointment as conservator, if one should be required.<sup>139</sup>

### C. Revocable Trust

As we have seen, a funded revocable trust avoids probate to the extent of the property held in the trust.<sup>140</sup> Because the trustee holds legal title to the trust property, there is no need to change title by probate administration after the death of the settlor. Even if the settlor

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135. DUKEMINIER & SITKOFF, *supra* note 3, at 503; *see also* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1 (2001); Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1 (2006); Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 582 (1996).

136. *See* UNIF. PROB. CODE § 5B-116 (UNIF. LAW COMM'N 2010); Whitton, *Durable Powers*, *supra* note 128, at 32-34.

137. Vallario, *supra* note 130, at 86.

138. Whitton, *Durable Powers*, *supra* note 128, at 9.

139. *See supra* note 122 and accompanying text.

140. *See supra* Part III.D.

had been the sole trustee, at the settlor's death a named successor trustee can act immediately and without need for a court order. In this way, a funded revocable trust provides continuity in property management in the event of the settlor's death.

For similar reasons, a funded revocable trust may also be used to provide continuity in property management in the event of the settlor's incapacity. As in succession planning, even if the settlor had been the sole trustee, upon incapacity a named successor can take over without court involvement and act expeditiously to protect the trust property. The parallel between succession planning and incapacity planning in this regard is straightforward. Because the settlor can no longer manage his property, a surrogate fiduciary is necessary. And a revocable trust provides for quick, cheap, and private transfer of responsibility for managing the settlor's property to the settlor's chosen successor fiduciary.

Accordingly, if ordinary estate planning considerations point to use of a funded revocable trust—such as avoiding probate, ensuring privacy, or obtaining more favorable governing law<sup>141</sup>—there is little marginal cost but substantial potential benefit to addressing also management of the trust property in the event of incapacity. As the court in *Fulp* observed, “[r]evocable trusts have become popular estate planning tools and substitutes for wills because they allow settlors to avoid probate *and guardianship*, to have greater privacy, and to manage their assets.”<sup>142</sup>

To be sure, the trustee can act only with respect to property put in the trust by the settlor before becoming incapacitated. But a settlor who wants to avoid probate will need to transfer to the trust all her probate property anyway. And much as a pour-over will serves a back-up role in property succession at death, a durable power of attorney can serve a similar back-up role in the event of incapacity.

The main additional trust term needed to adapt a will substitute revocable trust to serve also as a conservatorship substitute is a mechanism for private determination of whether the settlor has become incapacitated. A familiar solution is to put the determination in the hands of the settlor's physician and one or more additional named persons, such as the settlor's spouse or children. Here is a form book example:

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141. See *supra* Part III.B.

142. 998 N.E.2d at 207 (emphasis added).

For purposes of this agreement, I shall be considered to be unable to manage my affairs if I am under a legal disability or by reason of illness or mental or physical disability am unable to give prompt and intelligent consideration to financial matters. The determination as to my inability at any time shall be made by \_\_\_\_\_ and my physician, or the survivor of them, and the trustee may rely upon written notice of that determination.<sup>143</sup>

Because there will be no court involvement unless the settlor contests a private determination of incapacity,<sup>144</sup> a provision such as this reduces the risk of litigation. Judicial oversight is not foreclosed, but it is not automatic in every case. A conservatorship, by contrast, requires litigation in every case commenced by a petition that alleges incapacity.

All told, a settlor who for estate planning reasons is going to create a funded revocable trust will seldom have a good reason not to use the trust also for incapacity planning. In both applications, part of what makes a revocable trust so attractive is that the settlor need not lose control over the trust property while he is alive and competent. In contrast to the *Farkas* era, in which courts posited a property right in the remainder beneficiaries and corresponding fiduciary obligation in the trustee, today the trustee of a revocable trust is under a duty to comply with a direction from the settlor even if the direction is contrary to the terms of the trust.<sup>145</sup> If the settlor is also the trustee, as in *Fulp*, then any action by the settlor-trustee that diminishes an interest of a remainder beneficiary is understood to be an implied revocation to that extent.<sup>146</sup> The trust property is "treated as though it were owned by the settlor,"<sup>147</sup> except that upon the settlor's death or incapacity, a successor trustee takes over without the delay, cost, or publicity of a court proceeding.

So compelling is the use of a funded revocable trust in planning for incapacity that the settlor should be presumed to intend a funded revocable trust not only as a will substitute but also as a conservator substitute. In many cases, this intent will be express. A professionally drafted revocable trust instrument typically will include a provision

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143. NORTHERN TRUST COMPANY, *supra* note 23, at 201-1.

144. A recent example that garnered media attention was the litigation over the competence of Donald Sterling in connection with the sale of the Los Angeles Clippers. See Scott Cacciola, *Plan B Eased Clippers Deal: Sterling's Diagnosis*, N.Y. TIMES (June 9, 2014), [http://www.nytimes.com/2014/06/10/sports/basketball/donald-sterling-impairment-eased-clippers-sale-to-steve-ballmer.html?\\_r=0](http://www.nytimes.com/2014/06/10/sports/basketball/donald-sterling-impairment-eased-clippers-sale-to-steve-ballmer.html?_r=0).

145. See *supra* Part III.D.

146. See *supra* text accompanying notes 100-102.

147. RESTATEMENT (THIRD) OF TRUSTS § 25 (AM. LAW INST. 2003).



for private determination of the settlor's competence, such as the form book example just given.<sup>148</sup> This intent will also be express if the instrument provides, as is normal and customary, for the consequences of a determination of incapacity—for example, a direction about the use of the trust property for the settlor's support. Here is a form book example:

If at any time or times I shall be unable to manage my affairs, the trustee may use such sums from the income and principal of the trust estate as the trustee deems necessary or advisable for the health and maintenance in reasonable comfort of myself and any person dependent upon me, or for any other purpose the trustee considers to be for my best interests.<sup>149</sup>

In such a trust, "the trustee (rather than a conservator or agent) was the fiduciary selected by the settlor for the exercise of administrative judgment and discretion" in the management of the settlor's property upon incapacity.<sup>150</sup>

Even if the terms of a funded revocable trust do not include an express provision for incapacity, the fact of the trust's funding telegraphs the settlor's intent to avoid probate in favor of private administration by a trustee. Given this preference for private fiduciary administration at death, the most reasonable inference about the settlor's probable intent in the event of incapacity is likewise private fiduciary administration, that is, management of the trust property by a successor trustee rather than a conservator. The question thus arises, if a funded revocable trust is in the normal case meant also to be a conservator substitute, should not the beneficiaries have standing to enforce the trust upon the settlor's incapacity?

## V. Standing Upon the Settlor's Incapacity

Under modern law, not only do the trustee's fiduciary duties in a revocable trust run exclusively to the settlor, but the other beneficiaries do not even have standing to sue the trustee for breach of trust while the trust remains revocable.<sup>151</sup> The theory, exemplified by the reasoning in *Fulp*, is that a funded revocable trust is meant to be a will substitute, not a management trust, hence the settlor did not intend for the beneficiaries to have an enforceable interest in the trust. But

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148. See *supra* text accompanying note 143.

149. NORTHERN TRUST COMPANY, *supra* note 23, at 201-1.

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

151. See *supra* Part III.D.

what about during a period of the settlor's incapacity? Who will enforce the trustee's duties while the settlor lacks capacity? As we have seen, a typical secondary motive for funding a revocable trust, in addition to avoiding probate, is to avoid a conservatorship (or guardianship) in the event of the settlor's incapacity.<sup>152</sup>

Although at first there was a movement toward recognizing beneficiary standing to enforce a revocable trust during the settlor's incapacity, today the trend in the law is to deny such standing, leaving enforcement during the settlor's incapacity to the settlor's agent under a durable power of attorney (if there is one) or to a conservator appointed by the court. This trend is misguided. A rule of presumptive standing for revocable trust beneficiaries upon the settlor's incapacity, such as is prescribed by the Restatement (Third) of Trusts,<sup>153</sup> is more likely to implement the typical settlor's actual or probable intent that, in addition to being a will substitute, the trust be a conservatorship substitute.

#### A. The Trend in the Law

As we have seen, freed from the formalism of *Farkas* and like cases, the law has evolved toward a rule of no standing for the beneficiaries of a revocable trust in accord with the settlor's actual or probable intent that the trust be a will substitute.<sup>154</sup> As the court in *Fulp* explained, beneficiary standing is in tension with the settlor's retained power to revoke the trust; the nature of the trust as revocable militates against beneficiary standing.<sup>155</sup> In that case, because the trust was revocable and the settlor-trustee was still competent, the trust was then functioning only as a will substitute.

But suppose in *Fulp* that the settlor had become incapacitated and that instead of the settlor-trustee it had been a successor trustee who sold the family farm for below market value. Would the settlor, while competent, have wanted to deny the remainder beneficiaries standing to sue the successor trustee, compelling them instead to bring an action for appointment of a conservator and then for the conservator to bring suit against the trustee? Or would the settlor have preferred the beneficiaries to enforce the trust without the need for a

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152. See *supra* Part IV.C.

153. See *infra* note 165 and accompanying text.

154. See *supra* Part III.D.

155. See *supra* text accompanying note 106.

conservatorship proceeding? In other words, would the settlor have wanted the trust to serve as a conservatorship substitute in the event of her incapacity?

In 1997, Hawaii adopted a statute that strongly implied no standing for a revocable trust beneficiary regardless of the settlor's capacity.<sup>156</sup> In 1999, applying a differently worded California statute,<sup>157</sup> a California appellate court suggested that if the settlor of a revocable trust became incapacitated (and if a conservator had not already been named) the beneficiaries would have standing to sue.<sup>158</sup> Also in 1999, Oklahoma adopted a statute that recognized standing for a revocable trust beneficiary upon the settlor's incapacity.<sup>159</sup> The following year, in 2000, the Uniform Law Commission endorsed beneficiary standing upon the settlor's incapacity in Uniform Trust Code § 603 ("Section 603").<sup>160</sup> Professor David English, the reporter for the committee that drafted the Uniform Trust Code, explained the rationale for Section 603 as follows:

The rights of the beneficiaries upon the settlor's incapacity was extensively debated by the drafting committee. One view was that a revocable trust should, in all instances, be treated the same as a will. Because the devisees under a will have no right to know of the devise no matter how incapacitated the settlor, then neither should the beneficiaries of a revocable trust. Another approach emphasized the use of a trust as a lifetime management device. Those holding this view argued that, in order for the beneficiaries to protect their rights, disclosure of the trust upon the settlor's incapacity should be required even if such disclosure was prohibited in the terms of the trust. The provision as finally drafted was a compromise. Settlers for whom confidentiality is important can

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156. HAW. REV. STAT. § 560:7-303 (1997) (stating that "during the life of the settlor, the trustee of a revocable inter vivos trust shall not be required to register the trust, reveal the terms to beneficiaries, or account to beneficiaries, unless otherwise directed by the settlor").

157. CAL. PROB. CODE § 16069 (1999) (the key language was "for the period when the trust may be revoked").

158. *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99 (Cal. Ct. App. 1999). In an unpublished opinion, the California Court of Appeals confirmed this implication. *See Parducci v. Demello*, No. A133707, 2012 WL 3013726 (Cal. Ct. App. July 24, 2012).

159. OKLA. STAT. tit. 60, § 175.57 (1999) ("[W]hile the trust is revocable and the settlor has capacity to revoke, the rights of the beneficiaries are held by, and the duties of the trustee are owed exclusively to the settlor; the rights to be held by and owed to the beneficiaries arise only upon the settlor's death or incapacity.").

160. *See* UNIF. TRUST CODE § 603(a) (UNIF. LAW COMM'N 2000) ("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.").

so provide in the terms of the trust. Otherwise, upon the settlor's incapacity, the beneficiaries are entitled to learn of the trust.<sup>161</sup>

At the start of this century, therefore, it appeared that American law would embrace the proposition that a funded revocable trust is not only a will substitute but also a conservatorship substitute. Between 2000 and 2004, eleven states adopted statutes or resolved by court decision the standing of a revocable trust beneficiary to sue upon the incapacity of the settlor. Eight followed Section 603, recognizing beneficiary standing upon the settlor's incapacity.<sup>162</sup> Two rejected the rule of Section 603, adopting instead a pure will substitute model that denied beneficiary standing even upon the settlor's incapacity.<sup>163</sup> One took an idiosyncratic approach, recognizing beneficiary standing only "to enforce the settlor's intent to benefit the beneficiary during the settlor's incapacity."<sup>164</sup> In 2005, the American Law Institute approved a Restatement provision, published in final form in 2007, that recognized beneficiary standing upon the settlor's incapacity.<sup>165</sup>

This steady (although not unanimous) trend toward recognizing beneficiary standing upon the settlor's incapacity—that is, toward recognizing the dual use of a funded revocable trust as both a will substitute and a conservatorship substitute—was more fragile than it appeared. Section 603 came under heavy criticism for its compromise departure from a pure will substitute model.<sup>166</sup> To the critics, a revocable trust was no less a will substitute upon the settlor's incapacity than while the settlor retained capacity. On this view, just as the devi-

161. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 188 (2002).

162. See KAN. STAT. ANN. § 58a-603 (2006); ME. REV. STAT. tit. 18-B, § 603 (2005); MO. REV. STAT. § 456.6-603 (2004); NEB. REV. STAT. § 30-3855 (2014); N.M. STAT. ANN. § 46A-6-603 (2007); TENN. CODE ANN. § 35-15-603 (2004); UTAH CODE ANN. § 75-7-606 (2004); WYO. STAT. ANN. § 4-10-603 (2007).

163. See LA. STAT. ANN. § 9:2088 (2001); *In re Malasky*, 736 N.Y.S.2d 151 (2002) ("[P]etitioner appears to be correct that since Mary is incapacitated, no one else except her guardian would have standing to compel an accounting during Mary's lifetime, not even the remainder beneficiaries of the trust."); *In re Mary XX*, 860 N.Y.S.2d 656, 658 (2008) (interpreting *Malasky*).

164. D.C. CODE § 19-1306.03 (2004).

165. See RESTATEMENT (THIRD) OF TRUSTS § 74(1) (AM. LAW INST. 2007) ("While a trust is revocable by the settlor and the settlor has capacity to act . . . [t]he rights of the beneficiaries are exercisable by and subject to the control of the settlor."); *id.* cmt. e ("If . . . the settlor lacks this required capacity, the other beneficiaries are ordinarily entitled to exercise, on their own behalf, the usual rights of trust beneficiaries, and the trustee is ordinarily under a duty to provide them with accountings and other information concerning the trust and its administration.").

166. See Newman, *supra* note 51, at 534-35 (noting that Section 603 was "not well-received").

sees under a will of an incapacitated testator lack standing with respect to the testator's property, so too should the beneficiaries of a revocable trust lack standing with respect to the trust property.

In response to the critics and in light of the danger that enactment of the entire Uniform Trust Code could be held up by opposition to Section 603, in 2004 the Uniform Law Commission amended Section 603. The Commission put in brackets, denoting as optional, the compromise language that recognized standing in a revocable trust beneficiary during the settlor's incapacity.<sup>167</sup> The official comment explained: "[C]oncern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same."<sup>168</sup>

Putting to the side the merits of this decision as a matter of policy (a question to which we will return below<sup>169</sup>), as a political matter the decision appears to have been sound. Since 2004, at least twenty-five states have rejected beneficiary standing during the settlor's incapacity, including some that had previously allowed beneficiary standing.<sup>170</sup> Meanwhile, only seven states have recognized standing upon the settlor's incapacity.<sup>171</sup> An eighth state adopted an idiosyncratic variant that requires the trustee to provide information to the beneficiaries only when "the trustee actually knows that the individual holding the power to revoke the trust is not competent."<sup>172</sup>

All told, as of this writing twenty-six states deny beneficiary standing during the settlor's incapacity,<sup>173</sup> whereas only fourteen

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167. UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2005).

168. *Id.*

169. *See infra* Part V.B.

170. *See* *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006); ALA. CODE § 19-3B-603 (2006); ARIZ. REV. STAT. ANN. § 14-10603 (2009); COLO. REV. STAT. § 15-16-703 (2013); FLA. STAT. § 736.0603 (2007); KAN. STAT. ANN. § 58a-603 (2006); ME. STAT. tit. 18-B, § 603 (2005); MINN. STAT. § 501C.0604 (2015); MISS. CODE ANN. § 91-8-603 (2014); MONT. CODE ANN. § 72-38-603 (2013); NEB. REV. STAT. § 30-3855 (2014); N.C. GEN. STAT. § 36C-6-603 (2007); N.D. CENT. CODE § 59-14-03 (2007); N.J. STAT. ANN. § 3B:31-44 (2016); OHIO REV. CODE ANN. § 5806.03 (West 2008); OR. REV. STAT. § 130.510 (2010); 20 PA. CONS. STAT. § 7753 (2006); S.C. CODE ANN. § 62-7-603 (2014); S.D. CODIFIED LAWS § 55-2-14 (2015); VT. STAT. ANN. tit. 14A, § 603 (2009); VA. CODE ANN. § 64.2-752 (2012); WASH. REV. CODE § 11.103.040 (2013); WIS. STAT. § 701.0603 (2014).

171. *See* ARK. CODE ANN. § 28-73-603 (2005); IND. CODE § 30-4-3-1.3 (2013); KY. REV. STAT. ANN. § 386B.6-030 (2014); MASS. GEN. LAWS ch. 203E, § 603 (2012); MICH. COMP. LAWS § 700.7603 (2012); N.H. REV. STAT. ANN. § 564-B:6-603 (2015); W. VA. CODE § 44D-6-603 (2011).

172. IOWA CODE § 633A.3103 (2006).

173. Alabama, Arizona, Colorado, Florida, Hawaii, Kansas, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York,

states recognize such standing.<sup>174</sup> Four states have various idiosyncratic rules,<sup>175</sup> and seven appear not yet to have addressed the issue.<sup>176</sup> It would be fair to say, therefore, that the majority position codified by prevailing American law is that in the event of the settlor's incapacity, enforcement of a revocable trust will require a conservatorship proceeding if there is no agent already authorized by a durable power of attorney.

### B. Beneficiary Standing as Conservatorship Substitute

The main reason for denying beneficiary standing to enforce a revocable trust upon the settlor's incapacity is inconsistency with the nature of a revocable trust as a will substitute. And indeed, in recognition of the revocable trust's primary use as a will substitute, the overall trend is toward unifying the law governing wills and revocable trusts.<sup>177</sup> The critics are therefore correct that, by "prescrib[ing] a different rule for revocable trusts than for wills,"<sup>178</sup> recognition of beneficiary standing upon the settlor's incapacity would be in tension with the general "policy of unifying the law of wills and will substitutes."<sup>179</sup>

But the policy preference for unification is not absolute. As the Restatement (Third) of Property explains, nonprobate transfers should be "subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions" only "to the extent appropriate."<sup>180</sup> Whether a particular wills rule is "appropriate" for application to a will substitute requires consideration of the purpose of the rule in light of the reasons for the unification policy. Those reasons are (i) protecting the integrity of supervening public policy limits on freedom of disposition, and (ii) implementing the

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North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, Washington, and Wisconsin.

174. Arkansas, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, Oklahoma, Tennessee, Utah, West Virginia, and Wyoming.

175. California, Connecticut, Washington, D.C., and Iowa.

176. Alaska, Delaware, Georgia, Idaho, Illinois, Rhode Island, and Texas.

177. We noted several examples. See *supra* text accompanying notes 51-56 and Part III.D.

178. UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM'N 2005).

179. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

180. *Id.* § 7.2; see also Langbein, *supra* note 36, at 1136-37 (arguing that the "subsidiary law of wills . . . should be treated as presumptively correct for will substitutes").

donor's actual or probable intent. Neither points toward denying beneficiary standing upon the settlor's incompetence.

Let us consider first supervening public policy. To protect the integrity of policy limits on freedom of disposition, such as the spousal forced share or creditor rights, those limits must apply to will substitutes in addition to wills. Applying a limit on freedom of disposition to a will but not to a will substitute would invite easy avoidance of those limits by elevating form over substance. Accordingly, seldom will there be a sound justification for not applying a policy limit on freedom of disposition to both wills and will substitutes.<sup>181</sup> And indeed, the trend in the law is toward applying the spousal forced share and creditor rights rules from the law of wills to a revocable trust.<sup>182</sup>

The supervening public policy basis for unification does not pertain to the question of beneficiary standing in a revocable trust upon the settlor's incapacity, however, as there is no public policy against it. Rather, the movement to deny such standing stems from the assumption that the typical settlor intended the trust to be a will substitute and thus the wills rule should apply.<sup>183</sup> Perhaps the easiest way to see this point is to suppose a revocable trust in which the settlor provided expressly that, upon the settlor's incapacity, the beneficiaries should have standing to enforce the trust. There would be no public policy objection to giving effect to this wish of the settlor.

Which brings us to the other rationale for unification—implementing the donor's actual or probable intent. This rationale points toward presumptive application to a will substitute of the "rules of construction and other interpretative devices" from the law of wills that "aid in determining and giving effect to the donor's intention or probable intention."<sup>184</sup> The theory is that these rules "are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation."<sup>185</sup> The classic example is the rule that a bequest to a spouse is presumptively revoked upon divorce. Because the intent implementing logic of this rule applies

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181. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003) ("Substantive restrictions on testation constitute important policies restricting disposition of property after the owner's death that should not be avoidable simply by changing the form of the death-time transfer.").

182. See *supra* text accompanying notes 113-116.

183. See *supra* Part V.A.

184. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

185. Langbein, *supra* note 36, at 1136.

equally to a will substitute, in many states the rule has been sensibly extended to a transfer by revocable trust.<sup>186</sup>

The key point here is *presumptive* application. In some circumstances, the logic of a particular wills rule may not be apt for a particular will substitute.<sup>187</sup> To be sure, any difference in the rules governing a will and those governing a will substitute will give rise to differing legal consequences based on the donor's choice of form. But the relevant question is whether such a difference is warranted by the fact of the donor's choice of form. If a donor might choose a revocable trust instead of a will for the purpose of falling within a trust law rule that differs from the comparable wills rule, then in accordance with the policy of freedom of disposition, that choice of the donor should be respected in the absence of a contrary supervening public policy.

For the reasons canvassed earlier, the typical settlor of a funded revocable trust intends not only to avoid probate but also to avoid conservatorship.<sup>188</sup> In the words of the Restatement (Third) of Trusts, revocable trusts are in "widespread use . . . as substitutes for both wills and conservatorships."<sup>189</sup> The principal objection to beneficiary standing, that it applies a different rule to a revocable trust than would apply to a will, misses the point that the settlor of a funded revocable trust commonly intends for the trust to be more than just a will substitute. In the event of incapacity, "the trustee (rather than a conservator or agent) was the fiduciary selected by the settlor for the exercise of administrative judgment and discretion."<sup>190</sup> It follows from an intent to avoid a conservatorship that the settlor would prefer the other beneficiaries to have standing to enforce the trust rather than to compel them to bring an action for appointment of a conservator who would, in turn, bring suit against the trustee.

To make this point more concrete, let us consider *Manon v. Orr*,<sup>191</sup> decided in 2014 by the Supreme Court of Nebraska, and treat it as a case study. The settlor in *Manon* created a revocable trust with herself

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186. See *supra* text accompanying notes 53-54.

187. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2004); see also McCouch, *supra* note 57, at 504; Newman, *supra* note 51, at 525 ("[T]his Article demonstrates that, while many revocable trust issues exist that are being, and should be, resolved by reference to the law of wills, many other issues exist in which that is not the case.").

188. See *supra* Part IV.C.

189. RESTATEMENT (THIRD) OF TRUSTS § 74 reporter's notes (AM. LAW INST. 2007) (emphasis added).

190. *Id.* cmt. a(2).

191. *Manon v. Orr*, 856 N.W.2d 106 (Neb. 2014).



as trustee.<sup>192</sup> Later, while still purporting to serve as trustee, she sold some of the trust property to her daughter. The settlor's son brought suit to unwind the sale on the grounds that the settlor lacked capacity at the time of the sale and that it "showed indications of fraud."<sup>193</sup> Applying the state's version of Section 603, which the legislature revised in 2005 to drop the bracketed language that would have given the son standing, the court dismissed the suit.<sup>194</sup> The court reasoned that, "because any incapacity would not affect the status of the trust as revocable," the son had "only a mere expectancy" and not a cognizable legal interest of the sort that would support standing to enforce the trust.<sup>195</sup>

The formalistic reasoning in *Manon* reflects a mirror-image of the reasoning in *Farkas*. In *Farkas*, the court posited that a revocable trust beneficiary must *always* have standing to sue the trustee, because a remainder beneficiary necessarily possesses a present property right in the form of a future interest.<sup>196</sup> *Farkas* thus imposed a management trust paradigm on what was intended to be a will substitute trust. In *Manon*, the court held that a revocable trust beneficiary *never* has standing to sue the trustee while the trust is revocable, because a remainder beneficiary has only an expectancy in the trust property, the trust being a will substitute. *Manon* thus imposed a pure will substitute trust paradigm on what the settlor likely intended to be a conservatorship substitute trust in addition to a will substitute trust. What is missing from the analysis in both cases is functional consideration of the settlor's actual or likely intent for the trust to be a management trust, a will substitute trust, a conservatorship substitute trust, or a mix of these options.

To see why a functional analysis points toward affording the son standing to sue, consider his next possible steps. After losing in *Manon*, the son could petition the court for appointment of a conservator, either himself or someone else. If the court determined that the settlor had become too incapacitated to manage her affairs, it would grant the petition.<sup>197</sup> And one of the obligations of the conservator, whether the son or someone else, would be to sue to unwind transac-

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192. *Id.* at 108.

193. *Id.*

194. *Id.* at 109-11.

195. *Id.* at 111.

196. *See supra* Part III.C.

197. *See supra* text accompanying note 121.

tions by the settlor while she lacked capacity if those transactions diminished her estate—for example, if the sale was for below market value or was procured by fraud.<sup>198</sup> But in most cases requiring these added steps will be contrary to the actual or likely intent of the settlor. These added steps would incur additional private and social costs. And in some cases, the additional private costs of these added steps will suppress meritorious claims to the detriment of both settlors and beneficiaries.

The inconsistency with the settlor's actual or likely intent is readily apparent. Even if a settlor has not by express terms indicated that her funded revocable trust was meant also to be a conservatorship substitute, such an intent is implied by the inclusion of provisions for determining her capacity, naming a successor trustee to take over upon her incapacity, or directing how the trust property is to be managed in the event of her incapacity (for example, whether priority is to be given to the settlor's support).<sup>199</sup> Even if the trust contains no such provisions, the fact of the settlor's funding the trust indicates a motive to avoid probate of the trust property, that is, an intent to avoid court supervision over the administration of that property. If a person opts out of the public system of probate by funding a revocable trust, the best inference is that the person would likewise prefer to avoid falling into the public system of conservatorship. In the absence of evidence to the contrary, the presumption therefore 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 additional private and social costs of denying beneficiary standing are also manifest. If the trust provides for a private determination of capacity, which is a standard form book provision,<sup>200</sup> then there would be no need for a judicial determination of the settlor's capacity unless the settlor disputed the private determination. Forcing the beneficiaries in every case to bring a conservatorship proceeding,

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198. A conservator normally has the powers and duties of a trustee, *see* UNIF. PROB. CODE §§ 5-418(a), 5-425(a) (UNIF. LAW COMM'N 2010), which normally includes a power and duty to bring actions "to enforce claims of the trust and to defend claims against the trust." UNIF. TRUST CODE § 811 (UNIF. LAW COMM'N 2005); *see also* RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. d (AM. LAW INST. 2007) (discussing the duty to take "reasonable steps to enforce or realize on other claims held by the trust"). The claim would be for restitution to prevent unjust enrichment, and the likely remedy would be a constructive trust. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 13, 16, 55 (AM. LAW INST. 2011).

199. *See supra* Part IV.C.

200. *See supra* text accompanying note 143.

by contrast, requires in every case a judicial proceeding with the attendant emotional and litigation costs. This point answers the secondary criticism of beneficiary standing that “it will often be difficult in a particular case to determine whether the settlor has become incapacitated.”<sup>201</sup> If the trust provides for a private determination of capacity, then determining beneficiary standing will be simpler than a conservatorship proceeding. And if the trust does not contain such a provision, then the fallback of determination in trust litigation will be no more costly than the baseline alternative of a conservatorship proceeding.

### C. The Settlor’s Intent and the Duty of Impartiality

Our argument for presumptive beneficiary standing in a funded revocable trust upon the settlor’s incapacity is based on the typical settlor’s actual or implied intent that, as regards the trust property, the trust substitute for conservatorship. It follows that the presumption should yield if, in a given case, there is good evidence that the settlor had a contrary intent. An example would be if the trust instrument stated expressly that the beneficiaries should not have standing even after the settlor’s incapacity. Another example would be if the trust instrument provided that the beneficiaries were not to be given notice of the trust in a state that permits such a provision (a so-called “silent trust”).<sup>202</sup> In such cases, the trustee would still be subject to suit by the settlor’s agent, if any, under a durable power of attorney or by a court-appointed conservator, as is currently the default mode of enforcement in the states that presumptively deny beneficiary standing.

Moreover, even if in a given case the presumption of beneficiary standing could not be overcome, the settlor’s intent would remain the “controlling consideration” in assessing the *merits* of the beneficiary’s claim,<sup>203</sup> which is distinct from *standing* to bring the claim. The rubric through which trust law resolves disputes about the relative interests of multiple beneficiaries is the duty of impartiality. “If a trust has two or more beneficiaries, the trustee shall act impartially in investing,

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201. UNIFORM TRUST CODE § 603 cmt. (2005).

202. See DUKEMINIER & SITKOFF, *supra* note 3, at 678; William R. Burford, *Pacifying a Silent Trust*, 151 TR. & EST. NO. 11, at 14 (Nov. 2012); see also Foster, *Trust Privacy*, *supra* note 65; T.P. Gallanis, *The Trustee’s Duty to Inform*, 85 N.C. L. REV. 1595 (2007).

203. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

managing, and distributing the trust property, giving *due regard* to the beneficiaries' respective interests."<sup>204</sup>

Notice the emphasized term "due regard." The duty of impartiality does not require impartiality in the sense of substantive equality but rather in the sense of a fair process that gives "due regard" to the "respective interests" of the beneficiaries as prescribed by the settlor. In the words of the Restatement (Third) of Trusts, "[i]t would be overly simplistic, and therefore misleading, to equate impartiality with some concept of 'equality' of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests."<sup>205</sup> In some circumstances, due regard for the respective interests of the beneficiaries will point toward favoring the interests of one beneficiary over another.<sup>206</sup>

Returning to the context of a funded revocable trust with an incapacitated settlor, the typical settlor does not intend for the other beneficiaries to have a greater claim on the trust property than the settlor. This intent is commonly expressed with form book language requiring the trustee to distribute income and principal as directed by the settlor and during the settlor's incapacity requiring use of the income and principal for the "reasonable comfort" of the settlor.<sup>207</sup> In such a trust, the trustee would be justified in making significant expenditures for the settlor's medical support, for example, even to the extent of exhausting the trust fund, because doing so would be consistent with the settlor's intent.

We conjecture that some of the opposition to Section 603 stems from confusion between standing and merits. Having standing to sue the trustee upon the settlor's incapacity, as under Section 603 as originally drafted, does not translate on the merits to an entitlement to a distribution. Viewed from this perspective, the primary benefit of recognizing beneficiary standing upon the settlor's incapacity is that it would harness the private interest of the other beneficiaries to protect the interests of the settlor to the extent those interests align. For example, the interests of the settlor and of the other beneficiaries are

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204. UNIF. TRUST CODE § 803 (UNIF. LAW COMM'N 2005) (emphasis added); see also RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. LAW INST. 2007) (similar).

205. RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. b (AM. LAW INST. 2007).

206. See, e.g., *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 411 (Mo. Ct. App. 2013); *Howard v. Howard*, 156 P.3d 89, 91-93 (Or. Ct. App. 2007).

207. See *supra* text accompanying notes 30, 149.

likely to be aligned with respect to trustee self-dealing, embezzlement, or reckless indifference. Accordingly, a key benefit from recognizing beneficiary standing upon the settlor's incapacity is in deterring loyalty breaches, such as was alleged in *Fulp*,<sup>208</sup> or in remedying fraud worked upon an incapacitated settlor, as was alleged in *Manon*.<sup>209</sup>

#### D. Other Fiduciary Surrogates

To this point, we have argued for a presumption of beneficiary standing in a revocable trust upon the settlor's incapacity without considering how that standing would interact with the potential standing of other fiduciary surrogates for the settlor—in particular, an agent under a durable power of attorney or a court-appointed conservator. The short answer is that, to the extent the authority of an agent under a durable power of attorney or a court-appointed conservator included management of the settlor's rights as regards the trust property, then as a fiduciary surrogate for the incapacitated settlor either could override a claim brought by a beneficiary.

Let us start with an agent under a durable power of attorney. As we have seen, a durable power of attorney is commonly included in a contemporary estate plan to provide for surrogate fiduciary management of a person's property upon the person's incapacity.<sup>210</sup> Under prevailing law, such as under the Uniform Trust Code and Uniform Power of Attorney Act, an agent may revoke or amend a revocable trust if the settlor expressly gave the agent the power to do so.<sup>211</sup> In such a case, the agent could direct the trustee in the administration of the trust or could ratify an action of the trustee, mooting an overlapping claim by the beneficiaries. The agent's priority over the beneficiaries reflects the settlor's choice, indicated by an express grant of authority to revoke or amend the settlor's revocable trust, that the agent be the settlor's fiduciary surrogate upon incapacity as regards the trust. If a beneficiary or other interested party believes that the agent has acted in a manner inimical to the best interests of the settlor, recourse is available by petitioning for appointment of a conservator or,

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208. See *supra* text accompanying notes 103-104.

209. See *supra* text accompanying notes 191-195.

210. See *supra* Part IV.C.

211. See, e.g., UNIF. PROB. CODE § 5B-201(a)(1)-(2) (UNIF. LAW COMM'N 2010); UNIF. TRUST CODE § 603(e) (UNIF. LAW COMM'N 2005).

under the Uniform Power of Attorney Act and statutes in some states, by direct action against the agent.<sup>212</sup>

A court-appointed conservator would likewise have priority over the beneficiaries in enforcing an incapacitated settlor's revocable trust. The rationale for beneficiary standing upon the settlor's incapacity is the settlor's actual or implied intent that, as regards the trust property, the trust substitute for conservatorship. A settlor cannot, however, override the court's power to appoint a conservator if the circumstances warrant such an appointment.<sup>213</sup> And under prevailing law, such as the Uniform Guardianship and Protective Proceedings Act, a conservator may "revoke or amend a trust revocable by the protected person" after "notice to interested persons and upon express authorization of the court."<sup>214</sup>

To say that an agent under a durable power of attorney or a conservator could moot a claim by a beneficiary is not to say, however, that the fact of an agent or conservator should be a categorical bar to beneficiary standing. Rather our point is that, by reason of the settlor's intent or supervening law, those fiduciary surrogates stand in the shoes of the settlor. In such circumstances, the beneficiaries (and the settlor) would be in the same position they would have been if the state did not recognize beneficiary standing. But to the extent that there is no fiduciary surrogate of the settlor or no authorized fiduciary surrogate acts to the contrary, then recognition of beneficiary standing better implements the actual or implied intent of the settlor while providing a salutary further enforcement mechanism for the duties of the trustee.

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212. See UNIF. PROB. CODE § 5B-116 (UNIF. LAW COMM'N 2010); Whitton, *Durable Powers*, *supra* note 128, at 32-34. On the fiduciary duties of the agent, see, e.g., UNIF. PROB. CODE § 5B-114 (UNIF. LAW COMM'N 2010).

213. We discuss the grounds for appointing a conservator above. See *supra* text accompanying note 121.

214. UNIF. PROB. CODE § 5-411(a)(4) (UNIF. LAW COMM'N 2010). As between an agent under a durable power of attorney and a conservator, the uniform act gives the agent precedence. See *id.* § 5-411(d).

## **VI. Conclusion**

The central descriptive aim of this Article has been to draw attention to the common use a revocable trust not only as a will substitute but also as a conservatorship substitute. From its origins as a conveyancing device used to avoid feudal incidents, the trust has evolved today into a device for fiduciary management of wealth down the generations (a management trust), for avoiding probate (a will substitute trust), and for avoiding conservatorship (a companion use of a will substitute trust). These various uses have been facilitated by a variety of law reforms that, taken together, represent a functional branching of American trust law. The law governing irrevocable trusts today reflects their predominant nature as management trusts, and the law governing revocable trusts today reflects their predominant nature as will substitute trusts.

In recent years, however, the law governing revocable trusts has come to deny the additional conservatorship substitute nature of such a trust, preferring to treat it exclusively as a will substitute. The central normative claim of this Article is that this development was a doctrinal wrong turn. To implement the actual or probable intent of the typical settlor that a funded revocable trust serve both as a will substitute and a conservatorship substitute, the beneficiaries of a funded revocable trust should have presumptive standing to enforce the trust upon the settlor's incapacity.

