

THE EXPRESSIVE, PROTECTIVE™ ESTATE PLANNING STRATEGY: A NEW PARADIGM FOR ESTATE PLANNING DESIGN AND ADMINISTRATION

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This Article explores how to fill the existing “Gap” in prevailing revocable trust laws concerning who may enforce the trust in the event a settlor becomes incapacitated, with particular emphasis on drafting around will-based revocable trust laws. With modest drafting changes, a settlor can establish a revocable trust that fulfills its dual function: to avoid probate and avoid conservatorship proceedings. With modest structural changes, incorporating statements of settlor intent, and by utilizing directed trusts during the settlor’s lifetime, settlors and their estate planning attorneys can build meaningful, enforceable estate and incapacity plans this Article calls “Expressive, Protective™” Trusts, which are more positive, significant, and sustainable in our aging society.

I. Introduction

It is a general maxim of trust and estate planning law that “[t]he dominant substantive principle of the law of gratuitous transfers is to carry out the donor’s intent.”¹ When settlors create revocable trusts and

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1. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, § 10.1 AM. LAW INST. (2003); David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity: More than Just a Will Substitute*, 24 ELDER L. J. 1, 4 (2016) [hereinafter Feder

transfer their property to the trusts, they actually and probably intend to substitute private trust administration for probate administration and conservatorships in the event of incapacity.²

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. A funded revocable trust is a textbook solution for the problem of property management during incapacity.

Yet most states that have considered the question across the last fifteen years have adopted the will substitute model, rejecting the conservator substitute model. Bucking this trend, this Article argues 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.

However, the prevailing revocable trust laws concerning who has standing to enforce an incapacitated settlor's trusts rely on conservators, if no agent under a power of attorney is empowered, to enforce the trusts. This policy reliance on conservators frustrates the settlor's real or likely intentions and raises doubt as to the efficacy of such trust laws.

In the words of Professor Jeffrey Pennell, there is a controversial and confusing "Gap" in the laws governing revocable trusts as they relate to trust enforcement if the settlor is alive, but loses capacity.³ The

& Sitkoff] (discussing that the settlor's intent is the principal object of this area of the law); For numerous citations of legal scholarship, judicial decisions, treatises and casebooks that reflect this overriding principle of the law of wills, see Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 382 n.13 (2011) [hereinafter Gordon] ("Donative intent is the 'polestar' that guides interpretation of testamentary documents."); see also John H. Langvein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004); see also Karen J. Sneddon, *The Will as a Personal Narrative*, 20 ELDER L. J. 355, 371-72, 385 n.100, 409 n.350 (2013) [hereinafter Sneddon] ("[T]he law of succession centers on the . . . importance of the testator's intent.").

2. Feder & Sitkoff, *supra* note 1, at 4 ("[The settlor] intends, actually or impliedly, for the trust instrument to substitute [for a will and for] conservatorship.").

3. See Steve R. Akers, *Estate Planning Current Developments and Hot Topics*, in BESSEMER TRUST 1, 126 (2017) (noting Professor Jeffrey Pennell's commentary at the

trust laws, enacted in the majority of states,⁴ adopted a version of the Uniform Trust Code (“UTC”) which provides that while a trust is revocable, the settlor controls the rights of the beneficiaries, and the trustee’s fiduciary duties are owed “exclusively” to the settlor.⁵ The settlor’s acknowledged control of revocable trusts during life creates a tension around allowing other beneficiaries to have standing to enforce revocable trusts while the settlor is alive. The modern rule of no beneficiary standing while the trust is revocable frustrates settlor intent and is contrary to the underlying principle in this area of the law,⁶ which is to implement the settlor’s intent.

The *exclusivity* of the trustee’s duty towards only the settlor⁷ logically implies that no one other than the settlor is entitled to information about the trustee’s actions, and no one other than the settlor (or an agent or conservator acting for the settlor) has standing to enforce a revocable trust while the trust is revocable. Although the denial of beneficiary standing is logical while the settlor is competent to monitor the trustee’s actions, it is less clear if the settlor loses capacity. At the point of the settlor’s incapacity, a successor trustee will step in, or be appointed, to manage trust assets.⁸ Accordingly, the question arises of who should monitor the actions of the successor trustee.

In the UTC’s original provisions, when the settlor lost the capacity to revoke the trust, the trustee’s duties were no longer “exclusive” to the settlor and accordingly the trustee’s reporting requirement expanded to “qualified” beneficiaries, including persons other than the settlor, who could then monitor the trustee’s actions and enforce the trust.⁹ The original promulgation of the UTC provisions contemplated

42nd Annual Notre Dame Estate & Tax Institute where he recognized a “Gap” in the enforcement of revocable trusts between the time of a settlor’s incapacity and the settlor’s death); Feder & Sitkoff, *supra* note 1, at 3 (answering the question of who can enforce a revocable trust with an incapacitated settlor is “not yet fully resolved in contemporary American law”); and Grayson M.P. McCouch, *Revocable Trusts and Fiduciary Accountability*, 26 ELDER L.J. 1, 2 (2018) [hereinafter McCouch] (“[The Uniform Trust Code] fails to address the respective rights and duties of the settlor, the beneficiaries, and the trustee while the settlor is alive, but incompetent.”).

4. See Feder & Sitkoff, *supra* note 1, at 37 n.173; McCouch, *supra* note 3.

5. UNIF. TRUST CODE §603(b) (UNIF. LAW COMM’N 2000).

6. Feder & Sitkoff, *supra* note 1, at 25.

7. UNIF. TRUST CODE §603(b) (UNIF. LAW COMM’N 2018).

8. See Feder & Sitkoff, *supra* note 1, at 25.

9. McCouch, *supra* note 3, at 20–24.

that upon the settlor's incapacity, the beneficiaries had immediate standing to enforce the terms of the trust.¹⁰

In its original promulgation, the UTC included an "incapacity" provision: Section 603 provided that while a trust is revocable *and the settlor had the capacity to revoke* the trust, the beneficiaries' rights were subject to, and the trustee's duties were owed "exclusively" to, the settlor.¹¹ The original "incapacity provision" of Section 603 proved controversial so the Uniform Law Commissioners later amended the pertinent revocable trust provision to place brackets around the incapacity provision, an indication it was optional.¹² States were free to, and the majority of states did, enact the UTC provision without the incapacity provision.¹³ By excluding the incapacity provision, the prevailing American trust law created uncertainty and provided no clear direction about who had standing to enforce the terms of revocable trusts when the settlor lost capacity.

One stated reason in support of adopting the UTC provision without the incapacity limitation concerned the desire to make the laws of succession uniform.¹⁴ Just as the law of wills provides that no heir has standing to challenge a will while the testator is alive,¹⁵ the law governing revocable trusts should similarly provide that no beneficiary has standing to challenge the terms of revocable trusts while the settlor is alive. After all, as the Uniform Law Commissioners have commented, a revocable trust is the "functional equivalent of a will."¹⁶

Minnesota's new UTC provides an example of a state statute enacted without the incapacity provision.¹⁷ Minnesota's statute omitted the bracketed incapacity provisions to provide that "while a trust is revocable, the settlor controls the rights of the other beneficiaries and the trustee's duties are owed exclusively to the settlor."¹⁸ Accordingly, Minnesota's law provides that when a trust is *irrevocable* the trustee must report to qualified beneficiaries who have standing to enforce the

10. See UNIF. TRUST CODE, §603(a) (UNIF. LAW COMM'N 2000).

11. *Id.* at §603(b).

12. *Id.* cmt. at 2 (discussing 2004 Amendment).

13. Feder & Sitkoff, *supra* note 1, at 37-38.

14. UNIF. TRUST CODE at §603 cmt. (UNIF. LAW COMM'N 2000).

15. See *Manon v. Orr*, 856 N.W.2d 106, 110 (Neb. 2014) ("[I]n the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated.").

16. UNIF. TRUST CODE, ch. 6, (UNIF. LAW COMM'N 2000).

17. See MINN. STAT. § 501C.0604 (2018).

18. *Id.*

terms of the trust.¹⁹ A problem arises, however, because the incapacity of the settlor alone does make a trust irrevocable; thus triggering standing by qualified beneficiaries. As the UTC comment states, “the settlor’s power to revoke does not terminate upon the settlor’s incapacity [and] the fact that the settlor becomes incapacitated does *not* convert a revocable trust into an irrevocable trust.”²⁰ Some judicial opinions similarly explain that “incapacity does not terminate a settlor’s power to revoke a trust, though it might well affect the ability of the settlor to exercise that power. And because it does not affect the power to revoke a trust, that trust remains revocable until revoked, either by the settlor, or by another acting in the settlor’s stead.”²¹

The incapacity “Gap” in prevailing American trust law persists even though our population continues to age. Although advances in medicine allow us to live increasingly longer lives, they are often characterized by chronic illness and debilitating disease.²² 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 5”²³ “Accompanying this increase in longevity is an increased chance that a person’s last days, months, or even years will be spent in a state of mental or physical decay.”²⁴ Planning for this possibility is therefore as much a part of contemporary estates and trusts practice as is planning for property succession at death. It is time to examine the efficacy of prevailing state laws that arguably fail to allow beneficiaries to enforce revocable trusts should settlors lose capacity, and to investigate how existing laws and revocable trust instruments can provide a meaningful, sustainable, and enforceable incapacity plans for settlors that are consistent with their actual and likely intent to avoid probate and conservatorships. Conversely, prevailing laws, by omitting the incapacity provision, treat revocable trusts as the functional equivalent of wills which apply after the

19. MINN. STAT. § 501C.0813 (2018) (noting that the Minnesota statute inserts the word “irrevocable” in its trust reporting statute which the complementary provision of the UTC has no such qualifier. The Minnesota statute, unlike the UTC, presumes that a trust is irrevocable unless the settlor specifically states otherwise); MINN. STAT. § 501C.0103(14) (2018) (the statutory definition of “revocable”).

20. UNIF. TRUST CODE § 101(14) cmt. (UNIF. LAW COMM’N 2000).

21. *Id.* § 602 cmt.

22. Feder & Sitkoff, *supra* note 1, at 25–26 (citing 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)).

23. *Id.*

24. *Id.* at 27.

testator dies and fail to support the use of revocable trusts as clear and effective incapacity plans.

Section II examines the nature of the existing incapacity controversy concerning revocable trusts. Section III investigates the extent to which the prevailing law of revocable trusts is consistent with a trustee's inherent fiduciary duties. Section IV proposes drafting options to better incorporate the traditional fiduciary duties into revocable trusts like the Expressive, Protective™ trust. Section V examines the efficacy of including expressive statements of settlor intent into revocable trusts. Section VI proposes using standard directed trust provisions and other incapacity plan provisions to establish a meaningful, sustainable incapacity plan in an Expressive, Protective™ trust. Finally, Section VII provides a brief conclusion.

II. The Existing Controversy Concerning Incapacity and the Revocable Trust

The revocable *inter vivos* trust (the "Living Trust") has become widely recognized as a valid and effective will substitute.²⁵ Like a will, a Living Trust allows a settlor to designate beneficiaries who will receive property after the settlor dies while retaining lifetime control of the property.²⁶ Unlike a will, however, Living Trusts operate outside the probate system²⁷—a feature many settlors and advisors view as an advantage of Living Trusts—to the extent funded, they "avoid" probate.²⁸ As a result, the Living Trust has emerged as the central instrument in contemporary estate planning.²⁹

The functional similarities between Living Trusts and wills have led to the enactment of several laws that unify many of the laws of wills and trusts.³⁰ For example, the Minnesota Trust Code provides that the "capacity to create, amend, or revoke a trust; or to direct the actions of the trustee of a revocable trust is the same as that required to make a

25. Cf. UNIF. TRUST CODE § 601 cmt. (UNIF. LAW COMM'N 2000); Feder & Sitkoff, *supra* note 1, at 4; McCouch, *supra* note 3.

26. Feder & Sitkoff, *supra* note 1, at 2.

27. *See id.* at 4.

28. *See id.* at 4–5.

29. *Id.*

30. *See* McCouch, *supra* note 3, at 1.

will.”³¹ In addition, the Minnesota Trust Code unifies the rules of construction under the laws of wills and trusts by expressly stating that the rules of construction of wills “also apply . . . to the interpretation of the terms of a trust and the disposition of the trust property.”³² Under these and similar laws enacted in many states that have adopted the Uniform Trust Code, “the revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death.”³³ Specifically, the UTC announced a “basic policy . . . to treat the revocable trust as the functional equivalent of a will.”³⁴ In pursuit of this policy, as adopted by a majority of the states, the UTC (and a majority of state laws) provide that while a trust is revocable, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed “exclusively” to, the settlor.³⁵ This provision has proved controversial because it fails to address the relationship, respective rights, and duties of the settlor, beneficiaries, and the trustee should the settlor lose capacity.

Unlike wills, which apply after the testator’s death, Living Trusts can also serve to provide for management of trust assets for the benefit of an incapacitated settlor³⁶ (*and perhaps other beneficiaries named or described by the settlor*). Private uninterrupted asset management of trust assets is often touted as a major advantage of living trusts as opposed to wills.³⁷ With a will-based estate plan, the testator continues to own title to his or her property.³⁸ In the event of the owner’s incapacity, absent a durable power of attorney, no person has authority to manage, lease, mortgage, encumber, deed, or convey the owner’s property.³⁹ If such authority is needed when a person is determined to be incapacitated, the court will appoint a conservator (or guardian) who can be authorized to control the incapacitated ward’s property.⁴⁰

31. Compare MINN. STAT. § 501C.0601 (2018) with UNIF. TRUST CODE § 601 (UNIF. LAW COMM’N 2000) (nearly identical terms).

32. Compare MINN. STAT. § 501C.0112, Sec. 12 (2018) (Rules of Construction) with UNIF. TRUST CODE § 112 (UNIF. LAW COMM’N 2000).

33. UNIF. TRUST CODE § 601 cmt. (UNIF. LAW COMM’N 2000).

34. See *id.* at prefatory note, § 603.

35. UNIF. TRUST CODE § 603 (UNIF. LAW COMM’N 2000); Cf. MINN. STAT. § 501C.604 (2018) (according to reported enactments by the Uniform Law Commission, twenty-six states have adopted this section of the Uniform Trust Code).

36. McCouch, *supra* note 3, at 2-3.

37. See Feder & Sitkoff, *supra* note 1, at 3.

38. McCouch, *supra* note 3, at 5.

39. See Feder & Sitkoff, *supra* note 1, at 3.

40. See *id.*

However, a Living Trust is different than a will in this respect: in a living trust-based estate plan, the trustee and not the individual settlor, owns the individual's property that has been transferred to the name of the trust.⁴¹ The trust instrument can empower a successor trustee to act when the settlor loses capacity to control and manage the trust property without requiring judicial intervention.⁴² The Uniform Law Commissioners have recognized that:

[M]ost settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee. . . . [A] settlor often creates a revocable trust for the very purpose of avoiding conservatorship.⁴³

A Living Trust plan thus substitutes fiduciary duties to supplant the protective measures of the conservatorship process to protect the settlor and the other beneficiaries. Under most conservatorship (or guardianship) laws, the "conservator shall be subject to the control and direction of the court at all times and in all things."⁴⁴ In addition, the conservatorship laws further require notice of the proceedings to be given to "interested persons;" typically defined to include the incapacitated person's spouse, children, and siblings who normally are the same as the "qualified" beneficiaries designated in living trusts.⁴⁵ A normative position of this Article is that the laws governing living trusts actually, or likely, intended to avoid conservatorships should provide similar notice requirements and protections for incapacitated persons that conservatorship laws do.

The controversy surrounding the incapacity provision included in the original promulgation of the UTC, which provided remainder beneficiaries with standing to enforce the terms of the trust immediately upon the settlor's incapacity, was twofold. First, critics of the in-

41. *See id.*

42. *See id.*

43. UNIF. TRUST CODE § 603 (UNIF. LAW COMM'N 2000); *see* UNIF. TRUST CODE § 602 cmt. (UNIF. LAW COMM'N 2000).

44. MINN. STAT. § 524.5-417(a) (2018) (corresponds to Probate Code).

45. *See id.* at § 524.5-113.

capacity provision argued that “incapacity” can be difficult to determine; and second, as mentioned above, that the laws of wills and trusts should be uniform.⁴⁶

A successor trustee acting in the event of the settlor’s incapacity can be faced with uncertainty about a settlor’s capacity which causes a dilemma for the trustee:⁴⁷ (1) should the trustee comply with the directions of a settlor with doubtful capacity that may be contrary to the trustee’s normal fiduciary duties or at odds with the terms of the trust and risk litigation by the remainder beneficiaries?; or (2) should the successor trustee reject the settlor’s directions and risk a lawsuit by the settlor who is later determined to have legal capacity? Eliminating the incapacity provision may avoid such a dilemma because the trustee will not be compelled by the terms of the trust law or the trust instrument to make a determination about incapacity.

The purported uncertainty surrounding the determination by a trustee about incapacity, however, is overblown. Professionally drafted living trusts typically include a provision that defines “incapacity” for purposes of trust administration by the successor trustee.⁴⁸ For example, “[i]f the trust provides for a private determination of capacity, then determining [incapacity and] beneficiary standing will be simpler than a conservatorship proceeding” with its inherent “emotional and litigation costs.”⁴⁹ Settlers who presumably determine the nature of such a “incapacity” provision for some trust purposes can make the definitional provision mandatory for all purposes of the trust. By merely adding a few simple words to define settlor “incapacity” for all trust purposes to the trust instrument, the uncertainty of determining incapacity can be minimized if not eliminated.

A frequently used mechanism for private determination of whether the settlor has become incapacitated 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.⁵⁰ The following is a form book example: I am “incapacitated” when any of the following occurs (a) a Guardian or Conservator is judicially appointed for me, (b) my attending physician states in writing that I am unable to manage my financial affairs, or (c) my spouse and a majority of my spouse and

46. UNIF. TRUST CODE § 603 cmt. (UNIF. LAW COMM’N 2004).

47. McCouch, *supra* note 3, at 13–14.

48. Feder & Sitkoff, *supra* note 1, at 32–33.

49. *Id.* at 42–43.

50. *Id.* at 31.

children who have attained the age of twenty-five determine in good faith that I am unable to manage my financial affairs.⁵¹ Typically, the trust instrument will indemnify and hold the trustee harmless for actions taken in good faith reliance on the instrument's definition of settlor incapacity.⁵²

The second basis of criticism is the desire for statutory uniformity between the law of wills and the law of trusts. The proponents of the modern rule of no standing point out that under the law of wills, a devisee has no right to information about her testamentary share of the estate property until the testator's death because the testator owns and controls her property until death.⁵³ Similarly, these proponents argue that a revocable trust beneficiary should have no right to information or standing to challenge a trustee's use of the trust property while the settlor controls the trust during her life.⁵⁴

However, the Restatement (Third) of Trusts explains that non-probate transfers should be "subject to substantive restrictions on testamentation and to rules of construction and other rules applicable to testamentary dispositions" only "to the extent appropriate."⁵⁵ The justification for uniformity is not universal. Whether a particular rule that governs wills "is appropriate" to apply to revocable trusts requires consideration of the underlying purpose of the rule in light of the justification of the unification preference.⁵⁶ Reasons for unification include protecting the integrity of supervening public policy restrictions on the freedom of disposition, and implementing the donor's actual or probable intent.⁵⁷ Neither support a policy denying beneficiary standing upon incapacity.

There are strong public policy justifications for applying some rules of construction applicable to wills to revocable trusts. For example, rules that enforce a spousal forced share or protect creditor's rights are common rules of wills.⁵⁸ However, the justifications for such rules

51. *Drafting Wills and Trust Agreements*, at tab 11, Revocable Trust with Disclaimer, § 8.1.14 (Minnesota Continuing Legal Education 7th Edition 2014, updated 2016) [hereinafter *Drafting Wills and Trust Agreements*].

52. *Id.* at §8.3.3.

53. Feder & Sitkoff, *supra* note 1, at 33–34.

54. *Id.*

55. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 7.2 cmt. a (AM. LAW INST. 2003); Feder & Sitkoff, *supra* note 1, at 38–39.

56. Feder & Sitkoff, *supra* note 1, at 38.

57. *Id.* at 38–39.

58. *Id.* at 39.

do not apply to limiting beneficiary standing. Applying the foregoing limits to testamentary transfers, but not to trusts would invite easy avoidance of the public policy and elevate form over substance.⁵⁹ Indeed, the trend is for prevailing revocable trust statutes to apply such rules of construction in the law of wills to revocable trusts.⁶⁰

However, there is no public policy against allowing standing for beneficiaries of revocable trusts should a settlor lose capacity; “[r]ather, 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.”⁶¹ If a trust expressly provided that upon settlor incapacity the remainder beneficiaries had standing to enforce the terms of the trust, there would be no supervening public policy objection to giving effect to the settlor’s wishes. Though in some cases the logic of a wills rule of construction will be apt for a particular will substitute like a revocable trust, the justification indeed fails in the case of denying standing to remainder beneficiaries of a revocable trust when the settlor loses capacity. For instance, “the typical settlor of a funded revocable trust intends not only to avoid probate but also to avoid conservatorship.”⁶²

The principal objection to beneficiary standing, that it applies a different rule for wills and for trusts, misses the point that the settlor of a funded revocable trust commonly intends the trust to be more than just a will substitute.⁶³ Unlike the testator of a will who may provide a durable power of attorney to act upon his or her incapacity or have no incapacity plan, the revocable trust settlor chose the revocable trust to serve as his or her incapacity plan: the trustee, pursuant to its inherent fiduciary duties operates to exercise administrative judgment and discretion rather selecting the public judicial process involved in conservatorships. It follows from the settlor’s choice that he or she would prefer 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.

59. *Id.*

60. *See id.* at 2 (discussing that the rules of construction of the law of wills also applies to the law of trusts).

61. *Id.* at 39.

62. *Id.* at 40.

63. *Id.*

The case *Manon v. Orr*⁶⁴ illustrates the issue with beneficiary standing. In *Manon*, the settlor created a revocable trust naming herself as the trustee.⁶⁵ Later, as trustee, the settlor sold some trust property to her daughter.⁶⁶ The settlor's son challenged the sale on the basis that the settlor-trustee lacked capacity and the sale was the result of undue influence.⁶⁷ The Nebraska Supreme Court, applying the state's version of the UTC (an example of the prevailing version of Section 603 without the capacity provision), reasoned that "because any incapacity would not affect the status of the trust as revocable," the son-beneficiary of the revocable trust had "only a mere expectancy" and not a cognizable legal interest of the sort that would support standing to enforce the trust, and affirmed the trial court's dismissal of the son's lawsuit.⁶⁸

Critics of *Manon* argue that the Nebraska Supreme Court's formalistic reasoning imposes a will-substitute trust paradigm on a trust which the settlor likely intended as both a will-substitute and a conservatorship-substitute.⁶⁹ Such application of the will rules to trusts serves to needlessly frustrate the settlor's probable intentions. 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 incapacitated and therefore could not manage her affairs, it would grant the petition and one of the conservator's obligations would be to sue to unwind transactions made by the settlor-trustee when she lacked capacity if those transactions diminished her estate or were procured by fraud. In most cases, requiring these added steps would add further private and social costs involved in the conservatorship proceeding. If a person opts out of the public system of probate by funding a revocable trust, the best inference is that the person likewise prefers to avoid falling into the public system of conservatorship.⁷⁰

The law of wills and the law of revocable trusts should be uniform where there is an important policy justification for making them uni-

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

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 111.

69. Feder & Sitkoff, *supra* note 1, at 41.

70. *Id.*

form, but where important distinctions between the two estate planning devices exist the laws should recognize the varying functions of the two instruments.

III. The Revocable Trust Functions as a Fiduciary Relationship

Unlike wills, Living Trusts most often serve multiple functions: a will substitute, a lifetime property management arrangement, a substitute for conservatorships, or some combination of these.⁷¹ Traditionally, the law generally recognized that a revocable trust provided trust management primarily for the settlor's benefit and also secondarily for the benefit of other beneficiaries.⁷²

A Living Trust, like any *inter vivos* trust, establishes a fiduciary relationship between the trustee and the beneficiaries with respect to property.⁷³ This fiduciary relationship is characterized by the trustee's duties to administer the trust according to the terms and purposes of the trust, to act with loyalty to the beneficiaries not placing his or her own interests above those of the beneficiaries, to administer the trust impartially with due regard to the beneficiaries' respective interests, and to administer the trust as a prudent person would by considering the purposes, terms, and distribution requirements of the trust and all relevant circumstances.⁷⁴ The trustee's fiduciary duties protect all of the beneficiaries, who, depending on the terms of the trust, include the settlor while alive and competent who generally retains primary benefit of the living trust and also the remainder beneficiaries whom are generally provided for secondarily after the needs of the settlor are met or after the settlor's death.⁷⁵

71. See generally *id.*

72. RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. (AM. LAW INST. 2007); UNIF. TRUST CODE § 603 (UNIF. LAW COMM'N 2000); UNIF. TRUST CODE § 602 cmt. (UNIF. LAW COMM'N 2000); Feder & Sitkoff, *supra* note 1.

73. See Feder & Sitkoff, *supra* note 1, at 3.

74. See UNIF. TRUST CODE §§ 801-804 (UNIF. LAW COMM'N 2000); MINN. STAT. §§ 501C.-501C.0804 (2018) (Powers and Duties of Trustee); *Accord*, RESTATEMENT (THIRD) OF TRUSTS, § 2 (AM. LAW. INST. 2007) (a trustee's duties generally include good faith, prudence, loyalty, and impartiality).

75. See UNIF. TRUST CODE § 803 (UNIF. LAW COMM'N 2000).

The trustee's duty of impartial administration has never required equality between differently situated beneficiaries.⁷⁶ All that the law requires is for a trustee to give "due regard" to the interests of all of the beneficiaries in terms of implementing a "fair process" which requires consideration of the varying interests.⁷⁷ Settlers can, and often do, direct the trustee to give primary (sometimes exclusive) consideration to the settlor while alive, and only secondary consideration to remainder beneficiaries.⁷⁸ This was the viewpoint of the Restatement (Third) of Trusts which the Uniform Law Commissioners attempted to codify when they promulgated the original version of the UTC.⁷⁹

The distinctive feature of the Living Revocable Trust is the settlor's retained power to revoke or amend the trust, which is held in a non-fiduciary capacity and is unlimited in scope.⁸⁰ This power also allows the settlor to terminate the Living Trust and regain outright ownership of the trust properties, to modify the terms of the trustee's management of trust property, and to control or direct the trustee's actions.⁸¹ Typically, the trustee is required to follow the directions of the settlor and is protected from liability when his or her actions are approved or consented to by the settlor.⁸²

While the settlor is competent, his or her right to revoke the trusts effectively preempts the rights of other beneficiaries.⁸³ Accordingly, the trustee is "exclusively" accountable to the settlor.⁸⁴ In effect, the "settlor calls the shots" and controls the rights of the beneficiaries while competent.⁸⁵ As the comments to the UTC and the *Manon* court explain, "a settlor's power to revoke is not terminated by a settlor's incapacity. The power to revoke may instead be exercised by an agent under a power of attorney[,] . . . by a conservator or guardian as authorized [by the court], or by the settlor personally if the settlor regains capacity."⁸⁶

76. *See id.*

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

78. *See id.*

79. UNIF. TRUST CODE §§ 602, 603 cmt. (UNIF. LAW. COMM'N 2000).

80. McCouch, *supra* note 3, at 9-18.

81. *Id.* at 9.

82. *Id.* at 9-10.

83. *Id.* at 10.

84. *Id.*

85. *Fulp v. Gilliland*, 998 N.E.2d 204, 209 (Ind. 2013) (stating that the settlor "was her own master"); McCouch, *supra* note 3, at 10 n.36.

86. UNIF. TRUST CODE § 602 cmt. (UNIF. LAW COMM'N 2000); *see also Manon v. Orr*, 856 N.W. 2d 106, 110 (Neb. 2014).

A. The Exclusive Duty to the Settlor Embodied in the Prevailing Revocable Trust Laws Has Led to Inconsistent Judicial Interpretations

Many courts, like *Manon*,⁸⁷ have determined that the “exclusive” duty language of the prevailing revocable trust laws that omit the limitation concerning the settlor’s capacity deny beneficiary standing during the settlor’s incapacity. In *Trimble v. Trimble*,⁸⁸ the Iowa Supreme Court determined that while a trust remained revocable, the trustee owes no accounting to the remainder beneficiaries and should not face retroactive accounting duties after the settlor’s death.⁸⁹

In *Trimble*, the settlor had acted as the sole trustee until eight months before her death, when she appointed her niece as the trustee.⁹⁰ After death, one of eighteen remainder beneficiaries sought a trust accounting for the period prior to the settlor’s death.⁹¹ The prevailing American rule is that upon settlor incapacity, only an agent named in a durable power of attorney or a conservator acting on behalf of a settlor will adequately protect the settlor and the other beneficiaries’ rights to enforce the trustee’s fiduciary duties to administer the trust according to its terms.⁹²

An alternative reading of the UTC, and prevailing state law variations, acknowledges the exclusive standing of the settlor, while alive and competent, to enforce the trust but also leaves the beneficiaries free to pursue remedies after the settlor dies or loses capacity for earlier breaches of trust that were not ratified by the settlor. This reading is consistent with the official comment of the original promulgation of the UTC and finds support in the case law.⁹³

87. *McCouch*, *supra* note 3, at 2.

88. *In re Tr. of Trimble*, 826 N.W.2d 474 (Iowa 2013).

89. *Id.* at 489.

90. *Id.* at 478.

91. *Id.* at 474.

92. *Id.* at 484; *Feder & Sitkoff*, *supra* note 1, at 37–38 (“[A]s of this writing, [twenty-six] states have adopted the rule that beneficiaries have no standing to enforce revocable trusts.”).

93. *See, e.g., Tseng v. Tseng*, 352 P.3d 74 (Or. Ct. App. 2015) (holding that after the settlor’s death, the remainder beneficiaries of a revocable trust could pursue an action against the trustee for breach of duties concerning substantial transfers made during the settlor’s last year of life. The court reasoned that the controlling state statutes (without the capacity limitation) was not a statutory bar on beneficiary standing to enforce the trust against remedying breaches of trust occurring during the settlor’s lifetime); *Fulp*, 998 N.E.2d at 207 (Ind. 2013) (“Revocable trusts have

For example, in *Tseng v. Tseng*, the settlor created a revocable trust naming his spouse and children as beneficiaries and two sons as the trustees.⁹⁴ Following the settlor's death, the beneficiaries learned substantial transfers of trust property had occurred during the last few years of the settlor's life.⁹⁵ The beneficiaries sought information about the transfers from the trustees who refused to provide it and argued that the beneficiaries lacked standing or any right to information during the settlor's lifetime.⁹⁶ The Oregon Court of Appeals interpreted that the state statute (without the incapacity limitation) simply deferred beneficiary standing to take steps to protect and enforce the beneficiary's interest until the settlor's death.⁹⁷

Tseng illustrates how the exclusive duty language of a statute, like Section 603 of the UTC and state variants without the incapacity provision, can be reconciled with the traditional view of beneficiary standing. In other words, the other beneficiaries have recognizable rights in revocable trusts, but they are preempted by the settlor's power to revoke that exists during the settlor's life and capacity. However, after death, the beneficiaries' previously recognized rights vest and are enforceable. The *Tseng* court stated that "in the case of a revocable trust, a beneficiary's interest in the trust is simply deferred until the settlor's death, at which point the beneficiary is entitled to invoke the provisions of [the trust code] to protect the beneficiary's beneficial interest in the trust."⁹⁸

Further, in *Giraldin v. Giraldin*, the California Supreme Court held that a statute (that served as the model for the original version of the UTC) permitted the remainder beneficiaries to sue the trustee after the settlor's death for breaches of the trustee's exclusive duty to the settlor during life to the extent that the breach harmed the beneficiaries.⁹⁹ *Tseng* and *Giraldin* illustrate how the exclusive duty language of the UTC and state variants can be interpreted to allow remainder beneficiaries standing after the settlor's death to enforce recognized rights should the settlor of a revocable trust lose capacity.

been popular estate planning tools and substitutes for wills because they allow settlors to avoid probate and *guardianships*, to have greater privacy, and to manage their assets.") (emphasis added).

94. *Tseng*, 352 P.3d at 76-77.

95. *Id.* at 77.

96. *Id.*

97. *Id.* at 80-81.

98. *Id.* at 80.

99. *Estate of Giraldin*, 290 P.3d 199, 209 (Cal. 2012).

Delaying remainder beneficiaries' ability to enforce the trust until after the settlor dies, as the *Tseng* and *Giraldin* courts allowed, may practically deny a remedy for the remainder beneficiaries. It is not difficult to imagine that trust resources may be depleted by a breaching trustee who otherwise may be judgment proof, or evidence of wrongdoing may be lost due to long time delays between a breach and the settlor's death when an action is permissible. Other courts, as in *Trimble*, indicate that in order to minimize administrative costs to the personal representative, rather than the remainder beneficiaries, should be the party with standing to challenge acts by trustees that occur during the lifetime of the settlor.¹⁰⁰ The argument is that if numerous beneficiaries were permitted to have such standing, the trustee's burdens and costs of reporting to numerous beneficiaries with varying interests would minimize the settlor's goal in creating revocable trusts to minimize estate probate costs.

Just as agents authorized in powers of attorney or conservators may have conflicts of interest in enforcing revocable trusts on behalf of remainder beneficiaries as discussed below, personal representatives also face similar conflicts. In *Brundage v. Bank of America*, a fiduciary acting on behalf of the settlor or her estate had no incentive to challenge a stock transfer allegedly favoring one beneficiary at the expense of others but had no adverse effect on the value of the trust as a whole.¹⁰¹ The personal representative owes duties primarily to a decedent's testate or intestate successors, which may be at odds with the interests of the remainder beneficiaries of revocable trusts.¹⁰² The personal representative may therefore have neither a practical incentive nor a legal duty to pursue remedies on behalf of the trust beneficiaries either individually or as a group.¹⁰³

It seems entirely appropriate that while the settlor is alive and competent, his or her right to enforce the trust preempts the rights of the other beneficiaries. The settlor, normally the sole lifetime beneficiary, is in the best position to monitor the trustee's action and pursue remedies for a breach of trust.¹⁰⁴ Accordingly, the trustee's duties run

100. *Id.*; *In re Tr. of Trimble*, 826 N.W. 2d 474, 487 (Iowa 2013).

101. *Brundage v. Bank of Am.*, 996 So.2d 877, 883-84 (Fla. Dist. Ct. App. 2008); *see also Siegel v. Novak*, 920 So.2d 89, 96 (Fla. Dist. Ct. App. 2006) (noting that personal representatives with conflicting interests failed to pursue remedy on behalf of trust).

102. *McCouch*, *supra* note 3, at 31.

103. *Id.*

104. *Id.* at 10.

“exclusively” to the settlor, and the other beneficiaries have no standing to question the trustee’s administration of the trust.¹⁰⁵ As a practical matter, it would be pointless for the beneficiaries to second-guess the settlor who has the right to extinguish their rights by revoking or amending the trust instrument. Courts uniformly dismiss any claims by such beneficiaries for lack of standing.¹⁰⁶ Such rulings imply that beneficiaries’ rights do not vest until death just as they would for surviving devisee’s rights in wills and probate estates.¹⁰⁷ Accordingly, once the trust becomes irrevocable, certainly after the settlor dies, the other beneficiaries have standing to enforce their then vested rights, compel the trustee to comply with the terms of the trust, and pursue remedies for breach of trust.¹⁰⁸

In codifying the fiduciary relationship between the settlor, the trustee, and the beneficiaries of revocable trusts, the drafters of the UTC adopted the general policy that treated revocable trusts as the “functional equivalent of a will.”¹⁰⁹ Accordingly, Section 603 provides that “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.”¹¹⁰

The settlor’s loss of capacity does, however, have potentially important effects on the trustee’s fiduciary duties. Upon incapacity, the settlor’s unfettered non-fiduciary power to revoke or modify the trust (which conceptually justifies denying standing to other beneficiaries) is personal to the settlor since no other person may act with the same lack of accountability.¹¹¹ Agents who are empowered in a power of attorney or court-appointed conservators may be authorized to revoke or modify a trust, but such actors are subject to fiduciary duties to act in the interests of the incapacitated settlor, which may conflict with those of the remainder beneficiaries.¹¹²

The agent’s, conservator’s, or personal representative’s powers to enforce revocable trusts do not necessarily preclude other beneficiaries

105. See RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. (AM. LAW INST. 2007).

106. See, e.g., McCouch, *supra* note 3, at 33 n. 140.

107. *Id.*

108. *Id.* at 23.

109. *Id.* at 33.

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

111. RESTATEMENT (THIRD) OF TRUSTS, § 63 cmt. 1 (AM. LAW INST. 2007).

112. *Id.*

from having concurrent standing to protect their own interests.¹¹³ The policy of reliance upon agents appointed in durable powers of attorney, on conservators, or on personal representatives, however, will prove unrealistic. First, in many families, the agent, conservator, and personal representative may be the same individual as the successor trustee.¹¹⁴ It is unlikely they will sue themselves. Second, even if the fiduciary positions are held by different individuals or institutions, the agent, conservator, or personal representative has a conflict of interest with the trust's beneficiaries.¹¹⁵ The agent or conservator's duty is to act in the "best interest" of the incapacitated settlor, while the personal representative's duty is to all of the estate beneficiaries as a whole, and not to protect any one particular trust beneficiary.¹¹⁶ Accordingly, the agent, conservator, or personal representative will be focused on the property owned by their incapacitated charge or by the decedent. These fiduciaries will likely not be focused on the rights of remainder beneficiaries and the actions being taken by the successor trustee. The approach to rely on such fiduciaries to protect the settlor's intended remainder beneficiaries is problematic because these fiduciaries may have neither a practical incentive nor a legal duty to pursue remedies on behalf of the trust beneficiaries either individually or as a group. Further, there may be no agent empowered in a power of attorney to enforce the trust or the agent may not have that specific power and a conservator or personal representative may not be appointed.

The remainder beneficiaries will presumably be focused on their interests in the trust and on the successor trustee's actions.¹¹⁷ The remainder beneficiaries may be better situated to protect their rights and the rights of the incapacitated settlor where their respective interests coalesce. A better approach than relying on the agent's, conservator's, or personal representative's fiduciary duties would be to recognize the dual nature of revocable trusts along with the client's actual and probable intent to avoid conservatorships and probate, and harness the financial interests of the remainder beneficiaries to protect their interest and those of the settlor where they coalesce. This notion is consistent

113. RESTATEMENT (THIRD) OF TRUSTS, § 6S (AM. LAW INST. 2007).

114. Feder & Sitkoff, *supra* note 1, at 3-4.

115. McCouch, *supra* note 3, at 30-31.

116. *Id.* (discussing the conflict of interests faced by agents and conservators who have a duty to act in the interests of the incapacitated person rather than in the interests of the revocable trust beneficiaries).

117. *Id.*

with traditional judicial interpretations and was recognized in the Restatement (Third) of Trusts, which was embodied in the UTC as provided for in the General Commentary.¹¹⁸

The UTC contemplated a lifetime enforcement scheme broadly consistent with the traditional approach developed in the case law and described in the Restatement (Third) of Trusts.¹¹⁹ The drafters intended that upon the settlor's incapacity or death, other beneficiaries would have immediate standing to enforce their rights.¹²⁰ The drafters contemplated that the beneficiaries, other than the settlor, could hold the trustee accountable for actions taken by the trustee without the settlor's knowledge or approval before or after the settlor lost capacity.¹²¹ The drafters seem to have considered a lifetime enforcement mechanism broadly consistent with the traditional approach developed in the case law, described in the Restatement (Third) of Trusts, and recognized in *Tseng* and *Giraldin*.¹²²

With cases like *Tseng* and *Giraldin* on the one hand, and *Manon* and *Trimble* on the other, they all illustrate how the ambiguous language of the prevailing state law without the capacity provision has led to inconsistent and confusing results in the case law. Such confusing inconsistency provides no legal certainty to settlors or their advisors and may serve to increase "the potential that faithless trustees deplete the [trust] resources without leaving any recourse for the [settlor's] intended beneficiaries."¹²³

The Minnesota Trust Code (adopting UTC Section 603 without the incapacity provision) offers another approach to ensure that successor trustees acting if the settlor loses capacity can be effectively monitored. Section 501C.0602(a) of the Minnesota Trust Code presumes that a trust

118. Traditionally, courts struggled with whether a settlor's declaration of a revocable trust was testamentary in nature, but many held that a settlor's declaration that certain assets were held by the settlor-trustee in trust was a valid creation of a fiduciary arrangement giving a present property interest to beneficiaries that could be enforced. *See, e.g., Farkas v. Williams*, 5 Ill. 2d 417 (1955) (illustrating how the Illinois Supreme Court determined that by declaring that certain stock purchases were to be designated as held in a revocable trust for a beneficiary transferred a contingent equitable interest in remainder in the property to the beneficiary); UNIF. TRUST CODE art. 6, general cmt. (UNIF. LAW COMM'N 2000); RESTATEMENT (THIRD) OF TRUSTS, § 56 cmt. f (AM. LAW INST. 2007).

119. UNIF. TRUST CODE § 603 (UNIF. LAW COMM'N 2000).

120. *Id.* at § 603 cmt.

121. *Id.* at § 603.

122. RESTATEMENT (THIRD) OF TRUSTS § 74 (AM. LAW INST. 2007).

123. McCouch, *supra* note 3, at 28.

is irrevocable unless the settlor expressly provides that it is revocable.¹²⁴ The Minnesota statute then obligates the trustee with an “irrevocable” trust to keep the qualified beneficiaries informed about the administration of the trust so that they can protect their interests.¹²⁵ The beneficiaries to whom information is provided have statutorily recognized “standing to enforce the trust” in a nonfiduciary capacity.¹²⁶ The position to make beneficiary standing depend upon the presumed “irrevocability” of the trust, however, and may leave the trust unprotected where the settlor has questionable capacity.¹²⁷ As previously described, the commentary to the UTC indicates that a trust does not become irrevocable when a settlor loses capacity.¹²⁸

B. The Revocable Trust Laws Should Implement the Settlor’s Real and Probable Intention to Avoid Probate and to Avoid Conservatorships

By creating and funding revocable trusts during life, settlors manifest an intention to rely on a trustee’s enforceable fiduciary duties in lieu of a court-supervised conservator or personal representative to protect the settlor’s interest.¹²⁹ The settlor’s actual and probable intention implies that upon a settlor’s incapacity, like in conservator proceedings that mandate the conservator’s accounting and reporting to “interested parties,” the remainder beneficiaries of a revocable trust should be provided information about trust administration so that they may monitor the trustee’s administration of the trust if the settlor is incapacitated and have standing to enforce the trust.¹³⁰ Further, such standing should not be dependent upon whether a trust is “revocable” or “irrevocable,” as specified in the Minnesota statute, for two reasons: (1) such formalistic reasoning can, as evidenced by *Manon*, lead courts to decisions that frustrate settlor’s intentions; and (2) many revocable trusts remain revocable despite the settlor’s incapacity. With no mechanism for enforcement related to “incapacity,” the trust may go effectively unmonitored for perhaps long periods of time with the “potential

124. MINN. STAT MSA § 501C.0602(a) (2018).

125. *Id.*

126. *Id.* at § 501C.0813(b).

127. *Id.*

128. UNIF. TRUST CODE § 103(14) (“[T]he fact that a settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust.”).

129. McCouch, *supra* note 3, at 28.

130. *Id.* at 29 n.128.

that faithless trustees deplete the [trust] resources without leaving any recourse for the [settlor's] intended beneficiaries."¹³¹

Despite a settlor's actual and probable intention and contrary to the promised benefits¹³² that funded revocable or "Living" trusts avoid probate, including conservatorships or guardianships, the prevailing view of the laws governing the "Living Trust Revolution" has left a tremendous and confusing "Gap"¹³³ in the planning for settlors who may become incapacitated. The ambiguous nature of the "exclusivity" provisions has led to inconsistent and confusing court cases that serve to enhance the uncertainty surrounding incapacity. This fails to serve either settlors or their families who already struggle with a settlor's incapacity. The unfilled Gap is caused in part by the failure of prevailing will-based revocable Living Trust laws to explicitly recognize the inherent dual nature of revocable trusts to provide continuing management of assets in the event of the settlor's incapacity and to provide for the distribution of trust assets after death without probate.¹³⁴

Given such controversy and uncertainty, inconsistent case law regarding statutory interpretation does not appropriately protect settlors who establish and fund revocable trusts to presumably avoid judicial intervention concerning the management and distribution of their estates during incapacity and the disposition of trust assets after death.¹³⁵ Preferably, the trust statutes would be clear and avoid controversy so that settlors can be assured that revocable trusts serve their dual function. Uncertainty about trust enforcement and, especially, a categorical bar on beneficiary standing is unsound as a policy matter.¹³⁶ Due to the unsettling uncertainty of statutory interpretation and the inconsistency in case law, settlors and their attorneys need to provide a clear mecha-

131. *Id.* at 28 n.124.

132. Living Trust advocates and promoters tout that living trusts avoid probate, guardianships, and conservatorships and that these instruments also provide customized directions to trustees for managing and distributing trust assets upon incapacity. See, e.g., Edwin G. Fee Jr., *Shooting Down Living Trusts*, A.B.A. J., Mar. 1997, at 82.

133. See sources cited *supra* note 3. The Gap is that the law is not clear about who has standing to enforce the terms of the terms for the benefit of the incapacitated settlor. *Marty Shnkman's Notes from the 42nd Annual Notre Dame Estate Planning Institute*, STEVE LEIMBERG'S ESTATE PLANNING NEWSLETTER (Leimberg & LeClair, Havertown, Pa.) Dec. 1, 2016.

134. *Id.*

135. Feder & Sitkoff, *supra* note 1, at 3.

136. *Id.* at 24.

nism in the governing instruments for monitoring trustees should settlors become incapacitated. Only with such clarity about enforcement will settlors achieve peace of mind about their revocable trust plans.

IV. Drafting Options to Clarify Standing for Remainder Beneficiaries of a Revocable Trust to Enforce the Terms of the Trust in the Event of Settlor Incapacity

The inherent flexibility of Living Trusts offers a solution. Revocable trusts are inherently and historically flexible and can be crafted to provide meaningful plans for incapacity that will more fully reflect the desires of settlors because “[t]he purposes for which we can create trusts are as unlimited as our imagination.”¹³⁷ Techniques and tools that can substantially fill the Incapacity Gap can be found in the existing laws that govern Living Trusts. Despite the general structure of the will substitute version of various trust laws, with minor changes, a revocable trust governed by these laws, including the Minnesota Trust Code, can serve as substitute for conservatorships.

A. Modest Changes in Forms Will Alter the General Statutory Structure of Living Trusts From Being Primarily Will Substitutes

There are at least two methods to convert a will-substitute Living Trust into both a substitute for conservatorships and for wills.

1. SPECIFY THAT UPON INCAPACITY, THE REVOCABLE TRUST SHALL BE IRREVOCABLE

By expressly stating that upon the settlor’s incapacity the trust becomes “irrevocable,” the terms of the trust will negate the settlor’s power to “control the trust while it is revocable” under Section 501C.604 of the Trust Code.¹³⁸

137. *See id.* at 1.

138. Note that there may be a reason to limit the irrevocability of the trust upon a settlor’s incapacity to only the trustee’s mandated duty to report to the remainder beneficiaries selected by the settlor. In Minnesota, in an irrevocable trust, the trustee is statutorily prohibited from paying out the trust assets in a manner that satisfies his obligation to support a beneficiary. MINN. STAT § 501C.0814(b) (2018). This statute has led to a spouse-trustee being held liable for breaching the statute and his fiduciary duty by using trust assets to pay nursing home costs for his incapacitated spouse whom he had a duty to support. This statute expressly does not apply to

Upon the trust becoming “irrevocable,” other provisions in the trust law, like the Minnesota Trust Code, govern “irrevocable” trusts automatically apply to the once-revocable trust.¹³⁹ One such provision requires the trustee of irrevocable trusts to keep qualified beneficiaries¹⁴⁰ (often, such beneficiaries would include the settlor, his or her agent under a power of attorney, spouse and children) reasonably informed about the administration of the trust and of the material facts necessary to protect their interests.¹⁴¹ The Minnesota statute then, for example, provides specifically that any person to whom information is furnished shall have standing to enforce the trust.¹⁴² There would be no requirement that the interested beneficiary first commence a conservatorship proceeding before being able to act to enforce the trust.

In states where the statutes are not like Minnesota’s Trust Code that expressly refers to “irrevocable” trusts, drafters could still expressly provide that qualified beneficiaries have a right to information about trust administration and standing once the trust becomes irrevocable upon the settlor’s incapacity. The revocable trust could then serve as a conservatorship-substitute regarding the management and protection of the trust assets upon incapacity by expressly imposing enforceable fiduciary duties on successor trustees towards the qualified (or remainder) beneficiaries upon incapacity. This type of provision in a revocable trust effectively substitutes for the protection afforded by conservatorship statutes by imposing enforceable fiduciary duties on trustees to keep the settlor’s intended beneficiaries informed about trust administration just as conservators are required to provide accountings to “interested persons.”

One commentator has remarked that a result where a revocable trust becomes irrevocable upon the incapacity of the settlor is “nonsensical” as a practical matter for three reasons: (1) it is difficult to determine capacity which creates a dilemma for the trustee; (2) the practical

revocable trusts. By limiting the “irrevocability” of the trust upon a settlor’s incapacity, presumably the pernicious statute will not apply. See *Lorberbaum v. Huff*, 765 N.W.2d 919, 929 (Minn. Ct. App. 2009).

139. See MINN. STAT. §§ 501C.0604, 501C.0813(a) (2018).

140. MINN. STAT. § 501C.0103(m) (2018) (defining “qualified beneficiaries” as “distributees or permissible distributees; distributees or permissible distributees of trust income or principal if the interests of the first set of distributees terminated without causing the trust to terminate, or distributees or permissible distributees if the trust terminated”).

141. MINN. STAT. § 501C.0813(a) (2018).

142. See *id.*; MINN. STAT. § 501C.0813(b) (2018).

problem of notifying the trustee and the beneficiaries; and (3) the possibility, however slim, that a settlor might recover capacity in the future.¹⁴³ These three reasons are overstated.

Most trust instruments detail some mechanism to determine the incapacity of the settlor so that the successor trustees will then be empowered to act.¹⁴⁴ There is no reason settlors cannot state that once the incapacity test is satisfied in writing, the writing is conclusively presumed to be valid for all trust purposes with an indemnification of the successor trustee's good faith actions following the satisfaction of the mechanism. The difficulty of notifying the successor trustee and the other beneficiaries about the "incapacity" of the settlor is often minimized in many families who otherwise act as the uncompensated caregivers for their senior, vulnerable parent-settlors.¹⁴⁵

Alternatively, in cases where there are a large number of beneficiaries, the settlor can reduce the burden of notifying all of the beneficiaries by limiting the successor trustee's duty to inform to only a select few designated individuals or, instead, to a trust protector who would have the same monitoring responsibility. Finally, just as a settlor can provide specific and binding mechanisms to determine incapacity in the first instance, the trust instrument can also provide a similar means by which the disgruntled settlor who perceives that he or she is not incapacitated can establish capacity conclusively. The stated justifications for not providing that a revocable trust become irrevocable upon the settlor's incapacity do not necessitate an outright bar toward such a provision as the stated justifications can be mitigated with proper drafting or are unrealistic under many family situations.

2. ANOTHER ALTERNATIVE MAY BE TO ADJUST THE REPORTING REQUIREMENT OF THE TRUSTEE

The Minnesota Trust Code, like the UTC, permits yet another alternative method to adjust the structure of a living trust to be a substitute for conservatorships. Generally, the Minnesota statute provides that trustees of "irrevocable" trusts keep qualified beneficiaries informed of the trust administration.¹⁴⁶ Paragraph "b" of section 501C.813

143. McCouch, *supra* note 3, at 15.

144. MINN. STAT. §501C.0601, 501C.0701(c)(1) (2018).

145. See generally Rebecca C. Morgan, *Family Matters in Elder Law Practice*, 29 J. AM. ACAD. MATRIM LAW. 1109 (2016) (discussing the role of family members in representing elder clients, including estate planning matters).

146. MINN. STAT. § 501C.0813 (2018).

of the Minnesota Trust Code further permits the settlor to provide specifically in the document that, even with regard to “revocable” trusts, the trustee keep the settlor and other beneficiaries, designated by the settlor, informed about the trust’s administration.¹⁴⁷ As described above, such informed beneficiaries would have standing to enforce the terms of the trust.¹⁴⁸ In addition, “[a] trustee concerned with potential liability for actions taken during the settlor’s lifetime can [also] protect itself by submitting regular accounts for the settlor’s [or remainder beneficiaries’] approval.”¹⁴⁹

Therefore, a settlor may, through either drafting technique, provide a lifetime enforcement mechanism for a trust so that any person to whom such information is provided has a right to enforce the trust whether it is irrevocable or revocable. In these ways, a trust settlor can harness the interests of the remainder beneficiaries where they coalesce with those of the settlor to administer and protect the trust assets as the settlor intends without probate processes of any kind.

Even if the structure of a living trust is altered to specify that the trustee’s inherent fiduciary duties serve to substitute for conservatorships, the trustees may still be faced with a dilemma. Trustees directed, upon incapacity of the settlor, to administer and distribute the trust estate “as is advisable in their discretion”¹⁵⁰ have no clear direction about how to act. Open-ended provisions in standard forms provide little if any guidance to fiduciaries. Further adjustments are necessary to fill the “Gap” surrounding the incapacity of chronically ill, aging and vulnerable settlors.

V. Drafting to Include Expressive Statements of Settlor Intent in Revocable Trusts Can Provide Meaningful and Sustainable Incapacity Plans for Incapacitated Settlers

Standard form trust instruments merely imply an intent that the trust operate as a substitute for conservatorships. Typical provisions in professionally drafted revocable trusts that apply upon the incapacity of the settlor include the following information.

147. MINN. STAT. § 501C.0813(b) (2018).

148. MINN. STAT. § 501C.0813 (2018).

149. McCouch, *supra* note 3, at 30.

150. *Drafting Wills and Trust Agreements*, *supra* note 51, at tab 11, § 2.2.1.

First, as mentioned above, revocable trusts typically provide a mechanism for the 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 named persons, such as the settlor’s spouse or children.”¹⁵¹ In this way, unless the settlor disputes the private determination of incapacity, there will be no court involvement. Such a provision reduces the risks and costs of litigation.

Second, “a professionally drafted revocable trust instrument typically will include some type of provision concerning the consequences of a determination of incapacity.”¹⁵² For example,

If any time or times I shall be incapacitated, as determined herein, the trustee may use such sums from the income and principal 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 in my best interests.]

These types of provisions express the intent that the settlor desires some type of private management of the trust assets should he or she lose capacity, but exacerbates settlor and trustee uncertainty in the event of incapacity by failing to provide any meaningful directions to the successor trustee. Unlike post-mortem dispositions, which have attracted the attention of commentators who have written numerous articles and commentary to clarify settlor’s post-mortem goals and intentions, there has been little or no commentary concerning the inclusion of more specific statements of settlor intent about managing trust assets should the settlor lose capacity.¹⁵³ This Article addresses the efficacy of including more expressive statements into trust instruments to provide a more meaningful incapacity plan for clients.

A. The Inclusion of Expressive Statements in Testamentary Instruments is Supported by the Case Law

Oftentimes clients complain about the dry, formalistic legalese that make up their estate plans. Yet, some practitioners and scholars are reluctant to include more expressive statements of a client’s intentions for fear that they will lead to an enhanced risk of litigation and should

151. Feder & Sitkoff, *supra* note 1, at 31. *cf.*, *Drafting Wills and Trust Agreements*, *supra* note 51, at § 8.1.14.

152. Feder & Sitkoff, *supra* note 1, at 32.

153. See Benjamin D. Patterson, *The Uniform Trust Code Revises the Historical Purposes of Trusts and Reiterates the Importance of Settlor’s Intent*, 43 CREIGHTON L. REV. 905, 917 (2010).

therefore be avoided.¹⁵⁴ A few commentators, however, posit that expressive statements should be included in wills as they enhance the testator's intent, testament, and legacy that wills serve to provide.¹⁵⁵ Expressive statements can be the last written documents that their families read.

Based on a study of 180 cases over five years, Professor Deborah S. Gordon concluded that:

[W]hen . . . wills incorporated even very simple expressions about the dispositive plan . . . , those wills were generally upheld, regardless of whether a judge or jury decided the case. Testamentary language that was ostensibly unnecessary, but descriptive also proved helpful (or at least not problematic) in the cases where such expressions occurred. Descriptive phrases identifying the beneficiary or her relationship with the testator, such as "lifelong" or "faithful" friend, helped courts to find and uphold donative intent with respect to the beneficiary to whom the description applied. Finally, colloquial language, or phrasing in the testator's individual voice, helped evidence the testator's purpose. Conversely, courts were more likely to find undue influence when the testator's language appeared to come from a source other than the testator. Rather than finding a testator's language that was not required to achieve the will's nonlinguistic purposes problematic, courts greeted the respective testator's more deliberate and purposeful approach to language with respect.¹⁵⁶

For example, in *Graham v. Fulkerson*, the testator gave token gifts to her three estranged daughters and left the bulk of the estate to her son "because [her] son [was] the only child who has cared for [her] in [her] old age."¹⁵⁷ The Kentucky Court of Appeals upheld the validity of the will against the daughter's claim of undue influence because the will was unambiguous and "clearly disposed" of the testator's estate as she intended.¹⁵⁸ Where the testator takes command of the estate planning process by specifically requesting the scrivener to include additional more expansive language, the Florida District Court of Appeals found that the testator's language showed he was less susceptible to undue influence.¹⁵⁹ As one commentator stated, "the will is one of the most personal legal documents an individual ever executes[:] [it helps the

154. Gordon, *supra* note 1, at 423-24.

155. *Id.*; see also Sneddon, *supra* note 1, at 409.

156. Gordon, *supra* note 1, at 421.

157. *Graham v. Fulkerson*, 187 S.W.3d 324, 326 (Ky. Ct. App. 2005).

158. *Id.* at 328-29.

159. *Langford v. McCormick*, 552 So. 2d 964, 969 (Fla. Dist. Ct. App. 1989).

testator] confront mortality, assesses life's accomplishments and disappointments, and contemplates [one's] legacy."¹⁶⁰ Accordingly, it has been remarked that "the last will and testament should be conceptualized and written as a personal narrative."¹⁶¹ In the words of James Boyd White:

[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.¹⁶²

Because revocable trusts are generally treated as the functional equivalent of wills and the rules of construction of wills also apply when determining the interpretation of trust instruments, the will cases, support the inclusion of expressive statements in revocable trusts.

The use of the narrative in incapacity plans also finds support in the medical profession. Medical journals provide positive commentary.¹⁶³ A geriatrician commented that he begins every patient intake interview with a discussion designed to illuminate the life story of the patient to determine what activities are enjoyable and should become a part of the patient's care plan.¹⁶⁴ Currently, healthcare trends are designed to be "patient-centered."¹⁶⁵ The incapacity provisions of revocable trusts, if "client-centered," can facilitate these medical trends.

The "inclusion of expressive language, personal narratives, components of the [client's] life story, vision for the future and guidance to fiduciaries and loved ones can also be a valuable addition to testamentary documents [and revocable trusts] rather than strictly limited to an ethical will."¹⁶⁶ This Article posits that the independent expressions of unique clients may have even greater impact in circumstances surrounding the uncertainty inherent in incapacity. A trust, like all estate

160. Sneddon, *supra* note 1, at 359.

161. *Id.* at 360.

162. *See, e.g., id.* at 361 (quoting JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND THE POETICS OF THE LAW* 168 (Univ. Wis. Press 1985)).

163. *Id.* at 364.

164. Interview with Dr. George Scheophoerster in Elk River, Minn. (Oct. 2018).

165. *See*, MINN. STAT § 144.651 (2018) (providing that the purpose of the Bill of Rights is to promote the interests and well-being of patients and residents of health care facilities); *see also* MINN. STAT. §§ 144A.441, 144A.44, 144A.751 (2018) (covering Assisted Living Bill of Rights, Home Care Bill of Rights, and Hospice Bill of Rights, respectively).

166. Sneddon, *supra* note 1, at 409 n.351.

planning documents, is intended to represent a client's intent. Conceptualizing the trust as a personal narrative therefore more fully imbeds the settlor's intent in the trust instrument. Leaving vague traditional terminology in trust instruments to define the trustee's fiduciary duties upon settlor incapacity fails to provide remainder beneficiaries who are given standing with any meaningful terms to enforce. Including expressive statements about a client's specific desires, preferences and intentions for care, for housing, for financial management, and in general for preferred (or at least existing) lifestyle activities and choices can enhance the meaningfulness and individuality of trust instruments and assist with the implementation of the trust instrument.

The emphasis on making revocable trusts more expressive cannot solve all problems of interpretation, especially where a settlor is unable to form or express intent. In such cases, the settlor's inability to formulate and convey her intent make it difficult to explain how any *language*, expressive or otherwise, might facilitate the interpretation of documents to discover intent. For example, in *Estate of Odian*, the California Court of Appeals invalidated a will that left all of the testator's property to her paid live-in caregiver to the exclusion of the charitable organizations she had left her property to in previously-executed wills.¹⁶⁷ Despite evidence that the testator had, for years, continually revised her estate plan and reviewed it with her attorneys, the court was concerned that during the last six years of her life when she executed the will, the testator suffered from defects in her mental capabilities.¹⁶⁸ The court found that the testator knew the language of capacity but even her close friends were not sure where her knowledge originated and whether the intent she demonstrated was her own.¹⁶⁹

Ultimately, the court, relying on a California statute, determined that the caregiver could not meet her statutory burden of proving "substantial evidence" that the will was not a product of undue influence and invalidated the will.¹⁷⁰ Even accepting that the ultimate goal of those charged with effectuating the testator's directives, a testator's inability to formulate and convey her intent, as in *Odian*, make it difficult to explain how any *language*, expressive or otherwise, might facilitate the process.

167. *Estate of Odian*, 145 Cal. App. 4th 152, 162 (Ct. App. 2006).

168. *Id.* at 157.

169. *Id.* at 162.

170. *Id.* at 167.

Despite some limitations on the efficacy of expressive terms in some cases, where testators were able to formulate and convey individual statements of expression, the case law illustrates that including expressive language helped facilitate knowledge of intention and responds to the skeptic's reluctance and fear about including such language in estate planning instruments in a manner consistent with current trends in incapacity and care planning in healthcare.

The will cases also respond to a traditional reluctance of estate planners and scholars to use or recommend using expressive language in a testamentary document for fear that such language will obscure and confuse the settlor's or testator's intent rather than illuminate it. The conceptualization of a will and a revocable trust as a narrative with expressive statements of a person's intent facilitates the production of a set of documents that are representative of a client's intent which is the polestar of this area of law. As one attorney wrote, "the client wants . . . an instrument that in simple, direct language, bearing her personal mark, tells her own story, that is also legally correct."¹⁷¹

Lawyers should not be afraid to deliberately deviate from standard forms to include expressive statements. *Shapiro v. Union National Bank* involved a will that required the testator's sons to be "married to a Jewish girl whose both parents were Jewish."¹⁷² This case raises speculation about the particular story behind the words leaving the beneficiary wondering about the story and striking back in litigation. One author stated, "[t]he law does not forbid such expressions of sentiment, nor does it require it. It seems preferable to limit the contents of a Will to the cold facts."¹⁷³ Thus, incorporating any language that seems unconventional into an estate planning document may seem to be courting disaster.

This issue is where an estate planning attorney can provide added value for clients. The attorney can ensure the re-narrated events are accurate by acting as an objective observer rather than a participant. The cases cited by Professor Gordon illustrate that using time-tested constructions, selected with care and tinged with personal choice, the attorney and the client can work together to construct a narrative that both acknowledges conventions and incorporates the person. Situating

171. Sneddon, *supra* note 1, at 160.

172. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 826 (Ohio 1974).

173. FRANK GERD OPTON, *DECEDENTS' ESTATES, WILLS AND TRUSTS IN THE U.S.A.* 26 (Kluwar Law & Taxation Publishers 1987).

a trust as a narrative conveys security in the manipulation of an accepted form.

It should be noted that the source of much of the legalese is the form book¹⁷⁴ or prior legal documents which contain legal formulas which, at least superficially, appear to fit the factual situation. Frequently, the form book's approval or inclusion of language arises from the fact that they have been tested in litigation. The form book does not recommend strict adherence to the language; on the contrary, the fact that the language was unclear enough to be susceptible to litigation does little to recommend it for further use.¹⁷⁵ A draftsman needs to be cautious, but in dealing with individuals with unique backgrounds, experiences, and perspectives, a one-size-fits-all approach is not appropriate. The polestar of the law in this area is to discern the testator's intent to determine the interpretation and construction of the testamentary document.¹⁷⁶

B. Incapacity Plans Require Expressive Statements

The practice of utilizing expressive statements in estate planning documents, specifically revocable trusts, requires a team approach to planning. In order to fill the Incapacity Gap, settlors also need to inform their estate planners about their values, goals, and preferences about their lives. Estate planners then should expressly provide more specific statements about their client's values, directions, desired housing, desired care, and more in the governing documents. By asking new questions, estate planners and prospective trustees can change the conversation surrounding estate planning to include inquiries designed to elucidate a client's goals, voice, and desires.

Trust law already recognizes the paramount importance of the settlor's purpose in establishing a trust. The UTC, and Minnesota's version of it, specifically recognizes the importance of stating the "material purposes" of the trust.¹⁷⁷ Practitioners have long included such statements of the purpose of the trust in different types of irrevocable trusts

174. *Id.*

175. Sneddon, *supra* note 1, at 381.

176. *Id.*

177. See, e.g., MINN. STAT § 501C.0411(b) (2018) (permitting modification by all of the trust beneficiaries if the court concludes it is not inconsistent with a "material purpose" of the trust); MINN. STAT. § 501C.0801 (providing the trustee shall administer the trust . . . in accordance with its terms and purposes); UNIF. TRUST CODE §§ 441, 801 (UNIF. LAW COMM'N 2000).

designed to achieve estate and tax benefits, and to provide supplemental or special needs benefits for disabled beneficiaries.¹⁷⁸ One commentator even analogized a statement of purpose in a trust to an “overture” in musical pieces that refers to the introduction to the music and draws from the terminology of the narrative.¹⁷⁹ The “overture” also refers to the beginning of an action or an “opening” of a fiduciary relationship or a course of action. It identifies the individual, domicile, and the document and also evidences testamentary intent, but it is more than a recitation of required elements of an enforceable testamentary document, it assumes a ceremonial voice, harboring back to the oral tradition of testamentary dispositions and illustrates the importance of the document.

A common current trend is that the beginning of the document uses the first person, “I,” with the name of the testator, thus building the resonating sense of the occasion. As such the will is a private expression of a public document and may (or should) use references, statements, and allusions that are meaningful to the document’s creator, the testator, or settlor; to the beneficiaries; to the administrator, trustee or personal representative, and express a value, or an honor relating to the testator’s own personal narrative. Seeds of personal narrative embedded within the instrument can be sown in the overture or introduction. The virtue of this addition is that it alerts the reader (i.e., the trustee and the beneficiaries) to the disposition of the deceased person’s property, which is the main performance. These references can add to the personal narrative. It may further call attention to the importance of the family to an individual testator as some have stated that “[I] will protect and provide for my wife and children through life.”¹⁸⁰ Unfortunately, no more than one in 1000 “overtures” show any personalization at all.

Similarly, settlors could expressly state that a revocable trust is intended as a substitute for conservatorships and provide a comprehensive plan for housing desires and care needs in the event of incapacity. For example, the trust could express language such as:

178. See, e.g., standard provisions in trusts that are intended for gift and estate tax savings and for supplementing a disabled beneficiary; see, e.g., form book cited in *Drafting Wills and Trust Agreements*, *supra* note 51, at tab 19 (Qualified Domestic Trust), 23 (Charitable Remainder trusts), tab 24 (Charitable Lead Trusts), tab 26 (special needs trust), and tab 27 (supplemental needs trust).

179. Sneddon, *supra* note 1, at 160.

180. *Id.*

I intend that this trust to serve as a substitute for both probate and conservatorships. Upon my incapacity, I desire that the trustee hold and manage the trust property subject to the limitations of enforceable fiduciary duties. I intend that upon my incapacity, as defined in this trust, the remainder beneficiaries shall have standing to enforce the fiduciary duties for my benefit and those of the beneficiaries. I further desire, if I become incapacitated, to continue to live in my home and direct the trustee to bring in caregivers, other health professionals, and adaptive technology that enable me to stay in my home. I desire to age-in-place as I am comfortable and enjoy familiar surroundings and amenities in my home.

Further, a settlor could expressly provide for his desires for care by providing something like the following:

If I become incapacitated, as defined by this trust, the trustee shall, in its discretion, administer and distribute the trust income and principal for my health, education, support and maintenance. For purposes of this trust, my "health" includes standard western medicine as prescribed by my physician, Dr. _____, and also other types of treatment or medications such as acupuncture, Chinese medicine, holistic treatment, touch therapy, music therapy, pet therapy, long-term care, or other treatment or medications receiving positive commentary in recognized medical journals that my physician believes may provide me with comfort, pain relief or a restoration or maintenance of my ability to live a meaningful, conscious and interactive life.

The foregoing statements expressing a settlor's desires can be as varied and individually unique as every person. As long as their statements are legal, not contrary to public policy, possible to achieve, and for the benefit of the beneficiaries,¹⁸¹ they should be enforceable by a court. They further provide a guide about the values and desires that can guide trustees to administer a trust estate pursuant to a settlor's intent. By including Expressive Statements that elucidate the settlor's major purposes, a settlor can begin to build a comprehensive, individual, and enforceable plan for possible incapacity. Clients can then enhance their independence by having a "voice in their care" even if they become incapacitated.

Some critics may suggest that a trust instrument is not the proper instrument to insert personal narrative or expressive statements, and instead consider a non-binding ethical will or non-binding letter of intent as the proper place for such sentiments. While a trust is personal

181. See, e.g., MINN. STAT. § 501C.0404 (2018) (providing, in part, that trusts may be created only to the extent its purposes are lawful, not contrary to public policy and possible to achieve).

document, it may also be a public document. Although not always required to be filed in court, a trust instrument may need to be recorded in the offices of local county recorders and sometimes, if contested, will be filed in courts.¹⁸² These filed documents, unless sealed, will become open to the public.

However, numerous states have enacted laws that minimize the requirement for filing trust instruments for purposes of establishing the trustee's authority for transactions concerning real or personal property.¹⁸³ Laws like these minimize the possibility that trust instruments will become open to the public. Despite such laws, however, supplemental writings, such as side letters or letters of intent, are still a tempting alternative mechanism by which a settlor may express her individual desires and provide guidance to her fiduciaries and beneficiaries, thereby reaping the nonlegal benefits of expressive writing without obscuring the dispositive documents and without the risk that such letters become open to public scrutiny. Notably, case law illustrates the risk inherent in utilizing writings that are intended as non-binding to supplement the interpretation of wills.

The difference between including expressive language or narrative in a side letter and including it in the dispositive document itself is illustrated in *Bajakian v. Erinakes*.¹⁸⁴ *Bajakian* involved a dispute between two siblings over the will of their widowed mother, Blanch Erinakes.¹⁸⁵ Blanch executed the contested will in November, 1994 leaving \$25,000 to her daughter and the balance of the large estate to her son.¹⁸⁶ Five years earlier, Blanch had executed a will (subsequently revoked by the 1994 will) dividing the estate equally between her children.¹⁸⁷ The daughter challenged the 1994 will for lack of capacity and undue influence.¹⁸⁸ The court mentioned the complete text of a letter purportedly written by Blanch in May 1994 that clearly explained Blanch's reasons for the provisions of the 1994 will: as Blanch dealt with the "nightmare" of losing her husband, the "only full time support" she received to

182. MINN. STAT. § 501C.1013 (2018).

183. See, e.g., MINN. STAT. § 501C.1013 (2018) (authorizing the use of Certificate of Trust form for purposes of evidencing the trustee's authority to sell, transfer or convey real property or personal property owned by the trust); UNIF. TRUST CODE § 1013 (UNIF. LAW COMM'N 2000) (providing for the use of a Certification of Trust).

184. See *Bajakian v. Erinakes*, 880 A.2d 843 (R.I. 2005).

185. *Id.* at 845.

186. *Id.* at 846.

187. *Id.*

188. *Id.* at 848.

“keep everything going,” including the responsibility of carrying on her life’s work of operating movie theatres and real estate businesses, was from her son.¹⁸⁹ Blanch and her son “worked together” to retain the properties, pay off seven mortgages, and expand the businesses.¹⁹⁰

Blanch explained “it only makes sense to me to let [my son] continue to carry on in this capacity, in control and to have ownership of everything,” stating her belief “in her heart that when the day comes when [he] is able to show a profit he can share it as he sees fit.”¹⁹¹ Despite her son’s attempt to have the letter admitted into evidence at trial, the court denied his motion because it found that the declarations of memory contained in the letter were inadmissible hearsay.¹⁹² The jury, which was not allowed to see or to consider the letter, found that Blanch lacked testamentary capacity when she signed the 1994 will and therefore invalidated it.¹⁹³ On appeal, the Rhode Island Supreme Court, although quoting the letter in its entirety in the opinion, affirmed that it was hearsay and affirmed the trial judge’s ruling that it was inadmissible hearsay.¹⁹⁴

Not only did the explanation in Blanch’s side letter clarify the basis of her otherwise curious decision to treat her daughter and son differently, it communicated her message to her intended devisees. By incorporating her explanation expressly in a binding manner into the testamentary instrument, Blanch could have effectively stated her intention. The *Bajakian* decision illustrates the inherent risks of using non-binding side letters to supplement a will and suggests that using side letters to supplement testamentary instruments should be concerning.¹⁹⁵ Relying on non-binding side letters to contain important explanations or expressions, as some lawyers do, can lead those expressions being ignored or devalued by the legal readers.

189. *Id.* at 847.

190. *Id.*

191. *Id.*

192. *Id.* at 847-48.

193. *Id.* at 846-47.

194. *Id.* at 843.

195. *See generally id.*

VI. New Trust Law Provisions Add to the Protection of the Incapacitated Settlor and Offer the Opportunity to Enhance Administrative Efficiency

A. Protocols Against Abuse, Neglect, and Elder Exploitation

The protective features of the Expressive, Protective™ Trust, including the harnessing of the remainder beneficiaries interests when they align with those of the settlor by expressly providing them standing, can be especially beneficial to combat elder abuse. The interests of the beneficiaries and the settlor likely are aligned with respect to trustee self-dealing, breaches of loyalty by the successor trustee, embezzlement, fraud, or reckless indifference.¹⁹⁶ Due to the epidemic of complaints and prosecutions for elder abuse, neglect, and financial exploitation,¹⁹⁷ planners should not ignore the opportunity to design and incorporate advance protections against such crimes into the Expressive, Protective™ Trust. Due to the inherent flexibility of trust instruments, imaginative planners can add features to the Expressive, Protective™ Trust (or power of attorney) structure to significantly prevent such crimes and protect the settlor and beneficiaries.

In addition to providing standing to remainder beneficiaries to enforce the settlor's expressive statements of intent in a revocable trust in the event of the settlor's incapacity, abuse and neglect may be minimized by simply authorizing or directing the trustee to hire independent care managers to visit periodically with an incapacitated settlor to look for the red flags of abuse or neglect and then report back to the trustee about their findings. The Minnesota legislature is also currently

196. See *Fulp v. Gilliland*, 998 N.E.2d 204 (2013) (concerning a settlor-trustee, who while competent, who sold trust property for less than market value to one remainder beneficiary and another remainder beneficiary challenged the sale as a breach of loyalty by the settlor-trustee to the remainder beneficiaries. The Court reasoned that the revocable trust was functioning as a "will-substitute" while the settlor was competent and the settlor-trustee owed no duty to the remainder beneficiaries); *Manon v. Orr*, 856 N.W.2d 106 (Neb. 2014) (concerning a remainder beneficiary who sued the trustee whom sold trust property to a remainder beneficiary claiming that the sale was inappropriate due to "indications of fraud"); *Feder & Sitkoff*, *supra* note 1, at 44-45.

197. Chris Serres, Special Report, *Left to Suffer: Abused, Ignored Across Minnesota*, STARTRIBUNE (Nov. 12, 2017), www.startribune.com/senior-home-residents-are-abused-and-ignored-across-minnesota/450623913/ (reporting that there were a vast number of complaints of elder abuse in Minnesota assisted living centers that were not prosecuted).

considering the efficacy of allowing patients to install electronic monitoring devices to provide real-time views of the living environment for an incapacitated or vulnerable settlor or principal.¹⁹⁸ Either type of early and repeated monitoring could provide an additional means to discover dangerous conditions early on so that they can be remediated before irreparable damage occurs.

There are many other techniques to minimize financial exploitation by both third parties or by “trusted” caregivers or fiduciaries which may include the following:

- (1) Requiring co-trustees to be required to agree before trust funds are expended (although this may not be necessary if a Distribution Trust Advisor Committee structure described below is utilized);
- (2) Requiring third party monitoring of account statements to look for unusual or large withdrawals or expenditures;
- (3) Requiring objective third-party consent to or veto power over withdrawals by the settlor or distributions by the trustee;
- (4) Separating financial assets into separate trusts or accounts, each for the benefit of the settlor, but having different amounts and different provisions: providing one trust or account with more settlor control and a smaller amount of funds and one trust or account being less controlled and more restrictive of settlor control, and different distribution terms;
- (5) Requiring accounting or audits of the trustee’s accounts on a periodic basis (although this may be accomplished when simple structural changes are made to the living trust to make it an Expressive, Protective™ Trust);
- (6) Separating the duties of the financial fiduciary from those of the health care agent to diminish the possibility of overreaching or undue influence of either one; or
- (7) Designating a Trust Protector with the power to remove bad actors and to replace them with more suitable trustees.

The limit on the kinds of structures is really only limited by the imagination of the settlor and the advisor, but the flexibility of Expressive, Protective™ Trust offers tremendous ability to establish a comprehensive incapacity plan that improves, preserves, and protects the well-being of clients and their families.

198. Victoria Cooney, *Senior Takes Center Stage in House Long-Term Care Division Discussions*, MINN. HOUSE OF REPRESENTATIVES (Jan. 28, 2019, 5:18 PM), <http://www.house.leg.state.mn.us/SessionDaily/Story/13510>.

B. Use of Incapacity Trust Distribution Advisors Can Add Still Further Protection Along with Enhancing Administrative Efficiency

The concept of a Directed Trust¹⁹⁹ offers even stronger opportunities to establish Expressive Protective™ Trusts. Delegation of fiduciary duties upon the settlor's incapacity among and between the named successor trustee and designated trust advisors is becoming more and more common in legal forms and drafting systems.²⁰⁰ The three functional divisions are administration, investment, and distribution. This trend offers a tremendous opportunity to enhance the "expressive" and "protective" nature of "living" trusts.

The Expressive, Protective™ Trust structure that incorporates distribution trust advisors can improve the distribution function leading to more comprehensive and significant incapacity planning and also adds a level of protection for settlors that should satisfy remainder beneficiaries too. The settlor generally develops the expressive nature of the Trust structure (also the power of attorney structure) whose central purpose is to enhance a settlor's "voice" in their housing and care upon incapacity. The protective feature of the Expressive, Protective™ Trust (enhanced by restructuring the trust as a substitute for conservatorships) can be strengthened further through the use of a Distribution Trust Advisor Committees or through the intentional use of incapacity consultants. Exactly how this protective structure is designed depends upon a settlor's unique desires and the circumstances surrounding his or her life and family.

Distribution Trust Advisor Committees could be made up of some or all of the following:

- (1) Family members or friends who know the settlor, his/her life-style, and his/her wishes for housing, preferred treatment and care;
- (2) Consultants or social workers who are familiar with the intricacies of public long-term care programs and resources designed to provide for vulnerable and incapacitated persons;
- (3) Health care agents appointed in advance directives,²⁰¹

199. See, e.g., MINN. STAT. § 501C.0808 (2018).

200. *Id.*

201. In Minnesota, and states with similar laws governing advance directives, it is important to name the health care agent as part of the Distribution Trust Advisor Committee for the following reason: health care agents are statutorily empowered to decide about their charge's place of abode but has no power to pay the costs of such an abode. If the health care agent and those with power to pay bills disagree,

- (4) Care managers or other health professionals with training and experience advocating for and working through the intersecting and sometimes conflicting types of medications and treatments for complex, chronic conditions and diseases;²⁰²
- (5) Perhaps religious advisors with training and knowledge of the how the settlor's spiritual beliefs may impact his or her care;²⁰³
- (6) Financial or insurance advisors with expertise in health insurance and long-term care insurance; and/or
- (7) Elder law attorneys.

By using such advisors, settlors take advantage of the expertise of the team members, add protections for themselves, and increase the efficiency of trust administration. By delegating fiduciary responsibilities among the most suitable fiduciaries, settlors can improve administrative efficiency and provide added protections for settlors.²⁰⁴ Alternatively, merely designating one trustee without training or expertise will often result in that individual fiduciary struggling through the convoluted, interconnected, intricate maze of unknown governmental laws and programs that provide safety nets for vulnerable, incapacitated persons along with struggling with unfamiliar fiduciary laws. The Distribution Trust Advisor Committee could review all of the important factors concerning a housing decision or a question of what types of care are desirable and beneficial to pay for, decide on a course of action, and direct the trustee to pay trust funds for such cares or protections. The Expressive, Protective™ Trust offers an enforceable, comprehensive, private incapacity plan that can be a substitute for conservatorships and enhances the probable purpose of the settlor, his or her voice and independence while simultaneously increasing efficient administration and protection for the settlor and the remainder beneficiaries.

this could lead to disputes and litigation. If the health care agent was also part of the Committee making distribution decisions, such disputes or litigation could be minimized.

202. See, e.g., MARTIN SHENKMAN, *ESTATE PLANNING FOR CHRONIC CONDITION OR DISABILITY* (2009) (discussing thoughtful considerations about planning for chronically ill clients).

203. See Martin Shenkman, *Religion and Estate Planning*, SHENKMAN LAW (Sept. 13, 2016), <https://shenkmanlaw.com/blog/2016/09/13/religion-and-estate-planning/>.

204. See, e.g., Martin Shenkman, *What You Must Know About Trust Fiduciaries*, SHENKMAN LAW ("[M]ore flexibility . . . improved asset protection and greater control can all be achieved with a broader mix of fiduciaries.") (June 24, 2014), <https://shenkmanlaw.com/blog/2014/06/24/what-you-must-know-about-trust-fiduciaries/>.

C. A Plan of Care for the Caregiver

Planners could add features to the Expressive, Protective™ Trust to minimize “burn-out” by the settlor’s preferred caregiver(s). Commonly, the duties of caring for incapacitated loved ones usually fall on one person (a daughter or son) who has her or his own life, career, and family. When suddenly faced with additional responsibilities for caring for an incapacitated loved one, such family caregivers often are overwhelmed and suffer “burn-out.” Over-burdened caregivers may become resentful, or even neglectful, abusive, or exploitive. The Expressive, Protective™ Trust can minimize this problem.

Initially, settlors and planners could simply provide that a successor trustee or attorney-in-fact pay reasonable compensation to themselves, to caregivers, and other types of fiduciaries. This may incentivize such fiduciaries to provide more professional services that benefit all parties.

Planners could go further and develop a plan of care for caregivers that envision things like planned respite, written caregiver contracts for family caregivers, clear directions for substitute caregivers should the primary caregiver become temporarily incapacitated or unavailable, directions for mutually enjoyable outings for both caregivers and their charges, and even directions for caregivers to interact with their incapacitated charge in personal rewarding ways that encourage mutual give and take and enhance discovery of their charge’s legacy. Again, the planner’s imagination provides the limit to designing such a care plan.

VII. Conclusion

Under the prevailing trust statutes, old and existing “living” trusts that are not structured as Expressive, Protective™ Trusts could be modified or decanted into new trust instruments embodying the features of the Expressive, Protective™ Trust. Such estate planning instruments, with modest changes, can serve as comprehensive incapacity plans, conservatorship substitutes as well as private, will substitutes. For new prospective settlors, with modest changes to the structure and terminology of standard living trust forms along with practice changes designed to discover and craft expressive statements of client intent, estate planners can design new Expressive, Protective™ Trusts that are more in line with settlor’s actual and probable intent that revocable

trusts serve a dual purpose of being will substitutes and conservatorship substitutes. Such newly designed Trust instruments will serve settlors and beneficiaries more effectively and provide comprehensive incapacity plans in a more meaningful and sustainable manner.