

## Title

Could it be that the Uniform Trust Code would effectively immunize the trustee of a revocable inter vivos trust from liability for his breaches of trust?

## Summary

Section 603 of the Uniform Trust Code provides that while a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries, such as the equitable remaindermen, are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. Nothing new here: This is merely a codification of traditional trust doctrine. Section 813(c) of the UTC partially codifies the common law/equitable duty of a trustee to account to the remaindermen. What about the trustee's duty to account to the remainderman for his actions during the period when the now-deceased settlor had capacity? Could it be that there is no longer such a duty in some of the states that have enacted the UTC? If that is the case, presumably a trustee could with impunity secretly self-deal in breach of trust during the settlor's lifetime, as the remaindermen would be deprived down the road of the critical information pertaining to the self-dealing that they would need to effectively protect their equitable property interests. In other words, their right of action against the trustee would be illusory.

The Supreme Court of Iowa was asked to "interpret" the "interplay" of the two comparable sections of the Iowa Trust Code, which, though it has a UTC flavor to it, was developed "from scratch." On January 25, 2013, the Court handed down its decision in *In the Matter of Trust # T-1 of Mary Faye Trimble*, 826 N.W.2d 474 (2013): "We hold the accounting issue is governed by section 633A.3103 [Iowa], under which the settlor alone is entitled to an accounting for the period the trust is revocable, even if the beneficiary's request for the accounting is made after the trust becomes irrevocable." This holding is a radical departure from traditional trust law doctrine. Just as the trustee who is to receive a pour-over from a probate estate traditionally has been entitled to a full accounting from the executor, so also have the remaindermen of a terminated revocable trust been entitled to a full accounting from the trustee upon the death of its settlor. How could this have happened? It happened, I suggest, because the Court was not looking in the right places for guidance. Instead of turning to general principles of equity, it turned to the law: "Because there are two reasonable ways to read the operative statutory language, we turn to the canons of statutory construction." The problem is that a trust code on this side of the Atlantic, unlike a civil law code, is not self-contained. It is essentially just a grab bag of assorted tweaks to the vast edifice that Prof. Maitland referred to as Equity, with a capital "E."

Finally, so much for the proposition that codification of aspects of the law of trusts would foster uniformity and clarity across the jurisdictions: Apparently, Florida and California would afford the remaindermen a right to such an accounting; Missouri and Louisiana, on the other hand, apparently would not.

The duties of the trustee of a revocable inter vivos trust are covered generally in §8.11 of *Loring and Rounds: A Trustee's Handbook* (2014), which is reproduced in its entirety below.

## **§8.11 What Are the Duties of the Trustee of a Revocable Inter Vivos Trust? [Charles E. Rounds, Jr., et. al., *Loring and Rounds: A Trustee's Handbook* §8.11(2014), pages 1041-1048].**

*Neither the First nor the Second Restatement of Trusts...have been as clear as one might have hoped in articulating the effect of a power of revocation on trust administration. One might speculate that one of the reasons for this deficiency was the need to paper over the dirty little secret that, in terms of trust theory, a revocable trust has always had but a tenuous claim to being a real trust.*<sup>1</sup>

**A revocable inter vivos trust is a true trust.** For purposes of this section of the handbook, the term “powerholder” is shorthand for holder of a *general inter vivos power of appointment/revocation*, whether or not the holder is also the settlor of the trust. In the United States, it is now settled law that a revocable inter vivos trust legally is a trust, not an agency.<sup>2</sup> Nor is it merely an invalid will that has been formatted to look like a trust.<sup>3</sup> It is a real trust. That means that the legal title to the subject property actually is in the trustee. Under classic principles of property and trust law, the “other” beneficiaries, as well as the principal beneficiary, *i.e.*, the powerholder, have equitable property interests.<sup>4</sup> The equitable property interests of the “others,” though, are hypercontingent.<sup>5</sup>

**But a revocable inter vivos trust has agency attributes.** In the United States, however, it also is now virtually settled law that the trustee is the constructive agent of the powerholder, be the powerholder the settlor or someone else,<sup>6</sup> provided and as long as the powerholder is of full

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<sup>1</sup>3 Scott & Ascher §16.5 (citing to the text in footnote 3). *See also*, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>2</sup>National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Estate of West v. West, 331 Utah Adv. Rep. 11, 948 P.2d 351, 351 n.1 (1997) (noting that while revocable trusts may be a “legal fiction,” they are “well entrenched in the law, useful, and accepted”). *See also* 3 Scott & Ascher §16.5 (suggesting that “revocable trusts are here to stay, it seems”). *See generally* §9.9.2 of this handbook (discussing the differences between a trust and an agency).

<sup>3</sup>*See generally* 3 Scott & Ascher §16.5 (noting that as late as the middle of the twentieth century, “there remained serious questions whether, in certain circumstances, a revocable trust was not invalid, under the statute of wills, as a ‘testamentary transfer’”).

<sup>4</sup>*See generally* 3 Scott & Ascher §16.5 (noting that “one of the primary theoretical steps” in validating the revocable trust was the proposition that persons other than the holder of the power of revocation have property “interests”).

<sup>5</sup>National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944).

<sup>6</sup>*See generally* 3 Scott & Ascher §16.6 (Effect of Presently Exercisable General Power of Appointment or Right of Withdrawal).

age and legal capacity.<sup>7</sup> No fiduciary duties are owed by the trustee to the other beneficiaries under such circumstances.<sup>1</sup> They are owed only to the powerholder.<sup>2</sup>

That power of revocation then is the functional equivalent of full ownership,<sup>8</sup> unless the power is held only in a fiduciary capacity, which is unlikely.<sup>9</sup> A transfer of property to the trustee of a revocable inter vivos trust, therefore, is constructively a transfer directly to the holder of the right of revocation.<sup>10</sup> It is no wonder, then, that more and more courts are deeming the “other” equitable interests, *i.e.*, the interests of those other than the powerholder, not to be interests in property at all, just expectancies.<sup>11</sup> Accordingly, while the powerholder is of full age and legal capacity, the trustee is constructively subject to the laws of agency.<sup>12</sup> When the powerholder ceases to have the requisite mental capacity, the constructive agency terminates.<sup>13</sup> Until such time, the trustee will generally have no duty to communicate with the “other” beneficiaries, and most likely will have a fiduciary duty to the powerholder not to.<sup>14</sup> Until such time, the powerholder may remove, replace, or add trustees without grounds and generally without court involvement.<sup>15</sup> The powerholder’s informed consent to the trustee’s accountings, or even to a breach of trust on the part of the trustee, will generally bind the other beneficiaries, including the takers in default.<sup>16</sup>

**When two or more persons simultaneously hold a general inter vivos power of appointment.** The prudent trustee will think long and hard before serving under a trust that has

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<sup>7</sup>Uniform Trust Code §603(a), available on the Internet at <<http://www.law.upenn.edu/library/archives>>, 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. *See generally* 2 Scott on Trusts §216.2; *Canter v. Comm’r*, 423 Mass. 425, 668 N.E.2d 783 (1996). Retention of control is not without consequences for the settlor: If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner. Uniform Trust Code §1011(d) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>1</sup> *See, e.g.*, *Fulp v. Gilliland*, 998 N.E.2d 204 (Ind. 2013) (the court musing that to hold that a trustee of a revocable trust also owes duties to the remainder beneficiaries “would create conflicting rights and duties for trustees and essentially render revocable trusts irrevocable”).

<sup>2</sup> *See Fulp v. Gilliland*, 998 N.E.2d 204 (Ind. 2013).

<sup>8</sup>*See generally* 3 Scott & Ascher §16.5 (Effect of Power of Revocation).

<sup>9</sup>*See generally* 3 Scott & Ascher §16.5.

<sup>10</sup>*See Brown v. Miller*, 2 So. 3d 321 (Fla. Ct. App. 2009).

<sup>11</sup>*Canter v. Commissioner of Pub. Welfare*, 423 Mass. 425, 429–431, 668 N.E.2d 783, 786–787 (1996). *See also* Restatement (Third) of Trusts §40, Reporter’s Notes on §40.

<sup>12</sup>1 Scott & Ascher §2.3.4 (noting that when a single person is both agent of, and trustee for, another, it is ordinarily the agency relationship that predominates, with the principles of agency, rather than those of trusts, applying).

<sup>13</sup>Restatement (Third) of Trusts §74 cmt. a(2).

<sup>14</sup>*See generally* 3 Scott & Ascher §16.5. *See also* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006). *See, however*, Turney P. Berry, David M. English, & Dana G. Fitzsimons, *Longmeyer Exposes (or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust*, 35 ACTEC Journal 125 (2009) (referring to *J. P. Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697 (Ky. 2009)).

<sup>15</sup>3 Scott & Ascher §16.5.

<sup>16</sup>*See generally* 3 Scott & Ascher §16.5; Uniform Probate Code §1-108 (acts by holder of general inter vivos power of appointment); §7.1.3 of this handbook (consenting to or ratifying a breach of trust).

two or more persons simultaneously holding rights of revocation (or general inter vivos powers).<sup>17</sup> Such a situation brings with it property and tax problems too intricate to be covered by a handbook of this scope and size.<sup>18</sup> The Uniform Trust Code, however, does provide that if a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.<sup>19</sup>

**When the powerholder relies on the trustee's discretion.** If the powerholder in practice defers to the trustee's discretion in matters pertaining to the administration and investment of the trust property, then the trustee ought to be held to the standards of loyalty and care of an agent-fiduciary.<sup>20</sup> As to entrusted bank deposits, for example, the trustee should see to it that FDIC insurance limits are not exceeded. In this regard, the reader is referred to the FDIC Guide to Calculating Deposit Insurance Coverage for Revocable and Irrevocable trusts.<sup>21</sup>

Even when the trustee is authorized by the settlor to deviate from the terms of the trust or to contravene standard principles of trust law, the trustee in exercising this type of empowerment must do so prudently and in good faith.<sup>22</sup>

**When the trustee is permitted to perform ministerial functions only.** On the other hand, if the powerholder expects the trustee to perform only ministerial functions, then the trustee ought to be held to a less rigorous standard.<sup>23</sup> Nevertheless, he remains a fiduciary. "Thus, if the settlor of a revocable trust simply directs the trustee to sell certain real property held in the trust, the trustee must, for example, act with prudence in arranging the price and other terms of the sale."<sup>24</sup> One consequence of this constructive agency is that the settlor of a revocable inter vivos trust (or the holder of an inter vivos power of appointment such as a right of withdrawal)<sup>25</sup> calls the

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<sup>17</sup>See, however, §9.25 of this handbook (the joint trust).

<sup>18</sup>Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (suggesting that no important reason exists for the creation of a joint trust in a non-community property state).

<sup>19</sup>Uniform Trust Code §603(c) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>20</sup>See, e.g., Wisconsin Acad. of Sci., Arts & Letters v. First Wis. Nat'l Bank of Madison, 142 Wis. 2d 750, 419 N.W.2d 301 (1987) (finding that a corporate trustee of a revocable trust had a duty of vigilance to advise settlor that the trust instrument as drafted would not serve to carry out her donative intent); Cohen v. First Camden Nat'l Bank & Trust (Matter of McCoy), 51 N.J. 11, 18, 237 A.2d 257, 261 (1967) (a trustee of a revocable trust may not enter into a self-dealing transaction with the trust, in this case by accepting a collateral assignment from the settlor-beneficiary of trust assets, unless the settlor-beneficiary consented to the transaction with full knowledge of all relevant facts and complete awareness of the resultant divided loyalty and its possible consequences). See generally Chapter 1 of this handbook (discussing the agent as fiduciary).

<sup>21</sup><[http://www.fdic.gov/deposit/deposits/di\\_trust\\_accounts/index.html](http://www.fdic.gov/deposit/deposits/di_trust_accounts/index.html)>.

<sup>22</sup>See, e.g., Namik v. Wachovia Bank of Ga., 612 S.E.2d 270 (Ga. 2005) (holding the trustee liable for the adverse estate tax consequences occasioned by its breach of the duty to exercise judgment and due care, namely, by failing to follow the directions of the settlor, a nonresident alien, to invest the trust property in U.S. government issues).

<sup>23</sup>See, e.g., McGinley v. Bank of Am., N.A., 109 P.3d 1146 (Kan. 2005) (where trustee was held harmless for retaining Enron stock in accordance with the written directions of the settlor).

<sup>24</sup>Restatement (Third) of Trusts §74 cmt. b.

<sup>25</sup>Uniform Trust Code §603(d) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

shots.<sup>26</sup> The settlor (or non-settlor powerholder), for example, may give a binding consent to a trustee account that has the effect of ratifying a breach of trust, provided the consent is informed.<sup>27</sup> As noted, he or she may remove, replace, or add trustees, though there is no express authority to do so.<sup>28</sup> He or she even may override the express terms of the governing instrument<sup>29</sup> to include subverting the interests of the contingent beneficiaries, *i.e.*, the takers in default of the power's exercise.<sup>30</sup> After all, inherent in the right to revoke the trust is the lesser right to modify its terms.<sup>31</sup>

**Exculpation of the directed trustee.** Nowadays, the trustee is expected to take directions from a competent settlor who has retained a right to revoke<sup>32</sup> (or from the third party who holds a general inter vivos power of appointment);<sup>33</sup> and the trustee, in most cases,<sup>34</sup> will be held harmless for so doing.<sup>35</sup> The responsibility, however, falls on the shoulders of the trustee to ascertain the powerholder's capacity. "In the absence of reason for the trustee to believe that the settlor or donee lacks the requisite capacity,...[however,]...the trustee is entitled to proceed on the assumption that the settlor or donee possesses that capacity."<sup>36</sup>

**Generally it is the powerholder who is entitled to be notified when the trustee intends to take an important action, such as resign.** The Uniform Trust Code provides as follows: "In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control, resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries."<sup>37</sup> Other situations in which the holder of the right of revocation stands in the shoes of others are gathered together in Section 1-108 of the Uniform Probate Code:

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<sup>26</sup>*See, e.g.,* McGinley v. Bank of Am., 109 P.3d 1146 (Kan. Sup. Ct. 2005) (though 77 percent of portfolio of revocable inter vivos trust had at one time been comprised of Enron stock, the trustee was held not liable for losses occasioned by the Enron stock's subsequent substantial loss of value, the trustee having been directed by the settlor to retain the Enron stock). *See generally* 3 Scott & Ascher §16.5 (Effect of Power of Revocation).

<sup>27</sup>Restatement (Third) of Trusts §74 cmt. d. *See generally* §7.1.1 of this handbook (defenses to allegations that the trustee breached the duty of loyalty) (containing a discussion of the concept of informed consent).

<sup>28</sup>Restatement (Third) of Trusts §74 cmt. e.

<sup>29</sup>Restatement (Third) of Trusts §74.

<sup>30</sup>*See, e.g.,* Restatement (Third) of Trusts §74(1)(b) (suggesting that the rights of the beneficiaries of a revocable trust are exercisable by and subject to the control of the settlor).

<sup>31</sup>Restatement (Third) of Trusts §74 cmt. d.

<sup>32</sup>*See generally* 3 Scott & Ascher §16.5 (Effect of Power of Revocation).

<sup>33</sup>Uniform Trust Code §603(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>); Restatement (Third) of Trusts §74 (suggesting that the trustee of a revocable trust has a duty to comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee's normal duties, if the direction is communicated to the trustee in writing in a manner by which the settlor could properly amend or revoke the trust). The trustee has a similar duty to honor the directions of the donee of a presently exercisable general power of appointment or power of withdrawal, provided the donee has capacity to act. *See* Restatement (Third) of Trusts §74(2).

<sup>34</sup>*See generally* §6.1.4 of this handbook (duty to give personal attention (not to delegate)).

<sup>35</sup>Restatement (Third) of Trusts §74(1)(a)(ii).

<sup>36</sup>Restatement (Third) of Trusts §74a(2).

<sup>37</sup>Uniform Trust Code §707 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). *See also* Restatement (Third) of Trusts §36 cmt. b.

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

**Incapacitation of powerholder.** Once the powerholder becomes incapacitated, the trustee's fiduciary duties and liabilities ratchet up, particularly with respect to distributions.<sup>38</sup> An outright distribution to an incapacitated powerholder could well constitute misdelivery<sup>39</sup> for which the trustee could be held personally liable even after the powerholder's death.<sup>40</sup>

Once a settlor becomes incapacitated, the trustee is obligated to accommodate the equitable interests of the other beneficiaries as well as the powerholder's,<sup>41</sup> such as by providing them with relevant information about the trust, unless the incapacity is expected to be short term.<sup>42</sup> The prudent trustee, therefore, will endeavor to mitigate the risk of having to cross swords<sup>43</sup> with the other beneficiaries while the powerholder is still alive (or after the settlor's death<sup>44</sup>) by having a questionable direction of the powerholder put into the format of a written amendment<sup>45</sup> (or written partial exercise of the general power<sup>46</sup>). If the trustee determines that a particular direction

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<sup>38</sup>4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Instruments).

<sup>39</sup>See generally 4 Scott & Ascher §24.31 (Liability for Incorrect Distributions).

<sup>40</sup>4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Instruments).

<sup>41</sup>Uniform Trust Code §603(b) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>); Restatement (Third) of Trusts §74, cmt. a(2).

<sup>42</sup>Restatement (Third) of Trusts §74, Reporter's Notes (Comments a(2) and (e)). See also Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>43</sup>“As a practical matter, . . . in the event of a surcharge action the trustee . . . [runs] . . . a risk in relying on unwritten evidence to support a defense based on settlor direction or authorization.” Restatement (Third) of Trusts §74 cmt. c.

<sup>44</sup>See, e.g., *Siegel v. Novak*, 920 So. 2d 89 (Fla. 2006) (the court granting standing to successor beneficiaries after the settlor's death to challenge distributions made before the settlor's death by the corporate trustee of a self-settled revocable inter vivos trust). But see *In re Trust of Malasky*, 290 App. Div. 2d 631, 736 N.Y.S. 2d 151 (2002) (successor beneficiaries denied standing to object to a post-death accounting of a revocable trust, an accounting that covered a period when the settlor-trustee was alive, had capacity, and possessed a personal right of revocation). *Siegel* perhaps can be distinguished from *Malasky* in that in *Siegel* the settlor had not been serving as a trustee.

<sup>45</sup>Uniform Trust Code §808 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>46</sup>Cf. Restatement (Third) of Trusts §74(1)(a)(i) (providing that if the settlor of a revocable trust issues to the trustee a direction that is contrary to the terms of the trust or the trustee's normal fiduciary duties, the trustee has a duty to follow it, provided the direction is communicated in a manner by which the settlor could properly amend or revoke the trust).

needs to be in writing, he has a fiduciary duty promptly to so notify the powerholder.<sup>47</sup> For a writing to constitute an enduring amendment, *i.e.*, an amendment that survives the death or incapacity of the powerholder, its terms may not be unlawful or violate public policy.<sup>48</sup>

For a discussion of whether the powerholder's court-appointed guardian, court-appointed conservator, and/or the holder of the powerholder's durable power of attorney would have revocation, amendment, or withdrawal authority, the reader is referred to Section 8.2.2.2 of this handbook (the revocable trust). When such authority exists, it is exercised in a fiduciary capacity.<sup>49</sup>

**Death of powerholder.** *Notice to qualified beneficiaries upon settlor's death of existence of trust and other such critical details.* The Uniform Trust Code<sup>50</sup> provides that within sixty days after the trustee acquires knowledge of the death of the settlor of a revocable trust, the trustee shall inform the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to trustee reports or accountings.<sup>51</sup>

*Applying antilapse principles to the revocable trust.* Section 2-707 of the Uniform Probate Code establishes an antilapse-type rule for revocable trusts. *In the absence of a contrary intention in the governing instrument*, upon the death of the settlor, the then-living issue of the designated successor beneficiary who has failed to survive the settlor shall take by right of representation what the beneficiary would have taken had he or she survived the settlor. This is in lieu of the imposition of a resulting trust or distribution to the beneficiary's estate.<sup>52</sup>

*The revocable inter vivos trust as will substitute.* A trust under which the settlor has reserved a right of revocation is a type of will substitute.<sup>53</sup> Thus, it is not surprising that the trend of the default law is in the direction of treating, at least for certain purposes, the settlor as if he or she were a testator/testatrix and the subject property as if it were probate property once the settlor dies, this even though title to the trust property does not transfer to the deceased settlor's executor/executrix, administrator/administratrix, or personal representative, as the case may be.<sup>54</sup> These purposes include the following:

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<sup>47</sup>Restatement (Third) of Trusts §74 cmt. c.

<sup>48</sup>Restatement (Third) of Trusts §74 cmt. i. *See generally* §9.24 of this handbook (the incentive trust (and the public policy considerations); marriage restraints).

<sup>49</sup>Restatement (Third) of Trusts §74, cmt. a(2).

<sup>50</sup>Uniform Trust Code §813(b)(3) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>51</sup>Upon the death of the settlor of a revocable inter vivos trust, the trustee will want to ascertain the applicable statute of limitations governing creditor claims, as well as actions by those seeking to defeat the trust. *See, e.g.*, Estate of Pew, 440 Pa. Super. 195, 248, 655 A.2d 521, 548 (1994). *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>52</sup>For a case where distribution was to the estate of the beneficiary of a revocable trust who had predeceased the settlor, *see* First Nat'l Bank v. Tenney, 165 Ohio St. 513, 138 N.E.2d 15 (1956). *See also*, Randall v. Bank of Am., 48 Cal. App. 2d 249, 119 P.2d 754 (1941).

<sup>53</sup>*See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>54</sup>*See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

- Satisfaction of claims against the probate estate, to include certain statutory allowances;<sup>55</sup>
- Application of the 120-hour requirement;<sup>56</sup>
- Application of the harmless-error rule;<sup>57</sup>
- Revocation or amendment by a subsequent will;<sup>58</sup>
- Revocation by marriage;<sup>59</sup>
- Ademption by extinction;<sup>60</sup>
- Antilapse;<sup>61</sup>
- Invalidity due to incapacity or wrongdoing;<sup>62</sup>
- Application of construction, reformation, and modification doctrines generally;<sup>63</sup>
- Application of rules of construction governing class gifts specifically;<sup>64</sup> and
- Application of social restrictions on freedom of disposition.<sup>65</sup>

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<sup>55</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. b. *See generally* §§5.3.3.1(b) of this handbook (the postmortem creditor), 5.3.4.1 of this handbook (spousal rights in common law states), 8.9.3 of this handbook (tax-sensitive powers).

<sup>56</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. c. “The original Uniform Probate Code introduced a rule of construction that devisees must survive the decedent by 120 hours or more, but the terms of the statute applied only to transfers by will. *See* Original UPC §2-601.” Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. c. “The Revised Uniform Simultaneous Death Act and the Revised Uniform Probate Code expanded the 120-hour requirement of survival to all donative documents (wills and inter vivos donative documents, including will substitutes) that require the donee to survive the donor.” Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. c. *See generally* §8.15.56 of this handbook (120-hour survival requirement [the trust application]).

<sup>57</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. d. The harmless-error rule applicable to wills is as follows: “A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.” Restatement (Third) of Property (Wills and Other Donative Transfers) §3.3. *See generally* §8.15.53 of this handbook (harmless-error rule [the trust application]).

<sup>58</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. e. *See also* §8.2.2.2 of this handbook (the revocable trust).

<sup>59</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. f. *See generally* §5.3.4.1 of this handbook (spousal rights in common law states rights of spouses of trust beneficiaries [divorce and separation]); Uniform Probate Code §2-804 (revocation of non probate transfers by divorce); *see also* Restatement (Third) of Property (Wills and Other Donative Transfers) §4.1 cmt., cmt. p.

<sup>60</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. f. *See generally* §8.15.54 of this handbook (ademption by extinction [the trust application]).

<sup>61</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. f. *See generally* §8.15.55 of this handbook (antilapse [the trust application]).

<sup>62</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. g.

<sup>63</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. h.

<sup>64</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. i. *See generally* §5.2 of this handbook (class designation: “children,” “issue,” “heirs,” and “relatives” (some rules of construction)).



For a discussion of the applicability of certain rules governing testamentary dispositions to self-settled revocable trusts, the reader is referred to Section 7.2 of the Restatement (Third) of Property (Wills and Other Donative Transfers), particularly the accompanying commentary and Reporter's Notes.<sup>66</sup> "These rules...[also]...inform the federal common law of will substitutes under the Employee Retirement Income Security Act (ERISA)..."<sup>67</sup>

*Mortmain principles applied to the will substitute.* To the extent any statutory restrictions on one's ability to devise to a charity still remain in place, a topic we touch on in Section 8.15.4 of this handbook, on policy grounds they should probably apply as well to dispositions by will substitute, particularly the revocable inter vivos trust.<sup>68</sup> In England, the Georgian Statute of Mortmain, which was enacted by Parliament in 1736, lumped testamentary dispositions and revocable inter vivos dispositions together in imposing restrictions on one's ability to make dispositions for charitable purposes.<sup>69</sup>

**Liability of trustee of revocable trust for breaches of trust committed before the powerholder died.** Upon the death of the powerholder, either his or her personal representative or the successor trust beneficiaries would have standing to bring an action against the trustee for any breaches of duty that the trustee owed *to the powerholder* during the powerholder's lifetime.<sup>70</sup> The successor beneficiaries, however, would have standing to bring an action against the trustee only to the extent their equitable property interests were adversely affected by the trustee's maladministration.<sup>71</sup> That having been said, in Iowa, the trustee of a self-settled revocable trust has no duty to account to the successor beneficiaries for the period when the deceased settlor was of full age and legal capacity, thus rendering such a right of action illusory, at least as a practical matter.<sup>3</sup> **Some non-U.S. trust jurisdictions may not recognize the revocable trust.** In closing, a note of caution: Not all jurisdictions have been receptive to the concept of a "revocable" inter vivos trust:

For example, trusts with assets and objects totally under the control of the settlor until death or incapacity may well be held invalid in the common-law jurisdictions of England, New Zealand, Australia, and Canada (omitting Quebec, as a civil law province)...Courts in those countries, like early cases in this country...may conclude that no trust can come into existence until such extensive settlor control is removed, characterizing the arrangement as "testamentary" or as an agency rather than a trust relationship.<sup>72</sup>

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<sup>65</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. j.

<sup>66</sup>See also, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>67</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. k.

<sup>68</sup>See generally 5 Scott & Ascher §37.2.6.6 (The Revocable Inter Vivos Charitable Trust).

<sup>69</sup>See Stat. 9 Geo. II, c. 36 (1736).

<sup>70</sup>See, e.g., *Estate of William A. Giralдин v. Christine Giralдин*, 55 Cal. 4th 1058, 290 P.3d 199 (2012).

<sup>71</sup>See, e.g., *Estate of William A. Giralдин v. Christine Giralдин*, 55 Cal. 4th 1058, 290 P.3d 199 (2012).

<sup>3</sup> See *In re Trust # T-1 of Mary Faye Trimble*, 826 N.W.2d 474 (Iowa 2013).

<sup>72</sup>Restatement (Third) of Trusts §74, Reporter's Notes. See generally §9.9.2 of this handbook (discussing the differences between a trust and an agency).



