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SHERLOCK HOLMES AND THE PROBLEM OF THE DEAD HAND: THE MODIFICATION AND TERMINATION OF “IRREVOCABLE” TRUSTS

RICHARD C. AUSNESS*

I. INTRODUCTION

I must confess that Sherlock Holmes will not appear in this Article.¹ The use of the eminent detective’s name in the title is nothing more than an underhanded attempt on my part to induce potential readers to test the murky waters of American trust law. However, unlike Mr. Holmes, the “Dead Hand” will appear with some frequency, principally in the form of long-dead ancestors who hope to continue exercising control over trust property at the expense of their living descendants.

In short, this Article is about the modification and termination of so-called “irrevocable” trusts. A trust may be made irrevocable at the time of its creation or it may become so at a later time. A testamentary trust is one that is embodied in a will and becomes effective at the testator’s death. Since the testator will be dead by the time the trust becomes effective, he² will not be in a position to modify

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¹ This is not to say that the famous sleuth was unfamiliar with trusts and estates matters. Some of his most celebrated cases involved inheritance and other donative transfers of one sort or another. See Stephen R. Alton, *The Game Is Afoot!: The Significance of Donative Transfers in the Sherlock Holmes Canon*, 46 REAL PROP. TR. & EST. L.J. 125 (2011).

² Of course, I realize that settlors, testators, beneficiaries, and trustees are female, as well as male. However, the constant use of “he, she or it” and similar phrases would make for very awkward writing. Consequently, and with all due respect to the female half of the human species, I have adopted the traditional, and possibly outdated, convention of using “his” or “him” to refer include not only members of the opposite sex, as well as corporate fiduciaries who, unlike ships, are not affiliated with any particular gender.

or revoke it.³ For the same reason, a revocable trust will become irrevocable when the settlor dies⁴ or when the power to revoke is released. Finally, an *inter vivos* trust may be irrevocable when it is first created if the settlor disclaims the right to revoke or modify the trust.⁵ Although these types of trusts are irrevocable as far as the settlor is concerned, they can sometimes be modified or terminated by others. This Article will examine the various ways in which irrevocable trusts can be modified or terminated. It will also consider the potential conflicts that may arise when beneficiaries desire to terminate the trust prematurely or change its terms in some significant way.

Part II analyzes the traditional rules regarding the modification and termination of irrevocable trusts. In most cases, judicial approval is required. The discussion of termination focuses on the *Clafin* Doctrine, which is widely followed in the United States.⁶ According to this doctrine, a court will not authorize termination if a material purpose of the trust has not been accomplished.⁷ This requirement effectively prevents discretionary, spendthrift, and support trusts from being terminated, as well as those which postpone vesting or distribution until the beneficiaries reach a certain age.⁸ On the other hand, modification of the administrative provisions of a trust may be permitted under the equitable deviation doctrine if unforeseen circumstances threaten to defeat or substantially impair the accomplishment of trust purposes.⁹

³ See Tara M. Niendorf, *Save the Wealth! Trust Decanting and Oklahoma*, 66 OKLA. L. REV. 615, 620 (2014); Charles Epps Ipock, *A Judicial and Economic Analysis of Attorney's Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries*, 43 ST. MARY'S L.J. 855, 863 (2012).

⁴ See Philip J. Ruce, *The Trustee and the Spendthrift: The Argument Against Small Trust Termination*, 48 GONZ. L. REV. 163, 175 (2012-13).

⁵ See Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 270 (1999); Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925, 927 (2011); Samuel R. Scarcello, *Transfer Taxes in Flux: A Comparison of Alternative Plans for GRAT Reform*, 107 NW. U.L. REV. 321, 323 n.7 (2012).

⁶ *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889). See Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 467 (2006) [hereinafter *Conditional Love*].

⁷ See, e.g., *Trabits v. First Nat'l Bank of Mobile*, 295 Ala. 85, 90, 323 So.2d 353, 357 (1975) (quoting RESTATEMENT (SECOND) OF TRUSTS § 337(2) (1959)); *Carnahan v. Johnson*, 711 N.E.2d 1093, 1097 (Ohio Ct. App. 1998) (citing *In re Trust of Grant*, 5th Dist. Stark No. CA-6122, (Sept. 26, 1984) (unreported); *Closset v. Burtchaell*, 112 Or. 585, 597, 230 P. 554, 558 (1924); *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307, 311-12 (Tex. App. 2003); *Frost Nat'l Bank of San Antonio v. Newton*, 554 S.W.2d 149, 154 (Tex. 1977); *Bussell v. Wright*, 133 Wis. 445, 113 N.W. 644, 646-47 (1907).

⁸ See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1328 (2002-03).

⁹ *In re Stephen L. Chapman Irrevocable Trust Agreement*, 953 N.E.2d 573, 580 (Ind. Ct. App. 2011).

In addition, a few courts have extended the equitable deviation doctrine to permit modification of a trust's distributive provisions.¹⁰ Nevertheless, it is still fairly difficult to modify or terminate a trust under the traditional regime.

Part III examines various provisions of the Uniform Trust Code (the "Code") and the Restatement (Third) of Trusts (the "Restatement") that loosen some of the traditional restrictions on trust modification and termination. For example, the Code permits a court to terminate a trust if, due to unforeseen circumstances, termination would further the purposes of the trust.¹¹ The Restatement goes even further, allowing a court to disregard the material purpose requirement if it determines that the reasons for termination outweigh the material purpose of the trust.¹² The Code and the Restatement also relax some of the traditional rules on modification. For example, the Code declares that a court may modify a trust's distributive provisions when necessary to further its purposes.¹³ In addition, the Code permits a court to modify a trust's administrative provisions without regard to changed circumstances if it concludes that retaining the original trust provisions would be impracticable, wasteful, or would impair administration of the trust.¹⁴ The Restatement also relaxes the equitable deviation doctrine's material purpose requirement by allowing a court to modify a trust if it finds that the benefits of the proposed modification outweigh the material purposes of the trust.¹⁵

Part IV describes how the settlor can authorize modification or termination of the trust in the trust instrument itself rather than relying on the courts. One alternative is to give the trustee the power to terminate or modify the trust.¹⁶ Another popular technique is "decanting," which involves empowering the trustee to transfer trust property to another trust.¹⁷ Because the second trust may have different administrative and distributive provisions than the original trust, decanting is a backhanded method of modifying a trust.¹⁸ A large number of states have now enacted legislation to allow

¹⁰ See *Petition of Wolcott*, 95 N.H. 23, 56 A.2d 641 (1948).

¹¹ UNIF. TRUST CODE § 412(a) (2013).

¹² RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003).

¹³ UNIF. TRUST CODE § 412(a).

¹⁴ *Id.* § 412(b).

¹⁵ RESTATEMENT (THIRD) OF TRUSTS § 65(2).

¹⁶ UNIF. TRUST CODE § 808(c) (2013).

¹⁷ See S. Alan Medlin, *The South Carolina Probate Code Patched and Refurbished: Version 2013*, 6 EST. PLAN. & CMTY. PROP. L. J. 81, 94 (2013-14).

¹⁸ Melissa J. Willms, *Decanting Trusts: Irrevocable, Not Unchangeable*, 6 EST. PLAN. & CMTY. PROP. L. J. 35, 37 (2013-14).

decanting.¹⁹ Finally, the settlor can appoint a trust protector and vest him with the power to modify or terminate the trust.²⁰

Finally, Part V discusses the potential conflicts between the interests of deceased settlors and living beneficiaries, an issue that often arises when the beneficiaries seek to modify or terminate the trust. Recently, this problem has become more acute as a growing number of states have abolished or modified the traditional Rule Against Perpetuities in a way that permits settlors to create perpetual or “dynasty” trusts that may endure for many generations.²¹ In an attempt to strike a reasonable balance between the rights of the deceased settlor (the dead hand) and those of the living beneficiaries, I propose that the first generation of trust beneficiaries (typically the settlor’s children) continue to be subject to the usual requirements for modifying or terminating a trust. This would ensure that the settlor’s intent is respected for at least one generation. However, second- and subsequent-generation beneficiaries – where permitted by state law – could modify or terminate the trust without court approval.

II. TRADITIONAL RULES CONCERNING THE TERMINATION AND MODIFICATION OF IRREVOCABLE TRUSTS

A. Termination

Under the traditional rules, a trust may be terminated in various ways.²² For example, if it is expressly limited in duration, it will terminate at the expiration date.²³ In addition, a trust will terminate when all of the trust purposes have been accomplished.²⁴ A trust will also terminate by merger if the beneficiary also acquires legal title to the trust property.²⁵ Moreover, a trust may terminate if

¹⁹ See Niendorf, *supra* note 3, at 622-23.

²⁰ Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 270 (2010).

²¹ Diana S.C. Zeydel, *Developing Law on Changing Irrevocable Trusts: Staying Out of the Danger Zone*, 47 REAL PROP. TR. & EST. L.J. 1, 2 (2012).

²² See *Chicago Title & Trust Co. v. Steinitz*, 288 Ill. App. 3d 926, 932, 681 N.E.2d 669, 674 (1997); *Hamel v. Hamel*, 296 Kan. 1060, 1068, 299 P.3d 278, 284 (2013).

²³ See *La Salle Nat’l Bank v. MacDonald*, 2 Ill.2d 581, 587, 119 N.E.2d 266, 269 (Ill. 1954).

²⁴ See *Brine v. Paine Webber, Jackson & Curtis, Inc.*, 745 F.2d 100, 104 (1st Cir. 1984); *Beach v. Oneida Nat’l Bank & Trust Co. of Cnt. N.Y.*, 206 F.Supp. 508, 511 (N.D.N.Y. 1961); *Clement v. Charlotte Hospital Ass’n, Inc.*, 137 So. 2d 615, 617 (Fla. Dist. Ct. App. 1962); *Matter of Estate of Stephan*, 566 N.E.2d 1084, 1086 (Ind. Ct. App. 1991); *Papale-Keefe v. Altomare*, 38 Mass. App. Ct. 308, 314, 647 N.E.2d 722, 726 (1995); *First Am. Nat’l Bank v. Cole*, 211 Tenn. 213, 222, 364 S.W.2d 875, 878 (1963); *Clayton v. Behle*, 565 P.2d 1132, 1133 (Utah 1977). A trust that is allowed to continue after its intended purposes have been accomplished is known as a “wasting trust.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446-47, 119 S.Ct. 755, 764 (1999); *Bennett v. Conrail Matched Savings Plan Admin. Comm.*, 168 F.3d 671, 679 n.7 (3d Cir. 1999).

²⁵ See *In re Saber*, 233 B.R. 547, 553 (Bankr. S.D. Fla. 1999).

the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.²⁶ Furthermore, a trust can be terminated if the settlor and all of the beneficiaries agree to it. Finally, a court may terminate a trust with the consent of all of the beneficiaries, provided that termination will not be contrary to a material purpose of the trust.²⁷

1. *Agreement by the Settlor and Beneficiaries*

A court can terminate a trust if the settlor and all of the beneficiaries (if they are *sui juris*) request judicial termination, even if the trustee objects and the trust purposes are not yet fully accomplished.²⁸ This rule applies even when the trust in question is a spendthrift trust.²⁹ Of course, this rule will not allow a court to terminate a trust when unborn or undetermined beneficiaries have not joined in the petition to terminate.³⁰ This exception is nicely illustrated in *DuPont v. Equitable Security Trust Co.*³¹

In 1929, Hallock DuPont created an irrevocable *inter vivos* trust in connection with a pending divorce from his wife, Elizabeth.³² The trust instrument was very complex, but essentially was intended to provide for Elizabeth and the settlor's two-year-old daughter, Eve.³³ However, Hallock also retained a reversion if Eve died without surviving issue.³⁴ Elizabeth remarried and died in 1942.³⁵ In 1954, Hallock and Eve informed the trustee that they were "revoking" the

²⁶ F. Ladson Boyle, *When It's Broke — Fix It: Reforming Irrevocable Trusts to Change Tax Consequences*, 53 TAX LAW 821, 824 (1999-2000).

²⁷ See *In re Estate of Harbaugh*, 231 Kan. 564, 569, 646 P.2d 498, 503 (1982); *Am. Nat'l Bank v. Miller*, 899 P.2d 1337, 1340-41 (Wyo. 1995).

²⁸ See *Peck v. Peck*, 133 So. 3d 587, 588-589 (Fla. Dist. Ct. App. 2014); *Preston v. City Nat'l Bank*, 294 So. 2d 11, 14 (Fla. Dist. Ct. App. 1974); *Botzum v. Havana Nat'l Bank*, 367 Ill. 539, 542, 12 N.E.2d 203, 205 (1937); *Ludlow's Trustee v. Ludlow*, 249 Ky. 396, 398, 60 S.W.2d 965, 966 (1933); *Mahan v. Mahan*, 320 Md. 262, 276, 577 A.2d 70, 77 (1990); *Hein v. Hein*, 214 Mich. App. 356, 359, 543 N.W.2d 19, 20 (1995); *In re Zinke's Trust*, 83 N.Y.S.2d 813, 814 (N.Y. Sup. Ct. 1948); *O'Brien v. Holden*, 104 Vt. 338, 347, 160 A. 192, 196 (1932); *Fowler v. Lanpher*, 193 Wash. 308, 318, 75 P.2d 132, 137 (1938); see also RESTATEMENT (SECOND) OF TRUSTS § 338(1) (1959); Boyle, *supra* note 26, at 823.

²⁹ See *Preston v. City Nat'l Bank*, 294 So. 2d 11, 14 (Fla. Dist. Ct. App. 1974); *Hein v. Hein*, 214 Mich. App. 356, 359, 543 N.W.2d 19, 20 (1995); *Musick v. Reynolds*, 798 S.W.2d 626, 629 (Tex. App. 1990) (citing *Sayers v. Baker*, 171 S.W.2d 547 (Tex. Civ. App. 1943)).

³⁰ See *Levy v. Crocker-Citizens Nat'l Bank*, 14 Cal.App.3d 102, 105, 94 Cal. Rptr. 1, 3 (1971); *Sawyer v. Sawyer*, 261 Iowa 112, 121, 152 N.W.2d 605, 611 (1967); *In re Kamerly's Estate*, 348 Pa. 225, 227, 35 A.2d 258, 259 (1944) (internal citations omitted); *In re Bowers' Trust Estate*, 346 Pa. 85, 87, 29 A.2d 519, 520 (1943); *In re Lewis' Estate*, 231 Pa. 60, 62, 79 A. 921, 922 (1911).

³¹ 35 Del. Ch. 261, 115 A.2d 482 (1955).

³² *Id.* at 262, 115 A.2d at 483.

³³ *Id.*

³⁴ *Id.* at 265, 115 A.2d at 485.

³⁵ *Id.* at 263, 115 A.2d at 484.

trust, alleging that they were the only remaining persons with an interest in the trust property.³⁶ When the trustee refused to return the trust corpus, Hallock and Eve sought judicial termination of the trust.³⁷ Unfortunately for the plaintiffs, the court appointed a guardian ad litem to represent the interests of Eve's minor children.³⁸ The guardian sided with the trustee, and opposed termination of the trust.³⁹

At issue was the nature of Eve's children in the trust. The trust instrument stated in considerable detail who would get the trust corpus if: (1) Eve predeceased Elizabeth, leaving lawful issue who survived Elizabeth, or (2) Eve predeceased Elizabeth, leaving lawful issue who did not survive Elizabeth.⁴⁰ What the trust instrument did not do was specify what would happen if Eve *survived* Elizabeth and died, leaving lawful issue.⁴¹ This led the court to invoke the "gift by implication" doctrine,⁴² concluding that the trust's overall scheme of distribution indicated that the settlor wanted to provide for his grandchildren if Eve outlived Elizabeth.⁴³ Accordingly, the court ruled that a remainder in favor of Eve's children was implied in the trust instrument.⁴⁴ Since Eve's children did not join in the plaintiffs' request to terminate the trust, the court refused to terminate the trust since essential parties had withheld their consent.⁴⁵

2. *Termination by Beneficiaries without the Settlor's Consent*

In some cases, the beneficiaries of a trust can compel its termination when the settlor is dead and, thus, unable to consent to the trust's termination. In theory, it is not necessary for the beneficiaries to obtain a court decree if the requirements for trust termination are met.⁴⁶ However, the trustee will often force the parties to seek judicial approval of a proposed termination.⁴⁷

³⁶ *Dupont*, at 263, 115 A.2d at 484.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 269-270, 115 A.2d at 487.

⁴¹ *DuPont*, at 270, 115 A.2d at 488.

⁴² For a discussion of this doctrine, see Pamela R. Champine, *My Will Be Done: Accommodating the Erring and Atypical Testator*, 80 NEB. L. REV. 450, 454 n.229 (2001); Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 820, 825-26 (2001); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change in Direction in American Law?*, 130 U. PA. L. REV. 530, 538-41 (1981-82).

⁴³ *DuPont*, 35 Del. Ch. at 274, 115 A.2d at 490.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See RESTATEMENT (THIRD) OF TRUSTS § 65, general cmt. a.

⁴⁷ *Id.*

a. The English Rule

Since the 1841 decision of *Saunders v. Vautier*,⁴⁸ English courts permit termination of a trust with the consent of all of the beneficiaries.⁴⁹ In that case, the testator placed a large amount of East India Company stock into a testamentary trust and directed the trustee to distribute it to the settlor's great nephew, Daniel, when he reached the age of twenty-five. However, Daniel brought suit to terminate the trust when he reached the age of majority. Since Daniel's interest was indefeasibly vested, the Chancery Court ruled that he was entitled to demand the trust property when he reached the age of twenty-one. The court reasoned that a trust should be indestructible only until the beneficiary became legally competent.⁵⁰

b. The *Claflin* Doctrine and the Material Purpose Requirement

The *Saunders* decision was generally followed in the United States until the emergence of the *Claflin* Doctrine in the late nineteenth century.⁵¹ According to the *Claflin* Doctrine, a trust cannot be terminated unless all of the beneficiaries consent and early termination will not defeat a "material purpose" of the trust.⁵² On the other hand, the converse of this is also true: the beneficiaries of a trust may compel the termination if all of the material purposes of the trust have been achieved.⁵³

⁴⁸ (1841) 49 Eng. Rep. 282 (Ch.)

⁴⁹ See, e.g., *In re Couturier*, [1907] 1 Ch. 470; *In re Jacob's Will*, (1861) 54 Eng. Rep. 683; *Gosling v. Gosling*, (1859) 70 Eng. Rep. 426; *Rocke v. Rocke*, (1845) 50 Eng.Rep. 267. In addition, the Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53 § 1 (a-d) (Eng.) now gives the English courts considerable discretion to modify or terminate trusts even when some of the beneficiaries are unknown or unborn. See also Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 *FORDHAM L. REV.* 1125, 1176-77 (2013-2014); *Unconditional Love*, *supra* note 6, at 468-469.

⁵⁰ Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 *REAL PROP. PROB & TR. J.* 704, 709-10 (2000-01).

⁵¹ See Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 *IOWA L. REV.* 215, 227 (2011). However, a few courts have continued to follow *Saunders*. See *Spooner v. Dunlap*, 87 N.H. 384, 180 A. 256 (1935); *Newlin v. Girard Trust Co.*, 116 N.J. Eq. 498, 502, 174 A. 479, 481 (1934).

⁵² See *Steele v. Kelley*, 46 Mass. App. Ct. 712, 733, 710 N.E.2d 973, 989 (1999). The party requesting that the trust be terminated has the burden of showing that termination will not be contrary to the material purposes of the trust. See *In re Estate of Somers*, 277 Kan. 761, 769, 89 P.3d 898, 905 (2004); *In re Tufford's Trust*, 275 Minn. 66, 71, 145 N.W.2d 59, 63-64 (1966).

⁵³ See *In re Estate of Harbaugh*, 231 Kan. 564, 568, 646 P.2d 498, 502 (1982); *Bennett v. Tower Grove Bank & Trust Co.*, 434 S.W.2d 560, 563, 1968 (Mo. 1968); *In re Bassett's Estate*, 104 N.H. 504, 508, 190 A.2d 415, 417-18 (1963); *Estate of Weeks*, 485 Pa. 329, 333, 402 A.2d 657, 658-59 (1979); *Am. Nat'l. Bank v. Miller*, 899 P.2d 1337, 1340, 1995 Wyo. LEXIS 129 at *8 (Wyo. 1995).

This rule originated in *Claflin v. Claflin*,⁵⁴ an 1889 decision by the Supreme Judicial Court of Massachusetts. In that case, the settlor, Wilbur Claflin, placed one-third of the residue of his estate in trust to pay the proceeds to his son, Adelbert, over a period of time.⁵⁵ The will directed Wilbur's trustee to pay Adelbert \$10,000 at age twenty-one, \$10,000 at age twenty-five, and the balance when he reached age thirty.⁵⁶ Several years after he reached the age of twenty-one, Adelbert sought to terminate the trust and receive the remaining trust property.⁵⁷ Rejecting the English court's ruling in *Saunders*, the *Claflin* court held that the settlor's wishes must be carried out, declaring that "a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions [should] be carried out, unless they contravene some positive rule of law, or are against public policy."⁵⁸

Following the *Claflin* Doctrine, most American courts refuse to terminate a trust if its "material purposes" are not fully accomplished.⁵⁹ As one commentator pointed out, "[t]he material purpose rule reflects a policy judgment that the settlor's intentions ought to be carried out."⁶⁰ The Restatement (Second) of Trusts section 337(2) adopted the material purpose restriction for terminating trusts, declaring "[i]f the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination."⁶¹

*Hurley v. Moody National Bank of Galveston*⁶² illustrates the material purpose concept. In her will, Mathilde Hurley bequeathed \$50,000 each to her two children, Paulette Hilton and James Hurley, and placed the rest of her estate in trust for the benefit of Paulette's son, Nathan.⁶³ The trustee was authorized to spend as much of the trust income as necessary for Nathan's education.⁶⁴ Furthermore, the trust instrument provided that the trust would terminate when Nathan reached the age of thirty-five or when the trustee determined

⁵⁴ 149 Mass. 19, 20 N.E. 454, 455 (1889).

⁵⁵ *Id.*

⁵⁶ *Id.* at 21, 20 N.E. at 455.

⁵⁷ *Id.*

⁵⁸ *Id.* at 23, 20 N.E. at 456.

⁵⁹ See, e.g., *Trabits*, at 90, 323 So. 2d at 357 (quoting RESTATEMENT (SECOND) OF TRUSTS § 337(2) (1959)); *Carnahan*, at 1097 (internal citations omitted); *Closset*, at 597, 230 P. at 558; *Hurley*, at 311-12; *Frost*, at 154; *Bussell*, at 445, 113 N.W. at 646-47.

⁶⁰ See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 662-63 (2013-14) (quoting *Claflin*, 149 Mass. at 23, 20 N.E. at 456).

⁶¹ See RESTATEMENT (SECOND) OF TRUSTS § 337 (1959).

⁶² 98 S.W.3d 307.

⁶³ *Id.* at 309.

⁶⁴ *Id.*

that Nathan had completed his education.⁶⁵ Upon termination of the trust, the trust corpus was to be divided between Paulette and James.⁶⁶ Nathan was eighteen years old when his grandmother died.⁶⁷ Nathan enrolled in college a year later, but eventually dropped out and told the trustee that he did not want to continue his education.⁶⁸ Later, Nathan changed his mind and enrolled in a community college in California.⁶⁹ Nathan testified that at the time he talked to the trustee, “he was using drugs heavily and was starting to get into cocaine and that his life was very difficult.”⁷⁰

Meanwhile, James Hurley requested that the trustee terminate the trust, arguing that Nathan had completed his education.⁷¹ The trustee filed a petition seeking a judicial determination of whether the trust had terminated, or whether Nathan was entitled to income from the trust while he continued his education in California.⁷² The trustee responded that Mathilde, by authorizing support for Nathan until he reached the age of thirty-five, did not expect him to be enrolled continuously in college, but realized that he might take time off from his schooling.⁷³ Consequently, the period that Nathan dropped out of college was merely a break in his education and not a completion of his education.⁷⁴

The trial court concluded that the trust had not terminated, which was affirmed on appeal.⁷⁵ The appeals court observed that the purpose of the trust was to enable Nathan to obtain a college education.⁷⁶ Furthermore, the court agreed with the trustee that Nathan was not required to attend college continuously.⁷⁷ The court observed that the settlor had given the trustee broad discretion to carry out the purposes of the trust.⁷⁸ Accordingly, it agreed with the trustee that a material purpose of the trust, namely providing support for Nathan’s education, was not yet achieved.⁷⁹

In particular, American courts have relied on the reasoning of

⁶⁵ *Id.*

⁶⁶ *Hurley*, 98 S.W.3d at 309.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 310.

⁷¹ *Hurley*, 98 S.W.3d at 311.

⁷² *Id.* at 310.

⁷³ *Id.* at 311.

⁷⁴ *Id.*

⁷⁵ *Id.* at 310, 312.

⁷⁶ *Hurley*, 98 S.W.3d at 311.

⁷⁷ *Id.* at 312.

⁷⁸ *Id.* at 311.

⁷⁹ *Id.*

the *Clafin* decision in refusing to terminate trusts which: (1) contain a spendthrift provision, (2) specify the age or other event at which the beneficiary is to receive his or her disbursement, (3) vest the trustee with discretion over such disbursements, or (4) provide support for the beneficiary.⁸⁰

c. Spendthrift Trusts

A trust which contains a provision that prevents a beneficiary from transferring his interest in the trust is commonly known as a spendthrift trust.⁸¹ Although spendthrift trusts are not recognized in England, they are valid in most American jurisdictions.⁸² The spendthrift provision is an effective device to protect a beneficiary's interest in the trust from attachment by creditors.⁸³ Therefore, it is not surprising that most courts have determined that the existence of a spendthrift provision in a trust will prevent a trust (along with the protection the spendthrift provision provides) from being terminated while the beneficiary is still alive.⁸⁴

An interesting example of this rule is *Cotham v. First National Bank of Hot Springs*.⁸⁵ The case involved a testamentary trust, which provided income of \$300 per month to the settlor's son, and after the son's death, \$100 per month to each of the settlor's grandchildren.⁸⁶ The trust also contained a spendthrift provision.⁸⁷ After the settlor's death, his son and one of the grandchildren filed suit against the trustee, arguing that the trust violated the Rule Against Perpetuities.⁸⁸ After the lower court upheld the validity of the trust, the other two grandchildren, together with the original plaintiffs,

⁸⁰ See Dukeminier & Krier, *supra* note 8, at 1328.

⁸¹ See Schreiber v. Kellogg, 849 F. Supp. 382, 387 (E.D. Pa. 1994) *aff'd in part, rev'd in part*, 50 F.3d 264 (3d Cir. 1995); *In re Trust D Created Under Last Will & Testament of Darby*, 290 Kan. 785, 792, 234 P.3d 793, 800 (2010).

⁸² See Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?* 45 DUQ. L. REV. 147, 150 (2007).

⁸³ See Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U.L.Q. 1, 2 (1995).

⁸⁴ See *Cotham* at 172-173, 697 S.W.2d at 104; *Sawyer* at 122, 162 N.W.2d at 611; *Merchants' Nat'l Bank v. Crist*, 140 Iowa 308, 118 N.W. 394, 395 (1908); *Darby*, at 793, 234 P.3d at 800; *Somers*, at 767-69, 89 P.3d at 903-05; *Univ. of Maine Found. v. Fleet Bank of Maine*, 2003 Me. 20, 817 A.2d 871, 875 (2003); *Mahan*, at 276, 577 A.2d at 77; *Rose v. So. Michigan Nat'l Bank*, 255 Mich. 275, 282, 238 N.W. 284, 287 (1931); *Heritage Bank-North, N.A. v. Hunterdon Medical Center*, 164 N.J. Super. 33, 36, 395 A.2d 552, 554 (1978); *In re Africa's Estate*, 359 Pa. 567, 570, 59 A.2d 925, 926 (1948); *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 37, 331 S.E.2d 385, 387 (S.C. Ct. App. 1985); see also RESTATEMENT (SECOND) OF TRUSTS § 337, general cmt. 1.

⁸⁵ 697 S.W.2d 101.

⁸⁶ *Id.* at 102.

⁸⁷ *Id.* at 103.

⁸⁸ *Id.* at 102.

requested that the trust be terminated by the court.⁸⁹ The trust beneficiaries appealed when the lower court refused to terminate the trust.⁹⁰

On appeal, the Arkansas Supreme Court first affirmed that the trust did not violate the Rule Against Perpetuities.⁹¹ It then determined that the trust was a spendthrift trust.⁹² According to the court, by withholding the power of alienation, the settlor intended to restrict the trust corpus so that the beneficiaries could not obtain access to it except at fixed intervals and in fixed amounts.⁹³ Finally, the court concluded, “[s]ince the continuance of the spendthrift trust is necessary to carry out the testator’s purpose, the beneficiaries cannot compel its termination.”⁹⁴

d. Postponed Enjoyment of the Trust Corpus

A number of cases have involved attempts by beneficiaries to terminate a trust notwithstanding the fact that the trust instrument has postponed full enjoyment of the trust corpus. In most cases, courts have refused to terminate these trusts even at the request of a sole beneficiary. The court’s opinion in *Speth v. Speth*⁹⁵ offers a comprehensive examination of this issue. In *Speth*, the decedent placed her residuary estate in a testamentary trust, and directed the trustee to distribute the income from the trust to her brother, James Speth, for ten years.⁹⁶ At the end of that period, James was to receive the entire trust corpus.⁹⁷ James requested that the court terminate the trust prior to the expiration of the ten-year period because he was the sole beneficiary.⁹⁸ The court considered several of the beneficiary’s arguments in favor of terminating the trust.⁹⁹ The court conceded that postponing a sole beneficiary’s enjoyment of a vested interest for an unreasonable period of time might be contrary to public policy, but delaying the beneficiary’s access to the trust corpus for a short period of time, such as ten years, did not seem contrary to any public interest.¹⁰⁰ The court observed that beneficiaries could freely alienate their interests if they chose to do so.¹⁰¹ Furthermore, a

⁸⁹ *Id.*

⁹⁰ *Cotham*, 697 S.W.2d at 102.

⁹¹ *Id.* at 103.

⁹² *Id.*

⁹³ *Id.* at 104.

⁹⁴ *Id.*

⁹⁵ 8 N.J. Super. 587, 74 A.2d 344 (1950).

⁹⁶ *Id.* at 587, 74 A.2d at 345.

⁹⁷ *Id.*

⁹⁸ *Id.* at 587, 74 A.2d at 346.

⁹⁹ *Id.* at 593, 74 A.2d at 348.

¹⁰⁰ *Speth*, at 594, 74 A.2d at 348.

¹⁰¹ *Id.*

settlor might have a good reason for delaying enjoyment until the beneficiary reached a certain age. According to the court:

It is equally difficult to perceive the considerations of policy which are said to prevent a testator from exercising his judgment and discretion by reasonably deferring the unqualified enjoyment of the principal of his devise or bequest without explaining to the beneficiary and to the public his reasons for doing so.¹⁰²

The court added that some seemingly arbitrary or unreasonable restrictions on the enjoyment of the trust corpus might, in fact, “rest upon wise and perspicacious reasons known to the testator and unknown to the general public and to the court.”¹⁰³

The court then addressed the beneficiary’s claim that the trust was passive because the trustee had no duty to hold or manage the trust assets.¹⁰⁴ In the latter instance, the trust would be executed by the Statute of Uses, and legal title to the trust corpus would be transferred to the beneficiary free of trust. However, in this case, the court pointed out that the settlor had directed the trustees “to invest and reinvest the rest, residue and remainder of my estate both real, personal and of every kind and description and wheresoever situated, and to collect and receive the income thereon” for a period of ten years.¹⁰⁵ In the court’s view, charging the trustees with these responsibilities ensured that the trust was active.¹⁰⁶

*Maley v. Citizens National Bank of Evansville*¹⁰⁷ involved an attempt by several beneficiaries to terminate a trust, which postponed full enjoyment of the trust corpus until they reached the age of thirty-one.¹⁰⁸ The trust was created in 1927 by Henry Maley from his share of a testamentary trust established by his mother, Eva, at her death in 1923.¹⁰⁹ It was later supplemented by additional funds that Henry received from his mother’s trust when he reached the age of thirty-one.¹¹⁰ The trust corpus consisted of Liberty Loan bonds issued by the United States Government.¹¹¹ The trust provided that Henry’s wife, Virginia, would receive the income from the trust during her lifetime.¹¹² In addition, the trust provided that after Virginia’s death,

¹⁰² *Id.*

¹⁰³ *Id.* at 595, 74 A.2d at 348.

¹⁰⁴ *Id.* at 595, 74 A.2d at 349.

¹⁰⁵ *Speth*, at 589, 74 A.2d at 345.

¹⁰⁶ *Id.* at 596, 74 A.2d at 349.

¹⁰⁷ 120 Ind. App. 642, 92 N.E.2d 727 (1950).

¹⁰⁸ *Id.* at 650, 92 N.E.2d at 731.

¹⁰⁹ *Id.* at 646, 92 N.E.2d at 729.

¹¹⁰ *Id.* at 649, 92 N.E.2d at 730.

¹¹¹ *Id.* at 646, 92 N.E.2d at 729.

¹¹² *Maley*, 120 Ind. App. at 647, 92 N.E.2d at 729.

the trust corpus would be distributed to Henry and Virginia's children when the youngest child reached the age of twenty-six.¹¹³ Henry and Virginia were divorced in 1932, and Henry died in 1935, survived by his ex-wife and two children, Henry and Virginia.¹¹⁴

Some years later, Virginia and the children brought suit to terminate the trust, although they had not yet reached the age of twenty-six.¹¹⁵ The trustee objected, and the trial court refused to grant the requested relief.¹¹⁶ Relying on the *Claflin* decision, the Indiana Appeals Court rejected the contention that the beneficiaries, as *sui juris*, were entitled to demand termination of the trust even though they had not reached the required age for distribution of the corpus.¹¹⁷ The court declared that Indiana courts had refused to terminate trusts except in cases "where the interference of the court did not disturb or destroy the trust scheme, but was rendered necessary in order to prevent its entire failure."¹¹⁸

The plaintiffs also claimed that the trust purpose had become impossible to carry out because the trustee could not obtain an adequate income from investing in government bonds.¹¹⁹ However, the court responded that the trustee was not restricted to investing in such low-interest securities, but was free to shift some of the trust's assets to higher-yielding investments.¹²⁰ For these reasons, the appeals court upheld the lower court's refusal to terminate the trust.¹²¹

In *Lafferty v. Sheets*,¹²² J.W. and Medora Sheets executed a joint will which provided that their son, Joseph, would receive the income from their residuary estate during the lifetime of Joseph's wife, Lala.¹²³ If Joseph survived her, he would receive the entire trust corpus at Lala's death.¹²⁴ It was not clear why Joseph's parents put this strange provision in their will. In any event, Joseph's father died

¹¹³ *Id.* at 652-653, 92 N.E.2d at 732.

¹¹⁴ *Id.* at 645, 92 N.E.2d at 729.

¹¹⁵ *Id.* at 650, 92 N.E.2d at 731.

¹¹⁶ *Id.* at 644, 92 N.E.2d at 728. In the alternative, the plaintiffs requested the court to modify the trust to enable the trustee to make higher-yielding investments; that request was also denied. *Maley*, 120 Ind. App. At 644, 92 N.E.2d at 728.

¹¹⁷ *Id.* at 654, 92 N.E.2d at 732.

¹¹⁸ *Id.* at 654, 92 N.E.2d at 733 (quoting *Wilson, Trustee, v. Edmonds*, 78 Ind. App. 501, 136 N.E. 48, 49 (1922)).

¹¹⁹ *Id.* at 655, 92 N.E.2d at 733.

¹²⁰ *Id.*

¹²¹ *Maley*, 120 Ind. App. at 656, 92 N.E.2d at 734.

¹²² 175 Kan. 741, 267 P.2d 962 (1954).

¹²³ *Id.* at 742, 267 P.2d at 964.

¹²⁴ *Id.*

in September 1950, and his mother died a few months later.¹²⁵ During probate of his mother's estate, Joseph, along with Lala and his two children, sought to have his mother's residuary estate distributed directly to Joseph.¹²⁶ The trial court agreed to distribute the estate to Joseph, and the executor appealed.¹²⁷

On appeal, the Kansas Supreme Court determined that the trust established by the parents' will was not passive in nature since the trustee was to actively manage the trust property.¹²⁸ The court also declared that it would follow the *Clafflin* Doctrine.¹²⁹ It also quoted section 337 and comment j of the Second Restatement of Trusts, which expressly stated that a court would not ordinarily terminate a trust prematurely when it provided that the sole beneficiary of the trust was not to receive the trust corpus until some later time.¹³⁰ The court concluded that Joseph's parents had made it clear that "the trust created by them was to continue until the death of the son's wife [and] that such provision was material to the manner in which they disposed of their property."¹³¹ Therefore, it reversed the decision of the trial court.¹³²

e. Discretionary Trusts

"A discretionary trust is established when the grantor gives the trustee discretion to make distributions from the trust, and the beneficiary has no legal authority to force the trustee to make a distribution . . . from either the income or principal."¹³³ In such cases, the trust beneficiaries cannot compel the trustee to terminate the trust prematurely.¹³⁴ A New Jersey court followed this rule recently in the case of *In re Estate of Bonardi*.¹³⁵ In that case, the testator's will created two trusts: the first trust designated the testator's wife, Donna, as the income beneficiary, with a gift over to his daughters,

¹²⁵ *Id.* at 743, 267 P.2d at 964.

¹²⁶ *Id.* at 743-44, 267 P.2d at 964-65.

¹²⁷ *Lafferty*, 175 Kan. at 744, 267 P.2d at 965.

¹²⁸ *Id.* at 747, 267 P.2d at 967.

¹²⁹ *Id.* at 748, 267 P.2d at 967.

¹³⁰ *Id.* at 750, 267 P.2d at 969.

¹³¹ *Id.* at 751, 267 P.2d at 969.

¹³² *Lafferty*, 175 Kan. at 751, 267 P.2d at 969.

¹³³ *Hemphill v. Shore*, 295 Kan. 1110, 1118, 289 P.3d 1173, 1180 (2012). *See Solis v. Koresko*, 884 F. Supp. 2d 261, 289 (E.D. Pa. 2012); *Tannen v. Tannen*, 416 N.J. Super. 248, 265, 3 A.3d 1229, 1239 (2010).

¹³⁴ *See, e.g., Clemenson v. Rebsamen*, 168 S.W.2d 195, 196-97 (Ark. 1943); *In re Roberts' Estate*, 35 N.W.2d 756, 757-58 (Iowa 1949); *Hemphill*, at 1118, 289 P.3d at 1180; *Tannen*, 416 N.J. Super. at 265, 3 A.3d at 1239 (2010); *In re Estate of Bonardi*, 376 N.J. Super. 508, 871 A.2d 103 (2005); RESTATEMENT (SECOND) OF TRUSTS § 337, general cmt. n.

¹³⁵ 376 N.J. Super. 508, 871 A.2d 103.

Danielle and Jessica.¹³⁶ The testator also authorized the trustee, a friend of the family, to distribute to Donna “such amounts of the principal of the Trust as the Trustee, in the exercise of the Trustee’s absolute discretion, deems advisable for her welfare.”¹³⁷ The second trust provided for the distribution of the corpus to Danielle and Jessica when they reached the age of twenty-five.¹³⁸

Shortly after the testator’s death, Donna obtained a release of the daughters’ remainder interest in the first trust and petitioned the chancery court to terminate it.¹³⁹ The lower court agreed to the termination and the trustee appealed.¹⁴⁰ The appeals court reversed.¹⁴¹ The court observed that the testator declared in his will that the trustee should not invade the trust corpus in order to provide primary support for Donna since she was capable of supporting herself.¹⁴² Instead, he directed the trustee to “preserve the corpus, to the extent possible, for ultimate distribution to my children.”¹⁴³ In addition, the court noted that the trustee had testified that Donna was qualified to work full-time as a nurse.¹⁴⁴ Furthermore, the trustee claimed that the testator was concerned about his wife’s excessive use of alcohol, and expressed concern “that if the estate’s assets were left to Donna outright, she would continue to lead this lifestyle which he felt was inappropriate, unhealthy and against his wishes.”¹⁴⁵

These trust provisions suggested that the testator’s intent was to provide supplementary income to Donna, but vested considerable discretion in the trustee to manage the trust’s assets prudently and to only invade the corpus for Donna’s benefit in the case of an emergency, with the expectation that Danielle and Jessica would receive most or all of the trust corpus at his wife’s death.¹⁴⁶ Allowing Donna to receive the entire trust corpus would ignore the testator’s concern about her ability to manage the property responsibly, and would also frustrate his objective of providing for his daughters or their descendants after his wife’s death.¹⁴⁷ Finally, since the daughters’ remainder interest in the trust would not vest until they

¹³⁶ *Id.* at 511, 871 A.2d at 104.

¹³⁷ *Id.* at 511, 871 A.2d at 105.

¹³⁸ *Id.* at 511, 871 A.2d at 104-105.

¹³⁹ *Id.* at 514, 871 A.2d at 106.

¹⁴⁰ *Bonardi*, 376 N.J. Super. at 514, 871 A.2d at 106-107.

¹⁴¹ *Id.*

¹⁴² *Id.* at 517, 871 A.2d at 108.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 512, 871 A.2d at 105.

¹⁴⁵ *Bonardi*, 376 N.J. Super. 512, 871 A.2d at 105.

¹⁴⁶ *Id.* at 517-518, 871 A.2d at 108-109.

¹⁴⁷ *Id.* at 518, 871 A.2d at 109.

reached the age of twenty-five, the release of their remainder was invalid since they had not yet reached twenty-five at the time they purported to do so.¹⁴⁸ Consequently, the court reversed the lower court's decision to terminate the trust.¹⁴⁹

f. Support Trusts

A number of courts have also refused to terminate support trusts prematurely.¹⁵⁰ A pure support trust is one where the terms of the trust direct the trustee to pay to the beneficiary or to apply for his use so much of the income or principal as he believes is necessary for his support.¹⁵¹ In contrast, a discretionary support trust is one in which the trustee is authorized to pay the beneficiary whatever amount of trust income or principal that he believes is necessary for the beneficiary's support.¹⁵² When the settlor's intent is to provide the beneficiary with maintenance and support for life, or for some fixed period, premature termination of a support trust would seem to be inconsistent with a material purpose of the trust. However, because most support trusts also contain spendthrift clauses, courts tend to rely on the spendthrift clauses instead of support provisions in order to justify a refusal to terminate a support trust.

However, the case of *Gershaw v. Gershfield*¹⁵³ is an interesting exception. The *Gershaw* case involved a trust established by Samuel Gershfield.¹⁵⁴ The trust instrument initially provided that its assets would be divided at Samuel's death between his daughter, Cynthia, and his son, Burton.¹⁵⁵ Cynthia was to receive her share free of trust, but Burton's share was to remain subject to the trust for his

¹⁴⁸ *Id.* at 518, 871 A.2d at 109.

¹⁴⁹ *Id.* at 520, 871 A.2d at 110.

¹⁵⁰ *See, e.g., Gershaw v. Gershfield*, 52 Mass. App. Ct. 81, 90, 751 N.E.2d 424, 432 (2001); *West v. Third Nat'l Bank of Hampton Cnty.*, 11 Mass. App. Ct. 577, 580-81, 417 N.E.2d 991, 993 (1981); *In re Henderson's Estate*, 258 Pa. 510, 515, 102 A. 217, 218 (1917); *Townsend v. Rainier Nat'l Bank*, 51 Wash. App. 19, 22, 751 P.2d 1214, 1216 (1988); *see also* RESTATEMENT (SECOND) OF TRUSTS § 337, general cmt. m.

¹⁵¹ *See In re McLoughlin*, 507 F.2d 177, 185 (5th Cir. 1975); *Schreiber v. Kellogg*, 849 F.Supp. 382, 391 (E.D. Pa. 1994) *aff'd in part, rev'd in part*, 50 F.3d 264 (3d Cir. 1995); *In re Estate of Gist*, 763 N.W.2d 561, 565 (Iowa 2009); *Emmet Cnty. Bd. of Supervisors v. Ridout*, 692 N.W.2d 821, 826 (Iowa 2005); *Darby*, 290 Kan. at 791, 234 P.3d at 799; *In re Estate of Brown*, 148 Vt. 94, 96, 528 A.2d 752, 754 (1987); *see also* George Gleason Bogert et al., *THE LAW OF TRUSTS AND TRUSTEES* § 229, 583-84 (3d ed. 2007).

¹⁵² *See In re Barkema Trust*, 690 N.W.2d 50, 54 (Iowa 2004); *Smith v. Smith*, 246 Neb. 193, 197, 517 N.W.2d 394, 398 (1994); *Bohac v. Graham*, 424 N.W.2d 144, 146 (N.D. 1988); *Lineback v. Stout*, 79 N.C. App. 292, 296, 339 S.E.2d 103, 106 (1976). *See also* Lawrence A. Frolik, *Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?* 46 U. PITT. L. REV. 335, 342 (1984-85).

¹⁵³ 52 Mass. App. Ct. 81, 751 N.E.2d 424.

¹⁵⁴ *Id.* at 82, 751 N.E.2d at 427.

¹⁵⁵ *Id.* at 82-83, 751 N.E.2d at 427.

lifetime.¹⁵⁶ The trust was later amended to provide that Burton's children, Ace and Julie, might also receive distributions for their education and support from Burton's share of the trust until they reached the age of twenty-five.¹⁵⁷

The trust instrument declared that "the Trustees shall pay or apply so much of the principal and income as the Trustees in their sole discretion deem advisable to provide for BURTON C. GERSHFIELD'S proper care, maintenance, medical needs, health, support, education and emergency needs and that of his issue under the age of twenty-five."¹⁵⁸ Burton's share was also subject to a spendthrift provision.¹⁵⁹ Samuel treated his children differently because Burton's life was characterized by mental instability, dysfunctional relationships, and drug abuse.¹⁶⁰ Consequently, Samuel felt that he should keep Burton's share in trust in order to provide him with lifetime support and housing.¹⁶¹

After Samuel's death, Scott Gershaw, the trustee, sought instructions with respect to the priority of distributions among the three beneficiaries of Burton's trust.¹⁶² However, at trial, the trustee asked the court's permission to terminate the trust and divide its assets equally among Burton, Ace, and Julie.¹⁶³ After ordering the distribution of some of the trust property for the payment of certain claims and expenses, the court ruled that the one-third of the remaining assets should be set aside for Burton's housing needs, and the rest divided equally between Burton's children to pay for their college education.¹⁶⁴

The appeals court vacated the trial court's judgment and concluded that the primary purpose of the trust was to provide for Burton's "lifetime support and housing needs," and this should take priority over any distributions to Burton's children.¹⁶⁵ The court also held that termination was improper because the trust, by its own terms, was to continue for Burton's lifetime.¹⁶⁶ The court concluded by declaring "[t]he trustees had a duty to fulfill the donor's clearly expressed intention that Burton receive lifetime support and housing,

¹⁵⁶ *Id.* at 83, 751 N.E.2d at 427.

¹⁵⁷ *Id.*

¹⁵⁸ *Gershaw*, 52 Mass. App. Ct. at 88, 751 N.E.2d at 431.

¹⁵⁹ *Id.* at 86, 751 N.E.2d at 430.

¹⁶⁰ *Id.* at 90, 751 N.E.2d at 432, n.14.

¹⁶¹ *Id.*

¹⁶² *Id.* at 84, 751 N.E.2d at 428.

¹⁶³ *Gershaw*, 52 Mass. App. Ct. at 84, 751 N.E.2d at 428.

¹⁶⁴ *Id.* at 84-85, 751 N.E.2d at 428-29

¹⁶⁵ *Id.* at 87, 751 N.E.2d at 430.

¹⁶⁶ *Id.*, at 89-90, 751 N.E.2d at 432.

if needed, and could not terminate the trust until its purposes had been fulfilled.”¹⁶⁷

3. *Partial Termination*

Sometimes a court will allow a partial termination of a trust, particularly when the trust corpus is capable of producing far more income than is necessary to pay the income beneficiaries. For example, *In the Matter of the Trust Established Under Trust Agreement of Thomas A. Boright, deceased*¹⁶⁸ involved a trust with a corpus of \$900,000 and a single beneficiary who was entitled to receive \$12,000 a year for life.¹⁶⁹ At the request of the remaindermen, the Minnesota Supreme Court authorized the trustee to set aside enough of the trust corpus to make the required payments to the life beneficiary, or to purchase an annuity to fund these payments.¹⁷⁰ The court also authorized the trustee to distribute the remaining trust corpus to the remaindermen.¹⁷¹

Another court also allowed partial termination in *University of Maine Foundation v. Fleet Bank of Maine*.¹⁷² The trust, known as the Gilbert Trust, was established by the will of Charles Gilbert, who died in 1953.¹⁷³ The trust provided for the payment of specific amounts of money annually to various family members and nonprofit organizations.¹⁷⁴ In addition, the trust provided for termination at the death of the last life beneficiary, and transfer of the trust corpus to the University of Maine Foundation and made part of the Charles E. Gilbert Fund.¹⁷⁵ The Fund, which provided loans to students in medicine, dentistry, and veterinary medicine, was established by Gilbert in his will when he exercised a power of appointment created by his wife.¹⁷⁶

Over the years, the trust corpus grew from \$3.13 million in 1990, to \$9.34 million in 2000.¹⁷⁷ This led the Foundation to offer the three remaining life beneficiaries \$25,000 annually to agree to terminate the trust instead of the \$5,000 that they were then receiving.¹⁷⁸ When the trustee refused to terminate the trust

¹⁶⁷ *Id.* at 90, 751 N.E.2d at 432.

¹⁶⁸ 377 N.W.2d 9 (Minn. 1985).

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 14.

¹⁷² 817 A.2d 871.

¹⁷³ *Id.* at 873.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Univ. of Maine*, 817 A.2d at 874.

¹⁷⁸ *Id.*

voluntarily, the Foundation sought judicial termination of the trust.¹⁷⁹ The lower court agreed, and ordered distribution of most of the trust corpus to the Foundation.¹⁸⁰

On appeal, the Supreme Judicial Court of Maine observed that the life beneficiaries' interests were subject to a spendthrift clause.¹⁸¹ Therefore, the court concluded that it would be improper to terminate the trust since a material purpose of the trust – the protection of the beneficiaries from the claims of creditors – could not be achieved if the trust was prematurely terminated.¹⁸² However, the court went on to consider whether partial termination was a viable option.¹⁸³ Noting that other courts allow partial termination of a trust in similar circumstances,¹⁸⁴ the Maine court declared that partial termination “carried out the respective settlor’s intent, while at the same time released idle funds to the remainderman that the settlor ultimately intended to benefit.”¹⁸⁵ Applying this reasoning to the instant case, the court concluded that “[n]o good reason exists for the foundation to wait for the life-beneficiaries’ interests to end before receiving surplus trust assets,” as long as the court withheld a sufficient amount from the Foundation’s distribution to enable the trustee to protect the life beneficiaries’ interests.¹⁸⁶

4. Family Settlement Agreements

Family settlement agreements are another means of terminating a trust.¹⁸⁷ A family settlement agreement is a plan formulated by interested parties to modify or terminate a trust and distribute the decedent’s property with court approval in a different manner than that provided for under a will or trust.¹⁸⁸ Courts usually encourage such settlements because they are thought to prevent hostility and discord among family members.¹⁸⁹ When the beneficiaries of a trust petition the court to terminate the trust

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 873

¹⁸² *Univ. of Maine*, 817 A.2d at 875.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 875-76 (citing *Ames v. Hall*, 313 Mass. 33, 46 N.E.2d 403, 404 (1943); *Boright*, 377 N.W.2d 9 (Minn. 1985)).

¹⁸⁵ *Univ. of Maine*, 817 A.2d at 876.

¹⁸⁶ *Id.*

¹⁸⁷ *See generally*, Gerry W. Beyer, *Annual Rev. of Texas Law: Wills and Trusts*, 59 SMU L. REV. 1603, 1614-1615 (2006).

¹⁸⁸ *In re Estate of Neiswender*, 616 N.W.2d 83, 86 (S.D. 2000).

¹⁸⁹ *See, e.g.*, *Harris v. Harris*, 236 Ark. 676, 685, 370 S.W.2d 121, 127 (1963); *In re Will of Pendergrass*, 251 N.C. 737, 744, 112 S.E.2d 562, 567 (1960); *In re Estate of Way*, 379 Pa. 421, 437, 109 A.2d 164, 172 (1954). Although these arrangements are usually referred to as family settlements, they are not limited to family members.

prematurely, they must show that they are competent to execute the agreement, and that all members of the beneficiary class are included.¹⁹⁰ The beneficiaries must also demonstrate that the agreement is reasonable and fair to all parties.¹⁹¹ In addition, the court must conclude that the agreement is designed to resolve a bona fide controversy involving the will or trust.¹⁹² Finally, under the traditional rule, the beneficiaries must also prove that the trust purposes have been achieved.¹⁹³

Although courts have long approved family settlements on the basis of their inherent powers,¹⁹⁴ many states have now enacted statutes that expressly authorize court approval of settlement agreements.¹⁹⁵ In addition, both the Uniform Probate Code¹⁹⁶ and the Uniform Trust Code¹⁹⁷ recognize family settlement agreements. Both of these uniform acts provide for nonjudicial family settlements.¹⁹⁸ It is interesting to note that neither act specifically requires that the proposed settlement arise from a dispute or controversy among the beneficiaries.¹⁹⁹

B. Modification of Irrevocable Trusts

The *Claflin* doctrine has commonly been applied to modification, as well as termination, of trusts.²⁰⁰ Consequently, a number of courts have refused to modify the terms of a trust,

¹⁹⁰ See Bogert et al., *supra* note 151, at § 1009, 458-61.

¹⁹¹ See *Merkel v. Long*, 368 Mich. 1, 14-15, 117 N.W.2d 130, 136-37 (1962); *Metzner v. Newman*, 224 Mich. 324, 336, 194 N.W. 1008, 1012 (1923); *Burtman v. Burtman*, 94 N.H. 412, 416, 54 A.2d 367, 370 (1947).

¹⁹² See *Breault v. Feigenholtz*, 358 F.2d 39, 44 (7th Cir. 1966); *In re Estate of Ward*, 200 Ariz. 113, 117-18, 23 P.3d 108, 112-13 (App. Div. 1 2001); *Altmeier v. Harris*, 403 Ill. 345, 350, 86 N.E.2d 229, 233 (1949) (quoting *Wolf v. Uhlemann*, 325 Ill. 165, 156 N.E. 334, 340 (1927)); *Stein v. La Salle Nat'l Bank*, 328 Ill. App. 3, 7, 65 N.E.2d 216, 218 (1946); *O'Neil v. O'Neil*, 271 N.C. 106, 112-13, 155 S.E.2d 495, 500-01 (1967).

¹⁹³ See *Adams v. Link*, 145 Conn. 634, 638, 145 A.2d 753, 755 (1958); *West v. Downer*, 218 Ga. 235, 243, 127 S.E.2d 359, 364-65 (1962); *Stephens v. Collison*, 274 Ill. 389, 396, 113 N.E. 691, 694 (1916); *In re Matter of Ransom*, 180 N.J. Super. 108, 120, 433 A.2d 834, 840 (Ch. Div. 1981) (internal citation omitted); *Appeal of Gannon*, 428 Pa. Super. 349, 367-68, 631 A.2d 176, 185 (1993) (citing RESTATEMENT (SECOND) OF TRUSTS § 337, cmt. a).

¹⁹⁴ See Bogert et al., *supra* note 151, at § 1009, 450-51.

¹⁹⁵ See ALASKA STAT. ANN. § 13.26.344 (West 2014); GA. CODE ANN. § 53-5-25 (West 2014); IND. CODE §§ 29-1-0-1 to 29-1-9-3 (2014); IOWA CODE ANN. §§ 633.114 & 633.115 (West 2014); MO. ANN. STAT. § 473.084 (West 2014); N.Y. GEN. OBLIG. LAW § 5-1502G (McKinney 2014); OKLA. STAT. ANN. tit. 60, § 175.24 (West 2014); 20 PA. CONS. STAT. ANN. § 3323 (West 2014); W. VA. CODE ANN. § 44-5-7 (West 2014); WIS. STAT. ANN. § 879.59 (West 2013).

¹⁹⁶ UNIF. PROB. CODE §§ 3-912, 3-1101, & 3-1102 (2010).

¹⁹⁷ UNIF. TRUST CODE §§ 111, 411 (2013).

¹⁹⁸ UNIF. PROB. CODE § 3-912 (2010); UNIF. TRUST CODE § 111 (2013).

¹⁹⁹ *Id.*

²⁰⁰ See *Conditional Love*, *supra* note 6, at 468; Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 607 (2005) [hereinafter *Perpetual Trusts*].

concluding that modification would be contrary to a material purpose of the settlor or that a material purpose of the trust had not been attained.²⁰¹ On the other hand, under the equitable deviation doctrine, “if circumstances unanticipated by the settlor occur, the court may modify the administrative terms of the trust, but only to prevent the unanticipated circumstances from defeating or substantially impairing the accomplishment of the purposes of the trust.”²⁰² This doctrine has been endorsed by many courts as a means of enabling them to modify the administrative provisions of a trust in response to unforeseen circumstances.²⁰³

1. *Equitable Deviation*

Courts have sometimes relied on the equitable deviation doctrine to override restrictions on the sale of trust property.²⁰⁴ One of the leading cases on this doctrine is *In re Estate of Pulitzer*.²⁰⁵ Newspaper publisher, Joseph Pulitzer, died in 1911.²⁰⁶ In his will, he left shares of the Press Publishing Co. and Pulitzer Publishing in trust for the benefit of his children and certain other persons.²⁰⁷ The former company published the New York World, the Sunday World, and the Evening World, while the latter company published the St. Louis Post Dispatch.²⁰⁸ In his will, Pulitzer expressly prohibited the trustees from selling any of the trust’s Press Publishing Co. stock.²⁰⁹ Nevertheless, in 1931, the trustees, with the consent of the trust beneficiaries, sought court approval to sell the stock.²¹⁰ The court

²⁰¹ See, e.g., *Smith v. Hallum*, 286 Ga. 834, 836, 691 S.E.2d 848, 850 (2010); *Thomson v. Union Nat’l Bank in Kansas City*, 291 S.W.2d 178, 182-83 (Mo. 1956).

²⁰² Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?* 38 AKRON L. REV. 661, 663 (2005). See also Chapman, at 953, N.E.2d at 580.

²⁰³ See *Thurlow v. Berry*, 249 Ala. 597, 605, 32 So.2d 526, 533 (1947) (internal citations omitted); *Adams v. Cook*, 15 Cal. 2d 352, 359, 101 P.2d 484, 488 (1940); *Young v. Young*, 255 Mich. 173, 179-80, 237 N.W. 535, 537 (1931); *In re JPMorgan Chase Bank, N.A.*, 19 Misc.3d 337, 340, 852 N.Y.S.2d 718, 721 (Sur. Ct. 2008); *In re Aberlin*, 264 A.D.2d 775, 695 N.Y.S.2d 383 (1999); *Carnahan*, at 1097 (internal citations omitted); *Nieman v. Vaughn Cmty. Church*, 154 Wash. 2d 365, 378, 113 P.3d 463, 470-71 (2005) (distinguishing, in the case of a charitable trust, between equitable deviation and *cy pres*); see also RESTATEMENT (SECOND) OF TRUSTS § 167.

²⁰⁴ See *Hewitt v. Beattie*, 106 Conn. 602, 138 A. 795, 802-03 (1927); *Stout v. Stout*, 192 Ky. 504, 233 S.W. 1057, 1059-60 (1921); *Young*, at 179-80, 237 N.W. at 537; *In re Estate of Pulitzer*, 139 Misc. 575, 249 N.Y.S. 87 (Sur. Ct. 1931); *Carnahan v. Johnson*, 711 N.E. 1093, 1097 (Ohio Ct. App. 1998) (internal citations omitted); *Weld v. Weld*, 23 R.I. 311, 50 A. 490 (1901); *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 474, 349 S.E.2d 655, 660 (S.C. Ct. App. 1986); *Nieman*, at 377, 113 P.3d at 468.

²⁰⁵ 139 Misc. 575, 249 N.Y.S. 87.

²⁰⁶ *Id.* at 577, 249 N.Y.S. at 91.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 578, 249 N.Y.S. at 92.

²⁰⁹ *Id.*

²¹⁰ *Pulitzer*, at 576, 249 N.Y.S. at 90.

found that the newspapers owned by Press Publishing had been losing money for several years,²¹¹ and it was likely that the stock would eventually lose much of its value, thereby diminishing the interests of the trust beneficiaries.²¹²

The New York Surrogate Court began by observing that “[c]ourts of equity in other jurisdictions have found power to relieve against the provisions of the instrument by granting the authority to dispose of perishable property or wasting assets, despite the express command or wishes contained in the will.”²¹³ The court then declared that the “extreme circumstances” in the *Pulitzer* case justified disregarding the direction of the testator and authorizing the trustees to sell the Press Publishing Co. stock.²¹⁴

As Professor Gallanis points out, the court purported to give effect to the settlor’s implicit, but unexpressed intention by finding that Pulitzer’s dominant purpose was to provide for a generous income for his children and the eventual distribution of the intact trust corpus to his grandchildren.²¹⁵ According to the court, “[a] man of his sagacity and business ability could not have intended that from mere vanity, the publication of the newspapers, with which his name and efforts had been associated, should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution.”²¹⁶ Notwithstanding the court’s flattering assessment of the testator’s business acumen, Gallanis concluded that Pulitzer was sufficiently vain that he probably never thought that his newspapers would become unprofitable.²¹⁷ Thus, the court’s reliance on imputed intent in the *Pulitzer* case was suspect to say the least.²¹⁸

In addition to authorizing the sale of trust property, courts have applied the principle of equitable deviation to such administrative matters as removing a trustee, modifying a trust investment portfolio, or extending the duration of the trust. *Donnelly v. National Bank of Washington*²¹⁹ provides an interesting example of a court’s use of equitable deviation to extend the duration of a trust. Before his death in 1940, the settlor executed a testamentary trust providing for his grandson, Willis Donnelly, to receive money for his support “so long as [he] is a student in good standing at some

²¹¹ *Id.* at 582, 249 N.Y.S. at 97.

²¹² *Id.*

²¹³ *Id.* at 581, 249 N.Y.S. at 95.

²¹⁴ *Id.* at 582, 249 N.Y.S. at 96-97.

²¹⁵ See Gallanis, *supra* note 51, at 225.

²¹⁶ *Pulitzer*, at 580, 249 N.Y.S. at 95.

²¹⁷ See Gallanis, *supra* note 51, at 225.

²¹⁸ *Id.*

²¹⁹ 27 Wash.2d 622, 179 P.2d 333 (1947).

recognized, degree granting college, University, or post-graduate school, but in no event beyond December 31, 1945.”²²⁰ Willis graduated from the University of Washington in August 1942, and had completed one year of law school when he was drafted into the Marine Corps.²²¹ He was discharged in April 1946, and resumed his law school studies.²²² However, the trustee refused to renew his stipend, declaring that it was not authorized to provide support for Willis after 1945.²²³

Willis sued the trustee, and the trial court ordered the trustee to make payments to Willis for another three years to allow him to obtain his law degree.²²⁴ Relying on the Restatement of Trusts²²⁵ and other sources,²²⁶ the appeals court affirmed the trial court’s decision.²²⁷ The court declared that it should do what it believes the settlor would have done if he could have foreseen what happened.²²⁸ According to the court, the settlor had intended to provide enough financial support to enable his grandson to complete his studies.²²⁹ If World War II had not broken out, the time limit specified in the will would have provided ample time for Willis to obtain his law degree.²³⁰ Obviously, the settlor did not foresee that his grandson would be called away from his studies for more than three years to serve in the military during the war.²³¹ According to the court, “[i]t is unthinkable that a settlor who regarded his grandson as a son would have so restricted the time on the education payments as to prevent the boy, because he was summoned from his school to the armed forces of our country, from completing his education.”²³² Therefore, the appeals court upheld the lower court’s modification of the trust provisions.²³³

The traditional doctrine of equitable deviation only allowed modification of the administrative provisions of a trust, and was not applicable to distributive provisions.²³⁴ However, a few courts have

²²⁰ *Id.* at 623, 179 P.2d at 333.

²²¹ *Id.*

²²² *Id.* at 624, 179 P.2d at 333.

²²³ *Id.*

²²⁴ *Donnelly*, at 624, 179 P.2d at 334.

²²⁵ RESTATEMENT OF TRUSTS § 167 (1935).

²²⁶ 2 SCOTT ON TRUSTS § 167 at 1268-82; *Cook*, at 362-63, 101 P.2d at 489; *Young*, at 173, 237 N.W. at 535; *Bennett v. Nashville Trust Co.*, 127 Tenn. 126, 153 S.W. 840 (1913).

²²⁷ *Donnelly*, at 629, 179 P.2d at 336.

²²⁸ *Id.* at 627, 179 P.2d at 335.

²²⁹ *Id.* at 627-28, 179 P.2d at 335-36.

²³⁰ *Id.* at 628, 179 P.2d at 336.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *See Estate of Van Deusen*, 30 Cal. 2d. 285, 288, 182 P.2d 565, 569 (1947); *Staley v. Ligon*, 239 Md. 61, 69, 210 A.2d 384, 388-89 (1965).

expanded the equitable deviation doctrine to permit the modification of a trust's distributive provisions.²³⁵ For example, this approach was followed by an Alabama court in *Trabits v. First National Bank of Mobile*.²³⁶ In 1943, the settlor created an *inter vivos* trust under which his daughter was to receive \$100 per month during her lifetime.²³⁷ After the death of the Settlor's daughter, the trust corpus was to be distributed to her children and grandchildren, if any existed.²³⁸ The trust instrument further provided that the trust corpus would be distributed to the daughter's estate if she died without having any children.²³⁹

The settlor reserved the power to raise the monthly payments, which he did on several occasions prior to his death in 1968.²⁴⁰ At the time of his death, the daughter was receiving \$400 per month from the trust.²⁴¹ Several years later, the daughter petitioned to either: (1) terminate the trust; (2) order the trustee to distribute all of the trust income to her; or (3) increase the monthly payments by an amount which, in the court's opinion, the settlor would have done if he were still alive.²⁴² The daughter alleged that the trust corpus exceeded \$150,000 and that the trust income was \$7,000 per year more than was paid out to her as a life beneficiary.²⁴³ She further contended that:

[T]he present accumulation of corpus and the amount of annual excess trust income added to the corpus are circumstances that were not foreseen by the settlor and that, in order to effectuate the original trust purpose, it has become necessary and proper either to increase the size of the monthly payment to the beneficiary or to terminate the trust.²⁴⁴

Finally, the daughter argued that because she was presently childless and had undergone a hysterectomy, there would be no children or grandchildren to take the trust corpus at her death.²⁴⁵

The lower court granted the trustee's motion to dismiss and the daughter appealed.²⁴⁶ The trustee maintained that the lower

²³⁵ See *Wolcott*, at 23, 56 A.2d at 641.

²³⁶ 295 Ala. 85, 323 So.2d 353.

²³⁷ *Id.* at 88, 323 So.2d at 355.

²³⁸ *Id.* at 86, 323 So.2d at 355.

²³⁹ *Id.*

²⁴⁰ *Id.* at 88, 323 So.2d at 355.

²⁴¹ *Trabits*, at 88, 323 So.2d at 355.

²⁴² *Id.* at 86-88, 323 So.2d at 355.

²⁴³ *Id.* at 88, 323 So.2d at 355.

²⁴⁴ *Id.* at 88, 323 So.2d at 355-56.

²⁴⁵ *Id.* at 88, 323 So.2d at 356.

²⁴⁶ *Trabits*, at 86, 323 So.2d 355.

court could not grant relief unless the trust instrument was ambiguous, which it was not.²⁴⁷ However, the Alabama Supreme Court held that the terms of a trust could be modified under the doctrine of equitable deviation, even if the terms were not ambiguous.²⁴⁸ Moreover, the court declared that if the trust purposes are not clearly expressed in the trust instrument, a court could identify its purposes with the aid of extrinsic evidence.²⁴⁹ The court reversed the lower court's decision and remanded the case for a trial.²⁵⁰ Furthermore, the court indicated that equitable deviation allowed the lower court to increase payments to the daughter if it concluded that this disbursement of trust funds was consistent with the trust purposes.

Prior to the promulgation of the Uniform Trust Code, a few states enacted statutory versions of the equitable deviation doctrine, enabling courts to modify the distributive terms of a trust. *Hamerstrom v. Commerce Bank of Kansas City, N.A.*, illustrates some of the issues that arose in connection with these statutes.²⁵¹ In this case, the settlor, who died in 1966, created a testamentary trust and directed his trustee to pay Elizabeth Hamerstrom \$150 per month for life.²⁵² At her death, the trust corpus was to be distributed to Elizabeth's husband, Davis, and if Davis predeceased Elizabeth, the settlor directed the trustees to distribute the trust corpus to Eric and Edward Hamerstrom.²⁵³ In 1989, Elizabeth petitioned the lower court to increase the payment to her to \$2,000 per month.²⁵⁴ Davis, Eric, and Edward consented to the proposed modification.²⁵⁵

Elizabeth alleged that inflation, her husband's retirement, and increased health care costs had resulted in an unforeseen change in her economic condition.²⁵⁶ She also claimed that the trust corpus of \$425,000 currently generated income of \$26,000 per year; therefore, the trustee could increase her payments without having to invade the trust corpus.²⁵⁷ The trial court appointed a guardian ad litem to represent the interests of any unknown or unascertained remaindermen.²⁵⁸ The guardian ad litem objected because the

²⁴⁷ *Id.* at 89, 323 So.2d at 357.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 91, 323 So.2d at 358.

²⁵¹ 808 S.W.2d 434 (Mo. Ct. App. 1991).

²⁵² *Id.* at 435.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Hamerstrom*, 808 S.W.2d at 435.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

proposed deviation would not benefit the remaindermen.²⁵⁹ The trial court agreed, and refused to approve the proposed modification.²⁶⁰

The *Hamerstrom* case arose in Missouri, which enacted an equitable deviation statute in 1983.²⁶¹ The statute provided that a court may vary the terms of a trust “only upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries”²⁶² The issue was whether the term “beneficiaries” in the statute included unnamed and unascertained potential survivors of Eric and Edward, or whether the term was limited to beneficiaries who were expressly mentioned in the trust.²⁶³ The court observed that there was a split of authority on this issue.²⁶⁴ States that had adopted the Uniform Probate Code defined beneficiary to include “a person who has any present or future interest, vested or contingent.”²⁶⁵ However, other states had limited beneficiaries to those who were currently receiving income from the trust, thereby excluding remaindermen.²⁶⁶ Without adopting one view or the other, the court concluded that the settlor intended to limit the distribution of the trust corpus to Eric and Edward, and that he did not intend to include their heirs as possible beneficiaries.²⁶⁷ Consequently, the court held that the trial court should have granted Elizabeth’s petition to modify the distributive provisions of the trust.²⁶⁸

C. Summary

It is very difficult to terminate or modify an irrevocable trust in jurisdictions that follow the traditional rules. While a trust can be terminated (even without court approval) if the settlor and all of the beneficiaries agree, such an agreement may be impossible to obtain if some of the trust beneficiaries are unborn or unascertained. Beneficiaries who wish to terminate a trust must overcome even greater obstacles when the trust is testamentary or when an *inter vivos* trust has become irrevocable because of the death of the settlor. In such cases, not only must all of the beneficiaries agree to terminate the trust, but, according to the *Claflin* Doctrine, they must also

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ MO. REV. STAT. § 456.590 (2015). *See also* Julia C. Walker, *Get Your Dead Hands Off Me: Beneficiaries’ Right to Terminate or Modify a Trust Under the Uniform Trust Code*, 67 MO. L. REV. 443, 452-54 (2002).

²⁶² *Hamerstrom*, 808 S.W.2d at 435.

²⁶³ *Id.* at 436-37.

²⁶⁴ *Id.* at 437.

²⁶⁵ *Id.* (quoting UNIF. PROB. CODE § 1-201(3) (2010)).

²⁶⁶ *Id.* *See also In re Trusts of Campbell*, 258 N.W.2d 856, 861 (Minn. 1977); *Lenzer v. Falk*, 68 N.Y.S.2d 699 (Sup. Ct. 1947).

²⁶⁷ *Hamerstrom*, 808 S.W.2d at 438.

²⁶⁸ *Id.*

persuade a court that the proposed termination will not conflict with a material purpose of the trust. The problem is compounded in states that assume as a matter of law that spendthrift trusts, discretionary trusts, support trusts, supplemental needs trusts, and trusts with time-based requirements for vesting embody a material purpose that is inconsistent with early termination.

Modification is also difficult. In theory, the equitable deviation doctrine allows a court to modify a trust in response to unforeseen circumstances. However, in most states, the *Clafin* Doctrine's material purpose requirement must be satisfied before a court will modify the provisions of a trust. In addition, some courts interpret unforeseen circumstances in a way that restricts the scope of equitable deviation. Finally, in many states, the equitable deviation doctrine is limited to the modification of administrative provisions, and does not permit a court to modify a trust's distributive terms.

III. NEW APPROACHES: THE UNIFORM TRUST CODE AND THE THIRD RESTATEMENT OF TRUSTS

Certain provisions of the Uniform Trust Code and the Third Restatement of Trusts, which were promulgated during the first decade of the twenty-first century, expanded the power of courts to modify or terminate irrevocable trusts. This development chipped away at the traditional scope of dead hand control over trust property, and significantly expanded the rights of beneficiaries.

A. Termination of Trusts

The Uniform Trust Code was first promulgated in 2000, and was amended several times since that date. Presently, almost half of the states have adopted the Code.²⁶⁹ The Restatement (Third) of Trusts was promulgated in 2003. Both of these documents provide for the termination of trusts, although the Restatement's provisions are somewhat less innovative than those of the Uniform Probate Code.

1. *The Uniform Trust Code § 411*

The prefatory note to article 4 of the Uniform Trust Code declares that the "overall objective of these sections is to enhance flexibility."²⁷⁰ At the same time, the prefatory note qualifies this objective by adding that the goal of greater flexibility must be "consistent with the principle that preserving the settlor's intent is

²⁶⁹ See Richard C. Ausness, *When Is a Trust Protector a Fiduciary?* 27 QUINNIPIAC PROB. L.J. 277, 281 (2014) (citing Jesse Dukeminier & Robert H. Sitkoff, WILLS, TRUSTS & ESTATES 389 (9th ed. 2013)).

²⁷⁰ UNIF. TRUST CODE art. 4, gen. cmt. (2006).

paramount.”²⁷¹ This sentiment was echoed by Professor David English, who described the Code’s balance between the need for increased flexibility and the need to give effect to the settlor’s intent as follows:

Due to the increasing use in recent years of long-term trusts there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument. The UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor’s intent. The result is a liberalizing nudge, but one founded in traditional doctrine.²⁷²

The provisions of section 411 are fairly consistent with the traditional approach to termination, as reflected in the *Clafin* Doctrine.²⁷³ Section 411(a) affirms the traditional rule that a trust may be terminated if the settlor and all of the beneficiaries agree to terminate it.²⁷⁴ Section 411(b) echoes the *Clafin* Doctrine by declaring that an “irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.”²⁷⁵ However, section 411(c) departs somewhat from the traditional approach by stating that there is no presumption that the existence of a spendthrift clause in the trust constitutes a material purpose.²⁷⁶ Moreover, section 411(e) provides that a court may terminate a trust, even when some of the beneficiaries do not consent, if (1) the court could terminate the trust if all of the beneficiaries could consent, and (2) the interests of non-consenting beneficiaries are adequately protected.²⁷⁷

Furthermore, section 412(a) declares that a court may terminate a trust if, due to circumstances not anticipated by the settlor, termination would further the purposes of the trust.²⁷⁸ Section 105(b)(4) states that these provisions are “mandatory rules,” which cannot be overridden by the settlor.²⁷⁹ Another provision of the Uniform Trust Code permits a court to remove a trustee not only for breach of trust, but also when removal is requested by all of the

²⁷¹ *Id.*

²⁷² David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002) (citations omitted).

²⁷³ See *Unconditional Love*, *supra* note 6, at 470.

²⁷⁴ UNIF. TRUST CODE § 411(a).

²⁷⁵ *Id.* § 411(b).

²⁷⁶ *Id.* § 411(c).

²⁷⁷ *Id.* § 411(e)(1-2).

²⁷⁸ *Id.* § 412(a).

²⁷⁹ UNIF. TRUST CODE § 105(b)(4).

beneficiaries, and the court finds that “removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust.”²⁸⁰ Finally, several provisions of the Code liberalize the rules relating to virtual representation, thereby making it easier to terminate a trust when some of the beneficiaries are unborn, underage, or unascertained.²⁸¹

2. *The Restatement (Third) of Trusts*

Although their basic approaches are similar, the Restatement Third appears to give less weight to the settlor’s intent than the Uniform Trust Code does.²⁸² For example, section 65(1) declares that “[e]xcept as stated in Subsection (2), if all of the beneficiaries of an irrevocable trust consent, they can compel the termination . . . of the trust.”²⁸³ However, section 65(2) provides that the beneficiaries cannot compel the termination of a trust if it “would be inconsistent with a material purpose of the trust” unless one of two conditions is met; either the settlor must consent to termination of the trust (a provision that is consistent with the traditional rule) or if the court “determines that the reason(s) for termination . . . outweigh the material purpose.”²⁸⁴

The balancing test embodied in section 65(2) represents a marked departure from the traditional approach.²⁸⁵ This test was modeled after section 15403(b) of the California Probate Code, which declares:

If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust.²⁸⁶

Finally, comment a to section 65 changes the way the material purpose requirement is applied to spendthrift and discretionary provisions.²⁸⁷ Specifically, comment e states that while spendthrift and discretionary provisions may suggest that the settlor had a material purpose that would be inconsistent with early termination of the trust, these “restrictions are not sufficient in and of themselves to

²⁸⁰ *Id.* § 706(b)(4) (2013).

²⁸¹ *Id.* §§ 301-305 (2013).

²⁸² *See generally*, UNIF. TRUST CODE, *and* RESTATEMENT (THIRD) OF TRUSTS.

²⁸³ RESTATEMENT (THIRD) OF TRUSTS § 65(1).

²⁸⁴ *Id.* § 65(2).

²⁸⁵ *See Unconditional Love*, *supra* note 6, at 473.

²⁸⁶ CAL. PROB. CODE § 15403(b) (Deering 2015).

²⁸⁷ *See Gallanis*, *supra* note 51, at 228.

establish, or to create a presumption of, a material purpose that would prevent termination by consent of all of the beneficiaries.”²⁸⁸ Taken together, these provisions make it easier for beneficiaries to obtain judicial termination of a trust.

3. *Recent Cases*

A number of courts have applied the termination provisions of the Uniform Trust Code and the Restatement Third during the last decade.²⁸⁹ However, in some instances, the courts have chosen to modify a trust instead of terminating it. For example, in the case of *In re Estate of Somers*, the Kansas Supreme Court considered the effect of a spendthrift clause on a beneficiary’s right to terminate an irrevocable trust.²⁹⁰ In her will, Eula Somers established a testamentary trust in which she provided for monthly payments of \$100.00 to each of her two grandchildren, Susan Somers and Kent Somers, for their lives with a gift over to the Shriners Hospitals for Crippled Children.²⁹¹ The grandchildren’s interest was subject to a spendthrift clause.²⁹² The trust corpus was about \$120,000 at Eula’s death in 1956, but had grown to \$3.5 million by 2001.²⁹³ At that time, Shriners Hospitals and the grandchildren reached an agreement under which Susan and Kent would each receive \$150,000 and the remainder of the trust would be distributed to the Shriners Hospitals.²⁹⁴ When the beneficiaries sought judicial termination of the trust pursuant to their agreement, the lower court refused.²⁹⁵ Instead, the court ordered a partial termination of the trust, with \$500,000 to be retained to fund annuity payments to the grandchildren, and the remainder to be distributed to the Shriners Hospitals.²⁹⁶

On appeal, the Kansas Supreme Court observed that the state legislature had recently enacted provisions of the Uniform Trust Code, including sections 410 and 411.²⁹⁷ The grandchildren relied on section 411(b) to support their petition for termination.²⁹⁸ In their

²⁸⁸ RESTATEMENT (THIRD) OF TRUSTS § 65, general cmt. e.

²⁸⁹ See, e.g., *Hamel*, at 1072, 299 P.3d at 286; *In re Estate of Oswald*, 45 Kan. App. 2d 106, 244 P.3d 698 (2010); *Somers*, at 761, 89 P.3d at 898; *Brams Trust v. Haydon*, 266 S.W.3d 300 (Mo. Ct. App. 2008); *In re Cove Irrevocable Trust*, 179 Vt. 587, 893 A.2d 344 (2006).

²⁹⁰ 277 Kan. 761, 89 P.3d 898.

²⁹¹ *Id.* at 762-63, 89 P.3d at 901.

²⁹² *Id.* at 764-65, 89 P.3d at 902.

²⁹³ *Id.* at 762-63, 89 P.3d at 901.

²⁹⁴ *Id.* at 763, 89 P.3d at 901. The Shriners Hospitals also agreed to continue the monthly payments to the grandchildren. *Somers*, at 763, 89 P.3d at 901.

²⁹⁵ *Id.* at 763, 89 P.3d at 901.

²⁹⁶ *Id.* at 763-64, 89 P.3d at 901.

²⁹⁷ *Id.* at 765-66, 89 P.3d at 902-03.

²⁹⁸ *Id.* at 766, 89 P.3d at 903.

view, continuance of the trust was not necessary to achieve any material purpose.²⁹⁹ However, unlike the Uniform Trust Code's version, the Kansas statute contained an additional provision, which declared that "[a] spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust."³⁰⁰ In light of this provision, the court ruled that the grandchildren were required to produce evidence to rebut the presumption raised by the statute.³⁰¹ However, they were unable to establish sufficient evidence.³⁰² The court also rejected the argument that the proposed annuity could take the place of payments from the trust.³⁰³ According to the court, the annuity payments would not be protected from the claims of creditors and, therefore, would not satisfy the settlor's protective objective as well as a spendthrift clause would.³⁰⁴ Nevertheless, relying on the equitable deviation principle embodied in section 412 of the Uniform Trust Code, the court concluded that the unexpected growth of the trust corpus justified a modification of its terms.³⁰⁵ Therefore, the court ordered: (1) for \$500,000 to be retained in the trust and subject to the spendthrift clause, (2) the trustee make monthly payments to the grandchildren, and (3) the remainder of the trust corpus be distributed to Shriners Hospitals.³⁰⁶

The Vermont case of *In re Cove Irrevocable Trust*, relying partly on the Third Restatement, also decided to modify a trust instead of terminating it.³⁰⁷ In that case, Anne Marden created a family trust, where the trust corpus consisted entirely of a certain piece of real property on Lake Champlain.³⁰⁸ The trust provided that the property was not to be sold until 2024, and the proceeds of the sale were to be divided among three of the settlor's five children or their issue.³⁰⁹ In 2003, Anne's sons, Elliot and George, brought an action in their capacity as trustees to permit the property to be sold.³¹⁰ Anne originally opposed the sale, but eventually agreed to it.³¹¹ However, the parties failed to agree on the disposition of the sale proceeds, so the case went to trial.³¹² The trial court ruled that it

²⁹⁹ *Somers*, 277 Kan. at 766, 89 P.3d at 903

³⁰⁰ *Id.* (quoting KAN. STAT. ANN. § 58a-411(e) (2003)).

³⁰¹ *Id.* at 769, 89 P.3d at 905.

³⁰² *Id.*

³⁰³ *Id.* at 767, 89 P.3d at 903.

³⁰⁴ *Somers*, at 767, 89 P.3d at 903.

³⁰⁵ *Id.* at 770, 89 P.3d at 905.

³⁰⁶ *Id.* at 771, 89 P.3d at 906.

³⁰⁷ 179 Vt. 587, 893 A.2d 344.

³⁰⁸ *Id.* at 587, 893 A.2d at 345.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 587, 893 A.2d at 345.

³¹² *Cove*, at 587, 893 A.2d at 345.

was still possible to carry out the primary purpose of the trust, and refused to terminate it.³¹³ Anne appealed the lower court's judgment, claiming that the trust failed and the proceeds of the sale should have reverted to her by way of a resulting trust.³¹⁴

On appeal, the Vermont Supreme Court agreed with the lower court that the primary goal of the trust was "to preserve assets for the use of Marden's three named sons and their children."³¹⁵ The court determined that this goal could still be achieved if the trust was preserved and funded with the proceeds of the sale.³¹⁶ The court expressly relied on section 66 of the Third Restatement to justify modifying the trust in this manner.³¹⁷

The beneficiaries were more successful in the Kansas case of *In re the Estate of Oswald*.³¹⁸ The case involved a trust established by Irma Oswald and funded by a pour-over provision in her will.³¹⁹ Irma died in 2008, survived by all five of her children.³²⁰ After Irma's death, some of her children petitioned the court to terminate the trust and distribute its assets to the trust beneficiaries.³²¹ One of her children, Lloyd, opposed termination, relying on a provision in the trust that allowed him to farm all real estate owned by the trust as long as he desired.³²² As executor of Irma's estate, Lloyd proposed to execute deeds for 1,340 acres of farmland to the various beneficiaries, but hold the deeds in escrow until he retired or ceased farming.³²³ Another child, Henrietta Werth, objected to the proposal, and demanded that all of the trust assets, including title to Irma's real property, be distributed immediately.³²⁴

At trial, Lloyd argued that permitting him to farm the land was a "primary purpose" of the trust.³²⁵ In contrast, Henrietta maintained that the trust required the immediate distribution of the trust property at Irma's death, and did not authorize Lloyd to hold title to any of the farmland in escrow.³²⁶ The trial court ruled that all of the trust assets, including title to the farmland, should be

³¹³ *Id.* at 588, 893 A.2d at 346.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 588-89, 893 A.2d at 347.

³¹⁷ *Cove*, 179 Vt. at 588, 893 A.2d at 347.

³¹⁸ 45 Kan.App.2d 106, 244 P.3d 698.

³¹⁹ *Id.* at 107-08, 244 P.3d at 699-700.

³²⁰ *Id.* at 109, 244 P.3d at 701.

³²¹ *Id.* at 107, 244 P.3d at 699.

³²² *Id.* at 109, 244 P.3d at 700.

³²³ *Oswald*, at 109, 244 P.3d at 701.

³²⁴ *Id.* at 110, 244 P.3d at 701.

³²⁵ *Id.* at 110-11, 244 P.3d at 701-02.

³²⁶ *Id.* at 111, 244 P.3d at 702.

immediately distributed to the trust beneficiaries.³²⁷ It also declared that Lloyd could farm the land as a tenant of his other siblings.³²⁸

On appeal, the Kansas Court of Appeals agreed that Irma intended for the trust to terminate at her death, and rejected the claim that the trust should continue as long as Lloyd conducted farming operations on the land.³²⁹ In doing so, the court also rejected the assertion that protecting Lloyd's right to farm was a material purpose of the trust.³³⁰ Quoting from section 65 of the Third Restatement, the court declared that it would not readily infer a material purpose; instead, the proponent would be required to provide evidence of a "particular concern or objective on the part of the settlor."³³¹ The court found that the settlor could have given Lloyd a life estate in the property if protecting his right to farm was an overriding concern,³³² and therefore, it affirmed the trial court's judgment.³³³

Finally, *Brams Trust v. Haydon*³³⁴ provides an interesting insight on use of virtual representation in a petition to terminate a trust under section 411(b) of the Uniform Trust Code.³³⁵ The *Brams* case involved a testamentary trust established by the will of Harriett Brams.³³⁶ The trust authorized the trustees, in the exercise of their discretion, to distribute any or all of the trust income to Harriett's grandson, Michael Brams.³³⁷ Michael was also given a testamentary power of appointment to distribute portions of the trust corpus to his descendants, born or unborn.³³⁸ If Michael failed to appoint the trust property, it would be distributed to his issue then living, *per stirpes*, as takers in default.³³⁹ Harriett died in 2002; in 2005, Michael filed a petition to terminate the trust pursuant to section 411(b) of the

³²⁷ *Id.*

³²⁸ *Oswald*, at 111, 244 P.3d at 702.

³²⁹ *Id.* at 112-13, 244 P.3d at 702-03.

³³⁰ *Id.* at 114, 244 P.3d at 703.

³³¹ *Id.*

³³² *Id.*

³³³ *Oswald*, at 111, 244 P.3d at 702.

³³⁴ 266 S.W.3d 300 (Mo. Ct. App. 2008).

³³⁵ Virtual representation allows a living member of a beneficiary class, a fiduciary or a parent to represent the interests of unborn, unknown or underage members of the class in litigation and family settlements. See UNIF. TRUST CODE § 304 (2013); Susan T. Bart & Lyman W. Welch, *State Statutes on Virtual Representation—A New State Survey*, 35 ACTEC J. 368 (2009).

³³⁶ *Haydon*, 266 S.W.3d at 302.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

Missouri Uniform Trust Code.³⁴⁰

At the time the petition was filed, Michael was thirty-two years old and had no children.³⁴¹ The trial court issued an order to terminate the trust, but made no finding that the unborn or unascertained beneficiaries of the trust would benefit from its early termination.³⁴² However, this finding was required by a state statute that governed irrevocable trusts created before 2005.³⁴³ The trial court assumed that section 456.3-302 allowed Michael to represent potential appointees and takers in default in his petition for termination.³⁴⁴ The statute declared that “[t]he holder of a testamentary power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.”³⁴⁵ However, the appeals court concluded that Michael was given a special, not a general, power of appointment; therefore, he could not represent the interests of the takers in default.³⁴⁶ Since Michael had not met the requirements of section 456.590.2, the court held that the trial court erred in terminating the trust.³⁴⁷

B. Modification of Trusts

1. *The Uniform Trust Code*

Several provisions of the Uniform Trust Code are concerned with the modification of trusts. Section 411 follows the traditional approach by allowing the settlor and the trust beneficiaries to modify the terms of the trust by unanimous agreement.³⁴⁸ This section also allows a trust to be modified by the beneficiaries alone if the proposed modification is not inconsistent with a material purpose of the trust.³⁴⁹ Section 412 also adopts the traditional view by declaring that a court may modify the terms of a trust when, because of circumstances not anticipated by the settlor, modification is necessary to further the purposes of the trust.³⁵⁰ Section 412(a) expands the conventional doctrine of equitable deviation by expressly stating that a court may modify a trust’s distributive provisions if such action is

³⁴⁰ *Haydon*, 266 S.W.3d at 302.

³⁴¹ *Id.* at 303.

³⁴² *Id.*

³⁴³ MO. REV. STAT. § 456.590 (2015).

³⁴⁴ *Haydon*, 266 S.W.3d at 304.

³⁴⁵ *Id.* (quoting MO. REV. STAT. § 456.3-302 (2014)).

³⁴⁶ *Id.* at 305.

³⁴⁷ *Id.* at 306.

³⁴⁸ See English, *supra* note 272, at 169-70.

³⁴⁹ *Id.* at 170.

³⁵⁰ UNIF. TRUST CODE § 412(a) (2013).

necessary to further trust purposes.³⁵¹ In addition, section 412(b) allows a court, without regard to changed circumstances, to modify an administrative provision if continuing the trust on its existing terms would be impracticable, wasteful, or would impair the trust's administration.³⁵² Section 414 authorizes courts to modify a trust when the trust property is insufficient to justify the cost of administration.³⁵³ Section 416 authorizes a court to modify a trust in order to achieve the settlor's tax objectives.³⁵⁴ Finally, section 706 allows a court to remove a trustee without cause when requested by the beneficiaries.³⁵⁵

2. *The Restatement (Third) of Trusts*

Sections 65 and 66 of the Restatement (Third) of Trusts also reflect some new thinking about the modification of trusts. Section 65, which applies to both termination and modification, declares that the beneficiaries of an irrevocable trust may modify the trust if all consent and the proposed modification is not inconsistent with a material purpose of the trust.³⁵⁶ If the material purpose requirement is not satisfied, the beneficiaries can still compel modification if the settlor consents or if a court determines that the reasons for the proposed modification outweigh the material purpose.³⁵⁷ As previously mentioned, this balancing approach weakens the material purpose requirement, making it easier for a court to modify the terms of a trust.³⁵⁸ Furthermore, unlike section 66, this provision does not require a finding of unanticipated circumstances.³⁵⁹

Section 66 sets forth the Restatement's version of the equitable deviation doctrine. It provides that:

The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.³⁶⁰

This language broadens the scope of the traditional equitable deviation doctrine in several respects. First, it clearly states that a

³⁵¹ See English, *supra* note 272, at 172.

³⁵² *Id.* at 172-73.

³⁵³ *Id.* at 173-74.

³⁵⁴ *Id.* at 175.

³⁵⁵ UNIF. TRUST CODE § 706.

³⁵⁶ RESTATEMENT (THIRD) OF TRUSTS § 65(2).

³⁵⁷ *Id.*

³⁵⁸ See *Unconditional Love*, *supra* note 6, at 450.

³⁵⁹ RESTATEMENT (THIRD) OF TRUSTS § 66, general cmt. a (2003).

³⁶⁰ *Id.* at § 66(1).

court may modify distributive, as well as administrative, provisions of a trust. Second, comment a states that section 66 does not require a showing of changed circumstances; instead, proponents of modification merely have to show that “the settlor was unaware of the circumstances in establishing the terms of the trust.”³⁶¹

3. *Recent Cases*

In recent years, a number of cases have tackled various issues raised by the modification provisions of the Uniform Trust Code and the Third Restatement of Trusts. First, the material purpose requirement remains an issue as the case of *In re Trust D Created Under Last Will & Testament of Darby* illustrates.³⁶² Senator Harry Darby established several testamentary trusts for the benefit of his sister and daughters.³⁶³ Trust D provided a payment of \$4,000 to one of the daughters, Marjorie Alford, during her lifetime, with a gift over to Marjorie’s daughters for their lives and then to the issue of each of her daughters.³⁶⁴ The trust also contained a spendthrift clause.³⁶⁵ Darby later increased Marjorie’s annual distribution to \$24,000 per year.³⁶⁶ Darby died in 1987, and in 2009, Marjorie petitioned the court to modify Trust D to increase her annual payments to \$40,000 per year.³⁶⁷ Marjorie claimed that payments from the trust were no longer adequate to satisfy her basic living expenses.³⁶⁸ All of the qualified trust beneficiaries consented to the proposed modification, and the lower court approved Marjorie’s petition.³⁶⁹

Reviewing the lower court’s actions, the appeals court considered whether it was authorized to modify the trust under two state statutes that corresponded to sections 411(b) and 412(a) of the Uniform Trust Code.³⁷⁰ The court began by observing that a trust cannot be modified under section 411(b), notwithstanding the fact that all of the beneficiaries have consented, unless it is consistent with a material purpose of the trust.³⁷¹ In order to determine whether that requirement was met, the court had to identify the trust’s material purpose. Quoting from one of the Third Restatement’s comments, the court declared that material purposes could not be

³⁶¹ *Id.* at § 66, general cmt. a.

³⁶² 290 Kan. 785, 234 P.3d 793.

³⁶³ *Id.* at 787, 234 P.3d at 796.

³⁶⁴ *Id.* at 787-88, 234 P.3d at 796-97.

³⁶⁵ *Id.* at 788, 234 P.3d at 797.

³⁶⁶ *Darby*, at 788, 234 P.3d at 797.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 789, 234 P.3d at 798.

³⁶⁹ *Id.* at 789-90, 234 P.3d at 798.

³⁷⁰ *Id.* at 790-91, 234 P.3d at 798-99.

³⁷¹ *Darby*, at 791, 234 P.3d at 799.

readily inferred.³⁷² A material purpose requires the proponent to show that the settlor had a particular concern or objective in creating the trust.³⁷³

Applying this rule, the court rejected Marjorie's contention that a material purpose of the trust was to provide for her basic support.³⁷⁴ It noted that the trust was not a support trust; rather, it provided for a specific payment to Marjorie without any connection to her support needs.³⁷⁵ On the other hand, the court determined that the presence of a spendthrift provision in the trust indicated that one of the settlor's material purposes for the trust was to protect the interests of the remainder beneficiaries.³⁷⁶ An increase in distributions to Marjorie would be inconsistent with that objective.³⁷⁷ Consequently, the court concluded Marjorie's request was not authorized by section 411(b).³⁷⁸

A number of other cases have also been decided recently under the Uniform Trust Code and Third Restatement regimes.³⁷⁹ For example, in the case of *In re Nobbe*, the Indiana Appellate Court, relied on section 412 of the Uniform Trust Code and suggested that equitable deviation could be used to modify the distributive provisions of a trust.³⁸⁰ The case involved a dispute among nine brothers and sisters over the terms of a testamentary trust created by their father in 1982.³⁸¹ The testator, Edwin Nobbe, bequeathed to his wife, Loretta, an amount sufficient to obtain the maximum marital estate tax deduction.³⁸² The remainder of Edwin's estate was to be placed in trust with Loretta as the income beneficiary.³⁸³ At her death, the corpus of the trust was to be distributed to Edwin's children free of trust.³⁸⁴ However, Item VII of the will left certain bank stock in equal shares to three of Edwin's children, Marlene, Herman, and Susan.³⁸⁵ At Edwin's death, his personal representative transferred 500 shares

³⁷² *Id.* at 792, 234 P.3d at 799 (quoting RESTATEMENT (THIRD) OF TRUSTS § 64, cmt. d (2003)).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 791-92, 234 P.3d at 799.

³⁷⁶ *Darby*, at 792, 234 P.3d at 799.

³⁷⁷ *Id.* at 793, 234 P.3d at 800.

³⁷⁸ *Id.*

³⁷⁹ *See, e.g.*, Ruby G. Owen Trust *ex rel.* Owen, 2012 Ark. 381, 418 S.W.3d 421, 422 (2012); *Chapman*, 953 N.E.2d at 580-82; *In re Nobbe*, 831 N.E.2d 835 (Ind. Ct. App. 2005); *Darby*, 290 Kan. 785, 234 P.3d 793; *In re Riddell*, 138 Wash. App. 485, 157 P.3d 888 (2007).

³⁸⁰ 831 N.E.2d 835.

³⁸¹ *Id.* at 836-37.

³⁸² *Id.* at 837.

³⁸³ *Id.*

³⁸⁴ *Id.* at 837.

³⁸⁵ *Nobbe*, 831 N.E.2d at 838.

of the bank stock, then worth \$40,000, to the trust.³⁸⁶ However, during the period between Edwin's death in 1982 and Loretta's death in 2003, changes in the banking laws caused the stock to increase in value by more than \$3 million.³⁸⁷

Shortly after Loretta's death, the Trustee petitioned for instructions regarding distribution of the trust corpus to the children.³⁸⁸ Later, in a separate petition, the other children ("the Appellees") argued that Edwin merely intended to leave Marlene, Herman, and Susan ("the Appellants") the *value* of the stock at the time of his death (\$40,000).³⁸⁹ Alternatively, the Appellees asked the court to approve a deviation from the trust because "the distribution of the trust proposed by the Trustee would defeat or substantially impair the accomplishment of the purposes of the trust, that is Edwin's intent to treat his nine children 'equally or substantially equally.'"³⁹⁰ The trial court agreed with this interpretation and ordered the trustee to distribute \$40,000 to the Appellants, and to distribute the remaining stock in equal shares to all nine children.³⁹¹ The Appellants then appealed.³⁹²

The appeals court held that the will, by its express terms, made a specific bequest of the bank stock to the Appellants.³⁹³ Therefore, unless the will was modified, all of the bank stock, including dividends and accretions, would be distributed to the Appellants when the trust is terminated.³⁹⁴ The court considered the Appellees' argument that Edwin intended to treat all of his children more or less equally, and his failure to foresee changes in state banking laws constituted an unforeseen circumstance that completely impaired his estate plan.³⁹⁵ In response, the Appellants contended that equitable deviation only allowed a court to modify the administrative provisions of a trust.³⁹⁶ However, the Appellees pointed out that both the Third Restatement and section 412(a) of the Uniform Trust Code provided that equitable deviation could be applied to modify distributive as well as administrative provisions of a trust.³⁹⁷ Furthermore, the appeals court noted, the state legislature

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 838-39.

³⁸⁹ *Id.* at 839.

³⁹⁰ *Nobbe*, 831 N.E.2d. at 839.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* at 840.

³⁹⁴ *Id.* at 841.

³⁹⁵ *Nobbe*, 831 N.E.2d. at 841.

³⁹⁶ *Id.* at 841-42.

³⁹⁷ *Id.* at 842.

had recently adopted the Uniform Trust Code, including § 412(a).³⁹⁸

The final question considered was whether significant changes in state banking laws were unforeseeable to the testator. The court concluded that this was not the sort of unforeseen circumstance that was required to justify the use of equitable deviation.³⁹⁹ In the first place, the court determined that changes in state banking laws were foreseeable, and that officers of the bank informed shareholders – including Edwin – as early as 1979 that such changes were likely to occur in the future.⁴⁰⁰ In addition, the court declared that an increase in the value of a trust asset was not the sort of economic change that the Restatement and the Uniform Trust Code considered to be sufficient to invoke the doctrine of equitable deviation.⁴⁰¹ The court concluded by declaring that “[w]e will not, over twenty years later, step in and redistribute Edwin’s estate in an attempt to equalize the devises at this point in time.”⁴⁰² Accordingly, it reversed the lower court’s judgment in favor of the Appellees.⁴⁰³

However, unforeseen circumstances may be sufficient to allow the conversion of an ordinary beneficial interest into one protected by a supplemental needs trust.⁴⁰⁴ For example, in the case of *In Re Riddell*,⁴⁰⁵ a Washington appeals court invoked the Restatement (Third) of Trusts to authorize a lower court to employ equitable deviation to convert the interest of one of the settlor’s grandchildren into a supplemental needs trust.⁴⁰⁶ George and Irene Riddell had created several trusts for the benefit of their son, Ralph, and his wife Beverly, as well as Ralph’s children, Donald and Nancy.⁴⁰⁷ The trusts provided, *inter alia*, that after Ralph and Beverly died, Donald and Nancy would receive the trust corpus when they reached the age of thirty-five.⁴⁰⁸ Unfortunately, Nancy suffered from a number of serious psychological disorders and was confined to a state mental

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 842-43.

⁴⁰⁰ *Nobbe*, 831 N.E.2d. at 842-43.

⁴⁰¹ *Id.* at 843.

⁴⁰² *Id.* at 843.

⁴⁰³ *Id.*

⁴⁰⁴ *See Owen*, at 381, 418 S.W.3d at 422; *White v. Kan. Health Policy Auth.*, 40 Kan. App. 2d 971, 981, 198 P.3d 172, 180 (2008); *Riddell*, 138 Wash. App. at 485, 157 P.3d at 888. “A supplemental needs trust is a trust that is established for the disabled person’s benefit and that is intended to supplement public benefits without increasing countable assets and resources so as to disqualify the individual from public benefits.” *Riddell*, 138 Wash.App. at 495, 157 P.3d at 892.

⁴⁰⁵ *Riddell*, 138 Wash.App. 485, 157 P.3d 888.

⁴⁰⁶ *Id.* at 488, 157 P.3d at 889.

⁴⁰⁷ *Id.* at 488-89, 157 P.3d at 889-90.

⁴⁰⁸ *Id.* at 489, 157 P.3d at 890.

hospital.⁴⁰⁹

In his capacity as trustee of the Riddell trusts, Ralph filed a petition asking the court to modify the trust so that Nancy's share would not be distributed to her outright, but instead transferred to a supplemental needs trust so that it would not be subject to attachment by the state for the cost of her health care.⁴¹⁰ At the time the petition was brought, both Donald and Nancy had reached the age of thirty-five, and would receive the trust corpus outright at their parents' deaths.⁴¹¹ However, the trial court refused to modify the trusts because it concluded that, even if the settlors did not foresee Nancy's mental situation, converting her interest into a supplemental needs trust would not further the overall purpose of the trust.⁴¹² On appeal, Ralph argued that the equitable deviation doctrine, as set forth in the Third Restatement, authorized a court to modify a trust in the manner requested.⁴¹³ He contended that the settlors, by requiring their grandchildren to reach the age of thirty-five before receiving the trust assets, demonstrated an intent that they achieve a certain level of maturity and stability before obtaining full ownership of the trust property.⁴¹⁴ Had they anticipated Nancy's debilitating mental condition, the Riddells would not have left the trust property to her outright.⁴¹⁵

The appeals court declared that it would rely on the Washington Supreme Court's analysis of equitable deviation in *Niemann v. Vaughn Community Church*,⁴¹⁶ which applied that doctrine to modify the administrative provisions of a charitable trust.⁴¹⁷ According to the appeals court, the court in *Niemann* adopted a two-pronged approach to determine if modification of a trust is permissible.⁴¹⁸ This approach is based on the Third Restatement, and states that a court may modify an administrative or distributive provision: (1) "because of circumstances not anticipated by the settlor," and (2) "the modification or deviation would further the purposes of the trust."⁴¹⁹ According to the *Riddell* court, the Restatement gave courts broader discretion in the area of trust modification than the traditional rule.

⁴⁰⁹ *Id.*

⁴¹⁰ *Riddell*, 138 Wash.App. at 489, 157 P.3d at 890.

⁴¹¹ *Id.*

⁴¹² *Id.* at 491, 157 P.3d at 890-91.

⁴¹³ *Id.* at 492, 157 P.3d at 891.

⁴¹⁴ *Id.* at 492-93, 157 P.3d at 891.

⁴¹⁵ *Riddell*, 138 Wash.App. at 492, 157 P.3d at 891.

⁴¹⁶ *Id.* at 493, 157 P.3d at 891 (citing *Niemann*, 154 Wash. 2d 365, 113 P.3d 463).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 493, 157 P.3d at 891-92.

⁴¹⁹ *Id.* (quoting RESTATEMENT (THIRD) OF TRUSTS (internal citations omitted)).

Applying these criteria, the court in *Riddell* determined that Nancy's grandparents could not have anticipated that she would become mentally incapacitated and unable to manage her financial affairs.⁴²⁰ Nor could they have anticipated passage of federal legislation that authorized the creation of supplemental needs trusts.⁴²¹ Furthermore, the court found that these changed circumstances had frustrated the settlors' intent that Nancy be given the trust property to use as she saw fit.⁴²² Consequently, the court concluded that since Nancy would never be able to manage the trust as she chose, transferring the funds to a supplemental needs trust would at least protect it from attachment by the state during her lifetime.⁴²³ Therefore, the court remanded the case back to the trial court, and directed it to "order such equitable deviation as is consistent with the settlors' intent in light of changed circumstances."⁴²⁴

A change in the tax laws is another type of unforeseen circumstance that has led trustees and beneficiaries to petition courts to modify a trust under the doctrine of equitable deviation.⁴²⁵ As previously discussed, section 416 of the Uniform Trust Code specifically authorizes courts to modify trust provisions in response to changes in existing tax laws, as long as the proposed modification is not contrary to the settlor's probable intent.⁴²⁶ However, section 416's "probable intent" language may create problems when the proposed modification changes the trust's distributive provisions.

This issue arose in the *Darby* case,⁴²⁷ discussed *supra* Section III.B.3. In that case, Marjorie Alford asked the court to grant her a limited testamentary power of appointment.⁴²⁸ The purpose was to vest the assets of the trust in her estate, thereby subjecting them to federal estate tax liability, but not to federal generation-skipping transfer ("GST") tax liability.⁴²⁹ Because the estate tax exemption exceeded the value of the trust, the proposed modification would have reduced the Darby family's overall tax liability.⁴³⁰ According to

⁴²⁰ *Riddell*, 138 Wash.App. at 494, 157 P.3d at 892.

⁴²¹ *Id.* at 494-95, 157 P.3d at 892.

⁴²² *Id.* at 494, 157 P.3d at 892.

⁴²³ *Id.* at 495-96, 157 P.3d at 893.

⁴²⁴ *Id.* at 496, 157 P.3d at 893.

⁴²⁵ *See Darby*, at 795, 234 P.3d at 798-99; *In re Harris Testamentary Trust*, 275 Kan. 946, 69 P.3d 1109 (2003); *Head v. Head*, 261 Ore. App. 471, 483, 323 P.3d 505, 507 (2014).

⁴²⁶ UNIF. TRUST CODE § 416 (2013).

⁴²⁷ *See Darby*, 290 Kan. 785, 234 P.3d 793).

⁴²⁸ *Id.* at 796, 234 P.3d at 801.

⁴²⁹ *Id.*

⁴³⁰ *Id.* On the other hand, if the trust property had been distributed to Darby's grandchildren as his will provided, it would have been subjected to a 45% tax rate under the provisions of GST tax. *Id.* at 802.

Marjorie, at the time the trust was created, a GST could effectively avoid federal estate taxation on trust assets passed to each generation; however, changes in the federal GST tax and increases in the estate tax exemption seriously undercut Darby's GST strategy.⁴³¹ Although the court conceded that Darby "could have done a far better job of tax planning had he desired to avoid the GSTT implications for Trust D," it nevertheless refused to modify the trust because the proposed modification was completely contrary to the settlor's intent.⁴³² His intent was reflected by the presence of a spendthrift clause in his will, which would preserve the trust's assets for the second and third generations.⁴³³

Finally, section 706 of the Uniform Trust Code allows a court to remove a trustee without cause at the request of the beneficiaries.⁴³⁴ By threatening to have the trustee removed, the living beneficiaries can pressure the trustee to modify the trust terms (if the trustee has the power to do so) in a way that is more to their liking.⁴³⁵ *Davis v. U.S. Bank National Association* provides an illustration of the Code's expansive approach to trustee removal.⁴³⁶ In that case, Lorenz Ayers executed a trust instrument that appointed National Association as trustee, and named Harold Davis as the income beneficiary.⁴³⁷ After Harold's death, the trust corpus was to be divided among his living children in equal shares.⁴³⁸ If there were no surviving children, the trust property was to go to Lorenz's heirs at law, and otherwise to Lafayette College in Pennsylvania.⁴³⁹ At the time of the litigation, Harold had two children, Dillon and Marguerite.⁴⁴⁰

In 2006, Harold filed a petition to remove National as trustee, transfer the *situs* of the trust to Delaware, and appoint a Delaware trust company as trustee.⁴⁴¹ There was no allegation of wrongdoing by National; however, Harold argued that its removal as trustee would serve the interests of all of the trust beneficiaries, and would not be inconsistent with a material purpose of the trust.⁴⁴² Affirming the lower court, the appellate court concluded that a state statute

⁴³¹ *Darby*, at 797, 234 P.3d at 802.

⁴³² *Id.* at 799, 234 P.3d at 803.

⁴³³ *Id.* at 799-800, 234 P.3d at 803-04.

⁴³⁴ UNIF. TRUST CODE § 706(b)(4).

⁴³⁵ See Dukeminier & Krier, *supra* note 8, at 1335.

⁴³⁶ 243 S.W.3d 425 (Mo. Ct. App. 2007).

⁴³⁷ *Id.* at 426.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Davis*, 243 S.W.3d at 426.

⁴⁴² *Id.*

based on section 706(b)(4) of the Uniform Trust Code authorized the court to remove the current trustee because the petitioner had presented evidence that the Delaware trustee would charge lower fees for the same level of service.⁴⁴³

C. Summary

Both the Uniform Trust Code and the Third Restatement have relaxed the traditional rules regarding termination and modification of trusts.⁴⁴⁴ Insofar as termination is concerned, section 411(b) appears to reaffirm the *Claflin* Doctrine. However, section 411(c) qualifies this by eliminating the presumption that a spendthrift provision indicates that the settlor would not want to terminate the trust prematurely. In addition, section 411(e) does away with the requirement that all beneficiaries consent to the termination of a trust. Finally, section 412 allows a court to terminate a trust when circumstances arise that were not anticipated by the settlor if termination would further the purposes of the trust. Thus, these provisions significantly liberalize the traditional requirements for termination.

The Third Restatement goes even further in this direction. Section 65(2) allows a court to terminate a trust if it determines that the reasons supporting termination outweigh a material purpose of the trust. In addition, comment e to section 65 declares that spendthrift and discretionary provisions do not create a presumption that early termination was contrary to a material purpose of the trust.

The Uniform Trust Code and the Third Restatement have also made it easier for courts to modify the terms of a trust. For example, section 412(a) of the Uniform Trust Code expands the equitable deviation doctrine by authorizing a court to modify the distributive provisions of a trust if it concludes that modification is necessary to further the purposes of the trust. Furthermore, section 412(b) allows a court to modify administrative provisions, even in the absence of changed circumstances, if retaining the existing trust terms would be impracticable, wasteful, or would impair the administration of the trust. Section 66 of the Third Restatement also extends the equitable deviation doctrine to distributive provisions, and allows a court to modify the terms of a trust in the absence of changed circumstances if it concludes that the settlor was unaware of an existing circumstance at the time the trust was established.

⁴⁴³ *Id.* at 431.

⁴⁴⁴ See Dukeminier & Krier, *supra* note 8, at 1329.

IV. MODIFICATION AND TERMINATION BY TRUSTEES AND TRUST PROTECTORS

Although trust beneficiaries may agree among themselves to modify or terminate the terms of a trust, trustees may seek judicial approval to protect themselves against potential liability for failing to carry out the original terms of the trust. A judicial decree may also be required if some of the beneficiaries are unborn, underage, or undetermined. Furthermore, even though the Uniform Trust Code and the Third Restatement have liberalized the traditional rules relating to the modification and termination of trusts, they still contemplate that judicial authorization will be needed in most instances.⁴⁴⁵ However, this sort of judicial involvement in trust management is not always desirable, either from the perspective of the trustee, the trust beneficiaries, or the efficient management of judicial resources.⁴⁴⁶ Fortunately, settlors can employ a number of devices to avoid the need for judicial action. Essentially, these alternatives involve authorizing a trustee or a trust protector to terminate or modify a trust without the need for judicial approval.

A. Modification or Termination by a Trustee

For many years, courts have upheld the exercise of a trustee's discretion in terminating a trust.⁴⁴⁷ However, two related questions have arisen in connection with the exercise of this power: (1) what standard of conduct applies to a trustee's exercise of this power; and (2) what standard of review should apply when a court is called upon to evaluate the propriety of a trustee's actions? Both of these issues arose in *American Cancer Society, St. Louis Division v. Hammerstein*.⁴⁴⁸ In that case, Lena Kohler established a testamentary trust for her daughter, Virginia Knoll, and son-in-law, John Knoll, Jr.⁴⁴⁹ Under the terms of the trust, Virginia was to receive the income from the trust during her lifetime; at her death, if John survived Virginia, he would receive the income from the trust until his death or remarriage.⁴⁵⁰ However, the trustee had discretion to terminate the trust during the lifetime of Virginia or John when

⁴⁴⁵ See *Perpetual Trusts*, *supra* note 200, at 609.

⁴⁴⁶ See *Dukeminier & Krier*, *supra* note 8, at 1331.

⁴⁴⁷ See, e.g., *Matter of McManus' Estate*, 407 N.Y.S.2d 180, 184, 62 A.D.2d 758, 764 (1978); *In re Eckert's Trust*, 23 A.D.2d 32, 35-36, 258 N.Y.S.2d 539, 543 (1965); *In re Estate of Fishberg*, 158 Misc. 3, 285 N.Y.S. 303, 307 (Sur. Ct. 1936); *Major v. Major*, 177 A.D. 102, 163 N.Y.S. 925 (1917). See also UNIF. TRUST CODE § 808(c) (declaring that "[t]he terms of the trust may confer upon a trustee . . . a power to direct the modification or termination of the trust." See also *Dukeminier & Krier*, *supra* note 8, at 1332 (highlighting that a non-trustee can be given a non-fiduciary special power of appointment to appoint trust principal).

⁴⁴⁸ 631 S.W.2d 858 (Mo. Ct. App. 1981).

⁴⁴⁹ *Id.* at 860.

⁴⁵⁰ *Id.* at 861.

either became the sole beneficiary of the trust.⁴⁵¹ Finally, if the trust did not terminate at the death (or remarriage) of the last income beneficiary, the trustee was directed to distribute the trust corpus to various other beneficiaries, including the American Cancer Society.⁴⁵²

Virginia died in 1966, and John became the trust's sole income beneficiary.⁴⁵³ In 1970, the trustee notified the remainder beneficiaries that he intended to terminate the trust and distribute the trust corpus to John.⁴⁵⁴ The trust owned one-third of the shares of the Kohler City Supply Company, a closely held corporation.⁴⁵⁵ John "and four long-time employees of the company owned the remaining shares."⁴⁵⁶ Both John and the trustee, Robert Hammerstein, were also officers and directors of the corporation.⁴⁵⁷ Hammerstein later testified that he decided to terminate the trust in order to prevent "chaos in the company," as he feared would occur if the shares in the trust were divided among a large number of beneficiaries.⁴⁵⁸

Upon receiving notice of the pending termination, the American Cancer Society challenged the right of the trustee to terminate the trust.⁴⁵⁹ The litigation lasted for more than ten years.⁴⁶⁰ The lower court ruled that the attempted termination was void because the trustee "unintentionally, in error and through mistake" abused his discretion.⁴⁶¹ However, the lower court's judgment was reversed on appeal.⁴⁶² The appeals court began its analysis of the case by declaring:

When a testator vests sole discretion in a matter in the trustee and supplies no objective standards by which to evaluate the reasonableness of his conduct, a court must not interfere unless the trustee, in exercising his power, [willfully] abuses his discretion or acts arbitrarily, fraudulently, dishonestly or with an improper

⁴⁵¹ *Id.* at 860.

⁴⁵² *Id.* at 859.

⁴⁵³ *Hammerstein*, 631 S.W.2d at 861.

⁴⁵⁴ *Id.* at 860.

⁴⁵⁵ *Id.* at 861.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Hammerstein*, 631 S.W.2d at 861-62. The remainder beneficiaries included four churches, two charities and forty-two individuals or their descendants. *Id.*

⁴⁵⁹ *Id.* at 860.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 862.

⁴⁶² *Hammerstein*, 631 S.W.2d at 863. The appeals court concluded that the trust was terminated in 1970 when the trustee announced his intention to terminate the trust and distribute the trust corpus to John. *Id.* at 860. Although the trust assets were not distributed until the end of the litigation, the court held that the trust property vested in John when the trust was terminated in 1970. *Id.* at 865.

motive.⁴⁶³

The court then determined that the settlor had clearly expressed an intent to give the trustee absolute discretion to terminate the trust and distribute the trust property to John.⁴⁶⁴ Consequently, the court concluded that the trial court erred in overruling the trustee's decision to terminate on the grounds that he acted "unintentionally, erroneously and mistakenly."⁴⁶⁵ According to the court, the trustee's decision would prevail unless there was a "willful abuse of discretion or bad faith on his part."⁴⁶⁶ In this case, there was no finding by the appeals court that the trustee had acted arbitrarily, dishonestly or fraudulently, or intentionally abused his discretion.⁴⁶⁷ Furthermore, the court observed that the contingent beneficiaries could not challenge the trustee's decision simply because it extinguished their interest in the trust.⁴⁶⁸ Finally, the court stated that the trustee was not obligated to seek a court's advice or permission before acting to terminate the trust.⁴⁶⁹

The extinguishment of contingent interests was also at issue in *Croslow v. Croslow*.⁴⁷⁰ The settlor, John Louis Croslow, established an *inter vivos* trust under which the trustees were given the discretion to pay income from the trust to Croslow or his wife and children.⁴⁷¹ The trustees were also authorized to terminate the trust and distribute the trust corpus to John, if living, or to his heirs, personal representative, or devisees.⁴⁷² The principal asset of the trust was a tract of land leased to the Marathon Oil Company for the production of natural gas.⁴⁷³ In 1972, the trustees terminated the trust and conveyed the property to John and his wife, Marguerite, as joint tenants.⁴⁷⁴ John died in 1973, and his children by a prior marriage brought suit against Marguerite, claiming that they were trust beneficiaries since the trustee had discretion to pay some of the trust income to them.⁴⁷⁵

The children contended that the trustees' action constituted a modification of the trust, requiring the consent of all of the trust

⁴⁶³ *Id.* at 863.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Hammerstein*, 631 S.W.2d at 863.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 864.

⁴⁶⁹ *Id.* at 865.

⁴⁷⁰ 38 Ill. App. 3d 373, 347 N.E.2d 800 (1976).

⁴⁷¹ *Id.* at 374-75, 347 N.E.2d at 801-02.

⁴⁷² *Id.* at 374, 347 N.E.2d at 801.

⁴⁷³ *Id.* at 375, 347 N.E.2d at 802.

⁴⁷⁴ *Id.* at 376, 347 N.E.2d at 802.

⁴⁷⁵ *Croslow*, at 376, 347 N.E.2d at 802-03.

beneficiaries.⁴⁷⁶ However, the court distinguished between a judicial modification and the trust instrument that gives the power to terminate to the trustee.⁴⁷⁷ Furthermore, the court held that if the trustee was empowered to distribute the trust property to a beneficiary upon termination, he could also distribute some or all of the property to a third person at the request of the beneficiary.⁴⁷⁸ Therefore, the delivery of a deed from the trustee to John and Marguerite as joint tenants did not constitute an improper transfer of trust property to a non-beneficiary.⁴⁷⁹ Finally, the court declared that “although the children of John Louis Croslow were in fact beneficiaries under the trust while the trust was in operation upon termination by the trustees in accordance with the discretionary power of the trust, the children’s rights as beneficiaries were extinguished.”⁴⁸⁰ Accordingly, the appeals court affirmed the judgment of the lower court.⁴⁸¹

In *Major v. Major*,⁴⁸² a New York court allowed a trustee to terminate a trust for his own benefit even though his action extinguished the remainder interest of his infant son.⁴⁸³ *Major* involved a provision in the will of Richard Major, which created income interests in trusts for each of his three sons, Frank, Richard, and George.⁴⁸⁴ The will also provided that the trust corpus would be distributed to each son’s issue at his death.⁴⁸⁵ Finally, the testator declared that his executors “in the exercise of their discretion” could terminate any of the trusts and distribute the trust property to the income beneficiaries.⁴⁸⁶ Richard appointed each of his three sons as executors of his estate.⁴⁸⁷ When Frank and George died, Richard became the sole executor and trustee.⁴⁸⁸ In that capacity, Richard decided to terminate the testamentary trust and take his share of his father’s estate free of trust.⁴⁸⁹ However, Richard’s infant son, Richard, Jr., challenged this action in court through a guardian ad litem.⁴⁹⁰ On an appeal from a decision upholding the termination, the

⁴⁷⁶ *Id.* at 377, 347 N.E.2d at 803.

⁴⁷⁷ *Id.* at 377, 347 N.E.2d at 803.

⁴⁷⁸ *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS).

⁴⁷⁹ *Id.*

⁴⁸⁰ *Croslow*, at 378, 347 N.E.2d at 804.

⁴⁸¹ *Id.*

⁴⁸² 177 A.D. 102, 163 N.Y.S. 925.

⁴⁸³ *Id.* at 103, 163 N.Y.S. at 928.

⁴⁸⁴ *Id.* at 103, 163 N.Y.S. at 926.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Major*, at 103, 163 N.Y.S. at 926.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 103, 163 N.Y.S. at 927.

⁴⁹⁰ *Id.*

New York court affirmed, concluding that a power held in several grantees could be exercised by the survivor.⁴⁹¹ According to the court:

It is an informing fact that the exercise of the power depended upon no conditions, contingencies or limitations. It was a naked power to pay over, without the exercise of any discretion referable to any requirement, advantage, or necessity. It was not to furnish support, if needed, or to maintain any state of living. It was merely an unconditional power to do something.⁴⁹²

It is interesting to note that the court seemed to view Richard's right to terminate the trust as a non-fiduciary power, independent of his status as a trustee. Apparently, the court did not believe that Richard owed any fiduciary duty to his son, who had a contingent remainder interest under the trust.

The settlor may also authorize a trustee to modify the terms of a trust. For example, section 808(c) of the Uniform Trust Code permits a trustee to modify the terms of a trust when expressly authorized to do so in the trust instrument.⁴⁹³ Of course, the power to modify may also be limited as illustrated in *Rosner v. Caplow*.⁴⁹⁴ In 1947, Leo and Anna Rosner established irrevocable *inter vivos* trusts for their two daughters, June and Mildred.⁴⁹⁵ Each daughter was named as an income beneficiary with a gift over to her issue.⁴⁹⁶ The trust instrument also created a trust for Anna.⁴⁹⁷ Leo was sole trustee for each of these trusts.⁴⁹⁸ However, Jacob Fisher and Samuel Ecker were named as substitute trustees in the event that Leo died or was otherwise unable to serve as trustee.⁴⁹⁹ Over the years, the parties entered into various agreements relating to the trusts.⁵⁰⁰ In 1951, Leo, Anna, June, and Mildred granted to Leo the right during his lifetime to name other substitute trustees.⁵⁰¹ At the time this agreement was signed, June was a minor, and the sole remainderman was Mildred's daughter, Stacey.⁵⁰²

In 1963, Leo resigned as trustee, and appointed Anna and

⁴⁹¹ *Id.* at 103, 163 N.Y.S. at 927.

⁴⁹² *Major*, at 103, 163 N.Y.S. at 928.

⁴⁹³ UNIF. TRUST CODE § 808(c) (2013).

⁴⁹⁴ 105 Misc. 2d 592, 432 N.Y.S.2d 577 (Sup. Ct. 1980).

⁴⁹⁵ *Id.* at 592, 432 N.Y.S.2d at 579.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Rosner*, at 593, 432 N.Y.S.2d at 579-80.

⁵⁰⁰ *Id.* at 594, 432 N.Y.S.2d at 580.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

Mildred as successor trustees.⁵⁰³ Several months later, June purported to “renounce” her interest in her trust in return for a cooperative apartment in New York City.⁵⁰⁴ In 1966, the parties entered into another agreement under which the corpus of June’s trust was divided into separate trusts for June’s three minor children, Jeffrey, Wendy, and Marcey.⁵⁰⁵ Finally, in 1973, the parties entered into another agreement, reinstating June as the beneficiary of her former trust.⁵⁰⁶ Leo died in 1977,⁵⁰⁷ and in 1978, Anna and Mildred agreed to name June as a third trustee.⁵⁰⁸ Nevertheless, in 1979, June brought suit to remove her mother and sister as trustees, and to designate herself as a successor trustee.⁵⁰⁹ June argued that the 1951 agreement, which purported to give Leo the power to name substitute trustees, was invalid because she and her niece, Stacey, were minors at the time.⁵¹⁰

The court observed that the settlor of a trust could revoke or amend it only if all persons “beneficially interested” consented.⁵¹¹ Although the court agreed that June did not legally consent to the agreement in 1951, it concluded that she had effectively consented after reaching her majority by accepting income from the trust for many years afterward.⁵¹² On the other hand, the court found that the 1978 agreement was not valid.⁵¹³ First, it declared that the designation of an additional or successor trustee was a modification of the trust.⁵¹⁴ Since no power to modify was reserved in the original trust instrument, it could have only come from the 1951 agreement.⁵¹⁵ However, that agreement only gave the power to modify the trust to Leo during his lifetime and not to Anna and Mildred as successor trustees.⁵¹⁶ Thus, the court held that Leo’s designation of Anna and Mildred as successor trustees was valid, but their designation of June was not.⁵¹⁷

⁵⁰³ *Id.*

⁵⁰⁴ *Rosner*, at 594, 432 N.Y.S.2d at 580.

⁵⁰⁵ *Id.* at 595, 432 N.Y.S.2d at 580.

⁵⁰⁶ *Id.* at 595, 432 N.Y.S.2d at 580.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 595-96, 432 N.Y.S.2d at 581.

⁵⁰⁹ *Rosner*, at 596, 432 N.Y.S.2d at 581.

⁵¹⁰ *Id.* at 597, 432 N.Y.S.2d at 581.

⁵¹¹ *Id.* at 597, 432 N.Y.S.2d at 581-82.

⁵¹² *Id.* at 598, 432 N.Y.S.2d at 582.

⁵¹³ *Id.* at 600, 432 N.Y.S.2d at 583.

⁵¹⁴ *Rosner*, at 600-01, 432 N.Y.S.2d at 583.

⁵¹⁵ *Id.* at 601, 432 N.Y.S.2d at 583.

⁵¹⁶ *Id.* at 601, 432 N.Y.S.2d at 583.

⁵¹⁷ *Id.* at 601, 432 N.Y.S.2d at 584. Nor was the statutory provision allowing modification available once Leo, one of the settlors, had died. *Id.*

B. Decanting

In addition to express modification of the terms of a trust, in many states, a trustee can effectively modify a trust by transferring the trust corpus to another trust if authorized to do so in the trust instrument.⁵¹⁸ This practice is known as “decanting,”⁵¹⁹ which occurs when a trustee, who has discretion to distribute trust property to certain beneficiaries, distributes the property to another trust created for their benefit instead of distributing the property to them outright.⁵²⁰ There are a number of benefits associated with decanting.⁵²¹ Some of the more important reasons to decant include: (1) updating trust terms to reflect changes in the law governing the trust; (2) modifying the distributive terms of the trust in order to address circumstances such as changes in a beneficiary’s financial status, marital status, or health; and (3) facilitating GST and other tax planning for trust beneficiaries.⁵²²

1. *The Common Law Power to Decant*

One of the first courts to consider the validity of decanting was the Florida Supreme Court in *Phipps v. Palm Beach Trust Co.*⁵²³ In 1932, Margarita Phipps created a trust for the benefit of her children and their descendants.⁵²⁴ Margarita named her husband, John, as individual trustee, and the Palm Beach Trust Company as corporate trustee.⁵²⁵ The trust instrument provided that John, “in his sole and absolute discretion,” could distribute trust property to any or all of the beneficiaries.⁵²⁶ In 1939, John directed the corporate trustee to transfer the trust corpus to a new trust, which had slightly different provisions.⁵²⁷ The corporate trustee requested the court to determine whether the individual trustee had the power to appoint the property in further trust.⁵²⁸ The court ruled that John could appoint the trust

⁵¹⁸ Willms, *supra* note 17, at 37.

⁵¹⁹ “Decanting” refers to the practice of transferring wine from its original bottle to another receptacle in order to remove sediment and other impurities. See Niendorf, *supra* note 3, at 619.

⁵²⁰ Medlin, *supra* note 16, at 94-95.

⁵²¹ Simmons, *supra* note 19, at 255 (identifying fifteen reasons to decant).

⁵²² See William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 14-15 (2010-11).

⁵²³ 142 Fla. 782, 196 So. 299 (1940).

⁵²⁴ *Id.* at 783, 196 So. at 300.

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 784, 196 So. at 300.

⁵²⁷ *Id.* at 784, 196 So. at 300.

⁵²⁸ *Phipps*, at 784, 196 So. at 300.

property in this manner, and the corporate trustee appealed.⁵²⁹

The Florida Supreme Court determined that John had a special, not a general, power of appointment since he could only distribute the trust property to Margarita's descendants.⁵³⁰ The corporate trustee argued that when the power to appoint was special, the trustee could only appoint in further trust if the trust instrument expressly authorized him to do so.⁵³¹ However, the court found that Margarita "reposed unlimited confidence and discretion" in her husband, and "clothed him with absolute power to administer and dispose of the trust estate to any one of the named beneficiaries to the exclusion of the others."⁵³² Therefore, the court concluded that the trust instrument vested John with the power to create a second trust as long as one or more of Margarita's descendants were made trust beneficiaries.⁵³³

In the case of *In the Matter of the Estate of Spencer*, an Iowa court relied on a special power of appointment analysis to uphold a trustee's power to appoint trust property to another trust.⁵³⁴ Unlike the *Phipps* court, the court in *Spencer* did not require any affirmative grant of authority in the trust instrument to appoint in further trust; instead, it recognized an implied power to appoint as long as the settlor did not "manifest a contrary intent."⁵³⁵

A New Jersey appeals court also upheld a trustee's distribution of trust property to a new trust in *Wiedenmayer v. Johnson*.⁵³⁶ In 1944, John Seward Johnson established an *inter vivos* trust for his son, John Seward Johnson, Jr.⁵³⁷ The trust instrument authorized the trustees to pay John, Jr. "so much of the net income in any year as the trustees in their absolute and uncontrolled discretion may deem to be for his best interests."⁵³⁸ In addition, "whenever in their absolute and uncontrolled discretion [the trustees] deem it to be for his best interests" they were also permitted to pay over to John, Jr. "any or all of the Trust Property."⁵³⁹ When the trustees agreed to distribute the trust corpus to John, Jr. in a new trust, several of his

⁵²⁹ *Id.* at 784-85, 196 So. at 300-01.

⁵³⁰ *Id.* at 786, 196 So. at 301.

⁵³¹ *Id.*

⁵³² *Id.* at 786, 196 So. at 301.

⁵³³ *Phipps*, at 786, 196 So. at 301.

⁵³⁴ 232 N.W.2d 491 (Iowa 1975).

⁵³⁵ *Id.* at 496.

⁵³⁶ 106 N.J. Super. 161, 163, 254 A.2d 534, 535 (App. Div. 1969), *aff'd per curiam*, 55 N.J. 81, 259 A.2d 465 (1969).

⁵³⁷ *Id.* at 164, 254 A.2d at 535.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

minor children, through their guardians ad litem, objected because the new trust failed to preserve their contingent remainders under the original trust.⁵⁴⁰

On appeal, the court observed that the trustees' power to distribute trust property to John, Jr. was limited only by the required determination the distribution would be in his "best interests."⁵⁴¹ In the court's view, "the trustees could, to safeguard the son's best interests, condition the distribution upon his setting up a substituted trust."⁵⁴² Finally, the court dismissed the claims of John, Jr.'s children, reasoning that the trustees did not deprive them of any rights since their contingent interests would extinguish if the trustees exercised their right to distribute the trust property absolutely to John, Jr.⁵⁴³ Note that the court in *Johnson*, unlike those in *Phipps* and *Spencer*, did not condition the power of a trustee to appoint in further trust on the existence of a special power of appointment; instead, it concluded that this power was based on the trustee's exercise of a discretionary power to distribute the trust property to a beneficiary.⁵⁴⁴

Finally, the Massachusetts Supreme Judicial Court recently endorsed the concept of decanting by name in *Morse v. Kraft*.⁵⁴⁵ In 1982, Robert and Myra Kraft established a trust and four sub-trusts for their four sons (the "1982 Trusts").⁵⁴⁶ However, the trust instrument provided that only a "disinterested trustee" could make distributions from the sub-trusts to the children.⁵⁴⁷ Richard Morse, the sole trustee, proposed to transfer all of the property in the sub-trusts to new sub-trusts established in accordance with the terms of a new master trust (the 2012 Trust).⁵⁴⁸ This transfer, if permitted, would have enabled the sons to serve as trustees with distributive powers over their respective sub-trusts.⁵⁴⁹

The trustee was concerned that the terms of the 2012 Trust would trigger liability under the GST tax.⁵⁵⁰ This, in turn, depended upon whether the 1982 Trust authorized distributions to the 2012 Trust by the trustee "without the consent or approval of any

⁵⁴⁰ *Id.* at 165, 254 A.2d at 536.

⁵⁴¹ *Wiedenmayer*, at 164, 254 A.2d at 535-36.

⁵⁴² *Id.* at 165, 254 A.2d at 536.

⁵⁴³ *Id.* at 165-66, 254 A.2d at 536.

⁵⁴⁴ *See Culp & Mellen, supra* note 522, at 11.

⁵⁴⁵ *Morse v. Kraft*, 466 Mass. 92, 992 N.E.2d 1021 (2013).

⁵⁴⁶ *Id.* at 92, 992 N.E.2d at 1022-1023.

⁵⁴⁷ *Id.* at 93, 992 N.E.2d at 1023.

⁵⁴⁸ *Id.* at 94, 992 N.E.2d at 1023.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Morse*, 466 Mass. at 94-95, 992 N.E.2d at 1023-24.

beneficiary or court.”⁵⁵¹ The court first observed that donees of a nonfiduciary special power of appointment could appoint trust property in further trust, provided that the donor did not express a contrary intent.⁵⁵² Examining the language of the 1982 Trust, the court determined that it did not expressly authorize the trustee to make distributions in further trust.⁵⁵³ On the other hand, the trustee was vested with broad discretion insofar as distributions were concerned.⁵⁵⁴ Therefore, the court concluded that there was nothing to preclude the trustee from exercising the power to decant from the 1982 Trust to the 2012 Trust.⁵⁵⁵

2. *The Statutory Power to Decant*

In 1992, New York became the first state to enact a statute that authorized trustees to decant from one trust to another.⁵⁵⁶ Since then, a number of other states have passed legislation to authorize decanting.⁵⁵⁷ Although these statutes are not uniform,⁵⁵⁸ they do address a number of common issues.⁵⁵⁹ For example, state decanting statutes impose different requirements for authorizing trustees to decant. In some states, a trustee cannot decant unless he has the power to invade the principal to make distributions.⁵⁶⁰ Statutes in other states permit decanting only if the trustee has the “absolute power” to invade the principal,⁵⁶¹ while statutes in a third group of states allow decanting if the trustee has absolute or more limited

⁵⁵¹ *Id.* at 95, 992 N.E.2d at 1024 (quoting 26 C.F.R. § 26.2601-1(b)(4)(i)(A)(1)(i) (2012)).

⁵⁵² *Id.* at 96, 992 N.E.2d at 1025 (citing *Loring v. Karri-Davies*, 371 Mass. 346, 357 N.E.2d 11 (1976)).

⁵⁵³ *Id.* at 97, 992 N.E.2d at 1025.

⁵⁵⁴ *Id.* at 98-99, 992 N.E.2d at 1026-27.

⁵⁵⁵ *Morse*, at 98-99, 992 N.E.2d at 1026-27.

⁵⁵⁶ *See Culp & Mellen*, *supra* note 522, at 3.

⁵⁵⁷ *See* ALASKA STAT. § 13.36.157 (2014); ARIZ. REV. STAT. ANN. § 14-10819 (2011); DEL. CODE ANN. tit. 12, § 3528 (2015); 760 ILL. COMP. STAT. ANN. 5/16.4 (West 2014); IND. CODE § 30-4-3-36 (2014); KY. REV. STAT. ANN. § 386.175 (West 2014); MICH. COMP. LAWS §§ 556.115a (2014), 700.7103 (2014), 700.7820a (2014); MO. ANN. STAT. § 456.4-419 (West 2014); NEV. REV. STAT. § 163.556 (2014); N.H. REV. STAT. ANN. § 564-B:4-418 (2014); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2014); N.C. GEN. STAT. § 36C-8-816.1 (2014); OHIO REV. CODE ANN. § 5808.18 (West 2014); R.I. GEN. LAWS § 18-4-31 (2014); S.C. CODE ANN. § 62-7-816A (2014); S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21 (2014); TENN. CODE ANN. § 35-15-816 (West 2014); TEX. PROP. CODE ANN. §§ 112.071-.089 (West 2013); VA. CODE ANN. § 64.2-778.1 (West 2014); WYO. STAT. ANN. § 4-10-816 (West 2014). It should be noted that the Uniform Trust Code does not specifically authorize decanting. *See Simmons*, *supra* note 19, at 263.

⁵⁵⁸ *See Niendorf*, *supra* note 3, at 624.

⁵⁵⁹ *See generally*, William R. Burford, *State Decanting Statutes: Tax and Non-Tax Aspects of Decanting Irrevocable Trusts*, TSUB09-ALI-CLE 35, 37-44 (Sept. 27, 2012).

⁵⁶⁰ *See* ALASKA STAT. § 13.36.157; ARIZ. REV. STAT. ANN. § 14-10819; DEL. CODE ANN. tit. 12, § 3528; TENN. CODE ANN. § 35-15-816.

⁵⁶¹ *See* IND. CODE § 30-4-3-36; R.I. GEN. LAWS § 18-4-31.

power to invade the principal.⁵⁶² Other statutes permit a trustee to decant if he has the discretionary power to distribute principal or income.⁵⁶³ Finally, a New Hampshire statute authorizes decanting if the trustee has the discretionary power to make distributions.⁵⁶⁴ Although a trustee's power to decant varies somewhat under these statutes, the common denominator is that in order to decant, the trustee must have some discretion to distribute trust income or principal to an ascertainable class of beneficiaries.

Typically, state decanting statutes also place certain restrictions on a trustee's power to decant. For example, a number of statutes provide that a trustee can only create a new trust in favor of one or more beneficiaries of the original trust.⁵⁶⁵ However, in a number of states, the second trust can vest a beneficiary with a power of appointment whose natural objects were not potential appointees under the original trust.⁵⁶⁶ In addition, statutes in a variety of states indicate that by decanting, the trustee can extend the time that the property will be held in trust, but not beyond the perpetuities period applicable to the original trust.⁵⁶⁷

Decanting statutes in certain states prohibit the trustee from reducing a beneficiary's fixed income interest under the original trust by decanting trust property to a new trust,⁵⁶⁸ while others prohibit accelerating remainder interests to current beneficial interests as a result of decanting.⁵⁶⁹ In addition, statutes in some states prohibit or

⁵⁶² See 760 ILL. COMP. STAT. ANN. 5/16.4; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; OHIO REV. CODE ANN. § 5808.18.

⁵⁶³ See KY. REV. STAT. ANN. § 386.175; MO. ANN. STAT. § 456.4-419; NEV. REV. STAT. § 163.556; N.C. GEN. STAT. § 36C-8-816.1; S.D. CODIFIED LAWS § 55-2-15; VA. CODE ANN. § 64.2-778.1.

⁵⁶⁴ See N.H. REV. STAT. ANN. § 564-B:4-418 (2014).

⁵⁶⁵ See ALASKA STAT. § 13.36.157; 760 ILL. COMP. STAT. ANN. 5/16.4; IND. CODE § 30-4-3-36; KY. REV. STAT. ANN. § 386.175; MO. ANN. STAT. § 456.4-419; NEV. REV. STAT. § 163.556; N.H. REV. STAT. ANN. § 564-B:4-418; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; N.C. GEN. STAT. § 36C-8-816.1; OHIO REV. CODE ANN. § 5808.18; R.I. GEN. LAWS § 18-4-31; S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21; VA. CODE ANN. § 64.2-778.1.

⁵⁶⁶ See DEL. CODE ANN. tit. 12, § 3528; 760 ILL. COMP. STAT. ANN. 5/16.4; NEV. REV. STAT. § 163.556; N.H. REV. STAT. ANN. § 564-B:4-418; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; N.C. GEN. STAT. § 36C-8-816.1; OHIO REV. CODE ANN. § 5808.18; R.I. GEN. LAWS § 18-4-31; S.D. CODIFIED LAWS § 55-2-15; TENN. CODE ANN. § 35-15-816; VA. CODE ANN. § 64.2-778.1.

⁵⁶⁷ See ALASKA STAT. § 13.36.157; DEL. CODE ANN. tit. 12, § 3528; 760 ILL. COMP. STAT. ANN. 5/16.4; IND. CODE § 30-4-3-36; KY. REV. STAT. ANN. § 386.175; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; N.C. GEN. STAT. § 36C-8-816.1; OHIO REV. CODE ANN. § 5808.18; S.D. CODIFIED LAWS § 55-2-20; TENN. CODE ANN. § 35-15-816; VA. CODE ANN. § 64.2-778.1.

⁵⁶⁸ See ALASKA STAT. § 13.36.157; ARIZ. REV. STAT. ANN. § 14-10819; DEL. CODE ANN. tit. 12, § 3528; 760 ILL. COMP. STAT. ANN. 5/16.4; IND. CODE § 30-4-3-36; KY. REV. STAT. ANN. § 386.175; MO. ANN. STAT. § 456.4-419; NEV. REV. STAT. § 163.556; N.H. REV. STAT. ANN. § 564-B:4-418; N.C. GEN. STAT. § 36C-8-816.1 (2014); R.I. GEN. LAWS § 18-4-31; S.D. CODIFIED LAWS § 55-2-15 to 55-2-21; TENN. CODE ANN. § 35-15-816; VA. CODE ANN. § 64.2-778.1.

⁵⁶⁹ See N.C. GEN. STAT. § 36C-8-816.1; VA. CODE ANN. § 64.2-778.1.

restrict the right to decant property when a beneficiary possesses a presently exercisable withdrawal power.⁵⁷⁰

A large number of states require that a trustee must give written notice to the beneficiaries of the original trust before exercising the power to decant.⁵⁷¹ In Nevada, the trustee must either notify the trust beneficiaries or seek court approval before decanting.⁵⁷² However, in New Hampshire, the trustee need only provide notice to those beneficiaries who are charitable entities.⁵⁷³ Finally, statutes in many states permit a trustee to decant without first seeking court approval.⁵⁷⁴

3. *Fiduciary Duties and Tax Issues*

Although decanting is a useful way to modify the terms of a trust, trustees need to proceed with caution. First of all, a trustee acts in a fiduciary capacity when exercising the power to decant.⁵⁷⁵ A number of statutes state that a trustee owes a fiduciary duty to beneficiaries of the trust when decanting.⁵⁷⁶ The South Dakota statute specifies that a trustee must determine whether appointing in further trust is “necessary and desirable” after taking account of (1) the purposes of the original trust, (2) “the terms and conditions of the second trust, and (3) the consequences of the distribution.”⁵⁷⁷ On the other hand, an Ohio statute provides that “a trustee who acts reasonably and in good faith . . . is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”⁵⁷⁸ Moreover, it is not clear whether a trustee can be held liable for failing to decant. Several states have declared that a trustee’s decision whether to decant is a matter of discretion,⁵⁷⁹ while Missouri’s decanting statute explicitly states that a trustee’s

⁵⁷⁰ See DEL. CODE ANN. tit. 12, § 3528; N.H. REV. STAT. ANN. § 564-B:4-418. This restriction is probably designed to avoid gift tax liability when certain parties are involved, or certain types of property are transferred, when decanting occurs. See Culp & Mellen, *supra* note 522, at 3.

⁵⁷¹ See IND. CODE § 30-4-3-36; KY. REV. STAT. ANN. § 386.175; MO. ANN. STAT. § 456.4-419; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; N.C. GEN. STAT. § 36C-8-816.1; OHIO REV. CODE ANN. § 5808.18; R.I. GEN. LAWS § 18-4-31; S.D. CODIFIED LAWS § 55-2-18; VA. CODE ANN. § 64.2-778.1.

⁵⁷² See NEV. REV. STAT. § 163.556.

⁵⁷³ See N.H. REV. STAT. ANN. § 564-B:4-418.

⁵⁷⁴ See ALASKA STAT. § 13.36.157; ARIZ. REV. STAT. ANN. § 14-10819; DEL. CODE ANN. tit. 12, § 3528; KY. REV. STAT. ANN. § 386.175; N.Y. EST. POWERS & TRUSTS § 10-6.6; N.C. GEN. STAT. § 36C-8-816.1; OHIO REV. CODE ANN. § 5808.18; VA. CODE ANN. § 64.2-778.1.

⁵⁷⁵ See Culp & Mellen, *supra* note 522, at 48.

⁵⁷⁶ See DEL. CODE ANN. tit. 12, § 3528; MO. ANN. STAT. § 456.4-419; N.H. REV. STAT. ANN. § 564-B:4-418; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6; VA. CODE ANN. § 64.2-778.1.

⁵⁷⁷ See S.D. CODIFIED LAWS § 55-2-15.

⁵⁷⁸ See OHIO REV. CODE ANN. § 5808.18.

⁵⁷⁹ ALASKA STAT. § 13.36.157(a); N.C. GEN. STAT. ANN. § 36C-816(b).

fiduciary obligations do not impose an affirmative duty to decant.⁵⁸⁰

Finally, exercising a power of appointment to transfer property from one trust to another may result in increased tax liability if not done properly.⁵⁸¹ For example, decanting by a trustee who is also a beneficiary may result in gift tax liability, unless distributions are limited by an ascertainable standard.⁵⁸² In addition, decanting from a trust that is exempt from the GST tax may result in loss of exempt status if not done properly.⁵⁸³

C. Modification and Termination by a Trust Protector

A trust protector is a person, other than the settlor or a trustee, who is authorized to exercise one or more powers over the trust.⁵⁸⁴ Trust protectors can be traced back to a number of sources, including non-trustee functionaries associated with England and various Commonwealth countries, officers associated with offshore and domestic asset protection trusts, and trust advisors in America with supervisory powers over a trustee's investment decisions.⁵⁸⁵ A majority of jurisdictions in the United States now recognize the legal status of trust protectors either through the adoption of the Uniform Trust Code⁵⁸⁶ or the enactment of statutes expressly authorizing their use by settlors.⁵⁸⁷

Arguably, a settlor can vest a trust protector with the power to modify or terminate the trust.⁵⁸⁸ The Uniform Trust Code states that the trust instrument may confer upon a trustee or "other person," such as a trust protector, the power to direct the modification or termination of a trust. Some state statutes, such as Alaska,⁵⁸⁹ Arizona,⁵⁹⁰ Idaho,⁵⁹¹ Missouri,⁵⁹² South Dakota,⁵⁹³ and Wyoming⁵⁹⁴

⁵⁸⁰ MO. ANN. STAT. § 456.4-419.

⁵⁸¹ See Culp & Mellen, *supra* note 522, at 16-37; Willms, *supra* note 17, at 67-80; Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting — Obtaining and Preserving the Benefits*, 111 J. TAX'N 288, 291 (2009).

⁵⁸² Treas. Reg. § 25.2511-1(g)(1-2) (1960).

⁵⁸³ See generally Willms, *supra* note 17, at 77-78.

⁵⁸⁴ See MO. ANN. STAT. § 456.8-808 (West 2014).

⁵⁸⁵ See Ausness, *supra* note 268, at 278-81.

⁵⁸⁶ UNIF. TRUST CODE § 808(b) cmt. (declaring that "[s]ections (b)-(d) ratify the use of trust protectors and trust advisors").

⁵⁸⁷ For citations to these statutes, along with useful comments, see Gideon Rothchild, *Trust Protectors: What Role Do They Play?* Estate Planning in Depth 585, 597 (SS043 ALI-ABA (June 12-17, 2011)).

⁵⁸⁸ See Alexander A. Bove, Jr., *The Trust Protector: Trusty Watchdog or Expensive Exotic Pet?* 30 EST. PLAN. 390, 391 (2003); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2779 (2005-06).

⁵⁸⁹ ALASKA STAT. § 13.36.370(b)(1-4).

⁵⁹⁰ ARIZ. REV. STAT. ANN. § 14-10818(b)(1-5).

⁵⁹¹ IDAHO CODE ANN. § 15-7-501(6).

list the power to modify or terminate a trust (at least in some circumstances) as one of the powers that a trust protector may exercise when authorized by the trust instrument. Other statutes are less explicit, but appear to permit a trust protector to exercise any power expressly mentioned in the trust instrument.⁵⁹⁵ This would seem to include the power to modify or terminate the trust.

However, there is the question of whether a trust protector is subject to any fiduciary duties. There is some authority to the effect that trust advisors in America cannot exercise their powers for their own personal benefit.⁵⁹⁶ There are similar holdings from foreign jurisdictions involving trust protectors.⁵⁹⁷ In addition, the Uniform Trust Code declares that power holders (such as trust protectors) are presumed to be fiduciaries, at least when exercising the power to direct the trustee to do something.⁵⁹⁸ A number of state statutes also impose fiduciary duties on trust protectors.⁵⁹⁹ However, other statutes state that a trust protector shall not be considered a fiduciary unless the trust instrument provides otherwise.⁶⁰⁰ The only appellate case to consider whether a trust protector was a fiduciary was *Robert T. McLean Irrevocable Trust v. Davis*, which eventually dismissed the trust beneficiary's claims against the trust protector.⁶⁰¹ The court concluded that the trust had not suffered any loss as the result of the trust protector's failure to remove a prior trustee.⁶⁰² Although the court indicated that the trust protector owed a fiduciary duty to the beneficiary, its observation was merely dictum since it ultimately decided the case on causation grounds.⁶⁰³

Arguably, a trust protector who exercises a discretionary power to modify or terminate a trust should be held to the same fiduciary standard as a trustee who is exercising the same power.

⁵⁹² MO. ANN. STAT. § 456.8-808.

⁵⁹³ S.D. CODIFIED LAWS § 55-1B-6.

⁵⁹⁴ WYO. STAT. ANN. § 4-10-710.

⁵⁹⁵ See Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?* 59 DRAKE L. REV. 67, 68 (2010-11).

⁵⁹⁶ See *Stuart v. Wilmington Trust Co.*, 474 A.2d 121, 123 (Del. 1984).

⁵⁹⁷ See Ausness, *supra* note 268, at 288-92.

⁵⁹⁸ UNIF. TRUST CODE § 808(d).

⁵⁹⁹ See, e.g., N.H. REV. STAT. ANN. § 564-B:12-1202 (2014); 760 ILL. COMP. STAT. 5/16.3(e) (2015); MICH. COMP. LAWS ANN. § 700.7809 (West 2014); WYO. STAT. ANN. § 4-10-711 (West 2014).

⁶⁰⁰ ALASKA STAT. § 13.36.370(d) (2014); S.D. CODIFIED LAWS § 55-1B-1.1 (2014).

⁶⁰¹ 283 S.W.3d 786 (Mo. Ct. App. 2009), *aff'd on remand sub nom.* *Robert T. McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482, 486 (Mo. Ct. App. 2013).

⁶⁰² *Ponder*, at 498.

⁶⁰³ *Id.* at 487, 490, 494, 496.

That standard, as articulated in *Hammerstein*,⁶⁰⁴ is that a court will not overrule a trustee's discretion unless the trustee "wilfully abuses his discretion or acts arbitrarily, fraudulently, dishonestly, or with an improper motive."⁶⁰⁵ Of course, this is only a default standard; presumably, the settlor can subject the trust protector to a higher fiduciary standard in the trust instrument.

D. Summary

Settlors who wish to avoid the delays and expense of judicial modification or termination of their trusts can authorize a trustee or trust protector to exercise this power instead. Trust instruments have empowered trustees to terminate trusts for many years⁶⁰⁶ and the Uniform Trust Code also endorses this practice.⁶⁰⁷ Case law⁶⁰⁸ and the Uniform Trust Code⁶⁰⁹ also permit trustees to modify trust terms if they are authorized to do so by trust instrument. In addition, a number of courts and state statutes have recognized the validity of decanting, a practice by which a trustee or other power holder is allowed to appoint trust property to another trust.⁶¹⁰ Finally, the settlor may empower a trust protector instead of the trustee to modify or terminate a trust.⁶¹¹

V. THE PROBLEM OF EXCESSIVE DEAD HAND CONTROL

Settlors often use trusts to maintain some control over their property after death. For example, vesting of property interests may be postponed until a beneficiary reaches a certain age; spendthrift provisions can restrict alienation; and incentive provisions can encourage particular behavior. However, beneficiaries often consider these sorts of restrictions or conditions to be inconvenient or unreasonable, especially after the settlor is dead. For them, modification or termination is a means to escape the dead hand's oppressive grasp.

A. The Conflict Between Deceased Settlor and Living Beneficiaries

If the interests of the deceased settlor and the living trust beneficiaries sometimes diverge, then what is the proper balance to

⁶⁰⁴ 631 S.W.2d 858.

⁶⁰⁵ *Id.* at 863.

⁶⁰⁶ *See, e.g., McManus' Estate*, at 184, 62 A.D.2d at 764; *Eckert's Trust*, at 35-36, 258 N.Y.S.2d at 543; *Fishberg*, at 3, 285 N.Y.S. at 307; *Major*, at 102 163 N.Y.S. at 925.

⁶⁰⁷ UNIF. TRUST CODE § 808(c).

⁶⁰⁸ *See Rosner*, 105 Misc. 2d 592, 432 N.Y.S. 2d 577.

⁶⁰⁹ UNIF. TRUST CODE § 808(c).

⁶¹⁰ Medlin, *supra* note 16, at 94.

⁶¹¹ *See Ruce*, *supra* note 594, at 68.

strike between them? There appear to be at least three general approaches for further consideration. The first alternative, exemplified by *Saunders*,⁶¹² would permit a court to terminate a trust at any time with the consent of all of its beneficiaries.⁶¹³ This rule, which is followed in England, treats the interests of the beneficiaries as completely superior to those of the settlor, and allows them to “overbear and defeat the intention of a testator or settlor”⁶¹⁴ whenever they choose. At the other extreme, the traditional American rules on modification and termination treat the interests of the settlor as paramount and refuse to allow modification or termination if one or more of the trust’s material purposes remains to be accomplished.⁶¹⁵ The approaches taken by the Uniform Trust Code and the Third Restatement, which relax the *Clafin* doctrine’s material purpose requirement somewhat,⁶¹⁶ can be said to occupy a middle ground between these two approaches.

Of course, this debate is part of a larger controversy about testamentary dispositions of property in general. Opponents of dead hand control argue that it is undesirable because of imperfect information on the part of the deceased donor, the possibility of negative externalities, and concerns about intergenerational equity.⁶¹⁷ According to one school of thought, imperfect information, particularly about future events and circumstances, may cause donors to make dispositions of their property that they would not have made had they been better prognosticators.⁶¹⁸ Unfortunately, once the donor is dead, such decisions cannot be reversed.⁶¹⁹ Particular dispositions may also result in negative externalities by imposing social costs on others.⁶²⁰ For example, society may have to support a donor’s dependent children when he fails to provide for them after death.⁶²¹ Another concern is the problem of first-generation monopoly.⁶²² As Stephen Shavell observes, “[b]y virtue of its priority in time, the present generation owns the whole earth and all the things on it.”⁶²³ Consequently, if this generation is allowed to tie up existing property well into the future, subsequent generations will have less property of

⁶¹² (1841) 49 Eng. Rep. 282 (Ch).

⁶¹³ See Sitkoff, *supra* note 58, at 663.

⁶¹⁴ *Goulding v. James*, [1997] 2 All E.R. 239 (A.C.) at 247.

⁶¹⁵ See *Unconditional Love*, *supra* note 6, at 468.

⁶¹⁶ See Dukeminier & Krier, *supra* note 8, at 1329.

⁶¹⁷ Kelly, *supra* note 48, at 1158.

⁶¹⁸ See Stephen Shavell, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW*, 70 (2004).

⁶¹⁹ See Richard A. Posner, *ECONOMIC ANALYSIS OF LAW*, 699 (8th ed. 2011).

⁶²⁰ Kelly, *supra* note 48, at 1161.

⁶²¹ See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?* 57 LA. L. REV. 1, 3 (1996-97).

⁶²² See Dukeminier & Krier, *supra* note 8, at 1321.

⁶²³ Shavell, *supra* note 617, at 71.

their own to invest and dispose of as they see fit.⁶²⁴

Proponents of dead hand control have compelling arguments of their own.⁶²⁵ First, permitting some degree of dead hand control provides donors with the satisfaction of knowing that they have provided financial security to loved ones, and possibly protected them from the vicissitudes of life and the consequences of poor judgment.⁶²⁶ In addition, a donor is likely to work harder to accumulate property if he knows that he can exercise some control over its disposition and use after death.⁶²⁷ Furthermore, donors will probably possess accurate information about the circumstances of prospective donees and, when necessary, can include protective devices, such as support and spendthrift provisions in their donative instruments.⁶²⁸ Finally, allowing dead hand control may enable parents to exercise a benign influence over the conduct of their children after death.⁶²⁹

B. Perpetual or “Dynasty” Trusts

Allowing property owners to control the use of their property after death also gives rise to the question of how long dead hand control should be permitted to last. Most trust instruments direct the trustee to pay income to a certain class of individuals, usually the children of the settlor. At the death of the income beneficiaries, the trust corpus is then distributed free of trust to a second class of beneficiaries, usually the settlor’s grandchildren. Thus, the settlor exercises control over his property for only one generation.⁶³⁰ One reason that trusts seldom last for more than one or two generations is the Rule Against Perpetuities. The Rule in its traditional form requires that interests not fully vested either become vested or fail to vest within the lifetime of a living person plus an additional twenty-one years.⁶³¹ Contingents who may exceed that period are considered invalid *ab initio*.⁶³² The use of a “life or lives in being” as a means of determining the validity of an interest was based on the notion that

⁶²⁴ See Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV. 179, 191 (1953-54).

⁶²⁵ See Kelly, *supra* note 48, at 1135-38.

⁶²⁶ Edward C. Halbach, Jr., *An Introduction to Chapters 1-4, DEATH, TAXES, & FAMILY PROPERTY* 3, 5, (Edward C. Halbach, Jr. ed. West Publ’g Co. 1977).

⁶²⁷ See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992-93); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 749 (1989-90).

⁶²⁸ See Hirsch & Wang, *supra* note 626, at 12.

⁶²⁹ Kelly, *supra* note 48, at 1137.

⁶³⁰ However, in order to avoid the possibility of having to appoint guardians for underage beneficiaries, settlors often provide that property will continue to be held in trust until members of the second generation reach their majority.

⁶³¹ See John Chipman Gray, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942).

⁶³² See *Perpetual Trusts*, *supra* note 200, at 600.

the settlor could properly assess the capabilities of living persons, but could know nothing about unborn persons.⁶³³

In recent years, however, a large number of states have abolished or substantially modified the Rule Against Perpetuities, thereby enabling a settlor to create multi-generational trusts. Many commentators believe that a change in federal tax legislation is responsible for this development.⁶³⁴ In 1986, Congress imposed a tax on GSTs that enabled the first generation of beneficiaries, who had equitable life estates, to avoid estate tax liability.⁶³⁵ The tax taxes GSTs at a rate equivalent to the highest estate tax rate. However, legislation included a \$1 million exemption for each transferor, which is now over \$5 million per transferor.⁶³⁶ Furthermore, if a settlor places exempted property into a trust, the property will not be subject to GST tax liability until the trust terminates.⁶³⁷ When the GST tax legislation was passed in 1986, only Idaho, Wisconsin, and South Dakota had abolished the Rule Against Perpetuities. Therefore, legislatures assumed that exempt trusts would terminate, and become subject to tax liability, within a generation or two. Instead, over the next three decades almost thirty states abolished or modified the Rule Against Perpetuities, thereby allowing trusts to last beyond the period allowed by the traditional Rule. Many wealthy persons, who liked the idea of establishing a trust that would last for hundreds of years without being subject to GST tax liability, set up trusts in states which allowed such trusts to be created.⁶³⁸

⁶³³ See Dukeminier & Krier, *supra* note 8, at 1309. Courts later allowed the settlor to exercise an additional twenty-one years of control to account for the possibility that some beneficiaries might be minors. *Id.*

⁶³⁴ See, e.g., Dukeminier & Krier, *supra* note 8, at 1315; Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2513, 2518-20 (2005-06); Gallanis, *supra* note 51, at 232-33; Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2467 (2005-06); *Perpetual Trusts*, *supra* note 200, at 602-05.

⁶³⁵ A tax on generation-skipping transfers was first enacted in 1976. However, it was substantially revised by Congress in the 1986 legislation. See *Perpetual Trusts*, *supra* note 200, at 602.

⁶³⁶ Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1164 n.77 (2010-11) (citing I.R.C. §§ 2631(c), 2010(c) (2012))(reviewing Lawrence M. Friedman, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (Stanford Univ. Press 2009)).

⁶³⁷ See Dukeminier & Krier, *supra* note 8, at 1313.

⁶³⁸ Dukeminier and Krier provide an example of what a tax exempt perpetual trust might look like. The settlor transfers \$5 million (or whatever amount is current exempt from GST tax liability) to a trust that will pay income to the settlor's daughter for life. At the daughter's death, the trust will be divided into separate shares for each of the daughter's children. Each child receives an income interest in his or her share of the trust. Upon each child's death, his or her share of the trust will be further divided and held in trust for that child's issue per stirpes. This process of further dividing shares of the trust will continue for as long as state law permits. If one line of the settlor's descendants runs out, that share will

However, trusts of such long duration present a number of challenges to efficient trust administration.⁶³⁹ Lack of flexibility is an obvious concern.⁶⁴⁰ A wise settlor can minimize this difficulty by empowering the trustee or a trust protector to modify the trust in response to changing circumstances. Otherwise, those who seek to modify a perpetual trust will have to rely on equitable deviation. Another problem is the proliferation of beneficiaries that will inevitably occur over time.⁶⁴¹ If each beneficiary's interest is divided among his heirs at his death, the number of beneficiaries will substantially increase after several generations, making trust administration increasingly difficult.⁶⁴²

Shortly before his death, Jesse Dukeminier and his co-author, James Krier, proposed a number of statutory "default rules" to address some of the problems associated with perpetual trusts.⁶⁴³ One alternative was to enact a statute that automatically terminated a trust after a certain period of time.⁶⁴⁴ This would place an absolute time limit on the duration of trusts and, unlike the traditional Rule Against Perpetuities, would deal with the duration problem directly instead of relying on lives in being and vesting to limit duration. A second approach was to limit the power to modify or terminate a trust for one generation, but freely allow it by later generations of beneficiaries.⁶⁴⁵ This approach would involve the enactment of a statute that allows a court to terminate or modify the trust, after all of the income beneficiaries alive at the creation of the trust are dead, in order to benefit the next generation of income beneficiaries.⁶⁴⁶ Presumably, a court will still have the power to terminate or modify a trust while the first generation of beneficiaries are still alive, but it would have to abide by the more restrictive requirements of the *Clafin* Doctrine, the Uniform Trust Code, or the Third Restatement.

be divided among the remaining branches of the family. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1315-18 (2003).

⁶³⁹ In addition, some commentators have pointed out, state prohibitions against "perpetuities," such as that found in the North Carolina constitution, raise questions about the validity of *Perpetual Trusts*. See Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1821-22 (2014).

⁶⁴⁰ Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1179 (2013-14).

⁶⁴¹ See *Perpetual Trusts*, *supra* note 200, at 625.

⁶⁴² Ascher, *supra* note 636, at 1161-62. Professor Ascher estimates that the average settlor might have as many as 450 descendants 150 years after establishing a perpetual trust. *Id.* at 1161.

⁶⁴³ See Dukeminier & Krier, *supra* note 8, at 1340-41. As Professor Tate points out, these proposed rules are mandatory, not permissive. See *Perpetual Trusts*, *supra* note 200, at 610.

⁶⁴⁴ Dukeminier & Krier, *supra* note 8, at 1340.

⁶⁴⁵ *Id.* at 1340-41.

⁶⁴⁶ *Id.* at 1341.

Dukeminier and Krier's third statutory proposal would vest each second-generation income beneficiary with a special power to appoint his share of trust property during life or by will to anyone except himself, his creditors, or his estate.⁶⁴⁷ The donee of this power could terminate the trust by appointing the entire trust corpus and could effectively modify the trust by appointing the property in further trust.⁶⁴⁸ A fourth statutory proposal would give the trustee the power by statute to modify or terminate the trust.⁶⁴⁹

C. Limiting Unreasonable Dead Hand Control

Dukeminier and Krier have identified a number of problems with perpetual trusts, including first-generation monopoly, inflexibility, and unreasonable duration.⁶⁵⁰ The inflexibility problem can easily be solved by allowing beneficiaries at some point to modify the administrative and distributive terms of the trust with or without court approval. The problem of unreasonable duration and attendant dead hand control can be addressed by placing some sort of time limit on the duration of private trusts. For example, states that have abolished the Rule Against Perpetuities could reinstate it. Another approach is to place a fixed time period, such as 100 years, on the duration of any private trust. Finally, states may adopt some version of the Dukeminier and Krier proposal and limit the temporal scope of dead hand control to the first generation of beneficiaries.⁶⁵¹ Limiting the duration of a trust could also address the problem of first-generation monopoly.

Assuming that a trust can be terminated involuntarily, a vexing question remains unanswered: to whom should the trust property be distributed upon termination? Consider the following three examples. First, assume that the settlor vests his children with an income interest with a gift over to each income beneficiary's children *per stirpes*. How will the trust property be distributed? There are a number of possibilities. If the settlor is barred from deciding who gets his property after the deaths of the first-generation

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.* A variant on this third proposal would vest income beneficiaries with a power, limited by an ascertainable standard relating to health, education, support or maintenance, to withdraw principal for their own benefit. Dukeminier & Krier, *supra* note 8, at 1341.

⁶⁴⁹ *Id.*

⁶⁵⁰ *See id.* at 1321-28.

⁶⁵¹ The term generation, as I am using it, does not necessarily mean a biological generation, but rather it refers to successive classes of beneficiaries. Thus, the first group of beneficiaries who receive a present interest in the trust would constitute the first generation. While in most cases, this class of beneficiaries would be made up of children of the settlor, it could be composed of children and grandchildren or some other biological mixture. The first group of beneficiaries to take after the death of first-generation beneficiaries (remaindermen) make up the second generation and so on.

beneficiaries, then the gift over would be void and the trust property would revert to the settlor's estate. This result not only makes little sense, but it may result in the trust corpus being included in the settlor's gross estate for estate tax purposes. A better alternative would be to distribute the property free of trust to the heirs of the income beneficiaries, not as remaindermen, but as beneficiaries under the statute.⁶⁵² Finally, the last and best approach would be to simply honor the settlor's wishes and uphold the validity of the remainder to the settlor's grandchildren.⁶⁵³ Likewise, if the settlor specified that at the death of the last income beneficiary, the trust principal was to be distributed to the grandchildren *per capita* instead of *per stirpes*, that distributional formula should be honored as well.

But consider the example of a perpetual trust where there is an infinite succession of income interests. What happens to the trust property when the first-generation beneficiaries die? Unlike the first example, the settlor in this case has not made a gift over free of trust. Instead, if the terms of the trust were upheld, the next generation of beneficiaries would only have an income interest. However, the statute directs that at this point the trust property must be distributed free of trust. Once again, there are several options. One possibility is to vest each first-generation income beneficiary with a special power of appointment to appoint a share of the trust property by will to anyone except himself, his creditors, or his estate.⁶⁵⁴ The amount of property subject to appointment is based on the number of persons in the class of first-generation beneficiaries. Thus, if the first-generation income beneficiaries consisted of the settlor's four children, each child is allowed to appoint one-fourth of the trust corpus, with the beneficiary's heirs being designated as takers in default. Finally, the approach that seems most consistent with the settlor's intent is converting the interest of second-generation beneficiaries from an income interest to an absolute one. In other words, the intended beneficiaries remain the same, but the nature of their interest is changed. As in the previous example, the settlor is allowed to determine who gets the trust property when the first-generation beneficiaries die, but the distribution is made free of trust.

The third example involves discretionary trusts. In such cases, the beneficiaries are not entitled to any fixed amount of income or principal. Of course, it does not matter that first-generation

⁶⁵² This might be roughly analogous to an anti-lapse statute that makes a substitute gift when the original gift lapses. However, in this example, the gift to the remaindermen lapses not because they are dead, but because the statute has deprived the settlor of the power to make it.

⁶⁵³ Notice that the class of takers in the second option (heirs) is greater than the class of takers in the third option.

⁶⁵⁴ See Dukeminier & Krier, *supra* note 8, at 1341.

beneficiaries had a mere expectancy, as long as the remainder interest is not also subject to the trustee's discretion. As in the first example, the trust property can be distributed free of trust to the remaindermen. However, the situation becomes more complicated with certain types of perpetual trusts where distributions to successive generations of beneficiaries are also subject to the trustee's discretion. In such cases, the best approach is to distribute the trust property pro rata and free of trust to second-generation beneficiaries provided for in the trust instrument.

D. A Proposed Solution to the Problem of the Dead Hand

Balancing the interests of dead settlors and living beneficiaries is a task that would challenge even the great Sherlock Holmes. Unfortunately, since he is not available, I will have to tackle this problem on my own. However, before doing so, I would like to start with a few basic assumptions. First, the interests of both settlors and beneficiaries are legitimate and are entitled to some recognition. Therefore, whatever rule emerges must balance the interests of both parties. Second, there is a need to limit the duration of dead hand control. Accordingly, at some point in time effective control over the trust property must pass from the settlor to the beneficiaries and the best way to accomplish this is to allow beneficiaries at some point to terminate the trust if they wish to do so.

With that in mind, I propose the enactment of a statute that would limit the power to modify or terminate a trust for one generation, but freely allow it by later generations of beneficiaries who have reached their majority. This approach is based on Dukeminier and Krier's first proposal, and recognizes the settlor's right to control the trust property during the lives of persons who are personally known to him, but not otherwise.⁶⁵⁵ The statute would read as follows:

If an irrevocable or testamentary trust does not provide for the distribution of the trust principal outright and free of trust at the death of the last member of the first generation of beneficiaries eligible to receive income or principal from the trust, each adult member of the succeeding class of beneficiaries shall have the power to direct the trustee to distribute his or her share of the trust principal outright and free of trust at any time and without court approval.

In addition, those members of the succeeding class of beneficiaries who do not choose to terminate their interest in the trust

⁶⁵⁵ *Id.* at 1340.

may direct the trustee to place their share of the trust principal in a separate sub-trust that is subject to different terms and conditions. The right to modify or terminate their interest in a trust shall apply to all subsequent beneficiaries as long as the trust remains in existence.

When a trust beneficiary exercises the right to receive his or her interest in the trust principal outright or to direct its transfer to a separate trust, in the absence of a method or formula for calculating the beneficiary's share in the will or trust instrument itself, the beneficiary's share shall be based on the law of intestacy if the beneficiary is related to the prior generation's class of beneficiaries. If not, the beneficiary's share shall consist of a *pro rata* amount based on the number of beneficiaries in the class of which the beneficiary is a member.

Implicit in the foregoing statutory proposal is the assumption that the first-generation beneficiaries are still able to seek judicial modification or termination of the trust, but they have to satisfy whatever requirements are applicable to modification or termination. In addition, the statute does not force the beneficiaries to terminate the trust when the last of the first-generation beneficiaries dies; rather, they are free, individually or collectively, to modify the administrative or distributive terms of the trust if they choose. Finally, the right to terminate or modify the trust is individual, not collective. Each second-generation (or later) beneficiary can take his share out of the trust at any time or transfer it to a sub-trust with different terms and conditions.

VII. CONCLUSION

It is sometimes desirable to modify or even terminate irrevocable trusts. This is particularly true of perpetual trusts that can potentially last for centuries. In the past, it was difficult for beneficiaries to modify or prematurely terminate irrevocable trusts because courts felt constrained to carry out the deceased settlor's intent as embodied in the trust instrument. This led to a number of problems, including the lack of flexibility. Unless the settlor was prescient enough to give the trustee or trust protector the power to modify or terminate the trust, unforeseen circumstances could defeat the settlor's estate plan or interfere with efficient administration of the trust. Traditional restrictions on modification and termination also enabled dead hand control to last for an unreasonable length of time. The Uniform Trust Code and the Third Restatement liberalized the rules on modification and termination somewhat, but arguably did not go far enough. Inspired by the work of Dukeminier and Krier, I have developed a statutory proposal that would allow deceased settlors to maintain control over trust property during the lives of the

first generation of beneficiaries, but would allow subsequent generations of beneficiaries to modify or terminate a trust without judicial approval.