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Frustration of Intent in the Wealth Transmission Process

MELANIE B. LESLIE*

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Abstract

In recent decades, the so-called "nonprobate revolution" has taken hold in the United States. Where the probate court once controlled the distribution of property on death, an individual can now avoid the expense and delay of probate by using a variety of mechanisms, such as revocable living trusts and "payable on death" designations attached to savings and retirement accounts. Although the nonprobate system often works well, it has generated unanticipated costs that U.S. law has yet to satisfactorily address. When people experience changes in life circumstances – such as marriage, divorce or death of a beneficiary -- but fail to take adequate steps to modify their nonprobate designations, the law does not enable courts to effectuate a deceased's probable intent. Unlike wills law, which prioritizes intent effectuation over other concerns, current legal rules governing nonprobate accounts and mechanisms value efficiency and institutional convenience. In addition, the ease and relative secrecy with which non-probate assets are executed can make it much easier for an overreaching friend or relative to take advantage of an elderly person who lacks capacity or to exercise undue influence. As a result of these problems, estates are increasingly being distributed in ways that frustrate the intent of the deceased.

Key words

Wills; nonprobate; probate; revocable trusts; retirement accounts; beneficiary designations; testamentary intent

Resumen

En las últimas décadas, la llamada "revolución no testamentaria " se ha afianzado en los Estados Unidos. Anteriormente, los juzgados testamentarios controlaban la distribución de las propiedades tras el fallecimiento de un individuo. Hoy en día, por el contrario, un individuo puede evitar el gasto y la demora de los testamentos, utilizando diversos mecanismos, como fideicomisos revocables en vida, o designaciones "pagaderas tras la muerte" asociados a cuentas de ahorro y pensiones. Aunque generalmente el sistema no testamentario funciona bien, ha

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* Professor of Law, Benjamin N. Cardozo School of Law, 55 Fifth Avenue, Room 503. New York, NY 10003. USA. leslie@yu.edu

generado costos imprevistos que la legislación de EE.UU. todavía debe abordar de manera satisfactoria. Cuando las personas experimentan cambios en su vida, como el matrimonio, el divorcio o la muerte de un heredero, si no toman las medidas adecuadas para modificar sus designaciones no testamentarias, la ley no permite a los tribunales hacer efectiva la posible última voluntad del difunto. A diferencia de la legislación testamentaria, que prioriza sobre otros asuntos que se ejecute la intención del fallecido, la normativa legal vigente que rige las cuentas y mecanismos no testamentarios, valoran la eficiencia y conveniencia institucional. Además, la facilidad y relativo secretismo con que se ejecutan los activos no testamentarios pueden hacer que sea mucho más fácil que un amigo o un pariente se extralimite para aprovecharse de una persona mayor que no está en plenas facultades, o ejerza una influencia indebida. Como resultado de estos problemas, cada vez más los bienes se distribuyen de manera no se respetan las intenciones del fallecido.

Palabras clave

Testamentos; no-testamentario; testamentario; fideicomisos revocables; cuentas de pensiones; designación de herederos; intención testamentaria

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1. Introduction

In 1996, when I published *The Myth of Testamentary Freedom* (Leslie 1996), much of the estates law scholarship in the United States focused on the difficulty of creating a valid will and the resulting frustration of testamentary intent. Reformers called for simplification of wills statutes, and for legislatures to authorize courts to forgive deviations from statutory requirements if clear and convincing evidence established that the testator intended the document to function as her will.[1] In the *Myth of Testamentary Freedom,* I argued that reformers were missing the point: courts were less committed to freedom than supposed. A review of the caselaw revealed that courts were more likely to deny probate to a will if its terms offended prevailing social norms – such as the belief that parents should prefer cooperative children over lovers, or close family members instead of same-sex partners. I concluded that our culture's allegiance to testamentary "freedom" was overstated – free testation was a fact only for those whose testamentary desires conformed to those of the majority.

Since that time, cultural rumblings challenging the traditional definition of "family" have resulted in seismic shifts.[2] As cultural norms shift, judges and juries are showing increased tolerance for alternative familial arrangements. At the same time, new developments in estate planning law have made it easier for those with nontraditional family relationships to transfer property to loved ones. The so-called "nonprobate revolution" has taken hold. Where the distribution of estates was once controlled by a judge, who determined the validity of testator's last will, now an individual can ensure that her assets pass privately, outside of the watchful and sometimes judgmental eye of the judicial system.

This shift has generated particular benefits for the nonconforming testator. Will formalities statutes can be complicated and difficult to comply with, and the slightest misstep in execution gave family members an opening to argue that the will was invalid. But if a testator structures her estate so that the bulk of her wealth passes outside probate, an attack on the legitimacy of the beneficiary designation is less likely, because all that is required is that the accountholder fill out and sign a simple form. For similar reasons, family members will be less successful when they allege that a non-conforming estate plan was procured by undue influence; because non-probate mechanisms can be created in secrecy, family members have difficulty establishing the facts necessary to challenge their validity.

Although the nonprobate revolution has been helpful to the non-conforming testator, it has created broader threats to testamentary freedom. Cases reveal that accountholders and settlers of revocable trusts often make mistakes that thwart their ability to distribute their assets in accordance with their true intentions, and

[1] See Langbein (1975, p. 491, 1987, pp. 1, 27-29, 33-34, 41, 45-53), Jane B. Baron (1992, p. 635) observes that "Unfortunately, as has long been recognized, the doctrines created to serve the testator's wishes have the potential to undercut them. Will execution requirements...may deny effect to wishes due to minor defects of form."; J. Rodney Johnson (1992, p. 13), recommending that Virginia legislature pass dispensing power statute; James Lindgren (1992, p. 1010) arguing for even greater reduction of formalities than are present in the Revised UPC because "when formalism falls, intent rises" and arguing that attestation requirements should be abolished because "the law should set requirements at a level that tends to enforce the testator's intent, not frustrate it" (Lindgren 1990, p. 546); Charles I. Nelson and Jeanne M. Starck (1979, pp. 354-356), criticizing strict construction and advocating their own statutory solution that would allow courts more discretion in validating wills; Rosemary Tobin (1991) arguing for adoption of dispensing power in New Zealand to ensure effectuation of testamentary intent; Lydia A. Clougherty (1991) suggesting new execution requirements to minimize the "risk of frustrating the testator's intent"; Kelly A. Hardin (1993, pp. 1178-81) arguing that dispensing power is necessary to effectuate testamentary intent; Melissa Webb (1983) urging Texas courts to adopt a substantial compliance approach to will construction. See also Bruce H. Mann (1985, p. 39) criticizing courts for "routinely invalidating wills because of minor defects in execution, even when no one questions that the will represents the wishes and intent of the testator".

[2] For example, seventeen states plus the District of Columbia now recognize same-sex marriage (Freedom to Marry 2013). In1980, 77% of children lived in a home with two married parents. By 2012, that number had dropped to 64% (Federal Interagency Forum on Child and Family Statistics 2013).

the applicable legal rules often fail to remedy the problem – in fact, the applicable law often frustrates, rather than effectuates, the deceased's intent. This problem has two causes: first, state courts and legislatures have been slow to extend intent-effectuating wills doctrine to nonprobate mechanisms. More importantly, banks and other financial institutions that manage nonprobate accounts have successfully lobbied for rules that prioritize efficiency and shielding institutions from liability over effectuation of intent. To add to the problem, many people own nonprobate assets that have been provided them by their employer as part of an employee benefits package. The Employee Retirement Income Security Act (ERISA), a federal statute, governs the distribution of those assets at death. ERISA contains no intent-effectuating provisions, and preempts all intent-effectuating state laws.

This essay will explore two examples of issues that have been frequently litigated and that often result in complete frustration of the deceased's intent. First, accountholders frequently neglect to change beneficiaries in response to changed life circumstances, such as a subsequent divorce, marriage or birth of a child. Second, many accountholders and trust settlors are confused about how to change the beneficiaries of an account or trust. People do not tend to consult lawyers before making these attempts, believing intuitively that informal written or oral statements, directives in a new will, or provisions in other documents, such as divorce agreements, will do the trick. The law's responses to these situations are confusing, inconsistent and often intent defeating.

Finally, I will highlight another way in which the nonprobate system might generate intent-defeating results: the ease and relative secrecy with which non-probate assets are executed can make it much easier for an overreaching friend or relative to take advantage of an elderly person who lacks capacity or to exercise undue influence. An heir who later attempts to challenge a beneficiary designation as procured by undue influence will have a difficult time meeting his or her burden of proof, since little direct evidence of fraud or overreaching will exist. As a result, increasing numbers of elderly may have difficulty ensuring that their estates are distributed in accordance with their true wishes.

2. The building blocks of the nonprobate revolution

Americans have developed a near obsession with avoiding probate. Although the average person's fears about the probate process may be exaggerated, probate often entails costs and delays. The principal costs are commissions paid to the executor or administrator selected to administer the estate, and legal fees paid to the lawyer who steers the estate through the probate process. The delays in administering the deceased's assets are inherent in the judicial process. If the property owner has left a will, the person named as executor in that will starts the process by petitioning for authorization to act on behalf of the deceased property owner's estate. The court will issue "letters testamentary", which authorize the executor to gather the testator's assets from banks and other third parties (Sterk *et al*. 2011, p. 46). The executor must offer the will for probate, submitting proof that the will was properly executed in accordance with statutory formalities (Sterk *et al*. 2011, p. 46). The executor must also notify decedent's creditors and closest living relatives of the proceeding (Sterk *et al*. 2011, p. 1006). Creditors must file creditor claims within a time specified by statute, which can range from one to six months.[3] The executor has a fiduciary duty to determine the legitimacy of those claims and challenge those that are suspect (Sterk *et al*. 2011, p. 1010-11). Relatives have a window in which to challenge the will. Once creditors' claims and objections, if any, are adjudicated or settled, the executor distributes the estate assets as the decedent has directed in the will (Sterk *et al*. 2011, p. 1010-11). Even for small estates, the probate process can take a minimum of six months. In contested

[3] See, e.g., Nev. Rev. Statutes Section 147.040 (stipulating a three month period for the filing of creditors' claims);

estates, probate can last for years, with some especially contentious estates being caught up in probate for more than a decade!

The nonprobate revolution has occurred because people seek “dispatch, simplicity, inexpensiveness, privacy” – qualities incompatible with the traditional probate process (Langbein 1984, p. 1116). Although a few types of non-probate mechanisms – insurance policies and joint tenancies with right of survivorship--have been in place for centuries, it was not until 1966, when Norman Dacey published the book How to Avoid Probate that the need for probate avoidance seeped into popular culture. Dacey’s diatribe against the evils of the probate system and his advocacy of the so called “revocable living trust” jump started the revolution. In the past forty years, the revocable trust has become ubiquitous, helped along by colorful television personalities[4] and bloggers[5] who insist that every person should have one. At the same time, courts gradually abandoned their historical reluctance to recognize the legitimacy of contracts with “payable on death” or beneficiary designations.[6]

As a result, the person who wishes to avoid probate has a variety of mechanisms from which to choose. The following sections explain the various accounts and mechanisms that are available.

2.1. Revocable living trusts

The American trust is a creature of English common law. A trust is an entity in which ownership is divided between the trustee (who is sometimes said to hold "legal" title to the trust property) and the beneficiaries (said to hold "beneficial" title). The trustee—not the beneficiary—has the right to manage the trust property, but also has the obligation to manage the property in the beneficiary's interest—not the trustee's own interest. These obligations are known as “fiduciary duties.” Trusts usually name both present and future beneficiaries. The present beneficiaries – often called the “income” beneficiaries – have the right to receive payments from the trustee for a specified period of time, usually the duration of their lives. The “remainder beneficiaries” are those who receive the remaining trust principal outright at the death of the income beneficiaries.

A trust can be created through a provision in a testator’s will (a “testamentary trust”) or during the trust settlor’s life (an “intervivos” or “living” trust). Intervivos trusts always avoid probate – at the income beneficiaries’ deaths, the trustee simply distributes the principal to the remainder beneficiaries. There is no need for a judicial proceeding of any kind. Historically, trusts were generally irrevocable transfers, and were created when the settlor wanted to make a gift. Although the termination of an irrevocable trust is also accomplished outside of probate, it comes at a high cost; a settlor loses the ability to amend or revoke the trust, and is thus locked in to the trust terms for the duration of her life. The generous of the revocable trust is that it allows a settlor to maintain total control over the trust assets while avoiding probate at death.

To create a revocable trust, an individual (the trust “settlor”) executes a trust document naming the settlor as the sole trust beneficiary during the settlor’s life (the “income beneficiary”) and designating remainder beneficiaries who will be

[4] See, e.g., Orman (2014) explaining that everyone must have a revocable living trust.

[5] See, e.g., Nolo (2009) explaining that “you transfer ownership of some or all of your property to yourself as trustee, keeping absolute control over the property held in trust”; Fortenberry (2013), Peters (2010).

[6] Courts originally viewed payable on death beneficiary designations as “invalid wills” because they operated to transfer assets on death but failed to comply with will formality statutes (Sterk *et al*. 2011, p. 566). The exception to this was the so-called “Totten Trust,” – which, though functionally indistinguishable from a bank account with a POD designation was validated by courts because the accountholder held the funds “in trust” for a designated trust beneficiary. Over time, courts began to recognize payable on death designations as valid non-probate devices. See, e.g., Green v. Green, 559 A.2d 1047 (R.I. 1989); Uniform Probate Code 6-101 (authorizing POD accounts).

entitled to any trust assets that remain in the trust at settlor's death. The settlor then transfers her assets to the trustee named in the trust. Although the creator can name any person or institution as trustee, the settlor who wants to maximize control over her own assets will designate herself as trustee. The trust instrument directs the trustee to make payments or transfer assets to the income beneficiary for any reason, and gives the settlor/trustee broad management powers, including the power to revoke the trust. At the settlor's death, the trustee (or the successor trustee if the settlor was the trustee) simply distributes any remaining assets to the remainder beneficiaries. The trustee need not seek judicial approval or involvement of any kind (Sterk *et al*. 2011, p. 570-76).

In most cases, revocable trusts are trusts in name only; because the settlor is the trustee and sole income beneficiary, she owes no fiduciary duties to anyone -- because the settlor can easily revoke the trust, the remainder beneficiaries have no incentive, or standing, to challenge the settlor/trustee's actions during the settlor's life.[7] And because a revocable trust retains for the settlor complete control and enjoyment of the trust assets, and allows the settlor to revoke the trust entirely at her discretion, it is virtually indistinguishable from a will from a functional perspective.

Of course, it is unlikely that the settlor will transfer every last asset to the revocable trust; the settlor may die owning items of personal property and miscellaneous sums of money outright. For that reason, revocable trusts must be accompanied by a "pour over" will. The will serves a "mopping up" function—it directs the probate court to distribute testator's probate assets to the successor trustee of the living trust, to be managed and distributed in accordance with the trust's terms. Although the pour over will usually must be probated, only a small fraction of testator's assets will pass through probate.

The objective of the revocable trust is to facilitate quick and easy transmission of assets on death without constraining the settlor's use of and control over those assets during life. But many trust settlors misunderstand the promise of "complete control." From the moment of trust creation, the terms of the trust instrument govern the settlor's management of the assets. The trust instrument may require that the settlor follow a specific procedure to remove assets from the trust, or may constrain the settlor's ability to revoke or amend the trust. The caselaw reveals that many settlors simply fail to understand the constraints that the trust instrument creates.[8]

The creation of the revocable trust generates no income tax savings for the settlor, although the careful use of revocable trusts can generate some federal gift and estate tax savings. Federal tax concerns aside, state law governs most aspects of the revocable trust.

[7] See In Linthicum v. Rudi, 148 P.3d 746 (Nev. 2006); Giraldin v. Giraldin, 55 Cal. 4th 1058; 290 P.3d 199 (Cal. 2012).

[8] See, e.g., Wetzel v. McCrory, 2008 Mich. App. LEXIS 509 (Mich. App. 2008) (finding that settlor's act of transferring property from one trust to another in attempt to disinherit her son was insufficient to remove the asset from the first trust); Midwest Trust Co. v. Ong, 293 P.3d 168 (Kan. App. 2013)(execution of deed transferring real property from trust is insufficient because settlor did not indicate that she was acting as trustee in making the transfer); McGovern v. Bigelow, 2003 Cal. App. Unpub. LEXIS 9346 (Cal. App. 2003) (husband and wife created trust to ensure that assets were ultimately distributed to their children, but because boilerplate did not provide that trust became irrevocable on the death of the first spouse to die, court upheld husband's transfer of assets to his girlfriend after wife's death); Aguilar v. Aguilar, 168 Cal. App. 4th 35, 85 Cal. Rptr. 3d 193 (Cal. App. 2008)(wife attempts to transfer "her share" of community property out of trust after husband died and trust became irrevocable).

2.2. Accounts and products with beneficiary designations

2.2.1. Retirement accounts

In the United States, retirement savings accounts fall into one of two categories: those that are sponsored by employers and offered to eligible employees and those created by individuals who are self-employed or eligible to participate in employer-sponsored plans.[9] Employer-sponsored retirement plans, like all employee benefits, are governed by federal law, specifically, the Employee Retirement Income Security Act (ERISA), enacted in 1974.[10] Individual Accounts ("IRA"s) are chiefly governed by state law.[11]

Employer-sponsored defined contribution plans and individual retirement accounts (IRAs) share important features.[12] When an employer establishes a defined contribution plan, each employee has an individual account with the plan administrator selected by the employer. With an IRA, the account holder chooses an account custodian. In each case, at the account holder's death, the administrator or account custodian typically distributes any remaining assets in accordance with a "contract" between the parties. The critical components of the contract are the beneficiary designation form filled out by the account holder and default provisions that apply when the account holder has made no effective designation. These default provisions are not generally set forth on the beneficiary designation form, but are located somewhere in the plan documents – typically in the summary plan description which few account holders will ever read (Sterk and Leslie 2014).

This framework generates significant advantages. First, and most obviously, the assets do not pass through the account holder's probate estate, which avoids delay in distribution and the need to pay commissions to the fiduciary representing the account holder's estate. Second, the framework keeps administrative costs down by limiting the inquiry required of the account custodian at the time of the account holder's death.

Today, the retirement account is the most significant nonprobate asset owned by most Americans. Individuals now hold more than nine trillion dollars in employer-sponsored defined contribution plans and IRAs (Investment Company Institute 2012).

2.2.2. Bank and investment accounts

Before the second half of the twentieth century, beneficiary designations attached to savings accounts were thought not to be enforceable; because the sole function of a beneficiary designation was to distribute account assets on the accountholder's death, they were (correctly) viewed as testamentary dispositions. But because beneficiary designation forms were not executed in accordance with testamentary formalities, they were unenforceable.[13] Courts were willing, however, to recognized

[9] See P.L. 93-406, Title II, §2002(b)), defining "Individual Retirement Account", codified as 26 U.S.C. §408,

[10] For an account of one of the most notorious retirement plan collapses, and its connection to ERISA, see James A. Wooten (2001). For another account, suggesting that the UAW was fully aware of the risks associated with the Studebaker pension plan at the time of its negotiations with Studebaker, see Langbrein et al. (2010).

[11] 29 U.S.C. §1051(7) exempts individual retirement accounts from ERISA's regulatory requirements, including those governing participation, vesting, and benefit accrual.

[12] Defined-contribution plans allow employees and employers to make fixed, tax-deferred contributions each year—known as "defined contributions"—into retirement savings accounts set up and administered by the employer. These plans allow employees to build up a retirement "nest egg," but provide no guaranty of fixed annual payment. Defined contribution plans are by far the most common form of employer provided retirement benefit (Sterk and Leslie 2014).

[13] See, e.g., In re Atkinson's Estate, 175 N.E.2d 548, 550 (Ohio Prob. 1961) (finding that accounts with POD designations were invalid and part of the probate estate, so surviving spouse could obtain a portion of the proceeds as part of her elective share); Compton v. Compton, 435 S.W.2d 76, 78 (Ky. 1968)(invaliding a POD designation because "[a]n instruction merely directing the disposition of property

the so-called “Totten Trusts”; bank accounts that the accountholder held “in trust” for a designated death beneficiary.[14] The difference between a beneficiary designation and a Totten Trust was in name only. Although functionally indistinguishable, because Totten Trusts were conceptualized as “trusts”, and not invalid wills, courts enforced them.

Eventually, some courts validated POD accounts by determining that the law of contracts, not wills, applied or by noting that PODs were functionally equivalent to Totten trusts.[15] State legislatures, at the urging of banks, enacted statutes authorizing POD accounts and insulating banks from liability for paying account proceeds to the designated beneficiary.[16] Currently, most commercial banks now give account holders the option to chose “payable on death” (POD) or “transferrable on death” (TOD) beneficiaries for ordinary savings accounts.[17] A few banks continue to offer the Totten Trust account.

An account holder can designate a death beneficiary by filling out a simple form. Most banks do not require that the form be witnessed or notarized. The accountholder can revoke or change the beneficiary designation at any time simply by filling out a new form. At the accountholder’s death, the bank will pay over the contents of the savings account to the payable on death beneficiary. The assets will not pass through probate. POD and TOD bank accounts are governed by state law.

With increasing frequency, mutual fund and brokerage accounts may now be registered “in beneficiary form”.[18] "Beneficiary form" is defined as a registration that indicates "the intention of the owner regarding the person who will become the owner of the security upon the death of the owner."[19] A registration in beneficiary form has no effect on the ownership of the account, and creates no rights in the designated beneficiary.[20] It too can be freely revoked or modified until the owner’s death. Conflicts involving ownership of securities are resolved by application of state law.

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upon the owner's death is not a declaration of trust. It is nothing but an attempted testamentary disposition”); Vercher v. Roy, 171 La. 524, 529, 131 So. 658, 660 (1930) (refusing to enforce a beneficiary designation on a CD because “[t]o hold otherwise would be to give to the clause in favor of Mrs. Roy the effect of a donation mortis causa, when such donations can be made only by last will and testament”); In Matter of Collier, 381 So.2d 1338 (Miss.1980) (holding that a POD designation was testamentary and invalid); Blais v. Colebrook Guaranty Savings Bank, 107 N.H. 300, 220 A.2d 763 (1966) (holding payable on death provision an invalid attempt to make a testamentary transfer).

[14] In In re Totten, 179 N.Y. 112, 71 N.E. 748 (1904), the beneficiary of a trust account sued the accountholder’s estate to regain funds that the accountholder had withdrawn from the account before death on the theory that the account was an irrevocable trust. The New York Court of Appeals determined that it was not the depositor’s intent to create an irrevocable trust, and sanctioned what it called “a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary.”

[15] *See, e.g,* Logan v Citizens Nat. Bank, 460 So 2d 1239 (Al. 1984) (enforcing POD designation by invoking contract law); In Re Estate of Wright, 17 Ill App 3d 894, 308 NE2d 319 (1974) (enforcing POD designation on grounds that it was a valid Totten trust and because it was enforceable under contract law); Peoples Bank v. Baxter, 41 Tenn App 710, 298 SW2d 732 (1956) (enforcing POD designation on grounds that death beneficiary was a third-party beneficiary of contract between depositor and bank).

[16] *See, e.g.,* In re Gubala's Estate, 81 Ill. App. 2d 378, 383, 225 N.E.2d 646, 650 (Ill. App. Ct. 1967) (holding that despite the fact that POD designation is “testamentary” in nature, the disposition is valid “since the Illinois Savings and Loan Act was intended to supplant the Statute of Wills in this respect. Section 770(c) of the Act, under which a ‘P.O.D. account’ is authorized . . .”); Virginia Nat. Bank v. Harris, 220 Va. 336, 341, 257 S.E.2d 867, 870 (1979)(emphasizing bankers’ brief arguing that statute authorizing POD accounts should be read as validating POD designations not executed with will formalities).

[17] See, e.g., Uniform Probate Code § 6–101 (validating P.O.D. accounts).

[18] UPC § 6–302 authorizes registration of securities "in beneficiary form" whenever a security is owned by one individual or by two or more individuals with right of survivorship.

[19] UPC § 6–301.

[20] UPC §6-306.

3. Non-probate mechanisms and frustration of intent

3.1. The change of beneficiary problem

Today, it would not be unusual for a middle class American to die with a will, a revocable trust, several retirement accounts and life insurance policies provided by a series of employers, an IRA, and perhaps an additional individually purchased life insurance policy. She might also own one or more mutual fund or savings accounts with POD designations. She may be unaware of the various, conflicting legal rules that govern the distribution of her probate assets, her revocable trust and her numerous nonprobate accounts; in fact, she may forget that she has filled out beneficiary designation forms for one or more accounts. As a result, the distribution of her assets at her death may violate her preferences.

3.1.1. Variation one: Default rules often fail to effectuate probable intent in light of changed circumstances

As a working example, consider Mary Decedent. Assume that by age 30 Mary was married to Lucky. Mary had:

1) A will devising all of her property to Lucky;
2) A revocable living trust (titled "the Mary Trust") naming herself as trustee and Lucky as the remainder beneficiary. Mary had properly transferred title to her house from herself individually to herself as trustee of the Mary Trust.

In addition, Mary owned the following assets:

3) An IRA;
4) A savings account at her local bank; and
5) A 401K retirement account sponsored by her employer.

For each of these accounts, Mary had filled out beneficiary designation forms naming Lucky as the person who would be entitled to the accounts should Mary die before exhausting them.

Suppose that several years later Lucky and Mary divorce. Mary thereafter adopts a son, Peter. Mary then dies in an accident, having neglected to update her estate planning documents to reflect her changed circumstances. In all likelihood, Mary would have wanted her assets to be distributed to Peter, not Lucky. Will a court effectuate her probable intent?

1) Mary's probate estate

Any assets that Mary owns in her individual name and are not held in an account or trust that names a beneficiary will need to pass through probate to be distributed in accordance with Mary's will. But Mary's will devises all of her probate estate to Lucky, her ex-husband, a distribution that is probably at odds with her intent at the time of death. To rectify this problem, each state has a statute or common law rule that revokes either the will or bequests to the spouse if the couple is divorced at the testator's death. Thus, Mary's residuary devise to Lucky would be revoked by operation of law. As a result, Mary's probate estate will be distributed to Peter, Mary's heir-at-law.[21]

[21] See, e.g., Ark. Code Ann. § 28-25-109(b) (2012); Cal. Prob. Code § 6122 (2012); Conn. Gen. Stat. § 45a-257c (2012); Del. Code Ann. tit. 12, § 209 (2012); Idaho Code § 15-2-508 (2012); Fla. Stat. § 732.507(2)(2012); Ga. Code Ann § 53-4-49 (2012); Ill. Comp. Stat. 5/4-7 (2012); Mo. Rev. Stat. § 474.420 (2012); Neb. Rev. Stat. § 30-2333 (2012); N.H. Rev. Stat. Ann. § 551:13(II) (2012); Ind. Code Ann. § 29-1-5-8 (2012); Iowa Code § 633.271 (2012); Kan. Stat. Ann § 59-610 (2011); La. C.C. Art. 1608(5) (2012); Ohio Rev. Code Ann. 2107.33(d) (2012); Tenn. Code Ann. § 32-1-202 (2012); W. Va. Code § 41-1-6 (2012).

Most states also have intent-effectuating statutes that give children born[22] or spouses married[23] after the execution of a testator's will a share of the testator's estate. Here, an "omitted child" statute would operate to give Peter an intestate share of Mary's probate estate, which in this case would be her entire estate, even if the will had not been revoked by statute.

Unfortunately for Peter, Mary's probate assets are likely to constitute only a small fraction of her property. The retirement accounts and her home are likely to be the most valuable property she owns.

2) The Revocable Trust

Lucky is also the remainder beneficiary of Mary's revocable living trust, which means that under the Lucky Trust document he should become the sole owner of her home, which is a trust asset. Because revocable trusts are will substitutes, it would make sense to extend all intent-effectuating statutes that apply to wills to revocable trusts. In that case, the trust provisions naming Lucky remainder beneficiary would be revoked by operation of law, and Peter would become the owner of the house. Although there is a clear trend towards extending intent-effectuating statutes to revocable trusts,[24] state legislatures have been slow to

[22] The majority of states have "omitted" or "pretermitted" child statutes that allow children born after the execution of testator's will to claim an intestate share of testator's probate estate if that result effectuates intent. These statutes vary in scope and detail. Some permit all children not named in the deceased parent's will to receive a portion of the estate. *See*, *e.g.* Ark. Code Ann. § 28-39-407; N.H. Rev. Stat. Ann. § 551:10. However, the majority of states have enacted statutes limiting protection of children unintentionally omitted from a deceased parent's will to those born or adopted after execution of the will. *See*, *e.g.*, Ariz. Rev. Stat. Ann. §14-2302 (West 2002); Colo. Rev. Stat. Ann. § 15-11-302 (West 2001); Fla. Stat. Ann. § 732.302 (West 2002); Md. Code Ann., Est. & Trusts § 3-301 (2001); Mass. Gen. Laws Ann. ch. 19, § 20 (West 2002); Minn. Stat. Ann. § 524.2-302 (West 2002); Miss. Code Ann. § 91-5-5 (1995); Mo. Stat. Ann. § 474.240 (West 1992); Mont. Code Ann. § 72-2-232 (2001); Neb. Rev. Stat. § 30-2321 (1995); N.J. Stat. Ann. § 3B:5-16 (West 2002); N.Y. EPTL § 5-3.2 (McKinney); N.D. Cent. Code § 30.1-06-02 (1996); Okla. Stat. Ann. tit.84, § 131 (West 2003). Many states permit the omitted afterborn to receive a share in the estate equal to that which he or she would have received if the testator had died intestate. *See*, *e.g.*, Del. Code Ann. tit. 12, § 301 (West); 755 Ill. Comp. Stat. Ann. 5/4–10; Ind. Code § 29–1–3–8; Iowa Code § 633.267; N.C. Gen. Stat. § 31–5.5; 20 Pa. Cons. Stat. § 2507(4); Tenn. Code Ann. § 32–3–103; Wash. Rev. Code § 11.12.091. In Kansas, the birth of a child after will execution revokes the will in its entirety. See K.S.A. § 59-610 (2011). This is a distinctly minority approach.

The Uniform Probate Code creates an omitted child share only in one of two circumstances: 1) if the testator has other children and the will makes a provision for those children, or 2) if the testator has no other children and his will does not leave substantially all of his estate to the child's other parent. States that have adopted this provision include: Alaska Stat. § 13.12.302; Ariz. Rev. Stat. Ann. § 14–2302; Colo. Rev. Stat. § 15–11–302; Fla. Stat. Ann. § 732.302 (West 2002); Haw. Rev. Stat. Ann. § 560:2-302 (1999); Idaho Code § 15-2-302 (2001); Ind. Code Ann. § 29-1-3-8 (2000); Me. Rev. Stat. Ann. tit.18-A, § 2-302 (West 1998).

[23] A majority of states guarantee the surviving spouse at least a fraction of the testator's estate. While a very few states cling to older statutes that provide that marriage revokes a pre-marital will, See Foy v. County Commission, 442 S.E.2d 726, 730-31 (1994) (discussing effect of such statutes, in a number of states, on wills executed before those statutes were repealed), most state statutes are more carefully crafted to award the omitted spouse a share of testator's probate estate only to the extent that giving a share to the spouse would effectuate the testator's probable intent. For example, UPC §2-301 provides that the omitted spouse is entitled to her intestate share of assets not devised to testator's children, unless it appears that the testator intended the will be effective even if he/she subsequently married, the will was made in contemplation of marriage, or the testator provided for that spouse by nonprobate transfers. See §2-301(a)(1)-(3). Pre-marital will statutes like UPC §2-301 do not revoke the pre-marital will entirely, but instead preserve significant portions of that will – in particular, any share devised to testator's issue. They are designed not to upset too much of the testamentary plan of a testator who enters into a second or subsequent marriage without changing a will leaving many of his assets to his or her children. Most separate property states also have elective share statutes, which give a surviving spouse the right to demand a fixed percentage of the deceased spouse's assets, regardless of the content of the deceased spouse's will. Although elective share statutes are not designed to effectuate intent, they may accomplish that result when testator fails to revise the will after marriage.

[24] UPC 2-804 extends the "revocation on divorce" rule to all non-probate mechanisms, including revocable trusts. Fewer than half the states have adopted 2-804. *See, e.g.*, Alaska Statute 13-12-804; Col. Rev. Stat. 11-15-804; HRS 560-2-804 (Hawaii); Ill. Rev. Stat. 1989, ch. 148, par. 301(a); ALM GL. Ch 190B-2.804 (Mass); MCLS 700.2806 (Michigan); Minn. Stat. § 524.2-804 (2012); §72-2-814, MCA (Montana); 1993 N.D. Laws, Ch. 334, § 40 (North Dakota); N.J. 3B:3-14 (New Jersey); N.M. Stat. Ann

move,[25] and some courts have been hesitant to interpret will statutes more broadly. Citing statutory language entitling spouses and children omitted from the "will" to take an intestate share of the "probate estate," courts have refused to allow such spouses and children to claim a share of assets held in a revocable trust,[26] and have declined to extend revocation on divorce statutes to cover revocable trusts. [27] Depending on the state, Lucky may end up owning Mary's home.

3) & 4) The POD bank account and the IRA

Because POD and IRA accounts are governed by state law, whether Mary's original beneficiary designation is controlling depends on whether the state's "revocation on divorce" statute is limited to wills (as the majority are)[28] or extends to non-probate beneficiary designations.[29] If the state does not extend its revocation on divorce statute to nonprobate accounts, Peter will most likely not be able to take the proceeds as an omitted child, because most omitted child statutes give the child only a share of the parent's probate estate.

If the relevant state does not extend the revocation on divorce statute to nonprobate beneficiary designations, Lucky may still lose those proceeds if Lucky and Mary's property settlement agreement purported to terminate Lucky's rights to those assets.[30] But courts construe divorce agreements quite narrowly, and often

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45-2-804 (New Mexico); NY EPTL § 5-1.4 (2012)(New York); ORC Ann. 5815.33 (2012)(Ohio);15 Okl. St. § 178 (2012); S. D. Codified Laws 29A-2-804 (South Dakota); Utah Code. Ann. § 75-2-804(2)(1998); Wis. Stat. § 854.15 (2012).

[25] Many states retain statutes that revoke only will provisions in favor of an ex-spouse. *See, e.g*., Ark. Code Ann. § 28-25-109(b) (2012); Ga. Code Ann.§ 53-4-49 (2011); Idaho Code Ann. § 15-2-508 (2009); Kan. Stat. Ann. § 59-610 (2012); Me. Rev. Stat. Ann. tit. 18-A, § 2-508 (2013); Mo. Rev. Stat. § 474.420 (2000).

[26] See, e.g., Benjamin v. Butler, 194 P. 3d 1269 (Ok. 2008) (holding that Oklahoma's omitted child statute did not apply to a revocable living trust); Bell v. Estate of Bell, 181 P.3d 708 (N.M. App. 2008)(holding that omitted spouse statute did not give husband a right to a portion of the assets in a revocable trust); Kidwell v. Rhew, 268 S.W. 3d 309 (Ark. 2007)(holding that omitted child statute did not apply to inter vivos trusts).

[27] See, e.g., Graves v. Summit Bank, 541 N.E.2d 974 (Ind. App. 1989).

[28] Ark. Code Ann. § 28-25-109(b) (2012); Cal. Prob. Code § 6122 (2012); Conn. Gen. Stat. § 45a-257c (2012); Del. Code Ann. tit. 12, § 209 (2012); Idaho Code § 15-2-508 (2012); Fla. Stat. § 732.507(2)(2012); Ga. Code Ann § 53-4-49 (2012); Ill. Comp. Stat. 5/4-7 (2012); Mo. Rev. Stat. § 474.420 (2012); Neb. Rev. Stat. § 30-2333 (2012); N.H. Rev. Stat. Ann. § 551:13(II) (2012); Ind. Code Ann. § 29-1-5-8 (2012); Iowa Code § 633.271 (2012); Kan. Stat. Ann § 59-610 (2011); La. C.C. Art. 1608(5) (2012); Ohio Rev. Code Ann. 2107.33(d) (2012); Tenn. Code Ann. § 32-1-202 (2012); W. Va. Code § 41-1-6 (2012); *See*, *also*, Schultz v. Schultz, 591 N.W.2d 212 (Iowa 1999) (awarding IRA proceeds to ex-spouse instead of current spouse because decedent did not revoke his beneficiary designation); Graves v. Summit Bank, 541 N.E.2d 974 (Ind. App. 1989)(finding that neither the accountholder's divorce or a notation that his IRA was to be distributed in accordance with his post-divorce will were sufficient to change the beneficiary designation in favor of the accountholder's ex-spouse); Finch v. Key Bank Nat'l Assoc., 2002 Ohio 3082 (Ct. App. 2002)(awarding ex-spouse account proceeds because decedent neglected to change beneficiary designation after divorce and remarriage); Leier v. Leier, 524 N.W.2d 106 (N.D. 1994) (awarding ex-spouse proceeds because beneficiary neglected to change beneficiary designation after divorce).

[29] *See, e.g.,* Alaska Statute 13-12-804; Col. Rev. Stat. 11-15-804; HRS 560-2-804 (Hawaii); Ill. Rev. Stat. 1989, ch. 148, par. 301(a); ALM GL. Ch 190B-2.804 (Mass); MCLS 700.2806 (Michigan); Minn. Stat. § 524.2-804 (2012); §72-2-814, MCA (Montana); 1993 N.D. Laws, Ch. 334, § 40 (North Dakota); N.J. 3B:3-14 (New Jersey); N.M. Stat. Ann 45-2-804 (New Mexico); N.Y. Est. Powers & Trusts § 5-1.4 (2012)(New York); Ohio Rev. Code Ann. 5815.33 (2012)(Ohio); 15 Okl. St. § 178 (2012); S. D. Codified Laws 29A-2-804 (South Dakota); Utah Code. Ann. § 75-2-804(2)(1998); Va. Code Ann 20-111.1 (2013); Wis. Stat. § 854.15 (2012). One court has held that to the extent this statute would apply to change beneficiary designations of nonprobate assets, it impairs the obligation of contracts entered before the statute's effective date in violation of the state constitution. Aetna Life Ins. Co. v. Schilling, 616 N.E.2d 893,896 (Ohio 1993).

[30] *See* Pinkard v. Confederation Life Ins. Co., 264 Neb. 312, 315-319; 647 N.W.2d 85, 87-90 (2002)(finding that language providing that deceased spouse would "receive as his sole and separate property all right, title and interest in his employee benefit plans" sufficient to override beneficiary designation); Deryke v. Teets, 702 S.E.2d 205 (Ga. 2010)(same); Stribling v. Stribling, 369 S.C. 400, 404-07; 632 S.E.2d 291, 292-295 (S.C. 2006)(finding that decree stating that the parties waive "*any interest* they may have in the other party's retirement" sufficient to override beneficiary designation);

interpret even explicit language surrendering an ex-spouse's rights to a nonprobate account as insufficient to override the beneficiary designation. For example, one court determined that a divorce agreement stating that the accountholder "retained all rights" to the account was insufficient, [31] while a number of other courts have held that language waiving "all of the [ex-spouse's] interest" in a specific account is not sufficient to change the beneficiary designation. Courts in this latter group reason that because a survivorship interest is a mere expectancy, not a current property interest, language relinquishing an ex-spouse's property "rights" cannot operate to change a beneficiary designation.[32]

As a result, there is a very good chance that Lucky will receive the proceeds of the IRA and POD accounts.

5) The 401K (Employer-Provided Retirement Account)

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see also, Estate of Anello v. McQueen, 953 P.2d 1143, 1145-46 (Utah 1998) (prior to Utah's adoption of 2-804, recognizing the general rule but finding that language of the separation agreement stating that the parties took their own separate IRAs "free and clear of any claim or interest of the other party" clearly expressed the parties' intent to waive "both existing property interests and future expectancies").

[31] *Compare* Crawford v. Barker, 64 So. 3d 1246, 1248 (Fla. 2011)(enforcing a beneficiary designation distributing IRA account proceeds to an ex-spouse, despite the property settlement's declaration that the accountholder "retained the retirement moneys" in his IRA account); Schultz v. Schultz, 591 N.W.2d 212 (Iowa 1999) (holding that a divorce decree awarding an IRA to one spouse does not terminate the other spouse's expectancy interest absent language in the decree indicating that the court intended to affect the expectancy interest); Maccabees Mut. Life Ins. Co. v. Morton, 941 F.2d 1181, 1185 (11th Cir. 1991) (concluding that the ex-spouse waived her "rights acquired through the marital relationship" to the IRA in the separation agreement, but finding that "her status as beneficiary was unrelated to the husband-wife relationship" and she, thus, did not waive her rights as a beneficiary to the proceeds of the IRA); In re Estate of Rock, 612 N.W.2d 891, 893-95 (Minn. Ct. App. 2000) (concluding that the divorce decree did not remove the ex-wife as the primary beneficiary of IRAs and emphasizing that a different result might have an adverse effect where former spouses intentionally keep the other as beneficiaries of each other's IRAs to protect their children); In re Estate of Bruce, 265 Mont. 431, 877 P.2d 999, 1002 (1994) (property settlement agreement which did not refer to ex-wife's interest as a beneficiary of an IRA "did not constitute a relinquishment of [her] inchoate interest in the ... IRA as a beneficiary"); Finch v. Key Bank Nat'l Ass'n, 2002 Ohio 3082 (holding that ex-spouse was entitled to the account proceeds because the divorce decree provided only that the deceased spouse would "own" the retirement account); Hopf v. Hopf, 477 N.W.2d 365, 365-66 (Wisc. App 1991)(finding that divorce agreement wherein ex-spouse gave up "all right, title and interest in and to the property awarded" to her husband insufficient to override beneficiary designation), *with* Estate of Anello v. McQueen, 953 P.2d 1143, 1145-46 (Utah 1998) (finding that language of separation agreement stating that the parties took their own separate IRAs "free and clear of any claim or interest of the other party" clearly expressed the parties' intent to waive "both existing property interests and future expectancies"); Pinkard v. Confederation Life Ins. Co., 647 N.W.2d 85, 87-90 (2002)(finding that language providing that deceased spouse would "receive as his sole and separate property all right, title and interest in his employee benefit plans" sufficient to override beneficiary designation); Deryke v. Teets, 702 S.E.2d 205 (Ga. 2010)(same); Stribling v. Stribling, 369 S.C. 400, 404-07; 632 S.E.2d 291, 292-295 (S.C. 2006)(finding that decree stating that the parties waive "*any interest* they may have in the other party's retirement" sufficient to override beneficiary designation).

[32] Painewebber Inc., v. East, 363 Md. 408; 768 A.2d 1029 (2001). Compare Crawford v. Barker, 64 So. 3d 1246 (Fla. 2011)(enforcing a beneficiary designation distributing IRA account proceeds to an ex-spouse, despite the property settlement's declaration that the account holder "retained the retirement moneys" in his IRA account);Schultz v. Schultz, 591 N.W.2d 212 (Iowa 1999) (holding that a divorce decree awarding an IRA to one spouse does not terminate the other spouse's expectancy interest absent language in the decree indicating that the court intended to affect the expectancy interest);Maccabees Mut. Life Ins. Co. v. Morton, 941 F.2d 1181, 1185 (11th Cir. 1991) (concluding that the ex-spouse waived her "rights acquired through the marital relationship" to the IRA in the separation agreement, but finding that "her status as beneficiary was unrelated to the husband-wife relationship" and she, thus, did not waive her rights as a beneficiary to the proceeds of the IRA); Estate of Bowden v. Aldridge, 595 A.2d 396, 397-98 (D.C. 1991) (holding language of separation agreement insufficient to establish waiver of expectancy interest in life insurance policy and IRA), *with,* Estate of Anello v. McQueen, 953 P.2d 1143, 1145-46 (Utah 1998) (finding that language of separation agreement stating that the parties took their own separate IRAs "'free and clear of any claim or interest of the other party'" clearly expressed the parties' intent to waive "both existing property interests and future expectancies"); Pinkard v. Confederation Life Insurance Co., 264 Neb. 312; 647 N.W.2d 85 (2002)(finding that language providing that deceased spouse would "receive as his sole and separate property all right, title and interest in his employee benefit plans" sufficient to override beneficiary designation); Deryke v. Teets, 288 Ga. 160; 702 S.E.2d 205 (Ga. 2010)(same); Stribling v. Stribling, 369 S.C. 400; 632 S.E.2d 291 (2006)(finding that decree stating that the parties waive "*any interest* they may have in the other party's retirement" sufficient to override beneficiary designation).

Although both the IRA and the 401K account are tax-deferred retirement savings vehicles, the law treats them quite differently. Because the 401K is administered by Mary's employer, it is governed by federal law[33] -- The Employee Retirement Income Security Act of 1974 (ERISA). And under ERISA, Lucky is very lucky indeed – the beneficiary designation on file with the plan administrator will be given effect because Mary failed to fill out and deliver the plan administrator's change of beneficiary designation form, *unless* Mary and Lucky's state divorce decree qualifies under ERISA as a Qualified Domestic Relations Order (QDRO). The following paragraphs elaborate.

The United States Supreme Court has held that ERISA's preemption provision preempts state law on key issues involving distribution of nonprobate accounts.[34] ERISA requires that a plan be administered in accordance with plan documents,[35] that plan documents specify how distributions shall be made,[36] and that plan administrators must make distributions to a beneficiary designated by a participant or by the terms of the plan.[37] As a consequence, the plan documents trump state laws and court judgments that might otherwise affect the distribution of ERISA-governed retirement plan benefits.[38] Any state law that attempts to effectuate intent when an accountholder divorces, marries or has a child after executing a beneficiary designation is inapplicable, and ERISA contains no similar intent-effectuating provisions.[39] Although the Supreme Court recognized that its holdings would frustrate intent in individual cases, the court interpreted ERISA as prioritizing administrative efficiency over those concerns. As the Court explained, "by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule."[40] Less certain rules would force plan administrators "to examine a multitude of external documents that might purport to affect the dispensation of benefits . . . and be drawn into litigation."[41]

ERISA provides for one exception to the plan documents rule: if a state law divorce decree is a Qualified Domestic Relations Order (QDRO), the plan administrator must look outside the plan documents and distribute the account proceeds as directed by the QDRO.

A QDRO is a "decree, judgment or order" that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant."[42] The statute sets forth detailed requirements for a QDRO, and divorce attorneys who are ignorant of these requirements often fail to take pains to ensure that a divorce decree qualifies.[43]

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[33] Employer sponsored retirement accounts usually take the form of 401(k) or 403(b) accounts.

[34] In *Egelhoff v. Eglehoff,* 532 U.S. 141 (2001), the Supreme Court held that ERISA preempts state laws that might change or revoke the beneficiary designation of an account. In *Kennedy v. Plan Administrator,* 555 U.S. 285 (2009), the Supreme Court took *Egelhoff* one step further, making it clear that ERISA's plan documents rule defeats an employee's attempt to change a beneficiary designation by any means other than executing a beneficiary designation form.

[35] 29 U.S.C. § 1102(a)(1); § 29 U.S.C. 1104(a)(1)(D). Although an employer can be the administrator, administration involves ensuring compliance with ERISA and other relevant laws. So administration is usually delegated to a plan administrator. The default rule is that the employer is the administrator.

[36] § 1102(b)(4).

[37] § 1002(8).

[38] 555 U.S. 285 (2009).

[39] Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[40] *Id.* at 302.

[41] *Id.* (internal quotations and citations omitted). For scathing criticism of the Supreme Court's ERISA preemption cases, see John H. Langbein (2014) [NB Regarding the date, I changed it to 2014 instead of 2013. See my note in the bibliography list], Lawrence W. Waggoner (2013).

[42] 20 USC section 1056(d)(B)(iii).

[43] To qualify as a QDRO, the judgment, order or decree must assign to a payee (or payees) a right to receive the participant's benefits under a plan. It must contain the last known addresses of the participant and the payees, the amount or percentage of benefits payable to each payee, the number of payments or period to which the order applies, and it must specify each plan to which the order applies.

Because courts often require strict compliance with the QDRO requirements, the slightest deviation can result in a judicial finding that a divorce decree is not a QDRO.[44] For example in *Met Life Ins. Co. v. Leich-Brannan*,[45] the court held that a divorce decree wherein the participant agreed to make his ex-spouse "his irrevocable beneficiary on all group and individual life insurance policies" was not a QDRO because the order did not clearly identify the insurance plan or state a specific amount or percentage of insurance proceeds that were to be awarded to the ex-spouse.[46] Therefore, if Mary and Lucky's divorce attorney neglected to abide by the exacting terms of the QDRO statute, Lucky will receive the proceeds of the 401K.

3.1.2. Variation two: The law's response to misguided attempts to change beneficiary distributions frustrates intent

Of course, people often do try to change their beneficiary designations in light of changed circumstances. When account holders want to change beneficiary designations, they can simply execute and deliver a "change of beneficiary" form to the relevant institution. A settlor of a revocable can clearly revoke a trust by executing (and, if the settlor is not the trustee, delivering to the trustee) an instrument of revocation and transferring titled assets back to herself in her individual capacity. Yet, for various reasons, accountholders and trust settlers routinely attempt to make changes using a variety of other methods, such as making informal oral and written statements or inserting provisions in their wills. Here again, when these problems arise the law can operate to frustrate, rather than further, the deceased's intentions.

To elaborate on some of the most common difficulties, assume the same initial facts concerning Mary's will, trust and assets. But now suppose that after divorcing Lucky and adopting Peter, Mary takes steps to change her estate plan. If Mary wants to ensure that her assets pass easily at her death to Peter, she must revoke her first will and the Mary Trust. Although Peter, as Mary's only heir, would then be entitled to all of her property even if Mary fails to execute any new documents, allowing Mary's estate to go through probate and pass by the laws of intestate succession to Peter is not a good plan, because probate generates unnecessary delay and expense. More importantly, if Mary dies while Peter is a minor, a court will have to appoint a guardian of the person (the person who will be responsible for Peter's care and upbringing) and a guardian of Peter's property. Because the guardianship systems in many states are terribly flawed, even corrupt,[47] the judge may appoint a guardian of the property who will not be devoted to Peter's best interests.

Mary's new estate plan, therefore, should include a will that appoints a guardian of the person, and that distributes Mary's probate assets to the trustee of a new trust. The new trust should be revocable during Mary's life and become irrevocable at

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20 USC 1056(d)(3)(C). In addition, a QDRO must also specify the name and mailing address of the alternate payee and the affected plan participant, the amount or percentage of the participant's benefits to be paid or the means by which that amount will be determined, the number of payments or time period to which the order applies, and the plan to which the order applies. 29 U.S.C. § 1056(d)(3)(C); *see also Bigelow,*283 F.3d at 441. 29 USC 1056(d)(3)(D) sets forth additional requirements: a QDRO cannot (1) require the plan to provide any type of benefit not otherwise provided, (2) require the plan to provide increased benefits, or (3) require benefits to be paid to an alternate payee which must be paid to another alternate payee under another QDRO. Finally, the judgment, order, or decree must be filed with the plan administrator, who must, within a reasonable period, determine whether the order is a QDRO[43]and notify the participant and each alternate payee of its determination. 29 U.S.C. § 1056(d)(3)(G)(i)(II).

[44] Metro.Life Ins. Co. v. Bigelow, 283 F.3d 436, 443-333 (2d Cir. 2002).

[45] 812 F. Supp. 2d 729 (E.D. Va. 2011).

[46] Note that the plan documents rule applies to all benefits with survivorship provisions in plans governed by ERISA. See Boyd, 636 F.3d at 142.

[47] See e.g., Guardianship: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, GAO REPORTS, Congressional Quarterly (2010)(detailing abuse, fraud and corruption involving court-appointed guardians).

Mary's death, at which time it will continue for Peter's benefit. The trustee of the trust will manage the assets for Peter, and distribute them in accordance with the trust's directions. Ideally, Mary should choose someone she trusts and who knows Peter well to act as trustee. Mary should transfer title to her home to the trustee of the new trust. In addition, she should change the beneficiary designations for the POD, IRA and 401K accounts to name the trustee of the new revocable trust as the beneficiary. In this way, Mary's assets will be consolidated into the trust after her death for easy management.

If Mary consults a competent estate planner, he or she will ensure that the old will and trust are revoked, that the new documents are properly drafted and executed, that title to Mary's home is properly transferred to the trust, and that the beneficiary designations on all three non-probate accounts are changed to make the trustee of the trust the beneficiary of the account proceeds. But for various reasons, this may not occur. For one thing, Mary may attempt to plan her estate by using form documents and bypassing the services of an estate-planning lawyer. Or, Mary may go to a lawyer who is not a specialist in estate planning; evidence indicates that many general practitioners are unfamiliar with nonprobate mechanisms and ERISA, for example. Even if Mary consults an attorney with estate-planning expertise, she may neglect to tell that attorney about all of her nonprobate accounts. Finally, she may acquire additional nonprobate accounts after the estate planning is done, and fail to name the proper people as beneficiaries. As a result, Lucky may receive assets that Mary does not intend for him to have. The following paragraphs explain the most common issues.

A. Mary may not understand how to properly revoke the Mary Trust

A.1. Mary may assume that the execution of a new will and trust will operate to revoke the Mary Trust

Under the law of all fifty states, if Mary's new will makes a complete disposition of her probate estate, it will revoke her first will by inconsistency, even if Mary's second will does not expressly state that it revokes the first will.[48] Whether Mary's execution of a new will and trust revokes the Lucky Trust is a more complicated issue. The first question would be whether the Lucky Trust sets forth a procedure that must be followed for revoking or amending the trust. In reality, most revocable trust instruments contain such provisions. A typical provision requires the settlor to execute a written instrument of revocation and deliver it to the trustee. Although this provision is usually included for the trustee's protection, it has become boilerplate. As a result, it is not uncommon to see this provision in a trust document where the settlor and the trustee are the same person.

If the Lucky Trust contains such a provision, its existence may frustrate Mary's attempt to the revoke the trust. For one of several reasons, Mary may fail to follow the instructions for revocation contained in the trust instrument. She may forget that the provision exists, and may fail to re-read the document; she may fail to understand the provision; or she might disregard it as inapplicable boilerplate, given that it is counterintuitive to assume she is supposed to memorialize her intent to revoke in a writing that she "delivers" to herself. She may believe that the execution of a subsequent trust instrument listing her home as trustee should be sufficient to make the point.

If Mary fails to follow the instructions, it is unclear whether Mary's execution of a new will and trust will constitute a revocation of the Lucky Trust. If neither the new will or trust expressly revokes the Lucky Trust, then a court may find that the Lucky trust was not revoked. If Mary's new will purports to revoke the Lucky Trust, then resolution of the issue will turn on state law, which varies. Some states expressly

[48] *See, e.g.,* UPC §2-507.

prohibit revocation by will.[49] The logic of these statutes is that intervivos wills are revocable only during the settlor's life, and a will becomes operative after the settlor's death. In other states, resolution of the question will turn on whether the court takes a strict[50] or substantial compliance[51] approach to the issue. A court that requires strict compliance will find that the trust was not revoked, while a court that employs a substantial compliance approach will interpret the will as "a writing, executed by the settlor and delivered to the trustee."[52]

But suppose the Lucky trust does not contain a provision specifying a method of revocation. In such a case, states adopt one of two rules on the opposite ends of the spectrum. Some states, adopting the common law approach, allow revocation of a revocable trust by any means, so long as there is clear and convincing evidence of the settlor's intent to revoke.[53] In such a state a court would be likely to find that Mary evinced such an intent. Other states, probably in response to pressure from institutional trustees, have sharply circumscribed the method of revocation, [54] with some statutes going so far as to allow revocation only by execution of a written instrument of revocation delivered to the trustee.[55] Whether a court in such a state would find that the Lucky Trust was revoked is anybody's guess.

B. Mary's attempt to transfer title to of her home to a new trust may fail

Currently, title to Mary's home is held by "Mary, as trustee of the Lucky Trust." To ensure that her home becomes an asset of the trust for Peter's benefit, Mary should both revoke the Mary Trust by executing an instrument of revocation and, because oral trusts of real property are not generally valid, execute a deed from herself as the settlor of the Mary Trust to herself as trustee of the new trust.[56] But trust

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[49] *See, e.g.,* Alaska Rev. Stat. §13.36.340; Ohio Rev. Code §5806.02; Cal. Probate Code §15401; Oregon Rev. Stat. §130.505; Wesbanco v. Blair, 971 N.E.2d 420 (Ohio App. 2012); Estate of Kovalyshyn, 343 A.2d 852 (NJ Probate 1975); In re Sanders, 261 Kan. 176; 929 P.2d 153 (1996); 4 Scott on Trusts, § 330.8 (and cases cited therein).

[50] See, e.g., McCreath v. McCreath, 240 P.3d 413, 418 (Colo. App. 2009)(holding that "if a trust agreement provides a method of revocation, that method must be strictly adhered to in order [to] revoke the trust" and so testator's will, which purported to revoke all prior wills and trusts could not operate as a revocation); Heaps v. Heaps, 124 Cal. App. 4th 286, 21 Cal. Rptr. 3d 239 (Cal. App. 4th Dist. 2004), rev. denied, 2005 Cal. LEXIS 1469 (Cal., Feb. 2, 2005); Connecticut General Life Ins. Co. v. First National Bank of Minneapolis 262 N.W.2d 403 (Mn. 1977) (citing Restatement, Trusts (2d) § 330, comment *j)*; Estate of Sanders, 261 Kan. 176; 929 P.2d 153 (1996); Estate of Kovalyshyn, 343 A.2d 852 (NJ Probate 1975) (holding that will provision invalid to revoke trust where trust instrument stipulated method of revocation).

[51] See UTC §602.

[52] See Estate of Lowry, 418 N.E.2d 10 (Ill. App. 1981)(holding that the testator validly revoked her revocable trust by executing a will that revoked the trust and "delivering" it to herself as trustee); Gardenhire v. Superior Court, 127 Cal. App. 4th 882; Estate of Davis, 671 N.E.2d 1302 (1996); In re Daoang, 953 P.2d 959 (Haw. Ct. App. 1998)(finding that where trust required that amendment be made by an instrument signed by both the Settlor and the Trustee, Settlor/Trustee's letter to Co-Trustee was sufficient to substantially comply with trust directives).

[53] *See e.g.,* Restatement (Third) of Property §7.2; Restatement (Third) of Trusts §63 cmt. h; UTC §602; Virginia Code §64.2-7.1; Fla. Statute §736.0602.

[54] *See e.g.,* Alaska Statute 13.36.340 (allowing revocation only by a writing signed by the settlor and delivered to the trustee during the settlor's lifetime, unless the trust otherwise provides); NY EPTL §§7-1.17 & 7-1.16 (allowing revocation only by a writing that complies with formalities or an express provision in testator's will); Washington Statute 11.103.030(3) (directing that unless the trust instrument expressly provides, a revocable trust can be revoked or amended by a later will or a written instrument signed by the trustor); Cal. Probate Code 15401 (providing that a trust may be revoked by complying with the process set forth in the trust or, if that process is not exclusive or if the trust is silent by a writing, other than a will, signed by the settlor and delivered to the trustee); Ala. Code § 19-3B-602 (curiously providing that a revocable trust can be revoked by any method, except that a "written" revocable trust can be revoked only by a later writing executed by the settlor and delivered to the trustee); Montana Code § 72-38-602 (revocation only by a writing delivered to the trustee that manifests clear and convincing evidence of the settlor's intent).

[55] See e.g., Alaska Statute 13.36.340; Cal. Probate Code 15401; Ala. Code § 19-3B-602; Montana Code § 72-38-602.

[56] See, e.g., N.Y. E.P.T.L. § 7– 1.18 (directing that no trust is created unless and until Settlor transfers title to real property to trustee and re-registers the stock in trustee's name)

settlors who are also trustees of their revocable trusts often fail to follow this procedure, perhaps because they fail to grasp the important legal distinctions between their roles as settlors, individuals and beneficiaries. They simply view themselves as the "owners" of the trust property. For example, in Kansas Midwest Trust v. Ong,[57] the court found that a trust settlor's attempt to transfer her home from her first revocable trust, which benefitted her family, to her second trust, which benefitted a charity and cut out one of her children, was inadequate. In attempting this transfer, the settlor executed a deed from herself as grantor to herself as trustee of the second trust. In other words, she did not indicate that she was acting in her capacity as trustee when she purported to grant the property. Although an estate-planning attorney helped her create the trust, he claimed to be unaware that the settlor had previously transferred title of the home to the first trust.

The court found that the settlor had failed to transfer the house from the first trust to the second, for two reasons: first, the court found that the first trust had not been revoked, because the instrument specified that revocation could be accomplished only by the settlor's execution of a writing that was delivered to the trustee, and the settlor had failed to indicate that she was acting as a trustee when she transferred the home. Second, because she did not own her home in her individual capacity, she had no authority to transfer title to the home, and so the transfer was invalid. In sum, because the settlor failed to appreciate the importance of putting the words "as trustee" after her name on the grantor line on the deed, her home passed in part to her son, whom she wished to disinherit.[58]

Here, if the Lucky Trust directs a procedure for revoking or amending the trust, Mary must follow it in order to transfer the home. In addition, she must be aware that she must execute a deed in her capacity as settlor to herself in her capacity as trustee of the second trust. Because most trust settlors view themselves as "owners" of trust property, they often fail to follow these steps.

C. Mary may assume that provisions in her will designating new beneficiaries of her POD, IRA and 401K accounts will be effective.

Although owners of nonprobate accounts can easily change the beneficiary designation by filling out a change of beneficiary form provided by the bank or account custodian, a surprising number of people attempt to change beneficiaries by other means. On this score, the most commonly litigated issue is whether a clear provision in an accountholder's will directing a change of beneficiary of a specifically described account is valid. Often, the answer will vary depending on whether the account is a POD bank account, an IRA or a 401K. The following paragraphs explain.

[57] 293 P.3d 168 (Kansas App. 2013).

[58] Similarly, in Heaps v. Heaps, 124 Cal. App. 4th 286, 21 Cal. Rptr. 3d 239 (Cal. App. 4th Dist. 2004), rev. denied, 2005 Cal. LEXIS 1469 (Cal., Feb. 2, 2005), a settlor's attempt to withdraw property from a trust was found invalid, resulting in a frustration of intent. In that case, George and Barbara Heaps transferred their home to a revocable living trust. George and Barbara were co-trustees and beneficiaries for their lives. At the death of the second to die, the trust property was to be distributed to their children. The couple soon sold the house; they financed the sale, taking a note that the purchaser made out to "George and Barbara Heaps, as joint tenants with right of survivorship." After Barbara's death, George married Mary Ann, and he transferred the note to a new trust that he and Mary Ann created. At George's death, his children sued the second wife, claiming that the note was an asset of the first trust. Mary Ann claimed that George and Barbara had removed the proceeds from the sale of the house from the trust by taking title to the note as joint tenants with right of survivorship.
The trial court held that the note was an asset of George and Barbara's trust, and ordered Mary Ann to turn it over to the children. In determining that the act of taking title to the note was insufficient to remove it to the trust, the court pointed to two trust provisions: the first allowed revocation or modification only by execution of a written instrument delivered to the trustee. The second directed that the title to trust property could be in the trustee's own name, "without a designation showing it to be Trustee." The court reasoned that these two provisions taken together prevented George and Barbara from removing assets from the trust by changing title to those assets.

C.1. POD Accounts.

For more than one hundred years, courts have held that Totten Trust bank accounts can be revoked by any means if there is clear and convincing intent to revoke.[59] Thus, courts have found that will provisions[60] and even oral statements[61] can operate as a revocation.[62] Because POD accounts are functionally indistinguishable from Totten Trusts, one would expect that courts would apply the same rule when an accountholder attempts to change a beneficiary. In recent years, however, many states have passed statutes strictly limiting the accountholder's procedure for changing beneficiaries. Taking their cue from the Uniform Probate Code, states are increasingly directing that beneficiary designations for Totten Trusts and POD accounts can be changed only by written notice to the bank delivered during the accountholder's life time.[63] While these statutes do a good job of protecting banks from litigation, they do so at the expense of effectuating testamentary intent. Thus, depending on the state, Mary's will provision expressly changing her POD account beneficiary may be ineffective.

C.2. IRA accounts

When an accountholder expressly and specifically devises the proceeds of an IRA in his or her will, states vary in their approaches. Some states have statutes that expressly prohibit changing a beneficiary designation by will or trust.[64] In states that have left the determination to the courts, outcomes vary. Although a minority of states hold that a will provision that clearly describes the account can override the beneficiary designation form,[65] in most states courts rely on the boilerplate in the custodial contract directing that a beneficiary designation must be changed by filling out a new beneficiary designation form and delivering it to the custodian. These courts hold that a will or revocable trust provision devising IRA account proceeds does not trump language in the custodial agreement.[66] Thus, in a

[59] See cases cited in Restatement (Third) of Property § 7.2; see also, Restatement (Second) of Trusts §58, cmt. c (stating that no formalities are necessary to revoke a tentative trust and that such a trust can be revoked at any time during the depositor's life or in his will "by a simple manifestation of his intent to revoke."); Restatement (Third) of Trusts § 26 cmt. c.; 46 ALR3d 487 (stating that virtually all courts adopting the Totten Trust doctrine adhere to [the Restatement's] liberal policy and recognize that a Totten trust is effectively revoked where some declaration of the depositor, regardless of form, and regardless of whether made intervivos or in a will, sufficiently expresses or implies the existence of a revocatory intent").

[60] Scanlon's Estate, 169 A. 106 (Pa.1933); Brucks v. Home Federal Sav. 228 P.2d 545 (Cal. App. 1951); Delaware Trust Co., v. Fitzmaurice, 31 A2d 383 (1943); In re Estate of Corbin, 645 So. 2d 39 (Fla. Dist. Ct. App. 1st Dist. 1994); see also, N.Y. EPTL § 7-5.2, which provides that a totten trust "can be revoked, terminated or modified by the depositor's will only by means of, and to the extent of, an express direction concerning such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution."

[61] See, West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Col. Ct. App. 1982)(POD bank accountholder's oral request of bank cashier to change designation from his daughter to his new wife was sufficient).

[62] See Restatement (Third) of Property section 7.2, Restatement (Third) of Trusts section 26 cmt. c (and cases cited therein).

[63] Section 6-213. Alteration Of Rights.

Rights at death of a party under Section 6-212 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective the notice must be received by the financial institution during the party's lifetime.

See, e.g., Cook v. Equitable Life As. Soc. 428 N.E.2d 110 (Ind. Ct. App. 1981).

[64] *See, e.g.*, N.D. 30.1-31.10 (1997); La. Rev. Stat. 2449(1986); Ga. Code 7-1.813; Ohio 1709.09A & 1709.09.11. By statute, Washington state allows people to change beneficiary designations for nonprobate assets by will, See Rev. Code Wash. § 11.11.020, but excludes IRAs from the definition of "nonprobate assets." See Rev. Code Wash. § 11.11.010(7)(iv).

[65] *See,* e.g., Nunnenman v. Estate of Grubbs, 2010 Ark. App. 75 (2010); In re Polk's Estate, 2013 N.J. Super. Unpub. LEXIS 1170 (2013)(affirming trial court's determination that there was clear and convincing evidence of intent that accountholder wanted his will, not his beneficiary designation, to govern the distribution of his IRA account).

[66] *See* Estate of Taylor, 159 Wash. App. 1003 (2010)(holding that an accountholder's attempt to leave his IRA to his son by executing a provision in his will was invalid, despite the court's belief that

majority of estates, Mary's clear attempt to change her beneficiary designations would be ineffective, and Lucky would receive the money.

C.3. 401K Account

Under ERISA's "plan documents rule," there were only two ways to for Mary to change the beneficiary designation on this account – to obtain a change of beneficiary form from her employer or plan administrator, fill it out, and deliver it to the employer or plan administrator, or to file with her employee or plan administrator a QDRO expressly terminating Lucky's rights to those benefits. A beneficiary designation in a nonprobate account cannot be changed by a will, trust or ordinary property distribution agreement.[67]

3.2. Secrecy, simplicity, and the frustration of intent

Will execution statutes serve a protective function; by requiring the testator to have witnesses, the law provides some protection against fraud, undue influence or overreaching by greedy friends or relatives of the testator. Complying with formalities statutes takes a degree of effort, and reduces the likelihood that will execution will be taken lightly or without serious thought. By contrast, nonprobate vehicles require little in the way of formal execution requirements. The vast majority of states impose absolutely no formal requirements on the creation of revocable living trusts – in theory, these trusts can even be created orally.[68] And most beneficiary designation forms require nothing more than a signature, and can now even be completed online with no signature at all.

As a result, the modern opportunist would find it much easier to obtain the right to assets through beneficiary designation forms or revocable trusts than by pressuring someone to execute a will. A confidant with access to an elderly or frail person's account information would have little trouble creating an account, or logging on to an existing one, and changing the beneficiary designation undetected.

Moreover, it is difficult, if not impossible, for loved ones to succeed in proving that a nonprobate asset was procured through fraud, undue influence, or when the settlor or accountholder lacked capacity. Because online or paper forms are filled out in private, there will be no evidence about the deceased's condition at the time of execution. And because trusts and beneficiary designation forms are presumed valid, the family member who suspects malfeasance will be unable to challenge the designation.

Finally, even if a family member obtains evidence of fraud, undue influence or lack of capacity, it might be impossible to capture the assets. When a family member challenges a will provision, the probate assets are subject to the jurisdiction of the probate court, and will not be distributed until all interested persons are given notice and an opportunity to be heard and all claims are resolved. By comparison, nonprobate assets are often distributed quickly and without notice to anyone other than the beneficiary. Those assets never become subject to the jurisdiction of a court. To press a claim based on malfeasance, the contestant generally must sue the beneficiary in a court of general jurisdiction on grounds of tortious interference

accountholder desired to leave his assets to his son and believed that his will would accomplish that change); In re Brown, 2005 WL 3753142 (Pa. Com. Pl 2005)(holding that attorneys attempt to "simplify" a client's estate by placing all of her assets in a revocable trust was insufficient to change ownership or beneficiary designation of IRA account, because settlor failed to execute a change of beneficiary form); *cf.* Cook v. Cook, 111 P.2d 322 (Ca. 1941)(dealing with insurance beneficiary designation).

[67] Kennedy v. Plan Administrator, 555 U.S. 285 (2009).

[68] *But see, e.g.*, N.Y. EPTL § 7-1.17 (McKinney)(requiring witnesses or a notary); Fla. Stat. §736.0403(2)(requiring same formalities as for execution of a will).

with inheritance;[69] by the time the lawsuit gets underway, the beneficiary might have spent or transferred the assets. If the beneficiary has insufficient assets of her own remaining, suing the beneficiary will be a waste of time and money. Moreover, most courts have found that the insurance companies or custodians bear no responsibility for paying out on a forged beneficiary designation, and no responsibility to investigate whether the beneficiary designation was valid.

These concerns – ease of creation, secrecy of distribution – are also applicable to the revocable living trust. In addition, trusts can leave the settlor vulnerable to fraud and theft in the event she loses capacity. When this occurs, a successor trustee – often a close friend or family member – takes over the duties of trustee, as provided in the trust agreement. This can give rise to another opportunity for overreaching – the trustee has unfettered access to and control over the trust assets, and no one but the incapacitated settlor has the legal authority to sue him.[70] The beneficiary who believes that the trustee is mismanaging or embezzling trust assets has only one option; she must commence a costly and time-consuming guardianship proceeding. If she establishes that the settlor lacks capacity and convinces a court to appoint her as guardian, she can then demand an accounting and, if necessary, sue the trustee on the settlor's behalf.[71]

4. Conclusion

In the wake of the nonprobate revolution, the will is of secondary importance. The vast bulk of wealth that is transmitted at death is held in nonprobate mechanisms. Although the nonprobate system generates significant benefits, the complexity and secrecy that are the hallmarks of the system have caused problems that regularly result in the frustration of intent. Because financial institutions have a vested interest in laws that emphasize efficiency and dispatch over the effectuation of intent, and because estate planning lawyers have only limited abilities to minimize these problems, the problem of intent-frustration is likely to be resolved any time soon.

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[69] On the availability of tortious interference claims when a person's intentional acts interfere with an expectancy interest in nonprobate property, see Irene D. Johnson (2008, pp. 780-81). For criticism of the emergence of the tortious interference claim, see John C.P. Goldbert and Robert H. Sitkoff (2013).
[70] In most states, the trust's remainder beneficiaries have no standing to sue the trustee for breach of duty until the settlor dies, even if the settlor is incapacitated. *See, e.g,* Parducci v. Demello, 2012 Cal. App. Unpub. LEXIS 5430 (2012).
[71] Carrasco v. Magana, 2001 Cal. App. Unpub. LEXIS 857 (2001).

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