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TRUST ALERATION AND THE DEAD HAND PARADOX

Jeffrey N. Pennell[*] *& Reid Kress Weisbord*[**]

ACTEC LAW JOURNAL (forthcoming 2023)

Trusts are popular instruments for wealth transmission because they can be crafted to suit almost any imaginable estate planning goal that is not contrary to public policy. With the abrogation of the Rule Against Perpetuities in most states, settlors may impose trust terms that will be legally enforceable for scores of future generations, if not in perpetuity. Long-term and perpetual trusts, however, present a paradox of dead hand control, because the specificity and the durability of settlor-imposed restrictions tend to be inversely related. As donative preferences become increasingly specific and restrictive, trusts become less durable with the passage of time, as changing circumstances imperil the settlor's original intent or render the trust unadministrable.

The proliferation of perpetual trusts underscores the salience and need for trust alteration, which coincides with significant reforms in the law governing trust modification. The common law always allowed courts to fortify settlor intent against obsolescence by modifying irrevocable trusts in conformity with the settlor's material trust purposes. Reforms under the Uniform Trust Code have codified, expanded, clarified, and liberalized the standards for judicial modification. And, most recently, a majority of states have privatized trust modification by authorizing "trust decanting," an extrajudicial technique that grants the power to trustees who have distributive discretion to convert a settlor's original trust into a new instrument. This Article examines the current landscape by surveying recent developments in the judicial and extrajudicial modification of trusts.

Applications of the modern rules of trust alteration have prevented beneficiaries from accelerating the termination of long-term trusts and allowed fiduciaries to reinvigorate older trusts for subsequent generations. By strengthening the grip of dead hand control and reinforcing the durability of settlor intent, these trust alteration rules also tend to increase the concentration of private wealth in the hands of trust fiduciaries, who are entrusted by settlors to protect the trust corpus from beneficiary improvidence, taxation, and creditors. The Article concludes by situating modern trust alteration rules within the current debate about wealth inequality in the United States.

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INTRODUCTION

Trusts are often a central feature of sophisticated estate planning among affluent property owners. Unlike intestate succession and wills that distribute property outright upon the owner's death, a trust allows settlors to prolong their exercise of control over property far into the future. Today, in many states, that control can prevail in perpetuity. Outside the small handful of states that have not abrogated the Rule Against Perpetuities, a trust settlor may control the enjoyment of wealth for multiple generations – in many cases literally forever.[1] Trusts are therefore among the most popular legal mechanisms through which the wealthy exert dead hand control over the transmission of property to subsequent generations. Through a trust, a settlor can assure the accomplishment or avoidance of certain uses of trust property, or reward or punish conduct of trust beneficiaries, subject only to the requirement that a trust must benefit its beneficiaries without imposing requirements, restrictions, or conditions that violate public policy.[2] Modern trust law now represents a powerful amplification of testamentary freedom, the cardinal principle of American inheritance law that recognizes as "sacred" and "absolute" the right to control the disposition of property at death.[3]

By facilitating dead hand control, however, trust law creates a paradox. Settlors have the power to restrict the use and distribution of property long after death, but they are rarely able to accurately foresee contingencies that could frustrate their own estate planning goals. Trusts that impose elaborate restrictions are the most likely to grow stale with the passage of time, unless the settlor embraces the possibility of future modification. Thus, donative intent is most durable when settlors loosen the grip of dead hand control by authorizing modification when necessary to accomplish the trust's purposes. We refer to that tension of estate planning as the "dead hand paradox." This Article explores that paradox by examining the evolution of trust alteration rules and by assessing the role of trust modification in wealth preservation and in the implementation of donative intent.

[1] *See* notes 18-20, *infra*, and accompanying text.

[2] *See* UNIFORM TRUST CODE § 404.

[3] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."); Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 415 (2018) ("the law generally defers to dead hand control because broad freedom of disposition is seen as maximizing the social welfare that is produced by the inheritance process"). *See also In re* Foss' Est., 202 A.2d 554, 558 (Me. 1964) ("The power of devising by will has been termed a legal incident to ownership and one of the most sacred rights attached to property."); *In re* Martinson's Est., 190 P.2d 96, 97 (Wash. 1948) ("The right of testamentary disposition of one's property as an incident of ownership, is by law made absolute.").

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A famous illustration of the dead hand paradox comes from the landmark case of *In re Estate of Pulitzer*.[4] Twentieth century media titan Joseph Pulitzer established a testamentary trust to hold capital stock of the newspaper publications that he had founded and grown into a successful business.[5] The trust expressly prohibited the trustees from selling shares of the publishing company, and further:

> enjoin[ed] upon my sons and my descendants the duty of preserving, perfecting and perpetuating 'The World' newspaper (to the maintenance and upbuilding of which I have sacrificed my health and strength) in the same spirit in which I have striven to create and conduct it as a public institution, from motives higher than mere gain, it having been my desire that it should be at all times conducted in a spirit of independence and with a view to inculcating high standards and public spirit among the people and their official representatives, and it is my earnest wish that said newspaper shall hereafter be conducted upon the same principles.[6]

The newspapers became unprofitable after Pulitzer died, and the trustees sought to modify the trust. The court granted reformation, finding that "continuance of the publication of the newspapers . . . will in all probability lead to a serious impairment or the destruction of a large part of the trust estate."[7] The court was persuaded that Pulitzer had failed to anticipate a circumstance that would lead to a total loss of the trust corpus.[8] In other words, had Pulitzer anticipated the possibility that his newspapers would become unprofitable, he would not have burdened his trustees with the self-defeating obligation of operating the business at a loss and retaining shares of the company.

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[4] *In re* Estate of Pulitzer, 139 Misc. 575 (N.Y. Sur. Ct. 1931).

[5] *Id.* at 578.

[6] *Id.*

[7] *Id.* at 580.

[8] The court offered the following reasons for allowing modification of the trust:

> The dominant purpose of Mr. Pulitzer must have been the maintenance of a fair income for his children and the ultimate reception of the unimpaired corpus by the remaindermen. Permanence of the trust and ultimate enjoyment by his grandchildren were intended. 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. His expectation was that his New York newspapers would flourish. Despite his optimism, he must have contemplated that they might become entirely unprofitable and their disposal would be required to avert a complete loss of the trust asset. The power of a court of equity, with its jurisdiction over trusts, to save the beneficiaries in such a situation has been repeatedly sustained in New York and other jurisdictions.

Id. at 580-81.

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Anticipating the inevitability of unforeseen circumstances is a hallmark of effective estate planning. That lesson is sadly but readily discerned from the shortsightedness of settlors, like Pulitzer, who demand compliance with restrictions narrowly tailored to suit the circumstances present at the time of the trust's creation.[9] Trusts, however, allow settlors to devise an infinitely flexible estate plan without having to exhaustively predict future events that might frustrate their intentions. For example, many settlors fortify their long-term wealth preservation objectives by expressly consenting to the exercise of powers of appointment or trustee discretion, or by granting authority to trusted advisors to alter the trust, its beneficiaries, or its administration. By vesting beneficiaries, fiduciaries, or third parties with discretion to alter certain aspects of the trust, settlors can realize the benefits of flexible administration without incurring the costs of judicial alteration or, worse, litigation or frustration of their trust purposes.[10]

Settlors do not usually give trustees broad discretion to modify or terminate beneficial interests of a trust, but sometimes unanticipated circumstances arise that can render such drastic alterations the most effective remedy for accomplishing the settlor's estate planning objectives. Suppose, for example, that a trust directs lifelong distributions of income to a beneficiary who later develops a permanent medical condition for which the cost of treatment is astronomical.[11] Income distributions from the trust may be insufficient to cover the beneficiary's cost of care, but large enough to disqualify the beneficiary for public health care benefits. The settlor's desire to provide for that beneficiary may be best served by allowing the trustee to convert the

[9] In Ochse v. Ochse, No. 04-20-00035-CV, 2020 WL 6749044 (Tex. App. Nov. 18, 2020), for instance, failing to anticipate the possibility that her son might subsequently divorce, the settlor designated her son's "spouse" as beneficiary. In contest litigation the court held that the trust referred to the son's spouse on the date of trust creation, not the son's spouse when the settlor died. Litigation would have been avoided by identifying the son's spouse by name.

[10] For example, many trusts include provisions that address the long-term cost of fiduciary administration. Certain routine functions, such as managing trust investments and filing trust income tax returns, must be performed regardless of the amount of income generated by the trust or the value of the trust corpus. As the value of trust assets declines over time, fixed recurring costs of routine trust administration may consume a disproportionate share of trust income. A common way to anticipate that situation is by including a "small trust termination" provision, allowing the trustee to terminate a trust if trust administration fees are excessive in relation to the size of the trust corpus or the income generated by the trust. *See* UNIFORM TRUST CODE § 414(a) ("After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than [$50,000] may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration").

[11] *See, e.g.*, In re Riddell, 157 P.3d 888, 892 (Wash. App. 2007) (trust settlors failed to anticipate beneficiary's need for in-patient treatment for mental illness).

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trust into a special needs trust ("SNT").[12] Likewise, a settlor's sole purpose for establishing a trust might be to protect assets from wealth transfer taxation. If that tax were repealed after the trust became irrevocable, then the settlor's intent to transfer the trust assets tax-free could be accomplished more expediently by authorizing the trustee to terminate the trust and distribute the corpus outright.

Settlors who vest fiduciaries with discretion to alter a trust must be willing to relinquish enough control to entrust other people with authority to make important decisions on their behalf. Trust law helps protect settlor intent by imposing a fiduciary duty on trustees to "administer the trust in good faith, in accordance with its terms and purposes."[13] When exercise of that discretion is challenged, however, courts are often highly deferential to the trustee, absent any fiduciary breach or conflict of interest.[14] Settlors who have reservations about reposing too much alteration power in the trustee may, instead, bifurcate that authority. By establishing a "directed trust," the settlor can empower a person other than a trustee to exercise control over "the investment, management, or distribution of trust property or other matters of trust administration."[15] Like a conventional trustee, a trust director is subject to the fiduciary duties and liabilities of trusteeship.[16] Thus, directed trusts enable settlors to enjoy the benefit of vesting discretion to alter the trust while imposing a "separation of powers" governance system that enables trustees and trust directors to monitor each other's performance.[17]

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[12] *See* 42 U.S.C. § 1396p(d)(4). Most favorable would be qualification as a "third-party" SNT because a so-called payback provision would not be required and the interests of remainder beneficiaries could be protected. If, instead, a court regarded the trust as a "first-party" trust, however, the "cost" of conversion would be loss or significant reduction of the remainder interest, which is why the remainder beneficiaries likely would object to the change.

[13] UTC § 801.

[14] *See, e.g.*, Jennings v. Murdock, 553 P.2d 846, 862 (Kan. 1976) ("The accepted rule is that where the instrument creating a trust gives the trustee discretion as to its execution, a court may not control its exercise merely upon a difference of opinion as to matters of policy, and is authorized to interfere only where he acts in bad faith or his conduct is so arbitrary and unreasonable as to amount to practically the same thing").

[15] UNIFORM DIRECTED TRUST ACT ("UDTA") § 2(5). *See also* CASNER, PENNELL, & WEISBORD, ESTATE PLANNING § 4.1.15.1 [hereinafter, CASNER, PENNELL, & WEISBORD] (describing the use of trust directors, such as advisors, committees, and protectors); Richard Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. TR. & EST. L.J. 319 (2010); John Morley & Robert Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3 (2019). In a directed trust, a general power to alter, amend, or terminate the trust can be reposed without tax consequences in almost anyone, other than a beneficiary or the settlor (and, if it is appropriate to avoid grantor trust income tax problems, other than the settlor's spouse).

[16] *See* UDTA § 8.

[17] Whomever is the chosen holder of the authority to make changes, however, issues arise as to what extent and to reflect what kinds of circumstances the power should be granted,

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Trust law has always permitted settlors to expressly authorize future alterations but, over the last thirty years, three major trends of law reform have reshaped and magnified the importance of trust modification doctrines. The first major wave of reform began in the 1990s, when states began to alter or repeal the Rule Against Perpetuities to permit very long-term or perpetual dynastic private trusts. At common law, the Rule Against Perpetuities restrained the duration of dead hand control by invalidating future interests that failed to vest within a life-in-being plus twenty-one years from creation of the interest.[18] After Congress enacted the Generation Skipping Transfer Tax ("GST Tax"),[19] state legislatures seized the opportunity to attract new inflows of trust assets by exploiting trust settlors' use of an exemption that shelters taxpayer-selected trusts of unlimited duration and appreciation.[20] The interjurisdictional competition among states to authorize perpetual trusts, in turn, underscored the salience of trust alteration doctrines because settlor-imposed restrictions pose a higher risk of obsolesce in perpetual trusts compared to trusts constrained by the Rule Against Perpetuities.

The second major wave of reform began in 2000, when the Uniform Law Commission promulgated the Uniform Trust Code ("UTC"), a highly influential codification of trust law that has been adopted by most states.[21] One UTC innovation

what to do with the trust property on a termination, and any tax exposure to the powerholder, especially if that person is a beneficiary.

[18] *See, e.g.,* Robert Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 364 (2005) (quoting John Chipman Gray's "classic formulation" of the rule).

[19] Chapter 13 of the Internal Revenue Code, originally enacted in 1976 was substantially revised in 1986, generally applicable to trusts created or altered in certain ways after the latter enactment.

[20] Robert Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 420 (2005). *See also* Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2520 (2006). One of three transfer taxes (estate, gift, and GST), the GST Tax provides an exemption equal to the gift and estate tax basic exclusion amount. When Congress enacted the GST Tax, few states had repealed or modified their Rule Against Perpetuities, so the GST exemption was not then used to create perpetual, tax-exempt trusts. Many states then repealed or modified their Rule Against Perpetuities to allow for just that result. *See* ACTEC, *The Rule Against Perpetuities: A Survey of State (and D.C.) Law*, p. 7 ("A majority of states have eliminated the rule against perpetuities, either entirely or for certain types of trusts, or have adopted a very long fixed permissible period of the rule."), actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf?hssc=1 (last visited Jan. 20, 2022).

[21] The UTC has been enacted in 35 states plus the District of Columbia. As of December 2021, enactment legislation is pending in New York. *See* Uniform Law Commission, *Trust Code* (2000), uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d (last visited Jan. 20, 2022).

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was its enactment of seven distinct provisions governing trust alteration.[22] The UTC's reporter described the modification and termination rules as enhancing flexibility to alter a trust "without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent."[23] Those statutes clarified and liberalized the judicial standards for modifying or terminating trusts by consent of beneficiaries,[24] and to approve alterations necessitated by unanticipated circumstances[25] or frustration of a charitable purpose,[26] to terminate uneconomic trusts, [27] to revise mistaken trust language, [28] to accomplish the settlor's tax objectives,[29] and to allow combination or division of trusts.[30]

A third major wave of reform emerged as courts and state legislatures began to validate a practice known as "trust decanting." Decanting power vests trustees with extrajudicial authority to modify a trust, typically to improve the clarity, efficiency, or administrability of the original trust instrument.[31] In 2015, the Uniform Law Commission promulgated the Uniform Trust Decanting Act ("UTDA"), which has been enacted in twelve states.[32] An additional fourteen states have enacted their own decanting statutes.[33] Trust decanting under the UTDA "provides flexibility by

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[22] *See* UTC §§ 410-417 (addressing modification, termination, reformation, merger, and division). For a comprehensive summary of state laws (including decanting authority), see Morris Nichols Arsht & Tunnell, *Overview of State Statutes Permitting Modification of Irrevocable Trusts*, actec.org/assets/1/6/Overview_of_State_Statutes_Permitting_Modification_of_Irrevocable_Trusts.pdf (last visited Jan. 20, 2022). For a discussion of authority allowing court-ordered or settlement-agreement changes to wills, see CASNER, PENNELL, & WEISBORD §3.8.

[23] David English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002).

[24] UTC § 411.

[25] UTC § 412.

[26] UTC § 413.

[27] UTC § 414.

[28] UTC § 415.

[29] UTC § 416.

[30] UTC § 417.

[31] *See* Stewart Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993 (2017) (assessing the private benefits and social costs of trust decanting); Jonathan Blattmachr, Diana Zeydel, & Jerold Horn, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141 (2012); William Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1 (2010).

[32] Uniform Law Commission, *Trust Decanting Act* (2015), uniformlaws.org/committees/community-home?CommunityKey=5b248bac-9251-47fb-bad8-57a23f3df540 (last visited Jan. 20, 2022).

[33] For up-to-date listings of statutes, consult db78e19b-dca5-49f9-90f6-1acaf5eaa6ba.filesusr.com/ugd/b211fb_ad72a49164924ba58ed62863303877cb.pdf (last visited Jan. 20, 2022).

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statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust, either directly or by distributing its assets to another trust."[34] The UTDA's rationale for providing this flexibility is "so that the settlor's material purposes can best be carried out under current circumstances."[35]

Twenty years ago, some of trust law's most prominent thought leaders took stock of these reforms and contemplated how the new developments might impact estate planning in the years to come. Writing in 2003, for example, Jesse Dukeminier and James Krier criticized the UTC's conspicuous disinclination to address perpetual trusts, which was unquestionably that era's most hotly debated controversy.[36] They argued that the UTC "should be amended to apply different modification and termination rules to perpetual trusts."[37] To that end, Dukeminier and Krier proposed rules that would allow courts, trustees, and beneficiaries to modify or terminate a perpetual trust before its natural expiration, such as after the death of income beneficiaries alive at the trust's creation.[38]

A few years later, Max Schanzenbach and Robert Sitkoff conducted an influential empirical study of the interstate movement of trust assets following widespread repeal of the Rule Against Perpetuities.[39] Schanzenbach and Sitkoff demonstrated persuasively that the sudden demand for perpetual trusts that emerged in the wake of perpetuities reform was motivated primarily by the desire of settlors to minimize transfer taxation, not by the pursuit of dynastic wealth control. Writing in 2006, Schanzenbach and Sitkoff opined:

> [O]ur findings tend to support recent proposals to liberalize the law of trust modification and termination to allow a court to adapt a long-term trust to reflect what the settlor would have wanted had the settlor anticipated subsequent changes in circumstances. Because the movement to abolish the Rule and the corresponding rise of the perpetual trust reflect strategies to minimize taxes, not a burgeoning

[34] UTDA, prefatory note at 1.

[35] *Id.*

[36] Jesse Dukeminier & James Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. Rev. 1303, 1331 (2003) ("Even though perpetual trusts were one of the most significant trust developments of the late twentieth century, they are not mentioned in the Uniform Trust Code").

[37] *Id.*

[38] *Id.* at 1340-41. *See also* Joshua Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 598 (2005) ("Dukeminier and Krier would put the beneficiaries in the driver's seat, allowing the beneficiaries to decide, without court supervision, who should be the trustee and whether (and on what terms) the trust should continue beyond the traditional perpetuities period. No U.S. jurisdiction currently gives such power to the beneficiaries. Dukeminier and Krier are proposing a sea change in the American law of trusts.").

[39] *See* Robert Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

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> desire among donors for perpetual control, such proposals are likely to facilitate rather than frustrate the settlor's intent.[40]

Recent caselaw suggests that the prediction of Schanzenbach and Sitkoff has prevailed and that the liberalization of trust modification and termination rules has indeed reaffirmed the primacy of settlor intent. For one illustration, in counterpoint to *Pulitzer*, consider *In re Trust under Will of Flint*:[41] Eighty years after the brother of IBM's founder established a testamentary trust for his descendants, beneficiaries petitioned for a modification that (unlike the petition in *Pulitzer*) would *prevent* diversification of the trust corpus (approximately 81% was invested in IBM stock).[42] The court refused, finding that the original trust "did not contemplate the position of Investment Advisor or the concept of a directed trust," and that the decedent intended for the trustees to "exercise judgment and discretion, not act as marionettes for the Investment Advisor."[43] The court explained:

> In Delaware, the settlor's intent controls. . . . Our Trust Code makes it the policy of the State of Delaware "to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments." It would undercut this policy . . . to enable . . . beneficiaries to rewrite the instrument after [the settlor's] death.[44]

States like Delaware that proactively seek to attract out-of-state trust business know that they cannot accomplish that goal by defeating or circumventing settlor intent. A pro-settlor policy therefore makes the result in *Flint* predictable, nearly a century after the trust became irrevocable. The modern rules of trust alteration do not generally permit modifications contrary to settlor intent even decades after the settlor's death. Today, the dead hand control of trust settlors seems stronger than ever. Comparing *Pulitzer* and *Flint* brings that shift into sharp relief: A 1931 court *approved* modification of Pulitzer's trust *twenty* years after his death, but a 2015 court *denied* modification of Flint's trust *eighty* years after his death.

Thus, the time is right for a fresh assessment of the trust alteration rules with the benefit of hindsight and three decades of experience since the enactment of major reforms. This Article provides a descriptive account and analytical appraisal of current trust alteration rules from a national perspective. Our research captures a contemporary snapshot of trust alteration rules while evaluating the impact of statutory reforms and judicial application of modern doctrine. In presenting this descriptive account, we highlight trust drafting considerations from the perspective of

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[40] Max Schanzenbach & Robert Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2497 (2006).

[41] 118 A.3d 182 (Del. Ch. Ct. 2015).

[42] *Id.* at 187 (placing the beneficiaries at odds with the corporate trustee, who recommended diversifying the trust corpus).

[43] *Id.* at 189-90.

[44] *Id.* at 194.

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settlors and their estate planning attorneys laboring in the trenches of trust drafting and administration.

We also consider the impact of trust alteration rules in light of the socioeconomics of trust settlors in the United States. Individuals for whom trust alteration rules are most salient are among the most affluent members of American society. Although recent headlines have exposed shocking examples of wealthy individuals abusing trust law to conceal the fruits of financial crimes,[45] trusts established for the purpose of money laundering are extremely uncommon in the vast majority of estate planning practices. To the contrary, the use of trusts by individual settlors (including the ultra-wealthy) to accomplish private estate planning objectives is entirely legitimate (so long as those objectives are lawful). Nevertheless, the large-scale use of long-term or perpetual non-charitable trusts by affluent settlors tends to concentrate wealth in the hands of fiduciaries to prevent dissipation from causes such as taxation or beneficiary improvidence. Indeed, long-term trusts are aggressively and transparently marketed by fiduciaries for the purpose of concentrating wealth in the hands of fiduciaries in states with favorable legislation.[46] The difficult question is whether this concentration of wealth indirectly affects the economic standing of the lower and middle classes by contributing to the rising stratification of wealth

[45] Since 2016, a series of bombshell investigative reports have published a vast trove of confidential documents that detail the use of private trusts in the commission of financial crimes. In particular, the Panama Papers (2016), Paradise Papers (2017), and Pandora Papers (2021) have been instrumental in exposing how wrongdoers exploit the lack of beneficial ownership disclosure requirements in the United States to conceal trusts used in the commission of financial misconduct, including tax evasion, government corruption, fraud, and drug trafficking. *See* Reid Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93 (2016); International Consortium of Investigative Journalists, *Panama Papers* (2016), icij.org/investigations/panama-papers/ (last visited Jan. 20, 2022); International Consortium of Investigative Journalists, *Paradise Papers* (2017), icij.org/investigations/paradise-papers/ (last visited Jan. 20, 2022); International Consortium of Investigative Journalists, *Pandora Papers* (2021), icij.org/investigations/pandora-papers/ (last visited Jan. 20, 2022).

[46] For example, in enacting the Trust Modernization and Competitiveness Act of 2006, the New Hampshire legislature declared:

> I. The market for trust and trust services across the nation is a rapidly growing sector of the nation's economy.
>
> II. New Hampshire is uniquely positioned to provide the most attractive legal and financial environment for individuals and families seeking to establish and locate their trusts and investment assets.
>
> III. This act will serve to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services, and this environment will attract to our state good-paying jobs for trust and investment management, the legal and accounting professions, and support an infrastructure required to service this growing sector of the nation's economy.

New Hampshire Laws Ch. 320 (S.B. 394) (2006).

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distribution in the United States. Our appraisal therefore considers the potential impact of trust alteration rules on wealth inequality.

This Article proceeds as follows: Part I surveys recent developments in the law governing trust alteration requiring court approval, including doctrines that empower courts to modify, reform, and terminate a trust. The primary focus is the modification of non-charitable trusts by consent of the beneficiaries, modification to address circumstances unanticipated by the settlor, and modification to accomplish the settlor's tax objectives. Part I will also consider the alteration of charitable trusts, discussing the common law and statutory doctrines of cy pres modification. Part II examines the extrajudicial alteration of trusts through a technique known as "trust decanting." After reviewing the statutory and common law authority for the decanting power, Part II analyzes the tax consequences of trust decanting and certain drafting considerations. Part III considers the impact of trust alteration rules on the growing concentration of wealth among fiduciaries who serve the ultra-rich and the resulting stratification of property ownership in the United States.

I. JUDICIAL ALTERATION: MODIFICATION, REFORMATION, TERMINATION

This Part examines the power of courts to alter trusts by approving petitions for modification, reformation, or termination. Part I.A discusses the alteration rules governing irrevocable non-charitable trusts. Part I.B considers the alteration doctrines for charitable trusts.

A. Non-Charitable Trusts

A court may modify, reform, or terminate an irrevocable non-charitable trust without the settlor's consent and, in some cases, without the consent of all beneficiaries. Under the UTC, distributive provisions of a trust that affect beneficial enjoyment may be altered without consent of a still-living settlor or after the settlor's death, but (1) only with the consent of all qualifying beneficiaries, and (2) only in a manner that is not inconsistent with any material trust purpose.[47] In addition, other

[47] UTC §411(b).

There is an apparent analog to § 411 found in UTC § 111, which authorizes "binding nonjudicial settlement agreement[s] with respect to any matter involving a trust." Validity of such an agreement requires "terms and conditions that could be properly approved by the court under [the UTC]" and, most importantly for purposes of a comparison to § 411, the agreement "does not violate a material purpose of the trust." The term "any matter involving a trust" is elaborated upon by § 111(d) as including (without limitation) (1) interpretation or construction of the trust terms, (2) approval of a trustee's report or accounting, (3) directions to trustees regarding actions or refraining from acting, (4) trustee succession and compensation, (5) transfers of the principal place for trust administration, and (6) trustee liability. The Comment to § 111 clarifies that "a court may intervene in the administration of

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grounds for modification do not require the consent of the settlor or all beneficiaries. For example, a court may alter either administrative or dispositive provisions of a trust to further the settlor's purposes if petitioners can demonstrate a circumstance not anticipated by the settlor.[48] Or a court may alter administrative terms alone if petitioners establish factors that produce impracticality, waste, or impairment of the trust's administration.[49] These statutory criteria for judicial alteration are narrow because settlor intent is paramount. If the settlor is not alive or able to give consent, then alterations are restricted so as not to violate settlor intent and material trust purposes. Courts do not readily *infer* material trust purposes,[50] but statutory trust alteration doctrines typically require fidelity to the settlor's intent when the trust was created.[51] Settlors who wish to constrain the power of courts to modify original trust

a trust" but "resolution of disputes by nonjudical means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court."

It is thus clear that § 111 is not meant to *add* to the various alterations allowed under UTC §§ 411 through 417 (discussed immediately below) but, rather, to clarify that avoidance of a court determination is encouraged if the parties can reach their own agreement. Required by § 111(a) is the consent of "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." The term "interested persons" is not defined and might not require or include all beneficiaries of the trust.

Although § 111(e) permits "[a]ny interested person [to] request the court to approve a nonjudicial settlement agreement," a Westlaw search in early 2022 discovered fewer than 40 cases in the United States that implicated nonjudicial trust settlement agreements, making it nearly impossible to know the extent of these agreements or the range of matters that they resolve. *See, e.g.*, In re Estate of Isner, Case No. 15-0904, 2016 WL 5348353 (W. Va. Sept. 23, 2016) (involving appointment of a corporate trustee and illustrating the material purpose constraint), and In re Draves Trust, 828 N.W.2d 83 (Mich. Ct. App. 2012) (contrasting the scope of modification available under § 111 and § 411).

[48] UTC §412(a) (providing judicial authority to alter or terminate a trust in response to a change of circumstances unexpected by the settlor).

[49] UTC §412(b) ("The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.").

[50] The comment to UTC §411 explains that:

> Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

[51] *See* UTC §412(a) (providing that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention"). *See also* de Lipkau v. Hanna, No.

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terms must employ great care in articulating their donative intent and in reciting their material purposes in the trust instrument.

Trust law's exaltation of settlor intent is often attributed to the 1889 decision of the Massachusetts Supreme Judicial Court in *Claflin v. Claflin*.[52] The settlor of a testamentary trust for his son postponed outright distribution until the beneficiary's thirtieth birthday.[53] At age 24, the beneficiary petitioned the court for an order to terminate the trust and compel outright distribution of the remaining corpus. Denying the beneficiary's petition, the court explained 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 ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[54] *Claflin* initially elicited sharp criticism by commentators who, on policy grounds, opposed alienation restraints and the paternalism of the dead hand.[55] Nevertheless, the so-called Claflin doctrine became the prevailing common law rule on early termination and trust modification. Ultimately it was codified by the UTC and was adopted by the vast majority of state legislatures.[56]

The current iteration of the Claflin doctrine, as incorporated in UTC § 411(b), provides:

> A noncharitable 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. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

Discernment of a settlor's material trust purposes is, therefore, the pivotal inquiry in disputes concerning alteration of irrevocable trusts. The UTC does not list the factors or otherwise explicate the standard for ascertaining material trust purposes, with an exception for spendthrift trusts (as explained in the next section).

C080555, 2018 WL 2931194, at *7 (Cal. Ct. App. June 12, 2018) (authorizing as consistent with settlor intent the alteration of a trust holding letters, journals, photographs, drawings, and other collectibles of Sierra Club founder John Muir, which nearly 90% of the living beneficiaries wanted to preserve better by transfer from the trust to the University of the Pacific); Hill v. United States, 2009 WL 2151183 (D. Colo.) (allowing reformation of a medical malpractice settlement trust to modify trust's definition of "parent" to include the injured infant beneficiary's stepparent).

[52] 20 N.E. 454 (Mass. 1889).

[53] *Id.* at 455.

[54] *Id.* at 456.

[55] *See* Austin Wakeman Scott, *Control of Property by the Dead*, 65 U. PA. L. REV. 632, 647-48 (1916-1917). *Cf.*, Alvin Evans, *The Termination of Trusts*, 37 YALE L. J. 1070, 1076 (1928) (noting the contrast between the American and English rules on early termination).

[56] *See, e.g.*, 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. 697, 701 (2001).

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1. Consent of Beneficiaries

As noted above, UTC § 411(b) authorizes judicial modification or termination of a trust by consent of all beneficiaries, provided that the "modification is not inconsistent with a material purpose of the trust." Before entertaining the issue of material trust purposes, courts usually adjudicate the threshold question of requisite consent. The rule requires the consent of all beneficiaries with "a present or future beneficial interest in a trust, vested or contingent."[57] Absent unanimous consent, a court may modify or terminate a trust, but only upon satisfying itself that "the interests of a beneficiary who does not consent will be adequately protected."[58] Nevertheless, some courts applying UTC § 411(b) have overlooked the beneficiary consent requirement altogether,[59] while other courts have applied the requirement so strictly as to seemingly frustrate settlor intent.

For example, in *Shire v. Unknown/Undiscovered Heirs*,[60] the settlor died in 1948. She established a testamentary trust for the benefit of her descendants, which

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57 UTC §§ 103(3)(A) (defining "beneficiary"); 411(b) (authorizing termination or modification "upon consent of all of the beneficiaries").

This requirement also usually prevents the settlor of an irrevocable trust from obtaining modification or termination without the consent of all beneficiaries. *See, e.g.*, In re Paradise Dynasty Trusts, 2021 WL 5564086 (Del. Ch. Ct., Nov. 29, 2021) (settlor's petition to reform inter vivos trusts based on "unilateral mistake" and fraud committed by the settlor's sibling, who acted as the settlor's agent in creating the trusts). *But see* Bilafer v. Bilafer, 73 Cal. Rptr. 2d 880 (Cal. Ct. App. 2008) (affirming legal standing of settlor of irrevocable trust who retained no beneficial interest to petition for reformation to comport with the settlor's original intent and cure drafting errors); Private Letter Ruling 201544005 (accepting for tax purposes reformation requested by the drafting attorney who alleged that inclusion of a power to amend the trust was a drafting error).

58 UTC § 411(e)(2).

59 In Miller v. Maples, No. E201600511COAR3CV, 2018 WL 6267123 (Tenn. Ct. App. Nov. 30, 2018), for example, beneficiaries petitioned for early termination of a trust that staged distribution of the corpus over a ten-year period. *Id.* at *7. But the interim permissible distributees included children and their descendants, making the settlor's grandchildren "beneficiaries" under UTC §103(3)(A) and "qualified beneficiaries" under §103(13)(A) and (B). This means that their consent should have been required under UTC §411. Yet *Miller* allowed termination over their objection, as if their discretionary-distribution entitlement did not rise to the requisite level to require their unanimous consent. Even without their approval, §411(e) would permit alteration or termination if "the interests of a beneficiary who does not consent will be adequately protected." This definitely was not the case in *Miller*, which may mean that the result in *Miller* simply was improper or, alternatively, that termination is achievable even in situations not provided for by statute.

60 907 N.W.2d 263 (Neb. 2018). Resolving a different issue but illustrating a similarly wooden trust provision, see Trust u/w of Ashton, 260 A.3d 81 (Pa. 2021), in which a total of three annuities, amounting to $11,400 of annual payments, constrained modifications sought to a $72 million trust created 60 years earlier with inception assets of approximately $2.6 million.

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ultimately entitled a granddaughter to a life annuity of $500 per month (with a remainder to the residuary beneficiaries under the settlor's will).[61] The granddaughter began receiving monthly payments in 1983 as the trust's sole income beneficiary; by 2016 she was virtually destitute, having accumulated no retirement savings, and her monthly Social Security and pension income totaled $652.[62] The trust corpus, by contrast, contained nearly $1 million and annually generated between $64,000 and $81,000 in income and appreciation.[63] Upon concluding that "the present value of a $500 payment in 1948 would be either $4,997 or $5,400.29 today," the corporate trustee petitioned for modification of the trust to increase the granddaughter's monthly distributions.[64] To demonstrate unanimous consent of the beneficiaries, the trustee identified and notified twelve remainder beneficiaries, six of whom expressly consented while the other six neither objected nor entered an appearance in the proceeding.[65] At the trustee's request, the court appointed a guardian ad litem to represent the interests of beneficiaries who were unknown to or could not be located by the trustee.[66] The guardian ad litem was the only party who objected to the proposed modification.[67]

The state supreme court held that the trust could not be modified, because consent was not unanimous and the requested modification would not protect the interests of non-consenting remainder beneficiaries.[68] On unanimous consent, the court held that the statute required evidence of express consent, so it was not sufficient that known beneficiaries with notice did not object or enter an appearance.[69] On the protection of non-consenting beneficiaries, the court held that the proposed modification would reduce the value of the trust corpus, meaning that there was no way to protect the interests of non-consenting remainder beneficiaries.[70]

The UTC is intended to liberalize the availability of trust modification, making settlor intent both a limiting principle and a basis for approving a beneficiary's petition to alter an irrevocable trust. The *Shire* court invoked settlor intent to set a high bar for demonstrating the unanimous consent of beneficiaries. Consequently, the trustee was required to continue administering the 70-year-old trust according to its original terms, thereby impoverishing the settlor's granddaughter during her golden years while leaving nearly $1 million invested in the trust corpus for the ultimate benefit of remainder beneficiaries who could not be located by the trustee or who did not object

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[61] *Id.* at 266.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 266-67.

[66] *Id.*

[67] *Id.* at 267.

[68] *Id.* at 270, 273.

[69] *Id.* at 268.

[70] *Id.* at 273.

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to the proposed modification. As *Shire* and other cited cases suggest, the requirement of beneficiary consent can confer non-consenting beneficiaries, including unknown and unborn beneficiaries, with a default veto power.[71]

If the unanimous-beneficiary-consent requirement is met, a beneficiary petitioning for trust termination or modification still must prove that the requested alteration is not inconsistent with any material trust purpose. On that requirement, one of the most commonly litigated questions is whether either a spendthrift provision or a postponement-of-enjoyment provision constitutes a material trust purpose that precludes early termination of part or all of the trust.

Spendthrift provisions are nearly ubiquitous in modern trusts, and most states have established presumptions for ascertaining the materiality of spendthrift protection. The traditional common law rule held that a spendthrift trust could not be terminated "while such inalienable interest still exists."[72] The rationale for the traditional presumption is that, if

> the interests of one or more of the beneficiaries of a trust are subject to restraints on alienation . . . , or if the terms of the trust provide support or other discretionary benefits for some or all of the beneficiaries . . . , [provisions that contemplate an ongoing role for fiduciary supervision] may supply some indication that the settlor had a material purpose—a protective purpose—that would be inconsistent with allowing the beneficiaries to terminate the trust.[73]

The modern trend regarding spendthrift provisions relaxes the traditional doctrine by eliminating the common law presumption of materiality. Thus, UTC § 411 contains the following optional subsection: "A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust."[74] States

[71] *See, e.g.,* Lewis v. Lewis, No. 2015-CA-000667-MR, 2016 WL 6311196, at *5 (Ky. Ct. App. Oct. 28, 2016) (sustaining objection of guardian ad litem representing minor and unborn beneficiaries because proposed modification failed to protect interests of non-consenting beneficiaries).

[72] Restatement (Second) of Trusts § 337 cmt. l (1959). *See* Ackers v. Comerica Bank & Trust, N.A., 630 S.W.3d 292 (Tex. Ct. App. 2020) (spendthrift clause precluded enforcement of an agreement among income and remainder beneficiaries to terminate the trust); In re McGregor, 954 N.W.2d 612 (Neb. 2021) (denying petition for trust termination because lifetime beneficiaries failed to rebut the presumption of materiality for spendthrift provisions).

See also In re Estate of Somers, 89 P.3d 898 (Kan. 2004) (applying statutory presumption that a spendthrift provision constitutes an unfulfilled purpose to deny termination, but not alteration, of trust). When Kansas first enacted the UTC in 2002, it contained the following provision: "A spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust." 2002 Kansas Laws Ch. 133, sec. 32(c) (S.B. 297). In 2012, however, the Kansas legislature amended the statute to conform to the optional UTC provision. 2012 Kansas Laws Ch. 110 (H.B. 2655).

[73] Restatement (Third) of Trusts § 65 cmt. e (2003).

[74] UTC § 411(c).

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adopting the UTC are sharply divided on this matter. Twenty-two states plus the District of Columbia have either enacted the optional UTC provision or some version of it, thereby legislatively overruling the common law presumption.[75] Conversely, four states have expressly reversed the position of § 411(c) by enacting a statutory presumption of materiality for spendthrift provisions.[76] And another twelve states that have adopted UTC § 411 simply omit subsection (c), which has the effect of retaining without modification the common law materiality presumption.[77]

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[75] Nineteen states and the District of Columbia have enacted the UTC's option provision or some version of it. *See* Ala. Code § 19-3B-411(c); Colo. Rev. Stat. Ann. § 15-5-411(3); Conn. Gen. Stat. Ann. § 45a-499ee(c); D.C. Code Ann. § 19-1304.11(c); Fla. Stat. Ann. § 736.04113(3)(b) ("The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions"); Haw. Rev. Stat. Ann. § 554D-411(c) ("It is a question of fact whether a spendthrift provision constitutes a material purpose of the trust"); 760 Ill. Comp. Stat. Ann. 3/411(c) ("The court shall consider spendthrift provisions as a factor in making a decision under this Section, but the court is not precluded from modifying or terminating a trust because the trust contains spendthrift provisions"); Kan. Stat. Ann. § 58a-411(c); Ky. Rev. Stat. Ann. § 386B.4-110(3); Me. Rev. Stat. tit. 18-B, § 411(3); Md. Code Ann., Est. & Trusts § 14.5-410(b) ("The existence of a spendthrift provision or similar protective language in the terms of the trust does not prevent a termination of a trust under . . . this section"); Minn. Stat. Ann. § 501C.0411(c) ("The court is not precluded from modifying or terminating a trust because the trust instrument contains spendthrift provisions"); N.J. Stat. Ann. § 3B:31-27(c); N.M. Stat. Ann. § 46A-4-411(C); Ohio Rev. Code Ann. § 5804.11(B) ("A spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the trust"); Tenn. Code Ann. § 35-15-411(d) ("Modification of a trust . . . is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust"); Utah Code Ann. § 75-7-411(3); Vt. Stat. Ann. tit. 14A, § 411(c); Wis. Stat. Ann. § 701.0411(3); Wyo. Stat. Ann. § 4-10-412(d). Additionally, a handful of states that have not adopted the UTC have enacted statutes that reject the presumption of spendthrift materiality. *See* Alaska Stat. Ann. § 13.36.360(a); Ga. Code Ann. § 53-12-61(g) ("The court may modify or terminate a trust as provided in this Code section regardless of whether it contains spendthrift provisions or other similar protective provisions"); Tex. Prop. Code Ann. § 112.054(b) ("The court shall consider spendthrift provisions as a factor in making its decision whether to modify, terminate, or reform, but the court is not precluded from exercising its discretion to modify, terminate, or reform solely because the trust is a spendthrift trust").

[76] Four UTC states have enacted statutes that presume the materiality of a spendthrift provision. *See* Ark. Code Ann. § 28-73-411(c) ("A spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust"); Mont. Code Ann. § 72-38-411(c); Neb. Rev. Stat. Ann. § 30-3837(c); W. Va. Code Ann. § 44D-4-411(c). *See also* In re McGregor, 954 N.W.2d 612, 618 (Neb. 2021) (affirming denial of modification because there was no evidence "to rebut the presumption that the spendthrift provisions constitute a material purpose of the trust").

[77] Twelve UTC states simply omit UTC § 411(c) from their version of UTC § 411, thereby taking no position on the matter. *See* Ariz. Rev. Stat. Ann. § 14-10411; Mass. Gen. Laws Ann. ch. 203E, § 411 (West); Mich. Comp. Laws Ann. § 700.7411 (West); Miss. Code. Ann. § 91-8-

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The split among states over whether to presume the materiality of a spendthrift provision is far less consequential when applied by courts in actual trust disputes. Courts that actually examine the contested trust and evidence of settlor intent in jurisdictions that do not presume materiality often (though not always)[78] conclude that, as a factual matter, spendthrift protection *is* a material purpose of the contested trust. In *Horgan v. Cosden*,[79] for example, the life income beneficiary (the settlor's only child) and the remainder beneficiaries (three institutions of higher education) agreed to terminate a $3 million trust early by commuting their respective interests, each taking the discounted present value of their respective income and remainder interests.[80] The trustee objected, asserting that early termination of the income interest, subject to the spendthrift provision, "was against the Settlor's wishes to provide for her son for the rest of his life."[81] The court agreed, noting that "[m]any settlors choose to not provide a beneficiary with a lump sum distribution and may not want to spell out the reasons in a trust document."[82] It thus reversed a lower court's termination of the trust. In a strong reaffirmation of the Claflin doctrine, the appellate court explained: "If we were to affirm the trial court's ruling, beneficiaries could have trusts terminated simply by stating that they did not want to pay trustees' fees, administrative expenses, or be concerned with market fluctuations."[83] There was no evidence of waste, the trustee fees were customary, and the expenses of administration were not unusual. Thus, the court held that the simple desire of the beneficiaries to "want their money now" was not adequate to terminate the trust "in direct contravention of the Settlor's intent."[84]

By contrast, in trusts that do not contain a spendthrift provision, the postponement of enjoyment may not rise to the level of a material trust purpose. In *Miller v. Maples*,[85] for example, the trust provided for a staged distribution of corpus to the settlor's three children over a ten-year period.[86] The trust appointed the settlor's

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411 (West); Mo. Ann. Stat. § 456.4-411B (West); N.H. Rev. Stat. Ann. § 564-B:4-411; N.C. Gen. Stat. Ann. § 36C-4-411; N.D. Cent. Code Ann. § 59-12-11 (West); Or. Rev. Stat. Ann. § 130.200(3); 20 Pa. Stat. and Cons. Stat. Ann. § 7740.1(b.1); S.C. Code Ann. § 62-7-411; Va. Code Ann. § 64.2-729 (West). Additionally, California, which has not adopted the UTC, enacted a modification statute that is silent on the materiality of spendthrift provisions. Cal. Prob. Code § 15403 (West). In these jurisdictions, the common law presumption of materiality for spendthrift provisions applies.

[78] *See* In re Pike Fam. Trusts, 38 A.3d 329, 331 (Me. 2012) (affirming termination of spendthrift trust when trustee failed to prove materiality of spendthrift provision).

[79] 249 So. 3d 683 (Fla. Dist. Ct. App. 2018).

[80] *Id.* at 685.

[81] *Id.*

[82] *Id.* at 687.

[83] *Id.*

[84] *Id.*

[85] Case No. E201600511COAR3CV, 2018 WL 6267123 (Tenn. Ct. App. Nov. 30, 2018).

[86] *Id.* at *7.

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three children as co-trustees with discretion to distribute any part or all of the income and principal of the trust pursuant to a health, education, maintenance, and support (HEMS) ascertainable standard.[87] The children agreed to terminate the trust early by distributing all assets outright to themselves in equal shares. One child died unexpectedly in a car accident prior to the distribution,[88] and children of that deceased child opposed the distribution agreement, arguing that early termination of the trust was contrary to the settlor's material purpose of postponing enjoyment for the ten-year period.[89] The court disagreed with those grandchildren because "the provision for periodic distribution cannot be read as a material purpose of the Trust when the provision immediately preceding it allows for full distribution at any time" (notwithstanding that the full-distribution authority was constrained by the HEMS standard).[90]

The holding in *Miller v. Maples* is notable because it could apply in numerous trusts that, without including a spendthrift provision, postpone distribution of a trust interest until the beneficiary reaches a specified milestone (such as the age of maturity) and, during the delay, authorize invasions of income and principal by trustees pursuant to some form of standard. If the beneficiary's needs are significant, the trustee acting under such a standard could – as in *Miller* – distribute the entire corpus, which would terminate the trust. Arguably this means that all such delayed-distribution trusts, administered in UTC jurisdictions, are subject to accelerated distribution upon the consent of all of the beneficiaries. Critics of *Miller* would argue that early termination is likely to frustrate the intent of a settlor who included a HEMS standard to repose discretion in the trustees without reposing similar discretionary authority in the beneficiaries.[91]

2. Unanticipated Circumstances

UTC § 412 empowers a court to alter administrative or dispositive trust provisions "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[92] Thus, the threshold question

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[87] *Id.*

[88] *Id.* at *1.

[89] *Id.* at *2.

[90] *Id.* at *8.

[91] *Cf.*, Skarsten-Dinerman, v. Skarsten Living Tr., No. A21-0280, 2021 WL 6109571, at *4 (Minn. Ct. App. Dec. 27, 2021) (denying beneficiaries' request to modify trust that prohibited sale of farmland because "a material purpose of the trust . . . was to retain the farmland as a continuous source of income for [the settlor's] six children until three of them had passed away").

[92] UTC § 412(a) (further providing that, "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention"). Non-UTC jurisdictions have

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under this modification doctrine is whether the circumstance asserted in support of alteration was anticipated by the settlor. If so, then modification is not warranted.[93]

After demonstrating the settlor's failure to anticipate, then the proponent must prove that the proposed modification would further the trust's material purposes. Once again, the Claflin doctrine[94] requires the court to perform a case-by-case factual inquiry into settlor intent. In some cases, modification may be consistent with settlor intent as applied to some beneficiaries, but not for others. For example, settlors of long-term trusts sometimes fail to anticipate extraordinary growth of the trust corpus. In those cases, courts have granted petitions to accelerate distribution to charitable beneficiaries as furthering the trust's purposes while denying early termination of income interests subject to a spendthrift provision.[95]

The most notable liberalization of this doctrine recognizes a beneficiary's catastrophic injury or chronic health condition (requiring expensive, ongoing medical care) as an unanticipated circumstance that warrants trust modification. Trusts created for a disabled beneficiary may disqualify the donee for Medicaid if the right to trust distributions exceeds financial eligibility requirements for public assistance.[96] Prior to 1993, federal law generally prohibited the use of so-called "Medicaid qualifying trusts" to exclude assets from a Medicaid applicant's countable financial resources. As one court explained then-prevailing policy:

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enacted identical or similar statutes. *See, e.g.*, Ga. Code Ann. § 53-12-61(d); Ind. Code Ann. § 30-4-3-24.4(a).

UTC § 412(b) also empowers courts to modify an administrative provision "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."

[93] *See* Kristoff v. Centier Bank, 985 N.E.2d 20, 25 (Ind. Ct. App. 2013) (denying modification because the statute "requires the existence of circumstances not anticipated by the settlor, and we have already concluded that the trust document itself anticipates the beneficiaries not having children"); Cleary v. Cleary, No. 1668, Sept. term, 2019, 2020 WL 7496513, at *10 (Md. Ct. Spec. App. Dec. 21, 2020) (affirming modification because the unanticipated "circumstances leading to the modification came into existence well after [the settlor's] death"); Skarsten-Dinerman, v. Skarsten Living Tr., No. A21-0280, 2021 WL 6109571, at *6 (Minn. Ct. App. Dec. 27, 2021) (denying modification, in part, because settlor anticipated fluctuation in value of farmland).

[94] *See* note 52 and accompanying text.

[95] *See* In re Est. of Somers, 89 P.3d 898, 906 (Kan. 2004); Univ. of Maine Found. v. Fleet Bank of Maine, 817 A.2d 871, 875-76 (Me. 2003).

[96] *See generally* 42 U.S.C. § 1396a (establishing eligibility requirements for state implementation of Medicaid program). *See also* Adam Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1898 (2014) (noting that Medicaid "exists to benefit the truly needy, not those who create[] their own need," such as by disclaiming inherited property to meet eligibility requirements). *See also* CASNER, PENNELL, & WEISBORD §7.1.6 n.238 (discussing disclaimer to prevent Medicaid disqualification).

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> Our conclusion reflects the legislative concern that the medicaid program not be used as an estate planning tool. The medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving medicaid benefits from the state. Congress enacted the medicaid qualifying trust provision as an addition to the "provisions designed to assure that individuals receiving nursing home and other long-term care services under Medicaid are in fact poor and have not transferred assets that should be used to purchase the needed services before Medicaid benefits are made available." H. Rep. No. 99, 99th Cong., 1st Sess. 71 (1985).[97]

Some courts applying the common law doctrine of unanticipated circumstances have held that a trust could not be modified to preserve a beneficiary's eligibility for public assistance, even if the original terms of the trust would disqualify the beneficiary for Medicaid. Rationalized under the unanticipated circumstances doctrine, a "court will not permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction."[98]

In 1993, however, Congress amended the eligibility rules to permit beneficiaries of certain self-settled and third-party special needs trusts to qualify for Medicaid coverage.[99] That change in federal policy opened the door for the legitimate use of trusts in planning for Medicaid eligibility. Thereafter, trusts that failed to anticipate the extraordinary medical needs of a disabled beneficiary could be altered by judicial modification to preserve the beneficiary's eligibility.

For example, *In re Riddell*[100] permitted alteration of a testamentary trust to create a special needs trust for an incompetent remainder beneficiary.[101] The beneficiary's bipolar and schizophrenia affective disorders were sufficiently severe to require ongoing in-patient treatment. The court found that she was "not expected to live independently for the remainder of her life."[102] Approving the modification

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[97] Forsyth v. Rowe, 629 A.2d 379, 385 (Conn. 1993).

[98] Appeal of Harrell, 801 P.2d 852, 854 (Or. App. Ct. 1990) (quoting RESTATEMENT (SECOND) TRUSTS § 167(1) cmt. b (1959)).

[99] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 13611; 42 U.S.C. § 1396p(d)(4)(A)-(C) (authorizing self-settled trusts containing the assets of certain disabled persons); 45 C.F.R. § 233.20(a)(3)(ii)(D) ("income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance"). Self-settled trusts must name the state as residuary beneficiary to the extent of Medicaid benefits paid to the settlor during life, whereas third-party special needs trusts are not subject to recapture upon the death of the disabled beneficiary. *See* CASNER, PENNELL, & WEISBORD §4.4 (discussing special needs trusts).

[100] 157 P.3d 888 (Wash. Ct. App. 2007).

[101] *Id.* at 890.

[102] *Id.*

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petition, the court found that the settlors "did not know of [their grandchild's] mental health issues or how they might best be addressed. They clearly intended to establish a trust to provide for their grandchildren's general support, not solely for extraordinary and unanticipated medical bills."[103] The court held that "[t]he proper focus is on the settlors' intent, the changed circumstances, and what is equitable for these beneficiaries," and that economic loss to the state should not be factored into the determination.[104]

Other courts are mostly in accord with granting petitions to convert nonqualifying trusts into special needs trusts that do not preclude eligibility for public assistance, allowing a beneficiary to receive support above and beyond the standard of care provided by Medicaid.[105]

3. Tax Objectives

UTC § 416 provides: "To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention."[106] This modification doctrine statutorily approves of tax minimization as a legitimate estate planning objective, which is consistent with public policy.[107] As noted

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[103] *Id.* at 893.

[104] *Id.* at 892-93.

[105] *See* In re Kamp, 790 N.Y.S.2d 852 (Surr. Ct. 2005) (granting petition to convert an incompetent beneficiary's mandatory income interest into a discretionary entitlement to qualify the trust as a special needs trust); In re Rappaport, 866 N.Y.S.2d 483 (Surr. Ct. 2008) (approving similar modification over objection of state health department); In re Kross, 971 N.Y.S. 2d 863 (Surr. Ct. 2013) (permitting trust created for infant beneficiary to decant into a new special needs trust created when the beneficiary was poised to turn 21 because the original trust granted the beneficiary a power to withdraw the corpus that would disqualify the beneficiary for Medicaid benefits). *But see* In re Rubin, 781 N.Y.S.2d 421 (Surr. Ct. 2004) (denying reformation of third-party trusts to qualify them as special needs trusts, while allowing "guardians of the property of the respective beneficiaries to create self-settled supplemental needs trusts"). *Compare* In re Owen Trust, 418 S.W.3d 421 (Ark. Ct. App. 2012) (denying on public policy grounds a petition to alter an existing trust to qualify as a special needs trust for a beneficiary who was diagnosed with schizophrenia) *with* In re Corn, 493 S.W.3d 311 (Ark. 2016) (permitting court-creation of a special needs trust and rejecting the public policy objection, noting that the trusts in *Owen* and other cited cases "did not include payback provisions to the State. They simply were not [42 U.S.C. §1396p(d)(4)(A)] trusts.").

[106] The Reporter's comment notes that this provision was based on the tentative draft of RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 12.2 (2003), which provides an exhaustive survey of supporting caselaw.

[107] As Judge Learned Hand observed:

> Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes

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below, courts are apt to approve petitions seeking modification to achieve the settlor's tax objectives, but only if the modification does, in fact, comport with settlor intent. However, some courts have limited the doctrine to modifications that do not alter the original dispositive provisions of the trust.[108]

Many modification petitions seek to minimize the generation-skipping transfer tax, which is a common objective in long-term trusts.[109] In addition, courts have entertained a broad range of requests seeking modification to accomplish the settlor's tax objectives, such as:

- to correct instruments that were improperly drafted;[110]
- to garner the marital deduction by creating a qualifying income interest for a surviving spouse;[111]

> are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Comm'r v. Newman, 159 F.2d 848, 850–51 (2d Cir. 1947) (dissent) (quoted with approval in Comm'r of Internal Revenue v. First Security Bank, 405 U.S. 394, 398 n. 4 (1972)).

[108] *See* In re Tr. D Created Under Last Will & Testament of Darby, 234 P.3d 793, 804 (Kan. 2010) (holding that "modification of trust provisions to achieve tax benefits cannot be validated when it would alter the dispositive provisions of the trust"); In re Est. of Branigan, 609 A.2d 431, 438 (N.J. 1992) ("We cannot conclude that plaintiffs' desire to evade taxes at the cost of the dispository scheme and the possible disinheritance of some of the heirs effectuates the testamentary intent of the testator.").

In the unusual case of Kirchick v. Guerry, 706 N.E.2d 702 (Mass. 1999), after the federal government entered an appearance and requested that the court not act, the state supreme court declined to answer the question presented in a complaint for instructions regarding the timing of a power of appointment: "It is apparent that the sole reason this suit was filed was to obtain a State court ruling which could then be used by the trustee in the pending Federal tax case . . . . We decline to answer the question presented because the pivotal issue is governed by Federal law, and because there are no State interests or duties that would be affected by our ruling." *Id.* at 703-04.

[109] *See* CASNER, PENNELL, & WEISBORD §11.4.8 n.266.

[110] *See, e.g.*, DiCarlo v. Mazzarella, 717 N.E.2d 257, 259 (Mass. 1999) (ordering reformation because the settlor "clearly intended to create a trust that qualified for the marital deduction, [so] it can only be scrivener's error that omitted a clause that would have provided for income to be paid to [the surviving spouse] for life after [the settlor's] death"); Walker v. Walker, 744 N.E.2d 60 (Mass. 2001) (reformation of nonmarital trust to impose an ascertainable standard to limit individual trustee's discretion, to avoid unintended § 2041 general power of appointment inclusion in that trustee's gross estate at death); Private Letter Ruling 200043036 (marital and nonmarital trust provisions inadvertently transposed).

[111] *See, e.g.*, Dassori v. Patterson, 802 N.E.2d 553 (Mass. 2004); Pond v. Pond, 678 N.E.2d 1321 (Mass. 1997).

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- to achieve equitable apportionment or otherwise alter how taxes are apportioned, usually to absolve a marital deduction;[112]
- to maximize a charitable deduction;[113]
- to bestow a power to assign a lead beneficiary's interest in a charitable remainder trust to the remainder beneficiary; [114]
- to accelerate distribution of a portion of a charitable remainder trust to cause the balance of the trust to meet the 5% minimum annual annuity distribution requirement;[115]
- to add a net income limitation to a charitable remainder unitrust; [116]
- to convert taxable general powers of appointment into nongeneral powers;[117]
- to limit an amendment provision to preclude general power of appointment treatment of the power to amend;[118]
- to alter the amount subject to lapsing annual powers of withdrawal to the § 2514(e) five-or-five amount or to take advantage of the § 2503 gift tax annual exclusion;[119]

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[112] *See, e.g.*, Seegel v. Miller, 820 N.E.2d 809 (Mass. 2005); In re Estate of Robinson, 720 So. 2d 540 (Fla. Ct. App. 1998).

[113] *See, e.g.*, Fleet Nat'l Bank v. Wajda, 750 N.E.2d 923 (Mass. 2001).

[114] *See, e.g.*, McCance v. McCance, 868 N.E.2d 611 (Mass. 2007).

[115] *See, e.g.*, Ratchin v. Ratchin, 792 N.E.2d 116 (Mass. 2003).

[116] *See, e.g.*, Putnam v. Putnam, 682 N.E.2d 1351 (Mass. 1997). Compare Private Letter Rulings 200601024 and 200649027, both indicating that courts made similar reformations but the latter denied tax recognition of the change because it was found that "the judicial reformation . . . was not due to a scrivener's error" but, instead, was based on changes in the investment climate that frustrated the trust's original intended purpose.

[117] *See, e.g.*, Dwyer v. Dwyer, 898 N.E.2d 504 (Mass. 2008) (conversion of power of appointment and limitation of certain trustee powers); Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191 (Ind. 2008) (affirming reformation of trust language to strictly ascertainable standards); Walker v. Walker, 744 N.E.2d 60 (Mass. 2001) (reformation adding an ascertainable standard to limit an otherwise general power to appoint); Hillman v. Hillman, 744 N.E.2d 1078 (Mass. 2001) (precluding child's exercise of inter vivos power to appoint corpus to settlor's "issue" from including the child personally), and Private Letter Rulings 201436036, 201006005, 9805025 (lower state court reformations to correct scrivener errors). *But see* Florez v. Florez, 803 N.E.2d 323 (Mass. 2004) (reformation to prevent merger of two trusts to minimize generation-skipping transfer tax, but denial of request to add a general power of appointment, presumably to attract a cheaper federal estate tax instead of generation-skipping transfer tax).

[118] *See, e.g.*, Fleet Bank v. Fleet Bank, 706 N.E.2d 627 (Mass. 1999).

[119] *See, e.g.*, Wright v. Weber, 768 N.E.2d 545 (Mass. 2002) (granting an increase in what appeared to be a gift tax annual exclusion-motivated withdrawal power, but refusing to include a hanging power variety of limitation); Private Letter Rulings 201837005-009 (correction of "scrivener's errors" by reforming Crummey clause powers of withdrawal).

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- to remove powers retained by a settlor to reduce exposure to § 2036(a)(2) inclusion;[120]
- to alter tax payment provisions to avoid § 2042(1) inclusion;[121]
- to account for unanticipated contingencies;[122]
- to adapt to changes in a state inheritance or estate tax.[123]

As tax laws change (or as lawmakers in Congress threaten to change them), fiduciaries and trust beneficiaries may respond by seeking modifications to realize the benefit of current favorable provisions that might be altered in the future. For example, suppose that a trustee was concerned about the imminent possibility of legislation that would reduce the basic exclusion amount under 26 U.S.C. § 2010(c) or scale back the new-basis-at-death rule under 26 U.S.C. § 1014 — both elements of tax reform that were proposed but not enacted in 2021. That trustee might petition for modification to take advantage of an unused exclusion amount by including certain property in a beneficiary's taxable estate. Similarly, a trustee might petition for modification of a trust provision impacted by statutory inflation adjustments, such as the 2022 increase in the gift tax annual exclusion from $15,000 to $16,000 per donee per year. Trust provisions that specify a fixed dollar amount often fail to take into account statutory inflation adjustments. Those provisions may therefore require alteration to conform the amount of the trust interest to the corresponding provision of the Internal Revenue Code.

An unresolved aspect of this doctrine, however, is whether the federal government is bound by state court decisions that modify trusts to accomplish the settlor's tax objectives. In *Commissioner v. Estate of Bosch*,[124] the Supreme Court held that federal courts should not disregard decisions of lower state courts when ascertaining principles of state law for the purpose of interpreting federal tax law, but that only decisions of a state's highest court are binding.[125] In response to *Bosch*, some state supreme courts have granted appellate review expressly for the purpose of affirming

[120] *See, e.g.*, Freedman v. Freedman, 834 N.E.2d 251 (Mass. 2005).

[121] *See, e.g.*, Barker v. Barker, 853 N.E.2d 1057 (Mass. 2006).

[122] *See, e.g.*, Van Riper v. Van Riper, 834 N.E.2d 239 (Mass. 2005) (reformation of a qualified personal residence trust to provide a reversion to the settlor if death occurred within the reserved term); Simches v. Simches, 671 N.E.2d 1226 (Mass. 1996) (reformation of qualified personal residence trust to avoid generation-skipping transfer tax).

[123] *See, e.g.*, Grassian v. Grassian, 835 N.E.2d 607 (Mass. 2005), and In re Brecher, 2017 N.Y. Misc. LEXIS 38 (Surr. Ct.) (reformation of marital deduction formula provision to reflect changes to federal and state law in the 27 years since the will was executed, which would eliminate over $500,000 of New York state estate tax).

[124] 387 U.S. 456 (1967).

[125] *Id.* at 465. Some taxpayers have won favorable results by seeking interpretation of the trust in federal tax litigation without first obtaining a state court decision. *See* Est. of Ellingson v. Comm'r, 964 F.2d 959 (9th Cir. 1992) (interpreting marital deduction trust favorably to the taxpayer as qualifying for the deduction under the federal estate tax).

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lower state court decisions to render them binding on federal authorities.[126] Because caselaw in this context is not very rich, it remains prudent to heed the *Bosch* requirement. For example, two Private Letter Rulings refused to honor decisions by lower state courts that were incorrectly decided or not supported by the evidence.[127]

B. Charitable Trusts

A common law exemption from the Rule Against Perpetuities permits charitable trusts to pursue multi-generational philanthropic goals of exceptionally long duration.[128] The common law developed the doctrine of "cy pres" to accommodate potentially perpetual charitable trusts. It permits modifications upon the happening of future events or occurrences that would frustrate the settlor's charitable purposes.[129] UTC § 413 codifies this cy pres doctrine:

> [I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:
>
> (1) the trust does not fail, in whole or in part;
>
> (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
>
> (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.[130]

Cy pres thus mandates judicial deference to settlor intent in deciding both whether and then how to modify the trust.

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[126] *In re St. Clair Trust Reformation*, 464 P.3d 326 (Kan. 2020), for example, approved a reformation that was clearly for tax purposes, acknowledged the need for court affirmation to satisfy *Bosch*, and probably misstated the consequences of adding an annual five-or-five withdrawal power in the settlor's husband (to preclude reciprocity in trusts created by spouses) as "not adversely affect[ing]" the interests of remainder beneficiaries (which could be true only if it was expected that the powerholder would allow the power to lapse on an annual basis).

[127] In Private Letter Ruling 201243001, the taxpayer obtained a local court's interpretation of a trust provision that clearly was wrong and that was entirely tax motivated (regarding a formula pecuniary bequest to shelter the generation-skipping transfer tax exemption as if it was a fractional division, to avoid gain on funding and to pick up a share of postmortem appreciation). In Private Letter Ruling 200848009, a state court ordered reformation notwithstanding that there was no ambiguity in the document and no evidence of the decedent's intent. In each case, the government properly refused to honor the state court actions.

[128] *See* Phillips v. Chambers, 51 P.2d 303, 311 (Okl. 1935) (surveying caselaw on application of Rule Against Perpetuities to charitable trusts).

[129] *See generally* RESTATEMENT (FIRST) OF TRUSTS § 399 (1935) (failure of particular purpose if settlor had charitable intention).

[130] UTC § 413(a).

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The threshold question in determining the appropriateness of cy pres is whether the settlor's particular charitable purpose can no longer be achieved because it has become unlawful, impractical, impossible, or wasteful.[131] For example, Stephen Girard was the richest person in the United States at his death in 1831. He established a charitable trust to fund in perpetuity a boarding school for poor children.[132] In 2013, citing a report that concluded the trust corpus would be exhausted within 25 years (based on then-current projections of income and expenditures), the trustees petitioned for cy pres relief that would have allowed the school to eliminate the residential program and devote all resources to operation of its daytime school program.[133] *In re Estate of Girard*[134] affirmed an Orphan's Court denial of the petition, because operation of a boarding school was an important component of Girard's charitable purpose, and because the trustees had overstated the severity of the trust's financial deterioration.[135] The appellate court noted that "the cy pres doctrine cannot be invoked until it is clearly established that the directions of the donor cannot be carried into effect."[136]

Upon being satisfied that circumstances prevent accomplishment of a charitable purpose, the second question requires a court to determine how best to alter the trust in a manner most consistent with the settlor's charitable purposes. The term "cy pres," French for "as near as," connotes the doctrine's directive to tailor, as closely as possible, any modification of the trust to the settlor's original charitable purpose.[137]

Thus, in *First Merit Bank, N.A. v. Akron General Medical Center*,[138] a trust distributed a share of its corpus to a community hospital, "its successors or assigns."

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[131] The charitable donee's own conduct can render the settlor's charitable purposes impossible to carry out. In *Reno v. Hurchalla*, for instance, the settlor established a trust with the "charitable intention to see [that her] home and surrounding, undeveloped acreage [would be] preserved in perpetuity." 283 So. 3d 367, 368 (Fla. Dist. Ct. App. 2019). When the charitable beneficiary named in the trust rejected the gift, the court applied cy pres to modify the trust and name another local university as the charitable beneficiary. *Id.* at 371-72. *But see* President & Fellows of Harvard Coll. v. Jewett, 11 F.2d 119, 122 (6th Cir. 1925) (cy pres denied and trust property reverts if, solely "by reason of the action of the trustee, . . . its further use for the purpose of the trust has become unnecessary and impracticable).

[132] *Id.* at 625 ("Girard directed that the College 'shall be sufficiently spacious for the residence and accommodation of at least three hundred scholars.'").

[133] *Id.* at 625-26 (the petition requested judicial permission "to temporarily modify the provisions of the Will to allow the elimination of the residential program and instead provide an extended day program for grades 1 through 8").

[134] 132 A.3d 623 (Pa. Commw. Ct. 2016).

[135] *Id.* at 629-30.

[136] *Id.* at 629.

[137] *See* Kolb v. Storm Lake, 736 N.W.2d 546, 553 (Iowa 2007) ("When the doctrine applies, . . . the change must be 'cy pres comme possible,' or as near as may be, to the settlor's original intention").

[138] 116 N.E.3d 843 (Ohio 2018).

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A proviso dictated that the "funds shall be restricted so as to benefit only the facilities of said hospital at 875 Eighth Street, N.E., Massillon, Ohio."[139] The hospital was a non-profit charitable organization when the settlor established the trust, but was later sold to a for-profit corporation.[140] The court held that the settlor's charitable purpose could not be accomplished by distributing trust property to a for-profit entity. So the court granted cy pres relief, modifying the trust to replace the community hospital with a charitable health foundation and the local rotary foundation.[141] That modification was consistent with the settlor's intent, to promote health of the local community and to support local charities, which she did by including other charitable beneficiaries in her trust. [142]

In re Trust ex rel. Gurney[143] considered the settlor's charitable purposes but reached the opposite conclusion. That trust called for distribution of 20% of the residuary corpus to a school that, unbeknownst to the settlor, closed four years before the settlor died.[144] The trustee petitioned for authority to distribute the share to other charitable residuary beneficiaries in the trust.[145] Opponents of the petition argued "that the school's share should be distributed . . . pursuant to the cy pres doctrine,"[146] which the trial court rejected,[147] finding that the trust manifested an intent to support charitable donees in the settlor's hometown (based in part on testimony of the trustee regarding the settlor's intent).[148] A divided panel of the appellate court affirmed, diverging solely on the factual question of settlor intent.[149]

These cases show that settlor intent remains a central consideration under the cy pres doctrine for determining whether a charitable trust necessitates modification and, if so, how a court should modify the trust's original charitable purposes. Other cases show that charitable trusts implicate more than just the settlor's private interest in their personal charitable preferences. Indeed, charitable trusts are tax-subsidized and endowed with favorable legal treatment precisely because they are devoted to the public good.[150]

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[139] *Id.* at 846.

[140] *Id.* at 845.

[141] *Id.*

[142] *Id.* at 848.

[143] 152 A.D.3d 1122 (N.Y. Supr. Ct. App. Div. 2017).

[144] *Id.* at 1122-23.

[145] *Id.* at 1123.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 1124.

[149] *Id.* at 1124-25.

[150] At common law, the state attorney general had primary enforcement authority over charitable trusts as the state's advocate responsible for protecting the public interest in charitable assets. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959) ("Since the

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In theory, the cy pres doctrine does not privilege the public stake in charitable assets above settlor intent. In practice, however, the settlor's charitable purposes are not impervious to the shifting landscape of popular norms and social preferences that change with the passage of time. Consider, for example, *In re Bierstadt Paintings Charitable Trust*,[151] which involved a gift to a city of two large masterpieces painted by a renowned German-American artist.[152] A local doctor donated both paintings in memory of his father, establishing a charitable trust that appointed the city as trustee.[153] No trust provision expressly required the city to retain ownership of the paintings in perpetuity. In 2019, the city still owned the paintings but petitioned for cy pres relief, seeking permission to sell both.[154] The city claimed that one (depicting the landing of Christopher Columbus in America) "contained 'racist implications' and 'to display it in a public forum in a community comprised mostly of people of color [would] only continue[ ] to cause irreparable harm.'"[155] Arguing that the painting "no longer provides aesthetic or artistic pleasure to the City,"[156] the petition invoked cy pres as grounds for approval to sell the paintings and to distribute the proceeds in trust to local charitable organizations devoted to literacy, education, and youth recreation.[157]

The state attorney general's office sided with the city. In a letter to the court, the attorney general contended that, "[i]n light of the current social climate, the racist themes depicted" rendered the city's continued display of the work impractical.[158] But the attorney general declined to opine on how the sale proceeds should be distributed to ensure the repurposed gift would be "as near as possible to what the Grantor intended."[159]

The court found that the donor's charitable purpose was for the city itself to display the paintings or, alternatively, to arrange for their display in a museum (presumably out of concern that, if sold at auction, the paintings would be acquired by private collectors and no longer be available for public viewing).[160] The court was "not convinced by the City's argument that current social perceptions of Columbus render

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community is interested in the enforcement of charitable trusts, a suit to enforce a charitable trust can be maintained by the Attorney General of the State in which the charitable trust is to be administered."). However, UTC § 405(c) now provides that "[t]he settlor of a charitable trust . . . may maintain a proceeding to enforce the trust."

[151] Case No. A-0529-20, 2021 WL 3057076 (N.J. Super. Ct. App. Div. July 20, 2021).

[152] *Id.* at *1.

[153] *Id.*

[154] *Id.* at *1-2.

[155] *Id.* at *1. The city did not regard the other painting as offensive, but sought to sell it because the city lacked the financial resources to maintain and preserve the work. *Id.* at *2.

[156] *Id.* at *5.

[157] *Id.* at *1.

[158] *Id.* at *2.

[159] *Id.* at *2.

[160] *Id.* at *5.

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the continued ownership of the paintings impracticable."[161] The court thus affirmed a trial judge's denial of cy pres modification, finding that the decision was supported by substantial evidence that the city had "not demonstrated the accomplishment of the trust has become impossible, illegal, or impractical."[162] Thus, in *Bierstadt*, a century after the initial gift, settlor intent prevailed over the public interest (as represented by the city and state attorney general), even without any express provision of the trust requiring the city to retain ownership of the paintings in perpetuity.

United States on behalf of Smithsonian Institution[163] features similar themes, but the court reached the opposite conclusion on cy pres. In 1920, the widow of British artist Herbert Ward donated to the Smithsonian Institution nineteen bronze sculptures through which Ward depicted visual representations of the Congolese people. Several of the larger "heroic-sized" and "life-sized" statutes weighed upwards of 1,000 pounds.[164] The written gift agreement obligated Smithsonian to exhibit the works together as a collection that would be continuously displayed "in a manner such that 'its educational advantages and uses might be properly fulfilled.'"[165] In 1961, the Smithsonian successfully petitioned for permission to separate the collection and to relocate some of the sculptures to storage, thereby removing those items from permanent display.[166] In the course of several renovations completed during the 1980s and 1990s, the Smithsonian gradually removed all of the Ward sculptures from its public exhibition galleries, under a mistaken belief that the 1961 order entirely terminated the agreement's continuous display requirement. [167]

In 2017, after receiving a complaint from one of Ward's descendants, the Smithsonian again petitioned for cy pres, this time seeking to completely relieve itself of the 1920 agreement's continuous display requirement[168] The Smithsonian claimed that the restriction was impracticable because, among other reasons, "the sculptures portray outdated colonial stereotypes"[169] that were inconsistent with its mission to educate visitors through "exhibitions that reflect contemporary cultural and societal concerns."[170] Overruling an objection filed by Ward's great grandson, the court granted the Smithsonian's petition, allowing the museum to maintain the sculptures in

[161] *Id.* ("The City is free to display the painting in any location it chooses. Even if the City decides not to display the painting, it can be donated to a museum where it can be appreciated and valued for its artistic value – consistent with the original intent behind the donation.").

[162] *Id.* at *6.

[163] Case No. CV 17-MC-3005, 2021 WL 3287739 (D.D.C. Aug. 2, 2021).

[164] *Id.* at *1.

[165] *Id.*

[166] *Id.*

[167] *Id.* at *2.

[168] *Id.*

[169] *Id.* at *3.

[170] *Id.* at *4. The museum also argued that its collection had outgrown its aging physical plant and that it no longer accepts gifts subject to a continuous display requirement. *Id.* at *3.

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a non-public storage facility and exhibit the artwork exclusively online.[171] The court explained its decision:

> When a provision in a trust conflicts with an industry practice, cy pres may be applicable. Here, requiring the Smithsonian to comply with the Agreement in light of existing industry practices is unreasonably difficult. Contemporary museum practice requires that museums supplement their exhibitions with stories, context, and relevance. The need to provide context for the Ward Sculptures is particularly important given that the sculptures reflect early twentieth century European social and scientific attitudes toward African societies that classified Africans as 'savages' in a state of social, artistic, and religious backwardness. However, museums require additional exhibition space to provide such supplemental information, and it is impossible to provide sufficient context to address the negative stereotypes portrayed by the Ward Sculptures given the Museum's space constraints. If the Museum were to display the Ward Sculptures without providing such context, the exhibit would not reflect contemporary cultural and societal concerns and would therefore be inconsistent with the Museum's mission. Consequently, it is unreasonably difficult to comply with both the continuous physical display requirement specified in the Agreement and contemporary museum practices.[172]

Juxtaposing *Bierstadt* and *Smithsonian*, similar disputes that arose a century after the original charitable gifts at issue, suggests that cy pres outcomes may be less predictable than non-charitable trust controversies governed by the Claflin doctrine. Curiously, the *Bierstadt* court *denied* modification in the absence of an express provision requiring perpetual retention of trust property and without the opposition of any party to the case. In *Smithsonian*, the court *granted* modification despite an express continuous display provision in the gift agreement and over the litigated objection of the donor's descendant.

II. EXTRAJUDICIAL ALTERATION: TRUST DECANTING

This Part examines the extrajudicial power of trust fiduciaries to modify a trust by "decanting" the original trust into a new trust.

Unlike judicial modification doctrines, which require court approval and impose various substantive requirements (such as unanimous beneficiary consent or proof of unanticipated circumstances),[173] decanting authority derives implicitly (or, in some more recent trusts, explicitly) from power granted to the trustee by the trust's

[171] *Id.* at *4.

[172] *Id.* at *4 (citations and internal quotation marks omitted).

[173] Nonjudicial settlement agreements also require consent of "interested persons" and cannot negate a material purpose of the trust. *See, e.g.*, UTC § 111.

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original terms. Commentators often analogize the trustee's authority to decant to rights conferred by powers of appointment,[174] which may be exercised to appoint trust assets in further trust or to create a new power of appointment in favor of any permissible appointee allowed by the original power.[175] Thus, a trustee vested with absolute discretion to distribute trust corpus to either of the settlor's two children may exercise that discretion by distributing 80% to one child and 20% to the other. Alternatively, the trustee could exercise that same discretionary authority by decanting that trust's assets into a new trust that provides for distribution of 80% to one child and 20% to the other.[176]

There are many reasons why trust decanting might be desirable.[177] For trusts established long ago, the trustee might want to update the original terms to incorporate new features of trust law enacted as part of trust law reforms. For trusts that were poorly drafted, the trustee might want to refresh the trust language to clarify and

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[174] This concept is sometimes described as the "common law" decanting authority. *See* Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940) (trustee's authority to distribute principal to an individual included authority to distribute it to a trust created by the trustee for the benefit of that individual); In re Estate of Spencer, 232 N.W.2d 491 (Iowa 1975) (exercise of a power of appointment in further trust is authorized, but only to the extent the terms of the receptacle trust are not inconsistent with the settlor's intent); cf. Wiedenmayer v. Johnson, 254 A.2d 534 (N.J. Super. Ct. 1969) (authority to distribute principal to an individual "absolutely, outright and forever" included authority to condition that distribution upon the individual establishing a trust to hold the distributed principal).

[175] *See, e.g.*, UNIFORM POWERS OF APPOINTMENT ACT § 305 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14; Jonathan Blattmachr, Diana Zeydel, & Jerold Horn, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 144 (2012) ("A trustee's power to invade the corpus of a trust is analogous to a power of appointment for property law purposes.").

[176] As Stewart Sterk explains:

> Decanting statutes rest on the premise that a trustee with absolute discretion to invade principal is the functional equivalent of the holder of a nongeneral power. The argument runs as follows: The trustee, like the holder of a nongeneral power, can exclude beneficiaries altogether by exercising its invasion power to distribute all principal to a single beneficiary. This "greater" power to exclude a beneficiary altogether should carry with it the "lesser" power to reshape the beneficiary's interest in a new, decanted, trust.

Stewart Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 2002 (2017).

[177] For commentary on the types of alterations that might be accomplished via the decanting power, see American College of Trust and Estate Counsel, ACTEC Comments on Transfers by a Trustee from an Irrevocable Trust to Another Irrevocable Trust (Sometimes called "Decanting")(Notice 2011-101), actec.org/resources/comments-on-transfers-by-a-trustee/ (last visited 10 Jan. 2022); Blattmachr, Horn, & Zeydel, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP., PROB. & TR. J. 141, 148 (2012); Kimberly Cohen, *Decanting: Facts, Fallacies, and Fantasies*, in PRACTICAL TRUST AND ESTATE DRAFTING (ALI-CLE 2015), with attribution to Marc Bloostein, Common Law Trust Decanting in Massachusetts, which was presented at the ACTEC New England Regional Meeting (2013).

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simply trust administration. For trusts established under the law of the settlor's domicile for the benefit of beneficiaries who have since relocated to another state, the trustee might want to alter the trust situs to reflect the beneficiaries' new domicile. This Part will explore the uses, requirements, limitations, and consequences of trust decanting.

A. The Scope of Decanting Power

New York enacted the nation's first trust decanting statute in 1992.[178] In its original form (since amended), the New York decanting statute authorized decanting only by trustees vested with absolute discretion to invade trust principal.[179] The Uniform Trust Decanting Act – the primary focus of our discussion – authorizes decanting by trustees vested with "expanded distributive discretion" (under § 11),[180] as well as by trustees vested with "limited distributive discretion" (under § 12).[181] For purposes of § 11, "expanded distributive discretion" is defined as "a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard."[182] In contrast, § 12 defines "limited distributive discretion" as "a discretionary power of distribution that is limited to an ascertainable standard or a

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[178] Act of July 24, 1992, ch. 591, 1992 N.Y. Laws 3520

[179] The 1992 statute provided, in part:

> Unless the terms of the instrument expressly provide otherwise:
>
> A trustee, who has the absolute discretion, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust for the benefit of the income beneficiary or income beneficiaries of the trust, may exercise such discretion by appointing so much or all of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created or under the same instrument with the consent of all persons interested in the trust but without prior court approval, provided, however, that (A) the exercise of such discretion does not reduce any fixed income interest of any income beneficiary of the trust (B) the exercise of such discretion is in favor of the beneficiaries of the trust, and (C) does not violate the limitations of [statutory limitations on powers and immunities of testamentary trustees].

Id. at §(b)(1). The legislation has since been amended and codified at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney).

[180] UTDA § 11.

[181] UTDA § 12.

[182] UTDA § 2(11). Thus, a trustee's discretion to make corpus distributions is not constrained by a "standard," such as the familiar HEMS standard that is sufficient to avoid § 2041 general power of appointment treatment for federal estate tax purposes. Similar to the HEMS standard is a "reasonably definite standard" under § 674(b)(5)(A) as applied for grantor trust income tax purposes; both are referenced in UTDA § 11.

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reasonably definite standard."[183] Greater trustee discretion to make distributions of principal authorizes greater variation in the trust terms that the trustee is permitted to introduce via decanting. Thus, the broadest decanting powers are authorized by § 11, which governs trusts that vest trustees with the broadest discretion.

UTDA § 11 applies to alterations of beneficial interests that are not vested ("not noncontingent" is the double-negative terminology used in the statute). A beneficial interest is, in turn, not vested if it is "subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur."[184] The statute also defines a beneficial interest as not vested "if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate."[185] Unlike some non-uniform decanting statutes,[186] it is notable that § 11 permits a trustee to reduce or eliminate non-vested benefits of a current beneficiary, or alter, add, or eliminate powers of appointment.[187] Conversely, not allowed is elimination of a presently-exercisable general power of appointment, or any vested interest. Nor may a trustee add new beneficiaries to the trust, or convert a remainder beneficiary into a current beneficiary.[188] The trustee may, however, alter a power of appointment to make the class of permissible appointees broader or different from the original.[189]

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[183] UTDA § 12(a). Thus, a trustee with limited distributive discretion is subject to an ascertainable standard or a reasonably definite standard, as those terms are defined under §§ 2041(b)(1)(A) and 674(b)(5)(A).

[184] UTDA § 11(a)(1).

[185] *Id.*

[186] *See, e.g.*, Hodges v. Johnson, 177 A.3d 86 (N.H. 2017) (invalidating a decanting that totally eliminated a beneficiary's interest).

[187] The Comment to § 11 also states as rationale: "When a trustee is granted expanded distributive discretion, that is an indication that the settlor intended to rely on the trustee's judgment and discretion in making distributions. The settlor's faith in the trustee's judgment supports the assumption that the settlor would trust the trustee's judgment in making modifications to the trust instrument . . . ." That presumed trust is not absolute, however, and a survey of judicial decisions that limit the decanting power suggests that courts are more conservative and constrained about the permissible reach of decanting than are some advocates. Suggestions in the literature of a nearly "anything goes" attitude regarding trustee discretion is likely more ambitious than the UTDA or beyond what existing case precedent might support. *See, e.g.*, Alexander Wolf, Anthony DeLuca, & Nicholas O'Brien, *A More Suitable Vessel: Trust Decanting and the Future of Trust Modification in Nebraska*, 53 CREIGHTON L. REV. 751, 757 (2020); Pete Melcher, Bob Keebler, & Steve Oshins, *The Ultimate Guide to Decanting Trusts: Strategies, Opportunities, Private Decantings, Tax Issues and More*, STEVE LEIMBERG'S ESTATE PLANNING EMAIL NEWSLETTER ARCHIVE MESSAGE #2554 (May 24, 2017). Further, the extent of the decanting power that does appear to exist may give a trustee a degree of discretion that is not consistent with the intent of a settlor who did not contemplate or expressly authorize the alteration of interests enjoyed by current beneficiaries.

[188] UTDA § 11(c).

[189] UTDA § 11(d).

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UTDA § 12 applies to trusts that limit the trustee's distributive discretion by imposing an ascertainable or reasonably definite standard. Under § 12(c), any decanted interest must be "substantially similar," "in the aggregate," before and after any alterations to the trust. Further, the Comment to § 12 explains that a fiduciary with *no* distributive discretion over *principal* may decant only as provided in § 13, which deals with trusts for disabled beneficiaries.[190] Thus, a trustee whose discretion is limited to the distribution of income has no general authority to decant. Only authorized fiduciaries vested by the original trust with distributive discretion over principal may decant, so a trust director empowered to direct the trustee but who lacks distributive discretion over principal has no power to decant whatsoever. That delineation of authority serves to underscore that decanting is a fiduciary action, subject to fiduciary duties and constraints.

On the flip side, several provisions of the UTDA expressly preclude certain alterations via trust decanting:

- § 16 precludes decanting to increase the fiduciary's compensation unless all qualified beneficiaries consent;
- § 17 precludes decanting to reduce a fiduciary's liability, although it "may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, trust directors (such as distribution or investment advisors, trust protectors, or other persons), and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law . . .";[191]

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[190] UTDA § 13(c) allows a trustee to decant to a 42 U.S.C. §§ 1396p(d)(4)(A) or (d)(4)(C) first-party special needs trust (defined in § 13(a)(4) as one that would not be considered a resource for purposes of determining entitlement to governmental benefits). This is allowed even if the trustee entirely lacks distribution discretion, if the beneficiary is disabled (meaning that the beneficiary "may qualify" for governmental benefits based on disability). Nothing is said about making a trust qualify as a third-party special needs trust. However, the comment says that the § 13(c)(1) authority to create a first-party special needs trust (meaning that it would be either a pooled trust or a trust with a payback provision) does not require that the second trust must be a first-party special needs trust.

[191] Additionally, the UTC imposes various mandatory restrictions and reporting requirements that may not be altered and, in some cases, these apply retroactively to pre-existing trusts. *See, e.g.*, UTC §§ 813(a) (duty to respond to beneficiary requests for information about a trust); 813(b)(3) (duty to notify trust beneficiaries of the existence of an irrevocable trust); Zimmerman v. Zirpolo Trust, 2012 WL 346657 (Ohio Ct. App. 2012) (mandating disclosure of trust document and reports to mother of trust beneficiaries notwithstanding express language in the trust that "the Trustee shall . . . provide no information about the trust proceeds to the beneficiaries . . . until they are entitled to receive the proceeds"). Trust settlors often seek to modify the beneficiary disclosure rules under UTC § 813. Presumably any other person with the power to alter the trust could override them, also. Note, however, that some states regard the withholding of trust information as contrary to public policy because it interferes with the right of beneficiaries to protect and enforce their interests in the trust. *See, e.g.,* Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010) (holding that neither state law nor

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- § 18 precludes alteration of a power to remove or to replace fiduciaries without consent of the holder of that revolving door power, unless the alteration is approved by a court;
- § 19 is a saving provision precluding changes that would muck up (1) the marital deduction, (2) the charitable deduction, (3) qualification for the annual exclusion under § 2503(b), (4) S Corporation qualification under § 1361, (5) a zero-inclusion ratio under § 2642(c), (6) § 401(a)(9) minimum distributions, or (7) alter § 672(f)(2)(A) foreign grantor trust treatment;[192] and
- § 20 precludes extension of the duration of a trust beyond the maximum perpetuities period for property in the first trust.

UTDA § 4 establishes that, unlike a power of appointment, the exercise of trust decanting power is generally subject to familiar fiduciary constraints, including the duties of loyalty, impartiality, and against self-dealing.[193] Those restrictions do not necessarily preclude extreme fiduciary action, such as to exclude or diminish a beneficiary's interests. But they do subject those actions to the potential for a claim of abuse of fiduciary duty and reversal upon any after-the-fact judicial review. Because court approval is not involved, the more significant the changes sought to an existing, irrevocable trust, the more exposed the trustee may be to challenge. Decanting is generally permitted without the prior consent of any person or court approval, but state law may require that notice be given to various affected parties.[194] Following such

the trust instrument could deprive beneficiaries of disclosure of information necessary to protect their interest in the trust).

[192] Permitted is conversion from or to a grantor or nongrantor trust. Although settlor consent is needed to create new grantor trust status, the Comment expressly says that this requirement does not apply to § 678-deemed grantors.

[193] UTDA § 4(a) ("In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust"). For the fiduciary duties applicable to trustees, see UTC §§ 801 et seq. *Cf.* In re Fund for Encouragement of Self Reliance, 440 P.3d 30 (Nev. 2019) (one cotrustee could not act to decant a trust because the cotrustees were required to act together to make distributions). In contrast, a power to appoint is not a fiduciary power. *Cf.* RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 19.14 (2011).

[194] *See, e.g.*, UTDA § 7(c) (requiring notice to the trust's settlor (if living), each "qualified beneficiary," the holder of any presently exercisable power of appointment, any person with the power to remove or replace the fiduciary, and any other cotrustee). Further, the Comment to § 7 refers to UTC § 813(a) for the proposition that notice and an accounting may be required if decanting causes termination of a trust, even if its assets are simply being transferred to a new trust.

UTDA § 7(d) absolves any duty to notify a minor who has no representative, and § 8(d) provides that "[a] settlor may not represent or bind a beneficiary under this act," but the Comment to § 8 specifies that the rationale was to protect the settlor from potential estate tax inclusion by virtue of having what could be regarded as a reserved power over trust property otherwise irrevocably transferred. It was not intended to protect the beneficiary from any kind

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notice, anyone whose trust interest is negatively affected may have standing to object,[195] including by bringing a judicial action to enjoin or contest exercise of the trustee's discretion.[196]

The decision *whether* to decant is not subject to a fiduciary duty to act or not to act. But the trustee must administer trusts solely in the interests of the beneficiaries, which may compel or restrain certain changes. The Comment to UTDA § 4 suggests that a fiduciary should decant if needed to preclude "needless dissipation of the trust assets should a beneficiary develop dependencies such as substance abuse or gambling, creditor problems, or otherwise be unfit to prudently manage assts that might be distributed from the trust."[197] Further, the same Comment states that the fiduciary duty of impartiality "does not mean that the trustee must treat the beneficiaries equally. Rather the trustee must treat the beneficiaries equitably."[198] This raises questions about diminution of a beneficiary's interest, which might be justified by "situations [such as] actual knowledge of the . . . extraordinary needs of [a] life beneficiary or irresponsibility of a potential distributee."[199] On the other hand, mere disappointment, disagreement, or other dissatisfaction with a beneficiary may not be a sufficient ground to reduce a beneficiary's interest via decanting.[200] One of the more significant issues with decanting is whether decanting may either add or remove beneficiaries via exercise of the power.[201]

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of overreach or impropriety from the settlor. Furthermore, § 7(d) is an optional provision and may not be the law in all jurisdictions adopting the UTDA.

195 UTDA § 7(g) states that giving notice "does not affect the right of a person" to file an objection to a proposed or completed decanting.

196 The need to bring a judicial action to enjoin a contested decanting may be compelled by the application of tax law. For example, a beneficiary whose beneficial interest in a trust is diminished by a decanting may be deemed to make a taxable gift if an action to protect the affected interest exists but is not pursued.

197 UTDA § 4, comment.

198 *Id.*

199 *Id.*

200 However, beneficiaries may also jeopardize their own interests in seeking the exercise of the decanting power. In Gowdy v. Cook, 455 P.3d 1201 (Wyo. 2020), for instance, a beneficiary's effort to decant a trust to change the trustee qualification requirements triggered an in terrorem (no contest) provision, resulting in that beneficiary's disqualification.

201 *See, e.g.*, In re Niki and Darren Irrevocable Trust, No. 2019-0302-SG, 2020 WL 8421676 (Del. Ch. Feb. 4, 2020) (denying request by petitioners with unclean hands to invalidate previously decanted trust, explaining (in dictum, but consistent with UTDA § 12) that the terms and conditions of the decanted trust must be "substantially identical" to the original trust terms); Hodges v. Johnson, 177 A.3d 86 (N.H. 2017) (holding that a decanting that totally eliminated a beneficiary's interest was invalid); Harrell v. Badger, 171 So. 3d 764 (Fla. Dist. Ct. App. 2015) (holding a decanting to be invalid because the successor trust granted a contingent remainder interest to a beneficiary that differed from the contingent remainder beneficiary of the original trust, in direct violation of the Florida statute authorizing decanting); In re

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Decanting without express, statutory authority is a more uncertain endeavor. *Morse v. Kraft*[202] essentially embraced a common law notion that decanting is allowable as a trust-to-trust distribution,[203] but declined an amicus request "to recognize an inherent power of trustees of irrevocable trusts to exercise their distribution authority by distributing trust property in further trust, irrespective of the language of the trust."[204] The court ruled that the contested decanting was allowable under state law without the consent of either a court or the beneficiaries, but regarded the issue as a facts-and-circumstances evaluation to be made on a case-by-case basis.[205]

In another validation of common law decanting, *Ferri v. Powell-Ferri*[206] authorized the trustee's alteration of a beneficiary's power to withdraw trust corpus after teaching target ages, as granted by the original trust.[207] The new trust removed those rights, the objective being to preclude or minimize any state law right of the beneficiary's soon-to-be ex-spouse to reach trust corpus in a property settlement incident to their divorce.[208] The court allowed the decanting.[209] However, a concurring opinion took pains to:

Johnson, No. 2011-2809/B, 2015 WL 220418 (N.Y. Surr. Jan. 13, 2015) (holding that decanting could not expand class of lifetime beneficiaries).

[202] 992 N.E.2d 1021 (Mass. 2013).

[203] UTDA § 4(c) provides a presumption that a trustee has the power to decant, absent an express provision in the trust to the contrary.

[204] *Morse*, 992 N.E.2d at 1027.

[205] *Id.* Similarly, Beardmore v. JPMorgan Chase Bank, N.A., Case No. 2014-CA-001536-MR, 2017 WL 1193190 (Ky. Ct. App. Mar. 31, 2017), authorized the conversion of two half-century-old trusts into a single $100 million directed trust (for investment purposes) and decanting of that trust to Delaware for what was represented to be income tax savings of 0.1% annually (which the court regarded as "a significant aggregate tax savings"), and that would extend the trust for another 50 years.

[206] 72 N.E.3d 541 (Mass. 2017).

[207] *Id.* at 544.

[208] *Id.*

[209] The court explained:

> [I]f a trustee has the discretionary power to distribute property to or for the benefit of the beneficiaries, the trustee likewise has the authority to distribute the property to another trust for the benefit of those same beneficiaries. . . . [The] trustee's broad discretion to distribute the assets of an irrevocable trust may be evidence of a settlor's intent to permit decanting. . . . [I]f a settlor intended a trust's assets to be protected from creditors, he or she necessarily intended that the trustee have the means to protect the trust assets consistent with his or her fiduciary duties. . . . If the trustee were unable to decant the portion of trust assets made 'withdrawable' as the beneficiary reached certain age milestones, the trustee correspondingly would lose the ability to exercise his or her fiduciary duties (including the duty to invest and protect the assets' purchasing power) over those assets . . . .

Id. at 546-550.

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> emphasize what we did not decide . . . : whether Massachusetts law will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust where the sole purpose of the transfer is to remove the trust's assets from the marital assets that might be distributed to the beneficiary's spouse in a divorce action. . . .
>
> I do not offer any prediction as to whether this court might invalidate as contrary to public policy a new spendthrift trust created for the sole purpose of decanting the assets from an existing non-spendthrift trust in order to deny the beneficiary's spouse any equitable distribution of these trust assets. I simply make clear that, in this opinion, we do not decide this issue . . . .[210]

So, although some types of trust decanting may be allowed in a state that lacks express statutory authority, the precise contours of permissible decanting may remain unpredictable until the development of common law precedent.

B. Drafting Considerations

The ultimate source of decanting power is the settlor's original grant of discretionary authority to the trustees, so the drafting of original trust terms should reflect careful and deliberate consideration of any implied or express restrictions that might affect the future ability of trustees to exercise the decanting power. For example, one of the most useful applications of trust decanting is to change the trust situs, typically from a tax-expensive jurisdiction to a tax haven, or to obtain flexibility under governing laws that are more amenable to accomplishing the trust's objectives.[211] However, at least one court has held that, absent express or implied authority in the

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[210] *Id.* at 552-53.

[211] A mere change of situs, however, differs from a full-fledged decanting that may result in administration under the law of a new jurisdiction. UTDA § 5(1) provides that the Uniform Act applies to a trust that "has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state." The Comment thereto notes that "[d]ecanting is considered an administrative power" in a conflict of laws choice-of-law analysis and, "[t]o avoid the difficulties of determining whether the law governing administration has changed when the principal place of administration has changed, the act applies to any trust with a principal place of administration in the state, regardless of what state law governs its administration and meaning and effect."

Multijurisdictional institutional trustees likely change the situs of trusts that they administer more easily than individuals, merely because they have a presence in multiple jurisdictions. Information about the size and duration of a trust, and the identity of a trustee, may be disclosed only to qualified beneficiaries, UTC § 813, so data about private trusts are not generally accessible from public records. As is data on decanting, which is nonjudicial. Thus, it is rank speculation whether more long-term trusts are administered by institutional trustees, although trustee succession over many years likely disfavors individual trustees who, unlike corporations, eventually retire or die.

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original trust and a demonstration that the proposed decanting will "have some beneficial effect," "a court is without authority to change the situs of a trust simply because the parties request it."[212]

The dead hand paradox suggests that settlors of long-term trusts should be counseled to presume the inevitability of changed circumstances. Some trust settlors do not wish to authorize changes to their long-term trusts. UTDA § 15(a) permits a trust to preclude decanting, but only to the extent the trust "expressly prohibits exercise of (1) the decanting power; or (2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust."[213] Lacking such an explicit declination of the authority to alter a trust, a spendthrift provision alone is not adequate to prevent decanting under the UTDA, nor is a statement that the trust is irrevocable or unamendable.

Thus, for new trusts, any express authority to decant should make clear the extent of any permissible changes, unless the settlor is sanguine that the trustee, perhaps many successions in the future, will knowingly and wisely exercise the decanting power well and without mishap. Otherwise, a decanting provision likely should address the following constraints:

- Beneficiaries that may be added (e.g., only the settlor's blood relatives and their spouses) or affected;
- Whether beneficiaries or beneficial interests may be diminished or removed, specifically including powers of appointment that may be added, expanded, restricted, or withdrawn (e.g., for basis improvement or generation-skipping transfer tax purposes);
- Fiduciaries or directors that may be added, deleted, or otherwise changed;
- Changes to accomplish or preclude certain consequences (e.g., causing or relieving grantor trust income tax exposure to the settlor of an inter vivos trust, eliminating or altering a source of wealth transfer taxation to a beneficiary or fiduciary, qualification to hold S Corporation stock, qualification as a special

[212] *In re* Tr. for Benefit of Hettrick, 111 N.Y.S.3d 522, at *4 (N.Y. Surr. 2018). *Hettrick* may be an unfortunate negative precedent for subsequent parties seeking to improve a trust's administration, reduce its tax burden, qualify as exempt for Medicaid qualification purposes, or merely improve relations between the trustee and the trust beneficiary. However, without express authority under the terms of the original trust, or under state law, any meaningful change in any beneficiary's interest might cause income and wealth transfer tax consequences, as if the beneficiary whose interest is diminished (but who did not object) made a gift when the right to challenge the change lapsed. As a consequence, decanting in lieu of judicial alteration may not be a preferable avenue for change.

[213] UTDA § 15(e) prohibits "serial decanting," so a prohibition on decanting in one trust cannot be defeated by decanting to a new trust that lacks the prohibition that then could be decanted to yet a third trust.

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needs trust,[214] elimination of a spendthrift clause to permit beneficiaries to transfer their interests, improvement of creditor protection, or tinkering with a vesting provision to avoid violation of the Rule Against Perpetuities);

- Modification to conform to new laws (e.g., increased federal security law reporting requirements);
- Current statutory restrictions on the decanting power under UTDA §§ 16-20 that the settlor wishes to replicate or incorporate by reference into the trust, thereby insulating those restrictions from future revisions of the law;
- Procedures governing the exercise of decanting power (e.g., only independent fiduciaries may act, only with the approval of a court of competent jurisdiction, and only to accomplish a reduction of taxes or a furtherance of the settlor's objectives); and
- Provisions that under no circumstances may be altered (e.g., anything that would cause loss of special needs trust qualification; diminish the marital or charitable deductions;[215] or taint an inclusion ratio of zero in an exempt generation-skipping trust; provisions relating to the identity, addition or removal, and accountability of fiduciaries or directors; or the provision under which all of these changes are authorized).

An open question remains as to whether federal authorities will recognize trust alterations achieved through trust decanting for purposes of federal tax law. Unlike judicial modification doctrines governed by the *Bosch* principle, federal courts have yet to decide whether to recognize purely extrajudicial alterations enabled by trust decanting for purposes of federal transfer tax laws. In 2011, however, the Internal Revenue Service issued a Notice requesting comments regarding trust decanting alterations that affect beneficial interests.[216] The Notice invited comments regarding the relevance and effect of various facts and circumstances that may impact one or more specific federal tax consequences, including: (1) modification of trust beneficial interests in principal or income; (2) alteration of income tax grantor trust status; (3) extension of trust duration; (4) modification of the identity of the donor or transferor for gift or generation-skipping transfer tax purposes; and (5) trusts that are

[214] Actions to qualify for Medicaid (or avoid disqualification, as might occur if a trust for a disabled beneficiary is slated to distribute outright upon attainment of a designated age) are common. *See, e.g.*, In re Kroll, 39 N.Y.S.3d 183 (App. Div. 2016) (Medicaid disqualification averted by decanting into a third-party special needs trust after state unsuccessfully argued that the decant was into a first-party special needs trust that required a payback provision).

[215] UTDA § 3(b) specifies that the Uniform Act does not apply to a wholly charitable trust, and the Comment to § 3 states that decanting likely would not be allowed in a split-interest trust, either, because the fiduciary would not typically have discretion to make any principal distributions from such a trust. For good measure, § 14(b) also specifies that a charitable interest may not be diminished or altered on any decanting.

[216] IRS Notice 2011-101, 2011-52 I.R.B. 932. Apparently, the government was not focused on alterations that modify trust administration provisions or affect state taxation of the trust or its beneficiaries.

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chronologically exempt from generation-skipping transfer taxation, or that have a zero inclusion ratio.[217] Although the Notice suggests that trust decanting is on the IRS radar, it specifies that no further Private Letter Rulings will issue with respect to transfers that change beneficial interests or the applicable perpetuities period. As a result, taxpayers have not been able to obtain further guidance from either the agency or federal courts.

III. TRUST ALTERATION AND WEALTH CONCENTRATION

This Part considers the impact of trust alteration rules on wealth concentration.

Lawmakers, philosophers, and economists have debated the merits of regulating societal wealth concentration and, in particular, the role of intergenerational wealth transmission, for centuries.[218] Commentators who favor regulating wealth concentration among the ultra-rich through mechanisms such as the estate tax have argued that wealth inequality tends to inhibit long-term economic growth and often vests the wealthy with disproportionate influence over the political process.[219] Others have argued that large disparities in the distribution of wealth tend to stifle upward economic mobility, which is one of the core promises of the "American dream."[220]

More recently, however, the debate about wealth concentration has considered the fractionation of "heirs property," a problem that largely affects individuals at the lower end of the wealth spectrum. In modest-sized estates, the most valuable asset often is a decedent's personal residence, which may be distributed (via the decedent's will or by intestacy) in undivided tenancies in common, which fractionates the ownership of inherited property among the decedent's beneficiaries.[221] Exploiting a cotenant's right to exit this concurrent form of ownership, real estate developers may acquire small fractional interests for the intended purpose of petitioning for a judicial partition sale, which enables their acquisition of the entire property for less than market value while dispossessing the non-consenting beneficiaries. This tactic has

[217] *Id.*

[218] *See generally* James Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 828 (2001).

[219] *See id.*

[220] *See* Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. REV. 859, 867 (2016).

[221] *See* Danaya Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2612 (2020). *See also* Thomas Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U.L. REV. 505, 518 (2001) (describing the problems associated with tenancy in common ownership of real property among intestate heirs); Joan Flocks et. al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, Fla. B.J., September/October 2018, at 57, 58.

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disproportionately preyed upon Black and other minority populations,[222] prompting the Uniform Law Commission to promulgate the Uniform Partition of Heirs Property Act (UPHPA) in 2010. The UPHPA establishes stringent rules for judicial appraisals and grants non-consenting tenants a right to purchase the partition petitioner's interest before a court-ordered sale.[223] Thus, while laws such as the estate tax seek to reduce concentrations of wealth, other reforms have sought to reduce wealth inequality by *promoting* wealth concentration. The regulation of property in furtherance of macroeconomic policy is, at best, tricky business.

Trusts created for intergenerational wealth transmission is an estate planning technique used almost exclusively by the rich. Thus, any effects of trust alteration are likely to increase, not mitigate, wealth inequality. However, empirically proving a connection between trust alteration rules and wealth concentration is a tall order because it is difficult to measure wealth inequality in the United States, as well as the societal factors that contribute to wealth inequality. Unlike income, which taxpayers report annually to comply with the federal income tax, no law generally requires individuals to disclose their wealth until death. Even then, a return generally is required only if the decedent's estate exceeds the basic exclusion amount.[224] The government, therefore, does not compile comprehensive data on the wealth of individual taxpayers.

To estimate levels of wealth inequality in the broader macroeconomy, economists have developed sophisticated models drawing upon multiple data sources that partially or indirectly measure capital ownership.[225] Those models show that

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[222] *See* UNIFORM PARTITION OF HEIRS PROPERTY ACT (2010), prefatory note at 5; Phyliss Craig-Taylor, *Through A Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737 (2000).

[223] *See* UPHPA § 6 (judicial appraisal), and § 7 (cotenant buyout). As of 2022, the Act has been enacted in 18 states and was recently introduced in another three state legislatures and the District of Columbia. *See* Uniform Law Commission, *Partition of Heirs Property Act*, uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=groupdetails (last visited Jan. 20, 2022).

[224] 26 U.S.C. § 6018(a)(1) ("In all cases where the gross estate at the death of a citizen or resident exceeds the basic exclusion amount in effect under section 2010(c) for the calendar year which includes the date of death, the executor shall make a return with respect to the estate tax"). The basic exclusion amount is indexed annually and, in 2022, is $12,060,000. 26 U.S.C. § 2010(c); Rev. Proc. 2021-45 § 3.41.

[225] Thomas Piketty, Emmanuel Saez, & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 QUARTERLY J. OF ECON. 553 (2018), found at gabriel-zucman.eu/usdina/, derive their figures with a model based on income, and suggest (among other things) that there has been a rise in income for the top percentage of income earners in America, which they regard to be a function of equity and bond ownership, from which their extrapolations produce estimates of the wealth held by various cohorts.

In a letter to Senator Elizabeth Warren dated Feb. 24, 2021, found at elizabethwarren.com/plans/ultra-millionaire-tax, Professors Saez and Zucman estimated (based on the Picketty, Saez, and Zucman data from 2018) that the top 0.1% of Americans

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wealth in the United States is highly concentrated among the rich and ultra-rich. According to one such model, as of 2012, the richest 10% of Americans owned 78% of all wealth in the United States.[226] The richest 1% owned 36%, the top 0.1% owned 15%, and the top 0.01% owned 6% of all wealth.[227] According to a Federal Reserve Board survey of finances in 2019, the bottom 50% of Americans controlled only 10% of the wealth while the top 10% controlled just under 70%.[228] Broken down further, the 90th to 99th percentiles in that same survey controlled roughly 38%, leaving roughly 32% as controlled by the top 1%.[229] Other measures of wealth inequality reveal

hold "almost as much wealth" as the bottom 90% (which the release estimated to be just 24% of all wealth in America as of 2019). Further, in 2019, they estimated the wealth of the top 0.1% to be "around 20% in recent years," compared to the wealth of the bottom 90% being about 25% (citing a decline in wealth for the bottom 90% due in large part to debt that increased in the past 30 years). These percentages vary from data from the Federal Reserve, noted at text accompanying note 228 infra. They also stated that "billionaire wealth" stood at $4.2 trillion (as of January 24, 2021), 40% higher than before the COVID crisis (it was only $3.0 trillion in March 2019). As is true with many economic models and extrapolations from known data, these figures are disputed by commentators who take exception to the methods and assumptions used. Nevertheless, the inordinate share of wealth owned by the richest Americans is a commonly accepted reality. *See also* Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. OF ECON. PERSPECTIVES 3 (2020), at jstor.org/stable/26940888?seq=1#metadata_info_tab_contents (comparing aggregate wealth to average yearly income: "In 1980, on average, members of the top 1 percent owned in wealth the equivalent of 60 years of average US income. In 2020, . . . they own 200 years of average US income in wealth." Further, "[i]n the United States, national income reached $17.5 trillion in 2018 . . . . The bottom 50 percent earned 12.5 percent of national income, which means that members of the bottom 50 percent earned one-quarter of the average income in the economy . . . .").

[226] Joachim Hubmer, Per Krusell, & Anthony A. Smith. Jr., *Sources of US Wealth Inequality: Past, Present, and Future*, NATIONAL BUREAU OF ECONOMIC RESEARCH MACROECONOMICS ANNUAL, Vol. 35, p. 391 at Fig. 8 (2020).

[227] *Id.*

[228] Based on the Survey of Consumer Finances from the Federal Reserve Board (2019) (the most recent), Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances, 106 FEDERAL RESERVE BULLETIN No. 5 at 37 (Sept. 2020), found at federalreserve.gov/publications/files/scf20.pdf.

[229] Share of Financial Assets Held by the 90th to 99th Wealth Percentiles, compiled by the Federal Reserve Bank of St. Louis, found at alfred.stlouisfed.org/series?seid=WFRBSN09139&utm_source=series_page&utm_medium=related_content&utm_term=related_resources&utm_campaign=alfred (last visited Jan. 20, 2022). These numbers are nearly the same as those contained in a table on "Distribution of Net Financial Wealth by Wealth Groups 2020" in Subcomm. Rep't by Joint Comm. on Taxation, Present Law and Background on the Taxation of High Income and High Wealth Taxpayers, at 23 (May 10, 2021). They also are roughly equivalent to the figures in Edward Wolff, A CENTURY OF WEALTH IN AMERICA (2017), that the top 1% of households ranked

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enormous disparities by race. For instance, one recent study reported that the median wealth of White non-retirees older than age 25 was more than ten times greater than Black non-retirees in the same cohort.[230]

More directly related to this project, some commentators believe that a large amount of wealth in the United States is acquired by gift or inheritance,[231] meaning that wealth inequality may be explained (at least partly) by the gratuitous transmission of property from one generation to the next.[232] A related explanation attributes the rise of wealth inequality to the dramatic abrogation of federal wealth transfer taxation, which once applied to estates valued as low as $60,000 (following World War II) but now exempts over $12 million of non-deductible transfers per taxpayer.[233] Another scholar has argued that the combined effects of reducing the transfer tax base and

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by net worth held 40% of United Staters wealth and earned 24% of income. See Florian Scheuer & Joel Slemrod, *Taxing Our Wealth*, 35 J. ECON. PERSPECTIVES 207 (2021).

[230] Christian Weller & Angela Hanks, *The Widening Racial Wealth Gap in the United States after the Great Recession*, 47 FORUM FOR SOCIAL ECON., at 237 at Fig. 2 (2018) (reporting median wealth of $142,180 for White non-retirees and median wealth of $13,460 for Black non-retirees).

[231] *See* Edward Kleinbard, *Capital Taxation in an Age of Inequality*, 90 S. CAL. L. REV. 593, 598 (2017) ("about one-half of the existing capital stock in the United States is held by virtue of such gratuitous transfers, and much of that wealth is extremely concentrated in its ownership"); Facundo Alvaredo, Bertrand Garbinti, & Thomas Piketty, *On the Share of Inheritance in Aggregate Wealth: Europe and the United States, 1900-2010*, at fig.1 (INET Oxford, Working Paper No. 201-07, 2015), inet.ox.ac.uk/files/WP7.pdf (last visited Jan. 20, 2022) (benchmarking the share of inherited wealth in the United States at approximately 55% as of 2010).

[232] Eric Kades explains:

> Inheritance inequality in the United States mirrors that of wealth inequality. In general, only about 20% of American households will ever receive a significant inheritance or inter vivos gift. Yet, households in the top 1% of incomes receive about 35% of all inheritance dollars and households in the top 10% receive about 73%. The analogous percentages for wealth acquisition are 33.8% for households in the top 1% of income and 80.5% for households in the top 10% of incomes. The largest inheritances generally are not dissipated in one generation. For households in the top 1% of incomes great wealth can be transferred to multiple generations.

Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 158 (2019) (hereinafter Kades). *See also* Thomas Piketty, CAPITAL IN THE TWENTY-FIRST CENTURY 377-78 (Arthur Goldhammer trans., Harv. Univ. Press 2014) ("the past tends to devour the future: wealth originating in the past automatically grows more rapidly, even without labor, than wealth stemming from work, which can be saved. Almost inevitably, this tends to give lasting, disproportionate importance to inequalities created in the past, and therefore to inheritance").

[233] *See, e.g.,* Jay Soled, *The Federal Estate Tax Exemption and the Need for Its Reduction*, 47 FLA. ST. U.L. REV. 649, 654, 664 (2020); Paul Caron & James Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013).

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repealing the Rule Against Perpetuities have significantly exacerbated the lopsided distribution of wealth.[234] The chasm between the small minority of wealthy Americans and everyone else is not likely to shrink absent a national wealth tax,[235] significant reduction of the wealth transfer tax exclusion amount, or revival of the Rule Against Perpetuities.[236]

A causal connection between the distribution of inherited wealth and wealth inequality is consistent with what little is known empirically about the aggregate amount of property held in trust in the United States. The Internal Revenue Service reported that, in 2014, fiduciaries filed 3.17 million federal income tax returns on behalf of trusts and estates.[237] Compared to the national population, roughly one trust filed an income tax return for every one hundred Americans. Data from 2014 also revealed a combined reported income for all trusts and estates totaling $141.6 billion.[238] Fiduciaries are not required to report the corpus value of assets under management,[239] but the income figures alone suggest a staggering amount of wealth held by fiduciaries in trusts and estates in the United States. And these figures understate the total value of trust assets in the United States, because income earned by *revocable* trusts is reported

[234] *See* Kades, supra note 232.

[235] Congress has yet to seriously consider proposals for a national wealth tax. *See* David Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499, 560 (2000) (proposing a flat wealth tax of 1.57%); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020) (proposing a form of wealth taxation through the current framework of income taxation). To date, Congress also has declined to reform the new-basis-at-death rule for capital assets or to reduce the gift and estate tax exclusion amounts.

[236] Another critic of inheritance law's contribution to wealth inequality proposes a framework of non-tax reforms to mitigate the wealth distribution disparity. Like other proposals, it has yet to gain traction. *See* Felix Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73 (2018).

[237] *See* Internal Revenue Service, Statistics of Income – Income from Estates and Trusts, *Fiduciary Returns -Sources of Income, Deductions, and Tax Liability, by Tax Status and Size of Gross Income*, Table 2014, irs.gov/statistics/soi-tax-stats-fiduciary-returns-sources-of-income-deductions-and-tax-liability-tax-status-and-size-of-gross-income (last visited Jan. 20, 2022). Tax returns filed in 2014 reported a combined deduction of $5.3 billion in fiduciary fees. *Id.*

The combined reported income for all trusts and estates has increased over time. In 1998, fiduciaries reported income of $92.5 billion. *Id.* at Table 1998. That amount grew to $141.6 billion in 2014, the most recent year for which the Internal Revenue Service has published Form 1041 statistical data.

[238] *See id.*

[239] *See* Internal Revenue Service, Form 1041, irs.gov/pub/irs-pdf/f1041.pdf (last visited Jan. 20, 2022).

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by their settlors individually, rather than by the trustee on a fiduciary income tax return.[240]

Combined with wealth transfer tax changes[241] and perpetuities "reform," alteration of long-term trusts affects the wealth gap because it makes it possible for dynastic wealth to grow inside trusts that evade or, at a minimum, protect against predators (including taxes, greedy family members, and incompetent management or use). Through the use of long-term trusts, the wealth gap will grow wider and deeper,[242] which exacerbates the dead hand paradox: these opportunities insulate and perpetuate settlor intent, by curing flawed planning and adapting to changing circumstances.[243]

Once upon a time, dilution of wealth occurred "naturally" due to inheritance and improvidence. Wealthy decedents would distribute their estates among several blood lines of descendants, followed by the death of those descendants, who similarly further fragmented the wealth. In addition, some beneficiaries were spendthrifts who squandered their inheritance, so "nature" did what the wealth transfer taxes do not. Today the "natural" fragmentation does not occur at the same rate as once was the case, due to significant reduction of the wealth transfer tax and alteration of the Rule Against Perpetuities, and even more recently because of alteration of trusts to fix their problems and extend their duration.

Moreover, even if regulation could fragment wealth among beneficiaries, such reforms would do nothing to retard wealth accumulation under the control of elite fiduciaries who manage that wealth. The number of beneficiaries that these fiduciaries serve increases exponentially, with each generation of trust beneficiaries begetting more beneficiaries, as Lawrence Waggoner explains:

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[240] A settlor who retains the power to revoke is treated as the owner of the revocable trust corpus for federal income tax purposes. 26 U.S.C. § 676. Income derived from a revocable trust is attributed for income tax purposes to the settlor rather than to the trust. *Id.* § 671.

[241] The wealth transfer taxes were enacted to fragment large holdings of wealth. *See, e.g.*, James Repetti, *Should We Tax the Gratuitous Transfer of Wealth? An Introduction*, 57 B.C. L. REV. 815, 816 (2016). In the main they are not successful in that regard. The generation-skipping transfer tax is designed to tax wealth that escapes the estate tax but, to date, this has not been successful, either. In over 30 years (40, considering the original generation-skipping transfer tax, enacted in 1976 and then replaced in 1986), there has not been a single case addressing a substantive issue under this tax. Every decided case to date has involved the chronological exemption, and trusts that will extend many more generations into the future without tax. Maybe the generation-skipping transfer tax will prove to be a success over several more decades, but it hasn't yet.

[242] In a sense, all the stars are aligned – which seems to be the message of the wealth tax advocates – that an income tax on accumulated wealth is needed. However, the current proposals to tax wealth are not administrable and raise constitutional concerns as well.

[243] A revision of the new-basis-at-death rule might take a bite out of dynastic wealth, but various proposals considered to date either will not be enacted (e.g. realization at death) or they won't accomplish their intended purpose (carryover-of-basis is effective only to the extent that beneficiaries sell appreciated assets – which frequently will not occur with a closely held business that generated the wealth).

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> Some 150 years since its creation, a . . . perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries; after 350 years, about 114,500 living beneficiaries. This means that . . . Wembley Stadium would not be large enough to hold them all. Nor, in America, would the Rose Bowl or any other sports stadium. The beneficiaries would have to book Rungrado May Day Stadium in Pyongyang, North Korea or Salt Lake Stadium in Kolkata, India for a meeting.[244]

But this cadre of beneficiaries does not reduce the influence of well-managed trustees. Rather, fiduciary administration can be routinized and communication can be automated in ways that minimize the toll of human interaction. Successful fiduciaries will thrive as they marshal and manage more accumulated wealth. The chasm between ordinary citizens and mega-wealthy individuals and the fiduciaries that serve them will get deeper and wider. And the aristocracy of wealth, and its influence on politics and public policy, will be exacerbated. Trust alterations that permit the vehicles of wealth to adapt and work better than ever before only serve to fuel this concentration of wealth.

Will anything alter this trend? By all appearances, Congress lacks the will to enact rules that could minimize wealth accumulations, and state legislatures continue to enact laws designed to make their states competitive for settlement of wealth with fiduciaries within their jurisdiction. These realities enhance the paradox between historic disdain and distrust of the dead hand and the law's consistent respect for settlor intent. Some trusted advisors opine that it is folly to create dynasty trusts that could survive for several hundred years, even with the potential for reform.[245] But the demonstrable trend is for clients to engage in long-term trust planning to best protect wealth for future generations.

Trust alteration rules — via both judicial and extrajudicial modification — mostly serve to concentrate wealth rather than accelerate the distribution of capital to living beneficiaries. As we saw in Part I, courts usually do not allow judicial modification of trusts by consent of beneficiaries, a prohibition that has the effect of restricting future generations' inheritances, restraining improvidence and loss of trust assets to the predators that settlors fear. Meanwhile, courts often permit modification of trusts to accomplish the settlor's tax objectives, which tends to concentrate wealth in the hands of trust fiduciaries and prolong the duration of dead hand control. As we saw in Part III, trust decanting statutes permit trust fiduciaries with distributive discretion to refresh the original terms of a trust in ways that may prolong the duration of dead hand control. Thus, trust alteration rules will ensure greater and longer adherence to settlor intent. But trust alteration rules are not primarily responsible for wealth concentration. Although reducing the impact of trust alteration rules in some manner might lessen concentrations of wealth, such reforms are not likely to reduce wealth inequality in an efficient, effective, or desirable way.

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[244] Lawrence Waggoner, *US Perpetual Trusts*, 127 L. REV. Q. 423, 426 (2011).
[245] *See, e.g.,* id.

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The earliest perpetual trusts are now in only their second or third decade of existence, so it is too early to know how trust alteration rules will enable courts and fiduciaries to adapt long-term trusts as the number of beneficiaries multiplies into hundreds, thousands, or hundreds of thousands of currently unborn descendants. It would be impossible, if not cost prohibitive, for fiduciaries to devote the time and effort necessary to properly exercise distributive discretion on behalf of such vast populations of future trust beneficiaries. Although trusts may be terminated if "the value of the trust property is insufficient to justify the cost of administration,"[246] termination could also be cost-prohibitive if fiduciaries must identify and compute the interests of thousands of resulting trust beneficiaries, each entitled to a share in the final distribution of the trust corpus. In the far distant future, might the impracticality of both administering and terminating perpetual trusts entice courts and fiduciaries to invoke trust alteration rules to convert unwieldy vestiges of settlor intent into charitable trusts that do not require a "definite or definitely ascertainable beneficiary"?[247]

Empirical analysis is beyond the scope of this Article, but the great magnitude of property held in trust compels us, at a minimum, to consider whether current trust alteration rules consolidate the grip of dead hand control. If, as legal scholars and economists contend, trusts of exceptionally long duration lead to high concentrations of wealth, then the impact of trust modification rules on dead hand control should factor into any discussions about trust law reforms.

CONCLUSION

This Article surveyed recent developments in judicial modification (unanimous beneficiary consent, unanticipated circumstances, settlor's tax objectives, cy pres) and extrajudicial modification (trust decanting power). Over the last thirty years, these trust alteration rules have evolved from staid doctrines of common law to an increasingly sophisticated body of statutory law. That emerging sophistication has responded to a growing desire for trust adaptability, coinciding with the rise of perpetual trusts and the booming managerial trust industry. The trust form is widely regarded by high-net-worth settlors as an effective tool for dynastic estate planning, especially because the adaptability of trust law can accomplish the long-term goals of intergenerational wealth protection and transmission. Trust alteration rules play a crucial rule in facilitating that adaptability because, under the dead hand paradox, settlor-imposed restrictions tend to lose durability in the long run unless courts or fiduciaries are empowered to alter those restrictions as they obsolesce.

The modern trend of law reform has mostly liberalized the alteration of trusts, both by extrajudicial decanting and by court approval. In liberalizing this alteration, courts have reflected fidelity to settlor intent and reaffirmed the power of dead hand control. Thus, traditional trust doctrine still privileges dead hand control over the

[246] UTC § 414(b).
[247] RESTATEMENT (THIRD) OF TRUSTS § 28, cmt c (2003).

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contrary preferences of living beneficiaries, because the modern suite of trust alteration rules looks to the settlor's material trust purposes to answer the question of when and how to modify a trust. Seldom does the liberalization of trust alteration rules have the effect of loosening the grip of dead hand control.

Sometimes, however, trust modification can accommodate a beneficiary's immediate and acute need for resources (such as can occur if a beneficiary is stricken by a catastrophic injury or serious chronic illness), either by accelerating distributions from the trust or by reforming the beneficiary's interest to provide supplemental support while preserving eligibility for public benefits. But, in other contexts, even in jurisdictions that have liberalized the trust alteration rules by statute, some courts remain zealously committed to honoring settlor intent and have imposed very high standards for modifying a trust. The impact of those decisions often prolongs dead hand control and concentrates wealth in the hands of trust fiduciaries.

On the whole, the modern law of trust alteration reinforces settlor intent as the cardinal principle of trust law in ways that usually enhance the durability of dead hand control, as already amplified by abrogation of the Rule Against Perpetuities. By design, the utilization of trusts by affluent settlors concentrates wealth in the hands of fiduciaries who are responsible for managing wealth long after the settlor's death. Intergenerational wealth transmission plays a key role in maintaining disparities of wealth distribution across society. Although the extent of that effect is beyond current measure, it is clear that trust law, and the dynastic estate planning that it facilitates, plays a role in wealth inequality, and trust alteration rules will only amplify rather than mitigate that effect. Because, in most cases, trust alteration rules strengthen and prolong dead hand control by reinforcing the primacy of settlor intent.

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