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TRUST TERM EXTENSION

Reid Kress Weisbord[*]

Abstract

Over the last thirty years, most jurisdictions in the United States have repealed or abrogated the Rule Against Perpetuities, which prohibits perpetual donor control over property. This, in turn, has led estate planning practitioners to consider whether a trust created to comply with the Rule could, after the Rule's repeal, be extended in perpetuity to provide for future generations of the settlor's descendants upon petition of the trustee. Trust term extension in this context implicates fundamental questions about the purpose of a trust: For whose benefit—the beneficiaries', the settlor's, or the trustee/fiduciary's—does the trust exist? This Article argues that the purpose of a private donative trust is to benefit beneficiaries selected by the settlor and that perpetual trust conversions are inconsistent with this purpose because they impair the interests of existing beneficiaries by converting remainder interests into less valuable life interests. Financial institutions serving as corporate fiduciaries, however, would further their own pecuniary interests by seeking perpetual trust conversions that extend the duration of commissions charged to the trust for performing administrative and managerial services. The possibility of trust term extension, therefore, not only implicates problems associated with dead hand control of property, but it also creates the potential for tension between corporate trustees and beneficiaries selected by the settlor. This Article, the first to examine the topic of trust term extension critically, argues that courts should reject trustee-proposed perpetual trust conversions for at least two reasons. First, modification should not be granted for the benefit of the fiduciary, particularly at a beneficiary's expense. Second, an important recent trend in trust law has sought to favor the rights of living beneficiaries over a settlor's right to exercise dead hand control over trust property, so evidence of what the settlor would have wanted but for the Rule should therefore not override vested beneficial interests.

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INTRODUCTION

Trust law and the broader legal framework governing wealth transfers in the United States have been pulled in opposing directions. On one hand, dead hand control has tightened its grip. Donor-friendly reforms include a widespread retreat from the Rule Against Perpetuities that expands the permissible duration of donor control over private gratuitous transfers and significant federal wealth transfer tax reforms that sweeten the donor's financial incentives to exercise that control. On the other hand, a different current of trust law reform has marked a modest shift in the balance of power away from the donor's dead hand in favor of living beneficiaries. Donor-constraining reforms include exceptions to spendthrift trust protections, a lowering of the threshold for trustee removal, and an expansion of doctrines permitting trust modification and termination. These divergent trends reflect tension in trust law between the settlor's right to exercise control over gifted property and the interests of beneficiaries for whose benefit the trust was created.[1] This Article examines an important aspect of this tension—trust term extension. That is, could the duration of a trust settled in a jurisdiction governed by the Rule Against Perpetuities be extended indefinitely after the jurisdiction's repeal of the Rule Against Perpetuities?[2] If so, the dead hand would seem to prevail over existing beneficiaries who would take in fee simple had the trust's duration remained within the term contemplated by the original trust instrument. Would trust term extension, particularly when proposed by the trustee, be consistent with the underlying intent-fulfilling purposes of private donative trusts and, if so, would it actually serve to further the settlor's interest in the trust? Or might this practice add another tension to the mix—a new source of conflict between fiduciaries and beneficiaries?

This Article envisions a plausible situation in which an irrevocable trust is settled in a jurisdiction governed by the Rule Against Perpetuities and the settlor, in preliminary discussions with estate planning counsel, states that her primary objective is to convey property in trust for the benefit of several generations of descendants, both born and unborn. Counsel, however, advises the settlor that the Rule Against Perpetuities would invalidate the interests of distant unborn descendants because, at the time of the trust's creation, those interests would not be certain to vest or fail to vest within the governing perpetuities period. As a result, following the advice of counsel, the settlor executes a trust instrument complying with the Rule: instead of creating beneficial interests spanning several future

1. For an example of this tension, compare UNIF. TRUST CODE § 404 (2010) ("A trust and its terms must be for the benefit of its beneficiaries."), with *id.* § 412(a) (authorizing modification of a trust by court order under certain circumstances, but noting "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention"). For scholarship on the debate about whether to allow or contain dead hand control, compare Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1257–64 (1985) (discussing the two basic arguments undergirding objections to dead hand control), with Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992) (discussing traditional justifications for preserving testamentary freedom), and Scott Andrew Shepard, *Which the Deader Hand? A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules*, 86 TUL. L. REV. 559 (2012) (criticizing arguments in favor of reviving the rule against perpetuities and offering alternative solutions to dead hand control).

2. For an overview of the Rule Against Perpetuities, see *infra* Part I.

generations of unborn descendants as the settlor would have liked, the executed trust limits its duration to only two generations below the settlor. If, after the settlor's death, the relevant jurisdiction repeals or abrogates its Rule Against Perpetuities, could the trustee then petition for modification that would extend the trust's duration beyond the perpetuities period in effect on the date of conveyance and add new generations of the settlor's descendants as beneficiaries? Could a trust with existing residuary beneficiaries be converted into a trust of perpetual duration that provides additional asset protection for incumbent beneficiaries and new income or remainder interests for the benefit of the settlor's unborn or later-born descendants?[3]

Practitioners have explored the idea of extending a trust's duration beyond its original perpetuities period through the use of an estate planning technique known as "trust decanting."[4] As originally conceived, this technique allowed the trustee to freshen a stale trust instrument by pouring all assets, distributable at the trustee's discretion, into a new trust with the same beneficiaries while updating obsolete administrative and distributive terms.[5] This Article considers the possibility that trustees may attempt to take the bolder step of seeking modification to extend a trust's duration in perpetuity and create new beneficial interests for descendants of the settlor that were not named in the original instrument. Citing settlor intent, a trustee might argue that, had the settlor anticipated the Rule Against Perpetuities' repeal, he would have wanted to extend the duration of the trust's asset protection features and create beneficial interests for future unborn generations.

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3. Or, alternatively, what if the original trust provided that it should last for as long as the law would allow?

4. *See* Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 166 (2012) ("[E]xercising the authority to decant the trust to extend its duration beyond the GST rule against perpetuities would not appear to have an adverse effect on a trust exempt by reason of an allocation of GST exemption."); William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 25–26 (2010) ("[I]t may be possible to extend a [zero inclusion ratio] trust in a manner that would violate the [GST tax] regulatory safe harbors, such as by decanting the trust property to a perpetual or dynasty trust in a state that has repealed the traditional rule against perpetuities.").

5. *See* William R. Culp, Jr. & Briani L. Bennett, *Use of Trust Decanting to Extend the Term of Irrevocable Trusts*, EST. PLAN., June 2010, at 1, 3–4 ("Trust decanting generally refers to the distribution of property from one trust to another trust pursuant to a trustee's discretionary power to distribute property to or for the benefit of the trust's beneficiaries. . . . A trustee with discretionary power to distribute property to or for the benefit of one or more beneficiaries . . . should be able to give the current beneficiaries . . . [powers of appointment] under the terms of the second trust that would be the functional equivalent of distributing the property outright to the beneficiaries.").

Under the doctrine of equitable deviation, courts have the power to modify original trust terms or terminate a trust where, "because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[6] The doctrine is commonly understood to *mitigate* dead hand control by authorizing relief from settlor-imposed restrictions where unanticipated circumstances render compliance with existing terms inconsistent with the trust's broader purpose.[7] Settlors cannot opt out of the court's modification power,[8] so the mandatory

6. UNIF. TRUST CODE § 412(a); *see also* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1182 (2013) (noting that the doctrine of equitable deviation permits a court to "modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust" (quoting RESTATEMENT (THIRD) OF TRUSTS § 66(1), at 492 (2003) (internal quotation marks omitted)).

7. *See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 658–59 (2005) ("While [equitable deviation] and other UTC provisions that provide greater flexibility with respect to the modification and termination of trusts were designed to be consistent with 'the principle that the primary objective of trust law is to carry out the settlor's intent,' they lessen the ability of the settlor to control the enjoyment of trust property by its beneficiaries." (footnote omitted) (quoting David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002))); Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 77 (2008) (stating that, in the restricted charitable gift context, "traditional Anglo-American legal doctrine gives two basic ways to remove or modify dead hand control of charitable assets: equitable deviation and *cy pres*"); Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97, 138 (2007) (observing, in the semi-analogous context of dead hand control over charitable assets, that "[t]raditional doctrine gives two basic ways to remove or modify dead hand control of charitable assets: equitable deviation and cy pres") ; John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 423 (2005) (stating that, in the restricted charitable gift context, "[t]he doctrines of cy pres and equitable deviation present a pervasive means by which donees may escape or circumvent the particulars of naming conditions"); John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 729 (2007) (stating that, in the restricted charitable gift context, "[c]y pres and equitable deviation are the primary 'orthodox' routes to dealing with problematic donor restrictions"); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1108 (2005) (stating that, in the restricted charitable gift context, assertion that administrative deviation provides an "avenue[] of legal relief" for a charity to "to free [donor-]restricted funds for other projects and purposes"); Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2241 (2011) ("[M]eans whereby lawmakers restrain the dead hand . . . grant[] courts power to modify estate plans over time."); Hirsch & Wang, *supra* note 1, at 51 (describing trust modification as a means of obtaining "relief" from donor-imposed restrictions); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 607–08 (2005) (describing the expanded formulation of equitable deviation as among the doctrines that grant "beneficiaries and courts more power to terminate or modify trusts" notwithstanding restrictions imposed by the settlor).

8. UNIF. TRUST CODE § 105(b)(4).

availability of modification doctrines limit the dead hand's power to control property in the face of unforeseen events and changed circumstances.[9] But legal scholarship has largely overlooked the doctrine's countervailing potential to *strengthen* dead hand control at the cost of impairing the interests of existing beneficiaries. This Article will consider that potential in the context of trust term extension, where the settlor's failure to anticipate a change in the law—the repeal of the Rule Against Perpetuities—could be offered by the trustee as a reason to expand the reach of the settlor's dead hand.

The factual illustration above implicates a core tension in trust law between settlors and beneficiaries because the interests of existing beneficiaries would be impaired to facilitate what would arguably constitute an expansion of the settlor's objectives. Examining that tension, this Article will evaluate the merits of trust term extension within the larger context of legal reform affecting the scope of dead hand control: the widespread repeal of the Rule Against Perpetuities and, in contrast, recent signs of a retreat away from dead hand control in certain aspects of trust law doctrine. So far, the dead hand appears to have won the upper hand. Although the broader law of trusts has undergone reforms that provide greater protection for beneficiaries, powerful interests support the expansion of dead hand control, including financial institutions that could potentially benefit from additional fees derived from administering perpetual trusts. This Article argues that modification extending the duration of a trust beyond the perpetuities period in effect at the time of conveyance would constitute a misapplication of the doctrine of equitable deviation, and would be inconsistent with a modern trend in trust law of providing greater protection for living trust beneficiaries.

This Article proceeds as follows: Part I surveys the doctrinal ingredients for trust term extension—a wealth transfer law framework shaped by dead hand control and the Rule Against Perpetuities. Part II explores practical considerations that a party, such as the trustee, might weigh in deciding whether to file a petition to extend the duration of an existing trust. Part III examines the doctrine of equitable deviation and its potential application to modify the duration of an irrevocably settled trust. Part IV considers the issue of trust term extension within the larger context of legal reform governing dead hand control of property, assesses its potential for misuse by corporate fiduciaries, and offers recommendations for law reform.

9. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 687 (9th ed. 2013) (explaining that the doctrine of equitable deviation, as a doctrine permitting a court to modify or terminate a trust, may represent a limit on a settlor's freedom of disposition "and therefore the reach of the dead hand").

I. Dead Hand Control and the Rule Against Perpetuities

Although debate about the permissible duration of dead hand control has stewed for centuries,[10] it continues to attract attention from leading property law scholars and policy makers today.[11] Advocates of dead hand control argue that principles of testamentary freedom vest the donor with power to dictate the future use of property and that, when exercised, dead hand control tends to manifest in the form of legitimate "principal-preserving" and "gate-keeping" objectives to protect future distributions—neither of which have a pernicious effect on society.[12] Opponents of dead hand control argue that: (1) perpetual or long-term dead hand control often creates inflexible restrictions that fail to account for a change of circumstances, thereby impairing the usefulness and value of property subject to the deceased donor's lingering restrictions;[13] (2) on average, the settlor's descendants tend to balloon in population with the passage of time, creating the possibility of tens of thousands of beneficiaries and an unmanageable administrative task for the trustee;[14] and (3) even when restrictions are sufficiently flexible, as a normative proposition, scholars have argued that dead hand control should be curtailed because it exacerbates the unequal distribution of resources in society by concentrating wealth and creating stasis within the upper class.[15]

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10. *See* Hirsch & Wang, *supra* note 1, at 17 & n.63 (citing critics of dead hand control, including Adam Smith, dating back to the seventeenth century).

11. *Compare* Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 4–10 (Law & Econ. Research Paper Series, Working Paper No. 13-007, 2013), *available at* http://www.ssrn.com/abstract=1975117 (arguing that, if settlors were to contemplate the sheer volume of future beneficiaries numbering in the hundreds of thousands, they might not be inclined to create a perpetual trust), *with* Shepard, *supra* note 1, at 605 (arguing that concern over dynastic wealth is not a problem best addressed by dictating the permissible duration of dead hand control, but rather by tax policy governing the transfer of wealth).

12. Shepard, *supra* note 1, at 591 ("[C]ontrol exerted by the modern dead-hand proves mostly beneficial, or at least neutral.").

13. *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers ch. 27, intro. note, at 549 (2010) (noting that "[t]he policy [of the rule against perpetuities] was this: given that one can, to a limited extent only, foresee the future and the problems it will generate, landowners should not be allowed to tie up lands for periods outside the range of reasonable foresight." (quoting A.W.B. Simpson, Legal Theory and Legal History 159–60 (1987))).

14. Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* 18–20 (Law & Econ. Research Paper Series, Working Paper No. 13-015, 2013), *available at* http://www.ssrn.com/abstract=2326524.

15. For example, Professor Lewis Simes argued:

> It is socially desirable that the wealth of the world be controlled by its living members and not by the dead. I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when

For centuries, Anglo-American law balanced these concerns through the imposition of a Rule Against Perpetuities that curtailed dead hand control by limiting the permissible duration of restrictions governing the use or enjoyment of property transferred to a private, noncharitable donee.[16] Originating in seventeenth-century England,[17] the Rule invalidates contingent future interests in property that are uncertain to vest (or fail to vest) "not later than twenty-one years after some life in being at the creation of the interest."[18] Under the Rule, the interest of a person unborn or unascertained at the time of conveyance is contingent upon that person being born or ascertained.[19] For property held in trust, the Rule limits the number of successive generations the settlor may include as beneficiaries because, at the time of the trust's creation, remote generations are unborn or unascertained and, therefore, their interests are not certain to vest within a life in being plus twenty-one years.[20] The Rule has been incorporated

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> he said: "The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please during their usufruct."

LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 59 (1955) (footnote omitted); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27 intro. note, at 561 ("[T]he perpetual or near-perpetual trust movement could . . . lead to large concentrations of wealth within a relatively small number of family dynasties and financial institutions . . . ."); 6 AMERICAN LAW OF PROPERTY § 26.3, at 412–13 (A. James Casner ed., 1952) (stating that the main social and economic objections to direct restraints on alienation are that the restraints "take the property out of commerce" and tend to "concentrate wealth"); Alexander, *supra* note 1, at 1258 ("[R]eference to the dead hand evokes images of aristocracy and wealth inequality based on feudal-like hierarchy."); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 87 (1990) ("The inescapable conclusion is that society has a major stake in all accumulated wealth. Given that stake, society need not continue to allow decedents nearly unlimited control over the disposition of their property after death."); Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 296 (2009) (noting the "economic" reproach of dead hand control that unrestricted arrangements for the distant future are "likely to result in an inefficient use of resources brought about by unforeseen contingencies" (internal quotation marks omitted)).

16. *See* JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 2.1, at 4 (Roland Gray ed., 4th ed. 1942) ("The system of rules disallowing restraints on alienation and the Rule [A]gainst Perpetuities are the two modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote."); *id.* § 4, at 4 (providing that the Rule Against Perpetuities "is the law limiting the time within which future interests can be created"); Harding, *supra* note 15, at 296–97. The limitation contains an exception for "a trust or other donative disposition of property solely for charitable purposes." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.3(2), at 604.

17. Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 229 (2011) ("The Rule derives from the *Duke of Norfolk's Case*, decided by the Court of Chancery in 1682.").

18. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 166 (2d ed. 1906).

19. For a lucid and concise illustration of how the Rule Against Perpetuities limits the duration of donor control, see Gallanis, *supra* note 17, at 229–30.

20. *See* Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L.

expressly into the law of trusts, which requires the settlor to select beneficiaries who can be identified or ascertained "within the period and terms of the rule against perpetuities."[21] As Professor Ray Madoff explains, "[t]he theory of the Rule is that a person should be able to impose restrictions only on people whom he or she knows plus the period of minority for the next immediate generation."[22]

Over the last thirty years, however, most jurisdictions in the United States abrogated or repealed the Rule Against Perpetuities by statute to permit perpetual or near-perpetual trusts.[23] This Article is the first to examine critically the implications of repeal for trusts that were created while the Rule remained in effect. If a state previously prohibited but now allows for perpetual dead hand control, should that allowance apply to trusts settled before the Rule's repeal? If it is known that the settlor would have wanted a trust to last forever, should the law allow the trustee to petition for an extension of the trust's duration in perpetuity? It is important to consider these questions for several reasons. First, the law of trusts must address whether the settlor's freedom of disposition includes the trustee's right to seek perpetual extension of an existing trust after the settlor's death. Second, jurisdictions that have repealed or abrogated the Rule Against Perpetuities must consider whether doctrines of trust law should enable retroactive application of the Rule's repeal where retroactivity might not have been intended by the legislature as part of its repeal legislation. Third, in states where the Rule remains in effect, legislatures presented with proposals to repeal the Rule should carefully consider the implications for existing trusts and the conflict of interest faced by trustees in seeking to extend the duration of a trust on behalf of a deceased settlor.

II. PRACTICAL CONSIDERATIONS AFFECTING THE DECISION TO SEEK TRUST TERM EXTENSION

This Part surveys some of the practical considerations that might affect a trustee's decision to seek modification extending the duration of a trust. Those considerations include: (a) the settlor's intent and purposes for

REV. 501, 502–03 (2006) [hereinafter Sitkoff, *The Lurking Rule*].

21. RESTATEMENT (THIRD) OF TRUSTS § 44, at 195 (2003) ("A trust is not created, or if created will not continue, unless the terms of the trust provide a beneficiary who is ascertainable at the time or who may later become ascertainable within the period and terms of the rule against perpetuities."); *accord* UNIF. TRUST CODE § 402 (2010) (providing that "[a] trust is created only if . . . the trust has a definite beneficiary" and that "[a] beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities").

22. RAY D. MADOFF, IMMORTALITY AND THE LAW 77 (2010).

23. Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1294 & n.9 (2013) (noting that the Rule "suddenly fell victim to a frenzy of legislative repeal after 1986 as state legislatures rushed to authorize perpetual trusts"); *see infra* Section IV.A.

creating the trust; (b) retroactive applicability of the state's repeal of the Rule Against Perpetuities; (c) transfer tax implications of term extension and the creation of new beneficiaries; (d) limitations imposed by the *Bankruptcy Code* and state fraudulent transfer laws; and (e) the trustee's potential conflict of interest in postponing the trust's termination.

A. *Settlor's Intent*

The settlor's intent should be the starting point for any inquiry into the possibility of trust term extension.[24] A party seeking to extend the term of a trust—in many cases, the trustee—might assert various justifications for modification based on the settlor's material purpose for creating the trust:[25] Perhaps clear evidence exists to show that the settlor intended to create a perpetual trust, but she was dissuaded from doing so by counsel's advice regarding the Rule Against Perpetuities. Perhaps the settlor was adamant about protecting trust assets from the beneficiaries' creditors through the repose of discretion in the trustee and the restraint on alienation imposed by a spendthrift provision. Perhaps the settlor created the trust to facilitate trustee supervision of the beneficiaries' needs, a purpose inconsistent with outright distribution of the trust corpus to remainder beneficiaries. Perhaps, since empirical research suggests that most perpetual trusts are motivated by tax considerations,[26] the settlor wanted to delay the trust's termination indefinitely to avoid subjecting property to estate and gift taxes imposed on transfers by future generations. Perhaps evidence of a settlor's intent to create a dynasty trust[27] might be found in a "Kennedy Clause," which

24. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1, at 276 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention.").

25. This Article does not address a trust providing expressly for as many generations of descendants as the law allows because such a trust would not have to be modified to provide for future generations and its enforceability would depend simply on the jurisdiction's retroactive application of the Rule Against Perpetuities' repeal. *See infra* Section II.B.

26. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 362 (2005); *see infra* Section IV.A.

27. Commenting on why settlors might choose to establish a dynasty trust, Professor Joshua Tate observes:

> While most settlors certainly want to pass tax savings down to their descendants, that is not the only apparent goal: settlors also wish to protect their wealth from being wasted and to encourage their descendants to be productive members of society. Moreover, although it may be true that most settlors do not care about their unborn descendants, some of them might, and those who do probably want their spendthrift provisions and restrictions on the use of funds to continue indefinitely.

practitioners use to maximize a trust's duration.[28] For these reasons and perhaps others, the idea of using trust decanting to create a perpetual trust has surfaced among practitioners.[29]

B. *Retroactive Repeal of the Rule Against Perpetuities*

The legality of extending a trust's duration beyond the perpetuities period in effect at the time of conveyance may depend in large part on whether the trust's jurisdiction limits retroactive application of the Rule Against Perpetuities' repeal. In some states, repeal applies only to property interests created after the effective date of the repeal statute.[30] In those states, the statutory limitation on retroactive application of repeal would seem to preclude a court from extending a trust beyond the perpetuities period because the beneficial interests, however modified, would have arisen under the old trust created before the repeal statute's effective date. But it is also possible that a court could apply common law or statutory doctrines of "trust decanting" to create a new trust bypassing the effective

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Tate, *supra* note 7, at 620. On the other hand, in states that repealed the Rule Against Perpetuities before Congress enacted the generation skipping transfer tax (GST tax), *see infra* Section II.C., the response by settlors was not overwhelmingly enthusiastic:

> Before 1986, three states—Wisconsin, South Dakota, and Idaho—had abolished the Rule by statute or had never adopted the Rule in the first place, but it appears that transferors had little desire to take advantage of the absence of a Rule in those states in order to establish perpetual trusts for their descendants from time to time living forever.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27, intro. note, at 554 (2010).

28. A Kennedy Clause is an estate planning technique used to extend the duration of a trust in jurisdictions governed by the Rule Against Perpetuities. For purposes of trust termination under the Rule Against Perpetuities, a Kennedy Clause adopts an extraneous person, such as the last to die of all descendants of Joseph P. Kennedy, as the measuring life. *See, e.g.*, Jesse Dukeminier, *Dynasty Trusts: Sheltering Descendants from Transfer Taxes*, 23 EST. PLAN. 417, 419 (1996).

29. *See, e.g.*, Blattmachr et al., *supra* note 4, at 166 ("[E]xercising the authority to decant the trust to extend its duration beyond the GST rule against perpetuities would not appear to have an adverse effect on a trust exempt by reason of an allocation of GST exemption."); Culp & Mellen, *supra* note 4, at 26 ("[I]t may be possible to extend a [zero inclusion ratio] trust in a manner that would violate the [GST tax] regulatory safe harbors, such as by decanting the trust property to a perpetual or dynasty trust in a state that has repealed the traditional rule against perpetuities."); Culp & Bennett, *supra* note 5, at 3 ("A trust decanting statute that is coupled with a statutory repeal of the rule against perpetuities potentially provides a powerful mechanism to extend the term of irrevocable trusts. . . . [I]t may be possible to extend the life of irrevocable trusts beyond the term traditionally allowed by the common law rule against perpetuities.").

30. *See, e.g.*, ALASKA STAT. § 34.27.070 (2014).

date of the Rule's repeal.[31] In other states, however, repeal of the Rule applies to *all* trusts "whenever created."[32] In those states, the effective date of the repeal statute would not prevent modification extending the trust's duration beyond the perpetuities period in effect on the date of conveyance.

C. *Transfer Tax Implications*

Modification of a trust's duration or beneficial interests can have transfer tax consequences, some of which could militate against trust term extension. At the federal level, excise taxes are imposed on the transfer of wealth during life (the gift tax),[33] at death (the estate tax),[34] and additionally, on wealth transfers skipping one or more generations (the generation skipping transfer tax, also known as the "GST tax").[35] Modification of existing beneficial interests may be treated for tax purposes as a fresh transfer that can in turn give rise to adverse tax treatment for either the property held in trust or the beneficiaries.

The Gift Tax. Adverse gift tax implications can arise when a modification of trust terms creates beneficial interests for new beneficiaries at the cost of impairing existing interests of incumbent beneficiaries. The cost borne by the incumbent beneficiary and the corresponding benefit to the new beneficiary could be treated as a transfer of property by gift from the incumbent beneficiary to the new beneficiary, thereby subjecting the incumbent beneficiary to gift tax liability.[36] However, gift tax liability may be avoidable if the existing beneficiary is not also the trustee seeking modification and the existing beneficiary objects to the modification.[37] The inquiry would focus on whether the incumbent beneficiary has exercised sufficient control over the property such that the incumbent beneficiary has

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31. *See generally* Culp & Bennett, *supra* note 5 (discussing the use of trust decanting to extend the terms of irrevocable trusts).

32. *See, e.g.*, 76 Del. Laws 101 (2008) (repealing the Rule Against Perpetuities by way of an amendment to DEL. CODE ANN. Tit. 25, § 503, making the amendment effective for all "trusts whenever created").

33. I.R.C. § 2501 (2012).

34. *Id*. § 2001(a).

35. *Id*. § 2601. For an overview of the GST tax, see *infra* Section IV.A.

36. *See* Culp & Mellen, *supra* note 4, at 26.

37. *Cf. id.* at 26–29 ("[A] trustee's exercise of a decanting power should not raise gift tax issues unless either: (1) the trustee exercising the power to decant is a beneficiary; or (2) a beneficiary's consent is required to exercise the trustee's power to decant." (footnote omitted)). A court-ordered trust term extension would not appear to trigger the "Delaware Tax Trap," an arcane provision of the gift tax governing the exercise of powers of appointment postponing the vesting of a property interest because the provision applies only to powers of appointment, not modifications pursuant to a court order. *See* I.R.C. § 2514(d); Treas. Reg. § 25.2514-1(b) (2013) (defining "power of appointment"). For a more detailed explanation of the Delaware Tax Trap, see generally Culp & Bennett, *supra* note 5, at 9–10.

effectively given away his own property interest.[38] If the incumbent beneficiary were also the trustee, then the decision to extend the trust's duration would constitute an exercise of control, which in turn, might be treated as a gift to the new beneficiaries.[39] An incumbent beneficiary's consent to modification by a third party trustee might also reflect some exercise of control over the trust interest sufficient to constitute a transfer of property by gift.[40]

The Estate Tax. Modification is unlikely to affect the settlor's estate tax liability because the inquiry here is confined to an irrevocable trust created by a deceased settlor.[41] Posthumous amendment to an irrevocably settled trust does not affect the amount of property that has already passed from a settlor at death so, ordinarily, there would be no need to reopen a finalized estate tax return in light of this type of modification.[42]

The GST Tax. Adverse GST tax implications can arise for irrevocable trusts created on or before September 25, 1985, the effective date of the GST tax.[43] When Congress enacted the GST tax, the Treasury Department promulgated regulations categorically exempting trusts that became irrevocable before the GST tax's effective date.[44] A GST tax-exempt trust, however, loses its exempt status upon judicial modification that: (1) shifts a beneficial interest to a person occupying a lower generation than the original beneficiary; or (2) extends "the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust."[45] This rule would be a significant consideration for a party seeking trust term extension because, under the illustration contemplated above, modification of the trust would add beneficiaries occupying a lower generation than the original beneficiaries and extend the time for the vesting of interests. Distributions from the modified trust would therefore likely be subject to the GST tax. The first $5.34 million of post-1985 generation-skipping transfers are subject to a separate exemption under 26 U.S.C. § 2631 (as of

38. *See* Robert B. Smith, *Reconsidering the Taxation of Life Insurance Proceeds Through the Lens of Current Estate Planning*, 15 VA. TAX REV. 283, 307 n.93 (1995) ("To avoid subjecting the beneficiary to gift tax with respect to trust property, however, it is necessary to avoid giving the life beneficiary either a fixed right to any of the trust property or *its income and control over the decision to distribute to any other person any of the trust income or property which is subject to the beneficiary's fixed right*." (emphasis added)).

39. Culp & Mellen, *supra* note 4, at 27–28.

40. *See id.* at 28–29.

41. *See id.* at 26 (noting the limited circumstances under which modification, by way of trust decanting, would give rise to adverse estate tax consequences).

42. *See id.* at 26, 29 ("It is possible for a trust decanting or modification to cause a shift of beneficial interests that is a taxable transfer for gift tax purposes.").

43. Treas. Reg. § 26.2601-1(b)(1)(i) (2013).

44. *Id.* (providing that "[t]he provisions of chapter 13"—i.e., the GST tax—"do not apply to any generation-skipping transfer under a trust . . . that was irrevocable on September 25, 1985").

45. *Id*. § 26.2601-1(b)(4)(i)(D).

2014),[46] but under current regulations, it is unclear whether the settlor's unused GST tax exemption amount could be applied to a modified trust.[47]

Tax consequences for trusts created *after* the GST tax effective date are more benign. For example, a trust created after September 25, 1985, could be entirely or partially exempt from the GST tax if the settlor allocated some or all of her GST tax exemption amount under 26 U.S.C. § 2631 to the trust.[48] The modification rules governing pre-1985 trusts do not apply to post-1985 trusts, so a trust containing property exempt under 26 U.S.C. § 2631 could likely be modified without adverse GST tax consequences.[49] Thus, the trust would be no worse off due to the modification because the exemption under 26 U.S.C. § 2631 would apply either way.

D. *Bankruptcy and Fraudulent Transfer Law*

A party petitioning for modification to a trust that would adversely affect the vested interest of a beneficiary who is insolvent, nearly insolvent, or bankrupt should proceed with extreme caution. Under the *Bankruptcy Code*, the beneficiary's vested interest in the trust would most likely be the property of the beneficiary's bankruptcy estate unless an exception applies,[50] so a bankruptcy trustee will likely object to any attempt to

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46. Note the distinction between a GST tax-exempt trust, which is categorically exempt from the GST tax because it was created before the statute's effective date, and the GST exemption, which excludes from the GST tax the first $5.34 million (as of 2014) of generation-skipping transfers made by the settlor after the statute's effective date. I.R.C. § 2010(c)(3) (2012) (providing that the GST tax exemption amount is $5 million plus inflation for any decedent dying after 2011); *Frequently Asked Questions on New Tax Rules for Executors*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Frequently-Asked-Questions-on-New-Tax-Rules-for-Executors#24 (last visited Nov. 4, 2014) ("Under current legislation, the applicable exclusion amount for estates and generation-skipping transfers . . . . for 2014 is $5,340,000.").

47. *See* Culp & Mellen, *supra* note 4, at 22.

48. I.R.C. §§ 2631–32.

49. *See* Culp & Mellen, *supra* note 4, at 25–26 & n.159.

50. *See* 11 U.S.C. § 541(a)(1) (2012) (providing that "all legal or equitable interests of the debtor in property as of the commencement of the case" becomes property of the bankruptcy estate). Note, however, that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable" under the *Bankruptcy Code*. *Id*. § 541(c)(2); *see also* Wetzel v. Regions Bank, 649 F.3d 831, 835 (8th Cir. 2011) (noting that under both applicable federal and state law, the beneficiary's interest in the net income of a trust would be property of the bankruptcy estate "unless an exception applies" and that "[o]ne such exception is described in § 541(c)(2)," which provides that an enforceable restriction on the transfer interest of a beneficial interest of the debtor in trust is also enforceable under bankruptcy law). Therefore, pursuant to § 541(c)(2), if a trust restricts the transfer of a debtor-beneficiary's interest in the distributions of net income from the trust, and such restriction is enforceable under applicable law, then the beneficiary's "interest in the distributions of net income from [the trust] is not property of [the beneficiary's] bankruptcy estate." *Wetzel*, 649 F.3d at 835; *see also* Gladwell v. Harline (*In re* Harline), 950 F.2d 669, 670 (10th Cir. 1991) ("Section 541 of the Bankruptcy Code, 11 U.S.C.

modify the trust in state court as a willful violation of the automatic stay of proceedings with regard to the property interests of the beneficiary-qua-debtor.[51] An attempt by the trust's trustee to further insulate the beneficiary's interest in the trust by extending asset protection features, such as the repose of discretion in the trustee or spendthrift protection,[52] may be viewed by the bankruptcy trustee as an attempt to hinder the creditor's collection of assets in bankruptcy. Willful violation of the automatic stay can give rise to punitive damages.[53] The bankruptcy trustee may also seek to set aside transfers of property interests up to two years before the debtor's bankruptcy petition if, in conjunction with one of four statutorily proscribed conditions,[54] "the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer or obligation."[55] The look-back period is ten years for certain transfers made by the debtor "with actual intent to hinder, delay, or defraud."[56] Where the beneficiary-qua-debtor has acted with intent to defraud or is otherwise unable to explain satisfactorily a loss of assets, the bankruptcy court may deny the debtor a discharge in bankruptcy.[57] Outside of bankruptcy, a court could set aside a modification that would diminish or impair the vested interest of an insolvent (or soon-to-be-insolvent) beneficiary under state-level fraudulent transfer statutes.[58] Thus, to the extent that trust term extension would interfere with pending or potential creditor claims, the ability to modify the trust may be severely constrained.

E. *The Trustee's Potential Conflict of Interest*

A trustee may have a conflict of interest in seeking to extend the duration of a trust beyond its natural termination. For example, a trustee receiving fees or commissions for its service during the life of the trust would have a financial stake in postponing the trust's termination indefinitely because termination of the trust would result in cessation of the

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§ 541, includes in the bankruptcy estate essentially all beneficial ownership interests of a debtor unless the interest contains '[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law*.'" (quoting 11 U.S.C. § 541(c)(2)) (alteration in original)).

51. *See* 11 U.S.C. § 362(a)(3) (stating that an automatic stay precludes "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate").

52. For more on spendthrift protection, see *infra* Subsection IV.B.1.

53. 11 U.S.C. § 362(k)(1).

54. *See id.* § 548(a)(1)(B)(ii)(I)–(IV).

55. *Id*. § 548(a)(1)(B)(i).

56. *Id*. § 548(e)(1).

57. *Id*. § 727(a)(2)–(5).

58. *See, e.g.*, UNIF. FRAUDULENT TRANSFER ACT §§ 4–5 (1984).

trustee's compensation.[59] Of course, pursuit of trust term extension for the purpose of aggrandizing the trustee's own personal gain would be a breach of the fiduciary duty of loyalty,[60] so a disloyal trustee would most likely disguise any improper motivation with pretextual legitimate reasons for seeking trust term extension. This type of conflict of interest is concerning because corporate trustees have been known to engage in litigation to protect the trustee's own fiduciary appointment and compensation, even where such litigation subjects the trust corpus to costs associated with the proceeding and fails to further either the beneficiaries' interests or the settlor's material purpose.[61]

III. TRUST TERM EXTENSION AND THE DOCTRINE OF EQUITABLE DEVIATION

This Part considers whether equitable deviation could be applied to extend the duration of a trust beyond the term imposed by the settlor or the perpetuities period in effect at the time of conveyance for the purpose of

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59. On the other hand, extension of a trust in perpetuity would also expose the trustee to administrative challenges and potential liability:

> Because a trustee acts at peril for mistaken distributions, the trustee must investigate whether a person who claims to be a beneficiary does in fact qualify. If, however, a trust were to have thousands or tens of thousands of potential beneficiaries, centuries removed from the transferor by descent, the task of ascertaining which persons qualify as beneficiaries would become enormously complex and expensive.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27, intro. note, at 558 (2010) (footnote omitted).

60. *See* UNIF. TRUST CODE § 802(a) (2010) ("A trustee shall administer the trust solely in the interests of the beneficiaries.").

61. For example, in *Davis v. U.S. Bank National Ass'n*, 243 S.W.3d 425 (Mo. Ct. App. 2007), the lifetime beneficiary sought removal of a corporate trustee with consent of all qualified beneficiaries. *Id*. at 426. The beneficiary sought removal because the newly proposed trustee was geographically closer to the beneficiaries, was more familiar with the beneficiaries' financial planning objectives, and offered a lower fee schedule than the incumbent trustee. *Id.* at 429. Opposing its removal as trustee, the bank asserted a specious argument that its appointment by the settlor was a material purpose of the trust. *Id*. at 431. The court found the trustee's assertion lacked "any evidentiary support" and ordered the trustee's removal. *Id*. Importantly, although *Davis* did not address whether the trustee could seek reimbursement of its litigation costs from the trust assets, absent a court order to the contrary, reimbursement is generally permitted. For instance, § 709(a) of the *Uniform Trust Code* provides:

> A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for: (1) expenses that were properly incurred in the administration of the trust; and (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

UNIF. TRUST CODE § 709(a).

creating new beneficial interests for future generations of the settlor's descendants not named in the original instrument. Section III.A begins with analysis of the two relevant doctrines: equitable deviation and modification to achieve the settlor's tax objectives. Section III.B considers arguments for and against trust term extension under those doctrines. Section III.C examines recent case law that applies equitable deviation with potential implications in the context of trust term extension.

A. *Equitable Deviation and Modification to Achieve the Settlor's Tax Objectives*

The trust law doctrine of equitable deviation permits modification of an administrative or distributive trust provision where circumstances unanticipated by the settlor arise and modification will further the trust purpose. Section 412(a) of the *Uniform Trust Code* provides:

> The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.[62]

Similarly, § 66 of the *Restatement (Third) of Trusts* provides:

> The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.[63]

The rationale underlying the doctrine of equitable deviation is that if the settlor had been aware of current circumstances, then he would have implemented his intent by selecting different terms.[64] Courts therefore

62. UNIF. TRUST CODE § 412(a).

63. RESTATEMENT (THIRD) OF TRUSTS § 66(1), at 492 (2003).

64. The comments to the *Restatement (Third) of Trusts* explains the doctrine's deference to the settlor's intent:

> [A] court, in granting equitable deviation "is permitting the trustee to do not what the settlor intended to permit . . . but what it thinks the settlor would have permitted if he had known of or anticipated the circumstances that have happened. Even though the settlor has expressly forbidden what the court permits to be done, the theory is that he would not have forbidden it, but on the contrary would have authorized it if he had known of or anticipated the circumstances. In so doing the court is not interpreting the terms of the trust but is permitting a deviation from them in order to carry out the purpose of the trust. If it appears that the settlor did, however, anticipate the circumstances and clearly provided that the trustee should

inquire into the settlor's intent before authorizing modification.[65]

Both modern formulations of equitable deviation, as articulated in the *Uniform Trust Code* and the *Restatement* above, represent a liberalization of the doctrine from its common law origins. An older formulation of the doctrine imposed a higher standard, requiring the petitioner to show that compliance with the challenged restriction would "defeat or substantially impair the accomplishment of the purposes of the trust."[66] The old formulation also restricted relief to modification of only an administrative provision.[67] By contrast, under the modern rule, equitable deviation may be applied where "modification or deviation will further the purposes of the trust,"[68] and the relief may include modification of an administrative or *distributive* provision.[69] Additionally, the party requesting deviation need not obtain the beneficiaries' consent nor prove that circumstances have changed since the trust's creation.[70]

For an illustration of the traditional doctrine, consider the case of *Donnelly v. National Bank of Washington*.[71] In 1939, the decedent

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> nevertheless have no power to act in such a way as to prevent the failure of the trust, it would seem that the court would not be justified in permitting the trustee so to act, unless the provision is against public policy."

Id. § 66 cmt. a, at 499 (alteration in original) (quoting 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 167, at 287–88 (4th ed. 1987)).

65. *See, e.g.*, Smith v. Hallum, 691 S.E.2d 848, 848–50 (Ga. 2010) (denying modification because terminating distributions to beneficiary indicted for aggravated assault and battery would be inconsistent with the settlor's intent to provide treatment for the beneficiary); *In re* Trust D Created Under the Last Will and Testament of Darby, 234 P.3d 793, 798–800 (Kan. 2010) (denying modification because increasing distributions to the petitioner beneficiary would be contrary to the settlor's intent).

66. RESTATEMENT (SECOND) OF TRUSTS § 167(1), at 351 (1959).

67. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a, at 498 ("The commentary to Restatement Second, Trusts § 167 . . . and its Illustrations, as well as the distinct weight of what case authority there is . . . indicate that the rule of 'equitable deviation' applies only to *administrative* provisions.").

68. RESTATEMENT (THIRD) OF TRUSTS § 66(1), at 492; *see also* UNIF. TRUST CODE § 412(a) (2010) (providing that equitable deviation may be applied where "modification or *termination* will further the purposes of the trust" (emphasis added)).

69. RESTATEMENT (THIRD) OF TRUSTS § 66(1), at 492; *see also* UNIF. TRUST CODE § 412(a) ("The court may modify the administrative or dispositive terms of a trust.").

70. RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a, at 498 ("[T]he rule of the Section does not require changed circumstances. It is sufficient that the settlor was unaware of the circumstances in establishing the terms of the trust."); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 662 (2014) [hereinafter Sitkoff, *Implementing Freedom*] (providing that the equitable deviation doctrine is one of two recognized grounds for "judicial modification or termination of a trust without the settlor's consent").

71. 179 P.2d 333 (Wash. 1947). Administrative deviation is rarely invoked to modify a substantive provision, so it is perhaps arguable that the *Donnelly* court extended the doctrine of administrative deviation beyond the context in which it is typically applied.

executed a will establishing a testamentary trust for his grandson to attend college or graduate school with a restriction that annual distributions from the trust would "in no event [continue] beyond December 31, 1945."[72] At the time of the decedent's death in 1940, the grandson was enrolled in a pre-law curriculum at the University of Washington.[73] In 1942, the grandson graduated from college having completed one year of law school course work but was drafted into the U.S. Marine Corps for service in World War II.[74] Upon discharge from active duty in 1946, the grandson sought to resume his law school course work and requested further distributions from the trust.[75] The trustees, citing the 1945 termination date, refused to distribute additional funds.[76] The grandson then filed an action for modification of the trust to postpone termination of the interest until he had completed law school.[77] Applying equitable deviation, the court granted the requested modification:

> Clearly, it was the intention of the settlor that the specified amount be paid to respondent to permit him to finish his law course. The time limit on the payments at the time the will was executed gave to respondent more than enough time to complete his law school studies. The time was limited to December 31, 1945, which time limit detracts in no way from the settlor's purpose toward his beneficiary. That respondent would be compelled to leave his studies for a period in excess of three years to serve in the armed forces of our country was not foreseen by the settlor, nor was any provision made therefor [sic] in the trust instrument. It is unthinkable that a settlor who regarded his grandson as a son would have so restricted the time on the education payments as to prevent the boy, because he was summoned from his school to the armed forces of our country, from completing his education. The only reasonable conclusion is that the settlor neither foresaw World War II nor anticipated that respondent would be required to leave his schooling unfinished and serve for more than three years in the armed forces of his country.[78]

Donnelly presents a straightforward, sensible application of equitable deviation. The settlor's original intent was to provide support for his grandson's education and, perhaps, to encourage his grandson to attain that

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72. *Id.* at 333.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 334.
78. *Id.* at 336.

education sooner rather than later.[79] But the grandson's compulsory service in the military necessarily altered the timing of his education, so the termination provision had the unintended effect of undermining the settlor's original intent. Had the settlor anticipated the beneficiary's induction into the military, he most likely would have set a later termination date allowing the beneficiary to complete his studies.[80] Although decided under the doctrine's old formulation that only allowed administrative modification, *Donnelly* granted modification to the trust's payment instructions and, as such, appears to have anticipated the modern formulation's extension of relief to distributive provisions.

An important doctrinal corollary to equitable deviation is a related rule authorizing modification of a donative instrument to achieve the settlor's tax objectives. Section 416 of the *Uniform Trust Code* 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. The court may provide that the modification has retroactive effect.[81]

Similarly, § 12.2 of the *Restatement (Third) of Property: Wills and Other Donative Transfers* provides:

> A donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives.[82]

This doctrine allows for modification when tax law governing the trust has changed subsequent to the conveyance, or where the instrument, as executed, simply fails to carry out the settlor's probable intent with regard to tax objectives.[83] Thus, like equitable deviation, this doctrine exists to implement the settlor's probable intent.[84] And like the modern formulation of equitable deviation, modification to achieve the settlor's tax objectives may include alteration of an administrative or distributive provision.[85]

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79. *Id.* at 333.

80. *Id.* at 336.

81. UNIF. TRUST CODE § 416 (2010).

82. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.2, at 388 (2003).

83. *See id.* § 12.2 cmt. e, at 390 ("Although failure to achieve the donor's tax objectives is often due to a change in the tax law occurring after the document was executed, this section is not restricted to that situation.").

84. *See id.* § 12.2 cmt. b, at 389 ("The rationale for modifying a donative document is that the donor would have desired the modification to be made if he or she had realized that the desired tax objectives would not be achieved.").

85. The *Restatement (Third) of Property: Wills and Other Donative Transfers* explains:

> [T]he modification necessary to achieve the donor's tax objectives may require an

The rule permitting modification to achieve the settlor's tax objectives represents a doctrinal offshoot of equitable deviation because, in its most typical application, the subsequent enactment of a new tax law governing the trust is treated as an unanticipated circumstance warranting modification to conform to the settlor's original intent. Consider, for example, the representative case, *In re Kaskel*.[86] In that case, the decedent died in 1968, leaving a will creating two trusts: a marital trust for his surviving spouse, and a family trust for the income benefit of his wife with remainder in trust for his children and grandchildren.[87] The marital trust gave the surviving spouse a general power of appointment that, in default of appointment, poured into the family trust.[88] The surviving spouse died in 1988 without exercising the power of appointment, so under the terms of the original instrument, the balance of the marital trust would have poured into the family trust.[89] Both trusts became irrevocable before the effective date of the GST tax in 1985, so they were exempt from the tax on generation skipping transfers.[90] However, the marital trust's pour-over provision would have caused the family trust to lose its GST tax-exempt status.[91] The trustees petitioned the court to modify the marital trust in two respects: first, to create separate trusts for the decedent's children to avoid distribution to the family trust; and second, to fund the newly created trusts in a manner that took advantage of the surviving spouse's GST exemption amount of $1 million.[92] Observing that the original instrument "resulted in unforeseen GST tax consequences," the court granted the requested modification.[93] Extrapolating from the decedent's use of planning

> alteration of beneficial interests. Such an alteration is acceptable so long as it does not violate the donor's probable intention. In determining the donor's probable intention, the donor's non-tax as well as tax objectives are to be considered. The greater the proposed alteration, the more rigorous the court should be in measuring the requested modification against the donor's probable intention. One measure of the donor's probable intention is the donor's general dispositive plan. Even if it is questionable whether the modification would be consistent with the donor's general dispositive plan, however, the court can still find that it does not violate the donor's probable intention if the detrimentally affected beneficiaries consent to the proposed modification. Such consent makes it more likely that the donor would have approved of the modification, whether or not the modification alters the donor's general dispositive plan.

Id. § 12.2 cmt. f, at 390.

86. 549 N.Y.S.2d 587 (N.Y. Sur. Ct. 1989).
87. *Id.* at 588.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 589.
93. *Id.* at 588.

techniques to minimize estate taxes, the court found that one of the decedent's overall objectives in creating the trust was to minimize federal transfer taxes.[94] The court concluded: "It is therefore clear that if some form of GST tax was in place in 1968, [the decedent] would have taken advantage of any exemption or benefit that was available to him by law."[95]

Thus, the doctrine can operate by treating a subsequent enactment of new tax law governing the trust—in *In re Kaskel*, the GST tax—as an unanticipated circumstance justifying modification of the original instrument to conform to the settlor's intent.[96]

B. *Arguments For and Against Trust Term Extension Under the Trust Modification Doctrines*

Proponents of trust term extension are likely to assert some of the following arguments: First, that under the doctrine of equitable deviation, modification should be granted where the settlor intended to create a perpetual trust but failed to consider the possibility that the Rule Against Perpetuities would be repealed or abrogated and this constitutes an unanticipated circumstance that allows for such modification.[97] Because no aspect of the equitable deviation doctrine expressly precludes adding new beneficiaries, the doctrine is sufficiently flexible to allow for this type of modification so long as the result is consistent with the settlor's probable intent.

Second, the related doctrine authorizing modification to achieve the settlor's tax objectives supports the case for trust term extension by recognizing that a subsequent change in the law governing the trust can form the basis for a modification designed to take advantage of the new tax law. Further, if a settlor's tax objectives included sheltering the trust assets from transfer taxation in perpetuity, then extending the duration of the trust in perpetuity arguably reflects a tax objective rather than merely a distributive preference. The doctrine permitting modification to achieve the settlor's tax objectives does not require a showing of unanticipated circumstances and, unlike equitable deviation, does not

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94. *Id.* at 590.

95. *Id.*

96. Courts have also found that case law decided after the original conveyance may constitute an unanticipated circumstance warranting equitable deviation. *See In re* Harris Testamentary Trust, 69 P.3d 1109, 1118 (Kan. 2003) ("The holding in *Jackson* could not have been anticipated by Harris, and the change furthers the purposes of the Trust. The change granted is consistent with Harris' probable and actual intent.").

97. Or, alternatively, the petitioner might argue that the settlor's failure to consider the possibility that *another* jurisdiction might repeal or abrogate the Rule constitutes an unanticipated circumstance warranting modification of the trust's situs and governing law to relocate the trust within a jurisdiction that has repealed the Rule.

limit its relief to modification of an administrative or distributive provision. [98]

Third, although a private donative trust must generally identify ascertainable beneficiaries, a jurisdiction permitting retroactive application of the Rule's repeal has, in effect, nullified the trust law requirement of an ascertainable beneficiary.[99] The *Uniform Trust Code* requires that a trust have a "definite beneficiary," but the *Code*'s requirement incorporates by reference the Rule Against Perpetuities: "A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities."[100] Thus, abrogation or repeal of the Rule Against Perpetuities would seem to abrogate or repeal the trust law requirement of an ascertainable beneficiary as well. For example, in a jurisdiction that has adopted this provision of the *Uniform Trust Code* and repealed or abrogated the Rule Against Perpetuities, an unborn descendant of the settlor eligible to take 200 years from the date of conveyance could be ascertained in the future even if he could not be identified today. If such a beneficiary would satisfy the trust law requirement of an ascertainable beneficiary, then the trust should be susceptible to modification that would render him a permissible beneficiary.

Fourth, the law should not discriminate against a settlor who intended (explicitly or implicitly) to create a perpetual trust, but by accident of history, created an irrevocable trust before the governing jurisdiction repealed its Rule Against Perpetuities. And fifth, a jurisdiction's repeal of the Rule Against Perpetuities signifies public policy favoring perpetual trusts,[101] so trust law should follow suit by facilitating the conversion of existing trusts into perpetual trusts.

Opponents of trust term extension will likely assert the following counterarguments: First, and perhaps most compellingly, that the consequences of trust term extension in this context would impair existing beneficial interests by converting remainders into lifetime interests in order to add new generations of the settlor's issue as permissible beneficiaries; trust term extensions would force residuary beneficiaries who would have received an outright distribution under the original instrument to accept a

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98. The tax objective modification doctrine provides, "[t]o 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. The court may provide that the modification has retroactive effect." UNIF. TRUST CODE § 416 (2010).

99. *See, e.g.*, *id.* § 402, at 59; RESTATEMENT (THIRD) OF TRUSTS § 44, at 195 (2003).

100. UNIF. TRUST CODE § 402.

101. Lee-Ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2639 (2011) (noting that "there is a growing trend in the United States of abolishing the Rule Against Perpetuities," and this abolition tends to "demonstrate a strong public policy of favoring donative freedom").

less valuable lifetime interest under the modified trust.[102] Further, modification impairing the interests of existing beneficiaries runs contrary to a core function of trust law: to benefit the beneficiaries identified by the settlor.[103] For example, the *Restatement (Third) of Trusts* takes the position that "it is appropriate that courts act with particular caution in considering a modification or deviation that can be expected to diminish the interest(s) of one or more of the beneficiaries in favor of one or more others."[104] Applying that rationale, courts have declined to grant equitable deviation, absent unanimous consent, where the proposed modification would augment the interests of some beneficiaries at the cost of diminishing the interests of other beneficiaries identified in the trust instrument.[105] If equitable deviation cannot be applied to redistribute or reallocate interests among existing beneficiaries, then, *a fortiori*, the doctrine should not be applied to create new interests for individuals not identified in the trust instrument at the cost of impairing existing beneficial interests.[106]

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102. Opposition to trust term extension would, perhaps, be less vociferous in cases where no living beneficiary is divested of a remainder interest. For example, in a trust where the remainder is to be distributed to *A*'s children, a trustee might seek to extend the trust's duration *before A* has children. In this situation, no living beneficiary would be divested because the remainder beneficiaries have yet to come into existence.

103. UNIF. TRUST CODE § 404 ("A trust and its terms must be for the benefit of its beneficiaries.").

104. RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b, at 493–94.

105. *See, e.g.*, Friedman v. Teplis, 492 S.E.2d 885, 887 (Ga. 1997) (denying modification that would have avoided unforeseen adverse tax consequences where the *guardian ad litem* appointed to represent the settlor's unborn children failed to prove the proposed modification would have protected the settlor's children's beneficial interest); Nobbe v. Nobbe (*In re* Trust Under the Last Will and Testament of Nobbe), 831 N.E.2d 835, 843 (Ind. Ct. App. 2005) (denying equitable deviation where the proposed modification represented "an attempt to equalize the devises" among all of the beneficiaries absent language in the trust authorizing redistribution); *In re* Trust D Created Under the Last Will and Testament of Darby, 234 P.3d 793, 801 (Kan. 2010) ("We conclude that funding an increase [for the first generation of beneficiaries] will inherently frustrate [the settlor's] intention for this growth, as well as jeopardize—or at least reduce—distributions to the second and third generation of beneficiaries."); *In re* Estate of Branigan, 609 A.2d 431, 438 (N.J. 1992) ("Under that proposed [modification], the interests of the grandchildren whose fathers were living at the time of decedent's death could be affected by making their father's power of appointment general with the possibility they could lose their inheritance.").

106. Two analogous provisions concerning powers of appointment are in accord. The draft of § 305(c)(3) of the Uniform Powers of Appointment Act provides, "[u]nless the terms of the instrument creating the power of appointment manifest a contrary intent, the powerholder of a nongeneral power may . . . create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power." UNIF. POWERS OF APPOINTMENT ACT § 305(c)(3) (Proposed Draft 2013). Thus, it follows that if the holder of a nongeneral power of appointment cannot create a second power whose objects exceed the objects of the first power, then the nongeneral power cannot be exercised in favor of an appointee not identified in the initial appointment. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 19.14, at 307 (2010) ("Except to the extent that the donor has manifested a contrary intention, the donee of

Second, equitable deviation exists to implement the settlor's intent as it existed at the time of conveyance.[107] While the settlor might have reconsidered the purpose, duration, and objects of the trust in light of subsequent changes to the Rule Against Perpetuities if given the opportunity, equitable deviation does not authorize a court to entertain a reconsideration of the settlor's original intent.[108] Likewise, evidence of objectives or intentions the settlor considered prior to conveyance, but absent from the finally executed instrument, should not form the basis for modification that would give effect to preliminary considerations that the settlor ultimately rejected.

Third, modifying a trust to create new beneficial interests for future generations of the settlor's descendants undermines the trust law requirement of a definite, ascertainable beneficiary.[109] The requirement that a trust have ascertainable beneficiaries implicates core functions of trust law—the placing of responsibility on the trustee to protect the interests of known beneficiaries and the right of beneficiaries to enforce the duties of trusteeship.[110] Abrogating the ascertainable beneficiary requirement in this context would appear to have the effect of undermining the duties of trusteeship while extending the trustee's compensation. Unborn, unascertainable beneficiaries require less of the trustee's attention and are not likely to sue the current trustee for breach of fiduciary duties, so the current trustee would be at least partially insulated from both the obligations and liabilities of trusteeship. Meanwhile, the existence of unascertainable future beneficiaries would require the trustee's continued service after the trust's original point of termination, so the trustee, if compensated, would receive fees that would not have accrued under the original trust. For these reasons and others, perhaps trust law should revise

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a nongeneral power is authorized to make an appointment in any form, including one in trust and one that creates a power of appointment in another, that only benefits permissible appointees of the power.").

107. *See* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a, at 493 ("The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.").

108. UNIF. TRUST CODE § 412 cmt. ("The purpose of the 'equitable deviation' authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes.").

109. *See* Sitkoff, *The Lurking Rule*, *supra* note 20, at 506 n.32 (noting the argument that trusts might still be invalidated for want of an ascertainable beneficiary in states that have abolished the Rule Against Perpetuities). A valid trust generally requires a definite beneficiary. *See, e.g.*, UNIF. TRUST CODE § 402. Under the *Uniform Trust Code*, a trust for a noncharitable purpose may have unascertainable beneficiaries, but its duration cannot last for more than twenty-one years. *Id.* § 409, at 67–68.

110. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 46 reporter's notes cmt. b, at 212 ("The beneficiaries' rights to enforce the trust and make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries are at the core of the trust.").

the ascertainable beneficiary requirement without regard or reference to the Rule Against Perpetuities.

Fourth, applying equitable deviation in this context would present a significant risk of misinterpreting the settlor's intent, particularly in cases where the settlor is deceased or incapacitated.[111] This is, in part, because the petitioner seeking modification has the upper hand in proceedings for equitable deviation, in which the ultimate burden of persuasion rests on the party opposing modification to prove the settlor anticipated the circumstance in question.[112] Inquiry into the settlor's intent is also, by nature, "likely to involve a somewhat subjective process of attempting to infer the relevant purpose or purposes of a trust from the general tenor of its provisions and from the nature of the beneficial interests, together with the family or personal relationships involved in the trust."[113] After the settlor's death or incapacitation, evidence of donative intent is often difficult to ascertain because the settlor is no longer available to testify or object.[114] But as difficult as it may be to posthumously obtain evidence of

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111. *Cf.* Tate, *supra* note 7, at 623 (arguing that while easy modification and termination of trusts may give beneficiaries the authority to "act on their superior information," such modification and termination may also involve value judgments that may "allow the beneficiaries, *at each generation*, to substitute their own values for those of the settlor" (emphasis added)).

112. The *Restatement (Third) of Trusts* explains the procedure for a petition for equitable deviation:

> Upon a showing of changed circumstances, or a petitioner's credible presentation that relevant circumstances were unknown to the settlor, the burden of persuasion shifts to the person(s) seeking to show that the circumstances were anticipated by the settlor during the formulation and execution of the trust. Failure to provide in the terms of trust for subsequent developments involved in a case reinforces an inference that the circumstances were not anticipated by the settlor.
>
> Then, upon a finding of unanticipated circumstances, the court must further determine whether a proposed or contemplated modification or deviation would tend to advance (or, instead, possibly detract from) the trust purposes. This latter inquiry is likely to involve a somewhat subjective process of attempting to infer the relevant purpose or purposes of a trust from the general tenor of its provisions and from the nature of the beneficial interests, together with the family or personal relationships involved in the trust. In this process, it is appropriate that courts act with particular caution in considering a modification or deviation that can be expected to diminish the interest(s) of one or more of the beneficiaries in favor of one or more others.

RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b, at 493–94.

113. *Id.*

114. Professor Robert Sitkoff has explained this evidentiary problem in the context of testamentary dispositions made by will:

> A will is a peculiar legal instrument, however, in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been

the settlor's intent, it is likely even more difficult to posthumously obtain evidence of what the settlor did *not* intend, particularly in the face of circumstances unanticipated by the settlor. A subjective inquiry based on what may often be unreliable, one-sided evidence of the settlor's intent is likely to create a dynamic in which the party bearing the lower burden of persuasion—the petitioner seeking modification—will dominate the equitable deviation proceeding. A court may not require much evidence at all to adduce the settlor's intent to establish a perpetual trust. This, in turn, suggests that the grant of modification may tend to have the effect of implementing the petitioner's objectives rather than the settlor's probable intent. Where unanticipated circumstances do not impede the administration of the original trust instrument executed by the settlor, it would seem unnecessary to expose the trust or its beneficiaries to the possibility of modification that would misinterpret the settlor's intent.

On balance, the arguments against trust term extension would seem to greatly outweigh those in favor. Although it may be true that the public policy of some jurisdictions now favors the creation of perpetual trusts, it does not necessarily follow that such policy would endorse modification of an existing trust and the resulting impairment of incumbent beneficial interests. There is no evidence that the drafting committees of the *Uniform Trust Code* or the *Restatement (Third) of Trusts* ever contemplated the remote possibility that a trust could be amended or extended in perpetuity, with the effect of adding new beneficiaries to the trust. If they were to contemplate the question today, however, it is likely they would reject the idea wholesale. Impairment of existing beneficial interests in this context would be manifestly inconsistent with provisions of trust law that protect existing beneficiaries of irrevocably settled trusts. Posthumous inquiry into the settlor's intent presents a significant risk of inaccurate factual findings and the consequences of those inaccuracies could adversely affect existing beneficiaries. Although the failure to modify a trust to extend its duration and expand its pool of beneficiaries may also pose a risk of deviating from the settlor's probable intent in light of the Rule Against Perpetuities' repeal, the adverse consequences of that risk would not divest any living individual of an existing property interest in the trust. The benefits of implementing the settlor's *probable* intent would therefore seem strongly outweighed by the costs of impairing the beneficiaries' *actual* property interest in the trust.

> called a "worst evidence" rule of procedure. The witness *who is best able to . . . clarify the meaning of its terms is dead by the time the court considers such issues*.

Sitkoff, *Implementing Freedom*, *supra* note 70, at 647 (emphasis added) (footnote omitted).

C. *Insights from Case Law*

To date, no reported judicial decision has applied, or refused to apply, equitable deviation to extend the term of a trust on grounds that the settlor failed to anticipate repeal or abrogation of the Rule Against Perpetuities. This Section will therefore consider two recently reported opinions addressing trust term extension outside of the perpetuities context, *In re Riddell*[115] and *In re Stephen L. Chapman Irrevocable Trust Agreement* (*In re Chapman*).[116] Both cases offer insight into how courts and litigants might analyze trust term extension within the perpetuities context.

In *In re Riddell*, husband-and-wife settlors created testamentary trusts for the lifetime benefit of their only son and daughter-in-law, and upon their death, for the benefit of the settlors' two grandchildren with an outright distribution of principal when the grandchildren reached the age of thirty-five.[117] Both grandchildren turned thirty-five while the son and daughter-in-law were still alive.[118] After the trusts' creation, the settlors' granddaughter Nancy was diagnosed with a serious mental illness and received inpatient treatment at a state hospital.[119] The settlor's son, as trustee, foresaw the adverse consequences that would arise if Nancy were to receive an outright distribution of principal and petitioned for equitable deviation to distribute her interest into a special needs trust:[120]

> [The trustee] argued that a special needs trust is necessary because, upon distribution, Nancy's trust funds would either be seized by the State of Washington to pay her extraordinary medical bills or Nancy would manage the funds poorly due to her mental illness and lack of judgment. [The trustee] argued that the modification would preserve and properly manage Nancy's funds for her benefit.[121]

The Washington Court of Appeals held that the creation of a special needs trust for this purpose would not violate public policy with regard to the treatment of property interests of persons receiving public assistance and granted the requested modification. Further, in regard to the settlors' intent the court reasoned that:

> There is no question that changed circumstances have intervened to frustrate the settlors' intent. [The settlors]

115. 157 P.3d 888 (Wash. Ct. App. 2007).

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

117. *In re Riddell*, 157 P.3d at 889–90.

118. *Id.* at 890.

119. *Id.*

120. *See id.*

121. *Id.*

> intended that she have the funds to use as she saw fit. Not only is Nancy unable to manage the funds or to pass them to her son, but there is a great likelihood that the funds will be lost to the State for her medical care. It is clear that the settlors would have wanted a different result.[122]

In re Riddell is noteworthy because it applied equitable deviation in a manner that impaired an existing, vested beneficial interest while, at the same time, it rendered the modified trust more useful to the beneficiary. By postponing outright distribution to Nancy, the modification made the trust corpus less available than under the instruments' original terms.[123] But the creation of a special needs trust allowed Nancy to retain her beneficial interest without jeopardizing her eligibility for public assistance.[124]

Proponents of trust term extension may cite *In re Riddell* for the proposition that equitable deviation can be applied to increase the duration of a trust beyond its natural termination notwithstanding impairment of an existing, vested beneficial interest. Proponents may also point out the implications of *In re Riddell* on remand. The remand proceedings for the case were not reported, but the trial court could have modified the trust in one of two ways to comply with the appellate court's mandate.[125] The first option would have created a special needs trust for the duration of Nancy's life and distributed the remainder outright to Nancy's estate upon her death. The second option would have created a special needs trust for the duration of Nancy's life and distributed the remainder to Nancy's children outright upon her death. Significantly, for purposes of the Rule Against Perpetuities analysis most relevant to this Article, the second option would have designated a new generation of the settlors' descendants, their great-grandchildren, as permissible beneficiaries of the trust.

If the trial court had ordered the latter modification on remand, then the grant of equitable deviation could have, in theory, enabled the trustee to take advantage of the State of Washington's abrogation of the Rule Against Perpetuities. In 2002, Washington abrogated its Rule, with respect to property interests held in trust, by extending the perpetuities period to 150

122. *Id.* at 892.

123. *Id.* at 890–91.

124. The *In re Riddell* court further noted that, as authorized by the Omnibus Budget Reconciliation Act of 1993, 42 U.S.C. § 1396p(d)(4)(A) (2012), "[a] supplemental needs trust is a trust that is established for the disabled person's benefit and that is intended to supplement public benefits without increasing countable assets and resources so as to disqualify the individual from public benefits." *In re Riddell*, 157 P.3d at 892.

125. On remand, the trial court was ordered to "reconsider this matter and to order such equitable deviation as is consistent with the settlors' intent in light of changed circumstances." *Id.* at 893.

years.[126] The amended Rule applies to irrevocable trusts with an effective date of January 1, 2002, or later,[127] and the *In re Riddell* trusts were presumably created long before the 2002 statutory enactment.[128] Thus, proponents of trust term extension might cite *In re Riddell* as support for the proposition that equitable deviation can be applied to extend the term of a trust beyond the perpetuities period in effect at the time of conveyance.

While arguably creative, this interpretation of *In re Riddell* would strain credulity because the appellate court's opinion did not address the perpetuities aspect of the trust term extension issue, and the remand order

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126. WASH. REV. CODE § 11.98.130 (2014) ("No provision of an instrument creating a trust, including the provisions of any further trust created, and no other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument is invalid under the rule against perpetuities, or any similar statute or common law, during the one hundred fifty years following the effective date of the instrument. Thereafter, unless the trust assets have previously become distributable or vested, the provision or other disposition of property is deemed to have been rendered invalid under the rule against perpetuities."). The prior statutory Rule in Washington provided, in part:

> If any provision of an instrument creating a trust, including the provisions of any further trust created, or any other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument violates the rule against perpetuities, neither such provision nor any other provisions of the trust, or such further trust or other disposition, is thereby rendered invalid during any of the following periods: (1) The twenty-one years following the effective date of the instrument; (2) The period measured by any life or lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such life or lives; (3) The period measured by any portion of any life or lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such portion of such life or lives; and (4) The twenty-one years following the expiration of the periods specified in (2) and (3) above.

WASH. REV. CODE § 11.98.130 (2001) (current version at WASH. REV. CODE § 11.98.130 (2014)).

127. The amended Rule added a section stating that:

> This act applies to any irrevocable trust with an effective date on or after January 1, 2002. Unless the trust instrument otherwise provides, this act does not apply to: (1) Any irrevocable trust with an effective date prior to January 1, 2002; or (2) a revocable inter vivos trust or testamentary trust with an effective date on or after January 1, 2002, if at all times after the date of enactment the creator of the revocable inter vivos trust or testamentary trust was not competent to revoke, amend, or modify the instrument.

WASH. REV. CODE § 11.98.130 (2001) (current version at WASH. REV. CODE § 11.98.130 (2014)).

128. Although the effective dates of the *In re Riddell* trusts were not disclosed in the court's opinion, the case facts imply that a long period of time had elapsed between the trusts' creation and the court's adjudication in 2007. Nancy received "extensive outpatient care" for her illness as early as 1991. *In re Riddell*, 157 P.3d at 890.

did not expressly require a modification that would extend the trust to the next generation of the settlors' descendants. Further, since Washington's pre-2002 Rule incorporated the Uniform Statutory Rule Against Perpetuities' "wait-and-see" approach,[129] the modified trust would likely have complied with the perpetuities period in effect when the trust was created. The remand proceedings were not reported, and it is entirely possible—indeed, likely—that the final modification ordered by the trial court altered the trust without extending the duration beyond the pre-2002 perpetuities period. Thus, opponents of trust term extension would seem to have the more persuasive reading of *In re Riddell* with regard to the perpetuities question.[130]

Another case that helps illustrate issues related to trust term extension is *In re Chapman*. In *In re Chapman*, husband-and-wife settlors, Howard and Elizabeth, created an *inter vivos* irrevocable trust for the benefit of their son, Stephen, and appointed themselves as trustees.[131] The trust provided that Stephen would receive a distribution on his fifty-fifth birthday.[132] On the date of the trust conveyance, Stephen (likely forty-three years old at the time) was engaged to his fiancée, Carrie, and they married about one month later.[133] After eleven and a half years of marriage, however, Carrie filed for divorce.[134] Howard and Elizabeth, as trustees, filed a petition for equitable deviation seeking to postpone the date of distribution until after the final decree in Stephen's divorce proceeding.[135] Carrie intervened as a party with a special interest and opposed the modification. She argued that the distribution should proceed as directed by the original trust instrument on Stephen's fifty-fifth birthday and that, upon distribution, the distributed funds should be treated as marital assets for purposes of the divorce proceeding.[136]

129. *See, e.g.*, Keith L. Butler, Note, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237, 1249 (2000) ("Washington's waiting period is set at beneficiaries' lives-in-being plus twenty-one years. Trust interests that vest before the end of this perpetuities period are distributed to the beneficiaries, even if there had been some remote possibility that the interests could have vested later." (footnote omitted)); *see also Statutory Rule Against Perpetuities Summary*, UNIF. L. COMM'N, http://uniformlaws.org/ActSummary.aspx?title=Statutory+Rule+Against+Perpetuities (last visited Nov. 4, 2014).

130. Although not related to the perpetuities issue, at least one court in another jurisdiction declined to follow *In re Riddell* on grounds that state public policy precluded insulating the beneficial interest of a trust where the beneficiary seeks public assistance. *See In re* Ruby G. Owen Trust *ex rel.* Owen, 418 S.W.3d 421, 423–25 (Ark. Ct. App. 2012).

131. Chapman v. Chapman (*In re* Chapman), 953 N.E.2d 573, 575 (Ind. Ct. App. 2011).

132. *Id.* The initial corpus consisted of stock in a mortgage company founded by Elizabeth's father, but the stock was later sold and replaced with other assets. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* at 575–76.

136. *Id.* at 576.

The trustees claimed that the original instrument contained its own equitable deviation provision, expressly providing for the possibility of unforeseen circumstances and authorizing modification when necessary.[137] The trust provided as follows:

> The Settlors recognize that one or both of the following *unforeseeable* conditions may arise in the future:
>
> (a) Legislation or court decisions highly detrimental to any trust created hereunder or to any beneficiary; or
>
> (b) Other events tending to greatly impair the intent and purposes of the Irrevocable Trust Agreement.
>
> Should either of these conditions occur, reformation or termination of the trust created hereunder might be desirable. The Trustee, in the sole judgment and discretion of the Trustee, may petition the court of competent jurisdiction for a determination that a condition coming within either of the foregoing standards has occurred, and that the best interests of the trust and of the beneficiaries require reformation or termination of the trust.[138]

Carrie argued that divorce was not an unanticipated circumstance.[139] She then pointed to language in the trust providing for the contingency of a pending divorce proceeding at the time of Stephen's death and argued that no such provision addressed that contingency other than at Stephen's death.[140] Carrie claimed that the trust's mention of divorce demonstrated that the settlors had anticipated the possibility.[141]

At a hearing on the trustees' petition to reform the trust, "Howard testified that the purpose of the Trust was to pass the property that had been inherited by Elizabeth and accumulated for generations to Stephen."[142] Crediting Howard's testimony, the court of appeals noted the lower court's findings:

> The trial court found that "[t]he intent of the Chapmans as the Settlors of the trust was to pass the assets received by Elizabeth Chapman from her parents on to her son, his family and his issue." The trial court determined that "the pending [marital] dissolution . . . is an event tending to greatly impair the intent and purposes of the [Trust] and that it is in the best

137. *Id.* at 575–76.
138. *Id.* at 579.
139. *See id.* at 582.
140. *Id.*
141. *See id.*
142. *Id.* at 576 (internal quotation marks omitted).

> interest of the [T]rust and the Beneficiary that [the Trust provisions] be reformed."[143]

Applying equitable deviation, the trial court below modified the trust "so that any interest of Stephen L. Chapman in the Trust shall not vest prior to six months after the entry of the final dissolution decree dissolving the marriage of Carrie A. Chapman and Stephen L. Chapman and disposing of the marital property."[144]

Yet the Indiana Court of Appeals reversed.[145] Setting a high standard for equitable deviation, the court cited approvingly authorities requiring "truly unforeseen" circumstances as a necessary condition for modification.[146] Under that standard, the court found equitable deviation inapplicable because the trust itself contained language anticipating Stephen's divorce—the "unforeseen" circumstances offered as grounds for modification.[147] Under the court's interpretation of the trust, the settlors foresaw the possibility that Stephen's marriage might dissolve and provided for that contingency if Stephen died during the divorce proceeding but not if he survived it.[148] According to the court, that was enough to demonstrate that the settlors anticipated the possibility of divorce and, therefore, it was not an unforeseen circumstance to allow for a modification of the trust.[149]

Particularly striking here is the court's refusal to apply equitable deviation where the settlor himself testified about his intent with regard to the trust's purpose and the proposed modification. Unlike testamentary trust cases where the parties struggle to adduce evidence of a deceased settlor's *probable* intent, *In re Chapman* involved an *inter vivos* irrevocable trust and the trial court record contained evidence of the settlor's *actual* intent.[150] But the court did not base its reversal on a credibility determination of settlor's testimony regarding the trust's purpose.[151] Rather, the court ascertained the settlor's intent and *ex ante*

143. *Id.* at 577 (alterations in original) (citations omitted).

144. *Id.*

145. *Id.* at 575, 582.

146. *Id.* at 581.

147. *Id.* at 582 ("[I]n Clause 5 the Trust mentions the possibility of a pending dissolution and directs that Carrie's contingent interest lapses if she and Stephen are not married or a dissolution is pending at the time of his death. This illustrates that Trustees, as then-Settlors, anticipated the possibility of a pending dissolution at the time of Stephen's death.").

148. *Id.*

149. *Id.*

150. *Id.* at 576.

151. *Id.* at 583 n.6 ("Because we find determinative our holding concerning the requirement that events be 'unforeseen,' and the trial court's decision to the contrary requires reversal, we do not reach the trial court's findings and conclusions concerning the Trust's purpose and whether the modification was in Stephen's best interests.").

consideration of Stephen's potential divorce from the four corners of the original instrument.[152]

At trial, Howard, one of the settlors, testified that "[t]he only way . . . that [Carrie] could ever become a beneficiary would be if Steve had died during the term of the trust and there were [sic] no divorce pending."[153] Although Howard's statement reflected his clear intent at the time of trial to prevent Carrie from sharing in Stephen's interest in the trust, that intent may not have been a trust purpose at the time of conveyance.[154] Howard must have realized that, as of Stephen's fifty-fifth birthday, Carrie was effectively a creditor of Stephen, so in hindsight it was a mistake to have required a mandatory distribution without asset protection features preventing creditors from reaching the trust property.[155] The trial court found Howard credible and, under the applicable standard of review, factual findings, including determinations about witness credibility, are reversed only if clearly erroneous.[156] Here, the appellate court's opinion contains language implying that it did not believe Howard's trial testimony because he may have changed his mind about the trust's purposes after the irrevocable conveyance.[157] Thus, had the applicable standard of review not required deference to the trial court's factual findings, the appellate court most likely would have found that the settlor's testimony reflected a reconsideration of the trust's objectives rather than the settlors' original intent at the time of conveyance.

Under a broader reading of the case, *In re Chapman* offers insight into the relevant inquiry regarding the settlor's intent. It suggests that only the settlor's *original* intent should be applied to determine whether the trust's terms should be modified in light of unanticipated circumstances. Equitable deviation authorizes a court to modify the trust's terms but does not permit reconsideration of the settlor's original intent, whether by the court or the settlor himself. Opponents of trust term extension may cite *In*

152. *See id.* at 583 (interpreting the terms of the trust in order to conclude that the settlor anticipated the possibility of a pending dissolution of marriage at the time of the beneficiary's death).

153. *Id.* at 576 (alterations in original).

154. Contrary to Howard's characterization, Carrie did not assert a beneficial interest in the trust. Rather, she claimed that trust property distributed to Stephen on his fifty-fifth birthday would become marital property for purposes of the divorce proceeding after its distribution from the trust. *Id.*

155. Some asset protection features, such as spendthrift protection, would not have prevented a former spouse from reaching the beneficiary's interest in the trust. *See infra* Subection IV.B.1.

156. *In re Chapman*, 953 N.E.2d at 578–79 (citing Tew v. Tew, 924 N.E.2d 1262, 1264–65 (Ind. Ct. App. 2010)).

157. *Id.* at 582 ("[B]y their very nature, irrevocable trusts carry risks that relationships and values and circumstances may change after the date the Trust is funded, and those risks must be evaluated against the tax and other benefits received by the settlor(s).").

re Chapman for the proposition that the settlor's probable intent must relate back to the time of conveyance and that courts should not authorize modification where the settlor might have chosen a different trust purpose, even in light of unanticipated circumstances.

IV. THE LARGER CONTEXT: PERPETUITIES AND TRUST LAW REFORM

This Part considers the issue of trust term extension within the larger context of legal reform affecting dead hand control of property. In recent years, trust law and the legal regime governing wealth transfers have been pulled in opposing directions. Perpetuities reform, in the form of widespread repeal and abrogation of the Rule Against Perpetuities, has moved in the direction of strengthening dead hand control while reforms in the broader law of trusts have staged a measured retreat away from dead hand control. This policy schism can be explained, at least partly, by the divergent views of stakeholders lobbying for reform. Academic legal scholars and members of the American Law Institute are, by and large, disinterested stakeholders with no financial stake in the outcome of legal reform. They tend to argue against perpetual dead hand control because inflexible restrictions lead to disagreement when circumstances inevitably change with the passage of time and concentrations of wealth often associated with dead hand control exacerbate wealth and income inequality.[158] The financial services industry, with a strong pecuniary interest in perpetuities reform, tends to favor expansion of dead hand control because the increased use of trusts, both in quantity and duration, generates a corresponding increase in revenues obtained from establishment and administration of those trusts.[159] This Part will place the issue of trust term extension within the framework of these diverging trends of legal reform.

158. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27 reporter's note, at 564–66 (2011) (noting that the American Law Institute's position is that the recent statutory trend of abrogating the Rule is "ill advised" and that "[a]n important reason for maintaining a reasonable limit on dead-hand control is that the limit forces control of encumbered property to be shifted periodically to the living, free of restrictions imposed by the original transferor"); *see also* Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2526 (2006) (arguing that perpetual trusts, if successful, "will probably exacerbate class divisions between the wealthy and the rest of Americans"); *cf.* Shepard, *supra* note 1, at 561 (discussing various arguments for and against the Rule Against Perpetuities); Tate, *supra* note 7, at 597 n.9 (noting that "law professors tend to regard issues of dead-hand control as important").

159. *See, e.g.*, Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2098, 2101–03 (2003) (describing competition among states to attract banks and trust companies through abolishment of the Rule Against Perpetuities); *cf.* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1335 (2003) ("There is an old saw in the banking business: 'How do you make a small fortune? Give a bank a large one to manage in trust.'").

A. *Perpetuities Reform: The Rise of Dead Hand Control*

Over the last few decades, reform in the law governing private perpetual trusts has facilitated the rise of dead hand control by dramatically scaling back limitations imposed by the Rule Against Perpetuities.[160] The vast majority of American jurisdictions had at one point adopted the Rule—or some form of limitation on perpetual restrictions on property—but a recent wave of state law reform has effected a broad reversal of policy such that today, most states permit the exercise of dead hand control for hundreds of years or in perpetuity through "dynasty trusts" as they are known within the bar.[161] This reform was driven, for the most part, by the desire of state legislatures to attract out-of-state trust business and the perceived economic benefits associated with locating the trustee's situs within the state's jurisdiction.[162] In a groundbreaking and influential

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160. *See* Harding, *supra* note 15, at 297–98.

161. *See id.* at 295–97; MADOFF, *supra* note 22, at 76–82. A recent fifty-state survey by the American College of Trusts and Estates Counsel summarizes the status of perpetuities reform:

> 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.
>
> Louisiana has never had the rule against perpetuities. Instead, trust terms are strictly limited by statute, to reflect the Civil Law background of Louisiana law.
>
> Eight states have repealed the rule against perpetuities. These states are Alaska (repealed the rule for vesting of property interests), Delaware (repealed entirely for personal property interest held in trust; 110 year rule for real property held directly in trust), Idaho, Kentucky (repealing the rule interests in real or personal property), New Jersey, Pennsylvania, Rhode Island, South Dakota.
>
> Nine states have adopted longer fixed periods for the rule against perpetuities, sometimes only for certain types of property. These states are Alabama (100 years for property not in trust; 360 years for property in trust), Arizona (500 years), Colorado (1,000 years), Delaware (110 years for real property held in trust); Florida (360 years), Nevada (365 years), Tennessee (360 years), Utah (1,000 years), Washington (150 years).
>
> Seventeen states have retained the rule against perpetuities, but allowed certain trusts to continue without application of the rule. These states are Arizona, District of Columbia, Hawaii, Illinois, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Virginia, and Wyoming.

The Rule Against Perpetuities: A Survey of State (and D.C.) Law, ACTEC, at 7–8 http://www.actec.org/public/documents/studies/zaritsky_rap_survey_03_2012.pdf (last updated Mar. 2012); *see generally* JEFFREY A. SCHOENBLUM, 2012 MULTISTATE GUIDE TO ESTATE PLANNING tbl.9 (2011) (providing a detailed state-by-state analysis of critical questions associated with the Rule).

162. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 intro. note, at 564 (2011) ("The movement to abrogate the Rule Against Perpetuities has not been based on the merits of removing the Rule's curb on excessive dead-hand control. The policy issues

empirical study, Professors Robert Sitkoff and Max Schanzenbach concluded that repeal or abrogation of the Rule did, in fact, attract trust-related business in states without an income tax on trust assets: "[T]hrough 2003, roughly $100 billion in trust funds have poured into the states that have validated perpetual trusts," alongside up to $1 billion in annual commissions charged by trustees.[163]

Donors found the Rule's repeal attractive for at least two reasons, one more potent than the other. First, perpetuities reform allowed donors to indulge in aspirations for immortality and posthumous influence by exercising enduring control over gratuitous transfers of property.[164] Second, and more importantly, federal tax reform in 1986 created a significant tax advantage for trusts spanning multiple generations: a large and perpetual exemption amount under the federal GST tax.[165]

The perpetual GST tax exemption arose from Congress's attempt to close a loophole in the federal estate tax.[166] The estate tax is imposed on transfers taking effect at death and applies to property included in the decedent's gross estate.[167] The value of the gross estate includes "the value of all property to the extent of the interest therein of the decedent at the time of his death."[168] A life estate held by the decedent is not included in the gross estate because it terminates upon the life estate holder's death and, therefore, is not a property interest owned or transferrable by the decedent at death.[169] Prior to 1986, a settlor could minimize estate taxes by creating successive life estates and, so long as the conveyance complied with the Rule Against Perpetuities, the conveyance would be taxed only

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associated with allowing perpetual or near-perpetual trusts have not been seriously discussed in the state legislatures. The driving force has been the effort to compete for trust industry (financial services) business from other states."); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes?: Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2474 (2006) ("The legislative history and contemporaneous local media coverage of these repeals indicate that their purpose was to preserve competitiveness in the jurisdictional competition for so-called dynasty trust funds . . . .").

163. Sitkoff & Schanzenbach, *supra* note 26, at 410–11.

164. *See* Tate, *supra* note 7, at 619 (noting that "some settlors may have truly dynastic intentions" and may be "interested in the long-term continuity of their family 'dynasty'").

165. Schanzenbach & Sitkoff, *supra* note 162, at 2467.

166. *See id.* at 2477 ("The 1986 GST tax closed the successive-life-estates loophole by levying a tax equal to the highest rate of the estate tax on any generation-skipping transfer.").

167. I.R.C. § 2031(a) (2012).

168. *Id.* § 2033.

169. *See* Estate of Johnson v. Comm'r, 718 F.2d 1303, 1316 n.48 (5th Cir. 1983) ("Life estates and other such interests which terminate at death are not reached [by the gross estate]."); John A. Miller & Jeffrey A. Maine, *The Fundamentals of Wealth Transfer Tax Planning: 2011 and Beyond*, 47 IDAHO L. REV. 385, 393 (2011) ("[I]nterests that are terminable at the decedent's death, such as life interests measured by the decedent's life or contingent remainders that terminate at death, are not included under § 2033.").

once rather than at each successive generation.[170] In 1986, Congress closed the loophole by enacting the GST tax, which imposed the maximum federal estate tax rate "with respect to any generation-skipping transfer."[171] A transfer skips a generation when it passes to "a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor" or a trust held by such persons.[172] The GST tax, however, provides an exemption amount equal to the estate tax exemption, which, as of 2014, allows every individual to transfer a cumulative amount of $5.34 million during life and at death free of federal transfer taxes.[173] Married couples may elect split treatment of a transfer from either spouse to a third party, such that each spouse is treated as having given half, which, in effect, doubles the exemption amount to $10.68 million.[174] The GST tax exemption, therefore, allows a settlor to create a perpetual trust (in states permitting such trusts) that will likely remain free of federal transfer tax liability forever.

Empirical analysis of data collected by federal agencies regulating the financial services industry compared trust holdings before and after enactment of the GST tax; the study produced "[c]onsiderable evidence support[ing] the view that the GST tax sparked demand for perpetual trusts by giving trust duration greater salience in estate planning."[175] Thus, for wealthy individuals, state-level repeal of the Rule Against Perpetuities and the sizable GST tax exemption proved to be powerful complements—dynasty trust legislation enabled enduring control over private property while federal transfer tax reform rendered it financially advantageous to exercise that control.[176]

In 2011, the American Law Institute (ALI) approved an official position opposing the modern trend toward allowing perpetual and long-term

170. *See* Schanzenbach & Sitkoff, *supra* note 162, at 2476–77.

171. I.R.C. § 2641(a); *see* text accompanying *supra* note 165.

172. I.R.C. § 2613(a).

173. *Id.* §§ 2631, 2010(c).

174. *Id.* § 2652(a)(2).

175. Schanzenbach & Sitkoff, *supra* note 162, at 2478; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 intro. note, at 568 (2011) ("The political pressure on the states to remove the limit entirely or to extend the limit to several centuries would not have arisen were it not for the artificial incentive created by the GST exemption. In fashioning the GST exemption, Congress did not intend to encourage states to modify or repeal state perpetuity law to facilitate perpetual or near-perpetual trusts. On the contrary: Congress displayed a lack of foresight in relying on state perpetuity law to limit the length of GST-exempt trusts. An unintended consequence of tax law should not determine policy on so fundamental a matter as state perpetuity law, especially since history suggests that tax loopholes do not last indefinitely.").

176. For a searing and colorful critique of the trend toward allowing perpetual dead hand control, see generally MADOFF, *supra* note 22, at 76–85.

trusts.[177] Noting that limitations on perpetuities are deeply rooted in American legal tradition, the ALI's statement asserted that trusts of limitless duration could yield millions of beneficiaries and "[n]o transferor has enough wisdom to make sound dispositions of property across such vast intervals and for beneficiaries so remote and so numerous."[178] State legislatures, however, have yet to heed the ALI's warning. No jurisdiction that abrogated or repealed the Rule has reinstated limitations on perpetuities since the ALI's pronouncement.[179]

Trust term extension, as contemplated in the example provided in the Introduction, represents a logical extension of the national trend toward repeal and abrogation of the Rule Against Perpetuities in at least three respects. First, dynasty trust legislation reinforces the settlor's prerogative to dictate the future use of gifted property and unequivocally favors expanding dead hand control over the rights of beneficiaries.[180] The rationale for trust term extension would rest on similar principles—authorizing the impairment of existing beneficial interests for the sake of carrying out a broader vision of the settlor's intent. Second, many states abrogated the Rule Against Perpetuities to attract trust business to their jurisdictions,[181] and because trust term extension would help those states retain that business with regard to pre-repeal trusts that would otherwise terminate naturally, trust term extension is therefore in line with those states policy objectives and the Rule's repeal. By extending the duration of such trusts in perpetuity, states would enjoy the perpetual benefits associated with locating the trustee's situs within their jurisdiction. It is also possible that the same financial institutions that lobbied to repeal the Rule may also seek to persuade state legislatures to broaden the retroactive applicability of the Rule's repeal. Third, in states that permit retroactive

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177. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 intro. note, at 564 ("It is the considered judgment of The American Law Institute that the recent statutory movement allowing the creation of perpetual or near-perpetual trusts is ill advised. The movement to abrogate the Rule Against Perpetuities has not been based on the merits of removing the Rule's curb on excessive dead-hand control. The policy issues associated with allowing perpetual or near-perpetual trusts have not been seriously discussed in the state legislatures. The driving force has been the effort to compete for trust industry (financial services) business from other states.").

178. *Id.*

179. Professor Lawrence Waggoner recently proposed another method of curtailing the proliferation of perpetual trusts: end the GST tax exemption for them. *See* Waggoner, *supra* note 11, at 2–3, 14–15 (arguing that Congress facilitated the perpetual-trust movement through the GST tax advantage, and "[b]ecause Congress has not yet acted to rectify its mistake, the perpetual-trust movement is in full bloom").

180. *See* Tate, *supra* note 7, at 596 ("These statutes have given rise to a new American legal entity: the perpetual dynasty trust, a trust that has the potential to last forever, or for hundreds of years . . . . The perpetual dynasty trust gives unprecedented freedom to the settlor, who can now extend a dead hand far into the future.").

181. *See id.* at 603; Schanzenbach & Sitkoff, *supra* note 162, at 2474–75.

application of the Rule's repeal, trust term extension would treat settlors who created trusts pre-repeal the same as settlors who created trusts post-repeal.

Trust term extension, however, would appear inconsistent with legislative intent in jurisdictions prohibiting retroactive application of the Rule's repeal. Many states *do* limit or prohibit retroactive application[182] and such limitations demonstrate the legislature's implied unwillingness to impair existing beneficial interests for the purpose of expanding dead hand control. Courts should therefore construe statutory limits on retroactivity to preclude the use of estate planning techniques, such as trust decanting, to bypass the legislature's intent only to repeal the Rule Against Perpetuities prospectively.

States should more carefully consider the costs associated with trust term extension. Unlike the prospective authorization of perpetual trusts, retroactive authorization of such instruments would harm incumbent beneficiaries by impairing the value of their interests. Since financial institutions are the driving force behind efforts to authorize perpetual trusts, the question is not limited to whether dead hand control should override the interests of living beneficiaries. The more relevant inquiry may be whether the financial institutions that profit from administering perpetual trusts should be given modification powers not contemplated by the settlor at the cost of impairing the interests of the settlor's handpicked beneficiaries. At bottom, trusts exist to benefit beneficiaries, not the corporate fiduciaries paid to administer them.

B. *Trust Law Reform: A Modest Retreat from Dead Hand Control*

A contrasting modern trend in trust law embodies features that tend to weaken the settlor's ability to exercise perpetual control over property held in trust. This is particularly true of reforms envisioned by national law reform organizations such as the ALI and the National Conference of Commissioners on Uniform State Laws, responsible for publishing the *Restatement (Third) of Trusts* and the *Uniform Trust Code*, respectively. Noting this trend, Professor Thomas Gallanis[183] has argued persuasively that "American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries."[184] This new direction of trust law tends to erode dead hand control by strengthening the interests and rights of trust beneficiaries in at

182. *See* SCHOENBLUM, *supra* note 161, at tbl.9.

183. Professor Gallanis is the executive director of the Joint Editorial Board for Uniform Trust and Estate Acts and he served as Associate Reporter for the Restatement Third of Trusts. *Thomas P. Gallanis*, U. IOWA C. L., http://www.law.uiowa.edu/faculty/thomas-gallanis.php (last visited Sept. 9, 2014).

184. Gallanis, *supra* note 17, at 216.

least four respects: (1) narrowing the scope of spendthrift protection; (2) lowering the standard for trustee removal; (3) relaxing the "material purpose" standard for early trust termination; and (4) permitting administrative deviation without regard to the settlor's intent.

These reforms, however, have taken place within a regime that remains guided by the principle of honoring the settlor's intent.[185] The settlor is the trust's primary principal and, as such, holds inherent powers to set the *ex ante* constraints governing the beneficiary's use and enjoyment of trust property.[186] With regard to the new direction of trust law, state legislatures have been slow to embrace the most aggressive reform efforts to contain dead hand control, and recent case law reflects continued judicial fidelity to settlor intent when beneficiaries seek to upset the settlor's reasons for creating the trust. Thus, while the trust law reform envisioned by the ALI and the Uniform Law Commissioners has moved in the direction of weakening dead hand control, adoption of the most progressive reform measures by state legislatures and courts has moved at a slower pace.

1. Spendthrift Protection

A spendthrift provision allows the settlor to protect interests in trust from anticipation by the beneficiary and, in turn, from attachment by the beneficiary's creditors.[187] A spendthrift provision disables the beneficiary from transferring her trust interest to third parties; also, because the protection precludes the beneficiary from alienating her interest, the beneficiary's creditors are likewise precluded from asserting claims against it.[188] Under *Broadway National Bank v. Adams*,[189] spendthrift protection

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185. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1, at 276 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."); UNIF. TRUST CODE prefatory note (2010) (noting that recent reforms governing trust modification and termination were drafted with deference to the "principle that preserving the settlor's intent is paramount").

186. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 683–84 (2004) [hereinafter Sitkoff, *Agency Cost Theory*] (arguing that the normative claim that trust law should minimize agency costs should be qualified by "the ex ante instructions of settlor" because such qualification "gives priority to the settlor over the beneficiaries as the trustee's primary principal").

187. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. d, at 360 (2003) ("Spendthrift protection prevents anticipation of the beneficiary's rights but does not extend beyond the point of distribution."); *id.* § 58, at 355 (providing generally that "if the terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid").

188. *See id.* § 58 cmt. a, at 355 ("The term 'spendthrift trust' refers to a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries' interests."); *id.* ch. 12, intro. note, at 348 ("The rules stated in this Chapter deal with the validity and effect of trust provisions

derives from the settlor's right as "absolute owner of his property" to dispose of property with any restriction or limitation not contrary to public policy.[190] Although spendthrift protection may, in some cases, benefit the beneficiary, its justification resides in the settlor's prerogative to determine the nature and extent of the beneficiary's interest in donated property. Highlighting the rule's deference to the settlor, Professor Gallanis observed: "The rule of *Broadway National Bank* permitted settlors to use spendthrift clauses to strip beneficiaries of the power of voluntary and involuntary alienation of their interests in trust."[191] Although controversial at their inception more than a century ago, spendthrift trusts have come to be recognized as valid by all fifty states.[192]

The modern trend toward codification of trust law ushered in a wave of spendthrift statutes,[193] many containing exceptions to and limitations on spendthrift protection.[194] The *Uniform Trust Code*, for example, provides that a "spendthrift provision is unenforceable against . . . a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance."[195] California and New York enacted statutory exceptions allowing creditors to reach trust income in excess of amounts necessary for the beneficiary's support and education.[196] California also enacted an exception to the enforcement of spendthrift protection where "the beneficiary owes restitution to crime victims due to

imposing forfeiture for voluntary or involuntary alienation of beneficiaries' interests (§ 57) and spendthrift provisions that disable beneficiaries from transferring their interests and their creditors from reaching those interests (§§ 58 and 59).").

189. 133 Mass. 170 (1882).

190. *Id.* at 173.

191. Gallanis, *supra* note 17, at 222.

192. Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2685 n.2 (2006); N. Camille Varner, Note, *Is the Dead Hand Losing Its Grip in Texas?: Spendthrift Trusts and* In re Townley Bypass Unified Credit Trust, 62 BAYLOR L. REV. 598, 609 n.89 (2010) (listing state statutory provisions).

193. For a survey of states adopting the spendthrift provisions of the *Uniform Trust Code*, see Barry A. Nelson, *Summary of States that Adopted the Uniform Trust Code and Those States' Treatment of Exception Creditors*, ACTEC, http://www.actec.org/public/Documents/Studies/Nelson_UTC_State_Laws_03_21_2013.pdf (last visited Sept. 9, 2014).

194. *See* Gallanis, *supra* note 17, at 221–22 ("By legislation, a number of states have imposed limitations on the effectiveness of spendthrift clauses, thereby providing some ability for the beneficiary to alienate, and creditors to reach, the beneficiary's interest in the trust." (footnote omitted)).

195. UNIF. TRUST CODE § 503(b)(1) (2010). Eighteen of the twenty-four states that have adopted the *Uniform Trust Code* have adopted this exception in one form or another. *See* Nelson, *supra* note 193.

196. CAL. PROB. CODE §§ 15306.5(b), 15307 (West 2014); N.Y. EST. POWERS & TRUSTS LAW § 7-3.4 (McKinney 2014); *see* Gallanis, *supra* note 17, at 222.

the beneficiary's criminal conduct."[197] Taken together, the modern rules governing spendthrift trusts now recognize "more circumstances in which the beneficiaries must have the obligations of ownership," including the obligation to allow some unpaid creditors to reach the beneficiary's interest in the trust.[198] By subjecting the beneficiary's trust interest to certain personal liabilities, newly codified exceptions to the spendthrift rule tend to erode the dead hand's power to insulate trust assets from obligations incurred by living recipients.[199]

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197. Ventura Cnty. Dep't of Child Support Servs. v. Brown, 11 Cal. Rptr. 3d 489, 495 (Dist. Ct. App. 2004) (citing CAL. PROB. CODE § 15305.5).

198. Gallanis, *supra* note 17, at 222–23; Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 230 (2005). Note, however, that some courts have limited the proliferation of exceptions to spendthrift protection under the guise of honoring settlor intent. For example, courts have deferred to the principle of settlor intent in rejecting common law exceptions for tort creditors seeking to attach a beneficiary's interest in a spendthrift trust. *See, e.g.*, Duvall v. McGee, 826 A.2d 416, 422 (Md. 2003) ("The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to them."); Scheffel v. Krueger, 782 A.2d 410, 413 (N.H. 2011) (noting that although the "defendant will likely remain incarcerated for a period of years . . . the trust's purpose 'may still be fulfilled while the defendant is incarcerated'" (citation omitted)). *But see* Sligh v. First Nat'l Bank of Holmes Cnty., 704 So. 2d 1020, 1029 (Miss. 1997) ("We find, as a matter of public policy, that a beneficiary's interest in spendthrift trust assets is not immune from attachment to satisfy the claims of the beneficiary's intentional or gross negligence tort creditors, and that such claims take priority over any remainder interest in such assets."). The *Uniform Trust Code* contains no exception for tort creditors and the majority rule is against creating a public policy exception for tort creditors. HELENE S. SHAPO ET AL., BOGERT'S TRUSTS AND TRUSTEES § 224 (2013).

199. *See* Laurene M. Brooks, Comment, *A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature*, 73 MARQ. L. REV. 109, 114–15 (1989) (arguing that notwithstanding the historical absolute validation of spendthrift provisions, the modern trend "has been to ignore the settlor's intent and carve out public policy exceptions to the spendthrift trust doctrine"). Pulling in the opposite direction, however, recent legislation authorizing self-settled spendthrift trusts—protection of trust assets from the settlor's own creditors while allowing the settlor to maintain a beneficial interest in the trust—represents an expansion of settlor control. Thirteen states have enacted legislation authorizing self-settled spendthrift trusts, discarding the traditional rule prohibiting the settlor from using a spendthrift provision to insulate his own assets from his own creditors. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 33 (1996) (noting traditional public policy prohibitions on self-settled spendthrift trusts, which amount, "in essence, to a declaration that one wishes to own one's assets free of the claims of one's judgment creditors—that is, free of liability"). For a survey of states authorizing domestic asset protection trusts, see generally David G. Shaftel, *Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC, http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf (last updated Apr. 2014) (charting state domestic asset protection trust statutes). While authorization of self-settled spendthrift trusts would seem to represent a great expansion of settlor power, "[i]t remains to be seen whether the courts of states that adhere to the traditional rule will respect domestic [self-settled asset protection trusts]." Sitkoff & Schanzenbach *supra* note 26, at 384. Recent case law has shown that, where settlors have used the device to defraud creditors, courts have responded by setting aside the trust conveyances as fraudulent transfers. Waldron v. Huber (*In re* Huber), 493 B.R. 798, 816 (Bankr.

Trust term extension is inconsistent with the modern trend of spendthrift law because it would divest incumbent beneficiaries of both the benefits and obligations of ownership. Statutory exceptions to spendthrift protection reflect a policy decision to override the settlor's intent to protect trust assets in order to satisfy certain legal obligations of the beneficiary.[200] By contrast, trust term extension would allow the settlor's intent to override the interests of both incumbent beneficiaries and statutorily-protected creditors of incumbent beneficiaries such as child and spousal support judgment holders. For example, a trust might be modified in a way that impairs the interests of incumbent residuary beneficiaries to create new interests for unborn generations of the settlor's descendants. If it were so modified, that alteration would also impair the rights of creditors of the incumbent residuary beneficiaries by limiting recovery to an income interest rather than the original residuary interest conveyed by the settlor. Unborn descendants of the settlor would have no current creditors, so the net effect of trust term extension would be to deprive current creditors of the statutory protections against enforcement of a spendthrift provision.

2. Trustee Removal

Trustee removal implicates the extent of dead hand control because the issue often arises in cases of disagreement between the beneficiary and trustee regarding the settlor's instructions. Such is the case where the beneficiary asks the trustee to override terms imposed by the settlor, the trustee refuses, and the beneficiary seeks the trustee's removal.[201] Under the common law of trusts, a court could remove a trustee only for cause, generally in serious cases of incompetence or misconduct.[202] Friction or

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W.D. Wash. 2013) (invalidating self-settled spendthrift trust on fraudulent transfer grounds); Battley v. Mortensen (*In re* Mortensen), No. 09-00565, 2011 WL 5025249, at *8 (Bankr. D. Ala. May 26, 2011) (same). While authorization of self-settled spendthrift trusts represents an expansion of settlor control, it does not reflect an expansion of dead hand control. The most potent benefits of self-settled spendthrift trusts accrue to settlors during their lifetimes and have less to do with protecting the interests of beneficiaries. Thus, on balance, these instruments do not significantly alter the tension between settlors and beneficiaries.

200. Brooks, *supra* note 199, at 114–15.

201. *Cf.* DUKEMINIER & SITKOFF, *supra* note 9, at 736 (treating trustee removal in the context of modification and termination and noting that under modern law, trustee removal "is more freely granted, effectively as a modification of the trust, sometimes in circumstances that reveal a tension between the intent of the settlor and the wishes of the beneficiary").

202. The *Restatement (Second) of Trusts* enumerates a nonexhaustive list of grounds for trustee removal:

> [L]ack of capacity to administer the trust . . . ; the commission of a serious breach of trust; refusal to give a bond, if a bond is required; refusal to account; the commission of a crime, particularly one involving dishonesty; unfitness, whether due to old age, habitual drunkenness, want of ability or other cause; permanent or

disagreement between the trustee and beneficiary, standing alone, was not grounds for trustee removal.[203] The common law's high standard for removal tended to strengthen dead hand control by preventing beneficiaries from installing, at will, a new trustee with less fidelity to the settlor's instructions.[204] On the other hand, the high standard for removal tended to insulate the trustee from external scrutiny and increase the risk of negligence or poor trustee performance.[205] The common law standard helped preserve the settlor's influence over the trust, but did so at the cost of enabling subpar trustee conduct that adversely affected the beneficiaries.[206]

Recent reform has modestly expanded the grounds for trustee removal while retaining deference to the settlor's purpose and selection of the trustee.[207] The *Uniform Trust Code* reverses the common law rule by

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> long-continued absence from the State; the showing of favoritism to one or more beneficiaries; unreasonable or corrupt failure to co-operate with his co-trustees.

RESTATEMENT (SECOND) OF TRUSTS § 107 cmt. b, at 235–36 (1959).

203. *Id.* cmt. c, at 236 ("Mere friction between the trustee and the beneficiary is not a sufficient ground for removing the trustee unless such friction interferes with the proper administration of the trust.").

204. *See* Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 242 (2002) ("Because changing trustees . . . can be seen as a type of trust modification, courts have been hesitant to permit it."); Gayle B. Wilhelm, *Changing Horses: Some Thoughts About Removal of Trustees*, 18 QUINNIPIAC PROB. L.J. 273, 274 (2005) ("The [removal for cause rule is] based upon the premise that if the grantor had intended that the beneficiaries have the right to remove the trustee without cause, the grantor would have included in the governing instrument any one or more of the many common forms of removal clauses. After all, the grantor may argue as follows: 'It is my money, my trust, and it is my right to determine who is to carry out my intent. If I wanted my beneficiaries to be able to remove my Trustee, I would have given them that power.'"). As Professor Sitkoff observes, "an important consideration for settlors when choosing a trustee is the trustee's expected fidelity to the wishes of the settlor in the future exercise of discretion." Sitkoff, *Agency Cost Theory*, *supra* note 186, at 663.

205. *See generally* Chester & Ziomek, *supra* note 204 (discussing the response of the *Uniform Trust Code* and the *Restatement (Third) of Trusts* to complaints of beneficiaries "regarding the difficulties in removing a corporate trustee").

206. *Cf. id.* at 250 ("[I]n continuing to hold the settlor's intent paramount . . . American courts and lawmakers are tying the hands of the beneficiaries, whose interests the settlor was originally concerned with promoting. To say that a settlor, by naming in his trust a particular bank as trustee, intended a special relationship with that trustee, may result in unintended *dead hand control disadvantaging the beneficiaries*." (emphasis added) (footnote omitted)).

207. Professor Sitkoff explains the tradeoff:

> The difficulty, then, is setting the threshold for trustee removal high enough so that the trustee can carry out the settlor's wishes (including the protection of future beneficiaries) in the teeth of a contrary preference of the current beneficiaries without setting it so high as in effect to sanction shirking or mismanagement.

authorizing at will removal of a trustee where "removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available."[208] Recent case law shows that beneficiaries have successfully sought "no fault" removal where a newly proposed corporate trustee offered to charge lower administrative fees and to provide better service to the beneficiaries than the incumbent corporate trustee.[209] In such cases, the risk of undermining the settlor's intent is minimal because the purpose of removal is to improve the trust's administration rather than override restrictions imposed by the settlor.[210]

The new rules governing trustee removal give incumbent beneficiaries leverage against a trustee seeking to extend the duration of a trust at the cost of impairing existing beneficial interests. Under the new removal by consent standard, an objecting incumbent beneficiary would be able to seek removal of the trustee without proving incompetence or other breach of trust.[211] A case may arise where the trustee was successful in obtaining modification over the beneficiaries' objection (as explained above, equitable deviation does not require the beneficiaries' consent) or without the beneficiaries' participation in the proceeding. In such a case, incumbent beneficiaries could seek the trustee's removal, post-modification, without

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Sitkoff, *Agency Cost Theory*, *supra* note 186, at 663–64.

208. UNIF. TRUST CODE § 706(b)(4) (2010). The *Restatement (Third) of Trusts*, however, does not authorize at will trustee removal upon consent of the beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 37 (2003) ("A trustee may be removed (a) in accordance with the terms of the trust; or (b) *for cause* by a proper court." (emphasis added)).

209. *See, e.g.*, *In re* McKinney, 67 A.3d 824, 833–34 (Pa. Super. Ct. 2013) (allowing the replacement of an existing beneficiary where the new beneficiary will, *inter alia*, "allow for more efficient administration of the assets"); Davis v. U.S. Bank Nat'l Ass'n, 243 S.W.3d 425, 430–31 (Mo. Ct. App. 2007).

210. *See McKinney*, 67 A.3d at 836 (noting that in the absence of evidence suggesting that a settlor contemplated a specific trustee, "the only material purpose that can be served through designating a trustee is that the *trustee effectively administers the trusts*" (emphasis added)). On the other hand, trustee removal is more likely to undermine the settlor's intent when a beneficiary seeks removal of the incumbent trustee and proposes herself as the successor trustee. For example, in *Rapela v. Green* (*In re* Kampros), 289 P.3d 428 (Utah 2012), the Utah Supreme Court explained as follows:

> [W]hen considering removal, courts must give effect to the beneficial interests identified in the trust and intended by the trustor, not to the beneficiaries' subjective desires. We therefore reject [the beneficiary's] contention that the district court owed deference to her desire to remove [the trustee] when it evaluated the beneficiaries' best interests.

Id. at 433.

211. *See* UNIF. TRUST CODE § 706(b).

appointing a *guardian ad litem* to represent the interests of unborn, remote, or contingent beneficiaries under the *Uniform Trust Code*'s qualified beneficiary concept.[212] Once the trustee is removed and replaced, beneficiaries could petition the court to undo the modification.

3. Early Trust Termination

If given the option, many beneficiaries would probably prefer to acquire possession of their beneficial interest outright, free of trust. As a general rule, however, American trust law has historically protected the settlor's interest in continuing the trust by setting a high standard for early trust termination. Under the common law *Claflin* doctrine, a beneficiary could not obtain early termination if a material trust purpose remained to be accomplished; this was true even if all beneficiaries consented to termination.[213] Courts construed this standard broadly, finding a material purpose in spendthrift provisions and terms reposing discretion in the trustee to distribute income or principal.[214] The *Claflin* doctrine facilitated dead hand control by readily inferring the existence of material trust purposes that could not be accomplished fully until the trust's natural termination. As Professor Gallanis observed: "Since virtually all modern trusts contain discretionary provisions, and most modern trusts contain a boilerplate spendthrift clause, the number of trusts in the modern age that can be terminated early has been very low."[215]

But the *Claflin* doctrine's stringent standard is now on the decline as recent reform efforts have strengthened the right of beneficiaries to obtain

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212. Under the modern rule, a trustee may be removed without cause by consent of all *qualified* beneficiaries, defined as follows:

> [A] beneficiary who, on the date the beneficiary's qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Id. § 103(13), at 11.

213. Claflin v. Claflin, 20 N.E. 454, 455 (Mass. 1889); RESTATEMENT (SECOND) OF TRUSTS § 337(2) (1959) ("If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination."); Sitkoff, *Agency Cost Theory*, *supra* note 186, at 659.

214. *See* RESTATEMENT (SECOND) OF TRUSTS § 337 reporter's notes, at 547–49 (1959) (listing cases where beneficiaries could not terminate a trust if termination would defeat the settlor's purpose in creating the trust); Sitkoff, *Agency Cost Theory*, *supra* note 186, at 659 ("[C]ourts have had little difficulty finding a 'material purpose' that would be offended by a modification or termination.").

215. Gallanis, *supra* note 17, at 228.

early trust termination.[216] The *Restatement (Third) of Trusts* lowers the standard for trust termination with the beneficiaries' consent in two respects. First, the *Restatement* provides that spendthrift protection and the repose of discretion in the trustee should not be presumptively treated as implying a material purpose:

> 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, this 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. Nevertheless, spendthrift restrictions are not sufficient in and of themselves to establish, or to create a presumption of, a material purpose that would prevent termination by consent of all of the beneficiaries. This is also true, in many contexts, of discretionary provisions.[217]

This standard forces the trustee to establish the settlor's reasons for continuing the trust with far greater specificity than under the *Claflin* doctrine, which in effect imposed a presumption against early termination. And second, the *Restatement* allows beneficiaries to compel early termination after the settlor's death where the court finds that the reasons for termination *outweigh* the trust's material purpose.[218] This position marks a stark reversal of the *Claflin* doctrine by allowing beneficiaries to override the settlor's objectives and redefine the trust's material purpose with the court's approval.

Like the *Restatement*, the *Uniform Trust Code* expresses caution in inferring the existence of a material purpose,[219] but is otherwise less permissive of early trust termination. Unlike the *Restatement*, the *Uniform Trust Code* does not permit early termination by consent of the beneficiaries where the reasons for termination outweigh the material trust

216. Tate, *supra* note 7, at 607.

217. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e, at 479 (2003).

218. *Id.* § 65(2), at 473.

219. UNIF. TRUST CODE § 411 cmt. (2010) ('"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 a 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 [intended] 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."' (quoting the RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d, at 477 (2003)).

purpose.[220] As initially drafted, the *Uniform Trust Code* provided that a spendthrift clause "is not presumed to constitute a material purpose of the trust," but after several states declined to adopt the provision, the language was placed in brackets and rendered optional.[221]

Taken together, the new direction of trust law reform at the national level reflects efforts to impose greater limitations on dead hand control by lowering the material purpose standard and, in the *Restatement*'s case, by allowing beneficiaries to override a material trust purpose upon demonstrating a good reason for early termination. What remains to be seen, however, is whether state legislatures and courts will follow the lead of law reformers. The *Restatement*'s balancing test has not been widely adopted,[222] and no reported judicial decision has granted early termination of a private trust at the request of consenting beneficiaries where termination was inconsistent with a material purpose of the trust and the reasons for termination outweighed the material purpose.[223] Early indications suggest that the shift toward permitting early termination will be gradual.[224] Some courts have continued to apply the presumption that

220. *Id.* § 411(b), at 70–71 ("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."); *see also* Tate, *supra* note 7, at 607 ("The Third Restatement, *but not the UTC*, allows a court to modify or terminate a trust even when doing so would contravene a material purpose of the settlor, provided that the court determines that the reasons advanced by the beneficiaries in favor of modification or termination outweigh the material purpose." (emphasis added)).

221. UNIF. TRUST CODE § 411(c) cmt.

222. *Cf.* Tate, *supra* note 7, at 607 n.74 (providing that the *Restatement*'s balancing test "is absent in the UTC, possibly because it has little chance of being adopted by state legislatures, which are reluctant to thwart the settlor's intent"). California may have been the first jurisdiction to anticipate the *Claflin* doctrine's decline. It enacted a standard permitting termination where the reasons outweigh the trust's material purpose in 1990, long before the *Restatement (Third) of Trust*'s promulgation of the standard in 2003. 1990 Cal. Legis. Serv. 79 (West) (codified at CAL. PROB. CODE § 15403(b) (West 2014) ("If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust.").

223. However, in *Boys & Girls Club of Petaluma v. Walsh*, 87 Cal. Rptr. 3d 413, 416, 423 (Dist. Ct. App. 2008), the court found that the reasons for termination of a *charitable* trust outweighed any material purpose in continuing the trust.

224. For example, in *Vaughn v. Huntington National Bank, Trust Division*, No. 2008AP030023, 2009 WL 342697 (Ohio Ct. App. Feb. 10, 2009), the trust provided beneficiaries with monthly income of $250; the beneficiaries sought early termination of the trust and outright distribution of the remaining $50,000 in the trust corpus. *Id.* at *1–2. The court acknowledged the *Uniform Trust Code* comment cautioning against readily inferring material purposes but denied early termination because it found that an implied material trust purpose was to ensure that the beneficiaries "receive a secure monthly income as long as the corpus of the trust remains." *Id.* at *4–5 (affirming denial of early termination where beneficiaries consented to outright distribution of corpus, but the settlor intended to provide a stream of income akin to an annuity).

spendthrift protection constitutes a material trust purpose[225] while other courts have rejected it.[226] Thus, the *Claflin* doctrine is on the decline but not yet obsolete.

The notion of extending a trust beyond its natural termination and the perpetuities period in effect at the time of conveyance represents a marked inconsistency with the modern trend's retreat from the *Claflin* doctrine. Trust term extension would strengthen dead hand control by expanding the settlor's stated objectives at the cost of impairing existing beneficial interests. The *Restatement*'s position on trust termination, however, allows beneficiaries to override the settlor's material purpose, thereby shifting control away from the settlor's dead hand. In jurisdictions that no longer readily infer a material purpose from spendthrift provisions or the repose of discretion for purposes of trust termination, it would be inconsistent to infer from the same provisions evidence of the settlor's intent to continue the trust indefinitely. Trust term extension is therefore inconsistent with the *Claflin* doctrine's decline and the increased ability of beneficiaries to terminate a trust by consent.

4. Administrative Deviation

Under the doctrine of administrative deviation, courts have the power to modify an administrative provision of a trust if circumstances unanticipated by the settlor threaten to adversely affect operation of the trust.[227] Older formulations of the doctrine required inquiry into the settlor's intent,[228] but the *Uniform Trust Code* authorizes modification of an administrative provision (though not a distributive one) where "continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."[229] The new standard for administrative deviation does not require deference to the settlor's intent. The comment to § 412 of the *Uniform Trust Code* explains that the essential purpose of a trust is to serve and benefit the beneficiaries, not

225. *See, e.g.*, Buckalew v. Arvest Trust Co., N.A., 425 S.W.3d 819, 822 (Ark. Ct. App. 2013); Weitzel v. First Citizens Trust Co. (*In re* Trust Under Last Will & Testament of Weitzel), No. 09-0447, 2009 WL 4842807, at *4–5 (Iowa Ct. App. Dec. 17, 2009).

226. *In re* Pike Family Trusts, 38 A.3d 329, 331–32 (Me. 2012) ("Prior to 2005, we recognized a common law presumption that a spendthrift clause, simply by virtue of its presence, was a material purpose of the trust . . . . By enactment of the Maine Uniform Trust Code, effective in 2005, the Legislature eliminated this presumption.").

227. *See* THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASE AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 536–39 (5th ed. 2011).

228. *See* Gallanis, *supra* note 17, at 223–25 (explaining that "[c]onsistent with the *Restatement (Second)*, the role of the settlor figures prominently in a leading case on administrative deviation").

229. UNIF. TRUST CODE § 412(b) (2010).

impose upon others an obligation to carry out unreasonable restrictions.[230] Opining on the doctrine's lack of deference to settlor intent, Professor Gallanis concluded that:

> the doctrine of administrative deviation shows how the new direction of American trust law is to rebalance the wishes of the settlor with the ownership rights of the beneficiaries. The administration of the trust must, in the end, be for the benefit of the beneficiaries, and their equitable ownership over the trust assets must be respected.[231]

Thus, the *Uniform Trust Code*'s formulation of administrative deviation does not bear directly on the issue of trust term extension because it does not apply to modification of a distributive provision. Its underlying rationale supports a retreat from the principle of dead hand control, however, by affirming that the essential purpose of a trust is to serve and benefit the beneficiaries. Trust term extension, by contrast, would impair the interests of existing beneficiaries for the purpose of expanding rather than implementing the settlor's stated intent.

C. *Recommendation for Law Reform*

It is highly likely that the drafters of the *Uniform Trust Code*, *Restatement (Third) of Trusts*, and *Restatement (Third) of Property: Wills and Other Donative Transfers* did not contemplate the possibility of trust term extension in the context presented in this Article. Had they considered the issue, they most likely would have drafted language precluding the practice for many of the reasons discussed herein. This Article therefore recommends that the *Uniform Trust Code* be revised to clarify that modification doctrines—including equitable deviation and modification to achieve the settlor's tax objectives—do not permit the addition of beneficiaries not identified in the original trust instrument. Prohibiting the addition of new beneficiaries would resolve the question of whether a trust could be extended in perpetuity because the duration would be limited to the lifespan of the beneficiaries identified by the settlor.

CONCLUSION

Widespread repeal of the Rule Against Perpetuities has prompted creative estate planning practitioners to contemplate whether an

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230. *Id.* § 412 cmt. at 77 ("Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others.").

231. *See* Gallanis, *supra* note 17, at 226.

irrevocable trust settled pre-repeal could be transformed into a perpetual trust post-repeal. For example, where there is evidence that the settlor wanted to create a perpetual trust to benefit several generations of unborn descendants but chose not to because of the perpetuities period in effect at the time of conveyance, a trustee might argue that, had the settlor anticipated the Rule's repeal, he would have created a perpetual trust. The trustee would further argue that, under the doctrine of equitable deviation, courts have the power to modify a trust to effectuate the settlor's intent notwithstanding objections of existing beneficiaries. By allowing a trust with identifiable residuary beneficiaries to be transformed into a trust of perpetual (or near-perpetual) duration, equitable deviation would arguably allow all settlors to be treated equally without regard to whether the trust was created before or after the Rule's repeal.

This Article articulates four reasons why resorting to equitable deviation in this manner would represent a misapplication of the doctrine. First, courts generally do not apply equitable deviation where the proposed modification would impair existing beneficial interests. Trust term extension would impair existing beneficial interests because, to create a perpetual trust, incumbent residuary beneficiaries would be forced to accept a less valuable lifetime interest in the trust. Second, equitable deviation exists to implement the settlor's intent as it existed at the time of conveyance by modifying terms of the original instrument in light of unanticipated circumstances; by contrast, trust term extension would not only modify the original instrument's terms but would also allow for reconsideration of the settlor's original intent. Third, extending the duration of an existing trust into perpetuity would undermine the trust law requirement of an ascertainable beneficiary. And fourth, application of equitable deviation in this context would present an unnecessary risk of misinterpreting the settlor's intent under circumstances where the trust could be administered according to its original terms without frustrating the original trust's purpose.

Within the larger context of reform movements affecting the law of perpetuities and the broader law of trusts, the idea of trust term extension implicates complex questions about the permissible extent of donor control and the purpose of donative trusts. On one hand, some states have repealed the Rule Against Perpetuities retroactively, implying a legislative intent to permit the conversion of pre-repeal trusts into post-repeal perpetual trusts. In states prohibiting retroactive application of the repeal, however, it would follow that pre-repeal trusts should not be modified or decanted in a way that would violate the perpetuities period in effect at the time of conveyance. On the other hand, legal reform in the broader law of trusts has marked a modest retreat away from dead hand control in at least four respects relevant to trust term extension: spendthrift protection, trustee removal, trust termination, and administrative deviation.

On balance, the idea of extending a trust beyond the perpetuities period in effect at the time of conveyance and creating new beneficial interests for unborn descendants of the settlor should be an exercise of creative thinking rather than creative estate planning. Trust term extension of this sort is inconsistent with modern trends in the broader law of trusts; also, to the extent that states have authorized retroactive application of the Rule Against Perpetuities, there is no evidence suggesting that legislatures foresaw the use of modification doctrines like equitable deviation to impair existing beneficial interests. The new direction of trust law increasingly recognizes the rights of beneficiaries, particularly when those rights stand in conflict with restrictions imposed by the settlor's dead hand. Trust term extension, under the illustration presented in this Article, would unfairly resurrect the dead hand and allow it to impair the interests of incumbent beneficiaries for the sake of conferring benefits upon individuals selected by the trustee rather than settlor. Worse yet, although proponents of trust term extension may purport to represent the interests of the settlor's dead hand, in many cases, such proponents may in fact be financial institutions furthering their own pecuniary interests in administering perpetual trusts. With regard to law reform, the drafters of the *Uniform Trust Code* might consider a revision clarifying that modification doctrines do not permit the addition of new beneficiaries not identified in the original trust instrument.