# TRUST PRIVACY

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## INTRODUCTION

In a landmark 1984 article, Professor John Langbein described the "nonprobate revolution" in transmission of American wealth.[1] He showed that Americans had turned en masse to donative devices that

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[1] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

accomplished all the purposes of a will without the costs, strictures, and inconvenience of probate.[2] Professor Langbein argued that it was time to recognize these devices for what they were—"will substitutes."[3] He called for a future "unified American law of succession" to cover both wills and will substitutes.[4]

Today, this unification process is well underway.[5] Wills doctrines and rules, such as lapse,[6] ademption,[7] mental capacity standards,[8] unworthy heirs exclusions,[9] and revocation upon divorce,[10] increasingly extend to even the most widely used will substitute—the revocable inter vivos or living trust (revocable trust).[11] Yet, one distinction re-

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2 *Id.* at 1109–25 (discussing the use of will substitutes); *see also* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 *passim* (1988) (discussing changing patterns in family wealth transmission).

3 Langbein, *supra* note 1, at 1125–34, 1140–41 (arguing that courts should abandon the fiction that nonprobate transfers are lifetime transfers and treat those transfers as will-like will substitutes).

4 *Id.* at 1141.

5 This unification has been a significant feature of recent Uniform Codes and Restatements. *See* 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003) ("This Restatement (along with the Restatement Third, Trusts, the Revised Uniform Probate Code, and the Uniform Trust Code) moves toward the policy of unifying the law of wills and will substitutes.").

6 *See, e.g.*, S.C. CODE ANN. § 62-7-606 (2005) (setting out antilapse provisions for revocable trusts); UNIF. PROBATE CODE §§ 2-706–707 (amended 2006) (establishing antilapse rules for nonprobate transfers and future interests under the terms of a trust); 1 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. p (1999) ("Antilapse statutes, however, apply by analogy to revocable trusts and other will substitutes.").

7 *See, e.g.*, Wasserman v. Cohen, 606 N.E.2d 901, 904 (Mass. 1993) (applying "the doctrine of ademption, as traditionally applied to wills" to a revocable inter vivos trust).

8 *See, e.g.*, Upman v. Clarke, 753 A.2d 4, 6 (Md. 2000) (holding that undue influence rules applicable to wills apply to a revocable trust); *In re* Estate of Tisdale, 655 N.Y.S.2d 809, 811 (Surr. Ct. 1997) (holding that beneficiaries of a revocable trust, like will beneficiaries, have a right to a jury trial in probate proceedings to set aside the trust on grounds of improper execution, lack of capacity, undue influence, and fraud).

9 *See, e.g.*, CAL. PROB. CODE § 250(a)(1) (West 2002 & Supp. 2007) ("A person who feloniously and intentionally kills the decedent is not entitled to . . . [a]ny property, interest, or benefit under a will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will."); OR. REV. STAT. § 112.465(1) (2005) (barring the decedent's slayer from taking from the decedent "by intestate succession, by will or by trust").

10 *See, e.g.*, OKLA. STAT. ANN. tit. 60, § 175(A) (West 1994) (providing for revocation of trust provisions in favor of the settlor's former spouse upon divorce or annulment). In states that have adopted the Uniform Probate Code (UPC), revocation upon divorce applies to the relatives of the divorced spouse as well. UNIF. PROBATE CODE § 2-804(b)(1)(i) (amended 2006) (revoking "any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse"). *But see generally* Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83 (2004) (presenting a critical analysis of revocation-on-divorce statutes and the continuing limitations in their application to will substitutes).

11 *See generally* 1 RESTATEMENT (THIRD) OF TRUSTS § 25 & cmts. (2003) (discussing the use of "[r]evocable inter vivos (or living) trusts" and the extension to such trusts of doctrines and rules governing wills); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the*

mains unchallenged. Wills—and any trusts contained therein—are public record, available to beneficiaries, heirs, thieves, reporters, and "inquiring minds" alike.[12] "Will-like"[13] revocable trusts, including those that continue for decades after the settlor's death, are private.[14] Indeed, in most states, even current beneficiaries of a revocable trust cannot view the full trust document that defines their rights and interests.[15]

This treatment of wills and their "functional equivalent,"[16] the revocable trust, is not only inconsistent but also dangerous. As Professors Jesse Dukeminier and Stanley Johanson have suggested, the cur-

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*Problem of Doctrinal Change*, 79 OR. L. REV. 527, 542–45 & n.62 (2000) (discussing will substitutes and efforts to extend testamentary doctrines to "nominally complete, nontestamentary transfers"). One state has even extended will execution requirements to revocable trusts that "dispose of the trust property on or after the death of the settlor other than to the settlor's estate." FLA. STAT. ANN. § 737.111(1), (4) (West 2005).

12 *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 390 (6th ed. 2000) ("A will is a public record, open to disappointed heirs, newspapers, and the just plain curious."). Books, periodicals, newspapers, and even Web sites regularly feature wills of particular public interest. *See, e.g.*, HERBERT E. NASS, WILLS OF THE RICH AND FAMOUS (2000) (reproducing sixty-eight wills of the "rich and famous"); *Where There's a Will*, PEOPLE, June 9, 2003, at 107 (discussing "weird but wonderful legacies," including an actor's will that left the actor's skull to a Chicago theater company to use in productions of *Hamlet*); Court TV News, Famous Wills, Nov. 12, 2007, http://www.courttv.com/people/wills (reproducing celebrities' wills).

13 Langbein, *supra* note 1, at 1109 (referring to "will-like modes of transfer").

14 *See* DUKEMINIER & JOHANSON, *supra* note 12, at 390–91 (discussing privacy of revocable inter vivos trusts); LUCY A. MARSH, PRACTICAL APPLICATIONS OF THE LAW: WILLS, TRUSTS, AND ESTATES 125–26 (1998) (reproducing and discussing John Lennon's will, under which Lennon "was able to secure the benefits of privacy" by transferring the residue of his estate to a preexisting inter vivos trust that was "not a matter of public record").

15 Most jurisdictions allow a beneficiary at best partial access to the trust instrument. States that have adopted the UPC approach, for instance, permit a beneficiary "[u]pon reasonable request" to view only the trust provisions that the trustee deems relevant to that beneficiary. UNIF. PROBATE CODE § 7-303(b) (amended 2006) ("Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest . . . ."); *see, e.g.*, KY. REV. STAT. ANN. § 386.715(2) (West 2002) (same). Since the 1990s, approximately twenty jurisdictions, largely those that have adopted the Uniform Trust Code (UTC), have recognized a current beneficiary's right to request a copy of the entire trust instrument. UNIF. TRUST CODE § 813(b)(1) (amended 2005) ("A trustee[,] . . . upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument . . . ."); *see, e.g.*, N.M. STAT. ANN. § 46A-8-813(B)(1) (2004) (same). Even the most liberal statutes, however, contain limitations on beneficiary access. For example, the UTC and nearly every jurisdiction that has adopted the UTC allow the settlor to waive in the trust instrument a trustee's duty to respond to a beneficiary's request for a copy of the trust instrument. UNIF. TRUST CODE § 105 cmt. (amended 2005) ("Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument . . . ."). For extended analysis and critique of recent reforms that limit beneficiary access to the trust instrument, see Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 739–63 (2006).

16 UNIF. TRUST CODE prefatory note (amended 2005) ("The basic policy . . . of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will.").

rent scheme effectively allows the trust settlor to do what the will testator cannot—make a "secret will."[17] As history has taught, secrecy can be a cloak for exploitation, corruption, and injustice.[18] In the changing trust environment of the twenty-first century,[19] these dangers are only increasing. With the mass marketing of revocable trusts to the unsophisticated and unwary,[20] the "erosion in fiduciary responsibility,"[21] and the emergence of perpetual trusts,[22] "secret" trusts present serious concerns.

Courts, legislators, and scholars have recognized and responded to some of trust privacy's potential dangers. They have given particular attention recently to the risks to beneficiaries denied the fundamental information required to enforce the trust and to monitor trustee conduct.[23] In devising their responses, however, these reform-

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17 DUKEMINIER & JOHANSON, *supra* note 12, at 943 ("Should the settlor be able to make, in effect, a secret will by using a revocable trust?"); *see also* 1 GEORGE M. TURNER, REVOCABLE TRUSTS § 2:7 (5th ed. 2006) (discussing how Bing Crosby's use of a revocable trust avoided public disclosure about the disposition of his estate and stating that Crosby's lawyer referred to this scheme as a "private will").

18 *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 25–26 (1982); Earl Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550 (1974) ("When secrecy surrounds government and the activities of public servants, corruption has a breeding place.").

19 For a superb overview of the changing trust environment, see Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543 (1998).

20 *See id.* at 563–67 (discussing the "massification" or "pedestrianization of trusts," including the "advent of trust mills selling revocable *inter vivos* trusts to old folks all over the country"). The mass marketing of trusts began in the 1960s with the publication of Norman Dacey's best-seller, *How to Avoid Probate!*. *Id.* at 563 n.91; *see also* NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965). Since that time, "do-it-yourself" trust books and software have been "heavily marketed." *In re* Estate of Pozarny, 677 N.Y.S.2d 714, 716 (Surr. Ct. 1998) ("[P]re-printed or form living trusts . . . are now being heavily marketed in New York State."). For a discussion of living trust scams, see *infra* notes 190–202, 238–86 and accompanying text.

21 Dobris, *supra* note 19, at 548.

22 Because of the recent trend to restrict or even repeal the Rule Against Perpetuities, perpetual trusts increasingly "exist unmolested and undenounced." Joel C. Dobris, *The Death of the Rule Against Perpetuities or the RAP Has No Friends–An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 603 (2000); *see also* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003) (presenting a comprehensive study of perpetual trusts, with analyses of their origins, problems, and possible solutions). For an "empirical study of the perpetual trust phenomenon," see generally Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 361 (2005).

23 *See* Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at the Century's End*, 88 CAL. L. REV. 1877, 1914–15 (2000) (discussing recent reforms to expand trust beneficiaries' access to information). This emphasis on keeping beneficiaries informed is a hallmark of the UTC. *See* UNIF. TRUST CODE § 813 (amended 2005) (expanding the trustee's duty to inform and report to beneficiaries). As Professor David English, Reporter of the UTC, explained, "The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee, for only by being informed can the beneficiaries know of and enforce their interests." David M. En-

ers simply take trust privacy as a given.[24] They have made no effort to explore the continued viability of the concept or to provide an analytical framework to guide reform.

This Article reconsiders the very notion of trust privacy. It does so through a humanistic approach that essentially looks beyond abstractions to consider the actual effect of laws on people. Part I sets out the conventional rationale for treating wills as public record but allowing will-like revocable trusts to remain private. The remainder of the Article addresses the basic question reformers have failed to discuss: Should trusts be private? It sets out possible arguments for and against trust privacy. Parts II and III show that although privacy confers important human benefits, it also imposes significant human costs that reformers have largely ignored. In presenting the human impact of trust privacy, the Article hopes to inspire a more nuanced and balanced approach to reform. Part IV attempts to begin that process by considering four possible future directions for reform and their responses to the human costs of trust privacy.

## I
## THE PUBLIC/PRIVATE DISTINCTION BETWEEN WILLS AND WILL-LIKE TRUSTS

The conventional view holds that privacy in transmission of wealth is the ideal. Publicity is the price a decedent pays for using "court-regulated devices" such as wills or testamentary trusts as opposed to a "private arrangement" such as a revocable trust.[25] Both devices can perform the same function and even dispose of the estate identically.[26] But the decedent who chooses the revocable trust gets to keep her private life private, a considerable selling point to athletes, celebrities, multimillionaires, latter-day Greta Garbos, and more com-

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glish, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 199 (2002) (discussing section 813 of the UTC). For a superb analysis of UTC provisions on the duty to inform beneficiaries and state variants on those provisions, see T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595 (2007).

24 *See, e.g.*, UNIF. TRUST CODE § 1013 cmt. (amended 2005) (discussing certification of trust):

> This section . . . is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. . . . While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons.

25 *In re* Estate of Hearst, 136 Cal. Rptr. 821, 824 (Ct. App. 1977).

26 Langbein, *supra* note 1, at 1113 ("Either by declaration of trust or by transfer to a third-party trustee, the appropriate trust terms can replicate the incidents of a will. . . . Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will.").

mon folk with uncommon lifestyles.[27] The decedent who chooses the will, however, "take[s] the good with the bad."[28] She gets court supervision and protection of her beneficiaries and estate plan but also public knowledge of her assets, beneficiaries, and disposition—both testamentary and personal.[29] For example, just the day after Jacqueline Kennedy Onassis's will was filed in the New York Surrogate's Court, the media reported in detail the disposition of her real and personal property, even the recipients of her Indian miniatures "Lovers Watching Rain Clouds" and "Gardens of the Palace of the Rajh," her "Greek alabaster head of a woman," and her copy of John F. Kennedy's Inaugural Address signed by Robert Frost.[30]

Some wills are even more revealing. For example, Doris Duke left most of her $1.2 billion estate to charity to support causes of particular importance to her: wildlife and farmland preservation, the performing arts, the prevention of cruelty to children and animals, ecological endeavors, education, and medical research.[31] She also provided for friends, employees, relatives, and her dog.[32] Duke appointed her former butler and confidant an executor and trustee.[33] Duke's friend, Imelda Marcos, and Duke's adopted daughter, Chandi Heffner, did not fare as well, however. Duke directed Marcos to repay a $5 million loan[34] and disowned Heffner.[35] She explained her decision to disinherit her adopted daughter as follows: "After giving the matter prolonged and serious consideration, I am convinced that I

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27 *See, e.g.*, 31 U. MIAMI INST. ON EST. PLAN. ¶ 2017.2, at 20-27 (1997) (discussing the use of revocable trusts in California so that the public "do[es] not have access to information about people who die who are in the entertainment business"); Joseph D. Wright, *Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in a New Millennium*, 6 SPORTS L.J. 27, 34 (1999) ("The confidentiality of a [revocable] trust also keeps the public from having access to the athlete's financial and familial arrangements by keeping them out of the public record, unlike wills."); Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 322 & n.308 (1999) (recommending the use of revocable living trusts rather than wills because they are not public records and because wills "may subject the private lives of your gay, lesbian, or non-traditional elder to unwanted scrutiny").

28 *In re Estate of Hearst*, 136 Cal. Rptr. at 824.

29 *Id.*

30 Steve Fainaru & Colum Lynch, *Onassis Gave Bulk of Estate to Children*, BOSTON GLOBE, June 2, 1994, at 1, 12.

31 *See* Last Will and Testament of Doris Duke arts. II, V, VIII (Apr. 5, 1993), http://www.courttv.com/archive/legaldocs/newsmakers/wills/duke.html [hereinafter Duke Will].

32 *See id.* at arts. II.G.3, V.B–C.

33 *See id.* at arts. X, XI. This turned out to be an unwise choice. *See* NASS, *supra* note 12, at 475–76 (describing Duke's former butler, Bernard Lafferty, as "semi-literate, profligate, [and] imprudent[,]" and detailing his many abuses of "his 'stewardship' of the Duke estate").

34 Duke Will, *supra* note 31, at art. IV.B.

35 *Id.* at art. VII.B (stating that Heffner should "not be deemed to be my child").

should not have adopted Chandi Heffner. I have come to the realization that her primary motive was financial gain."[36]

The public/private distinction thus does not respond to any differences between the transferors, survivors, assets, or beneficiaries of wills and will-like trusts. Nor does it reflect any peculiar features of the probate process.[37] Rather, what drives the public/private distinction is an overarching public policy against "secrecy in public affairs."[38] Wills are public record because of the "public's interest in openness and accessibility"[39] of court proceedings and records.[40] This

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36 *Id.* at art. XXI. Duke's efforts to disinherit her adopted daughter ultimately failed, however. "Chandi Heffner received $60 million from the James Buchanan Duke trusts in settlement of her claim to be a child of Doris and $5 million from the Doris Duke estate." DUKEMINIER & JOHANSON, *supra* note 12, at 767.

37 *See In re* Estate of Hearst, 136 Cal. Rptr. 821, 824 (Ct. App. 1977) ("[N]o statute exempts probate files from the status of public records . . . ."); *In re* Reisman, CONN. L. TRIB., Jan. 22, 1996, at 76 (Conn. Prob. Ct. Dec. 19, 1995) ("As with files of other courts in Connecticut, probate court files and the documents therein are accessible to the public."); Booth Newspapers, Inc. v. Cavanaugh, 166 N.W.2d 546, 549 n.13 (Mich. Ct. App. 1963) ("Probate records are judicial records and may become public records after proceedings are completed and entered."); *In re* Estates of Zimmer, 442 N.W.2d 578, 581–85 (Wis. Ct. App. 1989) (stating that the Wisconsin open records law gives the public the right to inspect the public records of any court of law, including probate courts).

38 *In re Estate of Hearst*, 136 Cal. Rptr. at 824; *see also* KITV-4 v. Hirai, No. 24403, 2001 Haw. LEXIS 332, at *6–7 (Haw. Aug. 30, 2001) (Acoba, J., dissenting) (arguing against sealing probate court records from media access):

> Our jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. . . . "Because of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges."

*Id.* (internal citations and quotations omitted).

39 *In re Reisman*, CONN. L. TRIB., Jan. 22, 1996, at 78.

40 For extended discussions of the historical tradition and "structural value of public access" to judicial proceedings, Richmond Newspapers v. Virginia, 448 U.S. 555, 598 (1980) (Brennan, J., concurring), see, for example, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605–06 (1982); *Richmond Newspapers*, 448 U.S. at 564–77 (majority opinion); *id.* at 587–98 (Brennan, J., concurring); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) ("The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute."); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 351–57, 365–67 (Cal. 1999). For a sampling of the literature on public access to court proceedings and records, see Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137 (2002); Lynn M. LoPucki, Court System Transparency (Aug. 23, 2007) (unpublished manuscript, on file with author).

abstract public interest is deemed so compelling that it supersedes the privacy rights of individual decedents and beneficiaries.[41]

Courts have even held that the public interest in open probate records outweighs beneficiaries' well-founded fears of criminal[42] or terrorist[43] attacks if their names and addresses are available for public inspection. For example, after the kidnapping of Patricia Hearst in 1976, the trustees of William Randolph Hearst's testamentary trust petitioned to seal the Estate of Hearst probate files on grounds that "use of the material in the probate files would expose many hitherto unnoticed persons as members of the family and reveal the locations of their homes and properties . . . ."[44] The court denied the petition, emphasizing the public's "legitimate interest in and right of general access to court records,"[45] and remanded the case to give the trustees an opportunity to "demonstrate . . . the existence of compelling reasons to seal portions of the file" temporarily.[46]

Individual judges and clerks may deny access to wills on a case-by-case basis.[47] But the probate court must exercise its discretion to limit access consistent with the law's overall approach to open judicial

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41 *In re Estate of Hearst*, 136 Cal. Rptr. at 824–25 & n.3 (stating that "traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals" and "point[ing] out that Trustees' arguments as to their absolute right of privacy in these files has no weight"); *In re Reisman*, CONN. L. TRIB., Jan. 22, 1996, at 78 ("The settlor's privacy interest is not sufficient to outweigh the public's interest in openness and accessibility of probate court files."); *Booth Newspapers*, 166 N.W.2d at 546–47 (upholding a newspaper reporter's right "to look at the last will of a prominent citizen" citing "[t]he fundamental rule in Michigan . . . that citizens have the general right of free access to, and public inspection of, public records").

42 Minneapolis Star & Tribune Co. v. Schumacher, 383 N.W.2d 323, 328 (Minn. Ct. App. 1986) (rejecting the trial court's argument that the complete files of wrongful death suits should be sealed because the decedents' families "could be victimized by thieves" if the media have access to the files); *In re Estates of Zimmer*, 442 N.W.2d at 584 (rejecting the argument that a probate court settlement agreement involving an intestate heir, Peter Zimmer, who killed his parents should be sealed due to "the other relatives' 'fear' of Zimmer").

43 *In re Estate of Hearst*, 136 Cal. Rptr. at 825.

44 *Id.* at 822–23.

45 *Id.* at 825–26.

46 *Id.* Three decades later, the file remains under temporary seal. Nicole LaPorte, *Trust Issues Tear at Hearst*, VARIETY, Apr. 27, 2005, at 1 ("Although the [probate file] seal was intended to be temporary, three decades later it remains . . . .").

47 *See, e.g.*, *In re* Will of Croker, 105 N.Y.S.2d 190, 191–92, 199 (Surr. Ct. 1951) (including in the probate file an edited version of a will with all "scandalous, libelous and scurrilous" language expunged to protect the "decedent's memory"); David Josar, *Radio Host's Will Sealed by Judge*, DETROIT NEWS, Apr. 25, 2000, at 6D ("A Wayne County judge has sealed the will of Martha Jean 'The Queen' Steinberg to prevent 'souvenir hunters and other opportunists' from pillaging her property, according to court records.").

records.[48] As a result, most wills are available to the public.[49] Indeed, some wills are posted on the Internet. For instance, Katharine Hepburn's will and codicil were filed for probate in Old Saybrook, Connecticut on Friday, July 25, 2003.[50] By Monday, the documents were available on the Smoking Gun Web site for all the world to see.[51] Wills of the rich and famous are not the only wills to appear on the Internet; some probate courts now routinely post probate records on their official Web sites.[52] In fact, an Ohio probate court has suggested that the Americans with Disabilities Act might require courts to publish wills online to ensure "access to public records for those individuals whose disabilities prevent them from traveling to the court."[53] The court rejected the estate's claim that Internet display of probate records "puts individuals 'at significant risk for theft and harm and infringes on their constitutional right of privacy.'"[54]

Not surprisingly, then, many see privacy as an essential feature of the revocable trust,[55] one that the legal system has gone to extraordi-

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48 *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598–99 (1978). The Court stated:

> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. . . . [T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

*Id.* (footnote omitted).

49 Admittedly, some wills are easier to obtain than others. For example, Bob Hope's will was filed for probate in late August 2003 with the Los Angeles Superior Court. It was not "released from the court's 'safekeeping' vault" until October 2003, however, after the Smoking Gun Web site successfully "appealed to an administrative judge." *See* The Smoking Gun, Discussion of Last Will and Testament of Bob Hope, http://www.thesmokinggun.com/archive/bobhopewill1.html (last visited Nov. 13, 2007).

50 Claudia Van Nes, *Hepburn's Beneficiaries*, HARTFORD COURANT, July 29, 2003, at A1.

51 *Hepburn Will Posted on Web*, L.A. TIMES, July 29, 2003, at E3.

52 *See, e.g.*, *In re* Estate of Engelhardt, 804 N.E.2d 1052, 1053–54 (Ohio Prob. Ct. 2004) (discussing the Hamilton County Probate Court's practice of making its records available on the Internet).

53 *Id.* at 1058.

54 *Id.* at 1053 (citing Estate's Memorandum in Support of Motion to Delete Pleadings from the Internet). The executor was particularly concerned about Internet access to "records of the administration of the estate," which "'contain[ed] sensitive financial information.'" *Id.*

55 Estate of Merrill, N.Y.L.J., Nov. 4, 1998, at 29 (N.Y. Surr. Ct. 1998) ("[T]he privacy thought to be afforded by lifetime trusts, as opposed to wills, is recognized as one of the primary motivating factors in the use of lifetime trusts . . . ." (citation omitted)). Indeed, in mass marketing revocable trusts to the American public, proponents cite privacy as one of its principal advantages. *See, e.g.*, NORMAN F. DACEY, HOW TO AVOID PROBATE! 45 (5th ed. 1990) ("The inter vivos trust . . . is a boon to those who seek privacy. Unlike a will, its terms are not disclosed to a probate court, and its assets and the identity of the persons to receive them are closely guarded secrets. If you resent the piece in the newspaper telling your business, this is the way to avoid it.").

nary efforts to preserve. Only a few exceptions exist. Some states require the recording or registration of the trust instrument, especially if real estate is involved.[56] A court may make a trust instrument public if the trust becomes the subject of litigation.[57] Of course, trustees must have access to the trust instrument and tax authorities must have access too.[58] Third parties that deal with the trust or trustee—including financial institutions, transfer agents, title insurance companies, and purchasers of trust property—may require a copy of the trust instrument as a condition of doing business.[59] However, these exceptions leave a broad area of privacy.

Even the classic "pour-over" will that leaves part or all of the testator's estate to a preexisting trust does not usually cause the trust to

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56 Ralph M. Engel, *The Pros and Cons of Living Trusts as Compared to Wills*, EST. PLAN., Apr. 2002, at 155, 163–64 (noting that states may require recording of a trust instrument "[i]f real estate is involved, . . . thereby decreasing the level of privacy that a living trust can provide"); *see also* GEORGE T. BOGERT, TRUSTS 64 & n.21 (6th ed. 1987) (discussing and citing statutes requiring recording); RESTATEMENT (THIRD) OF TRUSTS § 16 reporter's note (2003) (discussing recording of trusts). In addition, several states, especially those that have adopted the UPC, require registration of all testamentary and inter vivos trusts with the relevant local court. For an example of the UPC provisions, see ALASKA STAT. §§ 13.36.005–.025 (2004) (stating the duty to register trusts, registration procedures, and the effects of registering or failing to register).

57 For example, in a 1995 case, a beneficiary and conservator of person petitioned a Connecticut probate court for an accounting of his incompetent uncle's revocable inter vivos trust. *In re Reisman*, CONN. L. TRIB., Jan. 22, 1996, at 76. Rejecting the trustees' argument that disclosure of the trust instrument would violate the settlor's "privacy interest," the court ordered the trustees to provide a copy of the trust instrument to the court and "further ordered that the Trust accounting and Trust instrument shall not be confidential but shall be placed in the court file and accessible to the public." *Id.* at pts. IV, V. Thus, commentators have emphasized that the privacy of a revocable trust "can be illusory." Bruce G. Cohne & Martha S. Stonebrook, *The Living Trust in Utah—Boon or Boondoggle*, UTAH B.J., June/July 1993, at 10, 11 (citing as one "instance" the fact that "if there is any litigation concerning the trust, a court will take jurisdiction of the trust and it will become part of the public court record"); *see also* Ann Bradford Stevens, *Uniform Probate Code Procedures: Time for Wyoming to Reconsider*, 2 WYO. L. REV. 293, 302 (2002) ("An unhappy party can bring suit against the trustee and thus make the trust and actions of the trustee part of the public record.").

58 A. JAMES CASNER, ESTATE PLANNING 189 (4th ed. 1979) ("[A] document such as the instrument creating a revocable inter vivos trust will be filed with the [final federal estate tax] return; but the return and its accompanying papers are not open to general public scrutiny . . . ." (footnote omitted)). In some states, disclosure of the trust for tax purposes may ultimately result in "the existence of the trust . . . becom[ing] a matter of public record." Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 266 n.209 (1981) (discussing Missouri law).

59 JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS 555 (3d ed. 2007) (stating that "the trustee may have to provide copies of the trust document to financial institutions that invest trust assets"); KATHRYN G. HENKEL, ESTATE PLANNING AND WEALTH PRESERVATION: STRATEGIES AND SOLUTIONS ¶ 7.03[3], at 7–8 (1998) ("As a practical matter, persons dealing with the trustee (e.g., banks, brokerage houses, and purchasers of trust property) may require copies of the trust instrument."). This situation may not last much longer, however. *See* Foster, *supra* note 15, at pt. II.B.2 (discussing reforms to limit third parties' access to trust instruments).

become public record.[60] As one court explained, including the trust instrument in the estate probate files would "defeat" a basic purpose of an inter vivos trust: "to avoid publicity concerning family and business plans."[61] Marlon Brando's will illustrates the practical advantages of pour-over wills for publicity-shy testators. On July 9, 2004, Brando's will was filed in Los Angeles Superior Court.[62] The public record revealed that the actor left ten surviving children[63] and, notwithstanding rumors to the contrary,[64] an estate of over $21.6 million.[65] Despite a media feeding frenzy, reporters could not discover how Brando divided his property.[66] Except for "certain monthly payments"[67] to two friends,[68] Brando's will devised his entire estate to his Living Trust.[69]

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60 *See* Richard Gould, *The Living Trust: Fact v. Fiction*, 15 QUINNIPIAC PROB. L.J. 133, 136–37 (2000) (discussing the use of the pour-over scheme to "protect[ ] the privacy of a person's dispositive plan"); Dennis M. Patrick, *Living Trusts: Snake Oil or Better Than Sliced Bread?*, 27 WM. MITCHELL L. REV. 1083, 1098 (2000) (discussing the use of a pour-over will to promote privacy and stating that the "usual result" is that "most of the estate will remain out of the public view").

61 *In re* Estate of Meskimen, 235 N.E.2d 619, 622 (Ill. 1968).

62 *Will Announced: Court Lists Worth of Brando Estate at $21.6M*, NEWSDAY, July 10, 2004, at A14 [hereinafter *Will Announced*]; *see also* Will of Marlon Brando (Aug. 28, 2002) [hereinafter Brando Will] (on file with author); First Codicil to Last Will Dated August 28, 2002 of Marlon Brando (June 18, 2004) (on file with author).

63 The children ranged in age from eight to forty-four at the time the will was executed. Brando Will, *supra* note 62, at art. 1. The will included "the names of two previously unknown children" in Tahiti. *Reportedly "Broke" Brando Leaves 21.6-Million-Dollar Estate*, AGENCE FRANCE PRESSE-ENGLISH, July 10, 2004 [hereinafter *Reportedly "Broke" Brando*]. Apparently, Brando may have other children as well. *See* Drew MacKenzie, *"I'm Secret Love Child of Brando,"* MIRROR, July 10, 2004, at 11 (reporting that Lisa Worme "has come forward to claim she is the secret love child of Hollywood great Marlon Brando").

64 *Will Announced*, *supra* note 62 ("The $21.6 million in assets listed in the petition painted a different picture of Brando's wealth than recent reports which claimed he was facing deep debts and living off a meager Screen Actors Guild pension.").

65 Petition for Probate of Estate of Marlon Brando § 3.a(9) (No. BP086759) (filed July 9, 2004) (on file with author). "Brando held $18.6 million in properties, which include his home on Mulholland Drive in Beverly Hills and Tetiaroa, a string of 11 tiny islands in Tahiti[, which] he bought . . . for just $267,000 in 1966 . . . ." Terry Schermerhorn, *Brando Dough a No-Go*, N.Y. POST, July 10, 2004, at 8. The other $3 million is "said to include paintings, sketches and rare scripts." *See Reportedly "Broke" Brando*, *supra* note 63.

66 The one fact the media could report was that Brando's adopted daughter, Petra, and orphan grandson, Tuki, are not beneficiaries. Brando's will intentionally omits Petra and Tuki's deceased mother and their issue from taking under his will and living trust. Brando Will, *supra* note 62, at art. 1; *see* Ian Markham-Smith, *Brando Cash Snub to Family*, SUNDAY EXPRESS, July 11, 2004, at 18 (describing Brando's will "disinherit[ing] both the son of his tragic daughter Cheyenne and his own adopted daughter").

67 Brando Will, *supra* note 62, at art. 3.1.

68 The friends are Alice Marchak and Blanche Hall. *Id.*

69 *Id.* at art. 3.2; *see also Reportedly "Broke" Brando*, *supra* note 63 ("Brando ordered his assets . . . to be transferred to a 'living trust[,]'. . . which under California law can remain secret.").

Thus, the pour-over will gave Brando after death what he most craved during life—privacy.[70]

Trust law has placed such a premium on privacy that it has denied trust beneficiaries as well as the general public access to the trust instrument. To preserve trust privacy, traditional doctrines and rules have allowed a trust beneficiary to see at best the terms of the trust that the trustee deems relevant to that specific beneficiary.[71]

Even the most reform-minded courts, legislators, and scholars have not challenged this view of trust privacy. Nor have they made any attempt to reconcile or explain why two supposed "functional equivalents"—the will and the revocable trust—are treated differently in an otherwise far-reaching scheme to unify laws governing wills and will substitutes. Reformers simply have assumed trust privacy as the rule and designed their proposals to intrude minimally on that privacy.[72] As I have shown elsewhere, this uncritical acceptance of trust privacy ultimately impeded and distorted reform.[73]

Reformers have cited trust privacy as their principal rationale for restricting access to a decedent's revocable trust instrument by beneficiaries,[74] the public at large,[75] and third parties dealing with the trust and trustee.[76] Yet, reformers have never defined the term "trust privacy" or explored its continuing viability.[77] To compound the problem, they have used "privacy" indiscriminately to refer to diverse interests in and parties to a trust.[78]

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70 *Will Announced*, *supra* note 62 (describing Brando's private funeral as "cloaked in the kind of secrecy that the two-time Oscar winner craved toward the end of his life . . . [and] in keeping with his intensely private nature").

71 *See supra* note 15.

72 *See, e.g.*, Administration of Trusts: Hearing on A.B. 460 Before the Assemb. Comm. on Judiciary, 2000 Leg. 6 (Cal. 2000), *available at* http://info.sen.ca.gov/pub/99-00/bill/asm/ab_0451-0500/ab_460_cfa_20000112_101603_asm_comm.html [hereinafter Administration of Trusts] (seeking to avoid excessive intrusion into settlors' privacy rights).

73 *See* Foster, *supra* note 15.

74 *See, e.g.*, Administration of Trusts, *supra* note 72, at 6 ("[T]he changes . . . appear to strike an appropriate balance, giving trustees needed protections while protecting the privacy rights of settlors and the rights of beneficiaries and heirs to have access to information that affects their interests.").

75 *See* Foster, *supra* note 15, at pt. II.B.1; *see also* Patrick, *supra* note 60, at 1099 (lamenting that recording statutes requiring the registration of trust instruments "destroy the privacy otherwise afforded [to a] settlor of [a] living trust").

76 *See* Foster, *supra* note 15, at pt. II.B.2.

77 These problems are by no means limited to the trust context. "[T]he word 'privacy' has proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts," J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.7[E] (1999), yet notoriously difficult to define. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088–89 & nn.1–9 (2002) (citing numerous comments by "philosophers, legal theorists and jurists . . . lament[ing] the great difficulty in reaching a satisfying conception of privacy"); *id.* at 1093–124 (presenting a critical analysis of existing conceptions of privacy).

78 *See, e.g.*, Administration of Trusts, *supra* note 72 (discussing California amendments "to protect the privacy rights" of living settlors of irrevocable trusts); UNIF. TRUST CODE

The remainder of this Article explores the question reformers have left unanswered: Should trusts be private? To provide a more analytical discussion of the arguments for and against trust privacy, Parts II and III focus on the human impact of trust privacy. This analysis shows that trust privacy creates significant human costs as well as benefits for trust insiders and outsiders alike.

## II
## THE HUMAN BENEFITS OF TRUST PRIVACY

Trust privacy, like privacy in general, is not merely an abstract, theoretical concept.[79] It can have profound financial, administrative, and psychological implications for settlors, trustees, beneficiaries, family survivors, and other third parties.[80]

### A. Settlors

Trust privacy can promote settlors' control over their identity, reputation, and property.

#### 1. *Control over Identity and Reputation*

Privacy, Professor Laurence Tribe has written, allows an individual to be the "master of the identity one creates in the world . . . [, to] shape the 'self' that one presents to the world, and on the basis of which the world in turn shapes one's existence."[81] For many people, this desire to control their own identities and reputations extends be-

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§ 1013 cmt. (amended 2005) (stating that section 1013 "is designed to protect the privacy of a trust instrument"); Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 283 (2001) (stating that Iowa certification of trust reforms were designed "to facilitate commercial transactions, while at the same time protecting the privacy of beneficiaries' interests in the trust" (footnote omitted)).

79 *See* Solove, *supra* note 77, at 1128 (proposing "[a] pragmatic approach to the task of conceptualizing privacy" and arguing that approach "should not . . . begin by seeking to illuminate an abstract conception of privacy, but should focus instead on understanding privacy in specific contextual situations"); *see also* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 210–18 (2000) (discussing political, social, economic, and personal costs of the erosion of privacy).

80 Trust privacy can have larger implications as well. For example, South Dakota enacted special trust privacy legislation as part of an effort to "enhance South Dakota's appeal for the placement of wealth." Michael J. Myers & Rollyn H. Samp, *Essay: South Dakota Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage?*, 44 S.D. L. REV. 662, 665 (1999). South Dakota's trust legislation, entitled "Petition to Protect Privacy," permits a trustee, settlor (if living), or beneficiary to file a petition with the court to protect privacy "in any court proceeding concerning the trust." S.D. CODIFIED LAWS § 21-22-28 (2004). Once the petition is filed, the trust instrument, inventory, trustee statements and reports, and any petitions or court orders regarding the trust are sealed and "may not be made a part of the public record." *Id.*

81 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1304, 1389–90 (2d ed. 1988).

yond death.[82] They want to be remembered as they purported to be and not as they actually were.

When a person devises property in a will, the carefully constructed façade of a lifetime may crumble.[83] Because a will is public record, the decedent's real relationships and personality may be revealed for the entire world to see. The model family man may be exposed as a sham when his will spews hatred towards his nearest but, it turns out, not dearest[84] or leaves money to a nonmarital child or lover.[85] For example, the holographic will of CBS reporter Charles Kuralt revealed a shocking secret.[86] Unbeknownst to his wife and the viewing public, Kuralt had carried on a nearly thirty-year "intimate" relationship with a Montana woman.[87] Similarly, a will may reveal the community pillar's hidden prejudice, paranoia, or bizarre religious or political views.[88] The hero in life may be reduced to a figure of ridicule after death when inquiring minds learn that his will left millions

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82 Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 55 (1999) ("Social psychologists have observed that the desire somehow to transcend mortality and sustain one's identity beyond the grave is both common and strong." (footnote omitted)).

83 Of course, the opposite may be true as well. Testators may take advantage of the publicity of probate to "communicat[e] to survivors how [they] prefer to be remembered." *Id.* at 54 (footnote omitted). Through will bequests, "a testator might hope to win posthumous recognition as a devoted parent, a benevolent employer, a loyal friend . . . [or] define her character with precision. Thus can she present herself to the world as a humanitarian or, more particularly, as a hospitable host, a man of letters, a Marxist, a midget, a tobacco aficionado—or as a fancier of equestrian blood sport." *Id.* at 54–55 (footnotes omitted).

84 For a sampling of nasty will provisions about "close" family members, see Larry Van Dyne, *And to My Ungrateful Son . . .*, WASHINGTONIAN, Nov. 1998, at 62. One will read: "My wife . . . has been most ungrateful, disrespectful, contemptible, and uncooperative and will not deserve what she gets from me when I have left this earth . . . . I give her full credit for the physical and mental suffering I have had to endure for so many years." *Id.*

85 *See, e.g.*, Jo Ann Lewis, *Armand Hammer's Afterlife; His Money Brought Him Praise on Earth. In Death, It's Also Brought Acrimony*, WASH. POST, Dec. 27, 1996, at B1 (reporting that in a "last-minute scramble" to prevent exposure of his deepest secrets after his death, Armand Hammer revised his will a dozen times during his final months and eliminated provisions for his two mistresses and his nonmarital daughter). Because of the publicity of probate, some testators attempt to "cut out a nonmarital child without mentioning the child by name or suggesting his existence." DUKEMINIER & JOHANSON, *supra* note 12, at 547. Even so, the secret may become public if the child contests the will. *See* Presley v. Hanks, 782 S.W.2d 482, 489–90 (Tenn. Ct. App. 1989) (holding that Elvis Presley's will leaving property to his "lawful" children excluded his nonmarital daughter); DUKEMINIER & JOHANSON, *supra* note 12, at 547 (providing examples).

86 *In re* Estate of Kuralt, 15 P.3d 931, 931–34 (Mont. 2000) (upholding Kuralt's holographic will leaving his Montana property to Patricia Shannon and summarizing the details of Kuralt and Shannon's relationship).

87 *Id.* at 932.

88 *See* E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 282 & nn.26–27 (1999) (citing examples of bequests to "a non-mainstream religion [and] a radical political organization"); Rachel Tobin Ramos, *Will & Grace: A Church's Legal Battle over an $18M Estate*, DAILY REP. (Fulton County, Ga.), Aug. 11, 2003, at 1 (discussing a will

to a parrot[89] or ordered his remains frozen, turned into diamonds or frisbees, shot into space, or interred in a Ben & Jerry's Cherry Garcia ice cream container.[90]

Consider, for example, Ted Williams's tragic fate. A war hero and Hall of Fame slugger for the Boston Red Sox during life, Ted Williams was reduced after death to a frozen, severed, shaved, and cracked head in an Arizona cryonics lab.[91] Although Williams's will directed that his remains be cremated and sprinkled at sea,[92] these instructions were "overridden by a greasy scrap of paper produced by John Henry Williams 10 days after his father's death. The crude, handwritten note, purportedly stored in the trunk of a car, describes a vague commitment to 'bio-stasis,' and carries the signature of the Splendid Splinter and two of his children."[93]

For many people, posthumous "exposure to publicity of their own personality is distasteful, if not abhorrent."[94] Indeed, the mere prospect of such exposure can cause tremendous anxiety and distress to the point that it denies the dying a peaceful passing.[95] Trust pri-

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that left the testator's fortune to the Self-Realization Fellowship Church, "a very private religion that some call a cult").

89 *See* Claudia Joseph, *The Pet Rich List 2003*, MAIL ON SUNDAY, May 11, 2003, at 60 (summarizing bequests to a parrot, dogs, cats, cattle, sheep, tortoises, and a chimpanzee); Siobhan Morrissey, *Wills Go to the Dogs*, A.B.A. J. 24 (2003) (discussing devises to pets, including singer Dusty Springfield's will that "took care to ensure her cat, Nicholas, would live in the style to which he had become accustomed: his bed lined with Dusty's nightgown, Dusty's recordings playing at bedtime, and a diet of imported baby food"). *See generally* Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000).

90 *See* MARTIN M. SHENKMAN, INHERIT MORE 24 (2003) (discussing a case where a decedent specified that she wanted her ashes interred in a Ben & Jerry's Cherry Garcia ice cream container); Kristin Dizon, *Have It Your Way, Even After You Die*, SEATTLE POST-INTELLIGENCER, Nov. 14, 2002, at A1 (discussing unusual dispositions of remains, including Frisbee inventor Ed Headrick's instructions that his ashes be molded into frisbees, human and pet remains turned into red, blue and yellow diamonds, and Timothy Leary's and Gene Roddenberry's ashes launched into space).

91 *See* Tom Verducci, *What Really Happened to Ted Williams*, SPORTS ILLUSTRATED, Aug. 18, 2003, at 66.

92 Last Will and Testament of Theodore S. Williams, at art. 1.1 (Dec. 20, 1996) (on file with author) (directing that Williams's "remains be cremated and [his] ashes sprinkled at sea off the coast of Florida where the water is very deep").

93 Tim Sullivan, *Williams Deserves a Hero's Farewell*, COPLEY NEWS SERVICE, Aug. 22, 2003. The note read: "JHW, Claudia, and Dad all agree to be put into Bio-Stasis after we die. This is what we want, To be able to be Together in The Future, even if it is [only a] chance." Williams Note (Nov. 2, 2000) (on file with author).

94 Rudd v. Searls, 160 N.E. 882, 886 (Mass. 1928) (referring to will contests that "frequently, if not invariably, result in minute examination into the habits, manners, beliefs, conduct, idiosyncrasies, and all the essentially private and personal affairs of the testator").

95 *Cf.* John Crewdson, *Liberace's Death Raises Privacy Questions*, CHI. TRIB., Feb. 15, 1987, at 21 (discussing Liberace's attempts to cover up the fact that he was dying of AIDS because of "what the disclosure implied about his private life"); Michelle Green, *Liberace: The Gilded Showman*, PEOPLE, Feb. 16, 1987, at 24 (describing Liberace's efforts to preserve his "deceptive public image" until the very end).

vacy responds to this deeply personal need to define one's own public and private selves.[96] It allows settlors to devise property as they wish without risking the reputation of a lifetime, however unfounded.[97] As discussed below,[98] protecting the deceased's memory may also provide important psychic and financial benefits to settlors' survivors.

2. *Control over Property*

American inheritance law is locked in a family paradigm.[99] Rules governing intestacy, wills, contracts to devise, and will substitutes favor the so-called "natural objects of the decedent's bounty"[100]—the decedent's closest family members.[101] For those whose loved ones do not fit society's definition of "natural objects"[102] or whose estate plan does not meet society's notion of a "natural disposition,"[103] trust privacy

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96 *See* ROSEN, *supra* note 79, at 223 ("The ideal of privacy . . . insists individuals should be allowed to define themselves, and to decide how much of themselves to reveal or to conceal in different situations."); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1219–20 (1998) (describing individuals as "hav[ing] differing private and public masks" and stating that "[t]he ability to maintain divergent public and private personae creates the elbowroom necessary to resist social and political homogeneity"). It should be noted, however, that "[t]his differentiation between public and private visages need not be used for good . . . ." *Id.* at 1218. It may also be "conducive to social hypocrisy [and] interpersonal exploitation through deception." Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 6 (Ferdinand David Schoeman ed., 1984) (summarizing views of people who think "an indifference to privacy" is desirable). For an extended discussion of the dangers privacy creates by allowing individuals to misrepresent themselves to others, see, for example, RICHARD A. POSNER, OVERCOMING LAW 539–51 (1995); Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978); Lynn M. LoPucki, *Did Privacy Cause Identity Theft?*, 54 HASTINGS L.J. 1277 (2003); Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978).

97 This is not to say that use of a revocable trust will necessarily ensure privacy. For example, if there is subsequent litigation over the trust, its terms may well become public. *See supra* Part I; *see also Armand Hammer: His Will and His Way*, BUS. WIRE, Sept. 15, 1996 ("Hammer had made arrangements to provide for [his lovers and nonmarital daughter] through a living trust, but after [his wife] died and her estate sued him, the terms of the trust became vulnerable to scrutiny and he began moving assets out of the trust . . . .").

98 *See infra* Part II.D.

99 Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001).

100 *See* Mundy v. Simmons, 424 A.2d 135, 139 (Me. 1980) (defining "the surviving spouse and those who stand in closest relationship within the bloodline as the natural objects of the decedent's bounty").

101 *See* Foster, *supra* note 99, at 205–19 (discussing the preference for close family members in intestacy, wills, contracts to devise, and will substitutes).

102 *See id.* at 210–12 & nn.56–58 (discussing and citing case law and scholarly commentary on manipulation of testamentary doctrines and rules to defeat bequests to individuals other than "natural objects of the decedent's bounty").

103 "Unnatural dispositions" may include not only bequests outside the family but also bequests to family members "in amounts that deviate from intestate succession patterns." *Id.* at 212; *see also* Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got To Do with It?*, 57 U. PITT. L. REV. 841, 877, 880 (1996) (noting that "[w]hen the testamentary pattern of a will violates [the] . . . norm [of equal division among chil-

may have significant benefits. A revocable trust that operates as a "secret will"[104] can avoid the costs, strictures, and family bias of the probate system and give settlors control over their property at death as well as during life. Not surprisingly, the revocable trust has become a staple of estate planning practice for those most harmed by the family paradigm—unmarried same-sex or opposite-sex cohabitants, nontraditional elders, and other "nonconforming" property owners.[105]

In theory, revocable trusts are as vulnerable to the family paradigm as wills. Like wills, trusts that dispose of property "unnaturally" carry a heightened risk of invalidation on grounds of undue influence, fraud, or settlor incapacity.[106] In practice, however, revocable trusts have proven to be "more resistant" to mental capacity challenges.[107] While a variety of factors contribute to this resistance,[108] privacy is the principal reason. The practical effect of trust privacy is, as Professor Mary Louise Fellows has observed, that "potential challengers are much less likely to know that [a] trust exists than that a

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dren], eyebrows are lifted and questions are asked" and that "[d]isproportionate gifts to relatives can also trigger undue influence claims" (footnote omitted)).

104 *See supra* note 17 and accompanying text.

105 *See, e.g.*, Dubois, *supra* note 27, at 322 (recommending the use of revocable trusts for "gay, lesbian, or non-traditional elders"); Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75, 93–94 (2003) (discussing the benefits of revocable trusts for nontraditional couples). As Professor Sherman has observed, however, "it would hardly be reassuring to the homosexual transferor to be advised that his testamentary plans will be kept intact only so long as his relations do not find out about them." Sherman, *supra* note 58, at 266. For an extended discussion of "nonconforming" or "abhorrent" testators, see Spitko, *supra* note 88.

106 *See* Sherman, *supra* note 58, at 264–65 ("[A] homosexual settlor must be as concerned about charges of undue influence as is the homosexual testator."); Spitko, *supra* note 88, at 286 ("[W]ill substitutes are subject to the same grounds of attack as are testamentary transfers." (footnote omitted)); *supra* note 8 (citing cases extending to revocable trusts the mental capacity standards governing wills).

107 John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978); *see also* DUKEMINIER & JOHANSON, *supra* note 12, at 393 ("A revocable trust, like a will, can be contested for lack of mental capacity and undue influence. In practice, however, it is more difficult to set aside a funded revocable trust than a will on these grounds.").

108 *See* Langbein, *supra* note 107, at 67 (asserting that trusts are more resistant to capacity challenges because they "belong to the jury-free realm of equity law"); Jane A. Marquardt, *A Will–Not a Wish–Makes It So: Estate Planning Options for Same-Sex Couples*, FAM. ADVOC., Summer 1997, at 35, 38 ("Revocable trusts are also harder to challenge. Because no court proceeding is pending, a family member who wants to contest the estate plan must take the initiative to hire a lawyer and file an action contesting the trust."); Sherman, *supra* note 58, at 266 n.209 (noting that unlike a will, "[a] funded revocable inter vivos trust . . . because it generally provides for payments to the settlor throughout his life, continually thrusts itself into the settlor's consciousness . . . [and thus,] a contestant might have more difficulty persuading a jury that a revocable inter vivos trust was the product of the ephemeral influence of a beneficiary").

will exists."[109] In fact, in marked contrast to the wills context, even those most privileged by the family paradigm—the settlor's heirs—receive no notice of a trust that adversely affects their interests.[110] Thus, trust privacy ultimately trumps the family paradigm.

Privacy does more than prevent "disruption"[111] of settlors' dispositive schemes, however. It further promotes settlors' control over property by protecting the assets settlors can leave to their survivors. By discouraging potential challenges to trusts,[112] privacy in turn prevents depletion of settlors' estates.[113] Money that would otherwise be

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109 Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1094 (1980).

110 *Cf.* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 342 (3d ed. 2004) ("[M]any states require that heirs be notified before a will is admitted to probate, whereas no such notice is given to persons adversely affected by a living trust."). California, however, does require notice to the settlor's heirs upon "the death of a settlor or irrevocability within one year of the death of the settlor of the trust by the express terms of the trust because of a contingency related to the death of a settlor." CAL. PROB. CODE ANN. § 16061.7(b)(2) (West Supp. 2007). Even where notice is not required, it may be desirable for statute of limitations purposes. For example, under UTC section 604, "[a] person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within . . . [three] years after the settlor's death . . . ." UNIF. TRUST CODE § 604(a)(1) (amended 2005). If the trustee sends that person "a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding," the contestant has only 120 days to contest the trust. *Id.* § 604(a)(2).

111 Fellows, *supra* note 109, at 1095 ("Through the revocable trust, the settlor can help to protect against disruption of his dispository scheme . . . ." (footnote omitted)).

112 *See* DACEY, *supra* note 55, at 45 ("In a word, the publicity of probate invites attack upon a will; the privacy of an inter vivos trust discourages it.").

113 *See* Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 635–36 (1994) (stating that "[w]ill contests, with their attendant costs and attorneys' fees, can significantly reduce the bequests beneficiaries actually receive" and citing as examples cases in which "litigation costs consumed approximately one-third of an estate" and where "the reported legal fees exceeded twenty-four million dollars" (footnotes omitted)). By discouraging litigation, privacy can reduce other costs as well. Such costs include delays in distributing assets to beneficiaries, Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with* In Terrorem *Clauses*, 51 SMU L. REV. 225, 263 (1998), and "emotional costs" to survivors. Susan N. Gary, *Mediation and the Elderly: Using Mediation To Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425–28 (1997). Contests over decedents' assets can "generate family animosity and bring family quarrels and testators' private lives to public view." Begleiter, *supra*, at 636 (footnote omitted); *see also infra* Part II.C.2 (discussing advantages of trust privacy for maintaining relationships among survivors). For those concerned about their posthumous reputation, the costs of litigation may be particularly onerous. *See* Begleiter, *supra*, at 636–39 (discussing the "examination into a testator's beliefs, habits, and idiosyncrasies" and providing examples of the "ridicule, contempt, and criticism associated with the publicity surrounding a will contest" (footnote omitted)). Decedents who leave property outside the family paradigm may be particularly at risk of such "insult[s] [to the] memory of the deceased." Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 578 (1992). For an extended discussion of the use of mental capacity doctrines to overturn "unnatural" wills, see, for example, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243–69 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Spitko, *supra* note 88, at 278–87.

expended in defending trusts goes where settlors intended—to beneficiaries rather than lawyers.[114]

Even long after a settlor's death, trust privacy can continue to preserve the settlor's dispositive scheme and assets. Trust privacy allows settlors to prevent not only potential challengers but also beneficiaries and creditors from knowing that the trust exists.[115] In so doing, privacy can reduce future litigation and its associated costs.[116] Moreover, privacy can further enhance settlors' control over property by limiting beneficiary harassment of trustees. As the next section will discuss, privacy can effectively give trustees free rein to manage trust assets as directed by trust settlors, not beneficiaries.

### B. Trustees

Recent reports suggest that beneficiaries have declared war on trustees. Beneficiaries picket trustees,[117] lobby for new legislation to

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114 *See* BOGERT, *supra* note 56, at 356–57. According to Bogert:

> Expenses incurred by the trustee in performing his duty to defend the trust are payable from the trust property where the defense is successful. And even if the trustee were unsuccessful, the court may allow counsel fees out of trust property where the result of the transaction had not been the total destruction of the trust, and the trustee acted in good faith.

*Id.* (footnotes omitted). The settlor's estate could be even further depleted if the contestant of the revocable trust is the settlor's executor or administrator. Estate executors and administrators have a fiduciary duty to collect estate assets, which may include "maintain[ing] an action to recover possession of property or to determine the title thereto." UNIF. PROBATE CODE § 3-709 (amended 2006). Like trustees, executors and administrators are generally not personally liable for expenses incurred in litigation on behalf of the estate. *Id.* § 3-720 (stating that if such a fiduciary "defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred"). Thus, the costs of both contesting and defending the settlor's trust would be paid out of the settlor's assets.

115 *See infra* Part II.B (discussing litigation and other actions by beneficiaries); *see also* Engel, *supra* note 56, at 164 ("If the client has a beneficiary who has substantial debts, he or she may want to keep the fact that the beneficiary will receive assets under the client's will from the beneficiary's creditors.").

116 Even in subsequent court proceedings over a trust, the trustees may pay their legal expenses out of trust assets. *See* Carolyn T. Geer, *Bad Heir Days*, FORBES, June 17, 1996, at 212 (reporting that after the plaintiffs of a beneficiary class action suit against Mellon Bank lost on appeal, the bank sought $1.15 million from the named plaintiff's trust or from his lawyers to pay its legal fees, "potentially wiping out most of the trust").

117 *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 n.2 (2002) ("[I]n March 2001, a small group of protesters gathered outside the Deutsche Bank building in Manhattan, New York. They accused the bank of mismanaging trust accounts, including a $17-million estate.").

reduce trustee powers,[118] and flood trustees[119] and the media with complaints about trustee investment decisions, high fees, and insensitivity to beneficiaries' needs.[120] Individual and class action suits against trustees are up and are only likely to increase as baby boomers and their trusts age.[121] Beneficiaries even have their own support group, Heirs,® Inc., complete with a fight song and Web site that posts horror stories of trustee malfeasance and do-it-yourself guides to picketing and suing trustees.[122]

Recent trust reforms have taken a decided tilt toward beneficiary rights. Indeed, commentators have acknowledged that the UTC "provides a bill of rights for beneficiaries."[123] Over the past decade alone, state legislatures and courts have expanded beneficiary powers to

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118 *See, e.g.*, Katharine Fraser, *Trust Reform Group Clamors for Freedom To Switch Banks*, AM. BANKER, Dec. 22, 1995, at 1 (stating that the beneficiary advocacy group "Heirs, Inc. is waging a lobbying battle for portability in . . . Pennsylvania"). *See generally* Standish H. Smith, *Reforming the Corporate Administration of Personal Trusts—The Problem and a Plan*, 14 QUINNIPIAC PROB. L.J. 563 (2000) (containing proposals from Heirs, Inc. co-founder advocating extensive legislative reforms, including additions and revisions to an early version of the Uniform Trust Code).

119 Communication with trustees, especially corporate trustees, has been problematic, however. Simon Barker-Benfield, *The Trouble with Trusts: What Are Beneficiaries To Do When Funds Are Mismanaged?*, FLA. TIMES-UNION, Feb. 1, 1998, at G1 (discussing beneficiary complaints about nonresponsiveness of trustees); Jo Ann Engelhardt & Robert W. Whitman, *Administration with Attitude: When to Talk, When to Walk*, PROB. & PROP., May/June 2002, at 12, 13–14 (discussing complaints regarding lack of communication).

120 *See, e.g.*, Alison Beard, *When Trust in the Trustees Runs Out*, FIN. TIMES, Nov. 13, 2002, at 26 (discussing the "high-profile dispute [over Harry Winston's trust as] highlight[ing] a fundamental, and escalating, tension between beneficiaries and the various institutions that manage trusts"); Mike McNamee, *Keeping Trusts Out of Harm's Way*, BUS. WK., Apr. 10, 2000, at 228 (discussing beneficiaries' complaints about trustees).

121 *See* Barker-Benfield, *supra* note 119 (discussing beneficiary complaints about "unsatisfactory trust management" and claims that "the problem will only mushroom as aging baby boomers start inheriting from their parents and making their own long-term money management plans"); Margaret Price, *Inherited Problems*, NEWSDAY, Aug. 4, 2002, at F8 (referring to the "'dramatic' rise in trusts and estates litigation" (quoting a Chicago trusts and estates lawyer)); Mark Skertic, *Bank Trust Conversions Trigger Suits*, CHI. TRIB., June 15, 2003, at C1 (discussing class action suits against Bank One, Bank of America, First Union Corp., and LaSalle Bank). As Professor Robert Whitman and Kumar Paturi have emphasized, however, current court procedures and litigation costs mean that "beneficiaries who cannot gain the services of an attorney to carry out the necessary procedural steps required to bring a trustee before the court" cannot "effectively assert in court the rights that the law has, in theory, granted to a trust beneficiary." Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 70 (2002).

122 Heirs,® Inc. [hereinafter Heirs], founded in 1991, describes itself as "the first group of 'unhappy' beneficiaries in the country dedicated to reforming the administration of trusts/estates." Heirs, http://www.heirs.net (last visited Nov. 19, 2007). It has a "2,400-strong mailing list." Beard, *supra* note 120. It produces a newsletter, *Fiduciary Fun*, publishes books on trust management issues, holds conferences, and has a Web site which contains, *inter alia*, a list of banks and numbers of beneficiary complaints against those banks on file with Heirs. *See* Heirs, *supra*.

123 Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, PROB. & PROP., Mar./Apr. 2003, at 18, 21.

modify and terminate trusts, demand information from trustees, veto changes in trust situs, and remove trustees.[124] And, if some reformers have their way, beneficiaries will soon be able to fire and hire trustees at will.[125]

In an era of beneficiary empowerment, trust privacy can provide a buffer between beneficiary and trustee. Beneficiaries with little or no knowledge of their rights and interests under a trust are less likely to assert those rights, second-guess trustee decisions, or insist on an active role in trust management. Trust privacy thus can offer trustees significant benefits. By promoting secrecy and thereby reducing opportunities for beneficiaries to interfere with trusts, privacy promises to reduce the administrative costs and hassles that increasingly plague today's trustees.

### C. Beneficiaries

Trust privacy can also protect beneficiaries from the outside world, each other, and themselves.

#### 1. *Protection from the Outside World*

Critics of the probate process paint a grim picture of heirs and will beneficiaries victimized by con men, thieves, and fortune hunters.[126] The source of the problem, they claim, is probate's publicity.[127] "Unscrupulous characters"[128] use public probate files to identify future targets.[129] Apparently, there is even a booming busi-

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124 For summaries and analyses of these reforms, see, for example, Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697 (2001); Chester & Ziomek, *supra* note 117, at 248–59; Halbach, *supra* note 23; Kartiganer & Young, *supra* note 123, at 19–20.

125 *See* Chester & Ziomek, *supra* note 117, at 249 (discussing proposals that would allow beneficiaries "to switch easily from one corporate trustee to another without having to show breach of trust or some other substantial cause, [so that] banks would be forced to compete, driving down administrative costs and fees, while, at the same time, allowing beneficiaries to seek more productive investing and more cost-effective trust administration" (footnote omitted)); Lewis Beale, *An Heir-Raising Enterprise*, L.A. TIMES, Nov. 18, 1992, at E1 ("'What we are saying . . . is that the beneficiary must have the right to shop, to switch, to watch over his own welfare, because there isn't anyone else to do that.'" (quoting Standish Smith's explanation for Heirs' proposal to give beneficiaries enhanced powers to remove trustees)).

126 *See, e.g.*, DACEY, *supra* note 55, at 28 (describing widows and heirs who "become the victim of . . . sharpsters," "con m[e]n," and "unscrupulous characters"); HENKEL, *supra* note 59, ¶ 7.02[1][b], 7-4 (providing examples of married couples who want to avoid listing their estate assets in the public probate records "so that fortune hunters and other scoundrels will not be as likely to start pestering the survivor . . . [and to avoid] attract[ing] thieves and other unscrupulous characters").

127 DACEY, *supra* note 55, at 28.

128 *Id.*; HENKEL, *supra* note 59, ¶ 7.02[1][b], 7-4.

129 DACEY, *supra* note 55, at 28 (stating that a decedent's survivor can "become the target of the unscrupulous characters who purchase [probate] lists"); MARY RANDOLPH, 8 WAYS TO AVOID PROBATE 5 (6th ed. 2006) (stating that con artists use probate records to

ness in compiling and selling probate lists of "hot prospects"[130] ripe for the plucking—recent widows, heirs, and beneficiaries.[131] As a result, the mere appearance of a name in the probate records can be a "prelude to financial disaster."[132] The publicity of probate can also endanger survivors' lives, identities, and reputations. Probate files are open to all, including kidnappers,[133] identity thieves,[134] and tabloid reporters.[135]

Trust privacy responds to this need to protect beneficiaries from the outside world. It allows settlors to transfer wealth without publicly disclosing their assets, their survivors' names and addresses, and their nastiest parting shots—justified or otherwise—about a survivor's infidelity, parentage, vices, or character flaws.[136]

### 2. *Protection from Each Other*

Trust privacy can also protect beneficiaries from each other. Settlors, trustees, or even beneficiaries may not want certain beneficiaries to know the names and shares of other beneficiaries for a variety of

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collect information about survivors who "might be vulnerable to scams"); *see also In re* Estate of R.R., Jr., 582 N.Y.S.2d 644, 646 (Surr. Ct. 1992) (citing as one rationale for sealing probate court files in a wrongful death settlement that "confidentiality protects settling plaintiffs from becoming targets of unwanted solicitations and swindles").

130 DACEY, *supra* note 55, at 28.

131 *Id.* According to Dacey:

> [P]eople . . . go from probate court to probate court, compiling lists of names of widows and other heirs. Anyone can purchase such a list of names and addresses of widows, compiled from probate court records and broken down into three groups. Names of those who have been widows for ten years or longer will cost $100 per thousand, while the names of those who have been widows for six years or for three years will sell for $150 or $200 per thousand, respectively. These latter are prime prospects for a con man because presumably there is less likelihood that they have already lost whatever was left to them . . . .

*Id.*

132 *Id.*

133 *See supra* notes 44–46 and accompanying text (discussing the *Estate of Hearst* case).

134 *See* Editorial, *Make Probate Records Accessible by Internet*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 2003, at 4B (noting that probate records may "include bank account numbers and Social Security numbers" and reporting concerns about identity thieves' access to probate records).

135 *See* DACEY, *supra* note 55, at 28 (reporting that newspapers assign reporters to probate courts); TURNER, *supra* note 17, at 6 (describing the "near-obscene" media coverage of Natalie Wood's will); *supra* notes 12, 30 and accompanying text (discussing journalists' access to probate records).

136 *See* Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749, 751 nn.13–18 (1994) (citing examples of nasty wills including a will that described the testator's wife as an "'adulteress and fiend in human form'" and a will that accused the testator's daughters of having an "'unfilial attitude toward a doting father,'" and left "'the sum of $1.00 to each and a father's curse.'" The will went on to declare, "'May their lives be fraught with misery, unhappiness, and poignant sorrow. May their deaths be soon and of lingering and torturous nature. May their souls rest in hell and suffer the torments of the condemned for eternity.'").

reasons. In the most typical case, the goal is to preserve harmony among settlors' survivors.[137] As literature and human experience have shown, unequal or inequitable dispositions to family and friends can lead to jealousy, anger, and pitched battles—both emotional and legal.[138] Survivors often view a decedent's last wishes in a will as not only a dispositive scheme but a statement of lifelong love and appreciation—or lack thereof—for those around the decedent.[139] In an era of serial marriages and blended families, an "unfair" will may well cause "permanent rupture"[140] of already tenuous relationships among a decedent's survivors.[141] The battle over vacuum cleaner magnate H. Earl Hoover's estate is illustrative. When Hoover's adopted stepson, Robert, discovered that his father had disinherited him, he was

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137 As Professor Susan Gary has observed, "[p]ersons planning the transfer of property after death . . . generally view family harmony as a tangential, but important goal." Gary, *supra* note 113, at 397. Although most of the literature has emphasized what Professor Ronald Chester has aptly called the "corrosive effect [of will contests] on families," Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 174 (1999), equal concerns arise in the revocable trust context. Gary, *supra* note 113, at 416 n.116 (noting that "family disagreements" arise over distribution of the decedent's nonprobate as well as probate property); Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 257 n.8 (2001) (referring to "donors who value family relations, harmony and the preservation of trust assets from the ravages of litigation").

138 For extended discussion and examples of situations where survivors' differing views of "fair" and equitable distribution of the decedent's assets creates conflicts, see GERALD M. CONDON & JEFFREY L. CONDON, BEYOND THE GRAVE: THE RIGHT WAY AND THE WRONG WAY OF LEAVING MONEY TO YOUR CHILDREN (AND OTHERS) 19–35 (1995); SHENKMAN, *supra* note 90, at 215–30; Gary, *supra* note 113, at 416–24. For a sampling of cases where decedents' "closest" family and nonfamily survivors battled over revocable trusts, see *In re* Estate of Mumby, 982 P.2d 1219, 1222 (Wash. Ct. App. 1999), which involved the decedent's daughter and "very close . . . next door neighbors" and friends who helped him with chores, cooked for him, mended his clothes, checked in with him regularly, kept him company, and enabled him "to live in his own home up to the time of his death," and *In re* Estate of Tosh, 920 P.2d 1230 (Wash. Ct. App. 1996), which involved the decedent's daughters and life partner.

139 *See, e.g.*, Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 636 (2000) ("Disputes in probate, trust, or guardianship matters may be the tangible manifestation of long-standing family problems (e.g., sibling rivalry, perceived favoritism, jealousy, or disapproval of a marriage or other relationship)." (footnote omitted)).

140 Pamela Yip, *Preparing a Legacy: Careful Estate Planning Can Keep Heirs from Fighting*, DALLAS MORNING NEWS, Aug. 25, 2003, at 1D; *see also* Radford, *supra* note 139, at 637–38 ("Many, if not most, cases arising in probate, trust, and guardianship involve families whose relationships could be irreparably shattered by bitter and prolonged litigation." (footnote omitted)).

141 *See* SHENKMAN, *supra* note 90, at 225 ("The increasing complexity of many family structures—blended families, nontraditional families, second, third, and later marriages, make the prospects of a will challenge more likely."). Battles between a decedent's spouse and his children from a prior marriage are particularly common. *See, e.g.*, Marshall v. Marshall, 547 U.S. 293 (2006) (involving J. Howard Marshall's wife, Anna Nicole Smith, and his son from a prior marriage); DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993) (discussing the will contest between Seward Johnson's wife and his children from a prior marriage).

"[s]tunned and angry, looking for proof that the father he loved died loving him back."[142] Robert filed a will contest alleging that his brother, stepmother, ex-wife, and two daughters had "destroy[ed] the once warm and loving relationship"[143] between him and his father by fraudulently stating that Robert had left his ex-wife and daughters destitute in his divorce settlement and had refused to pay for his daughters' educations.[144] The result was years of litigation[145] and a family so fractured that it communicated only through lawyers.[146]

Another reason to keep beneficiaries' names and interests private may be to deter beneficiaries from pressuring other beneficiaries to limit requests for trust funds.[147] In so doing, trust privacy may encourage beneficiaries to seek appropriate medical treatment, education, and support without fear of harassment by other current or future beneficiaries.[148]

In extreme situations, trust privacy may help safeguard beneficiaries from physical harm at the hands of other beneficiaries. For example, in a 1992 Michigan case,[149] the trustee of a discretionary support trust used precisely this rationale to deny a trust remainderman access to a complete copy of the trust instrument.[150] The trustee argued that because of the remainderman's alleged drug use,[151] the

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142 Mary T. Schmich, *A Family Feuds over Fortune*, CHI. TRIB., Nov. 9, 1986, at C1.

143 *In re* Estate of Hoover, 615 N.E.2d 736, 739 (Ill. 1993).

144 *Id.* Robert challenged the will on grounds of lack of testamentary capacity and undue influence. "The undue influence count was based on allegations that Mr. Hoover's free will and agency had been overcome by a calculated series of lies, misrepresentations, and omissions concerning Robert's character" and that "these misrepresentations struck at the core of Mr. Hoover's ethical code of conduct . . . ." *Id.*

145 *See* William Grady, *Hoover Estate Lawsuit To Get a Trial by Jury*, CHI. TRIB., June 18, 1993, at 3 (describing the "long-running legal feud" over the Hoover estate).

146 Schmich, *supra* note 142 (stating that Robert and his stepmother, Miriam, "no longer speak, their anger at each other conveyed and buffered by lawyers"). What made this situation particularly tragic was that Miriam and Robert were "[o]nce close friends—Miriam helped [Robert] learn to drive a car and to decipher high school algebra . . . [and] 'was more of a mother to [him] than'" his own mother. *Id.*

147 *See* HENKEL, *supra* note 59, ¶ 40.02[1]–[2], 3–6 (discussing problems with trusts that provide income to support the settlor's surviving spouse for that spouse's lifetime with the remainder going to the settlor's children and stating that such trusts involve the "classic conflict-producer, the zero-sum situation—a dollar more income for Stepmom is a dollar less principal for Stepdad's kids"); DAN ROTTENBERG, THE INHERITOR'S HANDBOOK 155–57 (1999) (discussing conflicts among "beneficiaries whose needs or perspectives differ").

148 In some cases, however, the trustee rather than fellow beneficiaries may be the problem. *See, e.g.*, Marsman v. Nasca, 573 N.E.2d 1025, 1028 (Mass. App. Ct. 1991) (involving a trustee who "discouraged [a beneficiary] from making any requests for principal").

149 *In re* Childress Trust, 486 N.W.2d 141 (Mich. Ct. App. 1992).

150 *Id.* at 143. The trustee also "provided [the court] with only a redacted copy of the trust instrument." *Id.*

151 *Id.*

life beneficiary "fear[ed] for her safety if her identity and other information were disclosed."[152]

Desperate or greedy beneficiaries may even go so far as to murder another beneficiary to enlarge or accelerate their trust interests. Indeed, the drafters of the Restatement (Third) of Property: Wills and Other Donative Transfers have explicitly recognized this possibility to the point of extending the "slayer rule" to cover "felonious and intentional killing" of trust beneficiaries.[153] In the pet trust context at least, there is such concern for the life expectancy of present beneficiaries that experts advise settlors to choose remainder beneficiaries carefully. They "caution the pet owner against leaving the remainder to the caretaker, lest that tempt the caretaker to shorten the pet's life in order to keep the money."[154]

Additionally, recent horrific reports of elder and family abuse[155] suggest that the settlor's human beneficiaries may also be at risk. Unfortunately, there are numerous examples of elderly, disabled, and vulnerable individuals killed or neglected to death by caregivers or family members who stand to inherit from their victims. Eighty-six-year-old Olive Apponey, for instance, died from an overdose of

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152 *Id.* at 146. The trustee also argued unsuccessfully that "he was obligated to disclose only minimal information to petitioner because she was a contingent beneficiary . . . ." *Id.* at 143. The court ruled that the petitioner held a vested remainder interest and was entitled to trust information but remanded the case to determine whether the income beneficiary's safety would in fact be jeopardized by release of her name and other information. *Id.* at 146.

153 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmts. c, m (2003) (clarifying that "the slayer is not allowed to benefit from the victim's premature death whether or not the victim was the donor" and providing as an example a remainder beneficiary "responsible for the felonious and intentional killing of the income beneficiary").

154 Morrissey, *supra* note 89, at 25; *see also* Beyer, *supra* note 89, at 671. Equally dangerous are pet trusts that do not name any remainder beneficiary. The settlor's "successors in interest," often her closest surviving human family members, have a financial incentive to euthanize the pet "for health reasons" and prevent the trust from ever going into effect. Beyer, *supra* note 89, at 671. For example, a Florida woman left $25,000 to her "'beloved friend . . . for the care and shelter of [the testator's] two dogs, Riley and Shaun.'" Phillips v. Estate of Holzmann, 740 So. 2d 1, 2 (Fla. Dist. Ct. App. 1998). Two days after the testator's death, her family "decided it would be best to put the 10-year-old animals to sleep." *Dog Lover's Estate Wins $25,000 Appeal*, FORT PIERCE NEWS, Dec. 18, 1998, at A2. According to the testator's mother, "Marie was exceptionally close to those dogs. That's why we felt at their age and with her gone, that was the merciful thing to do." *Id.* (quoting Ramona McCall, Holzmann's mother). After the testator's parents put the dogs to sleep, they "petitioned to have the $25,000 returned to the estate." *Estate of Holzmann*, 740 So. 2d at 2. The court ruled in favor of the parents on grounds that "the honorary trust failed when the dogs were put to sleep." *Id.*

155 For summaries and discussions of such reports, see, for example, John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207 (2003); Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401 (1995); Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818 (1992).

painkillers and sleeping pills administered by her caregiver, Carolyn Kramer.[156] Apponey died just eight days after she named Kramer and Kramer's husband the sole beneficiaries under her will.[157] What made this death even more suspicious was that Kramer "had made arrangements for a funeral and cremation for Apponey the day before [Apponey] died."[158]

In "as sordid a [case] as is to be found in the annals of Maryland crime,"[159] a father, Lawrence Horne, hired a hit man to kill his son, Trevor, "a severely handicapped, quadriplegic eight-year-old boy along with the boy's mother for a combined price of $6,000."[160] Horne had a "strong financial motive"[161]—inheritance of Trevor's entire $1,839,920 estate, the funds remaining from a medical malpractice settlement for the procedure that had left Trevor with "severe brain damage and cerebral palsy."[162]

Some victims suffer slower deaths. They are neglected—even starved—to death by "caregivers" who happen to be their intestate heirs or will, insurance, or trust beneficiaries.[163] For example, when Shirley Swanson, a seventy-eight-year-old mentally disabled woman, died in 2002, she was "literally skin and bones."[164] She weighed only seventy-five pounds; "[h]er collarbones, her pelvic bones and her spine protruded from her body."[165] Her caregiver cousin, who stood to inherit at Swanson's death the bulk of a family trust fund created for Swanson's care, was eventually convicted of criminal neglect for "knowingly depriv[ing] her of adequate food and medical care."[166]

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156 Charles Bosworth Jr., *Bequest Is Challenged in Poisoning Death*, ST. LOUIS POST-DISPATCH, Jan. 15, 1999, at B1.

157 *Id.*

158 *Id.* Kramer was convicted of manslaughter and "agreed . . . to give up her claim to the victim's estate, part of which [would] still go to her husband." Jim Getz, *Caregiver Forgoes Cut of Patient's Estate*, ST. LOUIS POST-DISPATCH, Feb. 24, 2000, at B1.

159 Perry v. Maryland, 822 A.2d 434, 436 (Md. Ct. Spec. App. 2002).

160 *Id.*

161 *Id.* at 439.

162 *Id.* at 439–40.

163 For a particularly grim case, see Joseph Rose, *Caregiver Daughter Convicted in Death*, THE OREGONIAN, Oct. 10, 2002, at C3, which describes a seventy-six-year-old woman's "'living hell' with her caregiver daughter." The elderly woman was confined to a "feces-and-urine stained bed" and died emaciated, dehydrated, and "covered with bedsores, some exposing bone." *Id.* For another example, see *The Dark Side of a Hollywood Ending*, L.A. TIMES, May 13, 1998, at E1, which reports that a seventy-eight-year-old man died of starvation five months after marrying his caregiver.

164 Kara Spak, *Doctor Testifies Woman Starved; Elgin Couple's Attorneys Argue There's No Evidence Death Was Deliberate*, DAILY HERALD (Chicago), Oct. 23, 2003, at F1.

165 Victoria A.F. Camron, *Elgin Couple Not Guilty of Murder*, CHI. TRIB., Oct. 24, 2003, at 1.

166 *Id.* (quoting Circuit Judge Timothy Sheldon). The cousin's wife was also convicted of criminal neglect. *Id.* The prosecution had filed first-degree murder charges against the couple, claiming that "[t]hey intentionally killed her by starving her to death to collect the proceeds of the trust." Dan Rozek, *Prosecutors Say Heirs Starved Woman for Money*, CHI. SUN-

Trust privacy may reduce this ultimate risk to a trust beneficiary by denying information to those who would most profit from a beneficiary's untimely demise.

3. *Protection from Themselves*

In 1889, Andrew Carnegie wrote: "I would as soon leave to my son a curse as the almighty dollar."[167] Carnegie's concern about the impact of inheritance continues unabated today.[168] For example, billionaire Warren Buffett has announced that he plans to leave his children only "a few hundred thousand" and the rest to charity.[169] Buffett has concluded that "the perfect amount is enough so they feel they could do anything, but not so much that they could do nothing."[170]

The popular media and scholarly literature alike regularly chronicle the "wasted lives"[171] of so-called "trust fund babies"—the descendants of the fabulously wealthy who lack any incentive to work and instead devote their days and nights to almost unimaginable financial and personal excesses.[172] Hotel heiress Paris Hilton, for instance, has

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TIMES, Oct. 22, 2003, at 54 (quoting prosecutor Robert Berlin). The judge dismissed the charges, however, on grounds that insufficient evidence existed that the couple had intentionally killed Swanson. Camron, *supra* note 165, at 1. He sentenced the couple to 30 months of probation and 240 hours of community service. *Elgin Couple Get Probation for Neglecting Elderly Relative*, THE TIMES (Munster, IN), Dec. 12, 2003, http://www.nwitimes.com/articles/2003/12/12/news/local_illinois/ee0a50aeac8cb60c86256df9007e796f.txt.

167 ANDREW CARNEGIE, THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 21 (Edward C. Kirkland ed., 1962) (1889).

168 For a sampling of the scholarly literature, see Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 99 (1990), which details the argument that "[g]reat wealth confers tremendous disincentives to work, extraordinary incentives to consume frivolously, and unbelievable power." *See also* Joel C. Dobris, *Federal Transfer Taxes: The Possibility of Repeal and the Post Repeal World*, 48 CLEV. ST. L. REV. 709, 717 (2000) (discussing "the argument that trusts make beneficiaries weak," which he calls "sissification"); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 9 (1992) (discussing the argument that "bequests dampen beneficiaries' incentives to produce their own wealth").

169 Alison Adato, *So Young, So Rich: From Trust Fund Babies to Self-Made Mini Moguls, a New Generation of Superwealthy Kids Handles Its Money in Styles Ranging from the Prudent to the Party-Ready*, PEOPLE, Jan. 27, 2003, at 52.

170 *Id.*

171 DUKEMINIER & JOHANSON, *supra* note 12, at 198 (referring to the "wasted lives of people with too much money").

172 *See, e.g.*, John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2040 (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)) ("As adults, [Seward Johnson's] children were embarrassing wastrels, constantly in debt to their trust funds. They fared as badly in their marriages and family lives as in their careers and business affairs. The extravagant marital and extramarital adventures of one of Seward's daughters, Mary Lea, would strain credulity in a work of cheap fiction." (citations omitted)); Colleen Cason, *Inherited Wealth Loses Its Luster*, VENTURA COUNTY STAR, June 22, 2003, at B1 (describing Max Factor heir and convicted rapist, Andrew Luster, as "reinforc[ing] the stereotype of the spoiled, self-absorbed, trust-fund baby"); *see also* EILEEN GALLO & JON GALLO, SILVER SPOON KIDS (2001).

become a byword for extravagance. Her penchant for shopping and luxury has even inspired a hit reality television show that features her[173] comic efforts to adapt to the "simple life" of ordinary Americans.[174] Hilton amply deserves her reputation for extravagance. For example, at one Los Angeles party, she "arrive[d] by helicopter . . . frocked up in a little Chanel number that just happen[ed] to match that worn by her chihuahua, Tinkerbell—even down to the shoes."[175]

Although these stories of waste and arrested development are by no means true of all beneficiaries,[176] some decedents have concluded that it is essential to keep their legacies to survivors—especially young survivors—secret for the survivors' own good. As Joseph Kartiganer and Raymond Young have observed, "some settlors . . . believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens."[177] Trust privacy responds to this desire to protect beneficiaries from themselves. It allows a settlor to deny beneficiaries knowledge of the trust until they reach the appropriate age, maturity, and "self-sufficiency"[178] to handle wealth and all that goes with it.[179]

### D. Third Parties

Finally, trust privacy can protect interests of survivors who are not direct beneficiaries of a decedent's trust or will. When an individual dies, a wide circle of family, friends, colleagues, and even total strangers may feel a wrenching loss. That wrenching loss may well persist for decades. Consider, for instance, the daughter who grieves each year on her deceased father's birthday or the crowds that leave flowers and tears at Graceland, Kensington Palace, and Central Park on the

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173 Paris Hilton is joined by her best friend, Nicole Richie, the daughter of singer Lionel Richie.

174 *The Simple Life* (FOX television broadcast).

175 Anna Cock, *Rich and Relentless*, HERALD SUN (Melbourne), July 12, 2003, at 26.

176 *See* ROTTENBERG, *supra* note 147, at 115, 118, 158–68 (citing model "inheritors," including Leonard Stern, George H. W. Bush, William H. Danforth, Stewart Mott, George Pillsbury, Jr., Obie Benz, Helen Hunt Hendrix, Alida Rockefeller, and Charles Collins).

177 Kartiganer & Young, *supra* note 123, at 20.

178 UNIF. TRUST CODE § 105 cmt. (amended 2005) ("Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust.").

179 Beneficiaries face significant psychological as well as financial issues. *See* ROTTENBERG, *supra* note 147, at 120–85 (providing an extended discussion of "handling new wealth" and listing support groups, wealth advisers, therapists, and publications on the "psychology of inheritance" and money management); T.R. Fehrenbach, *"Poor, Little Rich Kids" Wander Around Aimlessly*, SAN ANTONIO EXPRESS-NEWS, Oct. 19, 2003, at 3H (reporting that many of "this generation [who] come into big money . . . do not know how to handle it" and that "[p]sychiatrists . . . report that irresponsibility, guilt feelings and lack of inner discipline . . . are common among the new breed").

anniversaries of Elvis Presley's, Princess Diana's, and John Lennon's untimely deaths.[180] To a survivor, the memory of the deceased may be so important that "[t]o violate that memory is to invade the personality of the survivor."[181] Trust privacy helps preserve that memory by ensuring that a decedent's final wishes are not exposed to public ridicule, speculation, and censure. In so doing, it can spare survivors the additional pain that publicity can bring—be it embarrassment, humiliation, anger, or disappointment.

Trust privacy may have financial benefits as well for survivors. In some cases, posthumous marketing of a decedent's image and products may be a multimillion-dollar enterprise.[182] For those involved in such an enterprise, trust privacy can safeguard their livelihood by keeping the decedent's reputation unstained. In other cases, trust privacy may discourage questions about a decedent's mental capacity[183] that might compromise the transactions in which the decedent en-

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180 *See* Tamer El-Ghobashy, *Imagine—The 22nd Vigil*, DAILY NEWS, Dec. 9, 2002, at 20 (describing the events in Central Park to commemorate the twenty-second anniversary of John Lennon's death, including a vigil "around the 'Imagine' circle in Strawberry Fields, which was bedecked with flowers, flickering candles, and other tributes"); Phil Kloer, *Fans Remember Elvis in Their Prayers*, ATL. J.-CONST., Aug. 17, 2002, at F1, F4 (reporting that on the twenty-fifth anniversary of Elvis Presley's death, there was "an honest outpouring of emotion [at Graceland] . . . unlike anything else today," including a "drenched throng" of 70,000 people reciting the Twenty-third Psalm, singing along to Presley's version of the hymn "How Great Thou Art," and parading past Presley's grave, which was covered with "[h]uge mounds of flowers . . .[,] teddy bears, angel figurines and American flags"); Jo Willey, *Half of Britons Want Di Probe*, EXPRESS, Sept. 1, 2003, at 6 ("Hundreds of mourners yesterday marked the sixth anniversary of the death of Princess Diana . . . [and a] sea of flowers . . . from pink carnations to hand-picked posies were left outside her former home at Kensington Palace by fans from around the world."). Some survivors choose a more lasting tribute than flowers and tears. For example, Elton John memorialized the tragic deaths of first Marilyn Monroe and then Princess Diana in a song that has become the "most popular single of all time," *Candle in the Wind.* Neil Strauss, *A Personal Peace for Every Mourner*, N.Y. TIMES, Sept. 13, 2001, at E5 (discussing the impact of musical tributes, including Elton John's *Candle in the Wind*, Eric Clapton's *Tears in Heaven*, and Puff Daddy's *I'll Be Missing You*).

181 Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000).

182 For a list of the "Top-Earning Dead Celebrities," see Lea Goldman & David M. Ewalt, *Top-Earning Dead Celebrities*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/deadcelebs. Some celebrities actually "do[ ] better in death than in life." Graeme Hammond, *Dead Lucky–"Rock Stars Grow in Stature After Death. They Remain Perpetually Sexy,"* SUNDAY MAIL, Oct. 12, 2003, at 88. Posthumous earnings often come from memorabilia. *Id.* (reporting that "95 per cent of [Charles Schulz's] estate's earnings are from stickers and stuffed animals"); John Tevlin, *Love Me Tender; Elvis May Be Dead, But Shrines to His Life Are Thriving*, STAR TRIB., Aug. 16, 2003, at E1 (listing a wide variety of Elvis collectibles, including Elvis pins, mugs, towels, pillows, beer cans, and earrings, and replicas of Graceland).

183 The mental capacity to execute a will "requires less competency than the power to make a contract or a gift." DUKEMINIER & JOHANSON, *supra* note 12, at 165. Thus, questions about the testator's capacity to execute a will may raise questions about the testator's competency to engage in other transactions as well. For discussions of the differing mental capacity standards for wills and other transactions, see, for example, Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 326–29 (2003); Madoff, *supra* note 113, at 588 n.53.

gaged or the business where the decedent worked. In still other cases, trust privacy may benefit a decedent's business associates and employees by avoiding the need to list the decedent's business assets and interests in the public probate records. There are real concerns that such listings can give competitors "important information"[184] and advantages and potentially result in a "fire sale" of a decedent's business.[185] Indeed, one Colorado judge was so persuaded by these dangers of probate that he took the unusual step[186] of sealing billionaire Bob Magness's probate file for three months to facilitate sale of Magness's stock and landholdings.[187] The file supposedly contained such "sensitive business issues"[188] that premature disclosure threatened financial disaster for Magness's estate, media empire, and other "operating entities."[189]

## III
## THE HUMAN COSTS OF TRUST PRIVACY

Part II has identified possible benefits of trust privacy for trust insiders and outsiders. This Part shows, however, that these benefits

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184 DACEY, *supra* note 55, at 45.

185 *Id.* ("When a business interest is involved, competitors may gain important information from [probate] records, information which can adversely affect efforts to sell the business."); Barkley T. Miller, *Wills and Trusts: Boon or Bust?*, TEX. LAW., July 27, 1998, at 27 (discussing the disadvantages of listing assets in the public probate files as "especially true of entrepreneurs, who may be concerned about competitors who wish to purchase a client's business or assets in probate when the family may be feeling a cash-flow pinch").

186 John Accola, *Judge Seals Huge Estate of TCI Founder Magness*, ROCKY MOUNTAIN NEWS, Dec. 21, 1996, at 2B (reporting that Judge Thomas C. "Levi said the Magness case was a rare exception and noted his decision wasn't a permanent seal"); Carol J. Loomis, *Dead Men Tell No Tales: The Secret Will of TCI's Founder*, FORTUNE, Jan. 13, 1997, at 72 (stating that the sealing of Magness's will "may be a first, since wills are by definition public documents . . . one prominent trust and estate lawyer in New York said that in his decades-long career he had literally never before heard of a will being made 'private'"). *But see In re* Estate of Hearst, 136 Cal. Rptr. 821, 825 (Ct. App. 1977) (discussing sealing of wills and probate files).

187 *See* Accola, *supra* note 186. Despite efforts by the *Denver Post* to have the Magness will unsealed in March 1997, *see* John Accola, *Attorneys Try to Keep Magness' Will Secret*, ROCKY MOUNTAIN NEWS, Mar. 21, 1997, at 1B, the will remained sealed until late June 1997, nearly six months after the original decision to seal the will. *See* John Accola, *Magness' Will Unveiled*, ROCKY MOUNTAIN NEWS, June 13, 1997, at 1B.

188 Loomis, *supra* note 186 (citing arguments of the Magness estate co-personal representatives). Apparently, the "sensitive business issues" were the estate's "huge tax liability" of $500 million. Accola, *Magness' Will Unveiled*, *supra* note 187. According to the estate's attorney, the executors did "not wan[t] for people to know that they ha[d] this enormous pressure to raise huge sums of cash over what's really a relatively short period of time." *Id.* (quoting William S. Huff).

189 Accola, *Magness' Will Unveiled*, *supra* note 187. For critiques of the decision to seal Magness's will, see, for example, *id.*, which quotes a *Broadcasting & Cable Magazine* editor, John Higgins, as saying, "It's not clear to me what all the secrecy was about . . . . I learned a heck of a lot more about Bob Magness and the problems with his estate by reading the SEC filings," and Accola, *supra* note 186, which sets out arguments from the *Denver Post*'s motion to unseal Magness's will.

come at a cost—a human cost—for settlors, trustees, beneficiaries, family survivors, and other third parties.

### A. Settlors

For the most vulnerable members of society, trust privacy can create significant costs both during life and after death.

#### 1. *Lifetime Costs of Trust Privacy*

Revocable trusts are supposed to protect deceased settlors' estates from the high costs of probate.[190] Yet, for settlors vulnerable to exploitation—be it due to mental or physical infirmity, dependency, misplaced confidence, or loneliness[191]—use of a revocable trust during life may result in little or no estate to protect at death.

For some such settlors, the very purchase of a revocable trust may lead to financial disaster. Mass marketing of revocable trusts to the unwary has become "one of the fastest growing consumer blitzes in the nation."[192] These so-called "living trust scams"[193] have fleeced millions of Americans, especially elderly Americans,[194] of their life savings.[195] Con artists posing as "certified trust advisors"[196] hawk their

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190 Indeed, the 1965 book that sparked the living trust revolution was entitled *How to Avoid Probate!*. DACEY, *supra* note 20.

191 For an extended discussion of the factors that make settlors vulnerable to exploitation, see *Death Planning Made Difficult: The Danger of Living Trust Scams, Hearing Before the Senate Spec. Comm. on Aging*, 106th Cong. (2000) (on file with author) [hereinafter *Hearing*] (testimony of Paul F. Hancock, Deputy Att'y Gen. for South Fla.), *available at* http://aging.senate.gov/events/hr53ph.pdf.

192 John Newsome, District Attorney, El Paso County, Colo., Scam Line: Living Trusts, http://dao2.elpasoco.com/scam.asp?ifile=livingTrusts (last visited Nov. 27, 2007).

193 Press Release, Federal Trade Commission, FTC Testifies Before Senate Special Committee on Aging on Living Trust Scams (July 11, 2000), *available at* http://www.ftc.gov/opa/2000/07/livingtrust.shtm; Terry Goddard, Arizona Attorney General, Living Trust Scam, http://www.azag.gov/consumer/livetrust.html (last visited Nov. 27, 2007).

194 *See Hearing*, *supra* note 191 ("[A]dvances in technology have made it easier for predators to target their intended victims."). For an extended discussion of how living trust marketers target the elderly, see *id.*; Jeanne Finberg, *Financial Abuse of the Elderly in California*, 36 LOY. L.A. L. REV. 667, 668–73 (2003). For example, one trust mill, Senior Estate Services, "obtained from a marketing company the names and addresses of elderly residents of Florida." *Hearing*, *supra* note 191.

195 *See CBS Evening News: Scam Artists Setting Up Phony Living Trusts Can Strip Seniors of Their Life Savings* (CBS television broadcast Mar. 14, 2003) (transcript available at LEXIS, News Library) (discussing how "scam artists are using living trusts to fleece the trusting" and stating that "California's attorney general says just one company, the Alliance For Mature Americans, took millions from the elderly").

196 *Hearing*, *supra* note 191 (statement of George B. Hoffman, Former Salesman, Alliance for Mature Americans, President, George B. Hoffman Estate and Retirement Planning, Long Beach, California) (describing his two-day training and his experience as a "certified trust advisor" for a living trust sales organization); Finberg, *supra* note 194, at 669 ("The scam artists often call themselves 'certified trust advisors' or estate planning experts, but they are not experts and usually not certified by anyone." (footnote omitted)).

product as the magic bullet to avoid guardianship, medical costs, creditors, probate taxes, and publicity.[197] Thousands of dollars later,[198] the purchaser ends up with a kit of revocable trust documents that is at best worthless[199] and at worst a "buyer's 'living hell.'"[200] For example, after executing a revocable trust drafted by an out-of-state trust mill, an Ohio couple discovered that they were no longer able to use their checking account or pledge their house equity as collateral.[201] They ultimately had to hire a local lawyer to arrange properly their affairs.[202]

If the would-be settlor transfers personal financial information as well as cash to such a "certified trust advisor," it may cost the purchaser more than a worthless or defective trust. The would-be settlor may also become the victim of identity theft[203] or a fraudulent investment scheme.[204] As the case of Raymond and Mildred Grossman

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197 *See* Charles F. Gibbs, *The Marketing of Living Trusts by Non-Attorney Promoters*, 20 ACTEC NOTES 193, 193 (1994) ("The public, particularly senior citizens, are told that the living trust is a cure-all for the problems entailed in asset management and wealth transfer, a claim with no more validity than the curative claim for snake oil."); Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 598 & n.14 (2000) (describing the "unfulfilled promises" made by living trust marketers); *see also* Newsome, *supra* note 192 (summarizing the misleading claims and representations that living trust marketers have made and providing the "true facts about those claims").

198 Vallario, *supra* note 197, at 596 n.3 ("The average cost of the living trust forms is $2000."); *see also* Lawrence Walsh, *If You Want a Living Trust, Use a Lawyer You Can Trust*, PITTSBURGH POST-GAZETTE, Nov. 22, 2002, at C4 (stating that Pennsylvania victims of living trust scams "are pressured into spending $2,000 to $3,000" for living trust kits); TEX. YOUNG LAWYERS ASS'N, LIVING TRUST SCAMS AND THE SENIOR CONSUMER (2002), *available at* http://www.texasbar.com/Template.cfm?Section=Home&CONTENTID=8273&TEMPLATE=/ContentManagement/ContentDisplay.cfm ("Each year thousands of consumers lose from $500 to $5,000 through the purchase of living trusts.").

199 *See* Tom Corbett, Pennsylvania Attorney General, Protecting Consumers: Beware of Living Trust Scams, http://www.attorneygeneral.gov/consumers.aspx?id=304 (last visited Nov. 27, 2007) ("Sometimes victims are sold worthless 'kits,' costing several thousand dollars, which are nothing more than standard forms that may or may not be valid, as laws concerning living trusts vary from state to state."). In some cases, "consumers send money for these do-it-yourself products, but receive nothing in return." FEDERAL TRADE COMMISSION, LIVING TRUST OFFERS: HOW TO MAKE SURE THEY'RE TRUST-WORTHY (2000), http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro08.pdf.

200 *Hearing*, *supra* note 191 (testimony of Esther "Tess" Canja, President of AARP).

201 Trumbull County Bar Assn. v. Hanna, No. 97-1021, 1997 Ohio LEXIS 2448, at *4 (Ohio 1997).

202 *See id.*

203 *Today: Consumer Lawyer Alan Kopit Discusses How To Guard Against Scams When Drawing Up a Living Trust* (NBC television broadcast Mar. 5, 2002) (transcript on file with author) (warning that living trust marketing companies will "find out what your Social Security number is, your bank account numbers, your credit card numbers, and then they'll sell that information to other people and all sorts of other problems can result from the identity theft").

204 For example, "[o]nce the trust-mill salesperson is privy to the consumer's financial information, the salesperson then recommends that the victim liquidate his or her assets and purchase insurance or annuity contracts." Vallario, *supra* note 197, at 596 (footnote omitted); *see also* United States v. Williams, No. 01-5031, 2001 U.S. App. LEXIS 22553, at

reveals,[205] the outcome can be truly tragic. Raymond Grossman, an eighty-year-old retired Methodist minister, and his wife, Mildred, a seventy-nine-year-old retired secretary, had such faith and confidence in their living trust salesman that they invested their life savings of $36,900 in bogus securities he recommended.[206] "As a result of the lost investments, the Grossmans: (1) were forced to move from a condo to mobile home; (2) cannot provide financial help to their children; and (3) can no longer afford an assisted living home."[207]

Other vulnerable settlors fall prey to larcenous trustees. One such trustee was David Stern, a Massachusetts attorney who took advantage of his "position of trust and confidence"[208] to convince longtime clients, Bertram and Dianne Parker, to name him co-trustee of their revocable trust.[209] In a three-year period, Stern transferred more than $3.5 million out of the Parkers' trust to finance his movie production business and pay off personal loans.[210]

Another recent example of trustee exploitation and theft occurred in New Jersey.[211] A mother-son team, Serena and Salvatore Bono, "persuaded" Laura Niles, "an eighty-eight-year-old, single, demented multimillionairess," to substitute Salvatore for the current trustee of her three revocable trusts.[212] The results were predictable: "With his newfound power, Bono embarked on a sixteen-month looting spree of Laura's estate."[213]

A California trustee went still further in his abuse of a vulnerable settlor—his elderly mother, Laura Lowrie.[214] After his father's death, Sheldon Lowrie took charge of his mother's finances[215] and isolated

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*2–5 (10th Cir. Oct. 17, 2001) (case involving a living trust marketer who targeted elderly, unsophisticated victims, acquired information regarding "his victims' financial condition in his role as their trust advisor," and persuaded his victims to invest in a nonexistent company); *In re* Flack, 33 P.3d 1281, 1283 (Kan. 2001) (describing a fraudulent scheme in which employees of a trust mill "acquired financial information concerning insurance, real estate, and stocks" owned by their victim, "collected a check for $1,995" for attorneys' fees related to the estate planning documents, and convinced their victim to liquidate her assets and purchase an annuity).

205 Dep't of Ins. v. Hooley, No. 01-3576PL, 2002 Fla. Div. Adm. Hear., LEXIS 199, at *21–22 (Jan. 28, 2002) (setting out the Grossman case). Unfortunately, the Grossmans were only two of many victims of this living trust marketer's "deliberate and largely transparent scheme to swindle Florida residents." *Id.* at *22; *see id.* at *10–24 (summarizing cases).

206 *Id.* at *21–22.

207 *Id.* at *22.

208 *In re* Stern, 682 N.E.2d 867, 869 (Mass. 1997).

209 *Id.*

210 *Id.*

211 *In re* Niles, 823 A.2d 1 (N.J. 2003).

212 *Id.* at 3.

213 *Id.* at 5.

214 Estate of Lowrie, No. B159305, slip op. at 4 (Cal. Ct. App. Apr. 30, 2004). A partially published version of the opinion appears at 12 Cal. Rptr. 3d 828 (Ct. App. 2004).

215 *Estate of Lowrie*, slip op. at 17.

her from family and friends.[216] He locked her[217] in a house that reeked of urine,[218] duct taped her telephones,[219] and posted a sign on the front door: "DAY SLEEPER, DO NOT DISTURB!! NO SOCIAL WORKERS. NO PEDDLERS. WILL NOT ANSWER DOOR."[220] In addition, Sheldon denied Laura medical care[221] and refused to assist her with personal hygiene to the point that her "hair was matted, her toenails overgrown, she was filthy and disheveled, and she wore dirty nightgowns."[222] During this period, Laura transferred revocable trust property and other assets to Sheldon, modified her revocable trust documents so that Sheldon would receive the bulk of her estate, and stepped down as trustee in his favor.[223] By Laura's death, Sheldon had stolen more than $665,000 from her revocable trust, bank accounts, and business.[224] In a final act of disrespect, he defied his mother's wishes to be buried next to her husband and donated her body for medical experimentation.[225]

These cases of fraud and abuse are by no means isolated incidents. Indeed, recent reports suggest that in a "greying"[226] America, exploitation of vulnerable settlors is on the rise.[227] Yet, most of these cases will never come to light (if at all) until it is too late—after the settlor has died with a botched trust or a depleted estate. The reason is trust privacy.

Current trust law declares the privacy of a living settlor and that individual's revocable trust sacrosanct. Under even the most liberal

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216 *Id.* at 20–22.

217 *Id.* at 21 ("Sheldon locked the metal security door on decedent's front door from the outside.").

218 *Id.* at 24 ("Decedent's home was filthy, feces were splattered on the toilet, the home smelled of urine, fleas were on the carpet, and decedent's bed was soiled.").

219 *Id.* at 4, 21.

220 *Id.* at 21.

221 *Id.* at 24–25 ("'Sheldon . . . failed to take [decedent] to the doctor, notwithstanding that she had become disabled from a fall that occurred three years prior to her death' . . . . When confronted, Sheldon said there was no need to take decedent to the doctor because she was fine." (third alteration added)).

222 *Id.* at 24.

223 *Id.* at 3; *see id.* at 16–19 (setting out evidence of financial abuse).

224 *Id.* at 26. What made this situation even more tragic is that while Sheldon was spending his mother's money on, *inter alia*, antique automobiles, he persuaded his mother that "she was poor and living off of social security." *Id.* at 17 (internal quotation marks omitted). As a result, she believed she could not afford even to "replace a broken table, a broken couch, or a broken television." *Id.* at 18.

225 *Id.* at 22.

226 *Hearing*, *supra* note 191 (testimony of Paul F. Hancock).

227 This focus on a "greying" America is not meant to suggest that all elderly Americans are vulnerable to exploitation. *See* Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 321 (2003) (warning of the dangers of "stereotyping the elderly as vulnerable"). However, because living trust scam artists have deliberately targeted senior citizens, *see supra* note 194 and accompanying text, most of their victims have been—and will likely continue to be—older Americans.

definitions of the "duty to inform," only the settlor is entitled to information about the trust.[228] Trust law prizes privacy to such a degree that it denies those who might protect the settlor and the settlor's property—the chosen beneficiaries—notice of the trust and information about its administration.[229] If the settlor subsequently loses mental capacity, the very existence of the trust may well remain a secret known only to the trustee and, if the settlor is fortunate, the settlor's legal agent, conservator, or guardian.[230]

Thus, trust privacy may come at a devastating cost to living settlors. By providing a shield for the unscrupulous, it may leave vulnerable settlors disqualified from Medicaid,[231] burdened with unnecessary taxes,[232] destitute,[233] or worse—broken in body and

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228 *See, e.g.*, UNIF. TRUST CODE § 603 & cmt. (amended 2005) ("While a trust is revocable [and the settlor has capacity to revoke the trust], . . . duties of the trustee are owed exclusively to [ ] the settlor," including "the duty under Section 813 to inform and report" (brackets in original)).

229 *See, e.g.*, CAL. PROB. CODE § 16064 (West Supp. 2006) ("The trustee is not required to report information or account to a beneficiary . . . (b) In the case of a beneficiary of a revocable trust" for the period when the trust may be revoked); UNIF. TRUST CODE § 603 cmt. (amended 2005) (denying beneficiaries the right to information about a revocable trust "as long as the settlor has capacity").

230 *See* Foster, *supra* note 15, at 744–46 (discussing the UTC and California compromises that protect the privacy of settlors' trusts after settlors lose capacity). The comment to UTC section 603 emphasizes that the settlor can waive beneficiaries' rights to information, including notice, if the settlor subsequently loses capacity. UNIF. TRUST CODE § 603 cmt. (amended 2005) ("However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights [to information under section 813], even to the point of directing the trustee not to inform them of the existence of the trust.").

231 *See* Sheryl Harris, *Proceed with Care in Setting Up a Living Trust*, NEWHOUSE NEWS SERV., Jan. 15, 2002, *available at* LEXIS, News Library, Allnws File (stating that poorly drafted living trusts "have made unwitting seniors ineligible for Medicaid nursing home reimbursement"); Kimberly Lankford, *Avoid the Medicaid Trust Abyss*, KIPLINGER'S PERS. FIN., Feb. 2004, at 87 (describing a Colorado living trust scam that left settlors ineligible for Medicaid). Edith Allison, an elderly nursing-home resident in declining health, and her son, Donald, fell for a living trust scam artist's "flier promising to 'protect your home and assets from nursing-home costs.'" *Id.* Donald paid $1950 for a living trust and transferred Edith's assets into the trust. *Id.* The results were disastrous. Edith's Medicaid application was denied "because she had too much money to qualify. The problem, Donald learned, was that [the scam artist] had set up a revocable living trust, not an irrevocable one. Therefore, all of the assets in the trust still counted in the medicaid calculations." *Id.*

232 *See, e.g.*, Vallario, *supra* note 197, at 596 n.5 (reporting that "a trust mill . . . sold a couple in their eighties annuities and recommended that they liquidate their savings bonds to do so, resulting in a $15,000 taxable gain" (citing Agnes C. Powell, *Beware! Living Trust Scams Do Exist*, PRINCE GEORGE'S B.J., Apr. 1999, at 12)); Sara Hansard, *Trust Scams Spur Crackdown: Mills Use High-Pressure Sales To Snare Elderly*, INVESTMENT NEWS, July 17, 2000, at 1 ("Walter Kulinski bought a living trust in 1997 from United Seniors Alliance in Wisconsin and was pressured into transferring $224,000 into annuities that caused him to pay about $10,000 in capital gains taxes.").

233 *See supra* notes 205–07 and accompanying text (describing the Grossman case). The financial impact of living trust scams on elderly victims may be particularly devastating. "Most live on fixed incomes and accumulated savings that must be available to support them for the remainder of their lives . . . . Unlike younger Americans who are employed,

spirit.[234] As the next section will show, the costs of trust privacy do not end at a settlor's death.

### 2. *Post-Mortem Costs of Trust Privacy*

#### a. *The Price for Protecting the Privacy of Living Settlors' Trusts*

For vulnerable settlors, a revocable trust may be a "financial time bomb ready to go off at death."[235] The very document that was supposed to preserve their estates for loved ones may end up instead leaving property to strangers—courts, lawyers, and tax authorities.

Here too privacy is to blame. By concealing a living settlor's trust from view, trust privacy can cause "irreparable" damage after the settlor's death.[236] After death, the settlor can no longer revoke a defective revocable trust or adopt a new estate plan that implements the settlor's actual intent.[237]

Nowhere have these problems emerged more prominently than in the area of living trust scams. Privacy allows victims to "go to their graves without realizing they've been swindled."[238] And, in so doing, privacy effectively denies those victims control over disposition of their property at death. As a Florida deputy attorney general concluded from his investigation of living trust scams, "none of us can repair the damage that is caused when the purchaser of the trust dies and, because of legal deficiencies in the trust documents, the de-

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senior citizens who lose their assets often lose their sole source of income and continued subsistence. This wealth cannot be replaced." *Hearing*, *supra* note 191 (testimony of Paul F. Hancock).

234 *See* Theresa Tighe, *Swindlers Zero in on Elderly*, ST. LOUIS POST-DISPATCH, Jan. 30, 1994, at 1D (stating that many scam victims are too afraid to call the police because they fear they will be regarded as mentally incompetent and "will be stripped of their independence"); *supra* notes 214–25 and accompanying text (describing the physical, emotional, and financial abuse of Laura Lowrie).

235 Tom Elden, *Living Trust Mills–The Scam That Keeps on Taking*, CONSUMER PROTECTION REP., May 1999, at 1, 3.

236 New York State Office of the Attorney General, Living Trusts: What You Should Know, http://www.oag.state.ny.us/seniors/living_trust.html (last visited Nov. 28, 2007) ("Even worse, the absence of an effective estate plan may not become apparent until after the victims of the scam have died, when the harm has become irreparable.").

237 Some courts have responded to these dangers by reforming revocable trusts after the settlor's death. *See, e.g.*, *In re* Estate of Robinson, 720 So. 2d 540, 543 (Fla. Dist. Ct. App. 1998) (holding that "a trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as the reformation is not contrary to the interest of the settlor"); Walker v. Walker, 744 N.E.2d 60, 65–66 (Mass. 2001) (granting a petition to reform a deceased settlor's trust to conform to the settlor's intent to minimize estate taxes).

238 CBS.MarketWatch.com, *Getting Personal: Don't Be Swindled by the Latest Estate Planning Scam*, MARKETWATCH, Mar. 27, 2000, http://www.marketwatch.com/search/?siteid=mktw (search "don't be swindled by the latest estate planning scam") (quoting asset protection attorney Jay Adkisson).

ceased's assets are not distributed in the manner that she intended."[239]

Unfortunately, there are numerous examples of invalid or defective revocable trusts discovered too late to remedy. For instance, Florida children learned only after their mother's death that she had purchased from an out-of-state trust mill a revocable trust that was invalid under Florida law.[240] The outcome was what the mother undoubtedly paid to avoid—"full probate administration"[241] of her estate. Sadly, because the decedent left no will, she died intestate[242] with her property distributed according to the Florida legislature's notion of an appropriate estate plan rather than her own stated wishes.

Other settlors have died with unfunded revocable trusts. Their trust marketers either neglected to tell them to transfer property into the trust[243] or botched the transfer. Once again the price of trust privacy is probate and a depleted estate. For example, a widow (identified only as "M.M.") bought a revocable trust from Daniel Schramek,[244] a former medical technician[245] and self-taught paralegal[246] who sold legal "kits"[247] to the unwary. As part of the transaction, Schramek prepared a quitclaim deed to transfer M.M.'s real property to the trust.[248] By error, he included on the deed a line for her deceased husband's signature.[249] Schramek "corrected" the problem by signing the husband's name and notarizing the signature.[250] Unfortunately, the defective deed and trust did not come to light until after M.M.'s death. As a result, her heirs had to probate her estate to

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239 *Hearing, supra* note 191 (testimony of Paul F. Hancock at pt. III).

240 *Id.* at pt. II.G (discussing a case involving "[a]n elderly resident of Sarasota County, Florida").

241 *Id.* (testimony of Paul F. Hancock at pt. II.G).

242 *See id.*

243 *See id.* (opening statement of Sen. Chuck Grassley, Chairman, S. Spec. Comm. on Aging), *available at* http://aging.senate.gov/events/hr53cg.pdf ("[T]he victim is not told, in some instances, that to effectuate the living trust, assets must be deeded over to the trust"); Albert B. Crenshaw, *"Living Trust" Peddlers Prey on the Uninformed*, WASH. POST, June 18, 2000, at H1 ("Assets have to be retitled in the name of the trust or the trust doesn't apply to them. 'We know in many instances the person who uses these cookie-cutter things isn't told they've got to fund them.'" (quoting Sally Hurme, AARP program consultant)).

244 *See* Florida Bar v. Schramek, 616 So. 2d 979, 981 (Fla. 1993) (setting out "The M.M. Incident").

245 Bruce Vielmetti, *Questions of Law, Without the Lawyers*, ST. PETERSBURG TIMES, Feb. 26, 1993, at 1A (describing Schramek as "a former medical technician and non-lawyer").

246 Williams Yelverton, *Largo Man Guilty of Contempt Gets 30 Days in Jail*, TAMPA TRIB., Feb. 2, 1996, at 1 (describing Schramek as "a self-taught paralegal").

247 *Schramek*, 616 So. 2d at 980.

248 *Id.* at 981.

249 *Id.*

250 *Id.* Interestingly, Schramek had been convicted only two years earlier of a similar offense. *Id.* at 984 (reporting that Schramek had been "convicted of forgery, uttering, and notary fraud because he forged the signature of another individual on a document and notarized that same signature" (footnote omitted)).

clear title to the property.[251] M.M.'s estate lost over $6650 in probate and other unnecessary expenses.[252]

Other victims of living trust scams have left trusts so poorly drafted that the trusts generate years—even decades—of litigation. As Judge Joseph S. Mattina has aptly noted from his experience as a New York Surrogate, such "problem trusts"[253] have had precisely the "opposite effect"[254] their marketers promised—rather than "put[ting] probate courts out of business . . . , they have increased our business."[255] A recent Nebraska case is illustrative. In 1979, Loyal and Veona Sheen bought a trust "kit" and "educational materials" from Reverend J. H. Schroeder.[256] Twenty-three years later, Nebraska courts were still attempting to determine the Sheens' intentions from their ambiguous trust document.[257]

A 1998 New York case featured the quintessential "problem trust." A few months before his death in 1996, Harold Pozarny was persuaded by a local franchisee with an out-of-state "estate planning institute" to replace his simple will with a living trust/pour-over will arrangement.[258] What Pozarny received for his money was expensive litigation after his death and a set of documents the surrogate's court later described as "the most egregious example of maladroit 'drafting' this court has encountered."[259] Pozarny's trust agreement consisted of forty-two pages of generic forms in a three-ring loose-leaf binder.[260] The pages were so riddled with errors, inconsistencies, and ambiguities that the court could not even identify the fiduciary[261] or determine which loose-leaf pages existed when the trust was originally signed.[262] The tragedy of the case was that Pozarny's intended dispo-

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251 *Id.* at 981.

252 *Id.*

253 Joseph S. Mattina, *The Probate Court and the Non-Probate Revolution*, 13 QUINNIPIAC PROB. L.J. 409, 413 (1999).

254 *Id.* at 416.

255 *Id.*

256 *In re* Sheen Family Trust, 640 N.W.2d 653, 655 (Neb. 2002); *see also* Nebraska v. Schroeder, 384 N.W.2d 626, 628 (Neb. 1986) (affirming trial court judgment against J.H. Schroeder under the Nebraska Consumer Protection Act and stating that "Schroeder employed unfair and deceptive acts and practices by misrepresentation in connection with the promotion and sale of certain purported trust forms").

257 Even before Loyal Sheen's death in 1982, the settlors and beneficiaries filed a petition "to clarify the intent of the Grantor Creator in creating said Trust." *In re Sheen Family Trust*, 640 N.W.2d at 656. For a summary of the twenty-year litigation over the trust, see *id.* at 656–58.

258 *In re* Estate of Pozarny, 677 N.Y.S.2d 714, 716–717 (Surr. Ct. 1998); Mattina, *supra* note 253, at 414 (describing the facts of *In re Pozarny*).

259 *In re Pozarny*, 677 N.Y.S.2d at 717.

260 *Id.*

261 *Id.* at 716.

262 *Id.* at 721–22.

sition of his million-dollar estate was "straightforward and simple."[263] He wanted to leave his entire estate to a close friend and have that friend serve as his executor.[264] Yet, the trust he purchased "placed that dispositive scheme at grave risk."[265] Indeed, by the end of the case, Pozarny's probate assets went to the very nieces and nephews he had intentionally omitted from his trust and will.[266]

In the worst case scenario, victims of living trust scams leave their loved ones a heavy tax bill as well as a defective trust. For example, many settlors who create so-called pure trusts, popular tax-evasion schemes hawked on the Internet, die thinking they have preserved their assets from income, estate, and gift taxes.[267] In fact, their trusts may have "truly catastrophic results" for their estates.[268] Once again, their survivors learn too late about the scam. Their survivors "figure it out[] when the IRS imposes stiff penalties and interest—in addition to the estate tax and prior years' income tax that was supposed to have been saved."[269]

Living trust scam artists are by no means the only scoundrels to take advantage of susceptible settlors for personal profit. A large cast of characters—from children[270] to lawyers[271]—use the veil of secrecy trust privacy provides to gain control of settlors' assets after death. In the classic pattern, a close relative, friend, or employee "persuades" a vulnerable settlor to name her the successor trustee[272] or remainder

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263 *Id.* at 726.

264 Mattina, *supra* note 253, at 414 (stating that Pozarny's "estate plan could not have been simpler (he wanted his entire estate to pass to a friend and to have the friend serve as executor)").

265 *In re Pozarny*, 677 N.Y.S.2d at 726.

266 *Id.* at 725–26 (discussing provisions intentionally omitting Pozarny's nieces and nephews and holding that probate estate assets pass to those nieces and nephews as Pozarny's intestate heirs). The probate assets amounted to only $60,000 of Pozarny's assets, however. *Id.* at 716.

267 For descriptions of "pure trust" scams, see, for example, Colorado v. Boyls, 591 P.2d 1315, 1315 (Colo. 1979); *Taxpayer Beware: Schemes, Scams, and Cons: Hearing Before the S. Comm. on Finance*, 107th Cong. 9–11 (2001) (statement of Robert L. Sommers, Attorney, Web site Operator, and Columnist), http://finance.senate.gov/73551.pdf; Brad Burg, *Can You Spot a Phony Trust? Don't Be Too Sure*, 76 MED. ECON., Jan. 11, 1999, at 137, 137.

268 Burg, *supra* note 267, at 142.

269 CBS.MarketWatch.com, *supra* note 238 (quoting Jay Adkisson).

270 *See, e.g.*, Turja v. Turja, 118 F.3d 1006, 1007 (4th Cir. 1997) (involving a son who unduly influenced his demented mother to execute a trust as well as other documents in his favor and who, without informing family members of his mother's death, "conveyed the family residence to himself pursuant to the trust agreement").

271 *See, e.g.*, PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS 39–55 (2003) (detailing the notorious case of James Gunderson, a California attorney who drafted revocable trusts (and wills) for residents of the Leisure World retirement community and named himself successor trustee and beneficiary).

272 Apparently, some living trust marketers may do this as well. *See* Matt Smith, *Son of Super Swindler*, S.F. WKLY., Sept. 10, 2003, at 18, 21, 23 (reporting that living trust marketers claim to be naming an out-of-state trust mill, "Great American Trust[,] as successor trustee in living-trust documents it was selling to elderly people in California" and that "[u]nder

beneficiary[273] of the settlor's revocable trust. In these cases, the ultimate price for the settlor is not an invalid or defective trust but a trust that "reflect[s] the will and desires"[274] of the wrongdoer rather than those of the settlor.

A Florida case provides a cautionary tale. Muriel Paananen, a volunteer at a retirement center, became a caregiver, "a friend and a companion"[275] to Erma Jean Carson, an elderly resident who suffered from Alzheimer's Disease and severe depression.[276] Three years later Erma died with a posthumous surprise for her family: a revocable trust that transferred her entire estate to her caregiver as remainder beneficiary.[277] No one informed Erma's family when she created the trust, and, because of the rules protecting the privacy of a living settlor's trust, no one had to do so.[278] Paananen took every precaution to ensure the trust remained a secret during Erma's lifetime. Paananen hired her own attorney to prepare the trust[279] and directed him not to disclose its contents to Erma's relatives.[280] After Erma executed the trust, Paananen took the trust document for "safekeeping."[281] Paananen then prevented Erma from communicating with her family.[282] She even instructed the retirement center to "evict" any relatives who tried to visit Erma.[283]

In this case, justice ultimately prevailed. After Erma's death, her great nieces, who were the residual beneficiaries of her original will,

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such an arrangement, Great American Trust apparently could take control of the assets of . . . [a] customer if the person became incapacitated, or died").

273 *See, e.g.*, *In re* Will of Catelli v. Villone, 825 A.2d 1209, 1214–15 (N.J. Super. Ct. App. Div. 2003) (finding a nephew unduly influenced his aunt to make him her sole beneficiary). In 1996, Anna Villone Catelli, an elderly, bedridden, debilitated, and blind nursing home resident executed a pour-over will and revocable trust that excluded the beneficiaries of her previous will and named her nephew, Thomas, trustee, executor, and sole beneficiary of her assets. *Id.* at 1211–13. The circumstances surrounding these documents were decidedly "suspicious." *Id.* at 1214. Thomas, an Arizona truck driver, had his personal Arizona attorney draft the documents. Thomas did not advise his aunt to consult with her attorney or any other New Jersey attorney, and "[o]ver the course of . . . three days, while she remained in her bed and dozed on and off, he read the documents to her." *Id.* at 1211–12. Apparently, no one else was in the room at the time. "[T]he only person who could verify that the contents of the documents had been read to her so that she knew what she was signing was Thomas . . . ." *Id.* at 1210. Catelli then executed the trust and will in front of witnesses by "plac[ing] an 'X' on the line Thomas indicated." *Id.* at 1212.

274 Paananen v. Kruse, 581 So. 2d 186, 188 (Fla. Dist. Ct. App. 1991).

275 *Id.* at 187.

276 *Id.*

277 *Id.*

278 *See supra* Part III.A.2(a) (discussing the costs of protecting the privacy of a living settlor's trust).

279 *Paananan*, 581 So. 2d at 187.

280 *Id.* at 188.

281 *Id.* at 187.

282 *Id.* at 188.

283 *Id.*

found out about the trust and successfully challenged it as the product of undue influence.[284] As a result, Erma's estate went as *she* intended—to the beneficiaries of her original will rather than to her unscrupulous caregiver.[285] Other settlors might not be as lucky, however. Their survivors might never learn about the trust that distorts their estate plan, let alone contest it. As the next section will show, the problem once again is trust privacy. For vulnerable settlors, rules that protect the privacy of deceased settlors' trusts come with a heavy price. Those rules deny settlors what will testators enjoy—the confidence that the ultimate distribution of their estates "represents [their] true desires."[286]

b. *The Price for Protecting the Privacy of Deceased Settlors' Trusts*

In theory, the law of trusts prevents distortion of a vulnerable settlor's estate plan. The law protects the settlor from herself and others by declaring invalid any trust induced by mental incapacity, undue influence, fraud, or duress.[287] In practice, however, trust privacy can render this protection meaningless,[288] denying survivors the information they need to challenge the trust and defend the settlor's actual intent.

An Illinois case[289] illustrates how trust privacy can obstruct a survivor's efforts. Two weeks before his death in August 1979, Martin Wiswald amended his revocable trust to cut out the beloved nephew he regarded as his son[290] and to name his attorney, his accountants, and their employee sole remainder beneficiaries.[291] The act was admittedly suspicious. At the time Wiswald supposedly amended his trust, he was a patient at the Mayo Clinic in Minnesota, "gravely ill," heavily medicated, and hooked up to artificial life support systems.[292] The only question was whether Wiswald's nephew, George, would ultimately be able to challenge the amendment after his uncle's death.

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284 *Id.* at 187.

285 *See id.*

286 DUKEMINIER & JOHANSON, *supra* note 12, at 161.

287 *See, e.g.*, UNIF. TRUST CODE § 406 (amended 2005) ("A trust is void to the extent its creation was induced by fraud, duress, or undue influence."); *id.* § 601 ("The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."); RESTATEMENT (THIRD) OF TRUSTS §§ 11, 12 & cmts. (2003) (stating that trusts can be set aside for settlor incapacity, undue influence, duress, or fraud).

288 *See supra* Part II.A.2 (discussing how trust privacy makes revocable trusts difficult to challenge).

289 Anderson v. Marquette Nat'l Bank, 518 N.E.2d 196 (Ill. App. Ct. 1987).

290 *Id.* at 198.

291 *Id.* at 199. There was a second alleged amendment as well—an unsigned document that supposedly "complie[d] with oral directives of" Wiswald to leave his business and "operating cash up to $25,000" to an employee. *Id.*

292 *Id.* at 198.

Trust privacy presented obstacles at every turn. Wiswald had told George's mother on several occasions that he had provided for George in his trust.[293] George apparently had never seen the actual trust instrument, however, and did not know whether he was in fact a trust beneficiary. Even had he wanted to see the trust, he would not have been entitled to do so during his uncle's lifetime; rules that protect the privacy of living settlors' revocable trusts deny beneficiaries access to the trust instrument.[294]

Rules keeping a deceased settlor's trust private only compounded George's problems. Upon his uncle's death, George did not receive a copy of the trust instrument and its purported amendment or even notice that the trust existed.[295] To preserve trust privacy after a settlor's death, Illinois, like other states,[296] does not "require[ ] that 'revocable inter vivos trusts to which a legacy is provided' must be filed in court as a public record, that notice of their contents or amendments be given to interested parties, or that they be subjected to proof of authenticity like a will."[297]

The trust finally surfaced two months after Wiswald's death, when his will was filed for probate.[298] It devised the bulk of Wiswald's estate to a trust identified only as "Marquette National Bank Trust No. 7633."[299] Once again, however, trust privacy limited access to the trust. As is common in pour-over will situations,[300] only the will, with its brief reference to the trust, was included in the public probate file.[301] The actual trust documents that disposed of Wiswald's estate were not part of the probate proceedings[302] and remained private.

George's next step was to contact the probate attorney and the trustees of Marquette National Bank Trust No. 7633 for information about the trust.[303] The co-trustees turned out to include none other than the two accountants, their employee, and the attorney named as remainder beneficiaries in Wiswald's trust.[304] For the next five years,

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293 *Id.*

294 *See supra* notes 228–29 and accompanying text.

295 *Anderson*, 518 N.E.2d at 201–02.

296 *See supra* Parts I, II.A. California is a notable exception because it requires notice to the settlor's heirs. *See supra* note 110.

297 *Anderson*, 518 N.E.2d at 202 (quoting Section 13-223 of the Ill. Code of Civil Procedure).

298 *See id.* at 201–02.

299 *Id.* at 198.

300 *See supra* notes 60–61 and accompanying text.

301 *Anderson*, 518 N.E.2d at 199.

302 *Id.*

303 *Id.*

304 *Id.*

the trustees stonewalled.[305] As a court later put it, "there was a concerted effort to keep the plaintiff uninformed."[306]

Eventually, on May 22, 1985, George turned to the courts in desperation.[307] He filed a complaint "at the risk of incurring sanctions because he lacked adequate information."[308] Here too trust privacy presented an initial hurdle. Under rules that protect the privacy of deceased settlors' trusts, George could not gain access to his uncle's trust unless he had standing to contest the trust. Yet, the only evidence that demonstrated he in fact had that standing was contained in the very documents that the trustees "kept . . . secret from him."[309] Fortunately for George, the trial court nonetheless ordered the trustees to disclose the trust documents, despite their "strenuous objection" that George "had no standing to sue because he was not a beneficiary of the trust."[310]

At long last, on January 28, 1986, George received the trust documents and with them the information he needed to contest his uncle's suspicious August 1979 trust amendment.[311] But George's travails were not over. The trustees argued, and the trial court agreed, that even if George's "allegations of fraud in the inducement, fraudulent concealment, undue influence, lack of mental and physical capacity, breach of fiduciary responsibility, and other acts of wrongdoing . . . [were] true," he still could not challenge the trust amendment because his action was time-barred under the statute of limitations.[312] Under Illinois law, George had to bring suit within six months after his uncle's will was admitted to probate.[313] He filed his first complaint over five years after that period expired.[314]

George's perseverance ultimately paid off, however. A merciful appellate court found the specific facts of his case so compelling[315] that it "enlarged"[316] the statute of limitations to permit him to contest the trust amendment and defend his uncle's true wishes. Without

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305 *Id.*

306 *Id.* at 202.

307 *Id.* at 201.

308 *Id.* at 202.

309 *Id.*

310 *Id.*

311 *Id.* at 199.

312 *Id.* at 200.

313 *Id.*

314 *Id.*

315 The court emphasized four main points: (1) the fiduciary misconduct; (2) the limited protection afforded to beneficiaries of revocable trusts as opposed to heirs and legatees of wills; (3) the fact that George was challenging only the amendment to the trust, not the will or original trust; and (4) the "diligence" of George and his attorneys in attempting to discover his cause of action. *Id.* at 200–03.

316 *Id.* at 202–03.

similar good fortune, other survivors will not be able to do the same for their vulnerable loved ones.

Martin Wiswald, like nearly all of the deceased settlors whose revocable trusts make it into the case reporters,[317] left a pour-over will that specifically referred to his revocable trust. Thus, once his will was filed for probate, the existence of his trust became public knowledge. The only issues that remained for his and other such settlors' survivors were whether the survivors had standing to contest and view the trust[318] and whether they had sufficient evidence to support their claims of settlor incapacity or third-party wrongdoing.[319] In cases where no companion pour-over will is filed for probate, the vulnerable settlor's trust may well remain undiscovered and uncontested.

In the end, then, rules that protect the privacy of deceased settlors' trusts may have a perverse effect. Those rules may harm vulnerable settlors and benefit "scheming perpetrators preying on elderly or infirm people . . . utilizing a revocable trust . . . as a vehicle for their misdeeds."[320]

### B. Trustees

Trust privacy can poison the relationship between trustees and beneficiaries. It can produce a climate of suspicion and conflict where none needs to exist. Trust privacy puts the trustee in the untenable position of denying a beneficiary's request for funds without being able to explain why. It can also create the impression that a trustee is arbitrarily favoring one beneficiary over another when in fact the trustee is simply following the settlor's secret instructions.[321]

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317 *See, e.g.*, Paananen v. Kruse, 581 So. 2d 186, 187–88 (Fla. Dist. Ct. App. 1991); *In re* Will of Catelli v. Villone, 825 A.2d 1209, 1214–15 (N.J. Super. Ct. App. Div. 2003); *In re* Estate of Pozarny, 677 N.Y.S.2d 714, 716–17, 721–22, 726 (Surr. Ct. 1998).

318 *See, e.g.*, Olson v. Toy, 54 Cal. Rptr. 2d 29, 32–33 (Ct. App. 1996) (holding that the settlor's heirs had standing to contest the validity of her inter vivos trust on grounds of mental incapacity and undue influence because of the "special circumstances" that the personal representative of the deceased settlor's estate was also the defendant trustee); *In re* Estate of Davidson, 677 N.Y.S.2d 729, 731–32 (Surr. Ct. 1998) (holding that a disinherited distributee had standing to contest his deceased aunt's revocable trust).

319 *See, e.g.*, Graf v. Nelson, No. B160259, 2003 Cal. App. LEXIS 10833, at *7, *10–20 (Ct. App. Nov. 19, 2003) (ruling that the decedent's niece provided "substantial evidence" that her elderly incapacitated aunt's pour-over will and revocable trust, which left the bulk of her estate to her neighbor/caregiver, were the product of her caregiver's undue influence); Lah v. Rogers, 707 N.E.2d 1208, 1213–14 (Ohio Ct. App. 1998) (holding that a beneficiary did not provide clear and convincing evidence that her nephew, who was the trustee, drafter, and beneficiary of her mother's trust, exerted undue influence).

320 *In re* Estate of Tisdale, 655 N.Y.S.2d 809, 812 (Surr. Ct. 1997).

321 Particularly problematic are cases where the settlor gives oral rather than written instructions. *See, e.g.*, Taylor v. Nationsbank Corp., 481 S.E.2d 358, 361 (N.C. Ct. App. 1997) (involving trustees who "contend[ed] that the settlor created a private living trust, the terms of which he instructed his trustees were to be held confidential"); Fletcher v. Fletcher, 480 S.E.2d 488, 490 (Va. 1997).

For some trustees, the costs of trust privacy can be personal. Family harmony may well be a casualty of trust privacy. For example, a Virginia trustee denied his brother, a trust beneficiary, information about their deceased mother's revocable trust on grounds that their mother had orally "request[ed] that the trust terms and dealings be kept confidential, even from the beneficiaries."[322] The price for honoring the settlor's request[323] was "'an extremely strained relationship between' the brothers"[324] that ultimately erupted in litigation.[325]

For other trustees, trust privacy can create trust administration problems. Consider, for instance, the case of a loving parent who wants to protect her child from the temptations of life as a "trust fund baby."[326] Under even the most liberal trust reforms, she is free to direct her trustee to keep the trust secret from a "younger" beneficiary.[327] Yet, as Joseph Kartinager and Raymond Young have emphasized, with secrecy comes practical difficulties for the trustee.[328] "[F]or example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return."[329]

Trust privacy can also unnecessarily expose trustees to liability. When a settlor waives trustee duties to account to and inform beneficiaries, the trustee may ultimately pay the price for trust privacy. The trustee may lose what Professor Halbach has called "vital protection from belated claims by beneficiaries whose challenges might . . . have been barred by doctrines of laches or estoppel or by applicable statutes of limitation."[330]

Two recent cases illustrate the practical advantage[331] of "proper disclosure"[332] to beneficiaries. In August 1993, Sylvia McDonald brought suit on behalf of herself as income beneficiary and her children as remainder beneficiaries claiming that the trustees of their

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322 *Fletcher*, 480 S.E.2d at 490.

323 This assumes that the mother in fact made the request.

324 *Fletcher*, 480 S.E.2d at 490.

325 Apparently, "other facts" not discussed in the opinion also contributed to the breakdown in family harmony. *Id.*

326 *See supra* Part II.C.3 (discussing settlors' desires to keep trust benefits secret from their survivors for the survivors' own good).

327 *See* Foster, *supra* note 15, at pt. II.B.3(a), 742–47 (discussing UTC reforms). California is the notable exception. *See id.* at pt. II.B.3(b), 750–51.

328 Kartiganer & Young, *supra* note 123, at 20.

329 *Id.*

330 Edward C. Halbach, Jr., *The UTC: Duties of Trustees*, UTC NOTES, Winter 2002, at 5, 8.

331 Kartiganer & Young, *supra* note 123, at 20 (referring to the UTC's "one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year").

332 Halbach, *supra* note 330, at 8.

family trusts had committed fiduciary breaches during the 1980s by retaining steadily declining stock.[333] The trustees argued that McDonald's suit was barred by Massachusetts's three-year statute of limitations.[334] The court concluded otherwise because "none of [the] children received accountings or other information that would have alerted them to the trustees' alleged mismanagement of the trusts' assets."[335]

A 1994 Florida case[336] provides a marked contrast. In April 1991, Diane Davis sued her trustee, Harris Trust Company of Florida (Harris Trust) for failing to distribute trust assets to which she was entitled.[337] Like the Massachusetts trustees, Harris Trust countered that Davis's suit was barred by the statute of limitations (here, six months).[338] In this case, however, the court agreed with the trustee.[339] It emphasized that Harris Trust had "fully disclosed" the disputed matter to Davis in a June 1989 accounting.[340]

The critical distinction between the Massachusetts and Florida cases was trustee disclosure. Unlike the Massachusetts trustees, the Florida trustee accounted to the beneficiary and, in so doing, triggered the statute of limitations.[341] Had the settlor of the Florida trust protected trust privacy by directing the trustee not to account or report to beneficiaries, the trustee could well have suffered a very different fate.[342] These potential dangers of trust privacy to trustees are so real that official comments to California's Probate Code actually suggest trustees ignore settlor waivers of accounting and reporting requirements: "Notwithstanding being excused from the duty to report information, the trustee may want to provide information to the beneficiaries in order to start the running of the statute of limitations . . . ."[343]

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333 McDonald v. First Nat'l Bank of Boston, 968 F. Supp. 9, 10–13 (D. Mass. 1997). There were three trusts: a revocable trust created by Sylvia McDonald and an irrevocable inter vivos trust and a testamentary trust created by her deceased mother. *Id.* at 10–11.

334 *See id.* at 13–14.

335 *Id.* at 14. The trustees ultimately escaped liability, however, because of exculpatory clauses in the trusts. *Id.* at 14–15. As the court explained, "The wrongful behavior the plaintiff asserts was that the defendants retained the Wyman Gordon stock in larger quantities and for a longer time than might normally be considered prudent. But, unfortunately, that is exactly what the exculpatory clauses empowered them to do." *Id.* at 14.

336 Harris Trust Co. v. Davis, 668 So. 2d 689 (Fla. Dist. Ct. App. 1996).

337 *Id.* at 689.

338 *Id.* at 689–90.

339 *Id.*

340 *Id.* at 690.

341 *See id.* at 689 (finding that the time of accounting was "the latest" the statute of limitations could have been triggered).

342 *See id.* ("The jury agreed with [Davis] that the trustees of the trust established for her benefit had not distributed to her all of the assets to which she was entitled.").

343 CAL. PROB. CODE ANN. § 16064 cmt. (West Supp. 2006).

Privacy can conflict with trustees' fundamental fiduciary obligations to beneficiaries. For example, recent legislation or terms of a particular trust instrument may limit notice to current trust beneficiaries.[344] Yet, trustees who act accordingly may end up violating their duty of impartiality to other beneficiaries. As an adviser to the UTC Drafting Committee stated, "At some point, favoring current beneficiaries over future beneficiaries without notice to the future beneficiaries results in an abandonment of impartiality exposing the trustee to surcharge for violating trust standards."[345]

Even an exculpatory clause in the trust instrument may not be sufficient to save the trustee who protects trust privacy at the expense of her duties to beneficiaries. The battle over Tylenol magnate Henry Slack McNeil's $300 million trust is illustrative.[346] In 1959, McNeil established a discretionary trust for his wife, lineal descendants, and their spouses.[347] The trust instrument gave the trustee "extraordinarily broad authority,"[348] declared that trustee decisions were "not subject to review by any court,"[349] and "relieve[d] the trustees of all personal liability except for gross negligence or willful wrongdoing."[350]

McNeil's oldest child, Hank, "the black sheep of the family,"[351] did not learn until 1995 that he was a current beneficiary of the trust.[352] In the early years, McNeil himself misled his children into thinking they were mere remainder beneficiaries with no rights to distribution from the trust until after their mother's death.[353] Later, the

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344 For example, Missouri's version of the UTC allows the settlor to waive notice to all but a "permissible distributee [of an irrevocable trust] who has attained the age of twenty-one years." MO. ANN. STAT. § 456.1-105.2(8) (West Supp. 2006). "'Permissible distributee' means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether mandatory or discretionary." *Id.* § 456.1-103(15). Under July 2006 amendments, Missouri now allows the settlor to restrict notice to "one or more permissible distributees . . . in lieu of providing the notice . . . to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee." 2006 Mo. Laws 649.

345 MICHELLE W. CLAYTON, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, ENACTING THE UNIFORM TRUST CODE 11 (2003), http://www.abanet.org/rppt/publications/estate/2003/3/clayton.pdf (quoting Raymond Young).

346 McNeil v. Bennett, 792 A.2d 190 (Del. Ch. 2001), *aff'd in part and rev'd in part*, McNeil v. McNeil, 798 A.2d 503 (Del. 2002).

347 *McNeil v. McNeil*, 798 A.2d at 506.

348 *Id.* at 508.

349 *Id.* at 509 (citing Article III(e) of the trust).

350 *Id.* (quoting Article IV(c) of the trust).

351 Brigid McMenamin, *Black Sheep Beats Bank*, FORBES, Sept. 17, 2001, at 60, 60 ("He'd been the black sheep of the family ever since his youth; he dropped out of business school, quit his job, divorced his wife and had used cocaine.").

352 McNeil v. Bennett, 792 A.2d 190, 203 (Del. Ch. 2001).

353 *McNeil v. McNeil*, 798 A.2d at 506; *see also McNeil v. Bennett*, 792 A.2d at 195 (stating that both parents told their children the trust was "'mother's trust'" and as a result the

trustees, who were McNeil's "close confidants,"[354] continued the deception[355] but only with respect to one child—Hank. In 1979, the trustees notified Hank's brother and sisters of their statuses as current eligible beneficiaries of the trust[356] and subsequently met with them, provided information about the trust's account balance, holdings, and distributions, and involved them in the trust decision-making process.[357] To this day, Hank might have still believed he was a remainder beneficiary had he not fortuitously received a carbon copy of a letter one of the trustees intended to send only to his siblings.[358]

Although the trust instrument did not specifically direct the trustees to keep Hank "in the dark,"[359] the trustees may have done so because both the trust settlor (McNeil) and principal beneficiary[360] (Hank's mother) did not want him to know he was entitled to trust benefits.[361] Indeed, both parents effectively disinherited him from their wills.[362] Hank was not only estranged from his family but also

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children did not think "they were entitled to apply for additional funds from the Lois Trust").

354 *McNeil v. Bennett*, 792 A.2d at 195.

355 *See McNeil v. McNeil*, 798 A.2d at 511 (referring to the trustees' "pattern of deception and neglect over a span of many years"). The court acknowledged that "it was defensible for some of the trustees who served later on to assume that notification had already been accomplished." *Id.* at 510. "Nevertheless, both PNC and Wilmington Trust, institutional trustees with policies of notification, should have known better. Moreover, Henry's repeated attempts to get information should have put the trustees on notice that he did not know he was a current beneficiary." *Id.*

356 *See McNeil v. Bennett*, 792 A.2d at 197–98 (reproducing "pertinent part[s]" of the 1979 letter).

357 *Id.* at 199–200.

358 *Id.* at 200 ("By mistake, Brodhead carbon copied 'Henry S. McNeil' and therefore a copy was sent to [Hank], being by then the only living McNeil Family member by that name.").

359 McMenamin, *supra* note 351, at 60.

360 Strictly speaking, Lois McNeil was only one of several beneficiaries entitled to discretionary trust distributions. *See supra* note 347 and accompanying text. Nonetheless, the trustees "administered the Lois Trust with a nearly exclusive focus on Lois during her lifetime" and adopted a policy of "total deference to Lois," "bending completely to [her] wishes," and the trustees "let [her] run the show." *McNeil v. Bennett*, 792 A.2d at 192, 213, 217, 221. The McNeil children "felt that the Lois Trust was 'mother's trust,'" *id.* at 195, 217, and "Lois regarded [the trust] as 'her' Trust," *id.* at 206 (footnote omitted).

361 *See* McMenamin, *supra* note 351 ("Perhaps some of the trustees didn't go out of their way to tell Hank he was a beneficiary because his parents didn't want him to know."). Despite the broad discretion the trust instrument gave them, the trustees deferred to the wishes of Henry McNeil, Sr., *McNeil v. Bennett*, 792 A.2d at 194, and then Lois McNeil, *see supra* note 360 (discussing the trustees' deference to Lois McNeil).

362 McNeil v. McNeil, 798 A.2d 503, 507 (Del. 2002) ("A direct result of this estrangement was that Hank received nothing under his father's will and, upon the later death of his mother, only two million dollars, a paltry sum in comparison to that received by his siblings."); *see also* Ann Davis, *Feud Fractures Family of Late Tylenol Magnate*, DESERET NEWS, July 27-28, 1999, at D7 ("His son's offenses, in his father's view, included using his kids as pawns in a nasty custody battle and shunning a traditional career path. Henry Jr., known as Hank, also had a cocaine problem. It didn't help matters that Hank sent his father scathing letters accusing him of being a bad dad."). After Hank learned that his mother

had a history of lavish spending on expensive habits[363] and hobbies, including national champion retriever dogs and a museum-quality collection of minimalist art.[364] Unemployed since the early 1970s, Hank was the quintessential trust fund baby.[365] He managed to go through more than $20 million of trust income (from his separate trust) and still land in debt.[366]

In 1997, Hank sued the trustees for failing to inform him of his rights under the trust and for giving his siblings preferential treatment.[367] Despite the fact that the case involved a decidedly unsympathetic plaintiff[368] and a trust with a broad exculpatory clause, the trustees ended up the losers. In what *Forbes* magazine described as a "public flogging . . . that is a rare horror in private banking,"[369] a Delaware judge ordered the trustees to return one-fifth of their fees from administering the trust and provide Hank (and his children) a "make-up distribution" from the trust of more than $5 million.[370] The judge even removed one trustee, PNC Bank.[371] McNeil's efforts to insulate his trustees from "judicial second-guessing and the threat of monetary liability"[372] proved futile. As the Delaware Supreme Court explained, the exculpatory clause did not excuse the trustees from performing "duties to furnish information and to act impar-

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"left him virtually nothing," he sued his sister and her husband (Barbara and Henry Jordan) for "tortious interference." *Id.* He argued that the Jordans had prevented his mother from "chang[ing] her Will in order to give [him] a share of her estate and the Marital Trust equal to that of his siblings." McNeil v. Jordan, 814 A.2d 234, 237 (Pa. Super. Ct. 2002). Hank was unable to provide sufficient evidence of his mother's intent, however. *Id.* at 240 (upholding the trial court's decision to dismiss the complaint for lacking "sufficient allegations . . . relating to Mrs. McNeil's intent").

363 Davis, *supra* note 362 (discussing "his descent into cocaine addiction").

364 Bishop v. McNeil, No. 15508, 1999 Del. Ch. LEXIS 186, at *3 (Del. Ch. Sept. 14, 1999) (referring to Hank as "a highly capable collector of minimalist art and handler of national champion retrievers"); *id.* at *15 n.3 (describing Hank's minimalist art collection as "considered quite outstanding and of museum quality by respected art experts").

365 *See id.* at *65 ("In essence, [Hank] has chosen to remain a well-funded ward of his Trustees. Rather than pursuing an income-generating profession, [Hank] chose to live solely off the Trust.").

366 *Id.* at *10, *15.

367 McNeil v. Bennett, 792 A.2d 190, 192, 207 (Del. Ch. 2001).

368 McMenamin, *supra* note 351 ("Henry S. (Hank) McNeil, 58, may not be the most appealing plaintiff."); *see also McNeil v. Bennett*, 792 A.2d at 221 (referring to Hank's "feisty litigation-based strategy and maximalist appetite for distributions"); *id.* at 216 n.58 (stating that when Hank "was asked what he had done with the $20 million in distributions he had received . . . [h]e could not even identify his expenditures by categories to the nearest million, much less in greater detail").

369 McMenamin, *supra* note 351.

370 *McNeil v. Bennett*, 792 A.2d at 223.

371 *Id.* The Court of Chancery decision also named a replacement trustee for PNC but the Delaware Supreme Court reversed this portion of the decision as inconsistent with the settlor's directives in the trust instrument. McNeil v. McNeil, 798 A.2d 503, 514 (Del. 2002).

372 *McNeil v. Bennett*, 792 A.2d at 197.

tially . . . [w]hatever may have been McNeil, Sr.'s intention in this regard . . . ."[373]

Trustees can confront similar fiduciary problems and potential liability in another context: where one trust beneficiary's right to privacy conflicts with other trust beneficiaries' rights to information.[374] For example, when a trustee makes a discretionary trust distribution to one of several trust beneficiaries, he owes the beneficiary who received the distribution a "duty of confidentiality."[375] As in the *McNeil* case,[376] however, the trustee also owes other trust beneficiaries duties of impartiality and information, including "relevant, general information concerning the bases upon which the trustee's discretionary judgments have been or will be made."[377]

Putting these competing fiduciary duties into practice can be a difficult balancing act. What exactly must the trustee disclose to meet his obligations to other beneficiaries? Must he disclose all factors that influenced his decision, including information that invades the recipient beneficiary's privacy, such as the beneficiary's medical condition, marital problems,[378] financial difficulties, nonmarital dependents, standard of living, and other resources?[379] Trust law offers little gui-

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373 *McNeil v. McNeil*, 798 A.2d at 509.

374 CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK § 5.4.1.1, at 218–19 (2006) (discussing the conflict).

375 *Id.* §§ 5.4.1.1, 6.2.3, at 216–19, 360–61 (referring to the trustee's "duty of confidentiality," which is "an incident of the trustee's duty of loyalty").

376 *See supra* notes 367–73 and accompanying text (discussing trustees' violations of their duties of impartiality and information to Hank McNeil).

377 RESTATEMENT (THIRD) OF TRUSTS § 50(1) cmt. b (2003).

378 ROUNDS, *supra* note 374, § 5.4.1.1, at 219 ("Is someone with a remote contingent remainder interest, for example, entitled to all the information that the trustee was privy to when a discretionary distribution to a permissible life beneficiary was made? That information might include medical information or intimate details of the beneficiary's marital situation.").

379 "The trustee has a duty . . . to ascertain the beneficiary's needs . . . ." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(1) (2003). The trustee who makes trust distributions to a beneficiary without inquiring into that beneficiary's actual circumstances may end up liable for breach of fiduciary duty to that beneficiary or to other beneficiaries. *See, e.g.*, Feibelman v. Worthen Nat'l Bank, 20 F.3d 835, 836–37 (8th Cir. 1994) (affirming the surcharge of a trustee for "reckless indifference" to the remainder beneficiary's interest where the trustee made payments to the income beneficiary out of trust principal without inquiring into the income beneficiary's "standard of living" and other resources); Marsman v. Nasca, 573 N.E.2d 1025, 1027, 1030 (Mass. App. Ct. 1991) (finding that "a trustee, holding a discretionary power to pay principal for the 'comfortable support and maintenance' of a beneficiary . . . [violated his] duty to inquire into the financial resources of that beneficiary so as to recognize his needs"). This duty to inquire raises another privacy-related problem for the trustee: To what extent must the trustee invade a beneficiary's privacy to satisfy the "duty to inquire"? Trust law provides only general guidelines. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(1) (2003) ("The trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary. This reliance is inappropriate, however, when the trustee has reason to suspect that the information thus supplied is inaccurate or incomplete."). Apparently, a trustee must go beyond sending a beneficiary a questionnaire, *see Marsman*, 573 N.E.2d at

dance. For instance, the Restatement (Third) of Trusts states: "Appropriate disclosure can usually be provided in general terms that allow reasonable protection for confidential, private, or sensitive information."[380] A trust treatise perhaps sums up the trustee's dilemma best: "There are no easy answers."[381] Yet, the penalty for a wrong answer can be catastrophic.

Thus, for the conscientious trustee, trust privacy creates conflicts in fiduciary duties—conflicts in duties to settlor and beneficiary and in duties to multiple beneficiaries. For the unscrupulous trustee, however, trust privacy provides opportunity and cover for wrongdoing. As the next section will show, a "trustee who may operate in secret is essentially unaccountable."[382]

C. Beneficiaries

The plight of beneficiaries has captured the headlines. Recent years have seen dramatic charges of trustee mismanagement or outright theft of funds that were supposed to support a decedent's closest or most vulnerable survivors. These cases feature some of this country's greatest fortunes and most prominent families and professionals. Hyatt heir Robert Pritzker, for example, has been accused of "raping and pillaging the trusts of [his] two tiny children."[383] Grocery store magnate John F. Schwegmann has been surcharged $5 million for using his half-sister's trust as his personal piggy-bank.[384] Banker's Trust allegedly "was asleep at the wheel"[385] as diamond dealer Harry Winston's trust for his heirs lost over $1 billion.[386] And, in a case that

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1030 (discussing Boyden v. Stevens, 188 N.E. 741 (Mass. 1934)), or "request[ing] only income/expense information," Austin v. U.S. Bank of Wash., 869 P.2d 404, 409 n.7, 411 (Wash. Ct. App. 1994). The trustee may well encounter resistance from the beneficiary. For example, the trustees of jeweler Harry Winston's trust had to "serve [ ] a notice of discovery and inspection on [Bruce Winston, the income beneficiary and brother of one of the trustees] to compel him to produce tax returns, bank statements, canceled checks and other financial documents." *In re* Estate of Winston, 613 N.Y.S.2d 461, 462 (Sup. Ct. 1994).

380 RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(1) (2003).

381 ROUNDS, *supra* note 374, § 5.4.1.1, at 219.

382 *Id.* at 218.

383 Jodi Wilgoren & Geraldine Fabrikant, *Knives Drawn for a $15 Billion Family Pie*, N.Y. TIMES, Dec. 11, 2002, at A1 (quoting "a person close to Liesel" [Pritzker's daughter]). On January 6, 2005, the Pritzkers reached a settlement agreement, under which Robert Pritzker's children, Liesel and Matthew, each received approximately $450 million. Mark Maremont, *Pritzkers Settle Family Lawsuit; Cost: A Fortune*, WALL ST. J., Jan. 7, 2005, at B1.

384 Ronette King, *Grocery Store Heir Told To Pay $5 Million; Sister Was Denied Schwegmann Cash*, TIMES-PICAYUNE, Jan. 28, 2005, at C1.

385 Beard, *supra* note 120, at 26 (quoting Bruce Winston's attorney, Paul Wexler).

386 Thus far, Harry Winston's son and trust beneficiary, Bruce Winston, has been unsuccessful in proving these charges in his $1.3 billion suit against Deutsche Bank, the successor to Banker's Trust. *See* Estate of Winston, N.Y.L.J., July 9, 2003, at 27 (N.Y. Surr. Ct. 2003) (conditionally granting a motion to preclude Bruce Winston from introducing evidence at trial in support of his allegations "unless he provides [Deutsche Bank] with a responsive bill of particulars"). The court observed that "[i]n the main, Bruce's responses

"abounds with tragedy,"[387] retired Paul Weiss partner Allan Blumstein, out of "personal greed and a fear of disappointing his wife,"[388] looted the family trust that was intended to support his elderly aunt who suffered from dementia.[389] Rather than paying his aunt's nursing home bills, Blumstein used trust funds "to maintain the affluent lifestyle for his wife and family that he could not sustain after his retirement."[390]

These cases of trustee misconduct are by no means limited to the rich and famous. As trusts become the middle-class estate planning device of choice,[391] beneficiaries from all walks of life confront trustee indifference, mismanagement, high fees, and malfeasance.[392] Consider, for example, the sixty-eight-year-old widow whose income derived solely from a $200,000 trust created thirteen years earlier for her benefit.[393] When she asked for $20,000 to pay for major dental work, the trustee responded by telling her to have her teeth pulled.[394]

Under the law of trusts, the beneficiary is the first—and often last—line of defense against an incompetent, partial, stingy, or larcenous trustee.[395] Only an informed beneficiary can fulfill this role as monitor and enforcer of trusts.[396] Yet, rules that protect trust privacy deny the beneficiary the very information necessary to determine whether a trustee properly invested and distributed trust assets—access to the entire trust instrument that defines trustee duties and beneficiary rights.[397] Indeed, some states perversely allow the beneficiary

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are ambiguous, inadequate and noncompliant . . . . If indeed Bruce intends to offer no proof with respect to certain of the specific allegations in his objections, as several answers suggest, then those allegations should be withdrawn." *Id.*

387 *In re* Blumstein, 801 N.Y.S.2d 299, 302 (Sup. Ct. 2005) (quoting the Hearing Panel's report).

388 *Id.* at 301.

389 *Id.* at 300–01.

390 *Id.* at 301.

391 McNamee, *supra* note 120, at 228 ("[T]rusts are becoming the estate-planning tool of choice for Middle America."); *see also* Dobris, *supra* note 19, at 563–67 (discussing the "massification" or "pedestrianization of trusts").

392 *See supra* notes 117–22 (discussing beneficiary complaints against trustees).

393 *See* Beale, *supra* note 125, at 1 (reporting the case).

394 *Id.*

395 *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 961, at 3–4 (rev. 2d ed. 1983) ("[O]nly the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary . . . ."); 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 200, at 209 (4th ed. 1988 & Supp. 2001 (Mark L. Ascher & Margit T. Rigney eds.)).

396 *See* English, *supra* note 23, at 199 ("[O]nly by being informed can the beneficiaries know of and enforce their interests."); Gallanis, *supra* note 23, at 19 ("As long as trust law locates the power of enforcement with the beneficiaries, they must have the information necessary for them to perform that enforcement function.").

397 *See* Foster, *supra* note 15, at pt. II.B.3 (discussing beneficiaries' need for direct access to the trust instrument and pro-privacy rules that limit access). "The trust instrument has been aptly called the 'most fundamental information' about a trust." *Id.* at 739 (quoting U.S. Nat'l Bank of Or. v. Duling, 592 P.2d 257, 265 (Or. Ct. App. 1979) (Buttler, J.,

to see only the trust provisions that the trustee—the very individual who may have wronged the beneficiary—deems relevant to that beneficiary.[398] These rules create significant risks to beneficiaries. As one court explained:

> [W]ithout access to the Trust Agreement . . . , the beneficiary has no basis upon which he can intelligently scrutinize the Trustees' investment decisions . . . . The beneficiary is unable to evaluate whether the Trustees are discharging their duty to use 'reasonable care and skill to make the trust property productive' . . . [or] to assure the Trustees are discharging their 'duty to deal impartially' with all the beneficiaries within the restrictions and conditions imposed by the Trust Agreement.[399]

The potential for harm to beneficiaries only escalates when they do not even know that a trust exists in their names. In such circumstances, unscrupulous trustees can—and do—loot trusts. Consider, for example, the Oregon daughter who discovered on her twenty-first birthday that she had been the beneficiary of two trusts created for her educational needs.[400] While she remained in the dark, her trustee-father spent her trust funds on family travel, clothing, medical expenses, birthday gifts, ballet tickets, and even his expenses for attending a Canadian Rotary Club meeting.[401]

Similarly, for thirty-four years, two Georgia children, Lorrie Anne Goldston and Scott Warren Zeigler, had no idea that their father had named them as the beneficiaries of his trust.[402] In direct violation of trust terms, their bank trustee never provided them with trust accounts, annual reports, or information; never used trust assets for their support during childhood; and never distributed trust principal when they reached age twenty-one.[403] Instead, the bank sold the trust

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dissenting)). "It records the original 'deal between settlor and trustee.'" *Id.* (quoting John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650 (1995)). "Moreover, because nearly all trust laws are mere default rules that the settlor can override in trust provisions, the trust instrument may well be the principal source of law governing trust and trustee." *Id.* at 739–40 (footnote omitted). *See* Langbein, *supra*, at 650 ("[V]irtually all trust law is default law—rules that the parties can reject. The rules of trust law apply only when the trust instrument does not supply contrary terms." (footnote omitted)); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 641–43 (2004) (discussing default and mandatory trust rules and stating that "[t]he rules of internal trust governance, which determine the rights inter se of the beneficiaries, the settlor, and the trustee, are for the most part default as to the settlor" (footnote omitted)).

398 *See supra* note 15 (discussing the UPC approach).

399 Fletcher v. Fletcher, 480 S.E.2d 488, 492 (Va. 1997) (citations omitted).

400 Jimenez v. Lee, 547 P.2d 126, 130 (Or. 1976) (en banc).

401 *Id.* at 131.

402 Goldston v. Bank of Am., 577 S.E.2d 864, 867–68 (Ga. Ct. App. 2003). The trust was an irrevocable, court-ordered trust created pursuant to a divorce action between the children's parents.

403 *Id.* at 867.

property to their stepmother for less than fair market value and kept the proceeds "for [its] own use."[404]

In the end, the Georgia children discovered their trust only by accident. In the process of settling their incapacitated mother's affairs, Goldston found trust documents among their mother's important papers.[405] Other beneficiaries would not be so lucky. They would never learn of a loved one's munificence or a trustee's failure to carry out her wishes. Yet, under recent reforms to promote trust privacy,[406] some states have removed even the most basic protection for beneficiaries—knowledge that a trust exists.[407] These states have left to the settlor's discretion whether current and future beneficiaries are entitled to any notice whatsoever.[408] Trust privacy thus can leave beneficiaries at the mercy of trustees by insulating trustees from any outside supervision or accountability.

For beneficiaries, the costs of privacy are rapidly becoming prohibitive. In today's changing trust environment, the "benevolent godparent"[409] model of trustee is disappearing and with it the intricate

404 *Id.* at 867–68.

405 *Id.* at 868.

406 *See* Foster, *supra* note 15, at pt. III.A.4 (discussing reforms).

407 *See* BOGERT & BOGERT, *supra* note 395, § 961, at 3 ("[T]he trustee is under a duty to notify the beneficiary of the existence of the trust so that he may exercise his rights to secure information about trust matters and to compel an accounting from the trustee." (footnote omitted)).

408 *See* Foster, *supra* note 15, at pt. III.A.4 (discussing settlor waiver of notice provisions).

409 *See* Demetrios Datch, *"Merger Mania" and the Demise of the "Benevolent Godfather" Trustee: How a Changing Corporate Environment Has Affected Trust Beneficiaries Across the Country* (2002) (previously published supervised research paper on file with Heirs, Inc.); *see also* Dobris, *supra* note 19, at 551–54 nn.44 & 47–48 (discussing the tradition of the "gentleman" trustee and presenting an "elegy for the noble trustee").

web of social,[410] moral,[411] and legal norms that traditionally encouraged compliance and generosity. The shift from individual to institutional trustee and the accompanying loss of a trustee's personal connection to both settlor and beneficiary significantly compounds the problem.[412] Indeed, in an era of recurrent bank mergers, the situation is only becoming worse for beneficiaries and the need for information more urgent.[413] The friendly local banker a settlor chose to manage funds for the settlor's nearest and dearest may well be re-

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410 *See* Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1221 (1995) (discussing the "[s]ocial and collegial pressures on the fiduciary" that "may be effective in a stationary society, in which everyone knows the fiduciary, his history, and his family"). "The fiduciary's family members or members of his professional club who seek to maintain their collective reputation will monitor his performance. As these sources of information and monitoring disappear in a mobile society, however, fiduciary relationships with strangers become far more risky to entrustors." *Id.* The disappearance of this "community approach" harms beneficiaries as well. For example:

> [An] elderly widow who was also the beneficiary of a trust fund . . . expressed concern about her bank trustee and its departure from a "community approach." For example, the [widow] attended church and community events with the employees of the community bank that managed the [widow's] trust fund. In addition, the convenient location of the community bank made it easy for the [widow] to stop in on a periodic basis while "performing routine errands" and to discuss the status of the trust account. However, when the community bank was absorbed by a larger bank, the management of the trust account was split between two offices in two different cities: "one [office managed] the status of the actual trust account in city 'X' 100 miles away, and another [office acted as] the new trustee in city 'Y' 100 miles from city 'X.'" The elderly widow's age and infirmity prevented her from commuting a long distance to check on the status of her trust fund.

Datch, *supra* note 409, at 10–11 (footnotes omitted).

411 *See* Dobris, *supra* note 19, at 548 ("High-mindedness in trust law is fading like an old picture in a family album. Putting it differently, there seems to be an erosion in fiduciary responsibility in the trust world . . . ."); *id.* at 549–60 (presenting "'proofs' of the erosion of fiduciary responsibility"). As Professor Leslie has observed, "Fiduciary duties are most effective when they function both as legal rules and moral norms." Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 70 (2005). Yet, the current trend in trust law scholarship and legislation is "to reconceptualize fiduciary duties as simple default rules, divorced of any normative content . . . ." *Id.* at 119. This trend threatens further erosion of the traditional moral and social constraints on fiduciary conduct. *Id.* at 70.

412 *See* Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 774–75 (2000) (discussing "[t]he shift from personal to institutional trustees"). As Professor Alexander observes, "Two-hundred years ago, trustees were individuals with whom the trustor had a long-term personal relationship. Today, the vast majority of trusts are administered by large financial institutions, such as trust companies and trust developments of commercial banks." *Id.* (footnote omitted).

413 One response has been to liberalize the rules for removal of trustees. *See* IND. CODE ANN. § 30-4-3-29(e) (LexisNexis 2000) (permitting beneficiaries to "petition the court for the removal of a corporate trustee if there has been a change in control of the corporate trustee after the date of the execution of the trust . . . [and] the removal is in the best interests of all the beneficiaries of the trust"); *In re* Fleet Nat'l Bank's Appeal from Probation, 837 A.2d 785, 795 (Conn. 2004) (stating that Connecticut's reform of trustee removal legislation had "its genesis in the bank acquisitions and merger phenomenon of the 1990s" (footnote omitted)).

placed after the settlor's death with a bank trust department located hundreds—even thousands—of miles away.[414]

Ironically, at the time when beneficiaries most need information,[415] legislators and courts are restricting their access to information.[416] For the sake of trust privacy, beneficiaries are left dependent on the kindness of strangers.

### D. Third Parties

Finally, trust privacy can harm those who are not direct beneficiaries of a settlor's trust. Consider, for example, eighty-nine-year-old South Carolina widow, Olive Deal, who discovered too late that her husband, John, had amassed and transferred millions of dollars to a revocable trust.[417] Through use of a trust, John kept his wealth a secret from Olive.[418] As a result, for most of their fifty-year marriage, he "made his wife live a life of poverty,"[419] even having her buy day-old bread to save money.[420]

Trust privacy may also deny third parties and family members money they deserve. For instance, financial institutions, transfer agents, title insurance companies, purchasers of trust property, and other third parties dealing with the trust or trustee require confirmation of the trust's existence and the trustee's authority to engage in a particular commercial transaction.[421] Trust privacy can deprive such parties of the basic information they need to evaluate whether or not

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414 *See* McNamee, *supra* note 120, at 228 ("[T]hese days it's unlikely that granddad [the trust settlor] would know the trustee, either. Waves of mergers have swallowed up local institutions, and a trust placed with a friendly banker in Elwood, Ind., might now be managed in Detroit.").

415 As Professor Dobris has observed, "Fewer and fewer people believe in fiduciary duty, unless someone is watching." Dobris, *supra* note 19, at 549.

416 *See* Foster, *supra* note 15, at pts. II.B.3, III.A (discussing recent reforms that have promoted privacy at the expense of beneficiary access to information).

417 *See* Andrea Weigl, *Widow Battles University for Spouse's Secret Fortune*, GREENVILLE NEWS, Sept. 29, 1999, at 1B. John Deal transferred $3.4 million to a revocable trust. *Id.* The funds were to be used by the University of Missouri "on scholarships for students who live in Livingston County in northeast Missouri, where John Deal grew up." Pat Healy, *Widow Sues U. Missouri System for Husband's Contribution*, U-WIRE, Oct. 5, 1999. Deal also created three irrevocable trusts totaling $2.3 million for the benefit of his alma mater, the University of Kansas. Weigl, *supra*.

418 *Widow's Cash Battle*, BELFAST NEWS LETTER, Oct. 2, 1999, at 3 ("Olive Deal . . . was unaware her husband, John, had amassed a fortune until he fell ill in 1997."). John Deal, who suffered from Alzheimer's disease, was declared incompetent in 1997. Healy, *supra* note 417. Deal's nephew, Mark Langdon, was appointed conservator of his estate. Weigl, *supra* note 417. "Langdon discovered the $3.4 million trust one day as he sifted through financial records." Healy, *supra* note 417.

419 Healy, *supra* note 417 (quoting Ned Nicholson, Olive Deal's attorney).

420 Weigl, *supra* note 417 ("'Do you know that he had me buying day-old bread?' Olive Deal said when family members told her how much money was in the estate, according to court records.").

421 *See supra* note 59 and accompanying text.

to deal with the trust or trustee in the first place or, in the event of a breach of contract, to enforce their rights.

Similarly, in theory, a settlor's creditors—be they a bank that loaned money,[422] a nurse that provided round-the-clock care,[423] an accident victim,[424] a spouse,[425] or a child[426]—can reach the assets of a settlor's revocable trust during the settlor's life and, increasingly, after the settlor's death.[427] In nearly every state today, however, this turns

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422 *See, e.g.*, State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771 (Mass. App. Ct. 1979) (holding that a bank that loaned the settlor $75,000 could reach assets in the settlor's revocable trust after his death to pay the settlor's debt to the bank).

423 *See, e.g.*, Johnson v. Commercial Bank, 588 P.2d 1096, 1097–99 (Or. 1978) (holding that a "practical nurse" could reach assets of a deceased settlor's revocable trust "to recover wages due her for nursing services rendered to" the settlor and his wife).

424 *See, e.g.*, *In re* Estate of Nagel, 580 N.W.2d 810, 812 (Iowa 1998) (holding that the executor of a deceased car accident victim's estate could reach the deceased settlors' revocable trust assets to satisfy a wrongful death claim).

425 *See, e.g.*, Sieh v. Sieh, 713 N.W.2d 194, 198 (Iowa 2006) (holding that assets in a deceased settlor's revocable trust were subject to his surviving spouse's elective share); Lynch v. Lynch, 522 A.2d 234, 236 (Vt. 1987) (holding that "property in a trust created by a spouse who retains a power of revocation is marital property subject to equitable distribution" in a divorce proceeding). The modern trend is to include revocable trust assets in the decedent's estate for purposes of calculating a surviving spouse's elective share. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmts. i, j & reporter's note (2003); RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d & reporter's note (2003); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 10-12 to -15 (4th ed. 2006). However, this is by no means a universal rule. *See, e.g.*, Dumas v. Estate of Dumas, 627 N.E.2d 978, 983 (Ohio 1994) ("[A] valid [revocable] trust executed by a settlor and in existence at the time of his or her death bars the settlor's spouse from claiming a distributive share in the trust assets . . . ."). A few states are now allowing surviving spouses to include revocable trust assets in calculating their share under omitted spouse statutes. *See, e.g.*, CAL. PROB. CODE §§ 21601, 21610 (West Supp. 2007) (providing the decedent's surviving spouse who was unintentionally omitted from a will or revocable trust executed before marriage a share in the decedent's estate and defining estate as "a decedent's probate estate and all property held in any revocable trust that becomes irrevocable on the death of the decedent").

426 *See, e.g.*, *In re* Marriage of Perry, 68 Cal. Rptr. 2d 445, 446 (Ct. App. 1997) (holding that assets of a decedent's revocable trust were subject to child support obligations); L.W.K. v. E.R.C., 735 N.E.2d 359, 367 (Mass. 2000) (holding that assets of a decedent's revocable trust could be reached to satisfy a support order for the benefit of his nonmarital child). Some states also extend pretermitted child statutes to include a decedent's revocable trust as well as probate estate. *See, e.g.*, IOWA CODE ANN. § 633A.3106 (West Supp. 2006) (providing an intestate share to a child born to or adopted by the settlor after creation of a revocable trust if the settlor unintentionally omitted that child from the trust).

427 Under the traditional view, a creditor could not reach revocable trust assets unless a statute provided otherwise or the settlor made a fraudulent conveyance. 4 SCOTT & FRATCHER, *supra* note 395, § 330.12, at 372–74. "More recently, the UTC, UPC, Restatement 3d of Trusts, and several decisions have broken away from the traditional position and allow the [settlor's] creditors to reach assets in a revocable trust, even though the transfer to the trust was not in fraud of creditors." WAGGONER ET AL., *supra* note 425, at 8-4. Today, the rights of creditors to reach assets of a living settlor's revocable trust are "a well accepted conclusion." UNIF. TRUST CODE § 505 cmt. (amended 2005). Although in some states "the rights of a settlor's creditors in the assets of revocable trusts after the settlor's death are uncertain," Clifton B. Kruse Jr. & Stanley C. Kent, *Creditors' Rights in Probate Avoidance Trusts—A Model Statute*, PROB. & PROP., Jan./Feb. 1995, at 61, 64, this too is changing,

out to be a "hollow privilege."[428] Rules that protect trust privacy can effectively make the settlor judgment proof. Those rules deny creditors the basic information they need to pursue their claims—notice that a trust exists.[429]

In his best-seller, *How to Avoid Probate!*, Norman Dacey, the leading proponent of revocable trusts, warned readers that "[o]f course, such a trust should not be used to deprive a spouse or creditors of sums to which they might rightfully be entitled."[430] Yet, this is precisely what trust privacy promotes. Under the cloak of privacy, "a mean-spirited, no good curmudgeon"[431] can leave his widow penniless, and a deadbeat can "evad[e] . . . his just debts."[432]

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*see* MCGOVERN & KURTZ, *supra* note 110, at 344 ("Creditors of a testator can reach the probate estate to satisfy their claims. In some states creditors of the settlor of a revocable trust have no comparable right, but this is no longer true in many jurisdictions today."). For a review of the relevant case law, legislation, uniform law provisions, and literature, see RESTATEMENT (THIRD) OF TRUSTS § 25 cmts. d, e & reporter's notes; WAGGONER ET AL., *supra* note 425, at 8-4 to -5.

428 Helen B. Jenkins, *Creditors' Rights to Actual Notice of Revocable Trust on Death of Settlor in the Aftermath of* Pope*: The Blessing of Change, the Sin of Avoidance, and the Forgiving Solution*, 19 SETON HALL LEGIS. J. 453, 468 (1995).

429 *See id.* at 453 ("The lawyer remarked that the creditors were entitled to be made whole out of the [revocable] trust estate, but added that no one really by law had the responsibility for notifying the creditors of the decedent's untimely demise."); *id.* at 467–69, 474 (arguing that because "a revocable trust might well serve as a convenient vehicle to avoid the payment of claims against a deceased settlor" creditors should be given actual notice of the existence of such a trust if the settlor dies). A few states do provide notice to revocable trust creditors. *See id.* at 470–73 (discussing California and Florida legislation). Interestingly, California and Pennsylvania require notice to family survivors who are not trust beneficiaries. CAL. PROB. CODE § 16061.7(b)(2) (requiring notice to "[e]ach heir of the deceased settlor, if the event that requires notification is the death of a settlor . . ."); Act of July 7, 2006, ch. 77, 2006 Pa. Legis. Serv. 305 (West) (requiring that after the settlor of a revocable trust has died, the trustee send notice to "the settlor's spouse or, if the settlor's spouse is incapacitated, the spouse's guardian [and] each of the settlor's children who is sui juris and the guardian, if any, of each child who is not sui juris").

430 DACEY, *supra* note 55, at 45.

431 Friedberg v. SunBank/Miami, N.A., 648 So. 2d 204, 206 (Fla. Dist. Ct. App. 1994); *see also* Lynn Brenner, *Spouse Gets Estate Share*, NEWSDAY, Apr. 11, 2004, at E7 (stating that because a revocable trust does not go through probate, "you can make it harder for [your surviving spouse] to exercise the right of election by transferring all your assets to a revocable trust"). Revocable trusts may frustrate efforts to bring claims against an estate:

> Anyone who has a potential legal claim on your estate must be notified in advance of probate. Naturally, that includes your spouse . . . . But if you transfer everything to a revocable trust, . . . there is no probate procedure. When you die, your assets will pass to the trust beneficiaries without any notice being given to anyone else. Your surviving spouse must then hire a lawyer and start a proceeding to find out who has the assets. That's not impossible, of course, but it is a higher hurdle to overcome.

*Id.*

432 Greenwich Trust Co. v. Tyson, 27 A.2d 166, 173 (Conn. 1942). Trust privacy's costs to creditors are only likely to increase as the traditional notion that "[y]ou should keep your promises and pay your debts because it is the right thing to do," Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000), yields to "[t]he [ascending] view that trusts are there to beat somebody out of something . . . . The

## CONCLUSION

The conventional wisdom is that trust privacy should be protected and celebrated. To preserve privacy, courts and legislatures are increasingly restricting access to trusts by beneficiaries, third parties dealing with the trust or trustee, and the public at large.[433] Even the most reform-minded scholars, judges, legislators, and practitioners have chosen to protect privacy at the expense of their larger reform agenda. As a result, their ambitious efforts to unify the laws governing wills and will substitutes[434] and to codify a uniform national law of trusts[435] remain unfulfilled.

This Article has considered whether trust privacy in fact deserves this privileged position. The Article concludes that trust privacy is by no means the unmixed blessing its proponents claim.

To evaluate the merits and flaws of trust privacy, this Article has presented a critical analysis of its human impact.[436] This analysis has revealed that trust privacy indeed has significant benefits for all affected by trusts. It can promote settlors' control over their identity, reputation, and property.[437] It can insulate trustees from beneficiary complaints and interference.[438] Trust privacy can also protect beneficiaries from the outside world, each other, and their own improvidence.[439] In addition, trust privacy can provide emotional and financial benefits for third parties who are not parties to decedents' trusts.[440]

At the same time, however, close analysis of trust privacy's human impact has exposed a darker side that commentators have largely ignored. It has shown that rules protecting privacy have real human costs. Trust privacy can leave vulnerable settlors without property or dignity.[441] It can cause trustees unnecessary liability and conflict with

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once unquestioned assumption that people want to pay their bills, and want their beneficiaries to pay their bills, is seemingly under siege." Dobris, *supra* note 19, at 547 (footnote omitted); *see also* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 364–66 (2002) (reviewing moral and economic arguments against asset protection trusts and stating as one possible response "[f]or purposes of protecting voluntary creditors from ill-advisedly extending credit to persons whose assets are held in an APT, the law might impose a public notice requirement for establishing an APT"). For a response to Professor Danforth's proposal, see Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2689 n.20 (2006).

433 *See supra* notes 74–76 and accompanying text.

434 Foster, *supra* note 15, at pt. II.

435 *Id.* at pt. III.

436 *See supra* Parts II, III.

437 *See supra* Part II.A.

438 *See supra* Part II.B.

439 *See supra* Part II.C.

440 *See supra* Part II.D.

441 *See supra* Part III.A.

beneficiaries.[442] Trust privacy can also leave beneficiaries at the mercy of incompetent, partial, stingy, and larcenous trustees.[443] Finally, it can impede third parties and family members from receiving the money they deserve.[444]

By presenting a more nuanced picture of trust privacy, this Article hopes to encourage reformers to resist the understandable impulse to protect trust parties from tabloid reporters, thieves, litigious family members, and spendthrifts. Focusing on the costs as well as the benefits of trust privacy can inspire a more consistent, principled, and compassionate approach to trust reform. At the very least, it provides a framework for evaluating the strengths and weaknesses of future directions for reform. The remainder of this Article will attempt to begin that process by outlining four possible approaches to trust privacy and their responses to the human costs identified above.

First, a *full publicity approach* would make revocable as well as testamentary trusts public record. Limited precedent for this approach already exists. For example, some states have enacted statutes that require recording of a trust in cases of real estate transactions to or from the trust.[445] The UPC has gone beyond the real estate context to mandate registration with the appropriate local court of both testamentary and revocable trusts.[446] Even the UPC, however, stops short of a full publicity approach. To protect privacy, it provides that a trustee must file only a brief synopsis of the trust.[447] A full publicity approach would take that next step: It would apply in all contexts and require recording of the entire trust instrument.

A full publicity approach would be the optimal scheme for addressing the human costs of trust privacy. It would provide beneficiaries independent access to the entire trust instrument, thereby giving a settlor's nearest and dearest the information they need to protect the settlor from exploitation during her lifetime and to ensure that after the settlor's death her property is distributed as she intended.[448] Giving independent access to the trust would reduce the

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442 *See supra* Part III.B.

443 *See supra* Part III.C.

444 *See supra* Part III.D.

445 *See supra* note 56 and accompanying text.

446 UNIF. PROBATE CODE §§ 7-101, -102 & general cmt. (amended 2006).

447 *Id.* § 7-102 (requiring the trustee to file a brief "statement" disclosing only the names of the settlor and original trustee, date of the trust, name and address of the registering trustee, and an "acknowledge[ment of] the trusteeship"). A number of state recording statutes permit trustees involved in real estate transactions to file only a brief synopsis of the trust rather than the trust instrument itself. *See, e.g.*, IOWA CODE ANN. § 614.14 (West Supp. 2006) (requiring only an "affidavit"); MINN. STAT. ANN. §§ 501B.56, 508.62 (West 2002) (requiring only a "certificate of trust"); *see also* Foster, *supra* note 15, at pt. II.B.1(a) (discussing restrictions on recording and registration of trusts to protect privacy).

448 *See supra* Part III.A.

risks to trustees that privacy creates—the climate of suspicion and conflict with beneficiaries, administrative costs, and potential liability.[449] This approach would also help beneficiaries fulfill their legal responsibilities as monitors and enforcers of trusts.[450] It would give third parties the information they need to engage in commercial transactions with trusts and trustees.[451] It would provide voluntary creditors information to evaluate whether or not to extend credit in the first place.[452] Finally, by permitting access to a revocable trust instrument, this approach would remove a "hurdle"[453] that impedes family and third-party creditors from pursuing litigation to satisfy their claims.[454] Given the strong pro-privacy sentiment today, however, a full publicity approach is unlikely to be adopted despite its clear advantages.

Second, a *wills approach* would unify the treatment of wills and revocable trusts. Like wills,[455] revocable trusts would remain private during the settlor's lifetime but become public record after the settlor's death. In exceptional cases, such as a threat to a beneficiary's life, a court could follow wills precedent[456] and temporarily seal a revocable trust instrument and any related documents and files.

For deceased settlors' revocable trusts, a wills approach would have the identical effect on human costs as a full publicity approach. Unlike a full publicity approach, however, a wills approach would be theoretically consistent with some recent trust reforms by maintaining privacy of living settlors' trusts. For example, the comment to section 7780.3 of the new Pennsylvania Uniform Trust Act proclaims: "This section recognizes that most revocable trusts are will substitutes and preserves the privacy associated with wills until the settlor's death."[457]

However, a wills approach would not address all human costs. The basic problem is that although a revocable trust is principally a "will substitute,"[458] it differs from a will in a critical respect—a revoca-

449 *See supra* Part III.B.

450 *See supra* Part III.C.

451 *See supra* note 421 and accompanying text.

452 *See* Danforth, *supra* note 432, at 366.

453 *See supra* note 431.

454 *See supra* notes 422–32 and accompanying text.

455 *See* Foster, *supra* note 15, at pt. II.A.1 (discussing treatment of wills); *supra* notes 28–54 (same).

456 *See supra* notes 44–47 and accompanying text.

457 Pennsylvania Uniform Trust Act, § 7780.3 Pennsylvania cmt. (Proposed Draft 2005), *available at* http://jsg.legis.state.pa.us/UTC%204%202005.pdf. Admittedly, even Pennsylvania stops short of adopting a wills approach. To be consistent with notice requirements for wills and intestacy, the Pennsylvania statute provides notice of the trust to a settlor's spouse and children. *See supra* note 429 (summarizing Pennsylvania legislation). The Pennsylvania Uniform Trust Act, however, does not make the trust public record after the settlor's death.

458 UNIF. TRUST CODE § 112 cmt. (amended 2005) ("The revocable trust is used primarily as a will substitute . . . .").

ble trust may become operative during a settlor's lifetime.[459] Thus, reformers would need to make some adjustments to a wills approach to respond to concerns raised by living settlors' trusts. For example, they should modify this approach to protect a vulnerable settlor from trustee malfeasance.[460] At the very least, they should require that if a settlor becomes incapacitated, someone other than the settlor and trustee have access to the trust instrument.[461] One option[462] would be to give trust beneficiaries that right.[463] As UTC drafters have already discovered,[464] however, beneficiary access to a living settlor's trust is likely to encounter significant resistance. Opponents have successfully argued that "[b]ecause the devisees under a will have no right to know of the devise no matter how incapacitated the settlor, then neither should the beneficiaries of a revocable trust."[465] Thus, a more feasible if less comprehensive solution might be to modify a wills ap-

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459 *See supra* Part III.A.1 (discussing costs of revocable trusts that become operative during a settlor's lifetime); *see supra* note 427 and accompanying text (discussing creditors' rights to reach assets of living settlors' trusts).

460 *See supra* notes 208–25 and accompanying text (discussing trustee exploitation of vulnerable settlors).

461 *See* David M. English, *The New Mexico Uniform Trust Code*, 34 N.M. L. REV. 1, 29, 30 n.351 (2004) (noting the problem with statutes that allow a settlor to waive beneficiary rights to information about an incapacitated settlor's revocable trust). As Professor English explains, "The dilemma is that by directing that information be withheld, the settlor may be denying the beneficiaries the very thing the beneficiaries need to make certain that the trustee will carry out the settlor's dispositive wishes." *Id.*

462 *See* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. e & reporter's notes (2007) (discussing various approaches to access information concerning the trust and the trust instrument itself after a revocable trust settlor loses capacity).

463 *See* Foster, *supra* note 15, at pt. III.A.1 (summarizing various approaches UTC states have adopted regarding beneficiary access to incapacitated settlors' revocable trusts).

464 Early UTC drafts made beneficiary rights to information about an incapacitated settlor's revocable trust a mandatory rule that a settlor could not waive in the trust instrument. *See id.* at 745 nn.207–09. After extensive debate and discussion, however, UTC drafters adopted a "compromise," allowing "[s]ettlors for whom confidentiality is important" to waive beneficiary rights to information regarding an incapacitated settlor's revocable trust. English, *supra* note 23, at 188; *see also* Foster, *supra* note 15, at 745–46 (discussing changes in UTC drafts in response to privacy concerns regarding beneficiary access to living settlors' revocable trusts).

465 English, *supra* note 23, at 188 (describing opponents' argument); *see also* UNIF. TRUST CODE § 603 cmt. (amended 2005) (stating that the 2004 amendment of the UTC that gives states the option of providing beneficiaries no rights during a revocable trust settlor's lifetime responded in part to "concern . . . that this section prescribe[d] a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated").

proach[466] to give an incapacitated settlor's guardian, conservator, or agent[467] access to the settlor's trust instrument.[468]

Third, an *enforcement approach* would preserve the privacy of both living and deceased settlors' revocable trusts with limited exceptions to ensure trust enforcement. Like the modified wills approach discussed immediately above, an enforcement approach would include an exception to trust privacy during a settlor's lifetime. For example, it would give someone other than the settlor and trustee access to the revocable trust in the event of settlor incapacity. After the death of the settlor, this third approach would depart from a wills approach. It would keep the decedent's trust private from all but those who are legally responsible for monitoring and enforcing the trust—trust beneficiaries.[469] At a minimum, an enforcement approach would require that current income beneficiaries and first-line remainder beneficiaries[470] receive notice of a deceased settlor's trust and a copy of the trust instrument that defines beneficiary rights and trustee duties. Reformers could modify an enforcement approach to deny trust information to "younger beneficiaries"[471] until those beneficiaries "reach[ ] an age of maturity and self-sufficiency."[472] To ensure enforcement of the trust during that period, however, an enforcement approach would require disclosure of trust information, including a copy of the entire trust instrument, to someone with legal authority to

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466 Generally, a will testator's conservator is not permitted access to an incapacitated testator's will. *See* Estate of Du Nah v. Zetterberg, 165 Cal. Rptr. 170, 171 (Ct. App. 1980) (holding that the testator's conservator "had no right to . . . [possess the testator's will] because the will was not property belonging to the conservatee's estate, and . . . [her lawyer] would be violating the confidence of his client Du Nah if he were to give up the will"). A few states, however, allow a conservator to view the will if the testator while competent had deposited the will with a probate court for safekeeping. *See, e.g.*, COLO. REV. STAT. § 15-11-515 (2006) ("A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and kept on deposit after the examination.").

467 This assumes that the settlor's guardian, conservator, or agent is not the same person as the trustee.

468 *See* Act of June 14, 2006, ch. 217, 2006 Fla. Sess. Law Serv. 1748 (West) (stating that "a person . . . who represents a settlor lacking capacity may receive notice and give a binding consent on the settlor's behalf").

469 *See supra* note 396 and accompanying text.

470 Remainder beneficiaries as well as current income beneficiaries must have access to trust information to ensure that a trustee fulfills the duty of impartiality to beneficiaries. *See supra* text accompanying notes 344–45 (discussing the importance of notice to future as well as current beneficiaries to ensure the trustee does not violate the duty of impartiality).

471 UNIF. TRUST ACT § 813 cmt. (Meeting Draft, 1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/uta/trustam99.pdf.

472 *Id.* Reformers should adopt a reasonable "age of maturity," however. For example, they should not follow the lead of the drafters of the draft West Virginia Uniform Trust Code and allow the settlor to waive notice to beneficiaries whose age does not "exceed the age of fifty." H.B. 2552, 77th Leg., 1st Sess. (W. Va. 2005).

monitor administration of the trust and to hold the trustee accountable for any violation of fiduciary duties. Recent variants of the UTC suggest several possible candidates: a minor beneficiary's parent or guardian,[473] an adult beneficiary with a trust interest identical to that of the beneficiary,[474] or a designated surrogate for the beneficiary.[475]

An enforcement approach has one significant advantage: Several states have already adopted it.[476] The principal disadvantage of this approach, however, is that it fails to address adequately the human costs of trust privacy identified in this Article. In particular, by focusing exclusively on enforcement of trusts, it provides minimal protection to settlors[477] or family survivors and third parties who are not trust beneficiaries.[478]

Fourth, a *full privacy approach* would keep the trust private during the settlor's lifetime and after the settlor's death. It would allow only settlors, trustees, and tax authorities access to the trust instrument. It would provide no notice whatsoever of the trust's existence even to current beneficiaries. This Article's analysis demonstrates that a full privacy approach is fundamentally flawed. This approach responds only to the human benefits of trust privacy identified above.[479] It completely ignores the human costs of trust privacy. Nevertheless, a full privacy approach seems to be the current trend in trust law. As I have shown elsewhere, state after state, especially those that have en-

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473 *See, e.g.*, Act of June 14, 2006, ch. 217, 2006 Fla. Sess. Law Serv. 1749 (West) ("A parent may represent and bind the parent's unborn child or the parent's minor child if a guardian of the property for the minor child has not been appointed."); *id.* ("A guardian of the property may represent and bind the estate that the guardian of the property controls."). The Florida statute defines representation to include rights to "notice, information, accountings, or reports." *Id.* at 1748.

474 *See, e.g.*, *id.* at 1749 ("Unless otherwise represented, a minor, incapacitated, or unborn individual . . . may be represented by and bound by another person having a substantially identical interest . . . .").

475 *See, e.g.*, D.C. CODE ANN. § 19-1301.05(c)(1), (3) (LexisNexis 2005) (allowing the settlor to designate a surrogate "to receive any notice, information, or reports . . . in lieu of providing such notice, information, or reports to the beneficiaries"); H.B. 416, 126th Gen. Assem., Reg. Sess. (Ohio 2006) (allowing the settlor to designate in the trust instrument a person other than the trustee to serve as a "'beneficiary surrogate' . . . to receive notices, information, and reports otherwise required to be provided to a current beneficiary"). For a critique of this approach, see Gallanis, *supra* note 23, at 1625–26.

476 For example, states that have enacted legislation identical or nearly identical to the 2000 version of the UTC fall within this category. *See, e.g.*, N.M. STAT. § 46A-6-603(A) (2005) ("While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."); *id.* §§ 46A-1-105(B)(8), (9), -8-813 (requiring trustee to provide notice and information after the settlor's death to beneficiaries who are twenty-five years or older in age).

477 Even a modified enforcement approach would not address the lifetime or postmortem costs discussed above, *see supra* Part III.A, to settlors who are not legally incapacitated.

478 *See supra* Part III.D.

479 *See supra* Part II.

acted extreme pro-privacy variants of the UTC, have given the settlor the right to waive all trustee duties to inform beneficiaries, including notice of a deceased settlor's trust.[480]

If reformers continue on this path, the ultimate costs may be systemic as well as human. A full privacy approach may spell the very end of the trust. A trust so private that it lacks beneficiary enforcement and trustee accountability is effectively no trust at all.

480 Foster, *supra* note 15, at pts. II.B.3(b), IV.A.4.