CONDITIONAL LOVE: INCENTIVE TRUSTS AND THE INFLEXIBILITY PROBLEM

Joshua C. Tate*

Editors' Synopsis: With the number of Americans capable of leaving their children large inheritances increasing, some parents are concerned that their children may have too much and may wish to leave money to their children with strings attached. One vehicle available to these parents is the incentive trust, which imposes fixed conditions on distributions to encourage certain beneficiary behavior and leaves little or no discretion to the trustee to determine whether the settlor would have approved of the beneficiary's actions. However, an incentive trust that provides little or no discretion to the trustee may prove to be inflexible and a burden to the beneficiaries. This Article examines whether the current trend toward trust modification reform takes into account the particular difficulties posed by incentive trusts and how the ability to modify a trust could affect the incentive trust's inflexibility problem.

---

* Assistant Professor of Law, Southern Methodist University. I would like to thank Mark Ascher, William Banks, Regis Campfield, Ronald Chester, Michael Crow, Alyssa DiRusso, Joel Dobris, Thomas Gallanis, Edward Halbach, Lisa Hasday, Adam Hirsch, Emily Pronin, Peter Salovey, Jeffrey Schoenblum, Robert Sitkoff, and Lawrence Waggoner for their comments and suggestions. I am responsible for any errors that remain.

I. INTRODUCTION

Many generations of Americans have used trusts to ensure that their descendants can live a comfortable lifestyle. By providing a steady source of income, a trust can prevent one's children or grandchildren from facing financial distress due to economic calamity or personal misfortune. No parent wants a child to starve, and the desire to provide for one's surviving family after death long has been—and still is—the main impetus for estate planning.[1] Recently, however, more and more Americans have begun to fear something other than the prospect that their children will not have enough: the possibility that they will have too much. This fear has significant consequences for American trust law.

The notion that inheriting too much wealth can be bad for a child is not new. In an 1891 essay entitled *The Advantages of Poverty*,[2] Andrew Carnegie wrote that "the parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would."[3] In recent years, however, the number of Americans capable of leaving "enormous wealth" to their children, or something close to it, has grown considerably. A 2005 survey found that there are a record 8.9 million U.S. households with a net worth over $1 million, an 8% increase over the same figures for 2004, which were in turn a 33% increase over the figures from 2003.[4] Multimillionaires are also increasingly common. From 1980 to 2000, the number of Americans whose annual income exceeded $1 million increased more than tenfold, and there were over twenty times as many American billionaires in 2000 as there were in 1982.[5] Some of this

---

[1] Of course, the avoidance of transfer taxes is also a primary goal of estate planning. *See* David Joulfaian, *Gift Taxes and Lifetime Transfers: Time Series Evidence*, 88 J. PUB. ECON. 1917, 1927 (2004). The purpose of avoiding such taxes, however, often may be to secure a larger inheritance for the decedent's intended beneficiaries. The two goals are therefore compatible.

[2] ANDREW CARNEGIE, *The Advantages of Poverty*, *in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 50 (Edward C. Kirkland ed., Harvard Univ. Press 1962).

[3] *Id*. at 56.

[4] *See Survey: Number of Millionaires Hits Record*, http://money.cnn.com/2005/09/28/news/economy/millionaire_survey/index.htm?cnn=yes (quoting a survey by market information company TNS) (last visited Aug. 29, 2006); *Record High Number of Millionaires*, http://money.cnn.com/2004/11/16/pf/millionaire_households/index.htm?.cnn=yes (same) (last visited Aug. 29, 2006). A similar trend is happening worldwide. *See High Net Worth Wealth Grows Strongly at Over 8%*, http://www.us.capgemini.com/news/current_news.asp?ID=489&PRyear=2005 (stating that the wealth of high-net-worth individuals grew by 8.2% in 2004) (last visited Sept. 9, 2006).

[5] *See* DINESH D'SOUZA, THE VIRTUE OF PROSPERITY: FINDING VALUES IN AN AGE OF

is due to inflation, but the fact is that being rich is less unusual today than it has been in the past.

By sheer force of numbers, today's millionaires are likely to have a broader impact on estate planning practice than their predecessors. It is therefore significant that the new millionaires seem to be worried about the ability of their children to handle money. A 2000 survey of the wealthiest Americans (defined as the top 10% by wealth or income) who have children revealed that more than half of these affluent parents are concerned that their children "will place too much emphasis on material possessions," "will be naïve about the value of money and how hard it is to earn," and "will spend beyond their means."[6] Almost half worry that their children "will have their initiative and independence undermined by having material advantages."[7] Parents with these concerns are likely to have reservations about leaving large amounts of money to their children.

In 1997, reporters from *Forbes* magazine interviewed a number of multimillionaire entrepreneurs and found that some of them planned to leave most of their wealth to charity on the theory that too much inherited money would be bad for their children.[8] Billionaire Warren Buffett, who has recently announced plans to give the bulk of his vast fortune to the charitable Bill and Melinda Gates Foundation,[9] was famously quoted in *Fortune* magazine as saying that "the perfect amount to leave to [one's] children is 'enough money so that they would feel they could do anything, but not so much that they could do nothing.'"[10] This sentiment may be particularly common among those who earned their fortune through hard work and did not inherit it themselves.

Leaving most of one's fortune to charity is one solution to the problem of protecting one's children from the perils of wealth, but some

---

TECHNO-AFFLUENCE 13–15 (2000) (citing data from *Forbes* magazine and the Internal Revenue Service).

[6] U.S. TRUST SURVEY OF AFFLUENT AMERICANS XIX, at 3 (Dec. 2000). The U.S. Trust Survey has been cited in the *Journal* before. *See* Joel C. Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlors, Their Advisors, and Retirees*, 40 REAL PROP. PROB. & TR. J. 39, 60 n.88 (2005). It is generally regarded as an unbiased barometer of the opinions of wealthy individuals in the United States.

[7] U.S. TRUST SURVEY OF AFFLUENT AMERICANS XIX, at 3.

[8] *See* Dana Wechsler Linden & Dyan Machan, *The Disinheritors*, FORBES, May 19, 1997, at 152–60.

[9] *See* Karen Richardson, *Warren Buffett Gives $30 Billion to Gates Foundation*, WALL ST. J., June 26, 2006, at B1.

[10] Richard I. Kirkland Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 29, 1986, at 18 (quoting Warren Buffett).

wealthy individuals may prefer to leave their money to their children with some strings attached. By using a trust, it is possible to limit distributions to one's children in such a way as to encourage positive behavior.[11] A traditional vehicle for doing this is the discretionary trust, in which the trustee is given the authority to decide how the money will be spread among the beneficiaries.[12] Under a discretionary trust, the trustee may reward beneficiaries whose conduct, in the view of the trustee, would have met with the settlor's approval. Recently, however, some estate planners have begun to promote trusts that attach fixed conditions on distributions, conditions that leave less discretion to the trustee. Conditions might include provisions requiring the beneficiaries to graduate from college, achieve a certain grade point average, or earn a certain amount of income in order to qualify for distributions from the trust. A trust that imposes such fixed conditions is generally referred to as an "incentive trust," although the term also may be applied to more traditional discretionary trusts. The term incentive trust was originally created for marketing purposes by estate planners, but it is beginning to work its way into the academic literature.[13]

Because the terms of inter vivos trusts are not publicly reported, it is not possible to know with certainty how many of the trusts being created today are drafted as incentive trusts. Anecdotal evidence, however, suggests that incentive trusts are increasing in popularity, although they remain the exception rather than the norm. Articles in periodicals such as the *New York Times* and the *Wall Street Journal* have suggested that it has become fashionable in some circles to draft incentive trusts.[14] According

---

[11] A trust "is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). The person creating the trust is called the settlor; the person who holds property in trust is the trustee; and a person for whose benefit property is held in trust is a beneficiary. *See id.* § 3; *see also* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 485, 489 (7th ed. 2005).

[12] *See* DUKEMINIER ET AL., *supra* note 11, at 533 (explaining the nature of discretionary trusts).

[13] *See, e.g.*, LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 709–37 (David L. Shapiro et al. eds., The Foundation Press Inc. 1991) (discussing "so-called incentive trusts" in the context of trust modification and termination).

[14] *See, e.g.*, Catherine M. Allchin, *In Some Trusts, the Heirs Must Work for the Money*, N.Y. TIMES, Jan. 29, 2006, § 3, at 6; Peter S. Green, *Planning an Estate to Preserve a Family*, INT'L HERALD TRIBUNE, Oct. 27, 2004, at 20; Mary Hickok, *Family Incentive Trusts Pass Along Values Too*, NAT'L LAW JOURNAL, Mar. 1, 2004, at 16;

to the *New York Times*, one estate planner in Seattle, "who has many wealthy clients in the technology and real estate fields, . . . has seen a growing interest in performance-based trusts."[15] A financial-services publisher that, in 1999, started selling a "family incentive trust" plan created by an Atlanta attorney—complete with audio tapes, a CD-ROM, and a forty-two-page outline for a trust—sold 450 copies of the package in the first five months, mostly to financial planners.[16] Some of these financial planners no doubt are pitching incentive trusts to their clients, and some of those clients may be listening.[17]

Conditional gifts are not a new phenomenon.[18] Parents long have sought to influence the behavior of their children through financial rewards, both before and after death. What is new about contemporary incentive trusts is that the institution of the trust is now being employed to carry out what was accomplished formerly through simple conditional bequests. Using the trust form brings new problems that older conditional gifts did not pose.

When an incentive trust is drafted to leave little discretion to the trustee, the possibility emerges that the trust will prove to be inflexible. A provision requiring a beneficiary to graduate from college in order to receive trust funds may create difficulties when the beneficiary has a serious medical problem that prevents her from attending school. A trust that awards a dollar of trust income for every dollar that the beneficiary earns on his own can discourage the beneficiary from entering a socially beneficial but less remunerative profession, such as teaching. Some settlors will anticipate these problems, but others may not. Incentive trusts

---

Monica Langley, *Trust Me, Baby: The House, the Money—It'll All Be Yours; There's Just One Thing—Rich Parents Find New Way to Keep Tabs on Heirs: "Family Incentive Plans*,*"* WALL ST. J., Nov. 17, 1999, at A1; Pamela Yip, *Attaching Strings: Children Now Inheriting Rules Along with Money*, DALLAS MORNING NEWS, Sept. 13, 1999, at 1D; J. Peder Zane, *The Rise of Incentive Trusts; Six Feet Under and Overbearing*, N.Y. TIMES, Mar. 12, 1995, § 4, at 5.

15 Allchin, *supra* note 14, § 3, at 6 (quoting George S. Holzapfel, an estate planning lawyer at a Seattle firm). Holzapfel reports that "[a]mong his clients with young children and assets of $10 million or more, about 60 percent have incentive trusts." *Id.*

16 *See* J. Alex Tarquinio, *An Estate Plan Worthy of Scrooge*, FORBES, Dec. 25, 1999, http://www.forbes.com/1999/12/25/feat.html (last visited Sept. 11, 2006); *see also* Langley, *supra* note 14.

17 *See* 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, 651–52 (2000) (discussing the "productization" of trusts generally).

18 *See*, *e.g.*, Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio C.P. 1974) (holding that the condition precedent to the bequest was a reasonable restriction, and containing further citations to cases regarding conditional gifts).

pose this inflexibility problem: because the settlor cannot foresee all potential eventualities or circumstances and take them into account in the trust, the terms of the trust can prove to be a burden for the beneficiaries. A reasonable settlor, it might be argued, would draft the trust so as to take into account the possibility of changed circumstances, giving the trustee, the beneficiaries, or both a mechanism to change the trust. An unreasonable or poorly advised settlor, however, may not take this approach. In the latter case, the question will arise whether a court should be able to approve a petition to modify the trust.

The traditional American rule is that a court cannot order a modification (or termination) of a trust after the settlor's death when doing so contravenes a material purpose of the settlor.[19] In recent years, however, law reformers have been pushing for changes that will make it easier to modify or terminate inflexible trusts after the death of the settlor. This trend is particularly noticeable in the *Restatement (Third) of Trusts*, which allows a court to balance the settlor's purposes against the reasons for modification or termination offered by the beneficiaries.[20] The *Third Restatement* approach, which follows the lead of an innovative provision in the California Probate Code,[21] would limit the inflexibility problem associated with incentive trusts. It also would give broad power to courts to disregard the settlor's wishes and side with the beneficiaries.

The *Third Restatement* approach appears to be mandatory law, although its drafters do not state that explicitly.[22] The Uniform Trust Code (UTC), which also gives somewhat greater modification powers to courts compared with the traditional approach (but does not go as far as the *Third Restatement*), makes its modification provisions mandatory law.[23] Mandatory rules, as contrasted with default rules, cannot be altered by the settlor.[24] This means that a settlor who does not wish to have the trust

---

[19] *See* Claflin v. Claflin, 20 N.E. 454 (Mass. 1889); RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); *see also* RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. b (stating that a court will not permit deviation from the terms of the trust merely because it is advantageous to the beneficiaries).

[20] *See* RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).

[21] *See* CAL. PROBATE CODE § 15403(b) (West 1991).

[22] *See infra* Part III.B.

[23] *See* UNIF. TRUST CODE § 412, 7c U.L.A. 293 (Supp. 2006) (allowing modification of administrative or dispositive terms of a trust "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust"); *see also id.* § 105(b)(4) (explaining the mandatory nature of this rule).

[24] *See, e.g.*, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032 (2004); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105 (2004).

modified by a court under any circumstances may be frustrated under the UTC or *Third Restatement* approaches. Whether this is a desirable result is open to debate.

Incentive trusts may present a challenge to American trust law for many years to come, even if they prove to be a passing fad, because it is now possible to create perpetual "dynasty trusts" in many states. These trusts have the potential to last forever but need not be limited to charitable purposes.[25] If a perpetual dynasty trust is drafted as an incentive trust, the conditions imposed by the settlor can continue to bind descendants as long as the trust remains in existence. This means that courts in a hundred years well may be hearing modification petitions by beneficiaries of a perpetual incentive trust created today. Incentive trusts are not likely to vanish from the scene in the foreseeable future, and policymakers must come to terms with their ramifications.

This Article questions whether the current trend toward trust modification reform adequately takes into account the particular difficulties posed by contemporary incentive trusts. Scholars who have examined recent reforms in the area of trust modification generally have assumed that allowing greater latitude to courts is a positive development, especially given the rise of perpetual dynasty trusts.[26] In the case of an incentive trust, however, mandatory modification rules may enable the beneficiaries to undo the scheme created by the settlor and remove conditions that encourage certain types of positive behavior. One might argue that some of the conditions imposed by settlors are actually good for the beneficiaries and that the ability of courts to tinker with the provisions of an incentive trust should be limited. A valid case can be made in support of the dead hand.[27] Nonetheless, sound arguments also exist for allowing the courts to step in when the terms of the trust are more of a hindrance

[25] *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1313–14 (2003); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 595–96, 603–05 (2005).

[26] *See, e.g.*, Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 729 (2001) ("[I]t is clear that reformers realize that modification and termination by beneficiaries must be made easier."); Dukeminier & Krier, *supra* note 25, at 1329 ("We have to discard the nineteenth-century idea . . . that trusts are written in stone by an omniscient settlor.")

[27] *See* Tate, *supra* note 25, at 623; *but see, e.g.*, Dukeminier & Krier, *supra* note 25, at 1327–39 (discussing problems that may arise when a trust is too inflexible).

than a benefit to the beneficiaries. The inflexibility problem posed by incentive trusts is not easy to resolve.

This Article is divided into six parts. Part II discusses the phenomenon of the incentive trust, using promotional websites and articles in newspapers and professional journals as evidence for how such a trust might be structured, what sort of conditions it might impose on access to trust funds, and how those conditions might pose a problem of inflexibility. Part III then discusses the traditional common law approach toward trust modification and recent proposals to give greater latitude to courts. Examining the policy rationales for and against dead hand control, Part IV considers the problems that might arise when courts are allowed to modify a trust against the settlor's wishes. Based on this analysis, Part V suggests some possible alternatives to current reform proposals–alternatives that take into account the special difficulties associated with incentive trusts. Part VI concludes.

II. The Contemporary Incentive Trust

Gathering empirical data on the special characteristics of incentive trusts is difficult. Although it is possible to get a sense of how many trusts are being created in the various states by looking at reports to federal banking authorities,[28] these reports do not distinguish between incentive trusts and other types of trusts. Making the terms of an inter vivos trust public is not required, and many settlors have good reasons for keeping their wishes private. Relying on those settlors who are willing to talk may result in a skewed sample.

Despite these difficulties, it is possible to get a general idea of what a contemporary incentive trust might look like. Several estate planning attorneys have written articles in professional journals and other periodicals explaining what might be accomplished with an incentive trust. Other estate planners, along with some financial institutions, have created promotional websites telling prospective and current clients how they might accomplish their goals with an incentive trust. A few newspapers have interviewed wealthy individuals about the incentive trusts they have created. These sources describe different conditions on access to funds that an incentive trust might include and discuss other important matters, such as the selection of the trustee and planning for changed circumstances. At least some individuals probably are following the suggestions made in the promotional websites and articles. Such sources, therefore,

[28] *See* Sitkoff & Schanzenbach, *supra* note 25, at 359.

offer some anecdotal evidence about the likely characteristics of contemporary incentive trusts.

A. Conditions Imposed by Incentive Trusts

The conditions that incentive trusts might impose can be divided into three broad categories. First are conditions that encourage the beneficiaries to pursue an education. Second are conditions that provide what might be termed moral incentives: incentives that reflect the settlor's moral or religious outlook or promote a particular way of living. Some of these conditions try to encourage the beneficiaries to contribute to charitable causes, while others discourage substance abuse or promote a traditional family lifestyle. Finally, there are conditions designed to encourage the beneficiaries to have a productive career. Within these broad categories are a variety of different incentives that can be tailored to the specific wishes of a particular settlor. Provided that these incentives do not violate public policy, courts generally will enforce them.[29]

Judging by the websites and articles that discuss incentive trusts, conditions relating to education are popular among settlors. The most common provision mentioned awards some amount of the trust income or principal to a beneficiary upon graduation from college.[30] An incentive

---

[29] Examples of conditions that violate public policy might include conditions encouraging criminal or tortious conduct, or conditions that interfere with family relationships or religious freedom. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. i-m (2003).

[30] *See, e.g.*, Hickok, *supra* note 14, at 16 (explaining that a trust might schedule a distribution "when a young heir . . . obtains a degree"); Langley, *supra* note 14, at A1 (discussing a trust that provides "$5,000 for each degree obtained"); Richard W. Ashley, *Family Incentive Trusts Help Children Set Goals*, http://www.ohiobar.org/pub/lycu/index.asp?articleid=372 (last visited Sept. 11, 2006) (explaining that a trust "can reward children with distributions upon achieving certain goals, such as . . . earning a college degree"); The Bank of New York, *Intergenerational Transfer of Wealth—and Values—with a Family Incentive Trust*, http://web.archive.org (search "http://www.bankofny.com/pbnl/spring00/pbnl/page2.html"; click on most recent date hyperlink) (last visited Oct. 5, 2006) (suggesting an "incentive for those who graduate from college"); Gary W. Buffone, *The Psychology of Inheritance*: *Securing Your Legacy*, http://www.grandtimes.com/articles/The_Psychology.html (last visited Sept. 11, 2006) ("[C]hildren may receive a specified amount of money when they graduate from college . . . ."); City National Bank, *Incentive Trusts: A Chance to Have It Your Way*, http://www.cityntl.com/wms/insights/incentive-trusts.asp (last visited Sept. 11, 2006) (suggesting that a trust "can be directed to give a beneficiary: $25,000 upon graduation from college"); Clark Hill PLC, *Use Incentive Trusts To Reinforce Values*, INSIGHT ON EST. PLAN., *available at* http://www.clarkhill.com/LAW_MEDIA/IEP2002-06.pdf (last visited Sept. 11, 2006) ("Charlie, a 20-year-old college dropout, learns that his Uncle Ed has provided him with $500,000 in trust. But Charlie can withdraw the trust funds only if he returns to college

trust might also provide funds when a beneficiary graduates from high school[31] or completes a graduate degree.[32] These distributions might be

---

and earns a bachelor's degree."); The Glenview Trust Company, "*Values-Based*" *Estate Planning*, http://www.glenviewtrust.com/topics/WealthTransfer/Values based estate plans.pdf (last visited Sept. 11, 2006) (stating that "payments of income or principal . . . may be tied to an educational objective" such as "completion of college"); KDV, *Stop Your Late Night Worries*, TAX IMPACT, http://web.archive.org (search "http://www.kdv.com/tax/pdf/TAXmj01.pdf"; click on most recent date hyperlink) (last visited Oct. 5, 2006) (describing a "[r]eward trust" as a trust that "rewards beneficiaries for meeting goals such as completing . . . college"); Merrill Lynch, *Inheriting More than Wealth*, http://askmerrill.ml.com/publish/marketing_centers/articles/eps_article_EP028/ (last visited Sept. 11, 2006) (discussing incentives for "educational milestones, such as graduating from college"); Rachel Sams, *Some Trusts Coming with Strings Attached*, CINCINNATI BUS. COURIER, Apr. 23, 2004, available at http://www.bizjournals.com/cincinnati/stories/2004/04/26/focus3.html?t=printable (last visited Sept. 11, 2006) ("With family incentive trusts, heirs must meet certain requirements in order to receive trust money—for example, graduate from college . . . ."); Thane Stenner, *Inheritance Without the Headache: Incentive Trusts Can Help Parents Pass on Wealth to Children*, http://www.truewealth.ca/IMAGES/inheritance.pdf (last visited Sept. 11, 2006) (explaining that a trust "might distribute money on the accomplishment of important life goals: graduating from university, for example"); Tarquinio, *supra* note 16 (discussing a trust created by Atlanta businessman Ted Levy that includes "cutting . . . a $5000 check for college graduation"); Terry Balding & Associates, *Incentive Trust*, http://www.plannr.com/pdf/IncentiveTrust.PDF (last visited Sept. 11, 2006) ("An incentive trust might pay income or principal, or perhaps pay a larger amount or pay it sooner, if the beneficiary graduates from college . . . ."); Wells Marble & Hurst, *Incentive Trusts: An Idea Whose Time Has Come (and Gone?)*, http://www.wellsmar.com/CM/NewsandArticles/NewsandArticles42.asp (last visited Sept. 11, 2006) (providing an example of a provision that allows the trustees to distribute up to $25,000 upon graduation from college).

[31] *See, e.g.*, The Bank of New York, *supra* note 30 (stating that the settlor "might arrange for the trust to pay a certain amount to each family member who graduates from high school"); KDV, *supra* note 30 (trust can reward beneficiaries for "completing high school").

[32] *See*, *e.g.*, John J. Scroggin, *Family Incentive Trusts*, J. FIN. SERV. PROF'LS, July 2000, at 74, 87 (describing a sample provision that provides $20,000 under certain conditions when a beneficiary obtains a first graduate degree); The Bank of New York, *supra* note 30 (trust can provide funds for beneficiaries who "obtain graduate degrees"); Buffone, *supra* note 30 (describing trusts that provide money to the beneficiaries when they "earn a graduate degree"); The Glenview Trust Company, *supra* note 30 (noting that distributions can be "tied to an educational objective" such as "completion of . . . graduate school"); Merrill Lynch, *supra* note 30 (explaining that "earning an advanced degree" can be a condition of receiving trust distributions); Wells Marble & Hurst, *supra* note 30 (offering a sample provision that pays a beneficiary $35,000 upon the receipt of a first advanced degree); Liz Pulliam Weston, *Making Heirs Work for Their Wealth*, LOS ANGELES TIMES, http://www.latimes.com/business/investing/la-famtalk-story4,1,5423811. story (last visited Sept. 11, 2006) (describing a trust created by businessman Marty Holmes that offers "extra payments for graduate school").

made conditional on the beneficiary's obtaining a specified grade point average.[33] Distributions may also be awarded while the beneficiary remains in school, provided that a certain grade point average is maintained.[34] The trust also might limit the number of years in which distributions are allowed.[35] If the settlor is particularly enamored of a certain educational institution, the trust could provide for distributions only if the beneficiary enrolls at that school.[36]

---

[33] *See, e.g.*, Scroggin, *supra* note 32, at 87 (providing sample incentives tying distributions to graduation from high school or graduate school with specified GPA).; William J. Berrall, *Trust Funds*, http://www.parentstalk.com/expertsadvice/ea_fp_0007.html (last visited Sept. 11, 2006) ("[A]n incentive trust may require that the trust's beneficiary receive funds only after graduating from college with a certain grade point average.").

[34] *See, e.g.*, Scroggin, *supra* note 32, at 87 (suggesting a provision that provides "$5,000 per year to any descendant who is attending college on a full-time basis [a]nd maintains at least a 2.8 grade point average"); Ashley, *supra* note 30 (noting trust distributions for "keeping a certain grade point average in school"); David Bell, *Do Clients Have the Incentive To Use Incentive Trusts?*, http://www.cannonfinancial.com/cgi-bin/newsDetail.cfm?ID=100 (last visited Aug. 29, 2006) (offering a sample provision stating that "[t]he trustee shall distribute trust principal to or for Son for his education during high school and post-secondary school, if and so long as Son maintains a cumulative grade point average of at least ___ and carries at least ____ substantive credit hours each semester"); Clark Hill PLC, *supra* note 30 ("Incentive provisions can make distributions contingent on the beneficiary . . . achieving a certain grade point average . . . ."); The Glenview Trust Company, *supra* note 30 (explaining that a trust could be tied to "achieving a certain grade point average"); Duane Sharpe, *Incentive Trust May Be Good Choice*, DAYTON BUS. J., Apr. 1, 2005, *available at* http://www.bizjournals.com/dayton/stories/2005/04/04/newscolumn1.html:

> An incentive to pay a monthly stipend to a full-time college student could lead to a never-ending career as a student. A more specific incentive would be to pay a monthly amount based on full-time attendance at an accredited institution, and maintaining a "B" average grade while in pursuit of the first bachelor, first master and first doctorate or medical degrees.

Tarquinio, *supra* note 16 (describing a trust that "cuts money off if an heir's GPA dips below 3.0"); Terry Balding & Associates, *supra* note 30 (stating that "[a]n incentive trust might pay income or principal . . . if the beneficiary . . . maintains a certain grade point average"); Weston, *supra* note 32 (describing a trust "that would reward good grades").

[35] *See, e.g.*, Bob Saalfeld, *"Kids, the Inheritance Is All Yours, but . . . ,"* http://www.sglaw.com/Article_EP_16.html (last visited Sept. 11, 2006) (referring to experts who suggest that a trust "[p]rovide for distributions so a child can complete college, vocational or graduate school, but require a minimum grade point average, or even limit the number of years to complete a degree").

[36] *See, e.g.*, Zane, *supra* note 14 (explaining that some benefactors reward "heirs who go to the same schools [or] study the same subjects . . . as they did"); Bell Capital Management, *Incentive Trusts: Keeping a Steady Hand on the Tiller*, http://www.bellcapital.com/pdf/q4_04.pdf (last visited Sept. 11, 2006) ("Incentive trusts have been used to

Encouraging education, therefore, is likely to be a central purpose of many incentive trusts. However, it is far from being the only purpose. Promotional materials often note that incentive trusts can promote a sober, family-oriented lifestyle. For example, many websites and articles suggest a provision restricting access to funds for beneficiaries who use or abuse drugs, alcohol, or tobacco; overeat; or engage in other compulsive behavior such as gambling.[37]

---

provide extra support to those heirs who . . . attend specified institutions."); Clark Hill PLC, *supra* note 30 (noting that incentives can "make distributions contingent on . . . attending a particular school").

[37] *See, e.g.*, Nancy G. Henderson, *Managing the Benefits and Burdens of New Wealth with Incentive Trusts (Part 2) (With Sample Provisions)*, PRAC. LAW., Oct. 2001, at 11, 12 ("A trust may be drafted to cut off benefits to a beneficiary who has substance abuse problems, other than those benefits necessary to secure treatment and to insure that basic living needs are met."); David R. Hodgman & Debra L. Stetter, *Can Incentive Trusts Encourage Children to Behave Responsibly?*, 27 EST. PLAN. 459, 459 (2000) (noting that incentive provisions can "address specific behavioral problems (e.g., substance abuse)"); Paul Arslanian, *Estate Planning—Family Values and Security for Your Children*, http://www.estateplans.com/articles/article.html?id=17&pf=1 (last visited Sept. 11, 2006) (suggesting that incentive trusts can involve "[w]ithholding of distributions based upon undesirable behavior, including drug use, gambling or other addictions"); Bell, *supra* note 34 (explaining that the trust could "dissuade" the beneficiary from engaging in "drug abuse, a gambling addiction, [or] alcohol abuse"); Bell Capital Management, *supra* note 36 (stating that some trusts withhold benefits for drug use); Berrall, *supra* note 33 (suggesting that the "trust could stipulate that no funds are to be paid from the trust if the young person is involved in drugs"); City National Bank, *supra* note 30 ("A provision seen often these days discourages illegal drug use . . . ."); Clark Hill PLC, *supra* note 30 ("Grantors commonly provide incentives for beneficiaries to stop smoking or drinking, avoid drugs, lose weight, or refrain from various kinds of destructive . . . behavior."); The Glenview Trust Company, *supra* note 30 ("The trust even may forbid distributions in the case of destructive behavior (for example, alcohol or substance abuse)."); George P. Guertin, *Inheritance Issues*, http://web.archive.org (search "http://www.attorneygeorgepguertin.com/Resources/InheritanceIssues.htm"; click on most recent date hyperlink) (last visited Oct. 5, 2006) (explaining that an incentive trust can be drafted so as to discourage "drug/alcohol abuse"); KDV, *supra* note 30 (noting that "some grantors have included disincentives—preventing trust-asset allocations to beneficiaries who . . . [f]all prey to substance abuse or other addictions"); The LeVan Company, *Incentive Trusts*, http://www.levanco.com/readings/incentive_trusts.html (last visited Sept. 11, 2006) (incentive trusts can "reward . . . the avoidance of alcohol or drugs"); Sharpe, *supra* note 34 (explaining that trusts can discourage "self-destructive behavior," including "drug or alcohol abuse"); Terry Balding & Associates, *supra* note 30 ("Some trusts won't pay out money unless the beneficiary stays free of drugs, alcohol or tobacco.").

The settlor might require drug testing or counseling as a condition of receiving trust income.[38] The trust might specify that other illegal activities warrant restrictions on distributions.[39]

In addition to discouraging substance abuse, settlors appear interested in encouraging beneficiaries to marry and stay married. Websites and articles mention provisions that distribute money when the beneficiary marries.[40] The distribution might be conditional on "waiting until a certain age to marry" or marrying "the 'right' sort of person,"[41] or staying married to and living with the parent of one's children.[42] The settlor might specify that the new spouse be of a particular faith[43] or otherwise limit the distribution based on the settlor's preferences. One suggested provision distributes "$10,000 upon the first marriage of each descendant of mine,

[38] *See, e.g.*, Bell Capital Management, *supra* note 36 (noting that the trust can withhold benefits from heirs who "fail a prescribed drug screening test"); City National Bank, *supra* note 30 (explaining that a provision can require "a 'clean' drug test before the trustee makes distributions"); Personal Benefit Services of Colorado, *For Parents Worried About Creating a Trust Baby, a Tool: Incentive Trust Can Be a Clever Lever*, http://www.pbscolorado.com/financial_planning6.htm (last visited Sept. 11, 2006) ("For children with a history of drug or alcohol abuse, the trust could reward sobriety, perhaps requiring blood tests or counseling to qualify for distributions."); Tarquinio, *supra* note 16 (noting that a popular incentive trust package "includes items to check if you'd like your heirs to submit to regular drug tests").

[39] *See, e.g.*, Langley, *supra* note 14, at A1 (discussing one client who instructed his attorney "to include in his children's trust a $10,000 payment for each year [the beneficiaries] don't have a driving violation"); Bell Capital Management, *supra* note 36 (suggesting that a trust could withhold benefits "from those heirs who might be convicted of a crime"); Berrall, *supra* note 33 (noting that trusts may impose restrictions for drug use or "other illegal activities"); KDV, *supra* note 30 (noting that a trust can withhold benefits from beneficiaries who "[c]onsistently violate the law").

[40] *See, e.g.*, Zane, *supra* note 14 (stating that some settlors attempt to "transform playboys into homebodies by tying their inheritance to marriage"). Of course, such a provision might backfire if it is not drafted carefully; one New York investment counselor recalls an incident in which an heir "married 13 times" in order to receive multiple payments of $250,000 conditioned on marriage. *See id.*; *see also* City National Bank, *supra* note 30 (including a sample provision giving the beneficiary "$50,000 when getting married"); Clark Hill PLC, *supra* note 30 ("Some grantors feel it's important to reward beneficiaries who wed and stay married."); KDV, *supra* note 30 (describing trusts that "match[] the beneficiary's share . . . of costs for events such as weddings"); Tarquinio, *supra* note 16 (discussing the trust of a businessman that provides "a $10,000 check for a wedding").

[41] Wells Marble & Hurst, *supra* note 30.

[42] *See* Langley, *supra* note 14, at A1 (discussing a trust that made "[g]reater distributions . . . if the descendant is married to the person who is the mother of his children and they're living together in the same house").

[43] *See* Bell, *supra* note 34 (noting a sample provision awarding $10,000 if the beneficiary marries "a woman of the Roman Catholic faith").

provided that the new spouse has never gone to law school."[44] A provision also might penalize a beneficiary who decides to divorce,[45] or a beneficiary who lives and has a conjugal relationship with a person to whom the beneficiary is not married.[46] The websites and articles do not suggest that a settlor might attempt to disrupt a marriage or encourage divorce through an incentive provision; such a provision likely would be void as contrary to public policy.[47]

In many cases, the likely goal of a settlor who wishes to encourage marriage is to encourage procreation. In some cases this is made explicit, and anecdotal evidence suggests that the tactic can be effective. One article describes a trust created by a settlor who wanted more grandchildren. The trust named the settlor's children as beneficiaries and tied the amount each child received to the number of offspring the child had. According to the settlor's attorney, the settlor more than doubled the number of grandchildren within three years.[48] Other common provisions offer a financial incentive for a beneficiary who leaves the workplace to stay at home with young children or marries a stay-at-home parent.[49] The

---

[44] Scroggin, *supra* note 32, at 87.

[45] *See* Tarquinio, *supra* note 16 ("Marriage counselors across the land will no doubt be glad to learn of the provision that penalizes heirs for divorcing.").

[46] *See* Hodgman & Stetter, *supra* note 37, at 444:

> The trustee shall make no distributions to a descendant of mine who is living with a person other than that descendant's spouse and with whom that descendant has a conjugal relationship, as the trustee determines in its sole and absolute discretion, for as long as the descendant continues to live with that person and they remain unmarried.

[47] *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003).

[48] *See* Sams, *supra* note 30.

[49] *See, e.g.*, Hickok, *supra* note 14, at 17 (noting that "clients often want to include provisions that cover a stay-at-home parent"); Langley, *supra* note 14, at A1 (discussing a trust that offers "a possible monthly payment of as much as $10,000 if [the beneficiary] is a stay-at-home mother"); Scroggin, *supra* note 32, at 87 (suggesting a provision paying "$30,000 annually to any parent or guardian who stays home with a minor descendant of mine"); Bell Capital Management, *supra* note 36 ("Some trusts are intended to promote family life by providing income support payments to heirs who choose to stay at home with children."); Clark Hill PLC, *supra* note 30, at 3 (noting that some settlors "choose to reward a spouse who stays home to take care of the family's children"); Sharpe, *supra* note 34 (suggesting an incentive promoting "marriage to a stay-at-home mom"); Tarquinio, *supra* note 16 (reporting that one estate planner "claims that 60% to 70% of his clients choose the provision to allow for additional payouts to a stay-at-home parent"); Wells Marble & Hurst, *supra* note 30 (offering an exception to a provision requiring gainful employment for circumstances in which a "beneficiary is either (i) occupied on a full-time basis caring for other family members such as children or disabled or elderly relatives, or (ii) married and [the family's homemaker], and, in either case, the

obvious rationale for such provisions is that having one parent stay at home is better for the children.

Some settlors apparently want to encourage their beneficiaries to engage in charitable activities. A trust might distribute money on the basis of philanthropic work or accomplishments, including involvement with a family charitable foundation.[50] Alternatively, a settlor might choose to match contributions that beneficiaries make to charitable organizations or to provide funding for such contributions.[51] Provisions of this kind are thought to foster a sense of altruism in the beneficiaries.

The final category of provisions commonly noted in the incentive trust literature involves income and employment. Many wealthy people want their children and grandchildren to work hard, and they believe they can use incentive trusts to reward productivity. For example, many

---

beneficiary's spouse, if any, works full-time or is unable to work full-time for medical or other reasons").

[50] *See, e.g.*, Ashley, *supra* note 30 (explaining that a "trust can match the income earned by [one's] children [and] make the match greater at the low end, encouraging philanthropic or other helping occupations such as teaching"); The Bank of New York, *supra* note 30 (stating that "the trust could compensate family members who regularly volunteer their time to charitable work, such as hosting fund-raisers or running a foundation"); Berrall, *supra* note 33 ("Other requirements might include community activity or involvement with certain charitable organizations."); Clark Hill PLC, *supra* note 30 ("An incentive trust . . . can reward a beneficiary who participates in the family charitable foundation."); Guertin, *supra* note 37 (stating that a trust can promote "volunteering for charitable causes supported by the Trustmaker"); KDV, *supra* note 30 (noting that a trust can "help beneficiaries earn extra cash by caring for sick relatives or performing volunteer work"); Merrill Lynch, *supra* note 30 (stating that the trust can reward milestones such as "philanthropic accomplishments"); Sharpe, *supra* note 34 ("Philanthropy is another area many choose to promote. This is usually accomplished through the child or grandchild's involvement in a family foundation or donor."); Terry Balding & Associates, *supra* note 30 ("An incentive trust might pay income or principal. . . if the beneficiary . . . does work for the family charitable foundation.").

[51] *See, e.g.*, The Bank of New York, *supra* note 30 (explaining that a trust might "match a percentage of financial contributions your loved ones make to charity"); Bell Capital Management, *supra* note 36 (noting that some trusts "provide matching funds for heirs' contributions to favored organizations"); Clark Hill PLC, *supra* note 30 (noting that "[f]ostering community involvement and volunteerism can take the form of matching charitable donations"); Tarquinio, *supra* note 16 (interviewing an estate planner who "tries to discourage overtly negative incentives, instead pushing clients toward positive reinforcement, such as matching charitable contributions"); Terry Balding & Associates, *supra* note 30 (suggesting that a trust distribute funds "if the beneficiary . . . donates a certain amount to charity"); Wells Marble & Hurst, *supra* note 30 ("An incentive trust may encourage charitable giving by the beneficiaries by, for example, matching contributions, or paying a set percentage of income to charity each year and making the beneficiaries meet to decide where the charitable dollars will be spent.").

websites and articles discussing incentive trusts mention provisions that pay out a certain amount of money from the trust for every dollar that the beneficiary earns on her own.[52] This is sometimes described as the "earn a dollar, get a dollar" arrangement.[53] The trust can direct the trustee to examine the beneficiary's W-2 forms to determine whether the

[52] *See, e.g.*, Candy J. Cooper, *Where There's a Will . . . Experts Show Wealthy How to Prevent "Affluenza" in Children*, DALLAS MORNING NEWS, Feb. 18, 2001, at 26A (explaining that some families "set up 'incentive trusts,' in which a child receives a dollar for every dollar earned"); Langley, *supra* note 14, at A1 (discussing a trust that matches the beneficiaries' "earned income up to $100,000"); Deborah Rankin, *The Perils of Raising Rich Kids*, N.Y. TIMES, Nov. 16, 1986, at F11 (noting that incentive trusts can "match or double the income a child earns from his or her salary"); Ashley, *supra* note 30 ("The trust can match the income earned by your children, thus encouraging them to be productive."); The Bank of New York, *supra* note 30 ("For your children in the working world, you might set up a salary match incentive."); Bell, *supra* note 34 (offering an example of a provision in which "[t]he trustee shall pay to Son, annually, an amount equal to Son's wages, salaries, tips, etc., as indicated on Son's Form(s) W-2 for the previous year"); Berrall, *supra* note 33 (stating that "the trust may be set up to distribute funds as part of a matching formula based on earnings from employment"); City National Bank, *supra* note 30 (suggesting that a "trustee can be directed to give a beneficiary . . . a 50 percent match of salary"); Clark Hill PLC, *supra* note 30 (discussing the possibility of an "incentive trust that provides matching earnings"); Bruce Fenton, *Incentive Trusts*, http://www.fentonreport.com/wealth_articles/estate_planning/incentive_trusts.htm (last visited Sept. 12, 2006) (stating that "payouts can be structured to match income goals achieved by the heirs"); The Glenview Trust Company, *supra* note 30:

> [I]f you believe in the importance of a productive life and fear that a large inheritance will put a damper on ambition, an incentive trust can be fashioned to provide for the distribution of assets only if a child has earned income; in which case, payouts often are designed to match salary (dollar for dollar, for example).

Personal Benefit Services of Colorado, *supra* note 38 ("An heir between the ages of 25 and 35, say, could get a dollar-for-dollar match of earnings exceeding $40,000. Then, as the son or daughter got older, the income level needed to achieve matching by the trust could be ratcheted up."); Saalfeld, *supra* note 35 ("Some parents state that the Trustee will distribute to the child an amount equal to the child's W-2 earnings."); Stenner, *supra* note 30 ("I've seen incentive trusts structured to make payments based on a percentage of what the child earned—excellent motivation for the child to go out and earn a living."); Terry Balding & Associates, *supra* note 30 ("If the beneficiary earns a certain level of pay, the trust might pay out a matching amount for each dollar earned by the beneficiary. Some match a higher amount the more money the beneficiary makes."); Weston, *supra* note 32 ("Affluent parents who want to encourage their children to work for a living may create trusts that match earned income dollar-for-dollar or link payouts to the beneficiaries' own efforts to increase their net worth.").

[53] *See, e.g.*, Buffone, *supra* note 30; Wells Marble & Hurst, *supra* note 30. It also has been termed the "beach-bum provision." *See* Cooper, *supra* note 52, at 26A.

beneficiary qualifies for the disbursement.[54] A settlor also might match the beneficiary's savings rather than income.[55]

If the settlor has more specific career goals in mind for the beneficiary, an incentive trust also can accommodate these goals. A settlor, for example, might reward the beneficiary for joining or taking over a family business or farm.[56] The settlor also could reward the beneficiary for entering the same profession as the settlor.[57] Alternatively, the settlor might encourage the beneficiary to start his own business, perhaps by matching contributions from other sources.[58] The settlor also might choose to reward a beneficiary who enters a profession that benefits society or is more personally rewarding even though it is less lucrative, such as teaching, nursing, religious service, or social work.[59] One article

---

[54] *See, e.g.*, Bell, *supra* note 34; Saalfeld, *supra* note 35.

[55] *See* Zane, *supra* note 14, at 25 (suggesting that some settlors "try to make the dissolute thrifty by matching their savings").

[56] *See, e.g.*, Buffone, *supra* note 30 (describing trusts in which "children may receive a specified amount of money when they . . . join the family business"); Clark Hill PLC, *supra* note 30 ("Incentive provisions can reward a beneficiary who takes over—or assumes important responsibilities in—a family business."); The Glenview Trust Company, *supra* note 30 ("Additional distributions from the trust might be made available for a beneficiary . . . to continue the operation of a family farm . . . ."); Terry Balding & Associates, *supra* note 30 (suggesting that a trust can pay income or principal if the beneficiary "takes over the family business").

[57] *See* Zane, *supra* note 14 (noting that some settlors offer financial rewards for beneficiaries who "enter the same profession as they did").

[58] *See, e.g.*, Langley, *supra* note 14, at A1 (discussing an incentive of "$200,000 to set up a veterinary practice or any other business, as long as [the beneficiary] has done well in school"); The Glenview Trust Company, *supra* note 30 (stating that the trust could encourage "a beneficiary whom you would like to see set up a certain business or professional practice"); KDV, *supra* note 30 (suggesting that the trust could "match[ ]the beneficiary's share . . . of costs for events such as . . . business start-ups"); Merrill Lynch, *supra* note 30 (explaining that a trust can distribute money upon "career milestones, such as starting a business"); Weston, *supra* note 32 ("Parents who want to produce entrepreneurs can turn the trusts into seed-money generators, matching any cash the beneficiary raises from other sources.").

[59] *See, e.g.*, Cooper, *supra* note 52, at 26A (suggesting that a trust could provide "more for serving society"); Blaine Harden, *Brat Control on Easy Street; Rich Parents Get Tips on Raising Kids Not to Be Rotten*, N.Y. TIMES, June 12, 2000, at B1 ("A child, for instance, might get more money if he became a teacher, rather than an international playboy."); Langley, *supra* note 14, at A1 (discussing a trust that provides "a $15,000 income supplement for any descendant who becomes a teacher"); The Bank of New York, *supra* note 30 ("[F]or those who use their talents in ways that don't necessarily garner a high wage, such as work in the nonprofit world, you could ensure that they, too, are recognized for their efforts."); Bell Capital Management, *supra* note 36 ("Trusts can be . . . used to offer focused financial support to beneficiaries who opt to follow paths that are personally and socially rewarding yet generally less lucrative."); Buffone, *supra* note 30

suggests creating a "Family Nobel Prize," disbursed every five years to reward the settlor's descendant "who has been designated by [third party] to have made the most significant contribution in the field of [charity, education, science, law, humanities, medicine, etc.]."[60]

B. Administration and Modification

There is no fixed template that an incentive trust must follow. Nevertheless, practitioner articles suggest some ways in which an incentive trust might be drafted. These articles may reflect a skewed sample of the estate planning bar because many (or perhaps most) estate planners do not publicize their trust-drafting strategies; however, they do give some indication of the possibilities. Of particular interest are these articles' suggestions regarding how the conditions are to be administered and how the trust may be modified.

With regard to administration of the conditions, the principal choice is who will serve as trustee. One practitioner suggests that three cotrustees be chosen, one of whom must not be a member of the family. The trust might provide that the trustees choose their own successors, that a majority of the adult beneficiaries choose successor trustees, or for some hybrid of the two options. A settlor also might select an institutional trustee to

---

("[In some cases,] the heads of the family want to communicate the value of service to their offspring. In these cases the donors provide special supplements for those children who become nurses, teachers, college professors, artists, social workers and the like."); City National Bank, *supra* note 30 (suggesting "[a]dditional compensation for performing public benefit work (e.g., teaching, social work), so that their total earnings approximate what he/she might make as a private industry executive"); Clark Hill PLC, *supra* note 30 (explaining that trusts can "provid[e] additional income to a beneficiary working in a low-paying career such as teaching, social work or a particular religious calling"); The Glenview Trust Company, *supra* note 30 ("[I]f the goal is to encourage a social conscience, the trust could provide for supplemental payments when a child enters a career that you favor—for instance, as a teacher, social worker or member of the clergy."); Sharpe, *supra* note 34:

> [O]ne child may be a special education teacher while another is a top executive for an international company. It can be a delicate balance to try to determine exactly how to develop a benefit plan for these vastly different career choices . . . . One way would be to provide an added benefit to the heir who has chosen a career path that benefits society but may not be as lucrative.

Tarquinio, *supra* note 16 (explaining that a trust can be used to "pay[] for missionary work"); Wells Marble & Hurst, *supra* note 30 (suggesting a clause to provide for a beneficiary who "works at least 35 hours per week ('full-time'), with or without compensation, in a socially useful vocation (examples of such a vocation include, but are not limited to, the fields of social work, teaching, religious service and charitable work)").

[60] Scroggin, *supra* note 32, at 87.

administer the trust and invest the trust funds, while leaving discretionary decisions to individuals.[61] This might be accomplished through an advisory committee composed of individuals selected by the settlor or by representatives of each line of descendants.[62] If the beneficiaries elect the members of the advisory committee, however, there is a danger that the decisions of the committee will lack objectivity.[63] For this reason, financial advisers (some of whom have a vested interest in attracting trust business) caution settlors to leave decisions concerning distributions to an independent party such as a corporate trustee and not to make the decisions of any advisory committee binding on the trustee.[64]

Estate planners envision the possibility that it might be necessary to remove one of the trustees. One author suggests giving the individual trustees the power to remove the institutional trustee and also allowing the beneficiaries to remove one or more trustees, provided that the remaining trustees or a super-majority of the adult beneficiaries approve.[65] Another author suggests that the beneficiaries have a limited power to remove the trustee that can be exercised only every two or three years unless the beneficiaries can show cause for the trustee's removal.[66]

---

[61] *See* Scroggin, *supra* note 32, at 83–84.

[62] *See* Henderson, *supra* note 37, at 16; Hodgman & Stetter, *supra* note 37, at 467.

[63] *See* Henderson, *supra* note 37, at 16.

[64] *See, e.g.*, Bell, *supra* note 34 ("The client should choose a trustee who will be able to not only manage the trust assets but also stand up to difficult family members."); Berrall, *supra* note 33:

> You may choose a family member or close friend as trustee, but this person might not be objective or could be too removed from family decision-making to see that the trust's required goals are met. An impartial, experienced professional trustee can make the most sense to help ensure that provisions drawn up in the trust document are strictly carried out.

Personal Benefit Services of Colorado, *supra* note 38 ("A family member or close friend might let emotions cloud his or her judgment in making incentive distributions. So an independent outside trustee is usually put in charge of determining whether a beneficiary has qualified to receive trust assets."); Wells Marble & Hurst, *supra* note 30:

> For obvious reasons, the use of an independent trustee is advisable, and for long-term trusts, this usually indicates a corporate trustee. Although corporate trustees may seem impersonal in the minds of some clients, impartiality may be more important in this case. . . . The advisory committee may be advisory only, or final authority may be given the committee, however, in the latter case, the trustee has no obligation regarding distributions, so why have a corporate trustee in the first place?

[65] *See* Scroggin, *supra* note 32, at 84.

[66] *See* Henderson, *supra* note 37, at 18.

Practitioner articles also discuss the possibility that a trust might need to be modified due to changed circumstances. One estate planner suggests allowing non-disposition modifications by the unanimous decision of the trustees with the approval of the adult beneficiaries.[67] Another lawyer proposes that the trustee have the power to amend administrative provisions of the trust without court approval and that various measures be taken to facilitate court-supervised modification of the dispositive provisions.[68] These measures include allowing living beneficiaries to represent the interests of minor and unborn beneficiaries, allowing a modification to go forward without the approval of all beneficiaries, lessening the factual burden required by statute, and giving "an unrelated 'Trust Protector' the power to amend the dispositive provisions of the trust without court intervention."[69]

C. The Problem of Inflexibility

The suggestion that a trust protector be appointed is an interesting possibility, but it is not a panacea. A trust protector is a person other than the trustee selected by the settlor to stand in the shoes of the settlor after the settlor's death and make decisions regarding the trust.[70] An obvious problem with giving an individual trust protector the power to amend the trust is that such a person eventually will die, as will any individual chosen as trustee. Any modification scheme must take into account the mortality of individuals to whom discretionary power is given. A corporate trustee does not have this drawback, but the settlor may have less confidence that a corporate trustee will share her ethical framework. It is therefore important to note that, if a trust is not drafted carefully, provisions designed to encourage certain behavior may not take into account unforeseen circumstances. Of particular concern are conditions relating to education, employment, marriage, and procreation, although other conditions also may create problems.

With regard to educational conditions, an obvious possibility is that a beneficiary might be unfit to attend college and may need more support for this reason. This could happen, for example, if the beneficiary suffers

---

[67] *See* Scroggin, *supra* note 32, at 84.

[68] *See* Henderson, *supra* note 37, at 17–18.

[69] *Id.*

[70] *See* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006). The appointment of a trust protector can help to deal with some of the agency costs associated with private trusts, but it also raises agency problems of its own. *See id.*; *see also* Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV 2807 (2006).

from a learning disability. Such a beneficiary might not be accepted into a college or might have great difficulty achieving the minimum GPA fixed by the trust.[71] If the settlor sets the bar too high, even beneficiaries without learning disabilities may be unable to meet the conditions. A provision distributing trust funds upon the beneficiary's graduation from Harvard may not offer much of an incentive to a beneficiary who is rejected by that institution.[72] If the trust does not provide an adequate modification mechanism, however, the beneficiaries may be bound by the terms of the trust.

Conditions relating to employment also could pose difficulties. Accident or illness could leave a beneficiary unable to work.[73] The "earn a dollar, get a dollar" arrangement, moreover, could penalize a beneficiary who loses a job for circumstances beyond the beneficiary's control, such as a downturn in the economy. It also rewards high-paying jobs rather than jobs that may offer more satisfaction or benefit society in some way. While some settlors might include an exception to the "earn a dollar, get a dollar" clause for socially beneficial employment,[74] it might prove difficult to define what employment qualifies as socially beneficial. Likewise, a beneficiary who chooses to stay at home with young children will be penalized unless the trust expressly provides for this.

A settlor's conditioning money on the beneficiary marrying a certain type of person could present problems if the beneficiary is unable to find a suitable spouse who meets the requisite qualifications. This is an old problem that is not limited to incentive trusts. For example, the case of *Shapira v. Union National Bank*[75] involved a provision in a will stating that the testator's son was to receive his share only if he married a "Jewish girl whose both parents were Jewish."[76] In seeking to have the condition set aside, the son argued that the number of available Jewish women in his area was extremely small.[77] The court refused to set aside the condition.[78]

---

[71] *See* Tarquinio, *supra* note 16 ("[T]he requirement to keep grades at a certain level . . . may unfairly penalize heirs with learning disabilities.").
[72] *See* Clark Hill PLC, *supra* note 30 ("[S]ome kids are not cut out for Harvard, medical school or straight A's.").
[73] *See* Sams, *supra* note 30.
[74] *See* sources *supra* cited note 59.
[75] 315 N.E.2d 825 (Ohio C.P. 1974).
[76] *Id*. at 826.
[77] *See id*. at 831.
[78] *See id.* at 832.

A condition distributing money when the beneficiary has children also could lead to problems if the beneficiary is infertile and the condition is not drafted in such a way as to include adopted children. Even if the trust takes into account the possibility of adoption, a beneficiary might not be approved by an adoption agency or might be barred from adopting a child (for example, in some states, a person involved in a same-sex relationship cannot adopt).[79] In these circumstances, the beneficiary might suffer a financial penalty on account of a condition that already is the source of considerable grief. Provisions that reward the beneficiary for being a stay-at-home parent also could be problematic if the individual is incapable of having children.

Drafting the trust in such a way as to give someone the power to modify it in light of changed circumstances could avoid these problems of inflexibility. Some incentive trusts, however, simply may be drafted poorly. Moreover, some settlors may feel strongly enough about the conditions they have drafted that they do not want them to be modified under any circumstances. A settlor may be more concerned about the possibility that the distribution scheme will be thwarted under pressure from the beneficiaries than the possibility that the trust might prove to be inflexible in light of changed circumstances. In such situations, the question is whether a court should be able to modify the trust notwithstanding the wishes of the settlor.[80]

III. JUDICIAL MODIFICATION OF TRUSTS

For more than a century, American law has limited the ability of a court to modify or terminate a trust after the settlor's death.[81] Absent some violation of law or public policy, American courts are forbidden from interfering with the material purposes of a trust. This traditional American approach differs markedly from the approach taken in England, where courts have broad powers to modify or terminate trusts at the petition of the beneficiaries.[82] In recent years, however, law reformers have spearheaded efforts to relax the American rule and to give greater effect to the

[79] *See* Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 179 n.57 (citing cases in which courts refused to allow same-sex couples to adopt).

[80] *Cf.* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 652–55 (1988) (arguing that courts should modify a trust's distributional provisions by reference to what a well-advised settlor would have wanted).

[81] *See* Dukeminier & Krier, *supra* note 25, at 1328.

[82] *See id.* at 1329.

needs of the beneficiaries.[83] Reformers point to the abolition of the Rule Against Perpetuities ("Rule") as a principal reason why change is necessary.[84] Some argue that because a noncharitable trust now can last forever, it is necessary to make the settlor's original scheme easier to undo. The proposed reforms, which are represented in particular by the *Third Restatement*, could directly impact incentive trusts by giving beneficiaries an opportunity to argue that conditions imposed by the settlor should no longer be applied. Whether the proposed reforms are desirable is open to debate.

A. The Traditional Rule

Some evidence suggests that, prior to the late nineteenth century, American courts liberally granted petitions by beneficiaries to modify or terminate trusts.[85] However, the Massachusetts case of *Claflin v. Claflin*[86] reversed this trend in 1889. *Claflin* involved a will that bequeathed personal property to trustees with instructions to distribute $10,000 to the testator's son when he turned twenty-one, $10,000 when he turned twenty-five, and the balance when he turned thirty. After the testator turned twenty-one and received the first installment of the money, but before he turned twenty-five, he sued to compel the trustees to pay him the balance of the trust fund.[87] Citing the earlier case of *Broadway National Bank v. Adams*,[88] the *Claflin* court held "that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[89] Accordingly, the *Claflin* court saw "no good reason why the intention of the testator should not be carried out" and upheld the lower court's dismissal of plaintiff's suit.[90]

The rule of *Claflin* came to be known as the "*Claflin* doctrine" and subsequently was adopted in most American jurisdictions.[91] Although the *Claflin* opinion did not use the term "material purpose," the case

---

[83] *See id.*
[84] *See id.* at 1331.
[85] *See* Chester, *supra* note 26, at 714–15.
[86] 20 N.E. 454 (Mass. 1889).
[87] *See id.* at 455.
[88] 133 Mass. 170 (1882).
[89] *Claflin*, 20 N.E. at 456.
[90] *Id.*
[91] *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1204 (1985).

subsequently was understood to stand for the proposition that a trust cannot be terminated prior to the time fixed for termination, even if all the beneficiaries consent, if termination would be contrary to a material purpose of the settlor.[92] Although *Claflin* dealt with a petition to terminate a trust, the *Claflin* doctrine subsequently was extended to cover modifications. Under the rule of the *Restatement (Second) of Trusts*, a court may direct a trustee to deviate from the trust's terms when "owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust,"[93] but not "merely because such deviation would be more advantageous to the beneficiaries."[94] This provision codified the so-called equitable deviation doctrine, which gave courts some flexibility to modify in light of changed circumstances when necessary to accomplish the trust purposes. Even this limited power to modify, however, applied only to the administrative terms of a trust, as the comments and illustrations in the *Second Restatement* make clear.[95]

As Robert Sitkoff has argued, the *Claflin* doctrine serves the purpose of aligning the interests of the settlor with those of the trustee.[96] Because the doctrine precludes modification or termination contrary to the settlor's purposes, the trustee need not defer to the interests of the beneficiaries and can administer the trust in the way the settlor would have wanted.[97] In other words, the doctrine favors the ex ante wishes of the settlor over the ex post preferences of the beneficiaries and frees the trustee from any obligation to take the beneficiaries' side when there is a conflict with the settlor's wishes.

B. Reforming Trends

Deferring to the wishes of the settlor is not a universal goal, and the *Claflin* doctrine is distinctly American. The English case of *Saunders v.*

---

[92] *See* RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); DUKEMINIER ET AL., *supra* note 11, at 573.

[93] RESTATEMENT (SECOND) OF TRUSTS § 167.

[94] *Id*. § 167 cmt. b.

[95] *See id.* § 167 cmts. a–c & illus. 1–16; *see also* RESTATEMENT (THIRD) OF TRUSTS § 66, Reporter's Notes on § 66, cmt. a (2003) ("The commentary to Restatement Second, Trusts § 167 . . . and its Illustrations, as well as the distinct weight of what case authority there is . . . indicate that the rule of 'equitable deviation' applies only to *administrative* provisions." (emphasis in original)).

[96] *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 659 (2004).

[97] *See id.*

Vautier,[98] decided in the mid-nineteenth century, reached the opposite conclusion from *Claflin* and allowed the sole beneficiary of a trust to terminate the trust at age twenty-one even though the settlor specified that the trust property be distributed at age twenty-five. Under the Variation of Trusts Act,[99] enacted in 1958, English courts have broad powers to modify or terminate trusts on behalf of unascertained or underage beneficiaries. In deciding whether and how to modify or terminate a trust, English courts tend to give less deference to the settlor's intent.[100]

Given the strong historic inclination of American law to defer to the settlor's intent, it seems unlikely that the United States will move toward the English position in the near future. In recent years, however, there has been a trend toward allowing courts greater flexibility in deciding whether to modify or terminate a trust.[101] This trend is particularly evident in California, for example, which enacted the following provision of the California Probate Code in 1986:

> If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest. . . .[102]

---

[98] (1841) 49 Eng. Rep. 282 (Ch.).

[99] 1958, 6 & 7 Eliz. 2, c. 53, § 1 (Eng.).

[100] *See, e.g.*, RICHARD EDWARDS & NIGEL STOCKWELL, TRUSTS AND EQUITY 156–58 (5th ed. 2002) (arguing that "[i]t is somewhat debatable to what extent the court is obliged to take the wishes of the settlor into account when deciding whether or not to give approval to an arrangement," and citing cases on both sides of the question); PAUL TODD & SARAH WILSON, TEXTBOOK ON TRUSTS § 18.3.3.3, at 434 (6th ed. 2003) (noting that "though the settlor's views can be relevant, they are rarely paramount," and citing a case in which the court held that the settlor's views "have no relevance at all unless they relate to someone on whose behalf the court's approval is required"); *see also* Paul Matthews, *The Comparative Importance of the Rule in Saunders v. Vautier*, 122 L.Q.R. 266 (2006) (illustrating a recent comparison of the English and American approaches).

[101] California, Missouri, New York, Ohio, and Wisconsin were among the first states to pass statutes making it easier for courts to modify or terminate trusts. *See* CAL. PROB. CODE § 15403(b) (West 1991); MO. ANN. STAT. § 456.590.2 (West 1992); N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (McKinney 2005); OHIO REV. CODE ANN. § 1339.66 (LexisNexis 2002); 20 PA. CONS. STAT. § 6102(a) (West 2005); WIS. STAT. ANN. § 701.13(3) (West 2001).

[102] CAL. PROB. CODE § 15403(b) (West 1991).

This section of the California Probate Code gives courts the power to balance the material purpose of a trust against the reasons for modification or termination under the circumstances, provided that the beneficiaries agree that modification or termination is warranted.[103] The intention of the settlor remains a relevant factor, but the court now can take other considerations into account, such as the needs of the beneficiaries. While the last sentence of the section limits the application of the provision to spendthrift trusts in which the beneficiary is forbidden to transfer his interest, that restriction, by its terms, applies only to termination, not modification.[104]

In addition to allowing the courts to balance the settlor's intent against the reasons for modification or termination, the California Probate Code also extends the equitable deviation doctrine to cover dispositive as well as administrative provisions of the trust. If the continuation of the trust on its terms threatens to defeat or impair substantially the accomplishment of the trust purposes, the court "may modify the administrative or dispositive provisions of the trust or terminate the trust."[105]

The UTC, promulgated in 2000, does not follow the California Probate Code in allowing the court to balance the material purpose of the trust against the reasons provided for its modification or termination. The UTC instead offers two avenues for modification and termination, depending on whether the court makes a finding of changed circumstances. Under UTC section 411(b), for a court to modify or terminate a trust after the settlor's death without a finding of changed circumstances, all of the beneficiaries must consent to the modification or termination, and the court must conclude that modification or termination would not be "inconsistent with a material purpose of the trust."[106] Thus, UTC section 411 essentially adheres to the *Claflin* doctrine, although a bracketed qualification is made in subsection (c) that "[a] spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the

---

[103] *See id*. § 15403(a) (requiring unanimity among the beneficiaries).

[104] *See id*. § 15403(b).

[105] *Id.* § 15409.

[106] UNIF. TRUST CODE § 411(b), 7c U.L.A. 286 (Supp. 2006). This rule is mandatory law. *See id* § 105(b)(4). However, it would not be difficult to prevent a court from applying this provision by stating in the trust instrument that any modification or termination under the section would violate a material purpose of the trust. *See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 663 (2005).

trust."[107] This provision was made optional in 2004 after it met resistance from state legislatures.[108]

In section 412, the UTC followed the lead of the California Probate Code in extending the equitable deviation doctrine to cover dispositive as well as administrative provisions of a trust. The UTC provision also is phrased differently: whereas the California Probate Code allows modification or termination "if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust,"[109] the UTC allows modification "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[110] The UTC provision further specifies that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention."[111] The provision does not require action by (or consent of) the beneficiaries.

Because the UTC allows modification only when consistent with the purposes of the trust, it is more deferential to the settlor's intent than the California Probate Code. Nevertheless, another provision of the UTC clarifies that the provisions relating to modification and termination are mandatory law, which the settlor may not override in the trust instrument.[112] In other words, a settlor who does not trust the courts to decide whether modification would "further the purposes of the trust,"[113] and who wishes to prevent a court from applying the expanded equitable deviation doctrine under section 412 cannot do so.[114] A settlor could attempt to preempt the section by stating all the circumstances that the settlor anticipated, but it might be difficult to produce an exhaustive

---

[107] UNIF. TRUST CODE § 411(c), 7c U.L.A. 287 (Supp. 2006).

[108] *See* DUKEMINIER ET AL., *supra* note 11, at 583.

[109] CAL. PROB. CODE § 15409 (West 1991).

[110] UNIF. TRUST CODE § 412(a), 7c U.L.A. 293 (Supp. 2006); *see also* Newman, *supra* note 106, at 663–64 (discussing the distinction between how the equitable deviation doctrine is phrased in the UTC and the California Probate Code). A separate provision, section 412(b), provides for modification of administrative terms "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." UNIF. TRUST CODE § 412(b).

[111] *Id.* § 412(a).

[112] *See id.* § 105(b)(4).

[113] *Id.* § 412(a).

[114] *See* Newman, *supra* note 106, at 666 (suggesting that this interference with the settlor's intent may be justified).

list.[115] To that extent, the UTC has the potential to thwart a settlor who does not want modification under any circumstances.

In addition to its general modification provisions, the UTC contains a specific provision dealing with removal of the trustee. Section 706(b) allows removal of a trustee by a court when

> (1) the trustee has committed a serious breach of trust;
> (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
> (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.[116]

The last of these provisions, section 706(b)(4), gives a court broad power to replace the trustee when all the beneficiaries agree and when modification does not violate a material purpose of the trust. This provision, however, is default law and "may be overridden by the settlor."[117]

Unlike the UTC, the *Third Restatement* has embraced both general modification reforms of the California Probate Code: the balancing test and the expanded equitable deviation doctrine. Section 65 of the *Third Restatement* is closely modeled on section 15403(b) of the California Probate Code:

> (1) Except as stated in Subsection (2), if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust.
> (2) If termination or modification of the trust under Subsection (1) would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor's death, with

[115] *See id.* at 665–66.
[116] UNIF. TRUST CODE § 706(b), 7c U.L.A. 341 (Supp. 2006).
[117] Newman, *supra* note 106, at 694.

> authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose.[118]

Like the California Probate Code, section 65 of the *Third Restatement* allows a court to balance the reasons provided for termination or modification against the material purpose of the trust when the beneficiaries are in agreement. The settlor's intent therefore remains a relevant consideration, but it is not the only consideration. This is a significant departure from the *Claflin* rule, and one not paralleled in the UTC. Moreover, unlike section 15403(b) of the California Probate Code, section 65 of the *Third Restatement* does not limit the court's ability to terminate a trust subject to a spendthrift provision. The *Third Restatement* also adopts an equitable deviation provision similar to that in the UTC, allowing the court to "modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust."[119]

The *Third Restatement* does not address the question of whether a settlor could override its modification and termination provisions by language in the trust instrument. A settlor, for example, might recite a list of incentives or restrictions in the trust instrument and state explicitly that those incentives or restrictions constitute a material purpose of the trust. Yet the *Third Restatement* seems to allow modification even when the material purposes of the trust are made explicit. Absent a provision stating that the terms of the trust take precedence, the implication is that the provisions of the *Third Restatement* are mandatory. If a state adopted the approach of the *Third Restatement* and made it mandatory law, a settlor could not draft a trust so as to prevent a court from balancing the reasons provided for modification or termination against the settlor's purposes or from applying the doctrine of equitable deviation.

The *Third Restatement* balancing test has been interpreted as applying to a situation in which the beneficiaries wish to remove the trustee.[120] Another provision in the *Third Restatement*, section 37, allows a court to remove a trustee "for cause."[121] A comment lists several grounds for

---

[118] RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).

[119] *Id.* § 66.

[120] *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, 254–56 (2002).

[121] RESTATEMENT (THIRD) OF TRUSTS § 37 (2003).

removal including unfitness, acquisition of a conflicting interest, repeated failure to provide proper information to the beneficiaries, the commission of a crime, "developments causing serious geographic inconvenience to the beneficiaries," or "a pattern of indifference toward some or all of the beneficiaries."[122] The comment explains that "[f]riction between the trustee and some of the beneficiaries is not a sufficient ground for removing the trustee unless it interferes with the proper administration of the trust."[123] A "serious breakdown in communications between beneficiaries and a trustee," however, "may justify removal, particularly if the trustee is responsible for the breakdown or it appears to be incurable."[124] Section 37 presumably is mandatory law, and, like section 65, it gives a court broad discretion to decide whether a change in the settlor's original plan is necessary.

The approach of the *Third Restatement* is not the most ambitious reform proposal that has been made in recent years. In his last article, finished by James Krier after his death, Jesse Dukeminier proposed various reforms that would make trustee removal and trust termination even easier. Dukeminier and Krier suggested that statutes be enacted to give beneficiaries the power to remove or replace the trustee and give the trustee the power to terminate the trust.[125] Dukeminier and Krier also proposed that when all the beneficiaries of a trust known to the settlor have died, the beneficiaries be given a statutory power to terminate or modify the trust without court approval (provided that they do not exercise the power in favor of themselves, their creditors, or their estates). They also proposed giving the beneficiaries a power, limited by a statutory standard, to withdraw principal for their own benefit.[126] The proposed statutes "would . . . be mandatory and applicable to all trusts."[127] These proposed reforms go far beyond the UTC and the *Third Restatement* and effectively would leave the duration of the trust up to the beneficiaries and would allow the beneficiaries to dictate the trust's terms after a certain period of time.[128]

---

[122] *Id.* § 37 cmt. e.

[123] *Id.* § 37 cmt. e(1).

[124] *Id.*

[125] *See* Dukeminier & Krier, *supra* note 25, at 1341–42.

[126] *See id.* at 1341.

[127] Tate, *supra* note 25, at 597 & n.8.

[128] *See id.* at 598, 610. The proposals of Dukeminier and Krier have met with some support among academics. *See, e.g.*, Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2547–48 (describing the Dukeminier and Krier suggestions as "wise"); Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27

C. Abolition of the Rule Against Perpetuities

The current trend toward allowing easier modification and termination of trusts coincides with an important development regarding trust duration: the abolition of the Rule. Abolition of the Rule has allowed the creation of perpetual or near-perpetual dynasty trusts, which can serve to keep property in a particular family for an unlimited number of generations. Advocates of modification and termination reform contend that, in light of the rise of the perpetual trust, it is more critical than ever to make it easier for courts to undo trusts after the settlor's death.

Until recently, private noncharitable trusts were limited in duration by the Rule, the classic formulation of which provided that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[129] The idea behind the Rule was that settlors should not be able to tie up property beyond the lives of people they knew and the minority of their children.[130] The original Rule, which mercilessly invalidated interests based on hypothetical possibilities, was reformed in many jurisdictions in the second half of the twentieth century so that a court could "wait and see" what actually happened.[131] This process culminated in the Uniform Statutory Rule Against Perpetuities ("USRAP"), which provided a ninety-year wait-and-see period.[132]

USRAP, like the other wait-and-see reforms promoted by legal scholars in the second half of the twentieth century, did not allow for the creation of perpetual noncharitable trusts. For some time, however, Idaho and Wisconsin had allowed the creation of such trusts, provided that the power of alienation was not suspended.[133] South Dakota joined this list in

---

CARDOZO L. REV. 2523, 2530–31 (2006) (arguing that "legal change will be needed to give the beneficiaries power to modify or terminate the trust despite the donor's stated intent that it be perpetual" (footnote omitted)). It remains to be seen whether this academic support will translate into legislative or judicial reform.

[129] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942) (footnote omitted).

[130] *See* Sitkoff & Schanzenbach, *supra* note 25, at 364.

[131] *See* Dukeminier & Krier, *supra* note 25, at 1305–11; Tate, *supra* note 25, at 599–602.

[132] *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 158–60 (1988).

[133] *See* IDAHO CODE ANN. § 55-111 (LexisNexis 2001); WIS. STAT. ANN. § 700.16 (West 2004); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2101 (2003). Idaho abolished the Rule in 1957 and Wisconsin in 1969. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27

1983.[134] In 1995, Delaware abolished the Rule, which triggered a race among other jurisdictions to abolish the Rule or to limit drastically its effect.[135] Three states and the District of Columbia abolished the Rule before 1986, and by early 2005, legislation abolishing or limiting Rule had been enacted in sixteen other states.[136] The list of states that have abolished the Rule is likely to grow.

The movement to abolish the Rule appears to be related to a federal tax exemption. For many years, wealthy people were able to avoid the federal estate tax by creating trusts with successive life estates, which could continue as long as the Rule permitted.[137] Congress eventually closed this loophole by enacting a tax on generation-skipping transfers, which was enacted in 1976 and substantially reconfigured in 1986.[138] In enacting the 1986 Generation-Skipping Transfer tax (GST), however, Congress included an exemption of $1 million for each transferor.[139] This exemption has been increased to $1.5 million for decedents dying in 2004 and 2005; $2 million in 2006, 2007, and 2008; and $3.5 million in 2009.[140] Accordingly, it is now possible to create a generation-skipping trust worth up to $2 million that will not be subject to the GST.[141]

Settlors creating perpetual dynasty trusts no doubt are attracted, at least in part, by the GST exemption. In a recent empirical study, Max Schanzenbach and Robert Sitkoff found that there was "little demand for perpetual trusts before the enactment of the GST tax."[142] It is important to note, however, that the tax advantages of dynasty trusts were even greater prior to the enactment of the GST; if tax reasons were the only motivation for creating such trusts, one would expect to see fewer dynasty trusts created after 1986, not more. The impact of the GST as an advertising

CARDOZO L. REV. 2465, 2473 (2006).

[134] *See* S.D. CODIFIED LAWS §§ 43-5-1, -8. (West 1997); Schanzenbach & Sitkoff, *supra* note 133, at 2473.

[135] *See* Sitkoff & Schanzenbach, *supra* note 25, at 375–76.

[136] *See* Tate, *supra* note 25, at 603. Three other states were considering abolishing the rule as of March 2005. *See id.* at 604 n.45.

[137] *See* REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 722–24 (22d ed. 2002); Dukeminier & Krier, *supra* note 25, at 1312.

[138] *See* 5 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 120.2.3, at 120-12 to -13 (2d ed. 1993).

[139] *See id.*

[140] *See* I.R.C. §§ 2010(c), 2631(c).

[141] *See* Dukeminier & Krier, *supra* note 25, at 1313; Sterk, *supra* note 133, at 2100–01. If the trust is created inter vivos, however, the initial transfer will be subject to gift tax to the extent it exceeds the $1 million gift tax exemption.

[142] Schanzenbach & Sitkoff, *supra* note 133, at 2467.

tool helps explain the fact that dynasty trusts became more popular after the enactment of the tax: estate planners could promote dynasty trusts by pointing to the GST exemption and encouraging their clients to take advantage of it. But promotional materials suggest that there are many reasons other than tax savings that might justify the creation of a dynasty trust. For example, some settlors might use perpetual dynasty trusts as incentive trusts, encouraging their descendants to be hardworking members of society.[143]

Proponents of modification and termination reform have pointed to the rise of the perpetual dynasty trust as a reason why statutes should mandate more flexibility to respond to changed conditions.[144] If some settlors are structuring perpetual dynasty trusts as incentive trusts, however, it is possible that they may not want a court to have broad powers to modify or terminate a trust when doing so conflicts with their material purposes. Even if this group is a relatively small fraction of the settlor population, it should be taken into account in deciding what the modification and termination rules should be.

D. Default and Mandatory Rules

An example may serve to show why a settlor might not want a court to exercise its power to modify or terminate a trust in the interest of the beneficiaries. Suppose that a settlor, who has one daughter living in a common law state, creates an incentive trust that names the daughter as the beneficiary. The trust provides a dollar of income from the trust for every dollar that the beneficiary earns herself. The intention of the settlor

---

[143] *See* Tate, *supra* note 25, at 613–17. Schanzenbach and Sitkoff concede that, even "if the transfer taxes were abolished, some demand for perpetual trusts might persist." Schanzenbach & Sitkoff, *supra* note 133, at 2468 (footnote omitted). *See also* Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2520 (2006) (identifying "[d]ead hand control, dismissiveness of donees' rights to control property, USRAP, and the commercialization of estate planning" as factors that have worked together with the GST exemption to bring about the popularity of the perpetual trust).

[144] *See* Chester, *supra* note 26, at 700 ("If the trend continues toward allowing and creating long-term trusts and expanding the spendthrift limitations protecting them, the need for easier modification and termination of such trusts will increase." (footnote omitted)); Dukeminier & Krier, *supra* note 25, at 1331:

> With a perpetual trust . . . [restrictions on modification and termination] will go on forever. Even though perpetual trusts were one of the most significant trust developments of the late twentieth century, they are not mentioned in the Uniform Trust Code. It should be amended to apply different modification and termination rules to perpetual trusts.

is to encourage his daughter to lead a productive life. No provision in the trust allows for a greater match of income if she chooses to pursue a socially valuable profession.

Now suppose that the settlor dies, and the trustee begins to administer the trust. The daughter decides she wants to become a sculptor. She attends sculpting classes and gains some proficiency. She has some talent and is able to sell some of her sculptures. However, her income from this endeavor is relatively small, say $20,000 per year. Her friends, on the other hand, are earning six-figure salaries in the business world. The daughter petitions the court to modify the trust to match her income on a three-to-one basis, so that she receives three dollars from the trust for every dollar that she earns selling her sculptures.

The court now faces the question of whether to modify the trust to allow a greater match for the artistic child. Suppose first that the jurisdiction in question has adopted the UTC. Under the UTC, the court may modify the trust upon a finding that, "because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[145] The court might decide that the beneficiary's decision to become a sculptor is a circumstance not anticipated by the settlor and that modifying the trust to provide a three-to-one match will further the purposes of the trust. In making this decision, the court will try to construe the "settlor's probable intention."[146]

If the jurisdiction in question is California, or if the jurisdiction follows the *Third Restatement*, the court has even greater flexibility. Even if the court finds that modifying the trust to help the budding sculptor would violate a material purpose of the trust, the court can balance that material purpose against the beneficiary's reasons for modification. If the balance weighs in favor of modification, the sculptor will prevail.

None of this poses any difficulty if the settlor actually would have wanted the trust to be modified. But what if the settlor would not have wanted to encourage his daughter's artistic endeavors? What if the settlor wanted the dollar-for-dollar match to be applied without exception? In that case, the prescient settlor living in a UTC jurisdiction might state in the trust that he anticipated the possibility that his child might wish to become an artist, thereby precluding the application of the equitable deviation doctrine. A settlor would face some difficulty, however, in writing into the trust a prediction of every possible circumstance that might arise. Moreover, in a jurisdiction that follows the *Third Restatement*

---

[145] UNIF. TRUST CODE § 412(a), 7c U.L.A. 293 (Supp. 2006).
[146] *Id*.

as mandatory law, the settlor would have no way to prevent modification regardless of what terms he included in the trust. The court would have the authority to decide that the settlor's plan was simply inferior to the alternative offered by the beneficiary.

If the provisions of the UTC and the *Third Restatement* were made default law, these issues would not create any problems for settlors because they could avoid them in drafting the trust instrument. The question, then, is whether there is a sound policy basis for allowing settlors to override statutory modification and termination provisions. If so, then modification and termination rules such as the *Third Restatement* balancing test should be enacted as default law; if not, then mandatory rules are necessary. The next section of this Article will consider the wisdom of restrictions in incentive trusts in light of broader debates about the justification for testamentary freedom in general.

IV. THE DEAD HAND

Overriding the settlor's intent in the law of trusts has consequences. Individuals who know that their intent cannot be carried out in a trust may behave differently: they may choose to spend money during their lifetime that they might have left for their descendants in a trust, or they may choose to alter the plan of their trust and leave their property to different individuals or entities or to vary the amount left to each beneficiary. In other words, when the law imposes a mandatory rule with respect to trusts, it may have an impact on what potential settlors do with their money. Whether this is a good thing depends on the reasons for or against allowing dead hand control.

A. Policy Justifications for the Dead Hand

In an article published in 1992, Adam Hirsch and William Wang surveyed the different rationales for testamentary freedom and analyzed which of them ought to apply to future interests.[147] Hirsch and Wang identified six different justifications for dead hand control. Each has its proponents and detractors, although some rationales may be more persuasive than others.

The first rationale that historically has been offered for freedom of testation is that there is a natural right to leave one's property to persons of one's choosing. This view is associated with the seventeenth-century

[147] *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–18 (1992).

philosophers Locke and Grotius.[148] Grotius's view was that, because testation "in its essential character . . . is related to ownership . . . it belongs to the law of nature," even though it "can take a definite form in accordance with municipal law."[149] Locke viewed the right of testation as stemming from the fact that each individual owned his own person and therefore owned the fruits of his labor.[150] Locke also indicated, however, that the testator's right to bequeath was qualified by his duty to provide for his children.[151]

An early criticism of Locke's view, offered by William Paley, was that Locke's explanation only accounted for property earned through "personal labour," and other forms of property, especially property in land, did not fall in this category.[152] Accordingly, Paley did not think a natural right to dispose of land after death existed.[153] Other eighteenth-century writers rejected outright the notion that there was a natural right of testation. Godwin considered it to be "the most extravagant fiction, which would enlarge the empire of the proprietor beyond his natural existence, and enable him to dispose of events, when he is himself no longer in the world."[154] Similarly, Blackstone thought that "naturally speaking, the instant a man ceases to be, he ceases to have any dominion."[155] Although the "universal law of almost every nation" allowed testation, it was not part of the primary law of nature.[156]

A second argument for testation is that allowing each individual to decide how property will be used after death encourages work and savings, thereby maximizing total wealth. This argument appears in the thirteenth-century English legal treatise known as *Bracton*,[157] and

---

[148] *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 265 (Francis W. Kelsey trans., 1925) (1625); JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT §§ 27, 65 at 287–88, 311 (Peter Lasleft ed., Student ed. 1988) (1690).

[149] 2 GROTIUS, *supra* note 148, at 265.

[150] *See* LOCKE, *supra* note 148, § 27.

[151] *See id.* § 65 ("[A] *Father* may dispose of his own Possessions as he pleases, when his children are out of danger of perishing for want . . . .").

[152] WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 183 (René Wellek ed., Garland Publ'g 1978) (1785).

[153] *See id.* at 184–85.

[154] 2 WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MORALS AND HAPPINESS 444 (F.E.L. Priestley ed., Univ. of Toronto Press 3d ed. 1946) (1798).

[155] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *10 (Univ. of Chi. Press 1979) (1766).

[156] *Id.*

[157] 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine & Samuel E. Thorne eds. & trans., Harvard Univ. Press 1968) (circa 1230) [hereinafter

philosophers restated the argument in subsequent centuries.[158] Forced inheritance, arguably, would "discourage individual initiative and thrift," because people would have less incentive to accumulate property if they could not choose who would receive it after death.[159] A related argument is that frustrating testamentary intent would lead to the depletion of resources because people might "cut timber prematurely, exhaust soil's fertility by intensive farming, or postpone needed improvements to buildings."[160]

The notion that individuals work and save more because they have the power of testation is subject to legitimate criticism. As Hirsch and Wang note, individuals may strive to accumulate wealth beyond the needs of lifetime consumption for a variety of reasons that are not related to the power of testation.[161] In many cases, persons may accumulate "to gratify their egos, to gain prestige, to gain power—and simply out of habit. Once these impulses are taken into account, the economic contributions traceable to freedom of testation could turn out to be small."[162]

In recent decades, economists have debated the extent to which a "bequest motive"—the desire to leave something behind after death—plays an important role in the accumulation of wealth. The so-called life-cycle hypothesis, which has provided a framework for research

---

BRACTON] ("[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives."). The royal judge Henry de Bracton, long assumed to be the author of this treatise, probably did not write the original version, although he may have been responsible for certain revisions. *See* Morris S. Arnold, *De Legibus et Consuctudinibus Angliae*, 91 HARV. L. REV. 517, 519 (1977) (book review) (discussing the findings of Samuel Thorne).

[158] *See, e.g.*, JEREMY BENTHAM, *Principles of the Civil Code*, *in* 1 THE WORKS OF JEREMY BENTHAM 297, 338 (Russell and Russell 1962) (1838) (suggesting that individuals would become spendthrifts, purchase annuities, or spend all their money during life if they could not devise it by will); 1 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 352 (1755) (arguing that "industry shall be much discouraged" if the right of testation were eliminated); HENRY SIDGWICK, THE ELEMENTS OF POLITICS 53 (Krans Reprint 4th ed. 1969) (1919) (stating that "the abrogation of the power of bequest would remove from [the individual] an important inducement to the exercise of industry and thrift in advancing years").

[159] THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 34 (2d ed. 1953).

[160] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 158 (Pearson Addison Wesley 4th ed. 2004).

[161] *See* Hirsch & Wang, *supra* note 147, at 8; *see also* A.C. PIGOU, THE ECONOMICS OF WELFARE 718–19 (4th ed. 1932) (suggesting that transfer taxes "should impose a relatively small check upon the creation of capital" because individuals have other reasons to accumulate wealth besides the desire to direct its disposition after death).

[162] Hirsch & Wang, *supra* note 147, at 8–9.

on consumption and saving since the 1950s, assumes that the average individual "neither expects to receive nor desires to leave any inheritance."[163] This assumption was challenged by Laurence Kotlikoff and Lawrence Summers, who argued that "the pure life-cycle component of aggregate U.S. savings is very small" and that "American capital accumulation results primarily from intergenerational transfers."[164] Subsequent research on the subject has not produced a consensus.[165] It may be the case that, while wealth is primarily accumulated to guard against future contingencies during life, the desire to bequeath wealth to future generations plays a secondary role.[166]

A third argument made in favor of testation, at least with regard to bequests within the family, is that such bequests may reward the beneficiaries for unpaid services rendered during the testator's lifetime. Anthropologists have shown that gifts are sometimes best understood in a context of reciprocity and social exchange.[167] Some economists have argued that bequests may be used to reward children who are more attentive to their parents in their old age.[168] Various authors over the centuries have

---

[163] Albert Ando & Franco Modigliani, *The "Life Cycle" Hypothesis of Saving: Aggregate Implications and Tests*, 53 AM. ECON. REV. 55, 56 (1963).

[164] Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706, 707 (1981).

[165] *Compare* Michael D. Hurd, *Savings of the Elderly and Desired Bequests*, 77 AM. ECON. REV. 298, 306 (1987) (finding "no evidence for a bequest motive"), *and* Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, J. ECON. PERSP. 15, 37–38 (1788) ("A certain amount of evidence suggests that the pure bequest motive—the accumulation of wealth entirely for the purpose of being distributed to heirs and not be used for own consumption—affects a rather small number of households, mostly located in the highest income and wealth brackets."); *with* B. Douglas Bernheim, *How Strong Are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities*, 99 J. POL. ECON. 899, 924 (1991) (finding "powerful bequest motives for a large segment of the population"), *and* William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, 8 J. ECON. PERSP. 145, 156 (1994) (suggesting that bequests and inter vivos transfers account for "at least 51 percent of net worth accumulation").

[166] *See* Karen E. Dynan et al., *The Importance of Bequests and Life-Cycle Saving in Capital Accumulation: A New Answer*, 92 AM. ECON. REV. 274, 277 (2002) (suggesting that "if the bequest motive suddenly disappeared because of a confiscatory estate and gift tax, saving behavior would likely change only modestly for all but the very wealthy").

[167] *See, e.g.*, CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 52–68 (James Harle Bell et al. trans., rev. ed. 1969) (1949); MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (W.D. Halls trans., 1990) (1950).

[168] *See, e.g.*, Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1 (1988); B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045 (1985); Donald Cox, *Motives for Private Income Transfers*, 95 J. POL. ECON

argued that testation is necessary to preserve the good order of the family.[169]

One criticism of this rationale for testation is that it encourages beneficiaries to engage in socially wasteful activities in the hope of capturing a bequest.[170] On the other hand, many children no doubt would continue to care for elderly parents even if freedom of testation were abolished. Whether a particular child looks after her parents may not be correlated with that child's expectations regarding inheritance.[171]

Another argument that sometimes is made in favor of freedom of testation is that it would be difficult to curtail in practice. If inheritance were abolished, individuals simply might give their property away during life, evading the restriction.[172] In response to this argument it may be

---

508 (1987); *but see* Maria G. Perozek, *A Reexamination of the Strategic Bequest Motive*, 106 J. POL. ECON. 423, 424 (1998) (arguing that "the association between bequeathable wealth and attention weakens when child and family characteristics are added to the specification").

[169] *See, e.g.*, 1 BENTHAM, *supra* note 158, at 337 (arguing that testation prevents ingratitude on the part of children in the parent's old age); 2 BRACTON, *supra* note 157, at 181 (arguing that testation will "put in the way of both wives and children an occasion for good behavior"); *cf.* 2 BLACKSTONE, *supra* note 155, at *11 (arguing that a man becomes a good citizen "when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections").

[170] This phenomenon is termed rent-seeking. *See* James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71 (1983); *see also* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 112 (1990) ("Children all too often make their parents' lives miserable trying to ensure places for themselves in their parents' wills . . . .")

[171] *See* Hirsch & Wang, *supra* note 147, at 11.

[172] *See, e.g.*, COOTER & ULEN, *supra* note 160, at 157 (suggesting that restrictions on testation encourage individuals to give property away during life and lease it back); GODWIN, *supra* note 154, at 445:

> To attempt . . . to take the disposal out of their hands, at the period of their decease, would be an abortive and pernicious project. If we prevented them from bestowing [their property] in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation.

1 HUTCHESON, *supra* note 158, at 352 (arguing that, if testation were eliminated, "men must be forced into a pretty hazardous conduct by actually giving away during life whatever they acquire beyond their own probable consumption in their lifetime"); SIDGWICK, *supra* note 158, at 53 n.1 (suggesting that in the absence of testation "most men would prefer either to exchange their capital somehow for a life-income or to transfer it in old age—or when the prospect of death was otherwise near—to the objects of their preference, rather than leave it to be absorbed by the State"); *see also* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 91 (1960) (arguing that if testation were abolished "men

pointed out that freedom of testation leads to much litigation regarding the decedent's plan of succession.[173] It is difficult to say whether this social cost outweighs the difficulty posed by enforcing a restriction on testation.[174]

A fifth argument in favor of freedom of testation is referred to by Hirsch and Wang as the "father-knows-best" hypothesis.[175] Under this rationale, free testation is preferable to other schemes of distribution because it permits more intelligent estate planning: the testator knows his family members better than anyone else and can distribute property in accordance each family member's needs.[176] This argument assumes that distribution according to need is a social virtue and that the average testator will behave rationally in creating an estate plan.

Hirsch and Wang criticize the father-knows-best hypothesis on the grounds that many wills are drafted with little thought and testators cannot be relied upon to make rational decisions.[177] Making a will has been called "an exercise of power without responsibility."[178] Deceased persons do not suffer the consequences of their actions, and there is no guarantee that a testator will plan wisely for her family. Nevertheless, Hirsch and Wang acknowledge that a scheme under which courts exercise discretion to distribute property in accordance with family circumstances would "entail substantially higher information and administrative costs."[179]

---

would look for other ways of providing for their children, such as placing them in positions which might bring them the income and the prestige that a fortune would have done; and this would cause a waste of resources and an injustice much greater than . . . the inheritance of property").

[173] *See* ATKINSON, *supra* note 159, at 34.

[174] *See* Hirsch & Wang, *supra* note 147, at 12.

[175] *Id.*

[176] *See* WILLIAM M. MCGOVERN JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 3.1, at 123–24 (3d ed. 2004); *see also* THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 223 (Longmans 1963) (1882) ("[A]s a general rule, the father of a family, if left to himself and not biassed[sic] by any special institutions of his country, is most likely to make that distribution among his children which is most for the public good."); SIDGWICK, *supra* note 159, at 100–01:

> [G]ranting it to be desirable that a man's property in a general way should go to his children, the testator evidently has special means of ascertaining his children's wants and deserts; so that any variations from equality of distribution which he may be induced to make, if free bequest is allowed, are likely on the whole to correspond to variations either in their wants or their deserts.

[177] *See* Hirsch & Wang, *supra* note 147, at 13.

[178] M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173.

[179] Hirsch & Wang, *supra* note 147, at 12 n.42.

The final argument for freedom of testation identified by Hirsch and Wang is that the power to bequeath simply "comports with political preferences."[180] According to Lewis Simes, "[a] compelling argument in favor of [testation] is that it accords with human wishes."[181] Adam Smith expressed the same sentiment by saying that "[w]e naturally find a pleasure in remembering the last words of a friend and in executing his last injunctions," in what Smith termed "piety for the dead."[182] This argument, however, does not extend necessarily to estate plans that are arbitrary or unprincipled—piety for the dead only goes so far.[183]

B. The Dead Hand and Incentive Trusts

The six policy rationales identified by Hirsch and Wang speak to the question of whether testation in general should be allowed. Whether these rationales justify allowing an individual to attach conditions on access to distributions by means of an incentive trust is another question, and the answer depends in part on whether the beneficiaries of the trust are known to the settlor.

To the extent that the beneficiaries of an incentive trust are known to the settlor, at least two of the arguments in favor of testation offer a plausible justification for incentive trusts. If individuals work harder and save more when they know they can direct the disposition of their property after death through testation, then it is possible that some individuals would work and save even more if they are allowed to impose controls through an incentive trust. Moreover, the father-knows-best hypothesis arguably could apply to incentive trusts: if the parent knows his children better than anyone else, it might be wise to allow the parent to set the conditions that the children must meet in order to inherit the parent's fortune. This rationale depends, however, on the presumption that incentive trusts are sometimes effective. If incentive trusts generally do not have the desired effect of encouraging positive behavior, then it is difficult to see them as a manifestation of paternal wisdom.

The other justifications in favor of testation apply less obviously to incentive trusts. Even if there is a natural right to bequeath, it would seem a stretch to say that there is a natural right to impose specific conditions on access to funds. The idea that bequests reward beneficiaries for

180 *Id.* at 14.

181 Lewis M. Simes, *Free Will vs. Family*, *in* PUBLIC POLICY AND THE DEAD HAND 1, 21 (Univ. of Mich. Law School 1995) (1955).

182 ADAM SMITH, LECTURES ON JURISPRUDENCE 466 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (ms. 1762–1766).

183 *See* Hirsch & Wang, *supra* note 147, at 14.

services performed during life also does not apply when the goal of testation is to withhold funds from children who may not meet the parent's expectations. Moreover, it would not be difficult to curtail incentive trusts in practice because an individual cannot recreate an incentive trust by giving all the property away during life. Finally, the notion that testation comports with political preferences cannot be extended to legal constructs that are foreign to most of the general public.

These rationales are even less applicable when the topic is not incentive trusts in general, but incentive trusts that are designed to distribute funds to unborn generations. Even the father-knows-best argument, which can be invoked in defense of incentive trusts generally, carries less weight when the beneficiaries known to the settlor have died. As Lord Hobhouse remarked in the nineteenth century,

> [a] clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.[184]

With regard to unborn generations, one might argue, only the productivity-incentive theory of testation offers a clear justification for allowing incentive trusts.[185]

Another problem with the father-knows-best rationale as applied to incentive trusts is that parents may be subject to what psychologists call "attribution errors," making unwarranted assumptions about their children.[186] Estate planners report that individuals who seek estate planning advice tend to judge others as less capable than themselves and to inflate their own ability to plan for others.[187] Parents may assume without good cause that their children cannot take care of themselves and may attach unwarranted strings to a trust as a consequence of this bias. Moreover, as one prominent estate planner has observed, "it is impossible to measure

[184] ARTHUR HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 138 (1880); *accord* Hirsch & Wang, *supra* note 147, at 15 n.53.

[185] *See* Hirsch & Wang, *supra* note 147, at 16.

[186] *See* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44–46 (1995).

[187] *See id.* at 45–46.

empirically all of the ways a child can become productive and lead a worthwhile life."[188] Even those parents who have a realistic view of their children's abilities may fail to see that there are some careers in which their children might excel.

Despite its limitations, the father-knows-best rationale may still have some validity—even after the beneficiaries known to the settlor have died—with regard to the broad issue of whether the beneficiaries should be able to disregard the settlor's wishes. The settlor's insight, if any, into the needs of her children conceivably could translate into wisdom with respect to the needs of young people generally (although the opposite might be the case if the settlor lacks insight into her own children). Even though the settlor had no knowledge of unborn beneficiaries, the beneficiaries' own wishes with respect to the trust are not necessarily wiser or better than the settlor's plan. When the question is whether the details of a particular plan should be respected by a court, however, the father-knows-best justification arguably is limited to the generations known to the settlor, and even then it has its limits.

We then have two possible justifications for incentive trusts, only one of which clearly applies to incentive trusts that extend to unborn generations. As discussed above, the jury is still out on whether the desire to leave bequests motivates people to work and save more.[189] It is also questionable whether this theory would extend to a desire to leave wealth in the form of an incentive trust, let alone a desire to create an incentive trust that cannot be modified by judicial intervention. Even more questionable is whether the incentives to work and save would vary significantly depending on whether a court has the power to modify or terminate the trust. While some settlors might be discouraged from working harder or saving more if courts have broad modification and termination powers, it seems unlikely that this is a large group. On the other hand, there might be a greater number of settlors who would be discouraged by a law that allowed beneficiaries to modify or terminate a trust or replace the trustee without court approval, as suggested by Dukeminier and Krier.

The father-knows-best hypothesis may offer the strongest argument in favor of allowing incentive trusts, at least as applied to beneficiaries known to the settlor, if such trusts are indeed effective in some

[188] G. Warren Whitaker, *Classic Issues in Family Succession Planning*, PROB. & PROP., Mar./Apr. 2003, at 32, 35. Whitaker draws an analogy to the Biblical story of Cain and Abel, in which God recognized Abel's talents as a herdsman by accepting Abel's animal sacrifice but declined to accept the vegetables offered by his brother Cain, a farmer. *See id.* (discussing *Genesis* 4:1–14).

[189] *See supra* notes 163–66 and accompanying text.

circumstances. If the settlor is the best person to decide how the property should be distributed among the members of his family, and incentive trusts are an effective tool for doing this, then the case for mandatory court modification and termination powers is weakened. The question, then, is how effective incentive trusts are likely to be.

C. The Effectiveness of Incentive Trusts

In considering whether incentive trusts are an effective tool, it is necessary at first to acknowledge that too much unearned income can have a negative impact on productivity. Some studies suggest that individuals who inherit large sums of money are more likely to leave the labor force.[190] Psychological costs, such as substance abuse, anxiety, and depression, also are associated with being a child of wealthy parents.[191] Receiving large unconditional bequests could compound these psychological costs. "Affluenza," a term "coined to describe an epidemic of overconsumption and its often negative effects on children—alienation, laziness, arrogance and low self esteem,"[192] is not merely a hypothetical problem. It may be particularly acute in families that have acquired a significant amount of "new" money in the parents' lifetime.

Incentive trusts have not been the subject of rigorous empirical analysis. It is therefore difficult to say whether the incentives in question will actually motivate beneficiaries to change their behavior. Some insight can be gained, however, from studies of the effect of pay-for-performance plans on employee performance and the effect of rewards on intrinsic motivation.

---

[190] *See* Douglas Holtz-Eakin et al., *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413, 432–33 (1993) (finding that "families with one or two earners who received inheritances above $150,000 were about three times more likely to reduce their labor force participation to zero than families with inheritances below $25,000" and that "high inheritance families experienced lower earnings growth than low inheritance families, which is consistent with the notion that inheritance reduces hours of work"); *cf.* Guido W. Imbens et al., *Estimating the Effect of Unearned Income on Labor Earnings, Savings, and Consumption: Evidence from a Survey of Lottery Players*, 91 AM. ECON. REV. 778 (2001) (finding a reduction in labor earnings and increased consumption of leisure among individuals who win the lottery); *but see* Darien Berkowitz & Jacob Mikow, *Beyond Andrew Carnegie: Using a Linked Sample of Federal Income and Estate Tax Returns to Examine the Effects of Bequests on Beneficiary Behavior*, INTERNAL REVENUE SERVICE, http://www.irs.gov/pub/irs-soi/estincli.pdf (last visited Sept. 13, 2006) (finding that beneficiaries who started out in the labor force tended to remain in the labor force even after receiving a bequest).

[191] *See* Suniya S. Luthar, *The Culture of Affluence: Psychological Costs of Material Wealth*, 74 CHILD DEV. 1581, 1590 (2003).

[192] Cooper, *supra* note 52, at 26A.

Economists and psychologists who have studied pay-for-performance plans, which tie employee compensation to productivity, offer differing opinions on whether these plans actually produce the desired behavior. On the one hand, some argue that pay-for-performance plans are not ineffective but rather "*too* effective: strong pay-for-performance motivates people to do exactly what they are told to do."[193] According to this view, the primary problem with pay-for-performance schemes is that it is "difficult to adequately specify exactly what people should do and therefore how their performance should be measured."[194] Studies also show that financial incentives are more likely to affect performance quantity rather than performance quality.[195] Money, however, is a highly effective motivator.[196]

The view that financial incentives motivate performance has been challenged, on the other hand, by those who think the effect of incentives is merely temporary. Financial incentives, some argue, "do not alter the attitudes that underlie our behaviors. They do not create an enduring *commitment* to any value or action. Rather, incentives merely—and temporarily—change what we do."[197] According to this view, offering money to encourage certain types of behavior is not likely to work and may even be counterproductive.[198]

The notion that financial incentives cannot change behavior permanently is related to the psychological concepts of intrinsic and extrinsic motivation. Financial incentives are an extrinsic motivator: they come from outside rather than from within. Three decades of psychological research have established that extrinsically mediated rewards may actually reduce intrinsic motivation.[199] For example, in a classic experiment,

---

[193] George P. Baker et al., *Compensation and Incentives: Practice vs. Theory*, 43 J. FIN. 593, 597 (1988) (emphasis in original).

[194] *Id.*

[195] *See* G. Douglas Jenkins et al., *Are Financial Incentives Related to Performance? A Meta-Analytic Review of Empirical Research*, 83 J. APPLIED PSYCHOL. 777 (1998).

[196] *See* E.A. Locke et al., *The Relative Effectiveness of Four Methods of Motivating Employee Performance*, *in* CHANGES IN WORKING LIFE 363, 374–75 (K.D. Duncan et al., eds., 1980).

[197] Alfie Kohn, *Why Incentive Plans Cannot Work*, HARV. BUS. REV., Sept.-Oct. 1993, at 54, 55 (emphasis in original).

[198] *See id.*; *cf.* G. Bennett Stewart III et al., *Rethinking Rewards*, HARV. BUS. REV., Nov.-Dec. 1993, at 37, 37–45 (presenting the views of several experts on the role of incentives in the workplace).

[199] *See* Mark R. Lepper & Jennifer Henderlong, *Turning "Play" into "Work" and "Work" into "Play": 25 Years of Research on Intrinsic Versus Extrinsic Motivation*, *in* INTRINSIC AND EXTRINSIC MOTIVATION 257 (Carol Sansone & Judith M. Harackiewicz eds., 2000).

children who showed intrinsic interest in a drawing activity were assigned randomly to one of three groups. The first group was offered a certificate with a gold seal at the beginning of the experiment as a reward for continuing to engage in the activity; the second group received the same reward without having being told they would receive it; and the third group received no award. The experiment found that the children who had knowledge of the reward prior to engaging in the activity were less likely subsequently to engage in the activity.[200] Another early experiment found similar results when the subjects were college students and the reward was money.[201] These experiments illustrate the so-called overjustification hypothesis—the theory that an external award may undermine a person's intrinsic interest in an activity.[202]

The overjustification hypothesis suggests that a person is more likely to develop a lasting interest in an activity when it is what Mihaly Csikszentmihalyi has termed "autotelic"—when the person considers the activity to be an end in itself.[203] Incentive trusts, which use extrinsic rewards as a motivator, may actually lead to the opposite of the intended result. If a beneficiary is paid to graduate from college, the beneficiary may finish school but lose the possibility of lifelong intellectual curiosity. Similarly, a beneficiary whose income is matched dollar-for-dollar may elect to work at a high-paying job but may not be motivated to work any harder or more efficiently than is necessary to avoid being fired. In addition, when a beneficiary is forced to avoid doing something that she wants to do, the beneficiary may come to "overvalue the action that was unfairly restricted" and rebel against her deceased parent's wishes.[204]

Another potential problem with incentive trusts is that, by using money as a motivating factor, they may make beneficiaries more materialistic. Social psychologists use the term "hedonic treadmill" to refer to the fact that it is difficult to remain "happy for very long if what motivates us

---

[200] *See* Mark R. Lepper et al., *Undermining Children's Intrinsic Interest with Extrinsic Reward: A Test of the "Overjustification" Hypothesis*, 28 J. PERSONALITY & SOC. PSYCHOL. 129 (1973).

[201] *See* Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105 (1971).

[202] *See* Lepper et al., *supra* note 200, at 130.

[203] *See* MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE 67 (1990); *see also* Eileen Gallo, *A Psychotherapist Looks at Incentive Trusts*, J. FIN. PLAN., Dec. 2004, at 26, *available at* http://www.fpanet.org/journal/articles/2004_Issues/jfp1204-art3.cfm (discussing the applicability of Csikszentmihalyi's ideas to incentive trusts).

[204] Clark Hill PLC, *supra* note 30, at 2 (quoting psychologist David Lansky).

is getting more."[205] Incentive trusts may lead to a cycle of unhappiness by encouraging the beneficiaries to concentrate on money as a principal goal.

Overall, the psychological literature does not suggest that incentive trusts will be a particularly effective motivational tool. It is important to consider, however, that not all individuals are intrinsically motivated to work hard or expand their intellectual horizons. If a beneficiary is not intrinsically motivated, then the use of money as an extrinsic motivator could have a beneficial effect. The hedonic-treadmill effect would also be less threatening if the beneficiary were unlikely to do anything productive without the external motivator. Thus, much depends on the individuals who would be the beneficiaries of an incentive trust. A valid argument exists for allowing a settlor to use his own judgment in deciding whether an incentive trust will be effective for his children.

V. MODIFICATION ALTERNATIVES

Assuming that situations exist in which it is desirable to allow a settlor to create an incentive trust, the question may be raised regarding how much power a court should have to modify or terminate such a trust when it proves to be inflexible. As a threshold matter, it is necessary to consider whether there should be special rules applicable only to incentive trusts. If not, then some changes to the general rules regarding trust modification may be in order to accommodate the difficulties posed by incentive trusts.

To the extent that incentive trusts involve some tension between the settlor's goals and the preferences of the beneficiaries, a case can be made for applying different modification rules for incentive trusts as compared with other types of trusts. Current trust modification rules appear to be based on an assumption that the settlor generally would support modifications that benefit the beneficiaries. In an incentive trust, however, a deceased settlor might have had a very different opinion than the beneficiaries, or even the court, regarding what is in the beneficiaries' best interest. One could argue, therefore, that the beneficiaries should have to meet a higher standard to demonstrate that modifications are necessary when the trust in question is an incentive trust.

If different modification rules are necessary for incentive trusts, the problem arises of how to distinguish between incentive or other-types of trusts. A trust that distributes money when a beneficiary gets married might be an incentive trust, or the settlor merely might want to help the beneficiary cover the expense of a wedding. The same might be said of a

---

[205] Gallo, *supra* note 203, at 27.

trust that distributes money when the beneficiary has a bar or bat mitzvah: such a trust could be an incentive trust intended to encourage religion, or it could be an effort to ensure that a predictable milestone is celebrated with an appropriately lavish party. If separate rules are written for the modification of incentive trusts, a workable definition of "incentive trust" is necessary.

Apart from the problem of definition, it is not clear that a separate statutory scheme needs to be created for incentive trusts. Rather than provide mandatory rules that apply only to incentive trusts, the law could allow individual settlors to set the parameters for modification and to decide how much court involvement is necessary. This would give the settlor, rather than the court, the ultimate power to decide how flexible or inflexible the trust should be. One alternative, for example, would be to enact the balancing test of the *Third Restatement*, but make it default law, stating explicitly that the settlor can override it in the trust instrument.[206]

Making the *Third Restatement* rules default law might be justified on the theory that giving absolute control to the settlor encourages work and savings. The productivity-incentive justification for dead hand control, however, rests on a shaky foundation when applied to incentive trusts. Moreover, while the father-knows-best hypothesis suggests that the settlor might be in a better position than a court to decide whether incentives are appropriate, it is difficult to say that a settlor will be so prescient as to anticipate all the circumstances that might warrant modification. There is a strong case for making the balancing test mandatory law.

Allowing a court to balance the settlor's purposes against the reasons for modification or termination, however, is not without its drawbacks. The first drawback comes into play when the settlor chooses an individual with significant knowledge of the settlor's family as trustee. To the extent the settlor has some insight into the needs of her children, that insight might be reflected in the settlor's choice of trustee. By choosing a trustee, the settlor identifies an individual or entity whose judgment the settlor deems reliable. If an individual trustee is chosen, the trustee may have a considerable knowledge of the settlor's family and the settlor's children. The same is true if a corporate trustee is advised by a committee of individuals or an individual trust protector.[207] In such circumstances, the individual or individuals the settlor selects might be in a better position than the court to decide how the needs of the beneficiaries should be balanced against the reasons for modification or termination.

---

[206] *See supra* Part III.D.
[207] *See supra* text accompanying notes 61–62.

In the event that the settlor chooses a corporate trustee and does not select a family advisory committee or trust protector, court-ordered modification raises a second problem. A corporate trustee may not care whether an incentive trust is modified by a court in the interest of the beneficiaries. Once the settlor has died, a corporate trustee may not be sufficiently motivated to oppose modification if the proposed modification has no impact on the trustee's fees or the cost of administering the trust.[208] (Termination, on the other hand, will obviously be a greater concern for a corporate trustee.) While corporate trustees may not defer blindly to the beneficiaries' wishes, a judicial modification proceeding brought by the beneficiaries may prove to be pro forma if the trustee is a corporation and the modification would not affect the corporation's bottom line. In such a case, the court might not benefit from any advocacy on behalf of the settlor's point of view.

To solve these problems, a legislature enacting the *Third Restatement* balancing test might take one of two approaches. To address the first issue, the legislature could provide by statute that, if the terms of the trust so direct, the trustee must consent to any proposed modification that would contradict the settlor's purposes. If the trustee refuses consent, and the trustee's consent is required in the trust, the proposed modification will not go forward. This would give veto power to the trustee over any proposed modification and would enable the settlor to choose the individual or entity who will have the final say over any proposed modification.

Another possibility, directed at the second problem, would give a corporate trustee an incentive to make the case against modification at any judicial proceeding. A statute could provide that, if a court modifies a trust contrary to the settlor's purposes, and the terms of the trust so direct, the court must remove the trustee and appoint a new trustee to administer the modified trust. Such a provision would make the trustee's continued administration of the trust contingent upon the trustee successfully defending the settlor's wishes. This would turn the modification proceeding into an adversarial proceeding, with real debate between the trustee and the beneficiaries.

If enacted together, these two proposals might make it too difficult for the court to apply the balancing test. Corporate trustees might prove

---

[208] Some institutional trustees might oppose modification in any circumstance to develop a reputation as a tough enforcer of the settlor's wishes in the hope of attracting other potential settlors to use their services. However, such reputational concerns might be balanced against the trustee's interest in maintaining favorable relations with the beneficiaries who could sue (under either the UTC or the *Third Restatement*) to have the trustee removed.

unwilling to consent to modification if doing so meant losing the administration of the trust. A legislature could solve this problem by specifying that the trustee's consent is required only if the trustee is an individual, and that the trustee will be removed only if it is a corporate trustee. This would prevent the two provisions from operating together to preclude modification.

Because the father-knows-best justification carries less weight after the beneficiaries known to the settlor have died, a legislature might limit the application of these provisions to circumstances in which at least some beneficiaries known to the settlor are still living. Once the beneficiaries known to the settlor have all died, a court freely could apply the balancing test as proposed by the *Third Restatement*. This policy would be in line with a suggestion recently made by Schanzenbach and Sitkoff that modification and termination be made easier after the perpetuities period expires.[209]

These alternatives take into account a fundamental characteristic of an incentive trust—the settlor's wishes may be at odds with the beneficiaries' desires. The alternatives give the settlor some flexibility in making sure that his wishes at least are given a fair hearing. They do not, however, prevent the trust from being modified when the settlor's purposes have proven to be inflexible.

The alternatives suggested here may be criticized. Requiring the consent of an individual trustee makes modification more difficult, and there may be circumstances in which an individual trustee unreasonably will withhold consent. On the other hand, forced removal of a corporate trustee may not serve the interests of the beneficiaries. The beneficiaries might be forced to give up a trustee they prefer in order to have the trust modified. Transferring administration of a trust may be costly and time-consuming, and the trust will have to pay the costs.

It is important to point out, however, that these proposals would only come into play if the settlor specified in the trust instrument that she wished them to be applied. If the terms of the trust were silent, the court could modify the trust without seeking the consent of an individual trustee and without removing a corporate trustee. The default would be free modification, and any deviation would be at the instance of the settlor.

---

[209] *See* Schanzenbach & Sitkoff, *supra* note 133, at 2497 n.110; *cf.* Alex M. Johnson Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 355–56 (1999) (making an analogous argument for charitable trusts).

Settlors who prefer the *Third Restatement* regime could simply choose not to address the matter in the trust.

To effect these reforms, a court might adopt a modified version of the *Third Restatement* provision that reads as follows:

(1) Subject to Subsection (2), if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust.
(2) If termination or modification of the trust under Subsection (1) would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor's death, with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose and the requirements of Subsections (3) and (4) are satisfied.
(3) If one or more beneficiaries known to the settlor is alive at the time a modification is proposed, one or more natural persons are serving as trustee, and the terms of the trust so direct, the court shall not modify a trust pursuant to Subsection (2) unless the natural person or persons serving as trustee consent to the proposed modification.
(4) If, after the death of the settlor, a court determines that a trust should be modified pursuant to Subsection (2), one or more corporations are serving as trustee, one or more beneficiaries known to the settlor are alive, and the terms of the trust so direct, the court shall remove that corporation or corporations and appoint a new corporation or corporations to serve as trustee.

This proposed statute may lack the virtue of simplicity, but it ensures that someone will speak up in favor of the settlor's original plan when a modification is proposed. If the settlor selected an individual trustee, that individual must consent to the modification if that was the settlor's wish; otherwise the trust will not be modified. If the settlor selected a corporate trustee, the settlor may direct the replacement of that trustee in the event of a court-ordered modification. Both provisions are limited to circumstances in which one or more beneficiaries known to the settlor are still alive at the time a modification is proposed. Modification against the settlor's wishes is still possible, but the settlor may choose a person to approve the modification or may ensure that there will be a real debate in the event a corporate trustee is chosen.

The proposal outlined here may be difficult to enact because banking lobbies are likely to oppose a provision that would remove a corporate trustee in the event of modification. It is important to point out, however, that corporate trustees as a class will not suffer from this proposal because the removal of one corporate trustee will result in the appointment of a new corporate trustee. The proposal requiring the consent of an individual trustee when the settlor so directs should be less controversial. States that have shied away from adopting the provisions of the *Third Restatement* out of a fear of losing trust business might be more inclined to follow this relatively pro-settlor model. In any event, future law reform proposals should take into consideration the possible tension between the intent of the settlor and the wishes of the beneficiaries presented by incentive trusts.

VI. CONCLUSION

Incentive trusts may or may not be the wave of the future. If incentive trusts catch on, however, they are likely to present difficulties for trust law that must be addressed. Ground rules must be set now so that potential settlors considering incentive trusts will know how likely it is that a court will modify the trust against their intentions. Because the problem of inflexibility can already be anticipated, legislatures should not wait until specific difficulties arise to choose the best legal regime.

Some argue that if children have not been raised properly during the life of their parents, conditions imposed from beyond the grave are not likely to help much. Every family's circumstance is different, however, and there may be cases in which an incentive trust is preferable to an outright bequest. What the law must decide is whether the settlor's original decision should bind future generations, and if not, who should be given the power to reevaluate that decision. If the beneficiaries alone are given a voice, that voice assuredly will speak against conditional love.