

IS IT TIME FOR IRREVOCABLE WILLS?

*Alex M. Johnson, Jr. **

I. INTRODUCTION

Almost everyone knows that inter vivos trusts can be made revocable or irrevocable.¹ And the reference to “inter vivos” as opposed to “testamentary” trusts is intentional. Testamentary trusts become effective only upon the death of the settlor by establishing a valid trust in his or her will and, as a result, are by definition irrevocable upon creation (the testator cannot die again nor can he or she undo his or her death to somehow later repudiate the creation of the trust). Hence, it is more precise to say that inter vivos and testamentary trusts may be made irrevocable, but only inter vivos trusts may be made revocable.

Although at one time the default rule in most states was that an inter vivos trust was irrevocable unless the settlor expressly retained the right to later revoke the trust, the modern and current majority view is the opposite: That is, trusts are revocable unless explicitly made irrevocable.² Whatever the default rule, it is important to emphasize that inter vivos trusts come in two flavors or varieties: revocable and irrevocable.³

Compare, however, wills that become effective only upon the death of the testator. By definition and in every jurisdiction, wills are ambulatory documents⁴ and can always be revoked prior to death.⁵ Indeed, there is no

* James C. Slaughter Distinguished Professor of Law, University of Virginia Law School. I thank my Spring and Fall 2013 Trusts and Estates classes who spent several class hours discussing with me the pros and cons of irrevocable wills.

¹ For those unfamiliar with the terminology, inter vivos trusts are those trusts made or settled while the settlor is alive and which have some legal effect while the settlor is alive. Testamentary trusts, on the other hand, are trusts that become effective only upon the death of the settlor. The testamentary trust is established or settled with a corpus upon the death of the settlor of the trust—the decedent.

² The default rule expresses what is presumed to be most settlors’ preference for revocable, as opposed to irrevocable, inter vivos trusts and requires settlors who do wish to establish irrevocable trusts to do so expressly—a typical penalty default rule that requires some act (in this case, an expression of intent)—to opt out of the default rule. Default rules are discussed *infra* notes 103–104 and accompanying text.

³ See *infra* notes 5–18 and accompanying text.

⁴ To be clear with respect to terminology, the ambulatory character of a will means that a will executed on Date A can dispose of property acquired later at Date B. This quality of a will—that it can dispose of property not owned by the testator at the time of the will’s execution—seems rather obvious and functional. Upon reflection, however, this is a feature that is unique to modern wills and is somewhat inconsistent with, for examples, other donative transfers. By that, I mean, one cannot make a

way for a putative testator to make an irrevocable will, meaning that there is no legal method by which an individual can commit to execute a will that is going to be effective upon that individual's death.⁶ In a legal regime that has as one of its primary goals the validation of the will maker's freedom of testation or disposition,⁷ it is somewhat surprising that individuals have no option to commit their future selves to a will executed by their present self.

The lack of this option is even more puzzling given that an individual can establish an irrevocable trust. Furthermore, it is clear that an individual can make a valid inter vivos gift that is irrevocable once the gift is completed.⁸ In other words and focusing solely on donative transfers, I can commit my current self to dispose of current property I own by either giving it away or placing it in an irrevocable trust over which I would then have limited or no control, but I cannot commit my current self to leave property that I own at the time of my death to the persons or entities designated in a will that I execute today. I can execute the will, but inherent in the attribute of the execution of the will is a retained power of revocation by the putative testator that cannot be waived or destroyed.⁹

valid contract to gratuitously transfer to another property that will be acquired in the future. That gratuitous promise unsupported by consideration is the famous "nudum pactum." See generally Alex M. Johnson, Jr., Contracts and the Requirement of Consideration: Positing a Unified Normative Treatment of Contracts, Gifts and Testamentary Transfers (forthcoming North Dakota Law Review, 2016-17). The fact that wills were not originally ambulatory is discussed *infra* Part II.

⁵ The methods to effectuate revocation are varied: (1) One can revoke by physical act, i.e., by tearing or destroying the will with the intent to revoke same; (2) one can revoke by express revocation in a subsequent will; and (3) lastly, one can revoke by inconsistency by enacting a subsequent will that provides for an inconsistent disposition of testator's property than that stated in the original will. See UNIF. PROBATE CODE §§ 2-507 to 509 (amended 2010).

⁶ As will be discussed *infra* notes 121-124 and accompanying text, this is a slight overstatement in that a valid will becomes irrevocable if the will maker lacks testamentary capacity necessary to revoke the will. Hence, a valid will becomes irrevocable given the lack of capacity of the maker. Consequently, it would be more accurate and precise to say that a maker of the will cannot voluntarily make the will irrevocable by a knowing or intentional act. Am I the only one who finds it odd that a will can become irrevocable if the maker lacks capacity, but a maker with capacity cannot voluntarily make such a will irrevocable? Again, all of this is discussed in greater detail later.

⁷ JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 1-4 (9th ed. 2013).

⁸ Gifts are discussed in greater detail *infra* notes 83-95 and accompanying text.

⁹ Indeed, to be technical, the putative testator has retained the equivalent of a general power of appointment over any property that may be disposed of pursuant to the validly executed but revocable will. For those unfamiliar with a general power of appointment, a general power of appointment allows the holder of the power to appoint the property to herself, her creditors, her estate, or the creditors of the estate or to any entity or individual the holder of the power selects. If the holder of the power can appoint to anyone of those four initial entities, the holder possesses a general power of appointment, which is essentially the equivalent of ownership in that the only thing that stands between the holder of a general power of appointment and absolute ownership is a piece of paper appointing the property. See DUKEMINIER & SITKOFF, *supra* note 7, at 796-98. If the holder of the power of appointment cannot appoint to any of those four entities but can appoint to any entity or individual other than those four, the holder has a special power of appointment—not absolute ownership—with different tax and other

Perhaps there is something about the ambulatory nature of a will that differentiates it from both the inter vivos trust and the completed gift.¹⁰ Maybe that explains why you can make irrevocable transactions via gift or irrevocable trust (completed present transfers), but not with respect to wills. In other words, with completed present transfers via gifts or irrevocable trusts, the donor loses dominion and control over the property that is either given or placed in the trust. Indeed, to accomplish a gift the donor has to have the requisite intent to make a *present* gift,¹¹ deliver that gift to the donee,¹² and the gift must be accepted by the donee.¹³

With inter vivos trusts, the settlor of the trust—the equivalent of the donee—must only have the requisite intent to create an irrevocable inter vivos trust and the court, employing its equitable powers, will enforce the terms of the trust. The absence of formalities and the focus on the trustee's intent and equity's enforcement of same means that one can make a completed transfer very formalistically (by gift) or informally with the requisite intent in trust.¹⁴ What is important to note, however, is that even with the absence of formalities, in order to create a valid inter vivos trust, the settlor must create a beneficiary (third party) or trustee who possesses an enforceable interest in the property. With respect to an irrevocable trust, once either or both the trustee or beneficiary comes into existence due to the creation of the trust, the settlor loses the power—that is, some dominion and control—over the asset because the assets in the trust are now governed by the terms of the trust and not the unfettered will of the settlor.¹⁵

important consequences.

¹⁰ Indeed, and quite to the contrary, I argue that it is instead the ambulatory nature of a will that makes it a perfect vehicle for irrevocability if that is what is intended by the putative testator. That thesis is spelled out in greater detail *infra* Part IV.

¹¹ Note that it can be a present gift of a future interest. See *Gruen v. Gruen*, 496 N.E.2d 869, 873–74 (N.Y. 1986).

¹² This is more complicated than it first appears given that not only can there be physical delivery of the gifted item, delivery can be satisfied by either constructive or symbolic delivery in many states. See, e.g., *Hebrew Univ. Ass'n v. Nye*, 223 A.2d 397, 399–400 (Conn. Super. Ct. 1966). These formal and functional requirements that must be met to establish a valid gift are addressed in greater detail elsewhere.

¹³ Normally a given if the gifted item has value.

¹⁴ The lack of formality inherent in the creation of irrevocable inter vivos trusts when compared to the formalities required to complete a gift is an historical product of the distinction between courts of law, with an almost rigid and laser-like focus on compliance with rules and process, and courts of equity that, not limited to such formalities, sought to achieve equity by carrying out the intent of the parties. See RESTATEMENT (SECOND) OF TRUSTS intro. note (AM. LAW INST. 1959).

¹⁵ With respect to revocable trusts, following the creation of same, the settlor should still be regarded as the absolute owner of the property, notwithstanding the existence of either or both an independent trustee or third-party beneficiary, because the settlor retains the power of revocation. See *Farkas v. Williams*, 125 N.E.2d 600, 607–08 (Ill. 1955). For general powers of appointment, see discussion *supra* note 9.

However, that relinquishment of dominion and control that occurs with either a completed gift or the establishment of a valid irrevocable inter vivos trust cannot be the demarcating factor with respect to this issue. Today the most popular estate-planning device is a pour-over will that designates a contemporaneously executed revocable trust as the taker of the will's residuary estate.¹⁶ Because revocable trusts are so easily amended and revocable, the trust with a will that pours over into it provides the putative testator with incredible and efficient flexibility in the disposal of her estate—flexibility and efficiency that is lacking with respect to the modification and revocation of wills.

Nevertheless, the important point is that the use of a revocable trust with a pour-over will has no practical effect on the settlor's assets until death and may also dispose of later acquired assets only upon death.¹⁷ In effect, the revocable trust with a pour-over will is synonymous with a revocable will; it creates the same ambulatory effect as a will. The fact that the putative testator or settlor of the revocable inter vivos trust with a pour-over will maintains complete control and dominion over the items subject to the revocable inter vivos trusts belies the fact that there is a distinction between revocable trusts and wills.¹⁸

Of course, one can make the argument that I have missed the point: That the fact that an irrevocable will does cause the putative testator to lose some control over the item is exactly what differentiates it from a revocable trust and a revocable will. But if that is the rationale for not allowing irrevocable wills, how are irrevocable trusts justified given that the donor or settlor does lose all or some control over the given or settled asset?

Moreover, the fact that the putative testator relinquishes control or dominion only in the future (upon death) is what makes a will different and legally distinguishable from either a completed gift or the execution of an irrevocable trust.¹⁹ The ambulatory nature of the will and its future effect are important from the putative testator's perspective. Does it necessarily follow, however, from these two attributes that a will should not be made

¹⁶ See Robert Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 654–56 (2014).

¹⁷ Robert J. Lynn, *Problems with Pour-over Wills*, 47 OHIO ST. L.J. 47, 48 (1986).

¹⁸ See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984).

¹⁹ That, however, makes little sense when one realizes that gifts of remainders that operate to limit the donor's dominion and control can be created, see *Gruen v. Gruen*, 496 N.E.2d 869, 873–74 (N.Y. 1986), and that irrevocable trusts are typically structured to limit the settlor's loss of dominion and control over the res and corpus of the trust until the settlor's death, which will take place in the future.

irrevocable? If, as I demonstrate, that the execution of the irrevocable will does not limit the donor's future dominion and control over the assets disposed of in the irrevocable will,²⁰ then what is the distinction between a revocable will or trust and an irrevocable will, especially if they are benefits to be gained by the use of an irrevocable will?²¹ Indeed, these benefits must be important because if I can document that an irrevocable will is synonymous with a revocable will or trust with respect to the putative donor's control and dominion over his or her present or future assets, I must also demonstrate that irrevocable wills provide the putative testator with options (benefits) not created by either or both the use of revocable trusts and wills. If not, there is truly no need for a superfluous document.

Again, then, why can one opt between revocable and irrevocable trusts but be denied the option of executing the testamentary counterpart of an irrevocable trust—an irrevocable will, especially if that irrevocable will looks and acts remarkably like a revocable trust? Maybe the answer is simple: There is no need for such a document in modern conveyancing and estate planning. But that cannot be correct, right? There is no empirical evidence to support that contention nor is it a plausible argument given that the very unavailability of an irrevocable will may prejudice the demand for such a document. Furthermore and more importantly, even if it can be proven that there is no pent-up demand or need for an irrevocable will, that lack of demand does not answer the question of whether it should be licit to create an irrevocable will?²²

To the contrary, the fact that some trusts and all valid inter vivos gifts are irrevocable demonstrate that irrevocable donative transactions are plausible and normatively desirable. More importantly, the fact that irrevocable trusts can be established in which the settlor retains all powers to use and consume the res of the trust until the time of the settlor's death,²³ as well as the fact that gifts of remainders can be made by a donor retaining a life estate in the property, lends credence to the claim that the settlor of the irrevocable trust and the creator of the remainder wants to precommit to

²⁰ This is addressed in greater detail *infra* Part III.

²¹ These benefits are addressed *infra* Part IV.

²² Case in point: With the proliferation and use of trusts for estate planning, there is little need or space for legal life estates (that is, life estates granted to the life tenant instead of established in a trust by which the trustee holds legal title and the holder of the life estate has an equitable interest in a life estate). Nevertheless, even though legal life estates are disfavored and of little or no utility, they are legal and allowed.

²³ See *infra* notes 105–108 and accompanying text for discussion of irrevocable trusts.

leave an asset to an individual upon the settlor or donor's death (assuming the asset is not consumed prior to that death).²⁴

Indeed, I posit that there are many situations in which individuals engage in precommitment strategies to bind themselves to take future actions (make future donative transfers) that if they were later free to cancel or negate, they would do so. An irrevocable trust or an inter vivos gift with a retained life estate in the donor can be viewed as just such a precommitment strategy. Further, these types of precommitment strategies are used quite often by the present self to irrevocably commit the future self to some action that the future self would not take if left free to do so.²⁵

Which again raises the question that is the seminal issue of this Article: Can or should wills be made irrevocable *à la* trusts? Is there any good normative reason why this should not be the case? In other words, does current law and practice precluding the use and exercise of an irrevocable will simply represent an historical anachronism that no one has had the temerity to address? Or to put in practical terms: If a putative testator executes what is explicitly drafted as an irrevocable will, can that will later be revoked or must a court treat it like an irrevocable trust or gift and bind the putative testator to its terms?

To answer these and related questions, this Article is divided into three additional brief parts and a concluding fifth. Part II addresses the historical development of wills, noting that wills were originally irrevocable and concluding with current law that apparently precludes the use of irrevocable wills by not providing for irrevocable wills by statute or decision.²⁶ One question that remains unanswered in Part II is why the development of the revocable will apparently precluded the use of irrevocable wills since the existence and use of an irrevocable will is not inconsistent with the use and prevalence of revocable wills.²⁷ In other words, it makes sense that

²⁴ Depending on the terms of the irrevocable trust and the nature of the gift, the settlor or donor, as the case may be, can conceivably retain the right to consume the subject of the trust or gift, thereby effectively negating the trust or gift. This, I argue, is akin to the power that the will maker would retain if irrevocable wills are legalized given the ambulatory nature of wills generally. See *infra* Part IV.B for further discussion of this point.

²⁵ See *infra* Part III for a discussion of precommitment theory and strategies employed pursuant to that theory.

²⁶ I cannot cite to a negative, so there is no cite proving that there is no statute or case that expressly approves of revocable wills.

²⁷ To be clear, one testator cannot execute a will that is both revocable and irrevocable in the same instrument just like one cannot execute an irrevocable and revocable trust in the same instrument. However, the option of executing an irrevocable trust does not preclude the option of having a revocable trust just like the option of executing an irrevocable trust does not preclude the testator from executing a revocable trust even in those jurisdictions in which the default rule favors an irrevocable trust. See

revocable wills would become an option—a favored option—for will makers. Part II addresses but does not answer the mystery of why irrevocable wills disappeared since it is not a given that permitting revocable wills precludes using irrevocable wills.²⁸

Part III then addresses other donative transfers, that is, inter vivos gifts, gifts causa mortis, revocable trusts, irrevocable trusts, and revocable wills, establishing a taxonomy of donative transfers to examine their attributes and compare their respective roles in donative transactions. By comparing these currently allowed donative transactions, I hope to support my thesis that there is no logical reason why irrevocable wills should not also be allowed as a donative transfer option for a capable or legally competent will maker. Given both testamentary freedom and personal autonomy,²⁹ an owner of an asset (a putative future will maker) should be free to commit himself or herself to a testamentary transfer that is irrevocable as well as one that is revocable.

Part IV briefly addresses anew the need for and benefits provided by irrevocable wills. By drawing on economic analysis of the benefits gained from precommitment strategies, I contend that legitimating irrevocable wills can provide individuals with meaningful donative options that are currently unavailing. Thus, I contend that testamentary freedom is limited in a world in which irrevocable wills are not an option. To do that, I demonstrate that irrevocable wills are not synonymous with or the functional equivalent of irrevocable trusts. Finally, I also demonstrate that even if irrevocable trusts are viewed as the functional equivalent of irrevocable wills (which they are not), allowing irrevocable trusts but not irrevocable wills is likely to benefit a segment of the population that utilizes attorneys for estate planning, but harm those who choose not to engage in sophisticated estate planning.

More importantly, if indeed irrevocable trusts are the functional equivalent of irrevocable wills, it begs the question of why irrevocable wills are not allowed? With respect to the benefits created by irrevocable wills, Part IV then briefly details a limited number of scenarios in which an irrevocable will is optimal to any other purported donative transfer in accomplishing the will maker's objectives at the time of execution of the irrevocable will. These scenarios mostly involve a competent will maker who may later become incompetent; the use of an irrevocable will creates what I characterize as a "safe harbor," insuring that the testator's competent

supra note 2 and accompanying text for a discussion of default rules and their application to trusts.

²⁸ Alas, this Part just illuminates the mystery of the disappearance of irrevocable wills. It does not provide an answer to the question of when and why they disappeared.

²⁹ See *supra* note 7 and accompanying text.

wishes are ultimately enforced.³⁰ This Part, then, neatly and effectively documents the estate planning gap created by the lack of irrevocable wills and how irrevocable wills fill that gap.

At the end of Part IV, I flip the analysis to address whether the costs created by an irrevocable will outweigh the benefits provided thereby. Hence, I approach these issues from a slightly different perspective, asking what harm is occasioned by creation of an irrevocable will. Indeed, and perhaps this should have been the first question, is there a verifiable downside to allowing the creation and use of irrevocable wills? Perhaps that is why no jurisdiction currently offers irrevocable wills as an option.

Given the ambulatory nature of the will, I conclude in Part IV that the predominant objection to irrevocable wills (inflexibility and the potential creation of improvident or ungrateful legatees) is specious at best. Examining again the range of donative transfers, I conclude that a donor can determine the finality or inflexibility of a contemplated transaction (i.e., the level of commitment at the time the transaction occurs) in a range from totally committed through a completed gift, to totally uncommitted by using revocable trusts or wills. Irrevocable wills provide a commitment option *à la* a completed gift with some of the flexibility of revocable trusts. As such, I contend that it expands testamentary freedom consistent with our current norms of promoting testamentary freedom.

II. FROM IRREVOCABLE TO REVOCABLE: A BRIEF HISTORY OF THE EVOLUTION OF WILLS

The evolution of will law, or better yet, testamentary transfers per common law is not simple and definitely not linear. As is discussed in more detail below, there are three different time periods or epochs that imposed different rules or requirements for the testamentary transfer of property and, relatedly, inter vivos transfers of real property.³¹ However,

³⁰ In brief, only a competent testator can revoke a previously executed will. However, since certain presumptions are employed by the court following the testator's death if the previously executed will is not found among the testator's paper, it is possible that an incompetent testator may have destroyed his or her will with no intent, legal or otherwise, to do so. In this scenario, without an irrevocable will, the sane and competent testator's estate plan may be invalidated, causing the testator to die intestate. This is discussed further, *infra* Part IV.

³¹ My limited focus on inter vivos transfers is solely to highlight how restrictions on inter vivos transfers will have an impact on the development of testamentary transfers. Thus, the prohibition wills and the requirement of primogeniture in the second epoch of English history no doubt played a significant role in the creation and utilization of the "use" by testators to avoid these restrictions. For a discussion of the "use" and the elimination of same by the execution of the Statute of Uses in 1535, see

these three time periods do not logically flow from one to the other representing a natural evolution from, say, very formal transfers, to less formal transactions, and then to an epoch or era of no requirement of formalities with a focus on testator intent instead.³² Nor does the evolution of testamentary transfer law represent a cyclical evolution in which similar themes or doctrines are enhanced through the development of the common law to adapt to changing circumstances as England evolved from an agrarian to an industrial society.³³

Instead, and for reasons that will remain largely unexplained as beyond the ken of this Article, the three distinct periods are: (1) the Middle Ages, or Medieval Period, before William the Conqueror's Conquest of Normandy in 1066;³⁴ (2) the period after the Conquest, but before the execution of the Statute of Uses in 1535 and the Statute of Wills in 1540;³⁵ and, finally, (3) the post-feudal period after the execution of the two aforementioned statutes, leading ultimately to the promulgation of the Uniform Probate Code and its subsequent enactment in whole or in part by most jurisdictions.³⁶

In brief, and as addressed in detail below, the first epoch allowed testamentary transfers with little formality and provided significant testamentary freedom, especially for the upper and royal classes. During the second epoch, testamentary freedom was severely restricted due to feudal requirements and limits on transferability imposed by law courts and the Crown. Finally, during the third and last epoch, testamentary freedom is expanded but with the cost of increased formalities that were absent in the first epoch until Uniform Probate Code § 2-503 was enacted.³⁷ The Uniform Probate Code, with its focus on the testator's intent in determining

infra notes 97–98 and accompanying text.

³² The focus on testator intent to the exclusion of requiring formalities is the approach taken by the Uniform Probate Code § 2-503 (amended 2010), which has been adopted in the vast majority of states.

³³ See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–80 (1988) (positing a theory in which the common law evolves to produce “crystal,” or clear rules, from “mud” rules, or rules that are less determinate); see also Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79 (2008) (proving Professor Rose's theory by applying it to the evolution of the caveat emptor doctrine).

³⁴ Broadly speaking, the Middle Ages lasted from the fifth century to the fifteenth century. Hence, I am splitting what is considered the Middle Ages into two distinct parts: pre-1066 and post-1066. Given the changes that occurred in England after the Conquest of Normandy, I think it is imperative and correct to divide this roughly thousand-year span into two separate epochs.

³⁵ The Statute of Uses and the Statute of Wills are discussed *infra* notes 41–44 and accompanying text.

³⁶ See Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2267–68 (2015).

³⁷ UNIF. PROBATE CODE § 2-503 (1990) (amended 2010).

whether a will is valid rather on will or testamentary formalities like witnessing and attestation, represents the culmination of the evolution of probate law with an emphasis of discerning and enforcing testator's intent.³⁸

Although the almost uniform initial reaction to the concept of irrevocable wills is negative, most are surprised to learn that wills, as originally conceived and used in the first epoch of the Middle Ages, were explicitly irrevocable. Modern wills are direct descendants of an inter vivos transfer known as "post-obit" conveyance and its cousin the "cwide." Somewhat confusingly and contradictorily, both post-obit and cwide testamentary transfers were inter vivos conveyances, and because they were also inter vivos conveyances, they were also deemed irrevocable as such.³⁹

To understand the inter vivos post-obit and cwide testamentary transfers, resort must be made to ancient and medieval Anglo-Saxon law and customs. First, until the mid-fifteenth century with the enactment of the Statute of Wills, Englishmen did not have the legal right to dispose of property pursuant to a will.⁴⁰ In particular, at the time that the post-obit and cwide testamentary transfers developed, real property was not transferred either by deeds or via wills. Those developments came much later with the passage of the Statute of Uses in 1535 that made it possible to convey property pursuant to a bargain and sale deed,⁴¹ and the Statute of Wills in 1540, which made it possible to effectuate valid testamentary transfers.⁴² Indeed, deeds were not required for the transfer of real property until the passage of the Statute of Frauds by the English Parliament in 1677.⁴³ Prior to 1535 and the Statute of Uses and after the Normandy conquest, land was transferred pursuant to a ceremony denominated feoffment with livery of seisin.⁴⁴

Without going into too much unnecessary historical detail, feoffment of livery of seisin required the grantor to deliver seisin to the grantee by some symbolic act like handing over a clod of dirt taken from the property to be

³⁸ Note that the promulgation of the doctrines of substantial compliance and harmless error represent attempts to reach this result.

³⁹ Orrin K. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96, 101 (1919).

⁴⁰ FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 315 (London, Cambridge Univ. Press 2d ed. 1898).

⁴¹ JESSE DUKEMINIER ET AL., PROPERTY 221 (7th ed. 2010).

⁴² POLLOCK & MAITLAND, *supra* note 40, at 315.

⁴³ The Statute was entitled "An Act for the Prevention of Frauds and Perjuries." 29 Car. II. c.3, 8 Stat. at Large 405 (1677). *See also* 2 ARTHUR CORBIN, CORBIN ON CONTRACTS § 275, at 3 (1964); 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 380 (2d ed., rev. 1937)

⁴⁴ *See* POLLOCK & MAITLAND, *supra* note 40, at 82–83.

transferred.⁴⁵ Moreover, the transfer, when made, was irrevocable. This fact, coupled with the prevalence of primogeniture⁴⁶ and universal succession,⁴⁷ meant that if an individual died owning property, he could not direct its disposition by will or other testament,⁴⁸ and it would descend to certain individuals, notwithstanding the intent of the owner that it descend to someone else, or to the Crown or one of the Crown's minions.

However, before feoffment with livery of seisin was required to validate the transfer of real property, it was possible to make a transfer of an interest without going to the land and symbolically transferring a clod of dirt or a twig to represent the transfer. The absence of this formality, surprisingly enough, created the opportunity for the post obit and cwide testamentary transfers predating the Statute of Wills by which the grantor could make a transfer that had a testamentary effect via an inter vivos conveyance and yet retain an interest in the land.

The post obit and cwide transfers are now little known and little understood, but their use and creation predating the requirement of livery of seisin may have been very important ultimately causing, in part, the development of the requirement of livery of seisin. Just as importantly and as will be explained momentarily, the post obit testamentary transfer is the ancient precursor for a vested remainder or reversion and may have served as a fundamental building block that subsequently created the system of estates in land that employs future interests, which are today ingrained in the law and essential to modern estate planning.⁴⁹ In addition, the historical

⁴⁵ See *id.*

⁴⁶ See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 399–400 (2006).

⁴⁷ Universal succession means that upon the death of the owner of property, real and personal, to which primogeniture does not apply, his heirs (typically the spouse and children of the decedent) became the owner of the property without the necessity of a will or any other type of conveyance. See Julius A. Leetham, *Probate Concepts and Their Origins*, 9 WHITTIER L. REV. 763, 768 (1988).

⁴⁸ Testament in ancient law means any kind of document of transfer or conveyance and was not used to refer exclusively to wills. "The word *testamentum* was laxly used; almost any instrument might be called a testament; the ordinary landbook which witnessed a conveyance by one living man to another living man was a testament." POLLOCK & MAITLAND, *supra* note 40, at 317 (footnote omitted).

⁴⁹ As one author writes:

When analyzed from the point of view of property with which it dealt, the *post obit* gift assumes the qualities of several modern transactions; for example, the settlement, the mutual gift between spouses, the reversion and the release are to be found among these acts. But all find their place within the general category of the *post obit* gift because in each case donation was made by formal contract and the gift was not completed until the death of the person or persons to whom the property was reserved.

role of cwide transfers is not insignificant, and one can make a plausible argument that the cwide looks remarkably like the predecessor to an irrevocable inter vivos trust in some respects.⁵⁰

Predating the Battle of Normandy in 1066, the post obit transfer was used in the Middle Ages to allow the owner of property to make an irrevocable testamentary transfer of his (remember this was the Middle Ages and most transferors and transferees were undoubtedly male) property to another person (his spouse, for example) upon his death. These remarkably flexible transfers had elements of both gift and contract in that clearly the owner of the property was making a donative and testamentary transfer upon the death of the designated person (usually the donor)—the donative aspect of the transfer—but contractual (that is the inter vivos portion of the act) at the time the promise was made, binding the donor to complete the transfer at his death and to do nothing before the donor's death to alienate or diminish the gift in any way.⁵¹ Indeed, some scholars assert that these transfers, even though donative in part, were enforced as legal acts of contracts and contracts that were completed after death of the donor.⁵² As a result, some scholars have concluded that post obit transfers were best characterized as contractual gifts concluding with a testamentary transfer after the donor's death (hence its surprising and perhaps confusing characterization as both an inter vivos and testamentary transfer).⁵³

Indeed, the methodology employed to create these gifts was both unilateral and bilateral, mimicking modern contractual transfers. In the analogous unilateral transfer, the donor could simply bind himself to make the testamentary gift without receiving a return promise from the donee. Although there is some debate about whether the donee had a present interest in the property as a result of the unilateral promise, most concluded that there was an immediate transfer of title to the donee of the property with a reservation of use in the donor per the terms of the gift even if title

MICHAEL M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY* 31 (1963) (footnotes omitted).

⁵⁰ The cwide reminds me of a trust because it contains multiple bequests and directives that can be altered or revoked depending upon subsequent events, and often a third-party intermediary was used to carry out the wishes of the donor following the donor's death. For a discussion of the revocable and irrevocable character of the cwide and its multifaceted disposition of the donor's property, see *infra* notes 62–66 and accompanying text. For a discussion of the use of third parties to carry out the terms of the cwide and the use of a *mund* whose role it was to protect the cwide and enforce the completion of the donor's gift, see SHEEHAN, *supra* note 49, at 44.

⁵¹ The post-obit gift as well as the cwide is explained in great historical detail in SHEEHAN, *supra* note 49, at 24–25.

⁵² *Id.* at 25–26.

⁵³ *Id.* at 27.

was not changed in the landbooks for property.⁵⁴ The transaction was most succinctly described as follows:

It was rather a contractual promise that delivery of a property would be made after the donor's death. The contract was made by a public formal act and the purpose of the formality was to impose a liability that was probably personal as well as proprietary.⁵⁵

Although a post-obit gift could be made unilaterally by the donor, many post-obit gifts were bilateral in nature, requiring a return promise or service from the putative donee. Quite often, this return promise was viewed as a counter-gift, or *launegild* in primitive Germanic law and society, and was used to make permanent and enforceable a donation that would not be such if it was merely a gratuitous gift promise.⁵⁶ The required counter-gift might be something as ephemeral as prayers for the donor's soul.

Because of the unilateral and bilateral nature of the post-obit gifts, two different types of procedures developed to effectuate them. In the simple unilateral transfer, the donor promised to make the gift when an event occurred (normally the death of the donor), and the donee acquired ownership of the property while the donor retained possession until death.⁵⁷ In the second type of post-obit transfer, the donor conveyed a complete and immediate gift to the donee in the first transfer, and the donee immediately reconveyed the property for the use of the original donor for one or more lives.⁵⁸ Eventually the two different forms of transfer became confused, and many contend that the distinctions between the types of forms of the transactions disappeared.⁵⁹

Irrespective of the form of the transfer, it is beyond cavil that these donative transfers were contractual in nature, binding the donor to complete the gift per the terms of the transaction and enforceable against the equivalent of the donor's estate. These post-obit gifts were also extraordinarily flexible:

Very frequently the donor [of the post-obit gift] specifically protected his own rights by reserving the use of the property for one or several lives. The reservation might be for the life of the donor himself; for the lives of

⁵⁴ *Id.* at 28–29.

⁵⁵ *Id.* at 29–30 (footnote omitted).

⁵⁶ *Id.* at 28.

⁵⁷ *Id.* at 26.

⁵⁸ *Id.*

⁵⁹ *Id.* at 26–27.

the donor, his wife and children; until the death of the last member of a group; or for an indefinite time.⁶⁰

What is important for the thesis of this Article is the irrevocability of the transfers representing the post-obit gift. Most post-obit gifts contained a clause (called the anathema clause) stating that the donation may not be revoked by the donor. Hence, the post-obit gift was considered irrevocable unless the donor expressly retained the right to revoke the gift (technically speaking, made it defeasible) upon the happening of certain conditions like, for example, the birth of a son or the failure of the donee in a bilateral agreement to perform his promise.⁶¹

A related inter vivos act and testamentary transfer was the *cwide*, which usually included several post-obit gifts. The difference between the *cwide* and the post-obit transfer, however, was that the *cwide* conveyed multiple gifts of the donor's property and could convey all of an individual's property among several beneficiaries. Indeed, the *cwide* had an ambulatory character that allowed the donor to convey or distribute property acquired after the act and before the donor's death.⁶² Being a complicated and multifaceted transaction conveying multiple interests in several properties to several beneficiaries, the *cwide* was used primarily by the upper class and royalty in the Middle Ages. Indeed, the *cwide* was normally made with the permission and in the presence of the King.⁶³

Because the *cwide* was a much more complicated act than a post-obit gift, with many more moving parts and contingencies that could affect the disposition of the property covered by the *cwide*, the *cwide* contained both irrevocable and revocable gifts, but gifts that were revocable upon the occurrence or non-occurrence of specific events (again, technically speaking a defeasible gift).

Thus different bequests within a *cwide* might have different degrees of irrevocability. Sometimes a *cwide* repeated the mourning gift to the testator's wife or a contract already brought to completion by delivery, and these transactions were to stand even against forfeiture to the King by the testator. Other bequests were post-obit gifts, irrevocable bilateral contracts completed only at the death of the donor and subject to the possibility of defeat where the testator's estate was seized by the King. Yet other bequests were donations by means of an intermediary, and some, perhaps,

⁶⁰ *Id.* at 25 (footnote omitted).

⁶¹ *Id.* at 28.

⁶² *Id.* at 39.

⁶³ *Id.* at 40.

were simple promises of a future gift; it is quite possible that they were revocable at least in cases of special need.⁶⁴

But even though certain gifts in the testator's *cwide* may be revocable upon the happening of certain conditions, by and large the *cwide* was treated as an irrevocable contractual act created by the performance of public formalities that created a donation with a delayed effect, effective at the death of the testator.⁶⁵ These *cwides* created enforceable rights in property in the beneficiaries that they could employ in the future to obtain the property. The *cwide*, then, with its ambulatory character, multiple gifts, and revocable parts, looks very much like a modern *inter vivos* trust or will—yet a will or act that was deemed irrevocable (except as to the expressly retained powers of revocation) after the performance of the public acts creating it.

Eventually, the post-obit and *cwide* testamentary transfers were eliminated from the common law in England by the requirement of livery of seisin for the transfer of real property.⁶⁶ Once the courts insisted that there could be no transfer of real property without livery of seisin, the donor could not transfer the equivalent of a remainder to the donee without making two transfers: First, the donee must be enfeoffed through the livery process; then, the donee would have to re-enfeoff the donor as a life tenant.⁶⁷

Thus, although it is hard to square with the evolution of property law, under common law, which typically has evolved from more formal to less formal, when post-obit and *cwide* transfers were allowed (that is, before the requirement of livery of seisin to effectuate transfers of land), it was easier to transfer land because there were laxer notions about what was required for seisin and subsequent transfer.⁶⁸ The requirement of livery of seisin to make a transfer of real property, however, no doubt played a role in the development and ultimately the enactment of the Statute of Uses in 1535 by which *inter vivos* transfers could also be made without livery of seisin and, subsequently, the Statute of Wills in 1540 by which property could be transferred by testament and without livery of seisin.

As noted previously, by the mid-sixteenth century, wills and deeds were both validated and common. What is interesting to note is that, by this time, wills had many of the attributes contained in the modern will. By that

⁶⁴ *Id.* at 46.

⁶⁵ *Id.*

⁶⁶ *See supra* notes 44–45 and accompanying text.

⁶⁷ POLLOCK & MAITLAND, *supra* note 40, at 318.

⁶⁸ *Id.*

I mean, they were hereditative and revocable at common law.⁶⁹ The mystery, of course, is why were all wills made revocable and no option was given to putative testators to make wills irrevocable when the Statute of Wills was enacted? In other words, why did not some subset of wills retain the irrevocable character of the post-obit transfer or the *cwide*? The answer may lie, in part, with deathbed transfers which were used at the same time that post-obit and *cwide* transfers were used.

My brief foray into historical research reveals that the upper and royal classes used post-obit gifts and the *cwide* to transfer property upon death. Those not as fortunate used what we would today refer to as deathbed transfers to dispose of their property. These deathbed inter vivos transfers were made in contemplation of death and no doubt served as the precursor for gifts *causa mortis*, which are discussed later.⁷⁰

It is reasonable to assume that the modern will evolved from the practice of deathbed transfers via the last confession and was made only when the testator felt that death was near.⁷¹ If, however, the putative testator did not die as anticipated, questions arose regarding the validity of the will and the dispositions made pursuant to the same. The revocable nature of the will was a response to this situation, allowing the now revived putative testator to revoke the previously enacted will and retain possession and ownership of the property disposed of pursuant to the now revoked will.⁷²

Consequently, at the time that the post-obit and *cwide* transfers were used by the wealthy to make both irrevocable (post-obit and *cwide*) and revocable testamentary transfers (*cwide*), revocable wills developed to allow those not as fortunate to make their own testamentary transfers. That power of revocation reflected the fact that wills were not made until shortly before the testator's demise and that in some cases the putative testator did not die as contemplated. As post-obit and *cwide* gifts were banned by the requirement that property be conveyed by livery of seisin,⁷³ and then by both the Statute of Uses and the Statute of Wills in the sixteenth century which, respectively, allowed the use of deeds and trusts (*inter vivos*) and

⁶⁹ Surprisingly enough, after the enactment of the Statute of Wills in 1540, wills were not expressly ambulatory in England until 1837. The reasons therefore are discussed *infra* notes 115–118 and accompanying text.

⁷⁰ See *infra* notes 89–95 and accompanying text.

⁷¹ POLLOCK & MAITLAND, *supra* note 40, at 340.

⁷² *Id.*

⁷³ See *supra* notes 45–50 and accompanying text.

wills (testamentary) to pass real and personal property upon death,⁷⁴ the revocable nature of the will seems to be taken as a given with little discussion of its justification.

What seems to have been overlooked, however, is the loss of irrevocable testamentary transfers by will, which is what was accomplished by the post-obit and cwide transactions or acts. No new sort of testamentary transfer arose to replace these two transactions, and there is no authority for the position that the elimination of these two transfers was specifically designed to eliminate irrevocable testamentary transfers. Instead, the rise of primogeniture and the feudal ownership of land after the Norman Conquest in 1066 were the primary reasons why the cwide and post-obit transfers became obsolete.⁷⁵

Although it is hard to prove a negative, what cannot be shown, because there is no modern authority or discussion of the issue, is whether there was ever any objection or opposition to irrevocable wills that caused them to be banned or, at the very least, disfavored after the execution of the Statute of Wills.⁷⁶ My best guess at this point is that there was no intent to ban irrevocable wills and that the question was never really addressed by the common law courts in England after the Statute of Wills given their view of how wills operated as the written equivalent of the last confession used with deathbed transfers before the enactment of the Statute of Wills.

What is even more important, and also unclear from my brief foray into the historical development of wills, is when the option to make wills irrevocable disappeared and why it disappeared with such finality. Although there appears to be no law or edict that precludes irrevocable wills, there is concomitantly no law, edict, or authority legitimating irrevocable wills. Indeed, there are no cases either challenging or validating irrevocable wills, and none can be found in which the will maker attempted to make an irrevocable will that is later invalidated.

The only “authority” supporting the invalidity of irrevocable wills is the very definition of “wills,” which includes as an inherent feature its revocability. Section 2-507 of the Uniform Probate Code provides that wills can be revoked either by a subsequent writing or a physical act.⁷⁷ All

⁷⁴ See Statute of Uses 1535, 27 Hen. 8, c. 10 (Eng.); Wills Act of 1837, 7 Will. 4 & 1 Vict., c. 26, (Eng.).

⁷⁵ See C. Douglas Miller, *Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 196–97 (1991).

⁷⁶ This is an issue best examined by a legal historian, which I am not.

⁷⁷ See UNIF. PROBATE CODE § 2-507(a) (amended 2010). That provision reads, in part, as follows:

United States jurisdictions have adopted section 2-507, meaning that wills are inherently and irredeemably revocable in all such jurisdictions.⁷⁸

Consequently, although I cannot demonstrate when the option of irrevocability was eliminated from wills, it is beyond cavil that the modern will possesses as an essential attribute its revocability, which apparently cannot be limited in any United States jurisdiction.⁷⁹ And although one can make a contract to make a will and later have that contract enforced against the promisor's estate, that contract does not make the will irrevocable.⁸⁰ Such a contract simply creates contractual rights benefitting the promisee that the promisee may later waive or enforce. The testator having made a contract can still revoke the will.

Given that the primary motivation for much of probate law is freedom of testation, i.e., to give effect to the will of a capable will maker,⁸¹ that lacuna is odd and puzzling. That question is even more pronounced given the validity of both inter vivos transfers and the inter vivos creation of irrevocable trusts, subjects to which I now turn.

III. A TAXONOMY OF VOLUNTARY DONATIVE TRANSACTIONS: WHITHER THE IRREVOCABLE WILL?

Although a separate course is devoted to testamentary transfers (that is, transfers that occur after death) typically designated in most law schools as Trusts and Estates, it is often overlooked that a testamentary transfer via a will is simply a type of donative transfer that takes place upon the death of

(a) A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or

(2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing or canceling is a "revocatory act on the will", whether or not the burn, tear, or cancellation touched any of the words on the will.

Id.

⁷⁸ DUKEMINIER & SITKOFF, *supra* note 7, at 215.

⁷⁹ Again, one can achieve the practical effect of irrevocability by executing a will and then losing the capacity to revoke the will because of illness or some other exogenous cause. That type of irrevocability could hardly be considered voluntary and is not the type of irrevocability I seek to promote as a viable option for will makers in this Article.

⁸⁰ The "irrevocability" of a contract to make a will or not to revoke a will is discussed *infra* notes 130-131 and accompanying text.

⁸¹ For further discussion of this point, see *supra* notes 7-9 and accompanying text.

the donor of the property.⁸² As such, it is simply one method of making a donative transfer among many including, of course, inter vivos gifts.⁸³ And there are many methods of making donative transactions, ranging from the simple to the complex.

First, of course, are inter vivos gifts that simply require that the donor intend to make a gift, that the donor effectuates delivery of the gift to the donee,⁸⁴ and that the gift be accepted by the donee.⁸⁵ Once these requirements are met, the gift becomes irrevocable. Consequently, the oft-repeated statement that gifts are not enforceable is incorrect legally. Uncompleted gifts—that is, gifts that are either not delivered, delivered without the requisite intent to make a present gift, or gifts that are delivered with the requisite intent and unaccepted—are not enforceable.

Gifts, however, that are completed are enforceable by the courts and cannot be made revocable simply because they are gifts.⁸⁶ These gifts are typically not will substitutes and are made for a variety of reasons including, of course, for love, gratitude, altruism, reputational enhancement and, most importantly, compulsorily and reciprocally as a matter of social

⁸² Without going into too much detail, which would detract from the thesis of this Article, donative transfers differ from bargained-for exchanges or “contracts” in that they lack that mystical glue of “consideration.” Of course, the concept of consideration is itself a tautology and the subject of reams of articles and books. See, e.g., Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. U. L. REV. 191 (2013). For the purposes herein, contracts are agreements that are enforceable by the state, whereas donative transfers are deemed to be unenforceable given that they lack consideration. For further illumination of these issues, see generally Johnson, *supra* note 4.

⁸³ Although inter vivos gifts are made while the donor is alive and require these three elements—intent on the part of the donor to make the gift, delivery of the gift (this one is more complicated than it appears to be), and acceptance on the part of the donee (this one is easy and is usually presumed if the object of the gift is valuable)—they share much in common with testamentary donative transactions (wills) in that most if not all litigation involving gifts, even inter vivos gifts, involves a deceased donor. This is so because if the putative donor is alive and professes not to have made a gift, that would destroy the intent necessary to validate a gift. Hence, it is impossible to find a contested inter vivos gift case in which the donor is alive. See generally Johnson, *supra* note 4. Thus, the proof problems associated with validating a will—the formalities associated with the execution of the will—are similar to the proof problems associated with proving the validity of an inter vivos gift once the donor is dead. Indeed, given the channeling function created by the execution of the Wills Act and the safe harbor it provides if the will maker complies with its requirements, it is somewhat easier to make a valid will (easier in the sense that the will maker can rest assured that he or she has made a valid and enforceable will free from successful challenge post-mortem) than a valid inter vivos gift that will not be successfully contested.

⁸⁴ See, e.g., *Gruen v. Gruen*, 496 N.E.2d 869, 872 (N.Y. 1986).

⁸⁵ Like with wills and other forms of property, no one can be forced to accept property against his or her wishes. With respect to wills, the legatee has the right to disclaim. See UNIF. PROBATE CODE § 2-1105(a) (amended 2010).

⁸⁶ See *Gruen*, 496 N.E.2d at 872, *supra* note 11.

norms.⁸⁷ What is important for my thesis is that these completed gift transactions, clearly allowable in all jurisdictions, have an irrevocable impact on the economic status of the donor but are in no way policed, limited, or prohibited in any extra-legal or extraordinary way.⁸⁸

A second type of gift more akin to a will substitute is a gift *causa mortis*, or a gift made in contemplation of and in expectation of immediate approaching death.⁸⁹ In order to make a valid gift *causa mortis*, the donor must satisfy the same three requirements as with a valid *inter vivos* gift with the additional requirement that the donor must make the gift in contemplation of death. Indeed, the delivery requirement for gifts *causa mortis* is even more pronounced than *inter vivos* gifts.⁹⁰

The major distinction between gifts *inter vivos* and gifts *causa mortis* other than the contemplation of death requirement is that gifts *causa mortis* are revocable if the donor survives the anticipated peril.⁹¹ Although states differ on whether the revocation occurs automatically (the majority view) or whether the donor must intend to revoke the gifts *causa mortis* after surviving the contemplated peril (the minority view),⁹² gifts *causa mortis* are a species of revocable gifts.

What this means is that there are two types of valid gift transactions: irrevocable gifts (*inter vivos* gifts) and revocable gifts (gifts *causa mortis*). And although the basis for revocation of the latter type of gift is somewhat limited, it is limited in a manner that suits the nature of the transaction.⁹³ In

⁸⁷ See, e.g., RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 15 (2009).

⁸⁸ My point is that a competent donor can lawfully impoverish himself should he choose to do so, even though that impoverishment is irrational and suboptimal. However, if the gift is made to impoverish the donor so that he or she qualifies for a governmental benefit like Medicare or Medicaid, the gift may be revocable given certain conditions. See 42 U.S.C. § 1396p(c) (2012).

⁸⁹ *DUKEMINIER ET AL.*, *supra* note 41, at 173.

⁹⁰ As one treatise puts it:

Because the courts see upholding gifts *causa mortis* as undercutting the Statute of Wills, traditionally they have more strictly applied the requirements for a valid gift *causa mortis* than for a gift *inter vivos*. They have also placed restrictions on gifts *causa mortis* not applicable to *inter vivos* gifts. For example, if the donee already is in possession of the property, there must be redelivery to effect a valid gift *causa mortis* but not if the gift is *inter vivos*.

Id.

⁹¹ Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 846 (2014).

⁹² *Id.* at 846 n.236.

⁹³ Also, it is very similar to the deathbed transfer, which was used before the enactment of the Statute of Wills in that it too was revocable if the putative testator did not die as contemplated.

other words, inherent in the intent of the donor of the gift *causa mortis* is the belief in impending death that motivates the gift. Hence, it makes sense that should death not occur as contemplated the gift should fail (be revoked) because the requisite intent is lacking. The donor has the option of making an irrevocable gift, and in limited circumstances (when the donor is faced with impending death⁹⁴), the donor can make a revocable gift.⁹⁵

Trusts clearly come in two flavors as well: irrevocable and revocable. Before I address the revocability of the trust or the absence of same, a brief primer on trusts is warranted for those unfamiliar with these flexible and important equitable creations. A trust is created when the ownership of property, real or personal, is bifurcated into two distinct types of ownership interests: legal and equitable ownership. The trust, which dates back to the Statute of Uses in 1535⁹⁶ and looks remarkably similar to the *cwide* discussed above,⁹⁷ is in reality a creation of the bifurcation of the common law courts into the courts of law and the courts of chancery, or the courts in equity.

Without going into too much historical detail, the Statute of Uses was enacted in 1535 to execute uses so that legal seisin shifted from the feoffee to uses (the person holding legal title) to the *cestui que use* (the equivalent of the beneficiary, or the person holding equitable title). In plain English, when a grantor executed a use, he was giving the property to another person to hold for the benefit of a third party (the intended donee). This was done to, among other reasons, evade taxes, avoid the prohibition on wills, evade feudal duties, and to avoid the rule of primogeniture. In order to collect taxes and enforce feudal tenure, King Henry VIII forced the English Parliament to enact the Statute of Uses, which shifted legal ownership of the property to the intended beneficiary thereby eliminating the use as an evasive or avoidance device. What was important for the creation of the modern trust is that the Statute of Uses had no impact on “uses” that required the *enfeoff* to perform active duties.

⁹⁴ Impending death is more than likely required for gifts *causa mortis* because if it was not a requirement, one could make a gift based on, or to become effective upon, the testator’s death (the anticipated event, but not an impending event), which death is certain to occur, and thereby make the equivalent of a testamentary transfer lacking attestation and other Wills Act formalities. For a discussion of the Wills Act, see *supra* note 74 and accompanying text.

⁹⁵ One can surmise that the gift *causa mortis* evolved from the deathbed transfer that was used by the lower classes to transfer property in a testamentary fashion when post-obit gifts were used by the upper classes. See *supra* notes 70–73 and accompanying text.

⁹⁶ For a discussion of the Statute of Uses, see *supra* notes 68–69 and accompanying text.

⁹⁷ See *supra* notes 61–70 and accompanying text.

If the enfeoffee (now the equivalent of the trustee) had active duties to perform as conditions of the use, the enfeoffee was regarded as the legal owner of the property by the law courts in England following the execution of the Statute of Uses. The chancellor in the chancery, or equity, court was concerned with moral duties and not seisin, and therefore required the enfeoffee with legal title to perform the active duties imposed on the enfeoffee by the donor. As a result of this development, ownership interests in property can easily be split into two types: legal and equitable. That development led to the creation of the modern trust.⁹⁸

In the modern trust, the person who would have been the donor in the sixteenth century following the execution of the Statute of Uses is regarded as the settlor of the trust. To break it down even further, the person who owns property can today make a decision to place that property, real or personal, into a trust. If the owner transfers the property to a trust, that owner is the settlor. The transfer of property is to a person or entity called the trustee, who takes only legal title to the property. The trustee, as described above, must have active duties with respect to the disposition of the property, and the trustee must perform those active duties or be in breach of the trust.

The trust may be created orally or in writing (though it must be in writing for a trust that consists of real property⁹⁹), and the key factor to the creation of the trust is the intent of the settlor establishing the trust. Because the duties of the trustee can indeed be burdensome and because the trustee owes fiduciary duties to the beneficiaries (of which more anon), no one can be forced to be a trustee, and therefore the trustee must agree to act as trustee either by subsequent action or expression of assent.¹⁰⁰

Having disposed of legal title to the property by transferring it to the trustee, the owner of the property must also create an equitable owner of the property that has been entrusted to the trustee. The equitable owner, called the beneficiary today, is the party who was characterized as the intended donee with respect to ancient uses and for whose benefit the enfeoffee holds the property. As the owner of the equitable interest in the property, the beneficiary of the trust can seek the chancellor's (today, with our unified courts, the judge's) aid in enforcing his or her equitable interest in the trust

⁹⁸ For a more complete discussion of the history of the use, the enactment of the Statute of Uses, and passive versus active uses, see DUKEMINIER ET AL., *supra* note 41, at 265–68.

⁹⁹ See An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3 (Eng.).

¹⁰⁰ See RESTATEMENT (THIRD) OF TRUSTS § 35 (AM. LAW INST. 2003).

by requiring the trustee to perform the uses (the active duties) imposed on him or her by the settlor in establishing the trust.

Because a trust must have a beneficiary who can enforce the provisions of the trust established by the settlor, the settlor, trustee, and beneficiary cannot be one and the same. If one person or entity holds all three roles, no one can sue to enforce the terms of the trust since one cannot sue oneself. However, due to the bifurcation of the interests in the settled property into legal and equitable, a settlor of the trust can also be its trustee because the beneficiary holding the equitable interest can, after the creation of the trust, sue the trustee to enforce the provisions of the trust that the settlor/trustee established.¹⁰¹

Trusts, as most know, come in two flavors or types: revocable and irrevocable. Indeed, taking another detour through history, for whatever reason property law exhibits a certain hostility to revocable transactions, preferring the certainty of irrevocable transfers.¹⁰² In trust law, this preference for certainty expressed itself initially in a default rule that preferred irrevocable trusts to revocable trusts.¹⁰³ In other words, until recently, if the settlor established an otherwise valid trust but neglected to address whether it was the settlor's intent to establish an irrevocable or revocable trust, the presumption and ruling was that the trust was deemed irrevocable. Thus, until recently, if the settlor wished to establish a revocable trust, the settlor must do so in no uncertain terms retaining the right to revoke the trust.¹⁰⁴

That presumption of irrevocability has been reversed in modern trust law. Instead, the presumption is that a trust is revocable unless expressly made irrevocable by the settlor at the time that it is established.¹⁰⁵ The settlor's intent that the trust be irrevocable must therefore be articulated and

¹⁰¹ The beneficiary may have an interest that is pretty ephemeral and almost impossible to enforce, given the settlor's retained right of revocation. For a discussion of this point, see *infra* notes 108–109 and accompanying text.

¹⁰² That antipathy to revocable transfers is not purely historical. Case in point, it is impossible in most jurisdictions to use a revocable deed to transfer title to real property although there is no harm or violation of public policy created by the execution and use of revocable deeds. The leading case holding revocable deeds invalid is *Butler v. Sherwood*, 188 N.Y.S. 242 (App. Div. 1921), *aff'd per curiam*, 135 N.E. 957 (N.Y. 1922).

¹⁰³ See generally Joel C. Dobris, *The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?*, 28 REAL PROP. PROB. & TR. J. 393, 397–409 (1993). This particular default rule is best characterized as a penalty default rule, requiring the person wishing to evade or avoid the default rule to take action communicating the same in no uncertain terms.

¹⁰⁴ Again, this is the equivalent of a penalty default rule, forcing the settlor to opt out of the preferred or off-the-rack interpretation of the trust.

¹⁰⁵ See RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. c (AM. LAW INST. 2003).

discernable by the interpreter to create an irrevocable trust in most jurisdictions today. The key point, of course, is that whether you apply a default rule that trusts are deemed irrevocable or whether you apply a default rule that trusts are deemed revocable, in both worlds trusts can be made irrevocable or revocable at the will and discretion of the settlor.

Focusing for a moment on irrevocable inter vivos trusts, just like with a gift, the settlor has the power to divorce himself or herself from ownership of the asset by making a transfer to an irrevocable trust that eliminates any ownership interest in the settlor. Thus, a settlor can establish a trust with the settlor or a third person as the trustee granting a life estate or interest in beneficiary *A*, with a remainder to *A*'s children equally, if any, and in default of such issue, to the settlor's alma mater, the University of Virginia School of Law.

By this act, the settlor has made an irreversible donative transfer that will benefit *A*, *A*'s children, if any, and if none, the University of Virginia School of Law. The ultimate beneficiary of the corpus of the trust will be determined by whether *A* has any children,¹⁰⁶ but after the creation of the trust, there is nothing the settlor can do to effect the disposition of the property except manage it as a trustee if the settlor sets up the trust with the settlor as trustee. If the settlor is not the trustee, the settlor will have no connection to the property after the creation of the trust.¹⁰⁷

Alternatively, the settlor can also set up an irrevocable trust in which the settlor retains a life estate interest in the trust, with a discretionary power to consume the corpus. If this occurs, the use of an irrevocable trust, even though it is deemed irrevocable, has no real impact over the settlor's domain and control over the trust assets. Although the trust cannot be revoked, since the assets can be consumed by the settlor for any or no reason, this irrevocable trust creates no measurable or valuable interest to the remainderman, be it *A* or the University of Virginia School of Law, because of the settlor's discretionary right to consume the corpus of the trust. Who would pay anything of value for the remainderman's interest

¹⁰⁶ This assumes that *A* has no children at the time the trust is created. If that is the case, the equitable title to the property is life estate in *A*, contingent remainder in *A*'s children, alternative contingent remainder in the University of Virginia School of Law. Once a child is born to *A*, the children's remainder turns into a vested remainder subject to open to allow addition children born or adopted by *A* to share in the trust corpus when *A* dies.

¹⁰⁷ To be technical, since the settlor set up the trust with alternative contingent remainders, at law the settlor would be regarded as holding a reversion. In equity, the settlor would not be regarded as retaining that interest because with this gift, the University of Virginia School of Law is the intended beneficiary should *A* have no children, and therefore the gift or corpus must be transferred to the University of Virginia School of Law no matter how the preceding life estate terminates.

since that interest is contingent on the failure of the settlor to consume the assets prior to death? That power of consumption gives the settlor the right to deplete the trust in its entirety by the settlor's subsequent decision to consume.

My point here is a simple one. With respect to inter vivos trusts, the settlor again has the power to either use an irrevocable trust or a revocable trust.¹⁰⁸ That power, however, does not necessarily mean that the use of an irrevocable trust will in any way delimit the settlor's control over the property. Given the language of the trust, the settlor can set up an irrevocable trust that provides the settlor with as much flexibility and control as would be the case if the settlor instead used a revocable trust. But the settlor may choose to use an irrevocable trust with limited or no flexibility if that is the settlor's preference, like the life estate in *A* and remainder to the University of Virginia School of Law addressed above. The irrevocability of the trust, coupled with an inflexible disposition, provides the settlor with options that a revocable trust cannot. (It also concomitantly provides beneficiaries with interests that are the equivalent of vested and cannot later be diminished by the settlor/donor.)

By contrast, revocable trusts are inherently flexible given the settlor's retained power of revocation that allows the settlor to destroy the beneficiaries' interest in the trust assets for no reason or any reason. Thus, should the settlor decide to consume, sell, or transfer the assets settled in the trust, the settlor need only revoke the trust. The beneficiary can in no way limit the settlor's retained power to revoke the trust and negate the beneficiary's interest in the same. The only possible impediment to the settlor's interest in a revocable trust occurs when the settlor becomes incompetent following the settlement of the trust. At that time, the settlor has no legal power to act, and the question becomes whether the guardian or the agent created by a durable power of attorney can revoke the trust.¹⁰⁹

By allowing both irrevocable and revocable trusts, settlors are given the maximum freedom to craft a trust to carry out their wishes. Moreover, the

¹⁰⁸ Testamentary trusts are by definition irrevocable because they come into existence upon the testator's death, as they are established in the testator's will. Given that the testator cannot be resurrected or die again, once the testator dies, the testamentary trust is irrevocable. It is discussed more *infra* notes 126–129 and accompanying text.

¹⁰⁹ The settlor's competency or lack thereof is the focal point of this Article. It is my contention that settlors should prepare their estate plans so that should they become incompetent, their competent wishes will be complied with by those in charge of their assets or estate. *See infra* Part IV.B. With respect to the revocable trust, if the settlor becomes incompetent and has executed a durable power of attorney, the holder of the power can revoke the settlor's trust, thereby destroying the settlor's competent wishes. *See, e.g.*, UNIF. TRUST CODE § 602(e) (amended 2010).

use of one type of trust does not necessarily inhibit settlor control over the settled assets once the trust is established. The attribute of revocability is simply a power¹¹⁰ that if retained by the settlor allows the settlor to wipe the slate clean by revoking the trust in its entirety should the settlor opt to do so. The trust is, however, about more than its revocability; the terms of the trust, while in force (that is, before it is revoked), will control the use and disposition of the property, and it is those terms that will delimit or inhibit the settlor's control and invest in the trustee the "uses," or fiduciary duties, that must be performed while the trust is viable.

The seminal question is why an irrevocable will cannot be created *à la* an irrevocable trust given my contention that it provides the putative testator with similar flexibility. The only rational answer must be that the costs imposed by allowing the use of an irrevocable will outweigh the benefits provided thereby. It is to that contention that I now turn to weigh the benefits and costs of a regime that allows irrevocable wills.

IV. THE BENEFITS AND ALLEGED COSTS CREATED BY IRREVOCABLE WILLS

Although it is clear that there is no segment of the population clamoring for the creation and subsequent use of an irrevocable will,¹¹¹ one can conceive of several scenarios in which a putative testator may wish to execute an irrevocable will and be better off as a result without making anyone worse off (i.e., be in a Pareto efficient position).¹¹² As noted in the introduction, the most common reason why a testator may choose to execute an irrevocable will is to commit the will maker's future self (the at the time of death self) to act in accordance with the wishes of the then current self (the self at the time of execution of the will). This type of precommitment can be optimal and beneficial from the perspective of the will maker employing a reasonable precommitment strategy.

¹¹⁰ Again, this is the equivalent of a general power of appointment that is defined and addressed *supra* note 9 and accompanying text.

¹¹¹ The lack of literature regarding this issue—there are no articles found that address this issue—may indicate either a lack of demand for irrevocable wills, or simply (and this is what I surmise) that the fact that wills are revocable is so ingrained in the consciousness of lawyers and will makers that they have given no conscience thought to the option and benefits provided by irrevocable wills.

¹¹² See Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1098–99 (1986).

A. The Rational and Efficient Use of Precommitment Strategy

The classic example of a beneficial and perfectly rational precommitment strategy is Odysseus who had himself bound to the mast (present precommitment strategy) to avoid the lure of the Sirens' song as his ship sailed within audible range of their voices (future action). Behavioral economists theorize that individuals use precommitment strategies to solve problems known as time inconsistent discount rates, which are not relevant to my thesis,¹¹³ and the problem created by multiple selves, which is very relevant to my thesis.¹¹⁴

Pursuant to the multiple selves phenomenon and recognizing that temporally individuals make decisions over their life when they are situated differently, individuals do not have a single utility function but instead multiple competing utility functions. Because each one of the temporal "selves" orders the preferences differently, there is a significant risk that the current self may make decisions not in the individual's best interest taking into account the preferences of all the selves valued accurately.

The reverse is also true meaning that the future self may not make a decision that is in the best interests of the individual (again computed by valuing all of the various selves), when the future self becomes the present or current self and makes decisions that favor that self over past selves. Employing a precommitment strategy solves this conundrum and binds the future self to act when it becomes operative as the present self.

One interesting historical observation supports the contention that employing a precommitment strategy may be the optimal strategy for the putative testator in certain situations. Although it is a given today that wills are ambulatory—disposing of later acquired property—¹¹⁵ that was not always the case. The ancient common law mind could not conceive of a current act, the execution of a will, affecting or controlling the disposition of property later acquired by the putative testator. Thus, in Epoch II,¹¹⁶ that is after William the Conqueror claimed England after the Battle of

¹¹³ Briefly, the discount rate an individual applies when making net present value calculations declines as the date of the reward or benefit recedes with the converse occurring when the benefit or reward is imminent. If the time the benefit will be received is far in the future, the farther it is, the greater the decline in the net present value calculation. The closer temporally to receipt of the benefit or reward, however, the greater the discount rate an individual will apply when making net present value calculations. See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

¹¹⁴ For a detailed discussion of this phenomenon, see *infra* note 115–119 and accompanying text.

¹¹⁵ See *supra*, note 5 and accompanying text.

¹¹⁶ See *supra*, note 34 and accompanying text.

Normandy, wills were not ambulatory and only disposed of property possessed by the testator at the time of the execution of the will. It was not until 1837 that English wills acquired their ambulatory character.¹¹⁷

What is interesting about this observation is what it reveals about the ambulatory nature of wills and how they actually operate as an ambulatory and testamentary document. The medieval mind could not conceive of a will acting in an ambulatory fashion because to do so, a will must serve and act as a precommitment strategy. Assuming the ambulatory nature of the will is best expressed in the will's residuary clause,¹¹⁸ an analysis of the operation and use of that clause reveals that it is nothing more than a precommitment strategy employed by the testator.

For example, let us assume that the testator's residuary clause states that the rest and residue of her estate shall go to her sister. At the time of the execution of the will, while the testator is in law school, she has very few assets, totaling \$20,000. Fifty years later when she dies without having changed her will, her estate that is not specifically bequeathed is worth \$1,000,000. By the execution of the residuary clause, coupled with the ambulatory character of the will, the putative testator made a precommitment to give all of her after-acquired property to her sister.¹¹⁹

In sum, the precommitment strategies discussed above can and do provide benefits for testators, benefits that are unavailing if irrevocable wills are not allowed. The question now is whether those benefits outweigh any costs imposed on testators by providing that option? It is to that question I now turn.

¹¹⁷ POLLACK AND MAITLAND, *supra* note 40, at 315.

¹¹⁸ It is not impossible for a will to act in an ambulatory fashion with respect to a specific bequest, but it is hard to fathom why a testator would make a specific bequest of property that the putative testator does not own currently but may own later. Indeed, in most cases involving specific bequests, the will may act in an ambulatory fashion by substituting the later acquired property for the specifically bequeathed property that is no longer in the testator's estate. By that I mean, the testator may bequeath his car to his brother. At the time the will is executed, the testator may own a Honda Prius. The testator may later, after the execution of the will, sell the Prius and purchase a Ferrari. If the testator owns the Ferrari at the time of his death and has made no change in his will, the Ferrari will be given to the brother pursuant to the will. A doctrine known as "ademption by extinction" mandates this result. UNIF. PROBATE CODE § 6-411 cmt. (amended 2010).

¹¹⁹ Of course, given the revocable nature of the will, this precommitment strategy is not irrevocably binding on the testator. By using an irrevocable will, the testator can make just such a binding commitment.

B. The Problems or Costs Created by the Incompetent Putative Testator

As Americans' life expectancy continues to lengthen, the specter of legions of enfeebled seniors owning and controlling substantial assets raises two important questions: First, who will have legal control over those assets while the enfeebled senior is alive? Second, what will happen to the property upon the eventual death of the enfeebled senior? The law has developed mechanisms to insure that incapacitated individuals no longer control the disposition of their property but have the benefit of that property's use while they are alive. Think guardianship or better yet, the springing durable power of attorney, which invests legal ownership in a third party agent when the owner of the property becomes incapacitated.¹²⁰ But it is my contention that the law has failed to develop mechanisms to insure or guarantee that the senior's freedom of testation when competent is honored even if that senior should later become incapacitated or incompetent. This problem is exacerbated by certain presumptions employed in probate law.

Indeed, the very fact that wills are revocable and that courts employ presumptions of revocations if a previously executed will is not found among the testator's papers after his or her death, raises the specter that that the testator's previously executed will was improperly revoked by an incompetent testator or, worse, that a relative can upset a competent testator's estate plan by destroying an incompetent testator's will without the knowledge or approval of the testator. The irrevocable will resolves this situation and insures that once an irrevocable will is executed, a competent testator has to take positive steps to defeat that prior executed intent expressed in the irrevocable will by either consuming the assets or transferring same before death. An incompetent testator will be unable to alter the estate plan represented by the execution of an irrevocable will.

Consequently, it is possible for the agent of the incompetent putative testator pursuant to a durable power of attorney to revoke a revocable trust established by the testator when the testator was competent but that agent cannot alter or revoke a will thus insuring that the testator's competent wishes expressed in the will are adhered to. The agent cannot revoke a revocable or irrevocable will but the revocable will creates other issues because the revocable will can be revoked in many different ways. Indeed, given that the testator will be dead and unavailable at the time any issue is adjudicated regarding the revocability of the revocable will, it may be

¹²⁰ See, e.g., UNIF. TRUST CODE § 602(e) (amended 2010).

possible that a court may erroneously conclude that a will was revoked when in fact it was not, at least not by the competent testator.

Thus I posit there are several reasons why a putative testator might want to bind her current self (precommit) to make a will that is irrevocable. In addition to precluding an agent from revoking or altering her testamentary plans should she become incompetent, one factor that may support the use of irrevocable wills is attributable to the fact that individuals are living longer in our society creating a higher incidence of Alzheimer's disease among the elderly.¹²¹ For example, what if the putative testator's family has a history of Alzheimer's disease and testator has been diagnosed as pre or early onset Alzheimer's. Let's assume that the putative testator is currently competent to make a will, notwithstanding the medical diagnosis,¹²² but is concerned that at some point she will no longer be competent to make a will. What she is really worried about is that at some point after the execution of her will while she is incompetent she might, in a fit of pique, destroy the will or make physical changes on the will.¹²³ That can and will create problems and issues for the execution of the previously valid will.¹²⁴

¹²¹ See generally Alzheimer's Ass'n, *2014 Alzheimer's Disease: Facts and Figures* 23 (2014), http://www.alz.org/downloads/Facts_Figures_2014.pdf (predicting that "[l]onger life expectancies and aging baby boomers" will increase the "oldest-old," which are the "individuals at the highest risk for developing Alzheimer's.>").

¹²² She meets the standard test for competency in that she is an adult and is capable of knowing and understanding in a general way: 1) the nature and extent of her property; 2) the natural objects of her bounty; 3) the disposition she is making of the property; 4) and relating these elements to one another to form an orderly desire regarding the disposition of her property. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSACTIONS §8.1 (b) (AM. LAW INST. 2003).

¹²³ Whether the putative testator is competent to revoke a will at that later point in time is in dispute. What is not in dispute is that if no will is found in the testator's effect following her death, a presumption arises that the will was revoked. Therefore litigation may ensue regarding the validity of the executed but unfound will. Perhaps to avoid the uncertainty and legal costs created by this possible scenario, the putative testator would prefer to guarantee that she cannot change or revoke the will.

¹²⁴ It may be impossible to prove later that she lacked capacity at the time the will was revoked (this is assuming there are witnesses to the revocation). Just as importantly, if the original will was in the possession of the testator and is not found among the testator's papers and possessions after the testator's death, that raises a presumption that the will was revoked by the testator. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 442 (2d ed. 1953) ("The same presumption [of revocability] is indulged if the will had been last heard of in the testator's possession and is not found at his death."); see, e.g., *Harrison v. Bird*, 621 So.2d 972 (Ala. 1993) (lost will presumed revoked); *In re Estate of Millsap*, 371 N.E.2d 185 (Ill. App. Ct. 1977) (lost original of will presumed revoked); *Bonner v. Borst*, 214 N.E.2d 154 (N.Y. 1966) (lost will presumed revoked). Given the revocability of wills, then, an incentive is provided to a disinherited heir at law to "find" the will and secretly destroy it to insure that the testator dies intestate. Irrevocable wills solves this problem.

Also, and this scenario may happen more than one thinks, what if the putative testator desires to disinherit her only daughter who has not treated her well since the daughter reached adulthood (displayed ingratitude). What if that disinheritance is known to the daughter and the daughter has, as most daughters do, access to her mother's home and is the first person on the scene following her mother's death—which because of her Alzheimer's disease is not unexpected. What if the will leaving all of the mother's estate to the Alzheimer's Association is not found among the mother's papers and effects? It is possible that the daughter discovered the will, perused same and then destroyed same causing the daughter, her intestate heir, to take the mother's estate as a result of her mother's lack of a validly executed will.

Sure, all that is possible and the mother thinking this through, decides she would like to die knowing that her current wishes, memorialized in the will leaving everything to the Alzheimer's Association, will be carried out after her death. We know she can do two things to ameliorate her concern and to assist in the validation of her wishes. First, in states that allow antemortem probate, she can have her will probated in advance of her death. A few states, Arkansas, North Dakota and Ohio, have statutes authorizing antemortem probate by which our putative testator can, in an adversary proceeding, declare the validity of the will and the testamentary capacity and freedom from undue influence of our putative testator.¹²⁵ All well and good, but the fact is that only three states allow for this procedure and even if allowed it does not preclude subsequent revocation.

Yes, that's right. Even if our putative testator is domiciled in the Queen City of Cincinnati in the great state of Ohio and can employ the antemortem probate process to validate her will, that validation does not preclude either of the two scenarios describe above from playing out subsequently. Again, the testator can later destroy the will of her own (twisted) volition or the will can be found by the daughter and subsequently destroyed causing uncertainty and possible litigation to ensue. So, this option does not really accomplish the putative testator's objective.

Since ante mortem probate will not work to achieve our will maker's objective, how about the other option: why not advise our putative testator to employ an irrevocable trust to accomplish her objective? If she transfers her assets into an irrevocable trust, naming the will maker as trustee, and if

¹²⁵ See, e.g., Ark. Code Ann. §28-40-202 (2008); N.D. Cent. Code §30.108.1-01 (2008); Ohio Rev. Code Ann. §2107.081 (2008). See also Aloysius A. Leopold and Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 Ark. L. Rev. 131 (1990); Dara Greene, *Antemortem Probate: A Mediation Model*, 14 Ohio St. J. Disp. Resol. 663 (1999).

she retains all rights to consume and control the assets during her life with only those assets remaining on her death to be transferred to the Alzheimer's Association per her wishes, what's the harm?

Hasn't she accomplished her primary objective? Yes and no. First, establishing an irrevocable trust creates new issues and raises new questions that our putative testator may want to avoid. Now that the Alzheimer's Association is the beneficiary in a trust established by our putative testator are they owed certain fiduciary duties by our trustee, the one and same putative testator? Yes. And although those duties may be minimal or illusory,¹²⁶ they nevertheless exist. If no duties are owed to anyone by our putative testator, except to herself, then no trust is established.¹²⁷ Furthermore, what happens to property acquired by the putative testator after the trust is established? If she wins the lottery, those proceeds are not part of the corpus of the trust and it would take a new process to create a new trust to entrust these assets. Finally, what happens if the agent possessing a durable power of attorney revokes the trust and that agent is expressly precluded from revoking or altering the trust? Hence, the irrevocable trust may not be very efficient.

But even if one assumes that an irrevocable trust can be created by our putative testator that: 1) in no way inhibits or limits the use of her property and thus guarantees that the property will be left to the Alzheimer's Association per her wishes; and 2) she acquires no assets following the establishment of the trust,¹²⁸ thus guaranteeing that all assets remaining in the trust will devolve to the Alzheimer's Association upon her death, the question still remains why must a trust be deployed instead of a will?¹²⁹

¹²⁶ See generally *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

¹²⁷ See UNIF. TRUST CODE § 105(b)(2) (UNIF. LAW COMM'N 2010).

¹²⁸ In an odd and ironic twist the use of an irrevocable trust by the putative testator that transfers title to all of her property to the trust with the putative testator as the income beneficiary and the Alzheimer's Association as the remainderman, creates a situation in which the putative testator can execute a will but that will does not have any effect over the property that is now the corpus of the trust. In effect, the use of the irrevocable inter vivos trust places a practical limit on the putative testator's freedom of testation.

¹²⁹ The answer, I think, has already been briefly sketched out *supra*. First, establishing a trust does involve the creation of fiduciary duties to beneficiaries that may otherwise limit the use to which the trust corpus can be put by the Trustee, even if that trustee is given unlimited powers over the corpus while the Trustee/Settlor is alive. One example proves my point. Although the trustee may use or consume the access, can the trustee destroy the asset or give the asset away to a donee? Wouldn't that be a violation of her fiduciary duties? Second, and perhaps more importantly, the creation and use of an inter vivos trust represents the creation and present transfer of a future interest in the trust assets to a third party, in this case, the Alzheimer's Association. That present transfer of a future interest gives a third party a present interest in the rights of property previously solely owned by the putative testator. It may be hard to place a value on that future interest, see *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955), but it is an interest creating a new right in another and possibly limiting how our putative testator can

And even if one can develop the perfect irrevocable inter vivos trust for this situation, that is, one that places no limits on the ownership rights of the putative testator while alive, but delivers all of the testator's remaining assets upon death, the creation of trusts and their use is notoriously complex and complicated requiring a declaration of trust and implicitly some knowledge of the law in this area. This declaration of trust accomplishes an objective that could easily be met if irrevocable wills are allowed.

Briefly, another common example which raises the salience of an irrevocable will, is the situation in which the will maker promises to leave his estate to an individual if that individual acts as a caretaker for the will maker up to and including the death of the will maker.¹³⁰ Currently, the promisor (the will maker) cannot bind himself to do what he has promised to do as an inducement to the promisee to act in reliance on the promise. At best, if the promisee acts in reliance on the promise and does serve as caretaker for the will maker, the promisor is free to repudiate his promise and die with a new will that does not comply with the promise. The promisor's estate may be sued for breach of contract and be subject to a claim for damages or unjust enrichment,¹³¹ but the promisor cannot legally bind himself to die with a will that complies with his promise.

The ambulatory nature of the will, when coupled with its irrevocability, provides the perfect vehicle for respecting and enforcing the needs and wishes of the future self versus the needs and wishes of the present self. Additionally, coupling irrevocability to an ambulatory testamentary instrument prevents opportunistic behavior (breach and bad behavior) on the part of a beneficiary of an irrevocable will and will preclude an agent from acting to alter the testator's wishes should she become incompetent. Finally, an irrevocable will insures that the testator can take no action while incompetent to alter or revoke a competent will.

C. Refuting the Costs of the Irrevocable Will

In this subpart, I flip the analysis to focus on the alleged costs created by a legal system that allows the putative testator to execute an irrevocable will. Although there is no academic or other literature advocating the prohibition of irrevocable wills, I attempt to fill this lacuna by postulating the possible objections to the use of irrevocable wills. Turning first to

deal with the asset.

¹³⁰ This fact pattern is familiar to anyone conversant in probate law and normally raises the issue of whether one can make a contract to make or not revoke a will and the remedy provided if there is a valid contract. *See, e.g., Via v. Putnam*, 656 So.2d 460 (Fl. 1995);

¹³¹ *See Symons v. Heaton*, 316 P.3d 1171, 1173 (Wyo. 2014) (caretaker asserted claims for implied-in-fact contract, promissory estoppel, and unjust enrichment).

possible objections to the use of irrevocable wills, one can anticipate that the primary objection to the use of irrevocable wills is the claim that instead of expanding testamentary freedom, the use of irrevocable wills will unduly restrict the future actions of the putative testator and that the regret contingency created by that restriction outweighs any benefits. In other words, what if the testator changes her mind after the execution of the irrevocable will?

To the contrary, in this subpart I demonstrate that the execution of an irrevocable will in no way inhibits the putative testator's use and disposition of property before the putative testator's death. Instead I conclude that the promulgation and use of irrevocable wills will expand the putative testator's freedom of disposition.¹³² The key to understanding why irrevocable wills are attractive and beneficial for putative testators is the ambulatory quality of the will. The fact that the putative testator continues to own and maintain dominion and control over the assets that would be disposed of by the irrevocable will provides the putative testator with control over those assets as long as the putative testator remains competent.

However, should the testator become incompetent and unable to manage his or her affairs,¹³³ the irrevocable will would mandate that assets owned at the death of the testator would be distributed per the testator's donative intent as bequests in a will that was made when the testator was competent and contemplating the fact that at some point he or she might become incompetent. This "lock-in" of the disposition of the testator's estate is something that putative testators currently lack which can be accomplished via the use of an irrevocable will. Consequently, the "lock-in" provided by the use of irrevocable wills expands testamentary freedom.

The primary objection to irrevocable wills—its alleged inflexibility—is overstated and overvalued when irrevocable wills are properly characterized as ambulatory documents creating no present interest in beneficiaries upon execution. The ambulatory nature provides support for my thesis that the beneficiary of such an irrevocable will has no interest in the property of the will maker while the will maker is alive and, therefore, will act in the best interests of the will maker up to and including the time of the will maker's death.

I contend that irrevocable wills differ very little from revocable wills due to their ambulatory character. Instead of inhibiting testamentary freedom, irrevocable wills expand testamentary freedom. This may seem

¹³² See *infra* notes 133–36 and accompanying text.

¹³³ See *supra* Part IV.B for the issues facing the incompetent testator.

contrary to my call for irrevocable wills (i.e., why bother if they are synonymous with revocable wills or add nothing to the testator's choices) except for the qualifier in that statement "in some respects." In some respects, an irrevocable will differs from a revocable will because an irrevocable will binds the future self to bequeath the will maker's property as designated in that irrevocable will and simultaneously provides (incentivizes) the series of present selves over the remaining lifespan of the will maker following execution of the will to make decisions to consume, use, acquire, dispose of assets with knowledge regarding how that consumption, use, acquisition, or disposition of assets will affect the takers pursuant to the now irrevocable will.

As such, an irrevocable will minimizes externalities with respect to the use of the will maker's resources (the postmortem impact or effect of the use of those resources), because the will maker of a licit irrevocable will internalizes how the use of those resources impact the ultimate taker of those assets following the death of the will maker. That is a complicated analysis that requires not only knowledge of economic theory but also a basic understanding of probate law and how wills operate.

Unlike a trust, either irrevocable or revocable,¹³⁴ a will does not create any beneficial interest in any exogenous third party. Indeed, even if named in a will as the sole heir of the will maker, that named individual has no interest in any asset of the will maker for several reasons and is deemed at best an heir apparent.¹³⁵ There is a reason why the phrase was coined no one can be an heir of the living. Putting aside the fact that wills are deemed revocable (that is after all the subject of this Article), the named sole heir must at the very least survive the will maker in order to take pursuant to the will.¹³⁶

More importantly, even if we assume the sole heir is alive at the time of the testator's death, there is another very important reason the sole heir has no interest in the property of the will maker even assuming that the will is not revocable: the will maker can always dispose of the assets prior to the

¹³⁴ See *supra* Part II.

¹³⁵ DUKEMINIER & SITKOFF, *supra* note 7, at 70.

¹³⁶ Even if an antilapse statute is applicable, see UNIF. PROBATE CODE § 2-603 (amended 2010), and substitutes the heir's issue for the deceased heir should the heir predecease the will maker, note that the heir does not take at the will maker's death, but the issue. If an antilapse statute is inapplicable, then any will bequeathing property to someone who predeceases the testator fails and falls into the residuary clause of the will if it is a specific bequest. See *id.* If, however, the failed bequest is in the residuary clause and there is no other residuary taker, the failed bequest will pass outside the will pursuant to the laws of intestacy. See *id.* For the rules regarding intestate succession, see UNIF. PROBATE CODE §§ 2-101 to 106 (amended 2010).

will maker's death thereby removing it from the estate of the will maker. If a specific asset is named in the will and is bequeathed to the sole heir and is not owned by the will maker at the time of his death, at common law the gift is adeemed.¹³⁷ Although the Uniform Probate Code has abandoned the identity theory of ademption in favor of the intent theory,¹³⁸ thereby establishing a presumption that a gift is *not* adeemed unless it is the testator's intent, if the testator intends to adeem a bequest and not provide a replacement, the specific bequest fails and no substitute bequest is provided.

The same rules apply with less precision to an heir who takes pursuant to a residuary clause. If we hypothesize a will maker with a very simple will that has but one operative provision, it leaves everything to the heir pursuant to a one paragraph residuary clause, if the heir survives the testator and the will remains unrevoked, the heir receives all of the assets owned by the testator at the time of the testator's death following payment of final expenses and taxes, etc.¹³⁹ In effect, the heir will receive the net estate of the will maker following the will maker's death and the administration of probate. Thus, at first glance it might appear that the heir in this situation has an "interest" in property of the will maker prior to the will maker's death.

However, that conclusion is clearly erroneous. The reason why such a conclusion is clearly erroneous is because there is no guarantee that the will maker will own any assets (or which particular assets will be owned by the will maker) at the time of demise. Obviously the will maker can make use of the fact that inter vivos gifts can be made in order to divest herself of assets prior to death.

The practical problem with utilizing this approach is that since gifts require delivery while the grantor is alive to avoid the claim that the gift is testamentary and not in compliance with the Statute of Wills,¹⁴⁰ is that the will maker may be unable to effectuate gifts to all intended donees prior to death. With adequate planning, however, that problem may be more imagined than real. (I am assuming that with adequate planning the will

¹³⁷ See UNIF. PROBATE CODE § 2-606 (amended 2010).

¹³⁸ *Id.* cmt. ("Recently, some courts have begun to break away from the 'identity' theory and adopt instead the so-called 'intent' theory. . . . The major import of the revisions of this section is to adopt the 'intent' theory in subsections (a)(5) and (6).").

¹³⁹ See Section 3 of the Uniform Probate Code that addresses in great detail the administration and probate of wills. UNIF. PROBATE CODE § 3 (amended 2010).

¹⁴⁰ *Grace v. Klein*, 147 S.E.2d 288, 293 (1966) ("Delivery of the gift by the donor is an essential element of a valid gift. . . . Such delivery must take place while the donor is a live.").

maker can easily give away most of his assets while living.) The real problem created by this gift scenario is that, as noted above, valid inter vivos gifts when made are irrevocable. Hence, no sane will maker will impoverish himself or herself by giving away all of his or her assets if she anticipates remaining alive for a significant period of time.¹⁴¹ The consequence of divesting oneself of all of one's assets would not only have the testamentary effect of depriving the heir of assets, it would have the inter vivos effect of impoverishing the will maker—a strategy I am assuming that most individuals would seek to avoid.

But these are drastic and impractical solutions to problem that is more imagined than real. Our will maker can solve this dilemma simply by the use of a revocable trust. If the will maker transfers all of his or her assets to a revocable trust, the trust can be settled with the settlor retaining essentially unlimited power over the assets in the trust,¹⁴² including the power to consume, transfer, sell, give to another while alive, with any property remaining in the trust at the time of the settlor's death to be transferred to the designated beneficiary (I am assuming this beneficiary is different from the heir whose interest is being divested by this transfer). In this very simple and effective way, the will maker can retain control over his or her assets and make certain that the assets will not pass to an ungrateful heir pursuant to the irrevocable will.

By manipulating the ownership and control of assets owned by the will maker at death, the will maker can avoid creating an interest in the heir that is more than an expectancy and that could, as a result, create incentives for the heir to act opportunistically or misbehave once the irrevocable will is made and the heir is aware of his or her status as the heir. In most situations, giving an individual or entity an irrevocable interest in an asset provides that individual with incentives to maximize the value and use of the asset. However, when an individual is given a future interest in an asset that is contingent but also given some limited present rights over that asset, the individual will act opportunistically and exploit the present rights to maximize the value inherent in the present right even if it means the destruction of the contingent future right.

The irrevocable will resolves this problem by creating a present interest in the takers of the will but a present interest that gives those takers no

¹⁴¹ In the rare case where the will maker is on his or her deathbed and is making gifts to avoid having assets in his or her estate, those gifts may be challenged as invalid testamentary transfers having no lifetime effect on the donor. As such these “gifts” could be treated as testamentary and fail because they do not comply with the Wills Act. *Id.*

¹⁴² See *supra* Part II for the definition and characteristics of a revocable trust.

incentive to exploit that present right. Quite the contrary, these takers are given incentives not to display ingratitude or act opportunistically since the putative testator has the practical power to destroy the gift via consumption or inter vivos transfer to a trust. The putative takers are instead given an incentive to act in the putative will maker's best interests.

V. CONCLUSION

Given the increased longevity of today's seniors, and concomitantly the increasing number of seniors afflicted with Alzheimer's Disease and other forms of dementia, more testators are preparing valid wills while competent but later dying incompetent. Couple that with the fact that most, if not all, states employ presumptions regarding the invalidity of a will that is not found among the testator's papers after the testator's death and you have the potential for revocation of the testator's will without the testator's knowledge, consent, or capacity. Irrevocable wills solve this problem by committing a competent testator to leave his or her property pursuant to the testator's unalterable wishes. Nevertheless, given the ambulatory nature of a will, the putative testator remains free to alter the property disposed of pursuant to the now irrevocable will thereby providing the sane and competent testator with the maximum amount of testamentary choice and freedom.

Taking a somewhat broader view, irrevocable wills, like irrevocable trusts and gifts, provide the putative testator with an option for a donative transaction that creates benefits to the putative testator as a result of his or her precommitment strategy. In addition, an irrevocable will creates an interest, albeit an interest that is hard if not impossible to quantify and value,¹⁴³ in takers of the testator's estate, but interests that provide incentives to these takers to act favorably toward the putative testator without otherwise limiting the putative testator's control over the assets to be disposed of pursuant to the irrevocable will.

At first glance the concept of an irrevocable will seems somewhat odd and improbable. Since the promulgation of the Statute of Wills in 1540 it

¹⁴³ This interest is impossible to quantify for a couple of reasons: First, in most states unless an antilapse statute applies, see *supra* note 136 and text accompanying for a discussion of antilapse provisions, the taker pursuant to a will has to survive the testator in order to take pursuant to that will. Second, and perhaps most importantly, given the ambulatory nature of the will and the fact that the putative testator retains the right to consume, transfer, destroy, etc., the property that is the subject of the bequest, there is no guarantee that the assets bequeathed will be in the testator's estate at the time of the testator's death. For this latter point, see *supra* notes 137-41 and text accompanying.

has been ingrained in lawyers, judges and will makers that an essential and immutable character of an executed, valid will is its revocability. As a result, to date no one has attempted to validate an irrevocable will. Indeed, no one has attempted to justify the use and validity of an irrevocable will. This Article represents the first step in what I hope will be a lively and informed debate about the benefits to be gained and costs incurred as a result of the use of an irrevocable will.

