

The following text (§8.2.2.2) may be found at pages 899-915 of the 2014 Edition of *Loring and Rounds: A Trustee's Handbook*:

§8.2.2.2 Trusts Revocable and Amendable by Settlers, Beneficiaries, and Other Nonfiduciaries; Trusts Revocable and Amendable by Trustees and Other Fiduciaries

*When the terms of the trust authorize the trustee to terminate the trust, the trustee may be guilty of an abuse of discretion in terminating the trust as well as in refusing to do so.*⁴²⁴

For purposes of this section, a trust is revocable if someone possesses an inter vivos power of appointment over the trust property.⁴²⁵ It is now settled law that the reservation in the settlor of a right of revocation will not in and of itself prevent a trust from coming into existence and functioning as a will substitute, notwithstanding the considerable control that is lodged in someone other than the trustee.⁴²⁶ This includes even self-settled declarations of trust.⁴²⁷ At one time, however, there was concern that such an arrangement might not be a trust but be a constructive agency and/or a failed attempt at a testamentary disposition.⁴²⁸

Some relevant power of appointment doctrine. A nonfiduciary power to revoke a trust and assume legal title to the entrusted property would include the power to cause the title to pass directly from the trustee to others, including to other trustees upon different trusts.⁴²⁹ Such a power meets the definition of a general inter vivos power of appointment.⁴³⁰ The Restatement (Third) of Property proposes that any express limitation on the power to partially revoke, or on the number of partial revocations that may be executed, is unenforceable.⁴³¹ Inherent in the power to revoke is the power to directly grant a power of revocation over the entrusted property to another, such as by the exercise of the power in further trust.⁴³² The Restatement incorrectly analogizes such a grant to an agency-type delegation of the power of revocation.⁴³³ Rather, such a grant is more analogous to an irrevocable assignment of vested property rights in the entrusted

⁴²⁴See generally Berall, Campfield, & Zaritsky, 468-2d T.M., Revocable Inter Vivos Trusts (describing the creation and use of revocable inter vivos trusts for asset management and estate planning).

⁴²⁵But see Uniform Trust Code §103(13) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (narrowly defining “revocable,” as applied to a trust, to mean revocable by the settlor without the consent of the trustee or a person holding an adverse interest).

⁴²⁶1 Scott & Ascher §5.7.

⁴²⁷1 Scott & Ascher §8.2.6.

⁴²⁸1 Scott & Ascher §§5.7, 8.2.1 (Will Substitute), 8.2.2 (Agency Substitute).

⁴²⁹Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13(a).

⁴³⁰See generally §8.1.1 of this handbook (powers of appointment).

⁴³¹Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13, cmt. c; Restatement (Second) of Property (Wills and Other Donative Transfers) §19.1, cmt. d.

⁴³²Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13, cmt. f; Restatement (Second) of Property (Wills and Other Donative Transfers) §19.2.

⁴³³Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13, cmt. g; Restatement (Second) of Property (Wills and Other Donative Transfers) §19.2, cmt. b.

property.⁴³⁴

Powers of appointment are covered generally in Section 8.1.1 of this handbook. The Restatement (Third) of Property floats by implication the novel proposition that a power of revocation, amendment, or withdrawal should be treated as a distinct species of general inter vivos power of appointment for purposes of avoiding application of the doctrine of capture in the face of an ineffective power exercise.⁴³⁵ We challenge the logic of the proposition in Section 8.15.12 of this handbook.

The settlor. *The traditional default presumption was that a trust was irrevocable.*⁴³⁶ Still, the settlor of a trust could expressly reserve an inter vivos right to revoke the trust, either in one shot or incrementally through partial revocations.⁴³⁷ “[I]n most states, the fact that the settlor has retained a testamentary power of appointment is not sufficient to allow the settlor to revoke the trust without the consent of all of the beneficiaries.”⁴³⁸

In the absence of an expressly reserved power to revoke a trust or reform its terms, a court may be willing to grant the settlor such a power, provided there is clear and convincing evidence that the absence of such a power was occasioned by scrivener error, or by the settlor’s mistaken understanding of the applicable facts or law at the time the trust was created.⁴³⁹ In Section 8.2.2.1 of this handbook, we cover mistake-based trust terminations generally, including reformation actions. Under the Uniform Trust Code, however, a trust, whether private or charitable,⁴⁴⁰ is presumed revocable by the settlor unless the terms of the trust expressly provide that the trust is irrevocable.⁴⁴¹ The Restatement (Third) of Trusts and the Uniform Trust Code are not entirely in sync in this regard.⁴⁴² The Restatement (Third) of Trusts would admit extrinsic evidence on whether a trust is revocable if its written terms do not adequately address the issue. If a settlor retains no beneficial interest other than by resulting trust, there is a rebuttable presumption that the trust is irrevocable.⁴⁴³ On the other hand, if the settlor retains some beneficial interest⁴⁴⁴ in addition to what might be due him or her pursuant to the imposition of a resulting trust,⁴⁴⁵ there is

⁴³⁴See *Marx v. Rice*, 3 N.J. Super. 581, 585–586, 67 A.2d 918, 920–921 (1949) (in the case of a general inter vivos power of appointment the analogy is to property, whereas in the case of a nongeneral inter vivos power, the analogy is to agency).

⁴³⁵See Restatement (Third) of Property (Wills and Other Donative Transfers) §19.21, cmt. f.

⁴³⁶5 Scott & Ascher §35.1 (Revocation by Settlor).

⁴³⁷See 5 Scott & Ascher §35.1; 4 Scott on Trusts §330; Bogert, Trusts and Trustees §993. See also 5 Scott & Ascher §35.1.6 (Partial Revocation) (“...[A] settlor who has the power to revoke ordinarily may exercise it by withdrawing part of the trust property at one time and another part or all of the remaining trust property at one or more subsequent times”).

⁴³⁸See generally 5 Scott & Ascher §34.4; §8.2.2.1 of this handbook (trust terminations by consent).

⁴³⁹5 Scott & Ascher §35.3 (Power of Revocation or Modification Omitted by Mistake).

⁴⁴⁰5 Scott & Ascher §37.4.2 (Revocation and Modification of Charitable Trusts).

⁴⁴¹Uniform Trust Code §602(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). See generally 5 Scott & Ascher §35.1.

⁴⁴²See Restatement (Third) of Trusts §63(1); 5 Scott & Ascher §35.1 (observing that the Restatement (Third) of Trusts “in some sense splits the difference between the traditional view and the merging view” as embodied in the provisions of the Uniform Trust Code).

⁴⁴³Restatement (Third) of Trusts §63, cmt. c.

⁴⁴⁴A reserved power of appointment would qualify as beneficial interest for purposes of the presumption of revocability.

⁴⁴⁵See generally §4.1.1.1 of this handbook (The Noncharitable Trust; Resulting Trust Defined) (in part defining the resulting trust).

a rebuttable presumption that the trust is revocable and amendable.⁴⁴⁶ Under the Restatement (Third) of Trusts, a so-called adapted trust is revocable until the earlier of the settlor's death and the exercise by the trustee of his power to select among those of an indefinite class of beneficiaries who shall take the trust property.⁴⁴⁷

Evidence of the filing of a gift tax return might overcome the presumption of revocability. It has been suggested, however, that the failure to file a gift tax return ought not to overcome the presumption of irrevocability.⁴⁴⁸ This is "because failure to file even a required gift-tax return is too common to be revealing of the settlor's intention or understanding of the trust."⁴⁴⁹

In England and Canada, the default presumption is that a *general assignment* to a trustee for the benefit of creditors is revocable by the debtor up until the time when the terms of the assignment are accepted by at least one of the creditors.⁴⁵⁰ In the United States, there is a default presumption of irrevocability in the absence of an applicable statute.⁴⁵¹ Of course, if the debtor's intention is that the assignee be just an agent of the debtor, then title to the subject property never leaves the debtor,⁴⁵² although there are some exceptions to this general rule, which we cover in Section 9.9.2 of this handbook. "When a debtor delivers money or other property to a third person with instructions to pay a *particular creditor*, the relationship that arises may be a contract for the benefit of the creditor, an agency for the debtor, or a trust," depending generally on the collective intention of the parties.⁴⁵³ Thus, before assessing whether a "trust" for the benefit of a particular creditor is revocable, one would be well-advised to first make sure that the property that was delivered actually is the subject of a trust.⁴⁵⁴

Inherent in the reserved right to revoke is the right to amend. Inherent in the right to revoke a trust is the lesser right to amend it;⁴⁵⁵ inherent in the right to amend is the right to insert by amendment into the trust instrument a revocation provision.⁴⁵⁶ Thus, the law that is applicable to reserved powers of revocation is generally applicable as well to reserved powers of modification.⁴⁵⁷ A settlor who has expressly or by implication reserved only the power to substitute beneficiaries may still be able to effect a termination of the trust by "indirection,"

⁴⁴⁶Restatement (Third) of Trusts §63, cmt. c.

⁴⁴⁷Restatement (Third) of Trusts §46, cmt. f. *See generally* §9.29 of this handbook (The Adapted Trust).

⁴⁴⁸Restatement (Third) of Trusts §63 cmt. c(1).

⁴⁴⁹Restatement (Third) of Trusts §63 cmt. c(1).

⁴⁵⁰5 Scott & Ascher §35.1.8.

⁴⁵¹5 Scott & Ascher §35.1.8.

⁴⁵²5 Scott & Ascher §35.1.8. *See generally* §9.9.2 of this handbook (agency arrangements).

⁴⁵³5 Scott & Ascher §35.1.9.

⁴⁵⁴4 Scott & Ascher §35.1.9. *See generally* §8.25 of this handbook (few American law schools still require Agency, Trusts, and Equity).

⁴⁵⁵Restatement (Third) of Trusts §63, cmt. g; *see generally* Bogert, Trusts and Trustees §1001 (The Exercise of a Power of Revocation or Termination); Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (suggesting that a power of revocation includes the power to amend); 5 Scott & Ascher §35.2.1 (Whether Power to Revoke Include Power to Modify).

⁴⁵⁶Restatement (Third) of Trusts §63 cmt. g; Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (suggesting that an unrestricted power to amend may also include the power to revoke a trust); 5 Scott & Ascher §35.2.2 (Whether Power to Modify Includes Power to Revoke).

⁴⁵⁷*See generally* 5 Scott & Ascher §35.2 (Modification by Settlor).

namely, by substituting himself or herself in as the sole beneficiary.⁴⁵⁸ Recall that in Section 8.2.2.1 of this handbook, we note that when the settlor is the sole beneficiary and under no legal disability, the settlor may revoke the trust and take back the subject property.

Mechanics of exercising a reserved right of revocation or amendment. How does a settlor with the right to revoke or amend exercise that right? When the instrument is silent on the mechanics of revocation or amendment, methods should be employed that manifest clear and convincing evidence of the settlor's present intent.⁴⁵⁹ Often the methods of revoking and amending a trust are prescribed in its governing instrument.⁴⁶⁰ It is generally some variation of the following: "by an instrument, in writing, delivered to the trustee." When the revocation procedure is specified, it should be followed to the letter,⁴⁶¹ though the law may be trending in the direction of substantial compliance.⁴⁶² Both the Uniform Trust Code and the Restatement (Third) of Trusts have come down on the side of substantial compliance.⁴⁶³ Some courts are even declining to enforce a provision seen in many trust instruments, namely, that for an amendment to be effective, the trustee must consent to it.⁴⁶⁴ Concern has been expressed that such a requirement is tantamount to a "veto power" in the trustee, a power that could be wielded in ways that might

⁴⁵⁸See generally §3.5.2.2 of this handbook (whether power to modify includes power to revoke).

⁴⁵⁹Uniform Trust Code §602(c)(2)(B) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>); Restatement (Third) of Trusts §63, cmt. h. See generally 5 Scott & Ascher §35.1.1 (When No Method of Revocation Is Specified).

⁴⁶⁰See generally 5 Scott & Ascher §35.1.2 (When Method of Revocation Is Specified).

⁴⁶¹Restatement (Third) of Trusts §63, cmt. i. See, e.g., *Salem United Methodist Church v. Bottorff*, 138 S.W.3d 788 (2004) (while a physical act such as a tearing might serve to revoke a will if the act were coupled with a present intent to revoke, the deceased settlor's revocable trust had not been revoked during the settlor's lifetime by the settlor's act of tearing out the distributive provisions from the governing instrument, the governing instrument having provided for a specific method of revocation that did not involve the act of tearing); *Austin v. City of Alexandria*, 574 S.E.2d 289 (Va. 2003) (holding that a settlor having failed to follow revocation procedures set forth in a deed of real estate to the trustee of his revocable trust, the real estate was still in the trust at the time of the settlor's death notwithstanding the settlor's efforts during his lifetime to transfer the real estate to the trustee of another trust); *Reid v. McCoy*, 46 P.3d 188 (Okla. Ct. App. 2002) (finding support in Restatement (Second) of Trusts §220 cmt. j, the court held that where the terms of a revocable and amendable inter vivos trust called for delivery of instrument of amendment to the trustee, an instrument of amendment delivered to the trustee after the death of the settlor was ineffective, the trust having been rendered irrevocable by the settlor's death); *One Valley Bank, N.A. v. Hunt*, 205 W. Va. 112, 516 S.E.2d 516 (1999) (holding that a reserved power to modify or revoke during the settlor's lifetime cannot be exercised by the settlor's will); *Phelps v. State St. Trust Co.*, 330 Mass. 511, 512, 115 N.E.2d 382 (1953) (the settlor having reserved the right to amend or revoke by an instrument in writing acknowledged and delivered to the trustee, any instrument that purported to amend the trust that had not been acknowledged by the settlor before a public officer authorized by law to take acknowledgments of other writings held ineffective). But see Uniform Trust Code §602(c)(1) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (allowing for substantial compliance with execution formalities prescribed in the governing instrument).

⁴⁶²See generally 5 Scott & Ascher §35.1.2; §8.15.53 of this handbook (the harmless-error rule [the trust application]).

⁴⁶³Uniform Trust Code §602(c)(1); Restatement (Third) of Trusts §63 cmt. i.

⁴⁶⁴See, e.g., *Godley v. Valley View State Bank*, 277 Kan. 736, 89 P.3d 595 (2004); *Huscher v. Wells Fargo Bank*, 18 Cal. Rptr. 3d 27 (2004).

frustrate the legitimate intentions of competent settlors.⁴⁶⁵ Also, if the method of revocation specified in the terms of the trust was intended to be a method—but not the only method—of effecting a revocation, then “the settlor may revoke by any method that sufficiently manifests the intent to do so.”⁴⁶⁶

On the other hand, when it comes not to the procedure for revoking but the *circumstances* under which revocation by the settlor is permissible, *e.g.*, only as necessary for the settlor’s support⁴⁶⁷ or only with the consent of the other beneficiaries,⁴⁶⁸ then there must be literal compliance.⁴⁶⁹ If the settlor may revoke the trust only with the consent of the trustee, then the consent power would likely be a fiduciary one.⁴⁷⁰ It would then depend on the terms of the trust whether the trustee’s fiduciary duty incident to holding the power to grant or withhold consent runs to the settlor or to the beneficiaries, or to both, and whether the power is discretionary or ministerial.⁴⁷¹ “[I]f the terms of the trust neither expressly nor by implication limit the power of the trustee to consent to revocation, it would seem that the giving or withholding of consent ordinarily should be effective, as long as the trustee does not act dishonestly or form an improper motive.”⁴⁷²

The Uniform Trust Code, in derogation of the common law,⁴⁷³ provides that a revocable trust even may be revoked by a later will or codicil that expressly refers to the trust, or specifically devises property that would otherwise have passed according to the terms of the trust.⁴⁷⁴ It is “understandable” that this provision of the Code “has proven controversial, and a number of

⁴⁶⁵It should be kept in mind that the purpose of the consent requirement is first and foremost to protect the trustee. Presumably there is always the option of resignation if the terms of the trust have metamorphosed in ways that the trustee finds objectionable. The problem is that even in the face of express resignation authority, a trustee is not relieved of his fiduciary responsibilities until such time as a qualified successor is in place. *See* §6.1.4 of this handbook (duty to give personal attention (not to delegate)).

⁴⁶⁶5 Scott & Ascher §35.1.2.

⁴⁶⁷*See generally* 5 Scott & Ascher §35.1.3 n.24 and accompanying text.

⁴⁶⁸*See generally* 5 Scott & Ascher §35.1.3 (When Power to Revoke Is Subject to Consent of Beneficiaries) (noting that a beneficiary generally may withhold consent for no reason at all, that is a beneficiary’s consent power is generally not a fiduciary power).

⁴⁶⁹5 Scott & Ascher §35.1.2.

⁴⁷⁰5 Scott & Ascher §35.1.4.

⁴⁷¹5 Scott & Ascher §35.1.4.

⁴⁷²5 Scott & Ascher §35.1.4.

⁴⁷³*See generally* 5 Scott & Ascher §35.1.2 (noting that “the vast majority of the cases have held that a settlor who has reserved the right to revoke a trust *during his or her lifetime* has not also reserved the power to revoke the trust by will”). *See, e.g.*, Last Will and Testament of Tamplin, 48 P.3d 471 (Alaska 2002) (holding that settlor’s will ineffective to revoke her trust).

⁴⁷⁴Uniform Trust Code §602(c)(2)(A) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). “A revocation in a will ordinarily becomes effective only upon probate of the will following the testator’s death.” Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). Under the Uniform Trust Code, a residuary clause in a will disposing of the settlor’s estate in a way that conflicts with the trust’s dispositive provisions alone would be insufficient to revoke the trust. For a testamentary revocation to be effective, there would need to be some reference to the trust. Uniform Trust Code §602 cmt. *See also* Uniform Trust Code §602(c) (each providing for the revocation of a revocable trust by a later will). *See generally* §8.26 of this handbook (why trustees need to know about will residue clauses).

states have rejected it.”⁴⁷⁵

The effective time of revocation. Absent special facts or a specific trust provision to the contrary, a trust is deemed revoked as of the time the trustee receives the notice of revocation, not at the time the trustee relinquishes physical control of the subject property.⁴⁷⁶ The revocation may even be effective as of the time notice is dropped in the mail, a consequence that would have a bearing on the rights, duties, and obligations of the parties should the settlor die before the notice is physically received by the trustee.⁴⁷⁷ When it comes to trust revocations, there is much to be said for delivery by fax or email, followed by the mailing of a hard-copy back-up, particularly for the settlor who is in ill health.⁴⁷⁸ A fax or email precisely sets the time of revocation, creates an evidentiary record, and eliminates any hiatus between the signing of the instrument of revocation by the settlor and its receipt by the trustee.⁴⁷⁹ Litigation thrives on ambiguous situations and language. As to language, “I hereby revoke” is obviously preferable to “I hereby intend to revoke,” which could be construed as words of futurity.

The Code provides that a trustee who does not know that a trust has been revoked is not liable to the settlor or the settlor’s successors in interest for distributions made and other actions taken on the assumption that the trust had not been revoked.⁴⁸⁰ The Restatement (Third) of Trusts is generally in accord,⁴⁸¹ as is the Restatement (Third) of Property.⁴⁸²

Whether an agent of the settlor may exercise a reserved right of revocation. A legally incapacitated settlor cannot exercise a reserved right of revocation.⁴⁸³ May, however, the settlor’s agent, acting under a durable power of attorney,⁴⁸⁴ exercise it? In theory, yes, provided three conditions are met: (1) the applicable durable power of attorney statute authorizes such an agency, (2) the durable power of attorney under which the agent purports to act is either sufficiently broad or sufficiently precise to cover the purported act of revocation,⁴⁸⁵ and (3) the governing trust instrument itself contains a provision that authorizes revocation by proxy.⁴⁸⁶

⁴⁷⁵5 Scott & Ascher §35.1.2 n.19 and accompanying text.

⁴⁷⁶5 Scott & Ascher §35.1.2.

⁴⁷⁷5 Scott & Ascher §35.1.2.

⁴⁷⁸*See, e.g.,* Estate of Noell v. Norwest Bank, 960 P.2d 499 (Wyo. 1998) (delivery of letter of revocation by fax).

⁴⁷⁹*See, e.g.,* Estate of Noell v. Norwest Bank, 960 P.2d 499 (Wyo. 1998) (delivery of letter of revocation by fax).

⁴⁸⁰Uniform Trust Code §602(g) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁴⁸¹Restatement (Third) of Trusts §63 cmt. h.

⁴⁸²Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. e.

⁴⁸³*See generally* 5 Scott & Ascher §35.1; 4 Scott on Trusts §330 n.7 and accompanying text. *But see* Florida Nat’l Bank of Palm Beach v. Geneva, 460 So. 2d 895 (Fla. 1985).

⁴⁸⁴Uniform Probate Code §5-501. *See also* §9.9.2 of this handbook (agency arrangements) (discussing the differences between a trust and an agency).

⁴⁸⁵*Cf. Perosi v. LiGreci*, 918 N.Y.S.2d 294 (Sup. Ct. 2011) (though the settlor of an “irrevocable” trust possessed the statutory right to revoke or amend the trust with the consent of all of the beneficiaries, his agent could not have exercised that right on the settlor’s behalf as there was no provision in the governing power of attorney instrument expressly granting the agent the authority to exercise that statutory right).

⁴⁸⁶*See, e.g.,* Matter of Goetz, 793 N.Y.S.2d 318 (Surr. Ct. 2005); *Muller v. Bank of Am.*, 12 P.3d 899 (Kan. Ct. App. 2000); *In re Guardianship of Lee*, 1999 Okla. Civ. App. 50, 982 P.2d 539 (1999) (each holding that the holder of general durable power of attorney of settlor could not amend or revoke settlor’s revocable trust as the right to amend or revoke was reserved to the

Under the Restatement (Third) of Trusts, only conditions (1) and (2) or (1) and (3) need be satisfied.⁴⁸⁷ The trustee honors at his peril a revocation by agents, unless all three conditions have been met. So also in the case of an amendment by proxy.⁴⁸⁸ This is, of course, subject to there being a case or statute on point suggesting otherwise.⁴⁸⁹

There are now statutes on the books in some jurisdictions subjecting to liability one who, without reasonable cause, fails to honor the instructions of an agent acting under a durable power of attorney. The trustee's lot is not an easy one. But it gets worse: The Restatement (Third) of Property (Wills and Other Donative Transfers) would arm the agent-fiduciary with a default "assumption" of authority to exercise a nonfiduciary general inter vivos power of appointment, such as a reserved right of revocation, but then impose *on the trustee* a duty to make a preliminary investigation of certain facts before honoring such an exercise. The trustee would have such a duty even if the trustee were to lack actual or constructive notice of any wrongdoing on the part of the third-party agent-fiduciary. Here is the actual wording:

Unless the donor has manifested a contrary intent, it is assumed that the donor intends that the...agent under the authority of a durable power of attorney of the incapacitated donee of a presently exercisable general power is to be permitted to exercise the power for the benefit of the donee to the same extent the...agent could make an effective transfer of similar owned property for the benefit of the donee.⁴⁹⁰

To paraphrase, the trustee, before honoring such an exercise, would not only need to assure himself of the agent-fiduciary's general authority, but also that the purported proxy power-exercise is sufficiently for the benefit of the donee of the power and that the agent-fiduciary would have the specific authority to make an effective transfer of "similar owned property" for the benefit of the donee. The concept of "similar owned property" presumably refers to property owned outright *by the principal*, although the Reporter's Notes are silent on the subject, as they

settlor personally, neither the trust nor the power of attorney having expressly authorized amendment or revocation by agents of the settlor). *See also* Kline v. Utah Dep't of Health, 776 P.2d 57 (Utah 1989); Cal. Prob. Code §15401(c) (Deering 1999) (providing that authority to revoke a trust by proxy must be in both instruments: the trust and the power of attorney). In Colorado, by statute, an agent of the settlor may revoke a trust under which the settlor has reserved a right of revocation, provided specific reference is made to the trust in the agency agreement. Colo. Rev. Stat. §15-14-608(2) (1998). Is not a written power of attorney making express reference to an amendable trust for all intents and purposes also a trust amendment? *Cf.* Uniform Trust Code §602(e) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (providing that a settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power); Uniform Trust Code §411(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (providing that a settlor's power to consent to the termination of a noncharitable irrevocable trust may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust).

⁴⁸⁷Restatement (Third) of Trusts §63 cmt. 1.

⁴⁸⁸*See, e.g.,* Gurfinkel v. Josi, 972 So.2d 927 (Fla. App. 3 Dist., 2007).

⁴⁸⁹*See, e.g.,* 5 Scott & Ascher §35.1 n.20 (catalog of citations to cases and statutes that pertain to the revoking of trusts by proxy).

⁴⁹⁰Restatement (Third) of Property (Wills and Other Donative Transfers) §19.8, cmt. d.

are on the subject of how directly the donee needs to be benefited for the proxy exercise to be effective. This is all default law. Presumably the scrivener of a power-of-appointment grant is free to specify in the terms of the grant that the trustee may reasonably rely on the affidavit of the agent of the donee as to the agent's authority to exercise the power on behalf of the donee, and that the trustee shall be held harmless if he does so to the detriment of the donee.

Whether the settlor's guardian or conservator may exercise, or have a duty to exercise, a reserved right of revocation. Close attention to matters of authority is warranted as well if the trustee is in receipt of an instrument of revocation submitted by the settlor's conservator or guardian,⁴⁹¹ a right of revocation generally being considered a personal right.⁴⁹² A guardian or conservator of the settlor of a revocable trust may not exercise the settlor's right of revocation unless granted such authority in a statute and in the governing instrument.⁴⁹³ Not all jurisdictions are in accord.⁴⁹⁴ In Ohio, the guardian may exercise the ward's right of revocation with court approval.⁴⁹⁵ In Connecticut, the conservator's inventory shall include the value of the ward's interest in all property in which the ward has an "equitable present interest."⁴⁹⁶ "Increasingly, there is authority relating to whether the guardian of a settlor who is under an incapacity...may exercise the settlor's power to revoke a trust."⁴⁹⁷

As between the trustee and those expressly authorized to exercise the settlor's power to revoke or amend, *e.g.*, the settlor's conservator, guardian, or agent acting under a durable power of attorney, the Restatement (Third) of Trusts offers some general guidance as to who should be responsible for what: "In short, conservatorship action (or action by an agent who is expressly authorized to exercise the settlor's power to revoke or amend) may be appropriate to substitute for the judgment an incapacitated *settlor* can no longer exercise when need appears—for example, to compensate for short-comings in the planning of the trust or to make necessary or desirable gifts from the trust; but conservatorship or agency action exercising a settlor's power would normally not be appropriate to substitute for (*i.e.*, to interfere with) the judgments the *trustee* was expected and adequately empowered to make."⁴⁹⁸

Suppose the governing trust instrument contains a revocation provision that *excludes* revocation by proxy. Would such a qualified revocation provision effectively foreclose revocation by the settlor's conservator or guardian? Why not?⁴⁹⁹ Presumably, it is the intention of the settlor that during periods of incapacity the trust be irrevocable and that the revocation provision be suspended so that there is no basis of authority on which the conservator or guardian can act.⁵⁰⁰

⁴⁹¹See, *e.g.*, In re Bo, 365 N.W.2d 847 (N.D. 1985).

⁴⁹²Restatement (Third) of Trusts §74, Reporter's Notes (Comments a(2) and e).

⁴⁹³Bogert, Trusts and Trustees §1000.

⁴⁹⁴See, *e.g.*, In re Rudwick, 2002 WL 31730757 (Va. Cir. Ct.) (the settlor's court-appointed conservator allowed to exercise the settlor's reserved right of revocation though the governing instrument made no provision for revocation by proxy).

⁴⁹⁵See Friedrich v. BancOhio Nat'l Bank, 14 Ohio App. 3d 247, 470 N.E.2d 467 (1984).

⁴⁹⁶Conn. Stat. §45a-655(a).

⁴⁹⁷See 5 Scott & Ascher §35.1 n.20 (Catalog of Statutes and Cases).

⁴⁹⁸Restatement (Third) of Trusts §74 cmt. a(2).

⁴⁹⁹See, *e.g.*, Smith v. Department of Health, 895 So. 2d 735, 39, 368 (La. Ct. App. 2005) (suggesting that the rule at common law is that a guardian of an incompetent person does not have a power to revoke a trust created by the ward while he or she was competent under which the ward had reserved a right of revocation, even when there is no express prohibition against revocation by the guardian, the right to revoke being nontransferable and personal to the settlor).

⁵⁰⁰"Where the settlor reserves a power to revoke the trust under certain circumstances, he can revoke it only under those circumstances." 4 Scott on Trusts §330.8. See, *e.g.*, In re Guardianship

To the extent the conservator or guardian is foreclosed from terminating an irrevocable trust created before incapacity, so too should it be foreclosed from terminating a trust where the power of revocation is suspended.

If a settlor's guardian or conservator has either a general or default fiduciary duty to attempt to obtain a court order transferring the ward's entrusted property into the guardianship or conservatorship estate, a duty that is incident to the duty to take control of all the ward's property, including the equitable interests, then things can get expensive. Under the Uniform Trust Code, the settlor's conservator or guardian could exercise a settlor's power of revocation upon approval of the court supervising the conservatorship.⁵⁰¹ However, "[b]ecause a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly."⁵⁰² Thus, the court should only override an express restriction if it concludes that the action furthers the interests of justice.⁵⁰³ The Restatement (Third) of Trusts provides that "unless the trust terms provide otherwise, the settlor's power to revoke or amend a revocable trust may be exercised by a conservator, guardian, or other legal representative if and to the extent authorized by the appropriate court."⁵⁰⁴

The Restatement (Third) of Property (Wills and Other Donative Transfers) would arm the legal representative of a donee of a nonfiduciary general inter vivos power of appointment, such as a reserved right of revocation, with a default "assumption" of authority to exercise the power by proxy, but then impose *on the trustee* a duty to make a preliminary investigation of certain facts before honoring such an exercise. The trustee would have such a duty even if the trustee were to lack actual or constructive notice of any wrongdoing on the part of the legal representative.

Here is the actual wording:

Unless the donor has manifested a contrary intent, it is assumed that the donor intends that the legal representative...of the incapacitated donee of

of Lee, 1999 Okla. Civ. App. 50, 982 P.2d 539 (1999) (denying settlor's guardian access to assets of revocable trust, the settlor having expressly reserved only to herself the right to revoke and having made no mention of revocation by proxy). *But see* Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (1999) (trust instrument being silent on the issue of conservator access to trust assets, the conservator of settlor of revocable trust allowed to revoke trust instead of settlor); Uniform Trust Code §602(f) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (apparently providing that conservator or guardian of incapacitated settlor of revocable trust may with court approval revoke trust in stead of settlor). *Cf.* Uniform Trust Code §411(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (providing that a settlor's power to consent to the termination of a noncharitable irrevocable trust may be exercised by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed).

⁵⁰¹Uniform Trust Code §602(f) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁵⁰²Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁵⁰³Uniform Trust Code §602 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁵⁰⁴Restatement (Third) of Trusts §63 cmt. 1.

a presently exercisable general power is to be permitted to exercise the power for the benefit of the donee to the same extent the legal representative...could make an effective transfer of similar owned property for the benefit of the donee.⁵⁰⁵

To paraphrase, the trustee before honoring such an exercise would not only need to assure himself of the legal representative's general authority, but also that the purported proxy power-exercise is sufficiently for the benefit of the donee of the power and that the legal representative would have the specific authority to make an effective transfer of "similar owned property" for the benefit of the donee. So also if the trustee is in receipt of an instrument of proxy exercise submitted by the legal representative of a minor donee.⁵⁰⁶

The concept of "similar owned property" presumably refers to property owned outright *by the donee*, although the Reporter's Notes are silent on the subject, as they are on the subject of how directly the donee needs to be benefited for the proxy exercise to be effective. The judicial complaint for instructions or declaratory judgment is tailor-made for protecting the trustee in the face of such factual and legal uncertainties, a topic we take up in Section 8.42 of this handbook.⁵⁰⁷

Revocation occasioned by undue influence. In Florida, a competent settlor of a revocable trust, though subject to undue influence, apparently may effectively revoke the trust:

The courts have no place in trying to save persons such as Mrs. Genova, the otherwise competent settlor of a revocable trust, from what may or may not be her own imprudence with her assets. When she created this trust, she provided a means to save herself from her own incompetence, and the courts can and should zealously protect her from her own mental in-capacity. However, when she created this trust, she also reserved the absolute right to revoke if she were not incompetent. In order for this to remain a desirable feature of the trust instrument, the right to revoke should be absolute.⁵⁰⁸

We leave to the reader to contemplate the public policy implications of the *Genova* holding, which is probably an aberration. The dissent suggested that the settlor's act was "not the exercise of her right to revoke, but rather was the will of another foisted on her."⁵⁰⁹

A revocable trust with multiple settlors. What if a revocable trust is created or funded by

⁵⁰⁵Restatement (Third) of Property (Wills and Other Donative Transfers) §19.8, cmt. d.

⁵⁰⁶Restatement (Third) of Property (Wills and Other Donative Transfers) §19.8, cmt. e. "A purported inter vivos exercise of a presently exercisable power by a minor is subject to ratification or disaffirmance by the minor when the minor becomes of age, as with a purported transfer by the minor of owned property." *Id.* An effective proxy exercise would negate these rights of ratification and disaffirmance.

⁵⁰⁷See Restatement (Third) of Property (Wills and Other Donative Transfers) §19.8, cmt. f ("A court may have jurisdiction apart from the donative document to authorize a legal representative to exercise the incapacitated donee's power.").

⁵⁰⁸Florida Nat'l Bank of Palm Beach County v. Genova, 460 So. 2d 895, 898 (Fla. Sup. Ct. 1984).

⁵⁰⁹Florida Nat'l Bank of Palm Beach County v. Genova, 460 So. 2d 895, 898 (1984).

more than one settlor?⁵¹⁰ To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses.⁵¹¹ To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.⁵¹² Upon the revocation or amendment of the trust by less than all of the settlors, the trustee must notify the other settlors of the revocation or amendment.⁵¹³ In the case of a revocable trust created by a husband and wife in a common law jurisdiction, there is some default law to the effect that upon the death of the first spouse to die, the survivor's power of revocation over even *the survivor's* allocable portion of the trust estate dies as well.⁵¹⁴

When revocation is subject to third-party consent. If a settlor may revoke the trust only with the consent of a third party, the third party may not act in bad faith or from an improper motive in granting or withholding consent.⁵¹⁵ If the trustee holds the power of consent, it is likely that he holds it in a fiduciary capacity.⁵¹⁶

When the holder of a reserved right to revoke a trust dies: quasi-probating the will substitute. A trust under which the settlor has reserved a right of revocation is a type of will substitute. Thus, it is not surprising that the trend of the default law is in the direction of treating, at least for certain purposes, the settlor as if he or she were a testator/testatrix and the subject property as if it were probate property once the settlor dies, this even though title to the trust property does not transfer to the deceased settlor's executor/executrix, administrator/administratrix, or personal representative, as the case may be. These purposes include the following:

- Satisfaction of claims against the probate estate, to include certain statutory allowances;⁵¹⁷
- Application of the 120-hour requirement;⁵¹⁸
- Application of the harmless-error rule;⁵¹⁹

⁵¹⁰See, e.g., §9.25 of this handbook (the joint trust).

⁵¹¹Restatement (Third) of Trusts §63, cmt. k; Uniform Trust Code §602(b)(1) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁵¹²5 Scott & Ascher §35.1.10 (Trust with Multiple Settlers); Restatement (Third) of Trusts §63 cmt. k.; Uniform Trust Code §602(b)(2) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). The Code, however, does not address how a trustee calculates a settlor's pro rata contribution of interests held jointly or as tenancies by the entirety.

⁵¹³Uniform Trust Code §602(b)(3) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁵¹⁴5 Scott & Ascher §35.1.10 (Trust with Multiple Settlers). See also §9.25 of this handbook (the joint trust).

⁵¹⁵Restatement (Third) of Trusts §63 cmt. j.

⁵¹⁶Restatement (Third) of Trusts §63 cmt. j.

⁵¹⁷Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. b. See generally §§5.3.3.1(b) of this handbook (the postmortem creditor), 5.3.4.1 of this handbook (spousal rights in common law states) and 8.9.1 of this handbook (the federal estate tax).

⁵¹⁸Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. c: "The original Uniform Probate Code [§2-601] introduced a rule of construction that devisees must survive the decedent by 120 hours or more, but the terms of the statute applied only to transfers by will... The Revised Uniform Simultaneous Death Act and the Revised Uniform Probate Code expanded the 120-hour requirement of survival to all donative documents (wills and inter vivos donative documents, including will substitutes) that require the donee to survive the donor." See generally §8.15.56 of this handbook (120-hour survival requirement [the trust application]).

- Revocation or amendment by a subsequent will;⁵²⁰
- Revocation by marriage;⁵²¹
- Ademption by extinction;⁵²²
- Antilapse;⁵²³
- Invalidity due to incapacity or wrongdoing;⁵²⁴
- Application of construction, reformation, and modification doctrines generally;⁵²⁵
- Application of rules of construction governing class gifts specifically;⁵²⁶ and
- Application of social restrictions on freedom of disposition.⁵²⁷

For a thorough discussion of the applicability of certain rules governing testamentary dispositions to self-settled revocable trusts, the reader is referred to Section 7.2 of the Restatement (Third) of Property (Wills and Donative Transfers), particularly the accompanying commentary and Reporter's Notes. "These rules...[also]...inform the federal common law of will substitutes under the Employee Retirement Income Security Act (ERISA)..."⁵²⁸

Termination or modification by beneficiary; nonsettlor holder (donee) of a presently exercisable inter vivos power of appointment. The terms of a trust may bestow on its beneficiaries a power to terminate it or modify its terms.⁵²⁹ The presumption is that the power is held in a nonfiduciary capacity.⁵³⁰ There is an opposite presumption when the power is in the

⁵¹⁹Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2, cmt. d. The harmless-error rule applicable to wills is as follows: "A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will." Restatement (Third) of Property (Wills and Other Donative Transfers) §3.3. *See generally* §8.15.53 of this handbook (harmless-error rule [the trust application]).

⁵²⁰Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2, cmt. e. *See also* the text of §8.2.2.2 of this handbook (the revocable trust).

⁵²¹Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. f. *See generally* §5.3.4.1 of this handbook (spousal rights in common law states) (rights of spouses of trust beneficiaries [divorce and separation]); Uniform Probate Code §2-804 (revocation of non probate transfers by divorce); *see also* Restatement (Third) of Property (Wills and Other Donative Transfers) §4.1 cmt., cmt. p.

⁵²²Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. f. *See generally* §8.15.54 of this handbook (ademption by extinction [the trust application]).

⁵²³Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2, cmt. f. *See also* §8.11 of this handbook (what are the duties of the trustee of a revocable inter vivos trust?) (in part discussing the concept of antilapse in the trust context). *See generally* §8.15.55 of this handbook (antilapse [the trust application]).

⁵²⁴Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. g.

⁵²⁵Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. h.

⁵²⁶Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. i. *See generally* §5.2 of this handbook (class designation: "children," "issue," "heirs," and "relatives" (some rules of construction)).

⁵²⁷Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. j.

⁵²⁸Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 cmt. k.

⁵²⁹5 Scott & Ascher §33.1.2 (Termination or Modification by Beneficiary).

⁵³⁰5 Scott & Ascher §33.1.2 (Termination or Modification by Beneficiary).

trustee.⁵³¹

With the possible exception of creditor access to the subject property,⁵³² the default law treats the nonsettlor holder of a general inter vivos power of appointment (or its equivalent, *e.g.*, a right to demand principal) pretty much as it does a trust under which the settlor has reserved a right of revocation.⁵³³ Like the settlor, the holder has the equivalent of an ownership interest in the portion⁵³⁴ or all of the property that is the subject of the power. Like the settlor, the holder has the power to extinguish the rights of the other beneficiaries.⁵³⁵ While the holder is of full age and has mental capacity, the exercise of such a power also will trump any co-existing discretionary authority in the trustee to make distributions to the holder, or anyone else for that matter.⁵³⁶

There are some differences, however. The trustee, for example, has a duty to apprise the other beneficiaries of the existence and nature of the power in the nonsettlor and to furnish them with accountings and reports until such time as the holder instructs otherwise.⁵³⁷ The holder, of course, needs to be legally competent to issue such an instruction. In the event of the donee's incapacity, the other beneficiaries' right to trust accountings and reports revives.⁵³⁸

If the general inter vivos power, on the other hand, is only exercisable with the consent of the trustee, another beneficiary, or a third party not beneficially interested, then the interests of the other beneficiaries are less easily subverted by the holder.⁵³⁹ This is because the holder's power then would not be the equivalent of ownership. A single-holder general inter vivos power of appointment subject to another's consent is not to be confused with a jointly held general inter vivos power of appointment (or power of withdrawal), which can only be exercised by all holders acting in concert. The joint power is a property equivalent that belongs to the holders collectively. It would enable them, acting in concert, to issue binding instructions to the trustee, to include instructions that if carried out could have the effect of subverting the interests of the other beneficiaries.⁵⁴⁰

Whether a third person holds in a fiduciary rather than personal capacity an express power to terminate or modify the trust will ultimately depend on the terms of the trust.⁵⁴¹ If, in the event of its exercise, the subject property passes or must pass to someone other than the third person, then the status of the third person may well be that of a fiduciary,⁵⁴² and quite possibly that of a trust

⁵³¹5 Scott & Ascher §33.1.1 (Termination or Modification by Trustee).

⁵³²See §5.3.3 of this handbook (rights of beneficiary's creditors and others to trust property) (discussing in part powers of appointment and creditor accessibility).

⁵³³Restatement (Third) of Trusts §74 cmt. g.

⁵³⁴Restatement (Third) of Trusts §74 cmt. h.

⁵³⁵Restatement (Third) of Trusts §74 cmt. g.

⁵³⁶See, *e.g.*, *Fleck-Rubin v. Fleck*, So. 2d (Fla. Ct. App. 2006) (2006 Westlaw 1300609).

⁵³⁷Restatement (Third) of Trusts §74 cmt. g. "This is because the donee, unlike the settlor of a revocable trust, is not the source of the beneficiaries' rights, and the beneficiaries are entitled to know of the donee's actions and to know of and verify the donee's authority over the trust."

Restatement (Third) of Trusts §74 cmt. g.

⁵³⁸Restatement (Third) of Trusts §74 cmt. g.

⁵³⁹Restatement (Third) of Trusts §74 cmt. g(1).

⁵⁴⁰Restatement (Third) of Trusts §74 cmt. g.

⁵⁴¹See generally 5 Scott & Ascher §33.1.3 (Termination or Modification by Third Person).

⁵⁴²See generally 5 Scott & Ascher §33.1.3 (Termination or Modification by Third Person).

protector.⁵⁴³ If, on the other hand, the third person may exercise the power in his or her own favor, then chances are we have a nonfiduciary general inter vivos power of appointment.⁵⁴⁴ The holder of a personal nonfiduciary limited/special inter vivos power of appointment over the entire corpus of a trust generally may revoke the trust by exercising the power, and do so without regard to fiduciary considerations.⁵⁴⁵ There is an important caveat: The terminating exercise cannot be a fraud on the power.⁵⁴⁶

Termination by trustee or protector. The terms of a trust may bestow on the trustee a discretionary power to invade principal to or for the benefit of the beneficiary or beneficiaries. A trust with such a provision is known as a discretionary trust, a topic we cover in Section 3.5.3.2(a) of this handbook. Unless the terms provide otherwise, the power is held in a fiduciary capacity and must be exercised accordingly.⁵⁴⁷ So also with an express discretionary power in the trustee to terminate the trust and revest the underlying property in the settlor.⁵⁴⁸ Whether the trustee may “invade the principal down to zero” and in so doing effect its termination will depend upon the terms of the trust.⁵⁴⁹ Thus, if the trustee has been given a personal nonfiduciary inter vivos power of appointment,⁵⁵⁰ then the trustee may effect the trust’s termination through the exercise of the power unencumbered by fiduciary constraints, provided the exercise would not constitute some kind of a fraud on the power.⁵⁵¹ Whether a trust protector with a direct or indirect discretionary power to terminate a trust is subject to trustee-like fiduciary constraints is discussed in Section 3.2.6 of this handbook.

The Restatement (Third) of Property would inject some quasi-capture doctrine into the law applicable to expired general powers of appointment. If the holder of a general inter vivos power of appointment dies without having effectively exercised the power, the power expires.⁵⁵² Likewise, if the holder of a general testamentary power of appointment fails to effectively exercise the power by will, the power expires at the holder’s death. In either case, the gift-in-default clause in the granting instrument, if there is such a clause, controls the disposition of the unappointed property.⁵⁵³ (So also if a power expires by inter vivos disclaimer or release.⁵⁵⁴) The time when a power expires “is almost invariably the death of the donee,”⁵⁵⁵ although one could certainly fashion a grant of a general power that would be capable of expiring before its donee had, such as upon the exhaustion of an intervening equitable estate *pur autre vie*. The concept of

⁵⁴³See generally §3.2.6 of this handbook (in part discussing the rights, duties, and obligations of a trust protector). See also 5 Scott & Ascher §33.1.3, n.1.

⁵⁴⁴See generally §8.1.1 of this hand book (powers of appointment).

⁵⁴⁵See generally §8.1.1 of this handbook (powers of appointment); but see 5 Scott & Ascher §33.1.2 (suggesting that even if a beneficiary holds a nonfiduciary power, there may be situations in which there is a duty not to exercise it in a manner that is “unnecessarily harmful or unfair to other beneficiaries” and finding support for the proposition in Restatement (Third) of Trusts §64 cmt. c).

⁵⁴⁶See generally §8.15.26 of this handbook (fraud on a power doctrine).

⁵⁴⁷See generally 5 Scott & Ascher §33.1.1 (Termination or Modification by Trustee); §3.5.3.2(a) of this handbook (the discretionary trust).

⁵⁴⁸5 Scott & Ascher §33.1.1.

⁵⁴⁹5 Scott & Ascher §33.1.1.

⁵⁵⁰See generally §8.1 of this handbook (powers of appointment).

⁵⁵¹See generally §8.15.26 of this handbook (fraud on a power doctrine).

⁵⁵²As we note in Section 8.1.1 of this handbook, a power of appointment is exercisable; it is never directly transferable.

⁵⁵³Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

⁵⁵⁴Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

⁵⁵⁵Restatement (First) of Property §367, cmt. d.

the estate *pur autre vie* is discussed generally in Section 8.15.64 of this handbook.

The Restatement (Third) of Property speaks in terms of a general power “lapsing,” an unfortunate innovation.⁵⁵⁶ Its predecessors spoke in terms of a power “expiring,”⁵⁵⁷ which is less ambiguous in that the term lapse can mean “to pass to another through neglect or omission.”⁵⁵⁸ As we note in Section 8.1.1 of this handbook, a power of appointment itself is never directly transmissible.

But what if the donor of an expired power had neglected in the granting instrument to provide for takers-in-default, or the instrument’s gift-in-default clause was ineffective when the power expired? In that case the unappointed property passes upon a resulting trust back to the donor if the donor is then living, or into the probate estate of the donor if the donor is not then living, but, again, not until all valid intervening equitable interests have themselves expired.⁵⁵⁹ Resulting trusts are covered generally in Section 4.1.1.1 of this handbook. *In a radical departure from settled doctrine, the Restatement (Third) of Property provides that if the donee “merely failed to exercise the power” the unappointed property is captured by the donee or the donee’s estate.*⁵⁶⁰ A resulting trust, however, would still be imposed in the case of expiration by disclaimer or release,⁵⁶¹ or upon the expiration by any means of a power of revocation, amendment, or withdrawal.⁵⁶² Again, as we did in more detail in our discussion of ineffective exercises of general powers in Section 8.15.12 of this handbook, we question the logic of treating a power of “revocation, amendment, or withdrawal” differently from other “types” of general inter vivos power of appointment, whether for capture purposes generally or for any other purpose. A resulting trust also would be imposed if the donee “expressly refrained from exercising the power.”⁵⁶³ Of course, this discussion is entirely academic if the donor is also the donee of the expired general power. The unappointed property would then end up in the probate estate of the donee in any case, whether by imposition of a resulting trust under traditional doctrine or by quasi-capture.

The Restatement (Third) of Property exhibits a curious and tenacious aversion to invoking applicable resulting trust doctrine,⁵⁶⁴ particularly in the sections devoted to unexercised or ineffectively exercised general powers of appointment. The result is an unhelpful dearth of context, particularly when it comes to following chains of title, as well as a fair amount of general incoherence. Take, for example, Section 19.22(b), which in part reads: “...but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor’s transferees or successors in interest.” The phrase “passes under a reversionary interest” is nonsensical in the trust context. What actually happens is that the legal title to the unappointed property passes from the trustee to the donor or his personal representative upon a resulting trust such that the equitable reversion, which had vested *ab initio*, becomes possessory. Nothing is passing from the trustee under, over,

⁵⁵⁶See Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22 (term lapse employed even in the section’s title).

⁵⁵⁷See, e.g., Restatement (First) of Property §367, cmt. d.

⁵⁵⁸The American Heritage Dictionary 1014 (3d ed. 1996).

⁵⁵⁹See, e.g., Restatement (First) of Property §367(1).

⁵⁶⁰Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

⁵⁶¹Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

⁵⁶²Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22, cmt. f.

⁵⁶³Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

⁵⁶⁴See, e.g., Restatement (Third) of Property (Wills and Other Donative Transfers) §25.2 (although the title to the sections is *Reversion or Remainder*, the resulting trust is mentioned once, and only in passing).

or in a reversionary interest.

We also quibble with the failure of all of the Restatements to expressly confirm that in the face of an expired power of appointment, title to property unappointed does not leave the hands of the trustee until such time as all valid intervening equitable estates have themselves expired, unless the terms of the trust so provide. An intervening equitable estate typically would be an equitable life estate.⁵⁶⁵

⁵⁶⁵See generally §8.27 of this handbook (the equitable life estate).

