

Title

Is it a true trust if settlor has reserved a right to revoke it?

Text

Classic equity doctrine. By the 1940s, it was settled law that a funded revocable *inter vivos* trust with multiple beneficiaries was a true trust. See Nat'l Shawmut Bnk v. Joy, 53 N.E.2d 113 (1944). It was not merely a failed will that was void *ab initio* due to noncompliance with the execution requirements of the statute of wills. Nor was it a mere common law agency. Had it been, legal title would have remained with the purported settlor such that upon his death legal title would have passed not to those designated to take the remainder in trust corpus but to the executor of his will, the agency having terminated. Take, for example, a valid funded revocable inter vivos trust that terminates upon settlor's death, legal title to trust property then passing free of trust directly from trustee to settlor's descendants *per stirpes*. It being a true trust, while settlor lives each class member enjoys contingent equitable property rights in the remainder in corpus. Equitable? Because legal title to subject property is in trustee. Contingent? Because each member's currently enforceable right to receive free of trust down the road a share of the remainder in corpus is subject to myriad conditions precedent. In the case of a yet-to-be-conceived daughter of settlor's son, for example, vesting in possession is subject to these conditions precedent: Her coming into existence; her surviving settlor; her father predeceasing settlor; settlor not having revoked trust; settlor not having amended her out of trust; and trustee not having invaded principal down to zero should there be discretionary fiduciary authority to invade principal for settlor's benefit. Thus, her contingent property interest in the remainder in corpus is said to be "non-transmissible." Not a problem. See *id.*; §8.30 of *Loring and Rounds: A Trustee's Handbook* (2026). Granted, while settlor lives the sticks in her property-rights bundle are few and slender: The right to critical information regarding trust's administration and the right to seek judicial remedies for breaches of trust, *each right, however, exercisable before termination of trust only in the event of settlor's mental incapacitation*. While a funded revocable *inter vivos* trust has some functional attributes of a will, it is far more than a will substitute. Unlike a will, which speaks only at death, it can function *inter vivos* as a property-management vehicle. And designated legatees and devisees possess no property rights while testator is alive, just hopes and expectations.

Uniform Trust Code (2000) §§ 603 & 706, cmt. UTC §603(b) provides that "to the extent a trust is revocable [and the settlor has capacity to revoke trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are exclusively to, the settlor." In 2004, the bracketed capacity language was made optional. In the absence of such language a trust during periods of settlor's mental incapacity is illusory in that the trustee, as a practical matter, is unaccountable, unless possibly when a court appointed guardian, or agent acting pursuant to a durable power of attorney, is in the picture. See generally §8.11 of *Loring and Rounds*, relevant portions of which section are reproduced in appendix below.

Now UTC §706 cmt., on the other hand, asserts that “the right of a beneficiary to petition for...[trustee]...removal does not apply to a revocable trust while the settlor has capacity.” By implication, beneficiary would possess such a right during periods of settlor’s mental incapacity. There is no bracketing.

Vermont’s unsynchronized versions of UTC §§ 603 & 706. Vermont elected to enact UTC §603 without the bracketed language such that the successor beneficiaries of a funded revocable inter vivos trust have no right to information regarding it even during periods when its settlor is mentally incapacitated. Vermont, however, also enacted UTC §706, which affords by implication successor beneficiaries the right/standing during those periods to seek judicial removal of trustee for cause. Upon settlor becoming incapacitated successor beneficiaries acquire no right to be informed even of trust’s very existence but do acquire a right/standing to seek to have its trustee removed from office for cause? See *In re Trust of Marsha Milot*, 2026 WL 628494, 2026 VT 7.

Appendix

§8.11 What Are the Duties of the Trustee of a Revocable Inter Vivos Trust? [from *Loring and Rounds: A Trustee’s Handbook* (2026)]

Incapacitation of powerholder. *Administering the equitable interests of the incapacitated powerholder.* Once the powerholder becomes incapacitated, the trustee’s fiduciary duties and liabilities ratchet up, particularly with respect to distributions.³⁸ An outright distribution to an incapacitated powerholder could well constitute misdelivery³⁹ for which the trustee could be held personally liable even after the powerholder’s death.⁴⁰ Moreover, once a settlor becomes incapacitated, the trustee may be obligated to accommodate the equitable interests of the other beneficiaries as well as the powerholder’s,⁴¹ such as by providing them with critical information about the trust, unless the incapacity is expected to be short term or the jurisdiction has rejected altogether beneficiary standing during settlor incapacity.⁴² The

³⁸4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Instruments).

³⁹See generally 4 Scott & Ascher §24.31 (Liability for Incorrect Distributions).

⁴⁰4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Instruments).

⁴¹UTC §603(b); Rest. (Third) of Trusts §74 cmt. a(2).

⁴²UTC §603(b) cmt.; Rest. (Third) of Trusts §74, Reporter’s Notes (Comments a(2) and (e)). Vermont has rejected beneficiary standing generally during settlor incapacity, though the beneficiaries may petition for the trustee’s removal notwithstanding their judicially enforced ignorance of the critical facts. This jurisprudential incoherence is likely the product of sloppy legislating rather than intentional. See *In re Trust of Marsha Milot*, 2026 WL 628494 (Supreme Court of Vermont). See Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006). Note, however, that the commentary to UTC §603(b) also provides that “because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the trust.”

prudent trustee, therefore, will endeavor to mitigate the risk of having to cross swords⁴³ with the other beneficiaries while the powerholder is still alive (or after the settlor's death⁴⁴) by having a questionable direction of the powerholder put into the format of a written amendment⁴⁵ (or written partial exercise of the general power⁴⁶). If the trustee determines that a particular direction needs to be in writing, he has a fiduciary duty promptly to so notify the powerholder.⁴⁷ For a writing to constitute an enduring amendment, *i.e.*, an amendment that survives the death or incapacity of the powerholder, its terms may not be unlawful or violate public policy.⁴⁸

Administering the equitable interests of the other beneficiaries. The UTC takes the position that once the holder of a right of revocation becomes incapacitated, the trustee's fiduciary duties, at least under the default law, run not just to the powerholder but also to the other beneficiaries, this though their equitable property interests remain ultra-contingent.⁴⁹ Otherwise, the powerholder's incapacity could, as a practical matter, render the trustee unaccountable.⁵⁰ Not everyone is in accord with the UTC's position. First, determining when a settlor is incapacitated is not always that easy. Second, those with contingent equitable property interests under a revocable inter vivos trusts arguably ought not to be afforded greater deference than devisees with expectancy interests under the ambulatory will of a living testator. Designated devisees, for example, generally have no legal or equitable right to information regarding a will's terms until the testator dies, *regardless of the testator's inter vivos capacity or incapacity*, absent special facts.

Powerholder's surrogates. For a discussion of whether the powerholder's court-appointed guardian, court-appointed conservator, and/or the holder of the powerholder's durable power of attorney would have revocation, amendment, or withdrawal authority, the reader is referred to §8.2.2.2 of this handbook (the revocable trust). When such authority exists, it is exercised in a fiduciary capacity.⁵¹

⁴³“As a practical matter, ... in the event of a surcharge action the trustee ... [runs]... a risk in relying on unwritten evidence to support a defense based on settlor direction or authorization.” Rest. (Third) of Trusts §74 cmt. c.

⁴⁴*See, e.g.*, *Siegel v. Novak*, 920 So. 2d 89 (Fla. 2006) (the court granting standing to successor beneficiaries after the settlor's death to challenge distributions made before the settlor's death by the corporate trustee of a self-settled revocable inter vivos trust). *But see In re Tr. of Malasky*, 290 App. Div. 2d 631, 736 N.Y.S. 2d 151 (2002) (successor beneficiaries denied standing to object to a postdeath accounting of a revocable trust, an accounting that covered a period when the settlor-trustee was alive, had capacity, and possessed a personal right of revocation). *Siegel* perhaps can be distinguished from *Malasky* in that in *Siegel* the settlor had not been serving as a trustee.

⁴⁵UTC §808 cmt. [superseded by the Unif. Directed Trust Act in 2017].

⁴⁶*Cf.* Rest. (Third) of Trusts §74(1)(a)(i) (providing that if the settlor of a revocable trust issues to the trustee a direction that is contrary to the terms of the trust or the trustee's normal fiduciary duties, the trustee has a duty to follow it, provided the direction is communicated in a manner by which the settlor could properly amend or revoke the trust).

⁴⁷Rest. (Third) of Trusts §74 cmt. c.

⁴⁸Rest. (Third) of Trusts §74 cmt. i. *See generally* §9.24 of this handbook (the incentive trust (and the public policy considerations); marriage restraints).

⁴⁹UTC §603(b). (“To the extent a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee were owed exclusively to, the settlor.) *But see In re Tr. of Cook*, 947 N.W.2d 870 (Neb. 2020) (Under Nebraska's particular version of the UTC, the non-settlor beneficiaries of a revocable inter vivos trust constructively possess mere expectancies such that they would lack the requisite standing to contest the settlor's capacity to establish the trust even in the face of the settlor's actual incapacity).

⁵⁰*See generally* §6.1.5 of this handbook (a purported trustee who is unaccountable is not a trustee).

⁵¹Rest. (Third) of Trusts §74 cmt. a(2).

