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A Will for Willa Cather

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ABSTRACT

Artists hold their creative works dear. Whether paintings, poems, or songs, their human creators treat them with special care and often desire that same care be exercised after death. Some may wish to ban the use of a song in a television commercial. Others may wish to stop their novel from being turned into an animated Disney movie. But directing particular uses of property from the grave can be met with several objections and legal impediments. The objections sound in alarmist responses to "dead hand control." The impediments include the Rule Against Perpetuities, uncertainty, capriciousness, and the repugnancy of restraints on alienation. This Article considers these and other recurring objections and impediments in one particular context and with one particular variety of creative works in mind: an author's unpublished and private letters to her friends. A mechanism for achieving an artist's restrictions over the use of her creative works after death is introduced in the form of a purpose trust. Purpose trusts are typically utilized by pet owners to ensure the continued care and preservation of their pets after the owner's death. Purpose trusts are unique in that they lack ascertainable beneficiaries to enforce the trustee's duties. Many purpose trusts do not qualify as charitable trusts, which can be enforced by the state attorney general's office. Instead, a private "enforcer" must be provided. Here, a noncharitable purpose trust designed to restrict access to an author's private correspondence is introduced: a testamentary trust hypothetically created under the terms of the Last Will and Testament of the celebrated twentieth-century American author Willa Cather.

"Considering the circumstances, dead authors are a prolific group."
- Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 259 (2017)

"I've got one! I've got a special purpose!"
- Steve Martin, as Navin Johnson, THE JERK (Universal Pictures, 1979)

I. INTRODUCTION

Consider a songwriter who wants to ban the use of her music in advertisements or an author intent on eliminating the possibility that her novel will be optioned to a filmmaker. The law frowns upon these sorts of alienability limitations and use constraints.[1] Property – including intellectual property –

1. *See, e.g.*, JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 279 (2d ed. 1895) ("Any provision restraining the alienation, voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels real or personal, whether legal or equitable, is void"); Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1771 (2014) ("American law . . . imposes a handful of anti-dead hand public policy constraints . . . ."); Michael D. Kirby, Comment, *Restraints on Alienation: Placing a 13th Century Doctrine in 21st Century Perspective*, 40 BAYLOR L. REV. 413, 413 (1988) ("[T]he concept of free alienability is

comes with an assorted bundle of use and alienability rights.[2] The law detests unreasonable restraints on alienability.[3] Courts have deterred owners from placing use limitations on property that bind future owners.[4] Restraints on alienation are said to be repugnant, as are future interests that vest too remotely.[5] The dead hand is feared and the living hand is protected.[6] Exceptions can be noted, such as short-term use limitations between contracting parties, equitable servitudes, and the nearly extinct determinable estates.[7] These exceptions, however, are generally present either in commercial or charitable contexts.[8] In the private noncharitable donative context, which we will be concerned in the pages that follow, use and alienability limitations are more closely scrutinized.[9]

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a cornerstone of modern Anglo-American civilization . . . ."); *see also* Dunlop v. Dunlop's Ex'rs, 132 S.E. 351, 354 (Va. 1926) (holding that an attempt to condition a devise of a business with a requirement that the devisee share three-fourths of the sale proceeds with other heirs if the business was later sold constitutes an unreasonable restraint, repugnant to the estate, and was therefore void).

2. *E.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Phila. Eagles Football Club, Inc. v. City of Phila., 823 A.2d 108, 123–24 (Pa. 2003); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 5 (3d ed. 2012). Typically, the four most important property rights are rights to exclude, transfer (i.e., alienate), possess/use, and destroy. *Id.*

3. *E.g.*, *In re* Jeromos' Will, 166 N.Y.S.2d 959, 959 (Sur. Ct. 1957) (holding that a devise of realty with the limitation that "he can dispose of the house only to his daughter" was void as an attempt to limit the devisee's power of alienation).

4. *See* Kirby, *supra* note 1, at 415–29 (surveying decisions invalidating restraints). For example, an absolute conveyance subject to the condition that the premises only be used for residential purposes is void. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.4 cmt. b, illus. 4 (AM. LAW. INST. 1981); *see also* William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 59–66 (2005) (explicating the relevant factors in the enforceability of use restrictions).

5. *See* Potter v. Couch, 141 U.S. 296, 315 (1891) ("[A] restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker . . . ."); Carter v. Berry, 140 So. 2d 843, 846 (Miss. 1962) ("[RAP] is a rule invalidating interests [that] vest too remotely.").

6. *See* Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J.L. & PUB. POL'Y 245, 249 (1996) (concluding, in a different context, that to "be[] governed by the dead hand may be inevitable, but we need not submit to rule by ghosts").

7. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 (AM. LAW. INST. 1998) (reasoning that "[a]n otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property").

8. *See, e.g.*, *In re* Succession of Baltazor, 540 So. 2d 1295, 1297 (La. Ct. App. 1989) (noting that although transfer restrictions on corporate stock are enforceable, they are strictly construed); Animal Rescue League of Boston v. Bourne's Assessors, 37 N.E.2d 1019, 1022 (Mass. 1941) (explaining that donors may make unrestricted or restricted gifts to charity).

9. *E.g.*, B. C. & H. Corp. v. Acme Mkts., Inc., 19 Pa. D. & C.3d 419, 428 (C.P. 1980) ("Our society, built as it is upon the private ownership of property, prizes as a

This Article is concerned specifically with use restrictions in the private non-charitable donative context.

In the commercial context, use limitations often reorder rather than indefinitely, suspend, or destroy rights in property.[10] Thus, for example, a landlord might withhold from her tenant the right to use the premises for particular purposes, but the right is reordered, not destroyed. With commercial transactions, use or alienability limitations might be exchanged or sold.[11] That is, the limitations are bargained for. In the charitable context, use restrictions might also be considered through a contract lens, despite the lack of consideration.[12] A restricted charitable gift might be also viewed in a "but for" context: The donor might not make a gift unless the donor is able to dictate the future use of it by a charitable organization.[13] If we want to encourage charitable giving, a greater array of enforceable use limitations serves this end.[14]

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basic right and social value the freedom to transfer private property without restriction . . . .").

10. *Compare* Iglehart v. Phillips, 383 So. 2d 610, 617–18 (Fla. 1980) (voiding a repurchase option for an unlimited period and fixed price as an unreasonable restraint on alienation), *with* Sandpiper Dev. & Constr., Inc. v. Rosemary Beach Land Co., 907 So. 2d 684, 686–87 (Fla. Dist. Ct. App. 2005) (upholding a six-year repurchase option for a fixed price). *See also, e.g.*, Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390, 399–400 (Neb. 2003) (rejecting a claim that a sublease provision barring further subletting to any grocery or discount store constitutes an unreasonable restraint on alienation).

11. *See* Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 560 (1991) (identifying one aim of the law as "determin[ing] an initial set of property rights from which subsequent bargains can go forward" and another as "facilitat[ing] the voluntary exchanges of property rights – the law of contracts").

12. *E.g.*, William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?*, 2016 MICH. ST. L. REV. 1267, 1291 (2016) (noting that conditional charity gifts "create[] an extreme, all-or-nothing situation, where either the donee keeps the gift or the gift reverts to the donor" when the condition is breached by the donee); *see also* William P. Sullivan, *The Restricted Charitable Gift as Third-Party-Beneficiary Contract*, 52 REAL PROP. TR. & EST. L.J. 79, 85 (2017) (recognizing, with regards to restricted charitable gifts, that "[c]ontract gives effect, within broad limits, to the consensual arrangements of private parties").

13. *See* Sullivan, *supra* note 12, at 82–83 ("[T]he restricted charitable gift is a deal – a third-party-beneficiary contract in which the donor transfers property to the charity in consideration of the charity's promise to respect the donor's restriction on the use of that property.").

14. *E.g.*, Perin v. Carey, 65 U.S. 465, 494–95 (1860) (emphasizing that a gift of property coupled with alienation limitations is permitted if it is a charitable gift); *see also* Lee Bollinger, *Foreword* to JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES, at xiii (2001) ("[T]ax laws also help prime the pump of charitable instincts . . . ."); Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1715–16 (2015) ("[C]ommentators have speculated that by failing to uphold donor terms and intent, courts may remove incentives . . . to philanthropy . . . ."). *See also, e.g.*, Jackson v. Phillips, 96 Mass. 539,

In the private noncharitable donative context, lengthy or even permanent suspensions of use rights are harder to justify and – predictably – more difficult to achieve.[15] Conveying property to a private donee while withholding a particular use right can be seen as an attempt to destroy the property, in part.[16] Withholding a particular use right in effect destroys a particular thread of the property. Consider the owner of a 1963 Ford Thunderbird who has meticulously restored the car to its original condition and wants to ban future owners from adding garish chrome wheels, aftermarket tricks, or modern conveniences like antilock brakes. Withholding a donee's right to modify the 1963 Thunderbird would, if enforceable, destroy a noteworthy stick within the bundle of property rights accompanying its ownership: automobile modification rights. A car forever lacking any modification rights would also complicate the future owners' ability to sell the car.[17] Marketability would be impacted. For these reasons, an attempt to withhold modification rights is likely unenforceable. Although one might extract this concession with a contractual promise from the donee (a promise not to modify the car), a contractual use limitation will degrade and dissipate as ownership of the car changes hands because future owners will not be in privity of contract with the earlier owner.[18] Alternatively, vesting one person with ownership of the car and another with the modification

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550 (1867) ("By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor . . . .").

15. *See, e.g.*, Goodman v. Andrews, 213 N.W. 605, 606 (Iowa 1927) (holding that a restriction within a deed suspending the power to sell the land for twenty years is void); Sipko v. Koger, Inc., 70 A.3d 512, 520 (N.J. 2013) (rejecting the contention that a gift of stock had been made conditional upon the donee's continued employment by the company); Troxel v. Bishop, 201 S.W.3d 290, 296 (Tex. Ct. App. 2006) (emphasizing that to make a gift, "[a]ll dominion and control over the property must be released by the owner").

16. *See, e.g.*, Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 791 (Va. 1951) (noting that doling out payment to individual schoolchildren delivered with an admonition to use the funds only in furtherance of education "would be wholly impotent and of no avail").

17. *See, e.g.*, Johnson v. Preston, 80 N.E. 1001, 1006 (Ill. 1907) ("To transfer a fee and at the same time to restrict the free alienation of it, is to say that a party can give and not give, in the same breath."); Cast v. Nat'l Bank of Commerce Tr. & Sav. Ass'n, 183 N.W.2d 485, 489 (Neb. 1971) ("It seems to us that a condition attached to a fee simple title which has for its purpose the satisfaction of a whimsical obsession or an expression of testator's vanity ought not be permitted . . . ."); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. j (AM. LAW. INST. 2001) ("A purported gift of an interest that is subject to a valid restraint on alienation is ineffective because the donor lacks the power to make the purported gift.").

18. *See, e.g.*, Bri-Den Constr. Co. v. Kapell & Kostow Architects, P.C., 867 N.Y.S.2d 437, 438 (App. Div. 2008) (holding contractual privity or its equivalent is necessary to enforce a promise).

rights to that car would likely fail from the outset.[19] Controlling the "fate of things" once they have left an owner's hands is not easy.[20]

With an inter vivos or testamentary transfer of property,[21] the donor who wishes to dictate the future uses of the property will typically be frustrated by rules that value the free alienability of wealth, property, and ideas more than the whims of a former owner, especially a deceased one.[22] The ability of authors to shape property rights in their creative works from the grave is – unhappily – slight.[23] Thus, a testamentary gift of one's diary to a legatee with instructions to share it only with close family members might be disregarded.[24]

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19. The *numerus clausus* principle limits this fragmentation of ownership of property and property interests so as to promote their free alienability. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1176–78 (1999); *see also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 8 (2000) ("The existence of unusual property rights increases the cost of processing information about all property rights."). Imagine the drag on marketplace transactions were one to risk purchasing a 1963 Thunderbird with an eye towards restoring and updating the car only to find out later that another individual holds the modification rights to the car. For this reason, and perhaps others, attempts to create a new estate in property and diffuse ownership in ways not already mapped out (e.g., concurrent ownership or determinable estates) will be unsuccessful. *See, e.g.*, Avihay Dorfman, *Property and Collective Undertaking: The Principle of* Numerus Clausus, 61 U. TORONTO L.J. 467, 502–03 (2011) (asserting that *numerus clausus* serves to enhance the legitimation of political authority by retaining control over the introduction of new forms of property ownership); *accord* Johnson v. Whiton, 34 N.E. 542, 542 (Mass. 1893) (invalidating a devise to "Sarah A. Whiton and her heirs on her father's side," reasoning that "[a] man cannot create a new kind of inheritance" but also noting that "[i]t is not too much to say that it would be plainly contrary to the policy of the law of Massachusetts to deny the power of Sarah A. Whiton to convey an unqualified fee."). "To maintain a finite set of categories, *numerus clausus* must eliminate idiosyncratic property interests." Meredith M. Render, *The Concept of Property*, 78 U. PITT. L. REV. 437, 444 (2017).

20. *See* Bollinger, *supra* note 14, at xii; SAX, *supra* note 14, at 9 ("Ownership is not just an economic interest, . . . [i]t can also involve a claim of entitlement to decide the fate of an object.").

21. *E.g.*, *In re* Estate of O'Brien v. Robinson, 749 P.2d 154, 157–58 (Wash. 1988) (en banc) (contrasting the "delivery" requirement for inter vivos gifts with wills act compliance for testamentary gifts).

22. These rules include limitations contrary to public policy, RAA, the repugnancy of restraints on alienation, and RAP. LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 33 (1955); *see also infra* Section II.D.

23. *See, e.g.*, Colonial Tr. Co. v. Brown, 135 A. 555, 564 (Conn. 1926) (invalidating provisions in a will restricting the erection of buildings more than three stories tall and forbidding leases of more than a year on certain property); Will of Pace, 400 N.Y.S.2d 488, 493–94 (Sur. Ct. 1977) (setting aside provisions in a will forbidding the construction of a garage on the testator's property).

24. Even if withholding a particular property right (e.g., the right to share the diary with anyone other than close family members) is permissible, the withheld property right would then pass pursuant to the residuary clause of the will, with the result being that one person may own the diary – less the wide sharing rights – while another – the

An inter vivos gift of a painting to a friend with the admonition never to loan it to a gallery might be unenforceable.[25] This Article aims to identify a mechanism by which these kinds of targets can be met. It is particularly sensitive to honoring the creator's use limitations in question – an artist and her painting, the lyricist and her song, or the author and her novel.[26] It will attempt to unearth enforceable private donative use restriction rights through the use of a trustee charged with overseeing the use and enjoyment of creative works and imbued with the values and objectives of their author. As detailed in the next Part, artist-imposed use limitations over creative works are not uncommon. These impulses might even be seen as a natural outgrowth of the creative process.

II. DISCUSSION

Several examples of artist-imposed use limitations that might be considered as natural expressions of the creative process – from Tennessee Williams to James Joyce – follow.[27] From these examples, this Part constructs a hypothetical problem: the aims of author Willa Cather with regards to her unpublished and private letters.[28] This is a hypothetical problem but also a genuine one insofar as Willa Cather did in fact desire certain use limitations over

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residual legatee – will own the rights to share the diary with anyone. If the residual legatee sells the wide sharing rights to the owner of the diary, then the diary owner will be able to share the diary with anyone.

25. Most of the artwork-limitations jurisprudence arises out of charitable gifts. *See, e.g.*, Georgia O'Keefe Museum v. Cty. of Santa Fe, 62 P.3d 754, 768 (N.M. 2002) (considering donations "restricted to educational, exhibition and acquisition purposes"). Restricted charitable gifts must be distinguished from private donative bequests. *See* discussion of charitable gifts *infra* Section II.C.1.

26. *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 77–78 (1994) (recognizing a "personal connectedness to one's original works").

27. *See infra* Section II.A; *see also* Jessica Gelt, *Authenticity in Casting: From 'Colorblind' to 'Color Conscious,' New Rules Are Anything but Black and White*, L.A. TIMES (July 13, 2017), http://www.latimes.com/entertainment/arts/la-ca-cm-authenticity-in-casting-20170713-htmlstory.html; Blake Morrison, *Up in Smoke: Should an Author's Dying Wishes Be Obeyed?*, GUARDIAN (Mar. 10, 2018), https://www.theguardian.com/books/2018/mar/10/up-in-smoke-should-an-authors-dying-wishes-be-obeyed (citing examples of authors, such as Michel Foucault, who wished that their unpublished works remain unpublished and others, such as Samuel Beckett, who opposed modifications to their narratives). "Who has the right to tell what stories? And who gets to make that decision?" Gelt, *supra*.

28. *See infra* Section II.F.

her letters.[29] Those limitations, however, were disregarded by her successors.[30] In articulating and navigating how her aims might have been achieved, an explication of trust law is required.[31] A framing of a particular sort of trust – a noncharitable purpose trust – comes next.[32] The numerous legal barriers and challenges to achieving Willa Cather's objectives must also be identified.[33] Finally, a resolution to these barriers and a particular testamentary trust for these objectives will be outlined.[34]

A. Artistic Sensibilities and the Desire to Preserve and Obscure

When Tennessee Williams, the author of *A Streetcar Named Desire*, died in 1983, he left a will that provided,

> It is my wish that no play which I shall have written shall, for the purpose of presenting it as a first-class attraction on the English-speaking stage, be changed in any manner, whether such change shall be by way of completing it, or adding to it, or deleting from it, or in any other way revising it, except for the customary type of stage directions. . . . To the extent that I can legally do so, no party who shall acquire any rights in any play, poem, or literary work of mine shall have the right to make or authorize the making of any changes in any play . . . .[35]

Tennessee Williams wished to impose no-modification restrictions on his plays. Because the restrictions were framed as a "wish," the drafter of his will likely recognized that the restrictions could not be legally enforced.[36] How-

29. Willa Cather expressly directed in her will for her successors to not publish personal letters. Jennifer Schuessler, *O Revelations! Letters, Once Banned, Flesh Out Willa Cather*, N.Y. TIMES (Mar. 21, 2013), https://www.nytimes.com/2013/03/22/books/willa-cather-letters-to-be-published-as-an-anthology.html.

30. Cather died in 1947, and her prohibition of letter publication was followed for nearly seventy years before *The Selected Letters of Willa Cather*, containing 566 letters, was published in 2013. *Id.* In the preface of that publication, the editors, Janis Stout and Andrew Jewell, "acknowledge that publication of the letters 'flagrantly' violates Cather's wishes, expressed in a will that partially expired in 2011 with the death of her nephew and second executor, Charles Cather." *Id.*

31. *See infra* Section II.B.

32. *See infra* Section II.C.2; Section II.E.

33. *See infra* Section II.D.

34. *See infra* Section II.F.

35. LUCY A. MARSH, PRACTICAL APPLICATIONS OF THE LAW: WILLS, TRUSTS, AND ESTATES 18 (1998).

36. *See, e.g.*, *In re* Estate of Brill v. Phillips, 76 So. 3d 695, 695, 701 (Miss. 2011) (en banc) (construing a holographic will's devise "with the understanding" that the devisee would take care of the testator's mother to be precatory). *But see* Colton v. Colton, 127 U.S. 300, 315–17, 321–22 (1888) (construing a devise wherein the testator did

ever, merely precatory instructions may accomplish an author's aims. A testamentary "hope," "wish," or "desire" about a testator's aims conveyed to his devisees could work, though not in a legal sense.[37] It could represent a de facto – though not a de jure – solution. As a legal matter, precatory instructions are unenforceable.[38] Still, so long as the devisee continues to honor the deceased author's instructions, the author's objectives are met. A testator's request to avoid optioning a novel's film rights may work, at least as long as the legatee remains under the testator's influence. This kind of chiding should not be ignored solely on account of its legal flimsiness. Choosing the right person – a "literary executor" – and delivering clear instructions may achieve the author's objectives.[39] A literary executor who shares the testator's values and abides by the decedent's wishes can be considered as an alternative to an unenforceable admonishment. Indeed, a resolute executor oftentimes abides by the testator's advice and wishes.[40] A nonbinding "ethical will" imposed upon a trustworthy

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"recommend to her the care and protection of [his] mother and sister" as creating an enforceable trust).

37. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.1 cmt. e (AM. LAW. INST. 2010) ("Words that merely express a suggestion, hope, or desire that a transferee of property will make a certain disposition thereof do not, in the absence of other circumstances, impose an obligation on the transferee to follow the transferor's suggestion, i.e., to create a trust.").

38. *See* Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1, 6–14 (2007) ("When language is 'advisory' rather than 'mandatory' the direction does not establish a trust, but rather it establishes a [conditional] gift . . . .").

39. Technically, there is no such office as a "literary executor" recognized under state probate codes. Woodhouse v. Cohen, 101 N.Y.S.2d 675, 676 (Sup. Ct. 1950) ("[T]here is no such entity in the law."); Cheryl E. Hader, *Making the Intangible Tangible: Planning for Intellectual Property*, 29 EST. PLAN. 574, 575 (2002) ("A literary or art executor . . . is not judicially appointed and, therefore, has no legal authority to enter into transactions involving estate assets."). *But see* Ian Hamilton, *Foreword* to KEEPERS OF THE FLAME: LITERARY ESTATES AND THE RISE OF BIOGRAPHY viii (1992) (describing the literary executor thusly: "there is the gem-like flame of art and there is the private bonfire, 'the trustful guardian of secret matters'"). Despite a literary or art executor not inherently having legal authority, such individual "may be designated executor solely for the purpose of administering literary property." *Woodhouse*, 101 N.Y.S.2d at 676. A "literary executor" therefore is "[a] limited-purpose executor appointed to manage copyrighted materials in an estate." *Literary executor*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* UNIF. PROBATE CODE § 3-709 (UNIF. LAW COMM'N 2010) ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of the decedent's property . . . .").

40. Willa Cather's executor, Edith Lewis, adhered to Cather's ethical admonishments for the rest of Lewis' life. *See infra* Section II.F. Regardless of her formal legal powers or role, Violette de Mazia clearly represented Dr. Albert Barnes' "literary executor." *See infra* Section II.D.3.

survivor might preserve and articulate a testator's unenforceable recommendations.[41]

Other testators besides Tennessee Williams have attempted to legally bind future owners' uses and alienation of their intellectual property creations. When the founder of the Beastie Boys died in 2012, his will emphatically directed that his music never be used for advertising purposes.[42] The Beastie Boys' composer expressed these use limitations vigorously – in a handwritten addition.[43] Similarly, J.D. Salinger emphatically restrained his heirs from ever licensing film rights to *A Catcher in the Rye*.[44] And Willa Cather begged for

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41. *See* Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 AM. C. TR. EST. COUNS. J. 154, 155 (2007) ("Some of the most common themes in ethical wills are exhortations to care for the community, expressions of love to the family, caring for loved ones and pets, statements of faith and beliefs, gratitude, and exhortation and encouragement to the family.").

> An ethical will is not considered a legal document in the same way as a last will and testament, a holographic will, or a living will. Rather, ethical wills are tools that communicate intangible gifts that come from the heart. Some scholars consider an "ethical will" to be any writing that imparts personal values, lessons, and experiences to future generations. Ethical wills tend to encompass several different functions: family history, personal story, or explication of a person's value system. When one drafts an ethical will, that person is able to acknowledge that there is more to his or her legacy than the wealth and tangible goods acquired throughout life. It allows the author the freedom to convey personal quirks and life passions.

Cindy E. Faulkner, *Happily Ever After: An Ethical Will May Be a Step on That Journey*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 451, 451–52 (2010) (footnotes omitted).

42. Wendy S. Goffe, *Part of Beastie Boy Adam Yauch's Will, Banning Use of Music in Ads, May Not Be Valid*, FORBES (Aug. 13, 2012, 6:23 AM), https://www.forbes.com/sites/deborahljacobs/2012/08/13/part-of-beastie-boy-adam-yauchs-will-banning-use-of-music-in-ads-may-not-be-valid/#34472b7e7698. The will provided: "Notwithstanding anything to the contrary, in no event may my image or name or any music or any artistic property created by me be used for advertising purposes." RJ Cubarrubia, *Adam Yauch's Will Prohibits Use of His Music in Ads*, ROLLING STONE (Aug. 9, 2012), https://www.rollingstone.com/music/news/adam-yauchs-will-prohibits-use-of-his-music-in-ads-20120809. A copy of the will was obtained by *Rolling Stone*. *Id.* "The phrase 'or any music or any artistic property created by me' was added in handwriting." *Id.*

43. *See* Cubarrubia, *supra* note 42.

44. Denise S. Rahne & Shira T. Shapiro, *Practical Considerations for Valuing Intellectual Property Assets in Estate Planning*, PROB. & PROP., July/Aug. 2017, at 8, 13; *see also* Matt Goldberg, *1957 Letter from J.D. Salinger Explains Why* Catcher in the Rye *Wouldn't Work as a Movie*, COLLIDER (Feb. 23, 2012), http://collider.com/catcher-in-the-rye-movie-rejection-jd-salinger/ (averring that as to Salinger's justifications for refusing to license movie rights to *Catcher in the Rye* during his lifetime, "Salinger could have simply responded, 'Fuck you. That's why,' and it would be a respectable answer"). "[T]he original dreamer should always have the final say." *Id.*

her letters to forever remain unseen.[45] These are all examples of a copyright owner wishing to reduce the range of uses of their property after it passes to their devisees.

Less commonly, a copyright owner might wish to bind future owners to more expansive uses than they might otherwise prefer. The poet Ezra Pound once proposed that "the heirs of an author should be powerless to prevent the publication of his works . . . ."[46] President Harding's heirs blocked publication of the President's love letters to a mistress for many years.[47] One suspects that Harding himself might have agreed with his heirs' decision.[48] But when the heirs of Dr. Martin Luther King sought to curtail the republication of "I Have a Dream," some wondered if Dr. King would have preferred more liberal uses of his intellectual properties than his heirs were willing to extend.[49] We can speculate that Dr. King would have liked to grant greater use and reprinting rights of his works.[50] Similarly, Stephen Joyce, James Joyce's sole heir, has been notoriously restrictive in granting rights to *Ulysses*, *Finnegan's Wake* and other works of his late grandfather.[51] Stephen Joyce once stated he would no longer grant permission to quote from anything James Joyce ever wrote.[52] Stephen Joyce sued sponsors of a nonprofit who wished to produce a webcast with

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45. WILLA CATHER IN PERSON 171 (L. Brent Bohlke ed., 1986) [hereinafter Bohlke]. "[Cather's] will absolutely restricts the publication of any of her correspondence." *Id.*

46. Ezra Pound, *Copyright and Tariff*, NEW AGE, Oct. 3, 1918, at 363, https://library.brown.edu/pdfs/1140814666999565.pdf.

47. FRANCIS RUSSELL, THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING IN HIS TIMES 658 (1968); Kenneth W. Duckett, *How Some Were Burned . . .* , AM. HERITAGE, Feb. 1965, https://www.americanheritage.com/content/how-some-were-burned%E2%80%A6.

48. *See* James M. Lindgren, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, 87 J. AM. HIST. 1088, 1088 (2000) (reviewing SAX, *supra* note 14). It was quite a "large cache of love letters." *Id.* Some of the love letters were finally released in 2014. *See id.*

49. SAX, *supra* note 14, at 146–48. *Cf.* Craig Fehrman, *The Last Word*, NEW REPUBLIC (Oct. 11, 2011), https://newrepublic.com/article/96122/vonnegut-shields-and-so-it-goes-estate (explaining how Kurt Vonnegut seemed happy when writers used his work, even sending University of Northern Iowa's English Professor Jerome Klinkowitz a letter granting him "unrestricted permission to quote anything I ever said or wrote, at any length, and without notice or compensation;" however, those running Vonnegut's estate have restricted use of his work only to those with express permission from Vonnegut.).

50. *See* David Plotz, *Content Is King*, SLATE (Mar. 16, 1997, 3:30 AM), http://www.slate.com/articles/news_and_politics/assessment/1997/03/content_is_king.html (criticizing the Martin Luther King Jr. family's profit-driven aggressiveness as inconsistent with Martin Luther King's values of selflessness).

51. *See* D.T. Max, *The Injustice Collector*, NEW YORKER (June 19, 2006), https://www.newyorker.com/magazine/2006/06/19/the-injustice-collector.

52. *Id.*; RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 145 (2010).

readings from *Ulysses*; Joyce's denials have been termed "explicitly capricious."[53] Stephen Joyce has even burned a number of his grandfather's letters.[54] Perhaps James Joyce would have preferred less of a postmortem "stranglehold" on his works.[55] The author's desires to control the use and alienation of his works can thus operate in two directions, both tighter and looser, but those desires can only be ensured if the law will recognize them.

Professor Eva Subotnik has authored important work on post-obit copyright controls.[56] She has noted, for the most part, that authors cannot control their works after they die.[57] Yet many of them would like to do just that. Granting creators reasonable control of their works, at least during the operable period of copyright protections after death, is a worthy aim.[58] One way of enforcing this control is by means of a noncharitable purpose trust.[59] We might

53. *Id.*

54. SAX, *supra* note 14, at 138.

55. *See* MADOFF, *supra* note 52, at 145.

56. Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017) [hereinafter Subotnik, *Artistic*]; Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 79 (2015) [hereinafter Subotnik, *Copyright*].

57. Subotnik, *Artistic*, *supra* note 56, at 260. "This is because, to state the obvious, authors largely are not in a position to control their works or their reputations after they die." *Id.*

58. *See* 17 U.S.C. § 302(a) (2012) (copyright extends seventy years after an author's death).

59. The idea of using purpose trusts to enhance creator-autonomy over creative works appears to be a new one, but at least one artist has created an artwork that itself incorporates a purpose trust. *See* Alexander A. Bove, Jr. & Ruth Mattson, *The Purpose Trust: Drafting Becomes a Work of Art*, 43 EST. PLAN. 26, 26-27 (2016). Bove and Mattson describe the work in a SoHo gallery comprised of two large frames and twenty-six pages of text:

> An artist engaged the authors' firm to draft a trust, the purpose of which was the trust itself. More specifically, the trust purposes were to hold property and to present the trust as a 'statement emphasizing the continuing impact of slavery in the United States and encouraging federal and corporate programs of reparation.
>
> The trust was funded with stock from a company that has admitted to benefitting financially from slavery in the U.S. The trust directs that the stock will be held until the federal government makes an official act of financial reparation for slavery. At that time, the trust will distribute its funds in a manner consistent with the act of reparation, and its purpose will have been fulfilled. The trust also provides for the display of the trust instrument itself as a statement.

Id. at 27 (footnotes omitted). For other innovative uses of a purpose trust, *see* Igor Levenberg, Note, *Personal Revival Trusts: If You Can't Take It with You, Can You Come Back to Get It?*, 83 ST. JOHN'S L. REV. 1469, 1496–99 (2009) (considering the use of a purpose trust to maintain the preservation of a "cryonaut" in suspended animation after death until medical technology advances to a sufficient point, whereupon the

call a purpose trust designed to hold and maintain a particular form of control over copyrighted works an "artistic vision trust." The trust would create expansive postmortem moral rights for the authors and artists via the text of a trust instrument.[60] Some non-U.S. jurisdictions do recognize "moral rights"[61] – and some even permit the rights to be enforced post-mortem.[62] Moral rights

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trust could "be terminated upon their revival and the trust funds dispersed to their revived selves").

60. *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554–55 (1940) (noting that the doctrine of moral rights which protects the personal – and not merely economic – rights of the artist, known in France as "droit moral," has received "scant recognition in the United States). The Visual Artists Rights Act of 1990 (VARA) was enacted to protect creative work but has limited protections. *See* Pub. L. No. 101–650, 104 Stat. 5089, 51283–33 (codified as amended at 17 U.S.C. §§ 101–122 (2012)); *see also* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83–88 (2d Cir. 1995) (permitting alteration of artwork). Instead, aggrieved artists in the United States are typically limited to remedies based on "copyright, unfair competition, invasion of privacy, defamation, and breach of contract." *Carter*, 71 F.3d at 82. These doctrines may be inadequate. *See e.g.*, Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (holding that destruction of a mural did not violate the artist's rights because no rights in the mural were reserved by contract); *cf.* Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 1912, 9 DROIT D'AUTEUR 397 (Ger.), *cited in* Roeder, *supra*, at 554 (holding that an owner would not be permitted to drape the nude figures in a purchased mural). *But see, e.g.*, Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24–25 (2d Cir. 1976) (granting a preliminary injunction of an edit broadcast of the Monty Python group because the edited version impaired the integrity and distorted the group's work). Alternatively, state law remedies might be considered. *E.g.*, The 1979 California Art Preservation Act, CAL. CIV. CODE § 987 (West 2018); New York's Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW. § 14.03 (McKinney 2018), *preempted by statute,* VARA, Pub. L. No. 101–650, 104 Stat. 5089, 51283–33 (codified as amended at 17 U.S.C. §§ 101–122 (2012), *as recognized in* Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 CIV.1226 DAB, 2003 WL 21403333, at *16 (S.D.N.Y. June 17, 2003)).

61. Jennifer Pitino explains,

> The term "moral rights" derives from an 18th century French legal concept (*le droit moral*) of the non-economic, spiritual and personal interests which exist in creative works, independent of the artist's copyright interests. The underlying theory of moral rights arose from the belief that in creating a work of art, the artist injects his or her spirit into the work. Consequently, mora[l] rights dictate that the integrity of the work should be protected and preserved as a moral service to the artist.

Jennifer Pitino, *Art Ownership Requires an Understanding of Moral Rights*, 59 ADVOC. 32, 32 (2016) (footnotes omitted). "[M]oral rights cannot be sold, transferred or bequeathed, and terminate upon the death of the artist." *Id.* at 33.

62. *See* Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y U.S.A. 269, 276 (1989) ("French law . . . addresses problems regarding divulgation of works unpublished at the time of their authors' deaths."); James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP.

give copyright a degree of inalienability by tacking the rights permanently to the author himself and treating creative works "as inalienable extensions of the author's personality."[63] For example, moral rights would permit director John Huston's estate to obtain an injunction against a broadcast of a colorized version of one of his black and white films.[64] Moral rights recognize the preservation of artistic sensibilities.[65] No expansive moral rights are recognized to any sufficient degree in the United States.[66]

There are legitimate policy arguments for and against allowing greater postmortem artistic control.[67] This Article's bias is firmly in the camp of the artists.[68] An author's clearly articulated limitations for her works ought to be legally enforceable rather than mere precatory musings.[69] Copyright is not perpetual. Since copyrighted works typically enter the public domain seventy years after the author's death, the term of dead hand control over published

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L. 487, 505 n.67 (1968) (noting that eighteen of fifty-five jurisdictions surveyed provided for perpetual moral rights); Colleen P. Battle, Note, *Righting the 'Titled Scale': Expansion of Artists' Rights in the United States*, 34 CLEV. ST. L. REV. 441, 474 (1986) (noting that courts have "acknowledg[ed] the existence of the doctrine of moral right and its integrity component in many European and Latin American countries" when evaluating claims).

63. Netanel, *supra* note 26, at 2.

64. Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 232–33 (2006).

65. *See* Netanel, *supra* note 26, at 2 ("[T]he moral right entitles an author . . . to block publication, determine how authorship is attributed, and prevent material changes in, or uses of, the work that are repugnant to the author's artistic conception.").

66. 1 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:34, Westlaw (database updated Apr. 2018). *See also* 17 U.S.C. § 106A (2012) (articulating limited moral rights). *But see*, *e.g.*, CAL. CIV. CODE § 987(c)(1) (West 2018) (prohibiting "any physical defacement, mutilation, alteration, or destruction of a work of fine art").

67. *See* Subotnik, *Artistic*, *supra* note 56, at 292–302.

68. "It is this country's lack of respect for the deceased author of literature and the historical belief that protection of works of literature should extend no further than is necessary to compensate the author, that create a harrowing plight for today's authors." Donald Francis Madeo, Note, *Literary Creation and American Copyright Law: Authors' Wishes Hardly Resting in Peace*, 5 HOFSTRA PROP. L.J. 179, 179 (1992).

69. For example, Tennessee Williams' "wish" concerning the production of his plays (see *infra* at text accompanying note 35) would typically be construed as unenforceable precatory instructions and not binding except in the moral sense. *See, e.g.*, *In re* Carleton, 432 N.Y.S.2d 441, 451–52 (Sur. Ct. 1980) (holding a directive to an executor "to see that a small gift be made" is precatory and unenforceable given in indefiniteness of the amount); *In re* Stinson's Estate, 81 A. 207, 208 (Pa. 1911) ("[W]hen precatory words are used merely for the purpose of advising or influencing, or as expressive of a wish or desire that the legatee or devisees make a certain use of the testator's bounty, they are not obligatory."). Authors can also simply "lead by example" during their lives as a way of influencing their heirs' use of inherited copyrighted works. Subnotnik, *Artistic*, *supra* note 56, at 262–63.

works expires within that time frame.[70] Moreover, the nature of the property under consideration weighs in favor of dead hand control. Artistic works are creations of the author.[71] Many of us would be more sympathetic with J.D. Salinger banning a Pixar production of *Catcher in the Rye* than a farmer who wants to stop her heirs from rotating crops on her fields.[72] A novel *belongs* more to its author than a farm to its owner.[73] The farmland existed before the farmer, but J.D. Salinger summoned Holden Caulfield with his mind and his pen.[74] Furthermore, real property has greater scarcity than creative works.[75] It is often said of realty that "they aren't making any more of it,"[76] while new artistic works are produced every day. Real property also directly supports

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70. *See* 17 U.S.C. § 302(a) (2012).

71. 17 U.S.C. § 201(a) (2012). "The authors of a joint work are co-owners of copyright in the work." *Id.*

72. *See* Egerton v. Brownlow (1853) 10 Eng. Rep. 359 (HL) at 417. There, the court reasoned that

> [t]he owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interefere [sic] with the owner and compel him to cultivate his land, (though it be for the public good that land should be cultivated) . . . .

Id.; *see also* WILLIAM SHEPPARD, THE TOUCHSTONE OF COMMON ASSURANCES BEING A PLAIN AND FAMILIAR TREATISE ON CONVEYANCING § 132 (8th ed. 1826), https://archive.org/stream/touchstoneofcomm01shepuoft#page/n269 ("[I]f one grant his land to [a grantee] on condition that he (being a husbandman) shall not sow his arable land; this condition is void.").

73. *Cf.* JESSE DUKEMINIER ET AL., PROPERTY 124 (8th ed. 2014) (querying whether an individual's personal choice not to donate their own organs at death should be analyzed under the public policy objection to testator instructions to destroy property). Like creative works owned by their authors, one's own organs touch on more personal concerns than real property owned by a landowner. Accordingly, greater latitude in testamentary instructions to destroy one's diary ought to attach than to an instruction to destroy one's house. *But see* Netanel, *supra* note 26, at 9 ("Copyright is a privilege designed to serve the public interest, not an entitlement arising from the fact of creation.").

74. *See* United States v. Am. Bell Tel. Co., 167 U.S. 224, 250 (1897) ("The inventor is one who has discovered something of value. It is his absolute property.").

75. The scarcity of real property gives resonance to assertions such as that "property's role in a democratic society . . . [is] allowing some degree of equal access . . . ." *See* Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 339 (2017). Opening up creative works or an author's private correspondence to "some degree of equal access" even prior to the expiration of federal and common law copyright protections seems much less urgent. *See id.* To be fair, though, many real property owners hold equally strong sentiments about the future uses of their property.

76. John A. Ragosta, *Trade and Agriculture, and Lumber: Why Agriculture and Lumber Matter*, 14 KAN. J.L. & PUB. POL'Y 413, 418 (2005).

more fundamental human needs (e.g., food, shelter, energy) than works of fiction, so perhaps a greater range of latitude for artists to curb future uses of their works than owners of real property is in order.[77]

Occasionally, an artist will want to do more than ban particular uses of his creation. Sometimes, the artist will want to conceal an unpublished work.[78]

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77. *Compare* Brown v. Burdett (1882) 47 LT 94 (Ch) at 96 (invalidating a trust provision directing the trustee to board up the grantor's home for twenty years before distributing it to remainderman as "useless"), *and* Eyerman v. Mercantile Tr. Co., 524 S.W.2d 210, 212, 217 (Mo. Ct. App. 1975) (invalidating a directive to an executor to raze a home as "capricious" and "senseless" and finding that no motive was evidenced), *and* Will of Pace, 400 N.Y.S.2d 488, 492–93 (Sur. Ct. 1977) (characterizing a provision to demolish two houses as "unnecessary"), *and In re* Meksras Estate, 63 Pa. D. & C.2d 371, 371, 373 (C.P. Phila. Cty. 1974) (invalidating decedent's request to be buried with her jewelry, reasoning that it would create "a great potential for public harm" i.e., grave robbing), *with* Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 818–19 (Ohio Ct. Com. Pl. 1976) (upholding a testamentary directive to raze a home after evaluating the testator's purpose). In *National City Bank*, testimony was received indicating that the

> surrounding neighborhood had changed over the years from exclusively residential to one where the older houses were being converted to other uses, nursing homes, business offices, rooming houses, and that she did not want her house to be used for such purposes, that she had a great affection for it, that she felt in view of the location, the size of the house, the expense of upkeep, that it had no future as a residential property and that, therefore, she wanted it destroyed. . . . [S]he did not enumerate the various non-residential purposes that other houses in the locality had been converted to, but referred to it, generally, but it was the use of the house for other than residential purposes that she felt she did not want the home that meant so much to her converted to.

Nat'l City Bank, 369 N.E.2d at 816–17; *accord In re* Beck, 676 N.Y.S.2d 838, 841 (Sur. Ct. 1998) (respecting a testamentary wish to demolish a home in view of the decedent having "personally treasured" the property). The *Pace* court, by contrast, speculated that the testator's demolition instruction "was apparently to memorialize the property by having it remain vacant for the term of the trust" and noted that "absurd" directives would not be enforced. *Pace*, 400 N.Y.S.2d at 491, 493. Demolition or destruction can be contrasted with preservation of property without regard to any societal or individual benefit. *See* MARSH, *supra* note 35, at 76 (describing Justice Oliver Wendell Holmes' fourth and last codicil to his will, which "allowed the Executor to keep open the residences which Holmes owned, and to continue paying the employees 'for such time as, in his absolute discretion, he may deem necessary . . . without any obligation to utilize said residences for the production of income'").

78. Destruction of a chattel – *jus abutendi* – is generally permissible as an inherent property right (a form of use and enjoyment). *See* JOHN HERBERT WILLIAMS & WILLIAM MORSE CROWDY, GOODEVE'S MODERN LAW OF PERSONAL PROPERTY 17 (5th ed. 1912); *see also, e.g.*, *In re* Estate of Jones, 389 A.2d 436, 438 (N.H. 1978) (noting that where testator leaves farm to charity for the protection of forests, a discretionary power to raze farm buildings may be reasonable). The owner's motivations are seldom examined. Thus, for example, the heir of American artist Robert Henri could – and did – destroy around 550 of what she deemed inferior paintings in order to prop up the

Access limitations to creative works can represent similar aesthetic restraints to other use limitations: they can represent an important aspect of an author's vision for their creation. In 1972, Jerry Lewis made a film titled *The Day the Clown Cried* in which he starred as a German clown named Helmut Doork.[79] The clown, as retribution for mocking Hitler, was assigned to entertain children before they were murdered in gas chambers.[80] The film has never been released or made available to the public.[81] Lewis said it was a bad film and that he was embarrassed by it.[82] Yet he seems to have had some pride in it notwithstanding that the film was never fully completed; it survives as an unfinished rough cut.[83] Only a very small number of people have seen the film, although a thirty-minute segment was recently leaked onto the Internet.[84] Lewis retained

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demand and price of her remaining collection. SAX, *supra* note 14, at 146. An owner of a Jackson Pollock painting may cut it up into bits, selling those bits for more than he could have sold the intact work. Julius S. Held, *Alteration and Mutilation of Works of Art*, 62 S. ATLANTIC Q. 1, 14 (1963). Testamentary directive to destroy animals have not been well received. Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 939–43 (2001) (discussing testamentary directives to destroy animals). The underlying motives of a testator to direct a pet's euthanasia might vary from feeling the pet could not adapt to a life without its owner to concerns that no one would adopt it and that it might be euthanized anyway. BARRY SELTZER & GERRY W. BEYER, FAT CATS & LUCKY DOGS: HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET 64 (Jim Bee ed., 2010). "Courts are notoriously unsympathetic to people who request healthy animals to be euthanized, however." *Id*. (citing a Canadian man's testamentary directive to have his "horses shot by the Royal Canadian Mounted Police and then buried."). The killing of an animal, however, will not uniformly be construed as the destruction of property. Cattle who are slaughtered as a prerequisite to turning their flesh into marketable hamburgers are not being destroyed; indeed, the cattle as chattels are being improved, commercially speaking.

79. Bruce Handy, Jerry *Goes to Death Camp!*, SPY, May 1992, at 40, 42 [hereinafter, Handy I].

80. *Id.* at 42. Handy describes the film's plot: "An unhappy German circus clown is sent to a concentration camp and forced to become a sort of genocidal Pied Piper, entertaining Jewish children as he leads them to the gas chambers." *Id.*

81. Alison Cooper, *Why Was 'The Day the Clown Cried' Never Released?*, HOWSTUFFWORKS, https://entertainment.howstuffworks.com/why-was-day-clown-cried-never-released.htm (last visited Sept. 1, 2018).

82. Melissa Locker, *Jerry Lewis's Holocaust Movie May Finally See the Light of Day*, VANITY FAIR (Aug. 8, 2015, 1:49 PM), https://www.vanityfair.com/hollywood/2015/08/jerry-lewis-holocaust-clown-movie. Lewis has also said, "It's [either] better than *Citizen Kane* or the worst piece of shit that anyone ever loaded on the projector." *Id.*

83. Bruce Handy, *The French Film Critic Who Saw Jerry Lewis's Infamous Holocaust Movie – and Loved It*, VANITY FAIR (Aug. 21, 2017, 11:00 AM), https://www.vanityfair.com/hollywood/2017/08/jerry-lewis-day-the-clown-cried-holocaust-movie-review.

84. Mahita Gajanan, *Thirty Minutes of Jerry Lewis's* The Day the Clown Cried *Released Online*, VANITY FAIR (June 18, 2016, 2:31 PM), https://www.vanityfair.com/hollywood/2016/06/watch-jerry-lewis-the-day-the-clown-cried. According

only a single film print and kept it hidden in his office;[85] the internet-released segment was cobbled together from various sources including title cards and a German documentary on the film.[86] After Lewis' death in 2017, it was reported that he donated his copy of the film to the Library of Congress in exchange for a covenant not to show the film until 2025.[87] Lewis' estate retained the copyright.[88] The Library of Congress received title to the tangible copy from Lewis' briefcase.[89]

An artist's desire to preserve and secrete an artistic creation (for fifty-two years in the case of *The Day the Clown Cried*) is somewhat uncommon. But Lewis' desires are understandable given his simultaneous feelings of embarrassment and measured satisfaction about his film. In the case of an artist's private letters, desires to preserve and suppress are both more likely and more sympathetic. There are privacy objectives present, after all. Opera composer Giuseppe Verdi questioned the public interest in an artist's private letters:

> Why should anyone drag out a musician's letters? They are always written in haste, without care, without his attaching any importance to them, because he knows that he has no reputation to sustain as a writer. Isn't it enough that he should be booed for his music? No, sir! The letters too! Oh, what a plague fame is! The poor little great celebrated men pay dearly for popularity. Never an hour of peace for them, either in life or in death.[90]

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to Lewis, only he, his father, and his manager have seen the film. Chris Nashawaty, *The Day Jerry Lewis (Finally) Talked About the* Day the Clown Cried, ENT. WKLY. (Aug. 19, 2013, 9:54 PM), http://ew.com/movies/2013/08/19/jerry-lewis-day-clown-died/.

85. Handy I, *supra* note 79, at 43. It allegedly is kept in a Louis Vuitton briefcase for safe keeping. *Id.*

86. Gajanan, *supra* note 84.

87. Lou Lumenick, *You'll Finally Be Able to See Jerry Lewis's Holocaust Film – in 2024*, N.Y. POST (Aug. 10, 2015, 11:58 AM), http://nypost.com/2015/08/10/youll-finally-be-able-to-see-jerry-lewis-holocaust-film-in-2024/. Note that the use and alienability limitations are temporary and arise out of a contractual relationship between Jerry Lewis and the Library of Congress. The promisor agreed to the use limitations in exchange for other value.

88. *Id.*

89. *See* Handy I, *supra* note 79, at 43.

90. GEORGE MARTIN, VERDI: HIS MUSIC, LIFE AND TIMES 95 (1963). Verdi wrote these words as a sixty-eight-year-old in response to a friend's gift to him of a biographical article on Vincenzo Bellini. *Id.*; *cf.* SAX, *supra* note 14, at 139 ("[Stephen Joyce] added the following interesting perspective: . . . '[W]hy cannot [private] papers and letters be locked up, embargoed, or access be limited to scholars only?'").

Nebraska-raised novelist Willa Cather (1873-1947)[91] wished her private letters to remain private. The seventh paragraph of her will asked her successors to "prevent any 'dramatization' of her works and to prevent 'publication in any form whatsoever, of the whole, or any part of any letter or letters written by me in my lifetime.'"[92] Her wishes were recently disregarded with the support of her estate's executors.[93] Would it be possible to better achieve Cather's aims? Let us assume that Cather had engaged an estate planning attorney with instructions that her unpublished, private correspondence remain hidden and viewed only sparingly by students and scholars after her death.[94] In our hypothetical, Cather does not desire to destroy the correspondence, and any instruction to her executor to burn her letters may be unenforceable on grounds of public policy anyway since postmortem destruction instructions often fail.[95] She does instruct the letter recipients, however, to destroy her letters – some do so, others do not.[96]

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91. *Chronology*, WILLA CATHER ARCHIVE, https://cather.unl.edu/life.chronology.html (last visited Sept. 1, 2018).

92. Andrew Jewell, *Why Obscure the Record?: The Psychological Context of Willa Cather's Ban on Letter Publication*, 40 BIOGRAPHY 399, 399–400 (2017).

93. *See* THE SELECTED LETTERS OF WILLA CATHER (Andrew Jewell & Janis Stout eds., 2013) [hereinafter SELECTED LETTERS]; *see also* Jewell, *supra* note 92, at 401.

94. Willa Cather in fact made this request. *See Introduction* to SELECTED LETTERS, *supra* note 93, at x. Some may suspect that she worried that the correspondence might reveal her sexual orientation or other private matters. *See, e.g.*, Phillip Knightley, *T.E. Lawrence*, in THE CRAFT OF LITERARY BIOGRAPHY 154, 155-56 (Jeffrey Meyers ed., 1985) (explaining T.E. Lawrence's brother's decision to lift an embargo on private letters revealing how T.E. Lawrence paid an army mate to flagellate him was based upon a belief the papers would explain the event sympathetically – "[t]he beatings were intended to achieve a subjection of the body by methods advocated by the saints"); SAX, *supra* note 14, at 141 (highlighting how Henry James "burn[ed] letters in his possession and instruct[ed] his executor to do the same"); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 76 n.157 (1999) [hereinafter Hirsch, *Bequests*] (describing the *Valley of the Dolls*' author, Jacqueline Susaan's request to her executor to destroy her diary to avoid "embarrass[ing] those mentioned within it").

95. *See In re* Scott's Will, 93 N.W. 109, 109 (Minn. 1903) (assuming arguendo that a codicil directing the destruction of money would be void); *see generally* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005); *see* sources cited *supra* notes 78–79. The instruction to an executor to destroy letters also runs the risk that the executor will simply disregard the instruction, and no one seems to have standing to enforce the directive. *See* SAX, *supra* note 14, at 45–47 (detailing how W.H. Auden's and Franz Kafka's instructions to their respective executors to burn their letters were ignored). The solution to this defect – the lack of anyone who might be harmed by an otherwise enforceable use or alienability restriction – is a "purpose trust enforcer," which is discussed *infra* Section II.C.2.d.

96. Willa Cather actually made this request as well. Bohlke, *supra* note 45, at 171. Some of her correspondents complied with Cather's request to destroy her letters, but others predictably disobeyed her and instead "contributed the letters to various collections across the country." *Id.*

The twentieth century boasts a complex evolution of copyright terms, so let us further assume today's copyright laws apply and avoid any possible issue with "will-bumping."[97] We can safely conclude that federal copyright protections for any published Cather writings extend seventy years beyond Cather's death (thus, lapsing in 2018).[98] As to her unpublished, private letters, common law copyright will attach indefinitely or at least as long as they remain unpublished.[99] To further streamline the problem, we will also assume that Cather destroyed letters written to her by others and that her concern is focused on letters she authored and retained copies of before mailing. We will also assume that Cather retained all copyright privileges to her own letters despite having mailed the physical originals to her addressees.[100] In common law, first publication copyright ends only upon the distribution of a writing.[101] Common

97. "Will-bumping" refers to the circumstances "where an author of a work created prior to 1978 devises his or her entire copyright interest to a person or persons other than the surviving spouse, children, executors, or next of kin." Michael Rosenbloum, Note, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 188 (1996). The term was coined by Professor Francis Nevins. *Id.* at 187 n.142 (citing Francis M. Nevins, Jr., *The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide*, 35 J. COPYRIGHT SOC'Y U.S.A. 77, 78 (1988)).

98. 17 U.S.C. § 302(a) (2012). Private correspondence is neither a "work for hire" nor pseudonymous works, which would enjoy a different copyright term enduring from the date of initial publication. *Id.* § 302(c). Indeed, the federal copyright protections for Cather's letters did end in 2018. *The Complete Letters of Willa Cather: Introduction*, WILLA CATHER ARCHIVE, https://cather.unl.edu/letters/about (last visited Sept. 1, 2018) ("In 2018, Cather's letters enter into the public domain . . . .").

99. *See* 17 U.S.C. § 104(a) (2012) (providing that unpublished copyrightable works "are subject to protection under this title"). "Ownership of a document does not automatically carry with it the Common Law Copyright [, but] a sale of all rights to an artistic work by the owner will ordinarily include the right not only of ownership [] but also the Common Law Copyright . . . ." Rosenberg v. Zimet, 913 N.Y.S.2d 547, 549 (Sup. Ct. 2010).

100. "A copyright is separate and distinct from ownership . . . ." *Rosenberg*, 913 N.Y.S.2d at 549; *accord* Pushman v. N.Y. Graphic Soc., Inc., 39 N.E.2d 249, 251 (1942) (reasoning that an artist's sale of his painting impliedly includes the reproduction rights).

101. Chamberlain v. Feldman, 89 N.E.2d 863, 865 (N.Y. 1949); *see also* Walker v. Time Life Films, Inc., 1983 WL 37482, at *2 (N.Y. Sup. Ct. July 18, 1983) ("Although Common law copyright in an unpublished work lasts indefinitely, it is extinguished immediately upon publication of the work by the author.").

law copyright protection is therefore indefinite.[102] Federal copyright protections are not.[103] In our hypothetical, Willa Cather's objective is quite simple: She wishes to preserve and tightly regulate the disclosure of her letters. She wants to limit disclosure to serious scholars and students. She does not want her private correspondence being leered at by those with merely prurient interests. She wants the same dignified access to be ensured after her death as she exercised during life.[104]

There are several categories of property embedded in this example. The physical letters themselves – many of which are stored in archives across the country[105] – need to be indexed. First, there are the Cather's self-authored letters exclusively in her own possession; second, there are those letters held by both Cather (as a copy) and the recipient (the original). We can also consider the physical letters themselves (tangible chattels) separately from the copyrights in the letters' texts (intangible intellectual property).[106] In sum, there are a total of four classes of property: the tangible unpublished works in joint custody, the tangible unpublished works in Cather's sole possession, and the intellectual property rights in those two classes.[107] These four classes of property will be referred to simply as her "letters." As Cather's lawyers, we will be incapable of controlling the physical copies in the hands of the letter recipients.

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102. *See* Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 254 (N.Y. 1968) ("Common-law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public."); *Chamberlain*, 89 N.E.2d at 865 (observing that common law copyright permits an author "to keep meritorious literary achievement out of the public domain for [a] long a time" but decline to "express[] any views of our own as to the advisability of permitting literary flowers so to blush unseen"); *Walker*, 1983 WL 37482, at *2.

103. *See* 17 U.S.C. § 302(a) (expiring seventy years after the author's death).

104. *See* Jewell, *supra* note 92, at 420 (speculating that Cather banned the publication of her letter because "the future could not and should not be entrusted with her personal correspondence, especially those hundreds of letters written to family and friends that revealed her relatively unguarded self").

105. Robert Thacker, *Four "New" Cather Letters to Annie Fields at the Huntington Library*, WILLA CATHER ARCHIVE, https://cather.unl.edu/cs003_letters.html (last visited Sept. 1, 2018).

106. The tangible paper and text and the copyright thereto are severable and separate property interests. Henry Bill Pub. Co. v. Smythe, 27 F. 914, 923–24 (S.D. Ohio 1886). For example, I own a copy of Willa Cather's novel *Death Comes for the Archbishop*. I do not own the right to make copies of it, license the creation of derivative works, etc., but I can freely alienate my physical copy. *See* 17 U.S.C. § 109(a) (2012) (providing that the owner of a copy of a copyrighted work "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy").

107. The fact that Willa Cather mailed the letters to their recipients does not mean that the letters were "published" for copyright purposes; they remain unpublished after being deposited in the U.S. Mail. *See* Zachary v. W. Publ'g Co., 143 Cal. Rptr. 34, 44 (Ct. App. 1978) (concluding that an author retained common law copyright protections to drawings of a kite design because filing for a patent of the same did not constitute publication).

Even though the recipients do not hold the copyright, the recipients' ability to allow access and permit selective quoting from them may be permissible under copyright's fair use doctrine.[108] Our focus will be on Cather's physical letters in Cather's exclusive control and their copyright. Although today most of Cather's letters are available to anyone with an internet connection,[109] our hypothetical considers an alternative reality where her privacy concerns might be better implemented.

The simplest or most obvious technique by which we could try to achieve Willa Cather's aims would be for her to saddle these tangible and intangible assets with use and alienability restrictions like the donor of the 1963 Thunderbird attempted to withhold modification rights to the car from its donee. Could Cather simply proclaim what she permits and does not permit with regards to her letters after her death? Could she devise the letters but withhold rights to share or disseminate them widely? These attempts would likely be ineffective

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108. *See* 17 U.S.C. § 107 (2012) ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1371 (2011) ("[A]cademics, critics, journalists, teachers, film makers, fan-fiction writers, and technology companies all rely on the fair use doctrine to give them a certain amount of freedom in dealing with other people's copyrights.").

109. *See The Complete Letters of Willa Cather: Introduction*, *supra* note 98. The archive explains,

> Willa Cather's will, executed in 1943, requested that her letters not be published in whole or in part, a request that was honored for over 65 years. In 2009, however, the literary trust created by Cather's will ceased to function, and a new entity was created to manage Cather's literary properties. The Willa Cather Trust, a partnership between the education-centered Willa Cather Foundation and the University of Nebraska Foundation, decided that the time had come to acknowledge Cather's importance to the greater culture and allow her letters to be published. The Trust implemented this change of policy, effective in 2011 . . . .
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> . . . .
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> In 2018, Cather's letters enter into the public domain, allowing for unrestricted publication of these once heavily-restricted documents. Our edition of *The Complete Letters of Willa Cather* honors the wide range of readers and scholars interested in Cather's work by providing free, open access to the texts of the letters and the treasure of information they contain. . . . As the title indicates, *The Complete Letters of Willa Cather* aims to publish *all* of Cather's known surviving correspondence, which currently is approaching 3,100 letters. These letters are held in nearly 90 different repositories around the world. Rather than wait until all of the letters are ready for publication in the edition – which we currently believe will be in 2021 – we have decided to publish groups of letters as they are completed.

Id.

as constituting "waste" or violating other doctrines favoring free alienability.[110] Cather might caution her devisees about sharing the letters with individuals other than serious scholars and students. Mere precatory instructions, however, are insufficient.[111] Attempts at binding admonitions that withhold publication, alienation, or use rights to her letters are unenforceable.[112] This Section proposes that a purpose trust that holds the letters as its res could largely accomplish the novelist's objective of keeping her letters mostly private.[113] A noncharitable purpose trust could accomplish Cather's aims.

What is most interesting is not Willa Cather's conveyance of her objectives to the right literary executor, but rather Willa Cather's creation of an artificial person – a trust – that she shapes and constructs.[114] Properly drafted,

110. *See, e.g.*, H.R. REP. NO. 94-1476, at 123 (1976) (declaring congressional adherence to "[t]he principle of unlimited alienability of copyright"); *see also, e.g.*, Gangemi v. Zoning Bd. of Appeals of Town of Fairfield, 763 A.2d 1011, 1017 (Conn. 2001) (characterizing a "no rental condition" as violating "the policy against economic waste" because it results in a "significant differential in value" without a "legal or useful purpose in doing so"); Daniel Martin, Note, *Dispersing the Cloud: Reaffirming the Right to Destroy in a New Era of Digital Property*, 74 WASH. & LEE L. REV. 467, 479 (2017) ("[I]n the late twentieth century and up to the present, courts and commentators began to reexamine the right to destroy.").

111. *See* Bohlke, *supra* note 45, at 172 (noting the letters of Willa Cather that have been published "whet the appetite in such a way that one can only hope her complete extant correspondence might be made available soon").

112. *E.g.*, Durbin v. Durbin, 153 N.E.2d 706, 710 (Ohio Ct. App. 1957) ("[A]ny attempt to restrict the right of the holder to alienate his interest is null and void.") (citation omitted); Nashville, C. & S. L. Ry. v. Bell, 39 S.W.2d 1026, 1028 (Tenn. 1931) ("[A] condition in a grant of a fee which restrains all power of alienation is void . . . ."). "Property law disfavors restraints on alienation and dead-hand control by prior owners." United States v. Evans, 844 F.2d 36, 42 (2d Cir. 1988). And use limitations may be construed as disabling restraints. *E.g.*, Casey v. Casey, 700 S.W.2d 46, 47–49 (Ark. 1985) (holding void a devise of certain property to the testator's son with the limitation that the son's estate should terminate if the son's daughter ever became the owner or tenant of the property or if she were ever a guest upon the property for more than one week per year). This "principle [that] prevents a person from imposing restraints on alienation inconsistent with the nature of the estate given *applies equally to personal and to real estate*, and general restraint on the alienation of articles, things, and chattels, except when a very special kind of property is involved . . . ." *Durbin*, 153 N.E.2d at 710 (alteration in original).

113. *See generally* Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1 (1999) (explicating fair use doctrine in connection with unpublished manuscripts).

114. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (AM. LAW. INST. 2001) ("Increasingly, modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal 'entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries."); *see also* Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1882 (2000) ("[T]ax law . . . has long treated the typical trust as an entity separate from the person who serves as trustee."). *But see* Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 512–14 (2015) (summarizing the theoretical

the trust will itself hold and exhibit Cather's artistic vision because it will have been stitched into the trust's fabric. A thoughtfully drafted trust will result in the creation of a new owner that has been programmed with Cather's artistic values. In a sense, Cather will have infused her artistic values into her trust. She will have embodied in her trustee "a special kind of qualified, obligation-bearing ownership."[115] This trust can take the form of a testamentary trust within the text of Cather's Last Will and Testament.

Before diagramming this idea of an artistic virtue trust as a means by which Willa Cather might achieve postmortem control over her private correspondence, an excursion into the background and development of purpose trusts is required.[116] Purpose trusts – trusts designed to accomplish an aim rather than benefit a beneficiary – had a rather difficult birth, opposing, as they do at several key points, the law's disfavor of property use limitations and trust

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scholarship of Professors John Langbein, Robert Sitkoff, and David Horton). I submit that transactional and relational ways of viewing purpose trust, in particular, are less helpful than entity models because of the more difficult conceptual problems of visualizing the relationship between the trustee and a noncharitable purpose. *See* James L. Musselman, *Separate but Equal: Proposal for Harmonizing the Rules for Marital Property Characterization of Beneficial Interests in and Distributions from Trusts with Those Applicable to Similar Types of Property*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 55, 69 (2012) ("[Some] appellate courts have effectively treated trusts as separate legal entities for purposes of marital property characterization of beneficial interests in trusts and undistributed trust income, but the courts have not done so in characterizing trust income distributed by the trustee to the beneficiaries.").

115. SAX, *supra* note 14, at 6. Professor Sax was referring to the kind of title on owner enjoyed in the Middle Ages to a religious relic. *Id.* Relics could be owned by private individuals, but because of the religious significance to the community, "owners were required to protect them in various ways – for example, by safeguarding them from danger (not displaying them when going into battle), or by depositing them in a secure and appropriately dignified place such as a religious institution." *Id.* Professor Sax contrasts this flavor of title with the general treatment: unqualified ownership that "enables owners to exercise unbridled power over owned objects, whatever the loss to science, scholarship, or art." *Id.* at 3.

116. Here – and elsewhere – I am particularly indebted to Professor Ausness's comprehensive article. *See generally* Richard C. Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 REAL PROP. TR. & EST. L.J. 321 (2016). Other particularly noteworthy purpose trust scholars are Professor Adam Hirsch and practicing attorney/scholar Alexander Bove. *See generally* Hirsch, *Bequests*, *supra* note 94; Adam J. Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, 36 EST. PLAN. 13 (2009) [hereinafter Hirsch, *Delaware Unifies*]; Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2215–21 (2011) [hereinafter Hirsch, *Freedom*]; Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (1999) [hereinafter Hirsch, *Trust for Purposes*]; Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, GPSOLO, Mar. 2005, at 18 [hereinafter Bove I, *The Purpose of Purpose*]; Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, PROB. & PROP., June 2004, at 34 [hereinafter Bove II, *The Purpose of Purpose*].

law's reliance on beneficiary rights as enforcement mechanisms.[117] A historical outline is necessary to fully appreciate the forces aligned against the kind of dead hand control that our hypothetical client, Willa Cather, wants to achieve. Today, purpose trusts are recognized, but typically in the "pet trust" form – a very different use than is proposed here.[118] The basic principles of trusts, their origins, and their architecture will set the stage for an outline of the recognized varieties of purpose trusts.[119] Following an examination of purpose trusts, certain recurring problems with purpose trusts will be noted.[120] Next, this Section will chart current statutory frameworks for constructing purpose trusts.[121] Finally, this Section will conclude with an exploration of purpose trusts as a means to vest artists with appropriate levels of postmortem control over their works and will consider how we might best achieve Willa Cather's goals for her letters.[122]

B. Origins and a Brief Introduction to Trust Architecture

The original impetus for trusts derived primarily from a property problem in pre-sixteenth-century England: One could not devise land by a will.[123] Land was inheritable but not devisable until 1540.[124] If land were devisable, the feudal lord's rights to revenue from reliefs, wardships, and marriages would have been jeopardized.[125] A lord's revenue could be equated with taxes of today. Trusts arose to achieve control over property not otherwise available as a matter of law and also to minimize the lord's ability to collect.[126] The original

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117. *See* Jennifer E. Levy, Comment, *Idaho's Noncharitable Purpose Trust Statute: Leaping over Age-Old Trust Laws in a Single Bound*, 44 IDAHO L. REV. 801, 813–14 (2008) ("The noncharitable purpose trust played tug-of-war for many years[,] . . . [and] [t]he continued hostility towards the noncharitable purpose trust presumably continued because of its appearance as an egotistic device employed primarily by the wealthy . . . .").

118. "Most attorneys . . . associate noncharitable purpose trusts with pet trusts because '[t]he thrust in the United States to adopt purpose trust legislation appears to be largely related to and motivated by the public's desire to be able to establish valid trusts for their pets.'" *Id.* at 820 (alteration in original) (quoting Bove II, *The Purpose of Purpose*, *supra* note 116, at 35).

119. *Infra* Section II.B & C.

120. *Infra* Section II.D.

121. *Infra* Section II.E.

122. *Infra* Section II.F.

123. Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181, 185 (2009).

124. *Id.* at 185 n.19 ("The first Statute of Wills was not promulgated until 1540.").

125. *Id.*

126. *See* RESTATEMENT (THIRD) OF TRUSTS ch. 1, introductory note, at 3 (AM. LAW. INST. 2001) (describing the evolution of the trust as "a device for flexible, long-term settlement of family property"). "By employment of the 'use,' feudal landowners could devise property, avoid the feudal incidents of tenancy (e.g.[,] ward, marriage, relief, heriot, escheat, and aids), protect land from attachment by creditors, and create certain

creative impulses from which trusts sprang were thus private, donative goals coupled with some tax avoidance ambitions.[127]

Trusts arose originally in English law as "uses" transplanted from early German law.[128] In German law, the trustee's duties were merely honorary (that is, unenforceable).[129] With English law, the obligations of a trustee (that is, the "feoffee to uses")[130] became binding and enforceable in the courts of equity in order to secure the rights of the beneficiary (the *cestui que use*).[131] The recognition of binding trustee obligations was brought on by landowners "retaining for themselves land [that] they had received upon the faith of their dealing" when the common law gave no remedy.[132] At early common law, the feoffee was the absolute owner.[133] But the property had been conveyed with an understanding that the feoffee held the property for another's benefit.[134] The courts of law were unsympathetic in enforcing the feoffe's obligations.[135] Equity stepped into the breach and ordered these feoffees to hold land for the benefit of their *cestui que use*.[136] Thus, the concept of a trust – a personal obligation of a trustee holding legal title to property for the benefit of another – was

types of future interest." Payson R. Peabody, Comment, *Taming CERCLA: A Proposal to Resolve the Trustee 'Owner' Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 432 n.117 (1994).

127. *See* Kesling v. Kesling, 967 N.E.2d 66, 81 (Ind. Ct. App. 2012) (quoting RESTATEMENT (SECOND) OF TRUSTS ch. 1, introductory note (AM. LAW. INST. 1959)) ("[T]he creation of a trust is a method of disposing of property"); Peabody, *supra* note 126, at 432 (noting the adverse revenue effects on England's treasury caused by trusts).

128. James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 263 (1908).

129. *Id.* at 265. "[T]he transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development." *Id.*

130. A "feoffee to uses" is a trustee. Ashhurst v. Given, 5 Watts & Serg. 323, 327 (Pa. 1843). The trustee held legal title to trust property but "notwithstanding the legal estate was vested in the feoffee to uses, equity stepped in to the relief of the *cestui que use*, and furnished a protection to the latter . . . ." *Id.*

131. Barr Ames, *supra* note 128, at 264–65.

132. *Id.* at 265.

133. Tyndall v. Tyndall, 119 S.E. 354, 355 (N.C. 1923). "[T]he feoffee was originally regarded in law as the real owner . . . ." *Id.*

134. *See* Claiborne v. Henderson, 13 Va. 322, 343 (1809).

135. *See* Thatcher v. Omans, 20 Mass. 521, 529–30 (1792).

136. Barr Ames, *supra* note 128, at 265.

born.[137] The most basic understanding of a trust is a relationship between two people – trustee and beneficiary – in regards to property.[138]

We can therefore view a trust as a personal relation relative to a res – a status of property.[139] When the owner of property creates a trust by transferring property to a trustee, she accomplishes a bifurcation of the legal and equitable interests between trustee and beneficiary while imposing fiduciary duties upon the trustee to carry out the terms of the trust.[140] While a trustee holds property, legally speaking, the beneficiary too holds a property interest to the same res, equitably speaking.[141] Alternatively, a trust is very much like a third-party-beneficiary contract, although in a donative context rather than a commercial

137. *E.g.*, McCreary v. Gewinner, 29 S.E. 960, 963 (Ga. 1898) ("A trust is an equitable obligation, either express or implied resting upon a person by reason of a confidence reposed in him, to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence."). Defining a trust as a kind of confidence can be traced back to Sir Edward Coke. *See* 1 JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 13, at 10 (3d ed. 1882) (quoting Coke, "[A] trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in chancery").

138. Barr Ames, *supra* note 128, at 271 n.5 (emphasizing that a trust "necessarily implies a relation between two persons"). "[T]he common law will not allow a right *in personam*, an obligation, to be created without two parties." John Chipman Gray, *Gifts for A Non-Charitable Purpose*, 15 HARV. L. REV. 509, 512 (1902) (alteration in original). "It will not recognize a promisor without a promisee, a contractor without a contractee, or a trustee without a *cestui que trust*." *Id.*

139. 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS § 40.2 (2005); *see also* RESTATEMENT (FIRST) OF TRUSTS § 2 (AM. LAW. INST. 1935) (defining a trust as "a fiduciary relationship with respect to property"); RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003).

140. *See In re* Adkisson, 26 B.R. 879, 882 (Bankr. E.D. Tenn. 1983) ("As a general rule, a separation of legal title and equitable ownership of the trust property is necessary to the formation of an express trust."); GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES § 18.1.2 (3d ed. 2005) (identifying the property interest held by a beneficiary as represented by "equitable title" without control while the trustee holds "legal title"); PERRY, *supra* note 137, at 11 ("[I]f an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate."); Schenkel, *supra* note 123, at 195–96 (highlighting how the equitable/legal title-split idea of trusts allows the *numerous clausus* rule that would otherwise restrict property interests to a finite number of clearly-defined forms).

141. *But see* GEORGE TAYLOR BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 1, Westlaw (database updated June 2018) ("Whether the beneficiary has a property right in the subject matter of the trust (a right in rem), or merely a personal right against the trustee (a right in personam), is a question much debated.").

one.[142] A trust is therefore an owner-trustee bargain intended to benefit a beneficiary.[143] The trust is more donative than contractual.[144] A trust is a different form of a gift – it is an alternative to an outright gift.[145] At the same time, contractual aspects cannot be denied. Upon the creation of a trust, the trustee agrees with the settlor to hold property, administer it, and distribute it as instructed to benefit a third party – the beneficiary.[146] One cannot say that a trust is strictly a third-party beneficiary contract since typically one party to the agreement – the settlor – lacks the power to enforce the agreement.[147] At the same time, a trust is also an artificial legal person similar to a corporation or an estate.[148] A trust is treated as a person for tax purposes.[149] A trust can sue and be sued and hire and fire advisors.[150] Three views compete for explaining a

142. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995) (calling the two "functionally indistinguishable").

143. *In re* Estate of Bodger, 279 P.2d 61, 67 (Cal. Dist. Ct. App. 1955). "In legal contemplation [sic] a declaration of trust is nothing other than a third party beneficiary contract." *Id.*

144. *See* Scanlon v. Scanlon, 993 N.E.2d 855, 866 (Ohio Ct. App. 2013) ("[B]alancing the rights and requirements at issue in a trust dispute should be resolved in favor of upholding the donor's intent when creating the trust.").

145. *See* BEYER, *supra* note 140, at 305 ("In general, a trust scenario arises when a property owner wants to bestow benefits on a worthy individual or charity but does not want to make an unrestricted outright gift.").

146. *E.g.*, *In re* E. Paving Co., 293 B.R. 704, 710 (Bankr. E.D. Mich. 2003) ("A provision contained in an indemnity agreement . . . purporting to create a trust, without any evidence of the intention of the settlor to create a trust or impose restrictions on the use of the funds by the purported trustee, is insufficient by itself to create an enforceable express trust."). *Contra* Lah v. Rogers, 707 N.E.2d 1208, 1211–12 (Ohio Ct. App. 1998) (reasoning that no "meeting of the minds" between settlor and trustee is necessary to create a trust).

147. *See* Alaska State Emps. Ass'n v. Alaska Pub. Emps. Ass'n, 825 P.2d 451, 458 n.8 (Alaska 1991) ("[A] settlor has created a trust, the settlor has no rights or powers with regard to the trust unless the trust instrument provides otherwise."); Amundson v. Kletzing-McLaughlin Mem'l Found. Coll., 73 N.W.2d 114, 117 (Iowa 1955) (listing a plethora of cases supporting the proposition that a settlor absent empowerment is not entitled to sue); BOGERT ET AL., *supra* note 141 § 42. With regards to charitable trusts, the rule of no-settlor-standing is beginning to erode. *Id.* § 415.

148. *See, e.g.*, Angelique Devaux et al., *The Trust as More Than a Common Law Creature*, 41 OHIO N.U. L. REV. 91, 93 (2014) ("[A] trust is a legal entity to hold, manage, and transfer property."); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 416 (2000) ("While it is sometimes said that the common-law trust lacks legal personality, in our view it is, on the contrary, quite clearly a legal entity . . . .").

149. I.R.C. § 641(b) (2012).

150. *See* RESTATEMENT (THIRD) OF TRUSTS § 105 cmt. a (AM. LAW. INST. 2011) ("[C]laims against a trust may be asserted by proceeding against the trustee in a representative capacity."); UNIF. TRUST CODE § 811 (UNIF. LAW COMM'N 2000) ("A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.").

trust: (1) the trust as property bifurcation;[151] (2) the trust as contract;[152] and (3) the trust as entity.[153]

In creating a trust, the necessary elements are (1) intent, (2) a res, and (3) ascertainable beneficiaries.[154] A writing is not even required in most cases.[155] Nor is a trustee absolutely essential to the creation of a trust because a court

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151. *See* Taliaferro v. Taliaferro, 921 P.2d 803, 809 (Kan. 1996).

152. *See* RESTATEMENT (FIRST) OF TRUSTS § 17 cmt. f (AM. LAW. INST. 1935) ("If a person makes an enforceable promise to . . . make a conveyance of property to another person as trustee, a trust may be created . . . ."). The contractual theory of trusts is most applicable to business trusts and commercial trusts, such as Real Estate Investment Trusts ("REIT") or mutual funds. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 167–172 (1997).

153. Anderson v. Wilson, 289 U.S. 20, 27 (1933); RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (AM. LAW. INST. 2001). For income tax purposes, any non-grantor trust is treated as a separate entity. *See* James A. Nitsche, *Income Taxation of the Family After the Tax Reform Act of 1986*, 26 J. FAM. L. 715, 715 (1988) ("[T]he income generated by the property held in trust will generally be taxed to the trust or the beneficiary, depending upon whether the trust accumulates or distributes the income pursuant to the terms of the trust instrument.").

154. *See* BOGERT ET AL., *supra* note 141, §§ 45, 111, 161 (reciting the elements of settlor intent, ascertainable beneficiaries, and a res). Thus, the three basic requirements for creating a trust are

> (1) an expression of intent that property be held, at least in part, for the benefit of one other than the settlor; (2) at least one beneficiary for whom the property is to be administered by the trustee; and (3) an interest in property which is in existence or is ascertainable and is to be held for the benefit of the beneficiary.

Id. § 1 (footnotes omitted). The res requirement is often recited as essential. *E.g.*, Begier v. I.R.S., 496 U.S. 53, 70 (1990) (Scalia, J., concurring) ("A trust without a res can no more be created by legislative decree than can a pink rock-candy mountain."). *But see* UNIF. TRUST CODE § 402(a) (UNIF. LAW COMM'N 2000) (requiring five elements to a valid trust: intent, settlor capacity, ascertainable beneficiaries, active duties of the trustee, and that "the same person is not the sole trustee and sole beneficiary" – while omitting the res requirement).

155. RESTATEMENT (THIRD) OF TRUSTS § 20 (AM. LAW. INST. 2001) ("Except as required by a statute of frauds, a writing is not necessary to create an enforceable inter vivos trust, whether by declaration, by transfer to another as trustee, or by contract."). "Most states have enacted statutory provisions like [s]ection 7 of the English Statute of Frauds, specifically requiring a writing for the inter vivos creation of enforceable trusts of interests in land." *Id.* cmt. a. And testamentary trusts must satisfy the applicable Wills Act since they are contained within the text of a will. *Id.*

can always appoint one.[156] Usually, a trust will not fail for want of a trustee.[157] One or more beneficiaries who can be ascertained, with or without some difficulty, however, are essential.[158] Extrinsic evidence may be admissible to properly identify a beneficiary, but if a beneficiary cannot be identified, the trust becomes impossible to enforce.[159] Without beneficiaries, there is no trust.[160] The existence of a beneficiary is essential because without one, there

156. RESTATEMENT (THIRD) OF TRUSTS § 31.

> Even though a trustee is essential to a trust, a trust does not fail simply because no trustee is provided by the terms of the trust or because, before or when or after the trust is created, the designated trustee dies, is unable or unwilling to act, or is removed.

Id. cmt. a. *But see* BOWE & PARKER, *supra* note 139, at 174 ("[If a trust] can be carried into effect only by the exercise of the personal discretion of the named trustee, this trust will, ordinarily, be held not exercisable by any person other than the trustee" and will therefore fail).

157. Childs v. Waite, 67 A. 311, 312 (Me. 1907); *In re* Jordan's Estate, 197 A. 150, 150 (Pa. 1938).

158. *See* Levy v. Levy, 33 N.Y. 97, 107 (1865) ("If there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement, is void, whether good or bad, wise or unwise."). "It cannot be claimed that, at common law, there can be a valid devise or bequest to an indefinite object, or a valid use without an ascertained *cestui que trust* or beneficiary." *Id.* at 101 (alteration in original); *see also* RESTATEMENT (THIRD) OF TRUSTS § 44 (stating the ascertainable beneficiary rule).

159. Weaver v. Kirby, 119 S.E. 564, 566 (N.C. 1923), *superseded by* Ch. 630, Public Laws of 1947, G.S. 36-23.1, *as recognized in* Banner v. N.C. Nat'l Bank, 146 S.E.2d 89. "There must be somebody in whose favor the court can decree performance." *Id.*

160. *See Levy*, 33 N.Y. at 104–05 ("In a trust limitation without a beneficiary, there is no one to enforce the trust, and necessarily it results to the heir . . . ."); Longoria v. Lasater, 292 S.W.3d 156, 168 (Tex. Ct. App. 2009) ("When an express trust fails, a resulting trust is generally implied in law."); RESTATEMENT (THIRD) OF TRUSTS § 8 cmt. a (providing that where a transfer to an intended trustee fails, "title to the property remains (with no need of the resulting-trust device) either in the would-be transferor or in the personal representative or beneficiaries of the testator's estate").

can be no trustee duties.[161] A trustee without duties is not a trustee.[162] Without the threat of enforcement from ascertainable beneficiaries, the trust collapses – unless a different kind of threat can sustain it.

C. Types of Trusts: A Proposed Taxonomy

Typically, trusts are ranked into two major divisions: express trusts and implied – or constructive, remedial – trusts.[163] Express trusts are themselves divided into two major groups: charitable trusts and noncharitable (private) trusts.[164] This is a sensible approach since charitable trusts enjoy a host of treatments and exemptions that are unique to them, such as tax breaks, *cy pres*,[165] and enforcement by the attorney general.[166] Noncharitable trusts do not enjoy these benefits.

Despite the justifications of dividing express trusts into charitable and private categories, this Section submits a different taxonomy of express trusts. It

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161. *See, e.g.*, Clark v. Campbell, 133 A. 166, 170–71 (N.H. 1926) (trust for "friends" fails for lack of ascertainable beneficiaries); Heiss v. Murphey, 40 Wis. 276, 292 (1876) (trust for "orphans" fails for a lack of ascertainable beneficiaries); UNIF. TRUST CODE § 402(a)(3) (UNIF. LAW COMM'N 2000) (providing that a trust, other than a charitable trust or a purpose trust must have "a definite beneficiary"). The *Clark* decision – considering a trust for the decedent's "friends" – noted: "It was the evident purpose of the testator to invest his trustees with the power after his death to make disposition of the enumerated articles among an undefined class with practically the same freedom and irresponsibility that he himself would have exercised if living . . . ." *Clark*, 133 A. at 171. That, the court concluded, violated the formality requirements of the Wills Act and the definiteness requirement of a noncharitable trust. *See id. But see* UNIF. TRUST CODE § 402(c) ("A power in a trustee to select a beneficiary from an indefinite class is valid.").

162. *See* RESTATEMENT (THIRD) OF TRUSTS § 6(3) cmt. b ("If the Statute of Uses or similar statute or doctrine applies to some or all of the property held in a passive trust, the trustee's legal (or possibly other) title to the affected property is extinguished and the beneficiary or beneficiaries take title to that property . . . .").

163. *E.g.*, Smiley v. Yllander, 105 So. 3d 1171, 1175 (Miss. Ct. App. 2012). *But see* RESTATEMENT (THIRD) OF TRUSTS § 1 (categorizing trusts into three types: express trusts, implied or resulting trusts, and charitable trusts). There are, in turn, two subtypes of implied trusts: constructive trusts and resulting trusts. McGhee v. Mergenthal, 735 N.W.2d 867, 870 (N.D. 2007). Express noncharitable trusts – or "donative trusts" – might be divided into "caretaker" and "dynastic" subcategories. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 113 (2009). Implied, resulting, and constructive trusts are beyond the scope of this Article. *See generally* Grace Murphy Long, Commentary, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875 (2006).

164. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a.

165. *See infra* Section II.C.1.

166. *See* 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Trusts* § 326 West (database updated June 2018) (noting five favorable characteristics of charitable trusts: relief from RAP, a liberal construction, *cy pres*, tax exemption, and attorney general supervision).

contends that express trusts are comprised of two subgroups: trusts for ascertainable beneficiaries and purpose trusts.[167] Purpose trusts, in turn, may be considered as comprised of two subtypes: charitable trusts and noncharitable trusts.[168] Charitable purpose trusts can be distinguished – sometimes not easily – from noncharitable (or private) purpose trusts because they involve promoting health, relieving poverty, advancing religion or education, or other purposes that benefit a community.[169] Noncharitable purpose trusts can be thought of as any private trust without ascertainable beneficiaries that fails to qualify as "charitable."

Thus:

I. Constructive Trusts
II. Express Trusts
  A. Trusts for Ascertainable Beneficiaries
  B. Purpose Trusts
    1. Charitable Trusts
    2. Noncharitable Purpose Trusts

Admittedly, this taxonomy is clumsy. Its clumsiness lies in the fact that although a great many charitable trusts are purpose trusts, some charitable trusts are also trusts for ascertainable, charitable beneficiaries. For example, the trust instrument in the famed *Ladysmith Rescue Squad* case directed the trustee to distribute the remainder to two named charitable beneficiaries – a volunteer fire department and the Ladysmith Volunteer Rescue Squad.[170] The charitable beneficiaries were not only ascertainable, but they were identified by name.[171] A charitable trust may therefore include ascertainable, charitable beneficiaries.[172] This is the primary clumsiness with categorizing charitable

167. Some charitable purpose trusts look very much like noncharitable purpose trusts. *See, e.g.*, *In re* Estate of du Pont, 663 A.2d 470, 471–72 (Del. Ch. 1994) (considering a realty in a charitable trust to be used as a convalescent hospital and monument); Kolb v. City of Storm Lake, 736 N.W.2d 546, 548 (Iowa 2007) (describing a charitable trust "to maintain a flower garden at a designated location in a city park for the enjoyment of the public in the memory of a family member").

168. *See* Hirsch, *Delaware Unifies*, *supra* note 116, at 17–18 (noting that as purpose trust law evolves, "its noncharitable branch has, in one respect, surpassed its charitable branch").

169. UNIF. TRUST CODE § 405(a) (UNIF. LAW COMM'N 2000); Statute of Charitable Uses Act 1601, 43 Eliz. I, c. 4 (Eng.). "However, gifts for more esoteric purposes, such as trusts to teach poodles to dance or to prove the world is flat, may be struck down as not sufficiently in the public interest." Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1348 (1995).

170. Ladysmith Rescue Squad, Inc. v. Newlin, 694 S.E.2d 604, 606 (Va. 2010).

171. *Id.* The named charities were (1) the Upper Caroline Volunteer Fire Department, and (2) the Ladysmith Volunteer Rescue Squad. *Id.*

172. *See* BOGERT ET AL., *supra* note 141, § 363. *See also* Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 957 (2004) ("[I]f we view the charity itself as the beneficiary, the [charity] does not need the help of the attorney general to enforce the proper use of the charitable assets.").

trusts as a type of purpose trust – some charitable trusts are pure purpose trusts (without ascertainable beneficiaries), some are quasi-purpose trusts (with some beneficiaries named and some unnamed), and some are simply trusts for ascertainable charitable (and/or noncharitable) beneficiaries.[173]

Still, there is also a certain clarity that follows from this proposed taxonomy. Charitable and noncharitable purpose trusts share four important commonalities. First, charitable trusts, like noncharitable purpose trusts, occasionally lack ascertainable beneficiaries. A wealth of jurisprudence from over 500 years' worth of charitable trust history illuminates noncharitable purpose trusts. What has worked and failed with charitable trusts must be included as part of any discussion of trusts for noncharitable purposes. Second, charitable trusts share with noncharitable purpose trusts the inherent tendency to violate the Rule Against Perpetuities ("RAP").[174] Without a savings clause,[175] a trust stating, "distribute for the maintenance of my headstone" violates the rule just as a trust stating, "distribute for the maintenance of orphans in London."[176] Third, we will see with purpose trusts generally, as well as charitable trusts particularly, repeated displays of settlor eccentricities with which the courts must

173. Perhaps a more complete taxonomy which recognizes charitable trusts as a subtype of purpose trusts would look like this:

I. Constructive Trusts
II. Express Trusts
  A. Trusts for Ascertainable Beneficiaries
    1. Trusts with Ascertainable Individual Beneficiaries
    2. Trusts with Ascertainable Charitable Beneficiaries
  B. Purpose Trusts
    1. Charitable Trusts (i.e., without ascertainable beneficiaries)
    2. Noncharitable Purpose Trusts (i.e., without ascertainable beneficiaries)
  C. Hybrid Purpose Trusts
    1. Charitable Hybrid Purpose Trusts (e.g., split interest trusts)
    2. Noncharitable Hybrid Purpose Trusts

Hybrid purpose trusts are discussed *infra* at Section II.C.2.f.

174. *See* BOGERT ET AL., *supra* note 141, § 214 (outlining the history and status of RAP).

175. *See infra* note 405 for a sample RAP savings clause; *see also, e.g.*, Fitchie v. Brown, 211 U.S. 321, 328–31 (1908) (finding a RAP savings clause stating an intent that the testamentary trust for "as long a period as is legally possible" sufficient).

176. *E.g.*, *In re* Palethorp's Estate, 24 Pa. D. 215, 220–21 (Orphans' Ct.) (holding a trust to "to show people where [the testator's gravesite] is" void as creating a perpetuity), *affirmed*, 94 A. 1060 (1915).

wrestle.[177] Both charitable and noncharitable purpose trusts often reveal ambitious, and sometimes puzzling, aims.[178] Finally, both charitable and noncharitable purpose trusts can involve a serious structural problem requiring an antidote: the lack of ascertainable beneficiaries to enforce the trustee's obligations. This structural deficiency is mended with both types of purpose trusts in different ways.

1. Charitable Purpose Trusts

Private trusts require an ascertainable beneficiary with standing to enforce a trustee's obligations.[179] Charitable trusts are permitted to violate this fundamental trust rule – charitable trusts may lack an ascertainable beneficiary.[180] Indeed, some seem to claim that a charitable trust benefits an indefinite class of persons.[181] This may be because of the frequency with which charitable

177. *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532–1827, at 27 (1969) (describing a bequest for "bows and arrows for children between the age of seven and seventeen" that Francis Moore concluded satisfied the public benefit element of a charitable gift statute despite legal obligation of parents to provide such items); *see also* Rosser v. Prem, 449 A.2d 461, 463, 471 (Md. Ct. Spec. App. 1982) (describing a devise to publish a book about the testator's daughter where the evidence showed was "ungodly bad," but the devise was nonetheless deemed charitable and enforceable).

178. *See, e.g.*, Detwiller v. Hartman, 37 N.J. Eq. 347, 354 (Ch. 1883) (invalidating a trust to establish a cornet band to perform a funeral march on the anniversary of the testator's death). "Gifts which are made out of mere sentiment and have no practical result except the satisfying of a whim of the donor are obviously lacking in the widespread social effect necessary to a charity." BOGERT ET AL., *supra* note 141, § 379.

> Thus, a trust to establish a museum to exhibit what a testator regarded as objects of art but which testimony establishes to be of no artistic value, or a trust to publish and distribute a testator's views that are irrational or other writings that are of no literary or educational value, is not charitable.

RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a(2). *See also, e.g.*, *In re* Hill's Estate, 204 P. 1055, 1056 (Wash. 1922) (holding a trust to promote faith healing void as harmful to public health).

179. RESTATEMENT (THIRD) OF TRUSTS § 44 (AM. LAW. INST. 2001). To be validly created, a trust must include "a beneficiary who is ascertainable at the time or who may later become ascertainable within the period and terms of [RAP]." *Id.*

180. *Id.* cmt. a.

181. *See* Russell v. Allen, 107 U.S. 163, 167 (1883) ("[Charitable trusts] may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness . . . ."); Bedford v. Bedford's Adm'r, 35 S.W. 926, 931 (Ky. 1896) ("Indefiniteness . . . characterizes all charitable trusts to a greater or less degree . . . ."); W. Allen, Annotation, *Charitable Gifts; Definiteness*, 163 A.L.R. 784, West (database updated weekly) (originally published in 1946) ("Their identity rests in the vague future . . . ."). These decisions reason that it is the vagueness of a charitable trust that fulfills the public aspect of a charitable gift.

trusts lack ascertainable beneficiaries. Yet a charitable trust could certainly be created to benefit charitable organizations by name (for example, the Salvation Army) or benefit charitable organizations that are capable of ascertainment (for example, all of the volunteer fire stations in a given county).[182] Charitable trusts may function as passive distributors of wealth to charitable organizations, and they may operate as charities themselves. For example, a trust directing the trustee to alleviate hunger in a community that lacks a soup kitchen or food bank may need to create those social services in order to fulfill the purpose of the trust. The majority of charitable trusts, however, operate passively, similar to private foundations by supporting governmental and nonprofit entities, which advance the charitable objectives that the settlor has articulated in the trust instrument.[183]

Where a trustee is directed to distribute towards the relief of poverty, the beneficiaries are unascertainable. So, for example, where a poor person demands an accounting or a food bank demands a distribution, a court would likely determine that they each lack standing because it is uncertain whether either would ever personally benefit from the trust. Therefore, they lack standing to make demands upon the trustee. This creates a problem; if no one has standing to sue a trustee for violating the trustee's duties, then there is no trust.[184] Vesting the state's attorney general with standing to enforce charitable

182. *See, e.g.*, Robert Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1027–28 (Ariz. Ct. App. 2004) (reasoning that a charitable organization's "position with regard to the trust is [not] more or less fixed so that it can be said to be certain to receive trust benefits"); *In re* Clement Tr., 679 N.W.2d 31, 40 (Iowa 2004) (holding that a nonprofit organization for which a trust had agreed to help fund citizen center had standing to challenge trust's decision to revoke funding, although it lacked standing to challenge administration of trust); *see also* discussion of Ladysmith Rescue Squad, Inc. v. Newlin, 694 S.E.2d 604, 606 (Va. 2010) *supra* notes 171–72 and accompanying text.

183. *See* William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 227–28 (2010) ("A family charitable trust typically conducts no charitable activities directly, but instead functions as an endowment which makes annual grants to operating charities.").

184. Generally, a settlor cannot enforce her own charitable trust, although exceptions can be noted. *See* Russell v. Yale Univ., 737 A.2d 941, 945–46 (Conn. App. Ct. 1999) (finding neither settlor nor his heir has standing to enforce a charitable gift); *see also* Courtenay C. & Lucy Patten Davis Found. v. Colo. State Univ. Research Found., 320 P.3d 1115, 1126 (Wyo. 2014). *But see* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426, 435–36 (App. Div. 2001) (reasoning that a deceased settlor's widow as executor has coextensive standing to enforce the terms of a charitable gift); UNIF. TRUST CODE § 405(c) (UNIF. LAW COMM'N 2000) (allowing settlor standing to "maintain a proceeding to enforce the trust"); RESTATEMENT (THIRD) OF TRUSTS § 94(2) (AM. LAW. INST. 2011) (allowing appropriate public officers, co-trustees, successor trustees, settlors, or other persons with "a special interest" to enforce the trust); Sullivan, *supra* note 12, at 116 ("A contract-based approach to restricted charitable gifts should specify that, by default, the donor retains a right of enforcement.").

trusts solves this problem.[185] Although some states vest their attorney general with exclusive standing, there is little to recommend of this approach.[186] State's attorneys general are often given poor marks for the vigor of their charitable trust enforcement efforts.[187] Yet where a charitable trust lacks ascertainable beneficiaries, the standing of the attorney general neatly solves a charitable trust's architectural deficiency that would otherwise be present.[188] Empowering the attorney general also addresses the practical difficulty that many cash-strapped charitable organizations would face in having to enforce a charitable trust out of their own revenues.[189] Attorney general enforcement of charitable trusts can be seen as a special government benefit reserved for charitable trusts.

Charitable trusts are often thought of in a class of their own, distinct from purpose trusts, but charitable trusts are, in fact, the most common variety of

185. *See e.g.*, Zoeller v. E. Chi. Second Century, Inc., 904 N.E.2d 213, 218 (Ind. 2009) ("The people's interest in the rectitude of entities created in the name of public good, such as charities, has long led to regarding the Attorney General as an officer with authority to enforce those interests."); *see also* JONES, *supra* note 177, at 7–8, 34–37, 54–56 (first citing fifteenth-century examples cases where a church chaplain or wardens of its brotherhood petition for enforcement of a charitable trustee's duties and then noting the later intervention of the attorney general). The standing of the attorney general would have become more critical as charitable trusts expanded in the Reformation from gifts to the church to broader purposes like relief of the poor. *Id.* at 10 ("[T]he objects of charity were to become more secular as the majority of Englishmen reflected less on the fate of their souls and become more concerned with the worldly needs of their fellow men.").

186. BOGERT ET AL., *supra* note 141, § 411. A better rule would be that the attorney general has exclusive standing only when the charitable beneficiaries are unascertainable or no one else has standing. *See, e.g.*, State *ex rel.* Champion v. Holden, 953 S.W.2d 151, 155 (Mo. Ct. App. 1997) (finding a charitable trust "sufficiently 'public'" to give attorney general standing). Approaches here vary. *C.f., e.g.*, MASS. GEN. LAWS ANN. ch. 214, § 3(10) (West 2018) (describing actions to enforce gifts to local governments in trust for specific purposes by ten taxpayers or the attorney general), *with* MD. CODE ANN., EST. & TRUSTS § 14-301(a) (West 2018) (extending standing to "any person having an interest in enforcement of the trust"), *and* VA. CODE ANN. § 57-13 (West 2018) (allowing suits by members of a congregation to sue a trustee of church property).

187. *See* BOGERT ET AL., *supra* note 141, § 411 (noting the "laxity in the enforcement by the Attorney General").

188. *Compare* Bascom v. Albertson, 34 N.Y. 584, 586, 592 (1866) (holding that a charitable trust "to found and establish an institution for the education of females" is void for lack of ascertainable beneficiaries), *with* First Camden Nat.'l Bank & Tr. Co. v. Collins, 168 A. 275, 275–76 (N.J. 1933) (holding that a trust "to help worthy people start in life by assisting them to secure homes on the partial payment plan" indicates a charity sufficiently definite). New York's Tilden Act of 1893 proclaimed that no charitable trust should be void for lack of ascertainable beneficiaries. *See* J. Frederic Taylor, *New Chapter in the New York Law of Charitable Corporations*, 25 CORNELL L. Q. 382, 384 (1940) (citing L. 1893, ch. 701, §§ 1, 2).

189. *See* JONES, *supra* note 177, at 20 (quoting the 1857 Victorian charity commissioners) (noting the "peculiarity of Charitable Trusts" in "that the persons beneficially interested under them are seldom in a position to originate measures affecting their government").

purpose trusts under my proposed taxonomy.[190] Although a charitable trust need not have ascertainable beneficiaries, it must be "charitable" in its purpose.[191] Various statutes have lists of qualifying charitable purposes.[192] So do the Restatements.[193] Of course, the Internal Revenue Service ("IRS") has its own list that it applies in determining whether a tax deduction is available.[194] Determining whether a trust qualifies as charitable or not depends on the answer to the following underlying question: whether the trust qualifies for a federal income tax deduction, a state property tax exemption, or other special treatments reserved for charitable trusts, such as relief from RAP.[195] Charitable trusts are also exempt from the Rule Against Accumulations ("RAA").[196] Earlier English law would streamline charitable trust court proceedings and exempt charitable trusts from the statute of limitations for enforcement actions.[197] The relief from these rules allowed greater settlor control over the scope and restrictions of a charitable trust.[198] One may think of this greater range of free-

190. *See supra* Section II.C.

191. Mapping the precise definition of a "charitable" purpose trust is difficult. *See* Lundwall, *supra* note 169, at 1348–51.

192. *E.g.*, Statute of Charitable Uses Act (1601), 43 Eliz. I, c. 4 (Eng.) (listing, inter alia, "[r]eleife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, . . . some for Mariages of poore Maides, . . . and persons decayed . . . ."); I.R.C. § 501 (2012).

193. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 368 (AM. LAW. INST. 1957) (stating that "[c]haritable purposes include (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; [and] (f) other purposes the accomplishment of which is beneficial to the community"); UNIF. TRUST CODE § 405(a) (UNIF. LAW COMM'N 2000) ("A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.").

194. *See* I.R.C. § 2055(a)(3) (2012) (allowing a charitable deduction against federal taxes for gifts to trusts "exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals"); Estate of Engelman v. Comm'r, 121 T.C. 54, 71–73 (2003) (disallowing a charitable deduction for an unrestricted devise to the State of Israel).

195. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d (AM. LAW. INST. 2003) ("Charitable trusts may be of unlimited duration").

196. SIMES, *supra* note 22, at 110. "[RAA] limits for a specified period of time a settlor's ability to direct that the income from trust property be added to principal rather than used as income. Like the [RAP], it limits the duration of a trust." BOGERT ET AL., *supra* note 141, § 215.

197. *See* JONES, *supra* note 177, at 18, 57. A rule of construction also provided that when an estate's creditors were numerous, private legacies were deemed to abate before charitable ones. *See id.* at 17–18.

198. SIMES, *supra* note 22, at 111. Charitable trusts permit "full scope to the control of the dead hand, far beyond that which is possible anywhere else in the law." *Id.*

dom as a bargained-for exchange: Benefits are extended to the settlor in exchange for the social good that we expect to flow from a charitable trust.[199] Certain "split interest" trusts can include both charitable and noncharitable beneficiaries and yet still qualify for favorable tax treatment and charitable trust favoritism.[200] "Split interest trusts" are a hybrid of both charitable and noncharitable components.[201]

While the standing of the attorney general solves the recurring charitable trust problem of unascertainable beneficiaries, the doctrine of *cy pres* allows charitable trusts to benefit from occasional judicial repairs and adjustments to keep their operational momentums optimum. The *Cy pres* doctrine functions as follows: "[W]here a charitable trust failed because its objects were uncertain, impossible to achieve[,] or illegal, the court would apply the property to similar charitable uses, provided that this was in accordance with the settlor's intention."[202] When the settlor's exact intent cannot be carried out, *cy pres* permits judicial modification so that the intent "will be given effect 'as nearly' as may be."[203]

The origins of the *cy pres* doctrine are obscure, but Roman law knew of it.[204] By the seventeenth century it was a mature doctrine.[205] Originally, the doctrine seems to have been deployed most frequently to repair a charitable trust from various defects and imperfections at inception (for example, upon the death of the testator who created the trust).[206] Today, it is more often applied to modernize a charitable purpose that threatens to stall on account of obsolescence.[207] The longer a charitable trust has been administered, the more

199. Tait, *supra* note 14, at 1673–74 (discussing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)).

200. *See* I.R.C. § 664(d)(2) (2012).

201. *E.g.*, Commonwealth v. Phoebe W. Haas Charitable Tr. 'A', 370 A.2d 406, 409 (Pa. Commw. Ct. 1977) (describing the "hybrid nature of [split interest trusts] having both charitable and noncharitable purposes and objectives"), *aff'd*, 409 A.2d 27 (Pa. 1979).

202. JONES, *supra* note 177, at 73; *accord* UNIF. TRUST CODE § 413 (UNIF. LAW COMM'N 2000) (allowing *cy pres* where "a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful"). *Cy pres* means "as near as possible." Obermeyer v. Bank of Am., N.A., 140 S.W.3d 18, 23 (Mo. 2004) (quoting GEORGE T. BOGERT, TRUSTS 520 (6th ed. 1987)). The full French phrase was *cy pres com possible*. *Id.*

203. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a (AM. LAW. INST. 2001).

204. *See* H. F. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 138–39 (1957).

205. JONES, *supra* note 177, at 74.

206. *Id.* at 60–70.

207. *E.g.*, Dunbar v. Bd. of Trs. of George W. Clayton Coll., 461 P.2d 28, 32 (Colo. 1969) (en banc).

likely that *cy pres* will be applied, especially where the original purpose is relatively narrow.[208] Adhesiveness to donor intent may wane with the passage of time.[209]

2. Noncharitable Purpose Trusts

The second broad category of purpose trusts are the noncharitable purpose trusts, which are distinguishable from charitable purpose trusts because they fall short of articulating a sufficiently charitable purpose.[210] A noncharitable purpose trust is typically ineligible for the benefits reserved for charitable trusts.[211] Generally, noncharitable purpose trusts do not enjoy exemption from RAP or other favorable exemptions.[212] The scholarship of Professor Ray Madoff of Boston College Law School has focused on philanthropy as well as the rights of decedents to control their bodies and property.[213] She notes that noncharitable purpose trusts have been "at best tolerated in limited circumstances, but just as often . . . disallowed" – at least until fairly recently.[214] We can subdivide noncharitable purpose trusts into three categories: (1) trusts for masses, gravesites, and memorials; (2) trust for pets; and (3) other types of noncharitable purpose trusts.[215] Each is considered below. Although noncharitable purpose trusts may be thought of as a relatively recent innovation, their history is nearly as ancient as charitable trusts.

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208. Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 370–74 (1999).

209. *See* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGANIZATIONS § 440 (AM. LAW. INST., Tentative Draft No. 2, 2009) (recognizing that with "the passage of a significant period of time following the creation of a charitable trust . . . the policy of adhering to the terms in the trust lessen").

210. *See* proposed taxonomy *supra* Section II.C. *See also* Hirsch, *Delaware Unifies*, supra note 116, at 14 (describing noncharitable purpose trust as being "sandwiched in between" charitable trusts and trusts which are void for purposes against public policy).

211. *See, e.g.*, Wilber v. Asbury Park Nat'l Bank & Tr. Co., 59 A.2d 570, 572, 584 (N.J. Ch. 1948) (finding a trust to be charitable and therefore eligible for *cy pres* correction despite the fact that "the testator was eccentric, egotistical, pompous, and had an exaggerated idea of his own importance" in wishing to publish a manuscript titled "Random Scientific Notes Seeking the Essentials in Place and Space"), *aff'd sub nom.* Wilber v. Owens, 65 A.2d 843 (N.J. 1949).

212. *See* Hirsch, *Delaware Unifies*, *supra* note 116, at 14–15 (noting that noncharitable purpose trusts traditionally do not enjoy *cy pres* relief, attorney general enforcement, nor exemption from RAP).

213. *Faculty Directory: Ray D. Madoff*, B.C. L. SCH., https://www.bc.edu/bc-web/schools/law/academics-faculty/faculty-directory/ray-madoff.html (last visited Sept. 1, 2018).

214. MADOFF, *supra* note 52, at 113.

215. *But see In re* Endacott [1959] 3 All ER 562. Lord Evershed, in the *Endacott* case, listed five varieties of noncharitable purpose trusts as "anomalous" exceptions to the general rule of English non-recognition of such trusts:

a. Trusts for Masses, Gravesites, etc.

Trusts or bequests for the saying of prayers for the testator after death are often intermixed with charitable inclinations in support of a church.[216] King Henry VIII's will was executed just days before his death.[217] Following a testamentary prayer, burial instructions for the King's body, and funeral details that he wished carried out, he made a bequest of lands equal to the yearly net value of 600 pounds to the Chapel of Saint George, subject to the following covenant:

> Deane and Cannons and thyr
> Successors for ever shall fynd two priestes
> to say masses at the said Aulter to be made . . .
> And also after our decease kepe yerely
> Foure solempne obites[218] for us . . .
> And also at
> every of the sayd obites to give to poore people
> in almez tenne poundes[;] And also to gyve for every yerly
> to thirteen poor men which shalbe called poore
> knightes to every of them twelf pens every daye[,] and
> ones in the yere yerely for ever a long gowne of white
> cloth, with the garter upon the brest embrodered
> with a shelde and crosse of Saint George . . . .[219]

Henry VIII's will also made an outright bequest to needy persons, adding, parenthetically, that "commyn beggars as moch as may be avoided."[220] This outright bequest should be contrasted with the gift to the Dean of the Chapter

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> (1) trusts for the erection or maintenance of monuments or graves; (2) trusts for the saying of masses, in jurisdictions where such trusts are not regarded as charitable; (3) trusts for the maintenance of particular animals; (4) trusts for the benefit of unincorporated associations (though this group is more doubtful); [and] (5) miscellaneous cases.

Id. at 567 (quoting J. H. C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 298 (2d ed. 1962)). Under the category of "miscellaneous," we will find trusts to promote fox hunting. Thompson v. Loyd [1934] All ER 805 (valid). Or a trust to dispose of property to the "best spiritual advantage" of the testator. Gibbons v. Gibbons [1917] 1 IR 448 (valid). *But see Re* Gassiot v. Vintners' Co. (1901) 70 LJ Ch 242 (Ch.) (voiding a trust to keep a portrait in repair).

216. *See* Gray, *supra* note 138, at 518 (observing that testamentary gifts "for the saying of masses for the soul of the testator or of others" are held to be valid charitable trusts in America).

217. SUZANNAH LIPSCOMB, THE KING IS DEAD: THE LAST WILL AND TESTAMENT OF HENRY VIII xii (2016).

218. An obit – obite in Henry VIII's spelling – is a requiem mass to pray for the soul of a deceased individual.

219. LIPSCOMB, *supra* note 217, at 116–17.

220. *Id.* at 115.

of St. George's Chapel at Windsor Castle to endow the support of the "poore knightes."[221] The former is simply a testamentary gift to a class of individuals selected by the executor. The latter is a perpetual trust with the church (or its Dean) as trustee thereof.[222] The poor knights were in fact supported and, although re-attired and renamed the "Military Knights of Windsor" in 1833 by William IV, still reside in Windsor Castle today.[223]

It can often be difficult to distinguish between a purpose trust and burial instructions. The more elaborate and expensive the burial instructions, the more likely they are to be both challenged by heirs who will suffer the costs and voided as capricious or unreasonable by the courts.[224] The settlor's milieu is highly relevant in questions of this kind.[225] Burial instructions that direct the erection of an enormous stone pyramid might be seen as grossly wasteful in our time but appropriate in another.[226] Waste may take forms other than a blatant instruction to destroy property.[227] Extravagant directions may be limited.[228]

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221. *Id.* at 117.

222. Henry VIII required that sermons be made at Windsor "every Sonday in the yere for ever." *Id.* at 117.

223. E-mail from Dr. Clare Rider, Archivist & Chapter Librarian, St. George's Chapel Archives & Chapel Library, Windsor Castle (Aug. 18, 2017, 06:18 CST) (on file with author).

224. *See* Gray, *supra* note 138, at 515 ("An executor or an administrator can pay the funeral expenses of the deceased; and although no one can compel him to carry out the directions of the will as to the testator's burial, yet, if he does carry them out, the courts will protect him from claims on the part of heirs, next of kin, or residuary legatees.").

225. *E.g.*, Wright v. Menefee, 145 So. 315, 317 (Ala. 1932) (reasoning that despite respect for the feelings of a father in giving a burial in accordance with the position of the family, the reduction of funeral expense was correct given the condition of the estate); *In re* Kiernan, 77 N.Y.S. 924, 399 (Sur. Ct. 1902) (trimming funeral bill where the deceased was a child who did not have a large circle of acquaintances or large inheritance).

226. *Cf., e.g.*, Aitken's Trustees v. Aitken, [1927] SC 374, 383 (Scot.) (invalidating a devise to construct a massive bronze statue of the testator as "irrational, futile, and self-destructive"), *with* John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 663 (1996) (noting that a "trust to endow Iowa with bronze, equestrian Langbeins" would be unenforceable).

227. *E.g.*, Pinkham v. Cent. Farmers' Tr. Co., 159 So. 289, 291 (Fla. 1935) (finding casket cost "grossly excessive").

228. *See, e.g.*, *In re* Kiefer's Estate, 19 P.a. D. 608, 609 (Orphans' Ct. 1909) ("Extravagance in funeral expenses is regarded as 'a species of waste,' and the courts will not countenance a silly exhibition by ordering bills for it to be paid."). *But see* Gray, *supra* note 138, at 515 (reasoning that expensive gravesite monuments, like expensive funerals, will be allowed "if the rights of creditors are not interfered with" even where "they be of the most extravagant character").

Few cases discuss bequests or trusts to fund the performance of Christian masses.[229] Perhaps because the bequests tend to be relatively insignificant in terms of monetary amounts, there is little motivation for heirs to challenge them. A bequest to say masses may escape judicial notice because of moral reservations of the residual devisees in setting aside sums intended to protect a departed one's soul.[230] Some masses bequests might be easily construed as precatory – a wish or desire but not a mandate. Others might be construed as individual bequests rather than purpose trusts. For example in *Sherman v. Baker*, the testator devised $100 to a priest "to say masses for me."[231] The court held that the instruction was valid as a gift to the priest.[232] Alternatively, a gift for the purpose of saying masses may be upheld as sufficiently charitable in purpose to be sustained; although, it might be argued that its intent is to spiritually benefit the donor only.[233] Occasionally, a devise to say masses is coupled with a bequest to maintain a gravesite, and the two purposes are mingled together in a single gift.[234]

Unlike bequests for the purpose of saying masses, bequests that are tied to requests to erect monuments or preserve gravesites are commonly litigated.[235] For example, *In re Byrne's Estate* concerned a will that provided

229. Ausness, *supra* note 116, at 355; *see also* John W. Curran, *Trusts for Masses*, 7 NOTRE DAME LAW. 42, 54-55 (1931) (collecting thirty masses trust cases from American jurisdictions); Gray, *supra* note 138, at 518–20 (collecting cases). "In England a trust for [m]asses was originally held valid, subsequently invalid, and again valid in 1919." Curran, *supra*, at 42.

230. *Compare In re* Beck's Estate, 225 N.Y.S. 187, 188–89 (Sur. Ct. 1927) (reasoning that a bequest of half the residue for the perpetual care of a burial lot and saying masses violated the state's mortmain statute), *and* Festorazzi v. St. Joseph's Catholic Church, 18 So. 394, 396 (Ala. 1894) (concluding that a bequest to say masses was unenforceable for the lack of an ascertainable beneficiary to enforce the church's obligation), *with* Bourne v. Keane [1918-19] All ER 167 (upholding a trust for the saying of masses).

231. 40 A. 11, 11 (R.I. 1898).

232. *Id.* at 12; *accord* Estate of Beckley, 405 N.Y.S.2d 861, 862, 864 (App. Div. 1978) ("The words 'with the request that High Masses be said' were precatory and created no trust.").

233. Obrecht v. Pujos, 268 S.W. 564, 565–66 (Ky. 1925); *In re* Smallman's Will, 247 N.Y.S. 593, 602 (Sur. Ct. 1931).

234. *E.g.*, Webster v. Sughrow, 45 A. 139, 139–40 (N.H. 1898) (quoting from a residual bequest to a trust "to pay the expense of keeping my burial lot in a proper and respectable condition, and for having anniversary mass said annually"). *Webster* upheld the trust as a charitable one, reasoning that mass is a religious ceremony "just the same in kind whether it be designated to promote the spiritual welfare of one or many." *Id.* at 141. The burial lot maintenance aspect of the trust was upheld on account of statutory authority for the same. *Id.*

235. Ausness, *supra* note 116, at 352–53; *see also* James T. Brennan, *Bequests for the Erection, Care, and Maintenance of Graves, Monuments, and Mausoleums*, 9 WASHBURN L.J. 23, 25–31 (1969) (collecting cases). "There are no cases in the United

$100 for the saying of masses and devised the $19,000 residue "to Thomas Doherty, . . . in trust, to be expended by him for the erection of a tomb on my family lot in St. Joseph's Cemetery, in said Manchester, of such material and architecture as to him may seem proper."[236] Without ascertainable beneficiaries, the trust could only be sustained if it were deemed charitable because New Hampshire law rejected the idea of noncharitable purpose trusts.[237] The court noted that ordinarily, a trust to *maintain* a gravestone or memorial would be deemed charitable because "[t]he public interest in the sightly [sic] appearance of cemeteries is served" while a trust to *erect* a gravestone or tomb would not.[238] Mr. Byrne's wishes, however, were thwarted when the cemetery determined that an above-ground tomb was unsuitable for the cemetery lot in question.[239] The court reasoned that the use of funds for the purpose designated was therefore "impossible," and the remaining estate was instead directed to be distribute to intestate heirs.[240]

b. Trusts for Pets

A second variety of noncharitable purpose trusts are pet trusts. Trusts for pets have generated quite a volume of American scholarship.[241] The love of a

States where trusts for monuments to private persons, such monuments having no connection with the interment of the testator, have been allowed." Gray, *supra* note 138, at 516.

236. 100 A.2d 157, 158 (N.H. 1953).

237. *Id.* at 159. Today, New Hampshire recognizes noncharitable purpose trusts. *See* N.H. REV. STAT. ANN. § 564-B:4-408 (West 2018) (pet trusts); N.H. REV. STAT. ANN. § 564-B:4-409 (West 2018) (other noncharitable purpose trusts).

238. *Byrne's Estate*, 100 A.2d at 159. However, the Supreme Court of New Hampshire noted, a trust to erect a memorial may qualify as charitable where "it would if it became a part of the fabric of a church or commemorated some notable person." *Id.*

239. *Id.*

240. *Id.* at 160. The court noted that the executor had the inherent authority to arrange for another burial memorial (e.g., a headstone) instead. *Id*; *accord, e.g.*, State *ex rel* Woodlands Cemetery Co., v. Lodge, 16 A.2d 250, 251 (Del. Super. Ct. 1940) (upholding a direction to an executor to pay a cemetery company a sum adequate to generate sufficient income to pay for the perpetual care of a family burial lot).

241. It is the rare pet trust title that does not utilize puns or playfulness. *See generally* Susan R. Abert, *Pet Trusts: The Uniform Trust Codes Gives Enforceability a New Bite*, 46 N.H. B.J. 18 (2006); Katharine Coxwell & Wanda D. Devereaux, *Paws Laws or How Nigel and Miss Muffy Came to Be Rich*, 67 ALA. LAW. 433 (2006); Christina M. Eastman, *Chapter 168: For the Love of Dog: California Fully Enforces Trusts for Pet Animals*, 40 MCGEORGE L. REV. 543 (2009); Margaret R. Hoyt & Sarah S. AuMiller, *Can You Trust Your Pet? A Primer on Florida Pet Trusts*, FLA. B.J., Nov. 2014, at 12; Michael A. Ogline et al., *Trusts for the Care of Animals: Estate Planning Goes to the Dogs*, 18 OHIO PROB. L.J. 9 (2007); Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419 (1999); Jonathan P. Wilkerson, Comment, *A "Purr"fect Amendment: Why Congress Should Amend the Internal Revenue Code to Apply the Charitable Remainder Exception to Pet Trusts*, 41 TEX. TECH L. REV. 587

pet motivates around a quarter of today's testators to include their pets in their wills.[242] Because humans have affections for their pets and because pets exhibit consciousness and autonomy, we may be tempted to treat a pet trust for a particular animal as similar to a trust for ascertainable beneficiaries. Despite the legal inability of pets to sue a nonperforming trustee, pets may certainly vocalize their mistreatment to a much higher degree than other chattels. For example, a toaster or the copyright to Beyoncé Knowles's newest hit can neither yowl nor yip. But the law still largely treats animals like any other personal property.[243] Until a guardian ad litem can be appointed for a chimpanzee, a trust for a chimpanzee will be legally considered in the same category as any other noncharitable purpose trust, such as a trust for a Beyoncé tune.[244] A trust for a puppy is more akin to a trust for a toaster than a trust for an infant.[245]

Pet trusts do not enjoy quite the same lengthy history as trusts for masses or burial arrangements. The first English case recognizing a testamentary gift for the maintenance of a testator's horses was reported in 1848.[246] Perhaps the

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(2009); Christine Cave, Comment, *Trusts: Monkeying Around with Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 OKLA. L. REV. 627 (2002).

242. *See* GERRY W. BEYER, TEACHING MATERIALS ON ESTATE PLANNING 816 (4th ed. 2013) (citing surveys which show "that between 12% and 27% of pet owners include their pets in their wills"). This is not to say that a quarter of wills include bequest for pets – or perhaps *of* pets – since only about a third of Americans own a dog or a cat. *See* Ogline et al., *supra* note 241, at 9 ("According to the American Veterinary Medical Association 36.1% of American households own dogs, and 31.6% own cats.").

243. *E.g.*, State v. Smith, 83 N.E.3d 302, 311 (Ohio Ct. App. 2017) (considering and rejecting a 5th Amendment taking of property without due process claim to seizure of forty-seven puppies); Smith v. City of Detroit, No. 16-11882, 2017 WL 3279170, at *1, *6–7 (E.D. Mich. Aug. 2, 2017) (granting defendants summary judgment to a 4th Amendment unlawful seizure claim where police shot three dogs – Debo, Smoke, and Mama – because they were unlicensed and thus considered contraband). In *Smith v. City of Detroit*, Judge Steeh wrote that "while pet owners consider their pets to be family members, the law considers pets to be property." Detroit, 2017 WL 3279170, at *7.

244. *E.g.*, Nonhuman Rights Project, Inc. v. Stanley, 16 N.Y.S.3d 898, 917–18 (Sup. Ct. 2015) (reasoning that two allegedly unlawfully detained chimpanzees could not claim habeas relief); *but see* Travis v. Murray, 977 N.Y.S.2d 621, 630–631 (Sup. Ct. 2013) (taking account of the dog's interests in a dispute over the dog in a divorce proceeding, declining to apply a strict property analysis).

245. *See* MADOFF, *supra* note 52, at 113 ("A dog cannot enforce a trust for its own benefit, and the attorney general has no obligation to enforce trusts that do not serve the public benefit."). Although wild animals are typically publicly owned or owned by no one, once captured or tamed, animals become property subject to ownership rights. *See* CAL. CIV. CODE § 656 (West 2018) ("Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.").

246. R. E. La G., Annotation, *Validity of Bequest or Trust for Care of Specified Animal*, 31 A.L.R. 430, West (database updated weekly) (citing Mitford v. Reynolds [1848] 60 Eng. Rep. 812)). The residual bequest in *Mitford* read:

emotional attachments to pets, common now, were less known prior to the nineteenth century. A sampling of pet affection in a testamentary context can be viewed in Thelma Russell's bequest to her dog, Roxy.[247]

Thelma Russell's holographic will on a small card read, in relevant part:

> I leave everything
> I own Real &
> Personal to Chester H. Quinn & Roxy Russell[248]

Chester H. Quinn was a close human friend, but Roxy Russell was an Airedale Terrier.[249] The trial court construed the will as a devise *of* Roxy to Chester.[250] The will's text, however, clearly contemplated a devise *to* Roxy *and* Chester. Alternatively, the trial court reasoned, the inclusion of Roxy was simply a precatory indication that the testator hoped Chester would care for Roxy.[251] The Supreme Court of California reversed.[252] The text of the instrument was plain: One-half of the residue was devised to a pooch.[253] One cannot

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> I will, devise, give and bequeath *the remainder of my property*, of whatsoever kind and description, and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea or pretense, to be used, rode or driven, or applied to labour) to the government of Bengal, for the express purpose of that government applying the amount to charitable, beneficial and public works at and in the city of Dacca in Bengal . . . .

Mitford v. Reynolds [1848] 60 Eng. Rep. 812, 813 (alteration in original). The bequest was thus a mixed charitable/pet devise. *See id.*; *cf.* Willet v. Willet, 247 S.W. 739, 741 (Ky. 1923) (discussed as the first American "pet trust" case *infra* text accompanying notes 251–257); Note, *Validity of Trusts in Favor of Animals*, 42 YALE L.J. 1290, 1291–92 (1933) [hereinafter *Favor of Animals*] (discussing problems with pet trusts).

247. *In re* Estate of Russell, 444 P.2d 353 (Cal. 1968); *see generally* Page Dowdakin, Note, *Revisiting Roxy Russell: How Current Companion Animal Trust and Custody Laws Affect Elderly Pet "Guardians" in the Event of Death of Incapacity*, 20 ELDER L.J. 411 (2013).

248. *Russell*, 444 P.2d at 355. The reverse side of the card read:

> My ($10.) Ten dollar gold
> Piece & diamonds I leave
> To Georgia Nan Russell.
> Alverata, Geogia [sic]

Id. The will was dated more than eight years prior to her death in 1965. *Id.*

249. *Id.*

250. *Id.* at 356.

251. *Id.*

252. *Id*. at 364.

253. Actually, the facts were more complicated than this, but it didn't affect the court's reasoning. In fact, the Roxy Russell Airedale living at the time that its owner made her will "died after having had a fox tail removed from its nose" and was buried

give property to other property.[254] And so, because the devise was void under then-governing California statutes, one-half of the residue passed by intestacy to a niece.[255] Testator intent was quite obviously frustrated, but such intent might have been achieved had the option of a noncharitable purpose trust been considered.

The earliest pet trust decision in America was *Willett v. Willett*.[256] The devise in question reserved $1000 for a dog named Dick and the remainder to a church.[257] The court reasoned that the trust could be sustained because the

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in a pet cemetery prior to Thelma Russell's death. *Id.* at 355 n.2. Roxy I was then replaced by another dog of unspecified breed – but also named Roxy – that survived her owner. *Id.* at 355, 355 n.2. Professors Dukeminier and Sitkoff ask playfully: "Since the will was executed when the first Roxy was alive, isn't the second Roxy a pretermitted Airedale?" JESSE DUKEMINIER AND ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 353 n.26 (10th ed. 2017).

254. The petitioner in *Russell* argued that the probate code "enumerates those entitled to take by will; that '[d]ogs are not included among those listed … [n]ot even Airedale dogs." *Russell*, 444 P.2d at 355. Apart from probate code particulars, there are two primary reasons why an inter vivos gift cannot be made to a dog. One is that a chattel lacks the capacity to accept a gift; another is that a chattel lacks the power of ownership. *See* Snowden v. Crown Cork & Seal Co., 80 A. 510, 512 (Md. Ct. App. 1911) (considering "whether an unincorporated association has any capability whatever for the reception or retention of a gift inter vivos"); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. i (2001) ("Acceptance by the donee is required for a gift to become complete.").

255. *Russell*, 444 P.2d at 363–64.

256. 247 S.W. 739 (Ky. 1923); R.E. La G., *supra* note 246, at 430 (stating that *Willett* then was "apparently the only American case passing on the validity of a bequest or trust for the care of a specified animal").

257. *Willett*, 247 S.W. at 739. The will seemingly devised the testator's entire estate in trust for her sister Minnie Willet, remainder to the Hopewell Church with the exception of:

> $1[000], which is to be used for the support of our dog 'Dick,' if the interest is not sufficient for him to be kept in comfort, that is being well fed, have a bed in the house by a fire and treated well every day, that the principal be used to such a sum so it will last his lifetime.
>
> I also give Mrs. Belilah Stevens $100 for being kind to me when I needed it. Dicky must have three meals daily.

Id. The court felt that the wills meaning would be more easily ascertained if some of its parts be transposed so that it reads:

> I write this as my last will. I give to my sister Mrs. Minnie Willett, everything I have at my death, except $1[000], which is to be used for the support of my dog 'Dick,' to be used by her for life; at her death it is to go to the Hopewell Church . . . . If the interest from the $1[000], which is set aside for the support of my dog 'Dick,' be not sufficient to keep him in comfort, that is, be well fed, have a bed in the house by a fire and treated well every day, the principal (may) be used so it will last his lifetime.

purposes were humane, even partially charitable, especially in view of the remainder interest to the church.[258] The court explained: "This is not a devise to the dog Dick, but a trust created for his use and benefit."[259] Although the court did not consider RAP, the trust would qualify as exempt from RAP only if deemed charitable. Technically, the trust for Dick was construed as being "humane" and not "charitable."[260] While acknowledging that typically a trust for a particular animal could not be construed as charitable, the court upheld the trust as "humane" under a Kentucky statute validating such gifts.[261] Further, the court was untroubled by the testator's failure to name a trustee, citing the old trust rule that no trust shall fail for want of a trustee; the courts may appoint one.[262]

c. Trusts for Other Noncharitable Purposes

We now come to the third category of noncharitable purpose trusts. Several varieties within this final "catch-all" category can be sketched. Perhaps the most common noncharitable purpose, aside from the maintenance of a pet or a grave, is the publication of personal papers.[263] Theodore Schroeder was a lawyer who, after retiring, devoted himself to writing and self-published a book in 1911 titled *Obscene Literature and Constitutional Law*.[264] Other self-published pamphlets followed with titles like *Divinity in Semen*.[265] Many of his writings criticized the Mormon faith.[266] In 1953, he died with a will drafted in his own hand on a standard legal form of some kind.[267] The will nominated an executor, devised his entire estate to Ethel Clyde and Leslie Kuhn "to be expended in the collection . . . [,] arrangement, and publication of my writing" and further directed that Clyde and Kuhn "be allowed to serve without bond."[268] The net sum of his estate amounted to about $36,000.[269]

Id. at 740. The remainder of the estate, the court reasoned, was devised as a life estate to Minnie, remainder to the Hopewell Church. *Id.*

258. *Id.* at 740–41.

259. *Id.* at 740.

260. *Id.*

261. *Id.* The court acknowledged that while a trust to erect a fountain for the benefit of thirsty animals or a gift to a society that prevents cruelty to animals would qualify as charitable, a gift to favor the donor's own horses would not. *Id.* at 740–41.

262. *Id.* at 740.

263. MADOFF, *supra* note 52, at 112.

264. Fid. Title & Tr. Co. v. Clyde, 121 A.2d 625, 627 (Conn. 1956).

265. *Id.* Other titles included "Phallic Worship to Secularized Sex" and "Why Priests Don't Marry." *Id.*

266. *Id.*

267. *Id.* at 626.

268. *Id.* at 627 n.1. Typically, an executor or "personal representative need not obtain a bond when excused from doing so, either by the decedent's will or by waiver of all interested parties." *In re* Estate of Dickson, 736 A.2d 1007, 1009 (D.C. Ct. App. 1999) (citing D.C. Code § 20–502(a) (1997)).

269. *Clyde*, 121 A.2d at 626–27.

The court had little difficulty in construing the bequest as a trust despite the lack of the words "trust" or "trustee."[270] Schroeder had, however, "neglected to designate beneficiaries who would be definitely ascertainable either at the time of his death or within the period of [RAP]."[271] The trustees contended that the trust was charitable because of its educational aims.[272] The court acknowledged that "a trust to promote the dissemination of knowledge or of beliefs through the distribution of books or pamphlets may, in the absence of any profit element, qualify as a valid charity."[273] The court also acknowledged "the liberal construction we give to our statute of charitable uses."[274] But, the court gave one further hurdle to the trust's validity – a public policy concern. Before a charity will "be upheld, it must be consistent with public policy."[275] The court had read at least one of Schroeder's pamphlets and found it "a truly nauseating experience."[276] Where the object of the trust "is to distribute articles which reek of the sewer," a finding of invalidity must follow.[277] As a result, Schroeder's estate was distributed to his first cousins, with whom "[h]e had no interest."[278]

Another well-known example of a purpose trust, which does not fit within the two afore-described categories (trusts for masses and gravestones or pets), was in the will of George Bernard Shaw.[279] As a boy growing up in Dublin,

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270. *Id.* at 628–29.

271. *Id.* at 629.

272. *Id.* A charitable categorization would have solved the unascertainable beneficiary defect since attorney general enforcement would have been supplied. *See* RONALD CHESTER, GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411, West (database updated June 2018).

273. *Clyde*, 121 A.2d at 629 (citing RESTATEMENT (SECOND) OF TRUSTS § 370, cmt. a (1959)); *see* R. F. Martin, Annotation, *Validity, as for a Charitable Purpose, of Trust for Dissemination or Preservation of Material of Historical or Other Educational Interest or Value*, 12 A.L.R.2d 849 § 6[e], West (database updated weekly) (originally published 1950); *see also* Russell G. Donaldson, Annotation, *Validity, as for a Charitable Purpose, or Trust for Publication or Distribution of Particular Books or Writings*, 34 A.L.R.4th 419 §§ 2[a], 3[a], 3[b], West (database updated weekly) (originally published 1984) ("'[M]erit' is not for the courts to consider, so long as the books or writings in questions do not manifestly tend to encourage violation of law or the corruption of morals or religion, and an intent to benefit the public is manifested . . . .").

274. *Clyde*, 121 A.2d at 629.

275. *Id.* (citing CARL ZOLLMANN, AMERICAN LAW OF CHARITIES § 210 (1924)).

276. *Id.* at 629. The title, which the court read and characterized as "nauseating," was "Prenatal Psychisms and Mystical Pantheism." *Id.*

277. *Id.*

278. *Id.* at 627, 630. The court noted that "honorary" trusts had never been recognized in the jurisdiction and declined to consider whether Schroeder's trust could qualify as an honorary trust because the same public policy violation would invalidate a noncharitable honorary trust. *Id.* at 630.

279. *See* Bove & Mattson, *supra* note 59, at 26–27 (describing Shaw's alphabet trust as a failed purpose trust). "In Shaw's case, the trust failed in part because a court cannot enforce a trust if its purpose cannot be accomplished with certainty." *Id.*

Shaw developed an interest in reforming the English alphabet.[280] Through life, this remained one of his chief interests.[281] The will he left at his death in 1950 made bequests of substantial annuities to his servants and gifts to a few of his older relatives who survived him.[282] He devised the rest of his estate, one of the largest ever left by a writer, for the purpose of creating a new alphabet – simplified and phonetic, with forty letters, each of which having its own, single, pronunciation.[283] This idea of an "alphabet trust" was met with "derision among the large body of persons who know better than we do how our money should be spent."[284] The trust was challenged.[285]

The text of Shaw's will characterized the trust as charitable. But despite the arguments that a new, more sensible alphabet would prove educational and beneficial to the public, the court concluded that the trust was noncharitable.[286]

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280. ST. JOHN ERVINE, BERNARD SHAW: HIS LIFE, WORK AND FRIENDS 3, 596 (1956).

281. *Id.* at 596.

282. *Id.*

283. *Re* Shaw [1957] 1 All ER 745, 749. The will was dated June 12, 1950, when Shaw was ninety-four; he died in November of that year. *Id.* at 747, 748. The court described the instrument as "long and complicated" and offered "that it is rather youthful exuberance than the circumspection of old age that mars its symmetry." *Id.* The will devised the residue in trust, instructing the trustee,

> (1) To institute and finance a series of inquiries to ascertain or estimate as far as possible the following statistics (a) the number of extant persons who speak the English language and write it by the established and official alphabet of twenty-six letters (hereinafter called Dr. Johnson's alphabet); (b) how much time could be saved per individual scribe by the substitution for the said alphabet of an alphabet containing at least forty letters (hereinafter called the proposed British alphabet) enabling the said language to be written without indicating single sounds by groups of letters or by diacritical marks, instead of by one symbol for each sound; (c) how many of these persons are engaged in writing or printing English at any and every moment in the world; (d) on these factors to estimate the time and labour wasted by our lack of at least fourteen unequivocal single symbols; (e) to add where possible to the estimates of time lost or saved by the difference between Dr. Johnson's alphabet and the Proposed British alphabet estimates of the loss of income in British and American currency.

Id. at 733 (quoting will, cl. 35). The trustee was also directed to arrange for the transliteration of Shaw's *Androcles and the Lion* into the proposed British alphabet. *Id.* at 734.

284. ERVINE, *supra* note 280, at 596. Ervine asks rhetorically, "Why should a man not endow his hobby if that be his pleasure?" *Id*.

285. *Re* Shaw [1957] 1 W.L.R. 729, 736. As the litigation opened, Justice Harman playfully queried the assembled solicitors, "And who appears for the poor alphabet?" GEORGE BERNARD SHAW, SHAW: AN AUTOBIOGRAPHY 1898–1950, THE PLAYWRIGHT YEARS 293 (Stanley Weintraub ed. 1970) [hereinafter Weintraub]. Came the reply: "The Attorney-General, my Lord." *Id.*

286. *Re* Shaw [1957] 1 All ER 745, 758.

The conclusion was a fatal one because English law does not recognize noncharitable purpose trusts.[287] The court rejected the trustee's assertion that pure research – without any teaching – might be characterized as educational.[288] The court further rejected the claim that the aim of Shaw's trust represented a purpose beneficial to the community.[289] The court reasoned that since the research and promotion of a new alphabet might not benefit the general public, it could not be characterized as charitable on account of community benefits.[290] English law would not recognize a "trust, other than a charitable trust, for the benefit, not of individuals, but of objects," and the trust failed.[291] The court recognized that a different outcome might result under American law.[292] Under American law, noncharitable purpose trusts are generally permitted.[293] The

287. *Id.* at 759.

288. *Id.* at 755–56.

289. *Id.* at 756.

290. *Id.*

291. *Id.* at 758.

292. *Id.* at 759 (quoting J. H. C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 308 (1956) (quoting RESTATEMENT (FIRST) OF TRUSTS § 124 (1935)). Under American law, "the transferee has only a power and not a duty to apply the property . . . [so] it is more accurate to state that the trustee has a power than it is to state that he holds upon trust . . . ." RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. c (1935). *See also* discussion of honorary trusts *infra* Section II.E.1. Despite the court's decision, the litigation continued and eventually a settlement was reached where £8,300 was allocated to the alphabet project. Weintraub, *supra* note 285, at 294. "A competition, with prize money derived from the £8,300, was held to develop a new alphabet according to Shavian standards, and the result was the *Androcles and the Lion* edition Shaw wanted." *Id.* (alteration in original); *see generally* George Bernard Shaw, *Androcles and the Lion*, *in* SAINT JOAN, MAJOR BARBARA, ANDROCLES AND THE LION 325 (1956).

293. The Restatement (Third) of Trusts contains an illustration modeled on Shaw's alphabet trust litigation:

> George Bernard Shawnessy, a playwright and critic of the English language, left his entire estate to T "in trust to use one-third of the income for thirty years, or until the trust sooner terminates, to support (a) the study of the advantages of a phonetic alphabet and (b) the publication and free distribution of my play, 'Andrew and the Leopard,' written in this alphabet." The trust is otherwise for the primary benefit of Shawnessy's sole survivors, a daughter and the two children of his predeceased son; the trust is to terminate at the death of the last of these three life beneficiaries, with remainder to Shawnessy's then living issue. If the state will not uphold the "purpose" provision as one for a charitable purpose . . . T cannot be compelled to expend the intended share of the income as directed, but she has power as trustee of an adapted trust to do so for 21 years (not for the specified 30 years), subject also to the specified lives-in-being duration of the trust. To the extent T does not so expend the full income share and no successor trustee is appointed . . . T is to pay the rest of the income to the individual beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. d(1), illus. 7 (2001).

next sections explore the attorney general equivalent in noncharitable purpose trusts and two variations of such trusts: res purpose trusts and hybrid purpose trusts.

d. The Purpose Enforcer as Proxy for an Ascertainable Beneficiary

Noncharitable purpose trusts – like charitable purpose trusts – must confront their inherent flaw that beneficiaries are not ascertainable if the law is to allow them. Beneficiaries secure the trustee's duties.[294] An obligation "[that] nobody can enforce" is, Justice Roxburgh once wrote, "difficult to visualize."[295] The lack of an ascertainable beneficiary has historically been fatal to the creation of a private trust.[296] A beneficiary – whether presently ascertainable or who will become ascertainable – is required.[297] The problem of a trust with unascertainable beneficiaries is solved for charitable trusts by placing the attorney general at the helm of enforcement.[298] For noncharitable purpose trusts, the attorney general's role could, in theory, be expanded, but because noncharitable purpose trusts may lack a clear public benefit, this seems a poor policy choice. No states have adopted this approach. Instead, some form of private enforcement is preferred.

A noncharitable purpose trust needs its own enforcer or invigilate if it is to function as a trust.[299] The office and appointment of an "enforcer" might be grafted into the trust agreement. This enforcer acts much like an attorney general; she has standing to sue, just as a beneficiary would, to review, and to

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294. *See* BOGERT ET AL., *supra* note 141, §161 (emphasizing that in creating a trust "[t]he settlor must select and identify the person or persons who are to be the beneficiaries"). "The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control to avert its destruction, perversion, or abuse." Mannix v. Purcell, 19 N.E. 572, 586 (Ohio 1888).

295. *In re* Astor's Settlement Tr., (1952) 1 All ER 1067, 1071.

296. Ausness, *supra* note 116, at 330; *see* RESTATEMENT (THIRD) OF TRUSTS § 43 cmt. a.

297. *See* Note, *The Beneficiary of a Non-Charitable Trust*, 42 HARV. L. REV. 813, 813 (1929) ("[C]ourts have upheld present trusts for unascertained persons, provided sufficient information is given to enable the intended beneficiaries to be ascertained in the future."). Trust beneficiaries must become ascertainable within the perpetuities period. Reach v. Kelley, 10 Cal. App. 3d 1082, 1092 (Cal. Ct. App. 1970).

298. RESTATEMENT (FIRST) OF TRUSTS § 391 (1935).

299. *See In re* Astor's Settlement Tr., 1 Eng. Rep. at 1071 (explaining that the beneficiary principle reflects that because a person cannot complain to the court, a court cannot enforce a noncharitable purpose trust lacking ascertainable beneficiaries). In that case, a private trust for the benefit of independent newspapers was deemed void for want of any ascertainable beneficiaries who could enforce it. *Cf.* Alexander A. Bove, Jr., *The Use of Purpose Trusts in the United States*, TRS. & TRS., July 2004, 6 [hereinafter Bove, *Use of Purpose Trusts*] (theorizing that a charitable trust actually has ascertainable beneficiaries who could enforce it – "members of the public, but it would be cumbersome, confusing, and unworkable to allow any and every person to enforce the trust").

enforce the trustee's fiduciary obligations.[300] Indeed, the office of the enforcer is akin to a private attorney general.[301] One might question the efficacy of a purpose trust enforcer, as many have questioned the efficacy of the attorneys general in the context of charitable trust enforcement.[302] Will a noncharitable purpose trust enforcer vigorously advocate for the trust's purpose? The consequences of a lazy attorney general may be political because the attorney general is an elected office. The consequences of a representative of a party (for example, a guardian ad litem[303]) who is less than zealous are often in the form of liability to the represented party due to the fiduciary relationship between them.[304] With a lax purpose trust representative, however, unless there is a consequence for failed diligence, how can proper advocacy be assured?

Imagine a trust where the trustee is directed to maintain, preserve, and supervise the proper care of the settlor's poodle. The trustee ignores her responsibilities, and the poodle is maltreated, abused, and eventually dies. The architecture of a purpose trust relies on the enforcer asserting claims of fiduciary malfeasance against the trustee. But, if the enforcer ignores her responsibilities as well, who has a claim against the enforcer? Certainly not the poodle nor the deceased poodle's "estate" (indeed, there is no such thing).[305] If there is no real consequence for a lax enforcer, then is there, by extension, no real consequence for a lax trustee? And if, as Justice Roxburgh emphasized, there is no real obligation of a trustee, then there is (and was) no trust to begin

300. *See* Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 202–03 (2012) (explaining how the Cayman Islands' 1997 Special Trust – Alternative Regime or STAR – trusts appoint an "enforcer" with "standing to enforce the terms" of noncharitable purpose trusts).

301. *See* Bove II, *The Purpose of Purpose*, *supra* note 116, at 34–56.

302. *E.g.*, Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F.L. Rev. 37, 39 (1993) ("[T]he effectiveness of attorney general enforcement is likely to be sporadic, at best."); Brody, *supra* note 172, at 939 ("[F]ew state attorneys general have the funding and inclination to engage in aggressive charity enforcement.").

303. A guardian ad litem for a minor "is 'appointed as a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.'" Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974). Typically, an ad litem is a fiduciary. Collins v. Tabet, 806 P.2d 40, 49–50 (N.M. 1991).

304. *E.g.*, de Montigny v. de Montigny, 233 N.W.2d 463, 468–69 (Wis. 1975) ("The guardian ad litem is more than an adjunct to the court. He is an attorney for the children and their interest. He must perform his duties in accordance with the standards of professional responsibility adopted by this court. Nominal representation that fails to assure that children are treated as parties to the action is insufficient and constitutes a breach of the duties of professional responsibility."), *superseded by* WIS. STAT. 767.045 (1992), *renumbered and amended by* Act 443, S.B. 123, 2005 Leg. (Wis. 2005) (current version at WIS. STAT. 767.407 (2018), *as recognized in* Hollister v. Hollister, 496 N.W.2d 642 (Wis. 1992)).

305. *See* Hunt v. McLaren [2006] EWHC 2386 ¶ 89 (Ch) ("[T]rusts for purposes or objects are invalid, for a purpose or object cannot sue . . . .").

with.[306] Imposing some level of accountability on enforcers of noncharitable purpose trusts is key.

e. The Res Purpose Trust

There is no particular reason why a purpose trust, the purpose of which is to preserve or maintain certain property, cannot own that property as a part of the trust estate (or trust res).[307] The res of a pet trust, for example, might include the pet.[308] Such a "res purpose trust" might, in fact, be recommended.[309] The trustee will, after all, be better able to discharge her responsibilities in ensuring the proper care of a pet if the trustee owns the pet and can retake possession of the animal if it is mistreated. If ownership rights have vested in a third party, the trustee will have difficulty insisting upon finding the animal a new home if a neglectful owner resists. The trustee will also be better postured to insist upon periodically assessing the animal's health and welfare if the trustee retains ownership of it. Even discharging the trustee's obligation to confirm that the animal is still living (and that distributions should continue) would be simplified if the trustee retained ownership, if not necessarily possession, of the animal.

These advantages can be seen with a trust formed for the purposes of preserving and maintaining real property or even intellectual property. Consider a trust to maintain a particular tree. While a trustee directed to prune and maintain a majestic oak might be able to achieve the trust's aims even though the oak is located on property owned by a third party, the trustee's ability to satisfy the settlor's objectives will be improved if the trust res includes the tree and the underlying realty. Supervision and maintenance tasks are more achievable on property one owns. Attempts to trim someone else's tree will encounter challenges if the owner is uncooperative. It is much easier to preserve one's own oak than someone else's.

When the trustee holds legal title to a res, which is connected to the purpose of a noncharitable purpose trust, the trustee will typically still enjoy the

306. *In re* Astor's Settlement Tr., (1952) 1 All ER 1067, 1071.

307. *See, e.g.*, Craig J. Krogstad & Matthew P. Bock, *Modern Trust Governance*, 31 S.D. L. REV. 370, 377 (2016) (recommending a purpose trust designed to own interests in a special purpose entity which can act as a trust protector which is in turn created for the governance of a separate dynasty trust).

308. *See* SELTZER & BEYER, *supra* note 78, at 75 (discussing "what other property (in addition to your pet) to transfer to your trust"); Darin I. Zenov & Barbara Ruiz-Gonzalez, *Trusts for Pets*, 79 FLA. B.J. 22, 26 (2005) ("In order to ensure that someone is responsible for the pet at all times, the client should bequeath the animal to the trustee, in trust, with instructions to deliver the pet to the beneficiary or caretaker.").

309. Some noncharitable purpose trusts will be directed towards aims unmoored from any particular res. *See* Ausness, *supra* note 116, at 364–65. In these instances, a res purpose trust will be an unavailable option. *Id.* at 365.

power (as legal owner) to encumber or transfer the property.[310] There may be circumstances when the trustee's duties to beneficiaries suggest that the trustee should sell or exchange the res that the trustee is directed to maintain. For example, if the trustee receives an offer to purchase the res for a sum greatly exceeding its fair market value, the trustee would be cautious about rejecting the offer despite the greater difficulties the trustee would encounter in continuing to maintain that res. But the advantages typically inherent in a res purpose trust will give the trustee pause in considering any possible sale of the res to which the purpose of the trust is directed. The offer would have to be so attractive that it overshadows the difficulties in continuing to maintain the property once it leaves the trustee's ownership. This observation – that there is a built-in incentive for a trustee to retain unencumbered title to the maintained or preserved property– illustrates something else as well. A directive to a trustee to never sell or encumber trust property is typically an unenforceable restraint on alienation, but designing trust architecture to discourage alienation or hypothecation can largely achieve a trustee asset retention objective without running afoul of the alienation doctrine. The trustee of a res purpose trust retains full powers of alienation over trust property but is encouraged to retain unencumbered title to best achieve the noncharitable purposes of the trust.[311] The trustee is thereby discouraged – but not prohibited – from losing title to the res of a res purpose trust.

f. The Hybrid Purpose Trust

A second variety of noncharitable purpose trusts is the hybrid purpose trust.[312] A "hybrid purpose trust" is a trust for a noncharitable purpose with one or more concurrent, ascertainable beneficiaries.[313] Most noncharitable purpose trusts will have a successive ascertainable beneficiary – that is, the

310. *See* UNIF. TRUST CODE § 815(a)(2)(A) (UNIF. LAW COMM'N 2000) (providing that a trustee has "all powers over the trust property which an unmarried competent owner has over individually owned property"); *id.* §§ 816(2), (3), (5) (providing that a trustee has the power to "sell" or "exchange" and "mortgage or pledge" trust property).

311. Charitable purpose trusts may be exempt from the rule banning unreasonable restraints on alienation, just as they are exempt from RAP. *See* Phillips v. Chambers, 51 P.2d 303, 306–07 (Okla. 1935). The reasoning is that the rule against unreasonable restraints on alienation is a part of RAP. *Id*. Noncharitable purpose trusts, however, are not exempt. *See infra* Section II.D.2. In fact, however, the two rules are really quite distinct. *See* 61 AM. JUR. 2D *Perpetuities & Restraints on Alienation* § 2, West (database updated Aug. 2018). "Unlike [RAP], which is measured exclusively by the passage of time, the common law rule against unreasonable restraints on alienation evaluates the reasonableness of a restraint based on its duration, purpose, and the designated method for fixing the purchase price." *Id.*

312. Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 185 (2014). A hybrid trust is a mix of a support trust and a discretionary trust. *Id.*

313. *See generally* 76 AM. JUR. 2D *Trusts* § 113, West (database updated Aug. 2018).

taker or takers upon the accomplishment of the purpose in question. With a hybrid purpose trust, the trustee is directed to expend trust funds towards accomplishing a noncharitable purpose while also aiding particular beneficiaries.[314] There is no real objection to also including an ascertainable beneficiary concurrent with distributions to accomplish a particular noncharitable purpose, but they seem less common.[315] Hybrid charitable purpose trusts have been recognized as well.[316]

A hybrid noncharitable purpose trust is especially useful in the most common type of American drafted trusts – those for young children.[317] Consider two spouses with three children and a loyal dog whom we will call Clifford. A typical estate plan would include a contingent trust to manage wealth for the children until they reach a suitable age in the event that both parents pass away before the children are grown.[318] During the term of the trust, the trustee is vested with authority to make distributions that advance the children's health, education, maintenance, and support.[319] Imagine that the trustee receives a distribution request from the orphaned children's guardian to pay for Clifford's veterinary and grooming bills. The trustee might conclude that paying for Clifford's reasonable expenses advances the children's support if Clifford is living in the same household given the emotional attachments they certainly have for the pet. Yet a trust that specifically authorizes the trustee, in addition to distributing for the children's benefit, to also make distributions for a purpose – maintaining Clifford's health and well-being – might better fulfill the parents' preferences. They probably view Clifford almost as much as a part of their family as their children.[320] In jurisdictions that permit it, a hybrid pet trust

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314. *See id.*

315. *E.g.*, *In re* Howells' Estate, 260 N.Y.S. 598 (Sur. 1932), *modified*, 261 N.Y.S. 859 (Sur. 1933) (considering a trust for five pets and one human being).

316. *See, e.g.*, Dingwell v. Seymour, 267 P. 327, 333–34 (Cal. Ct. App. 1928) (holding that provisions benefitting nieces and nephews did not destroy the otherwise charitable character of a trust). For purposes of qualifying as a charitable trust for tax purposes, split-interest trusts are permissible. 26 U.S.C. § 664 (2012).

317. *E.g.*, 16A N.J. PRAC. *Legal Forms* § 58:8 (4th ed. 2017) ("Some of the more common types of trusts are the insurance trust, educational trust, charitable trust, trust for the benefit of minor children and family income trust.").

318. *E.g.*, *In re* Goldfaden's Estate, 81 A.2d 758, 759 (N.J. 1951) (discussing a trust which terminated upon the youngest child's 21st birthday or marriage, whichever occurred first). The sort of "contingent minor's trust" could take the form of testamentary trusts funded in the event that one or more of the children are not yet ready for an outright inheritance – say, age twenty-five or thirty – or within the provisions of revocable trusts for each spouse.

319. *E.g.*, Xiaojun Zhang Revocable Tr. v. Weijun Ling, No. 2004–L–114, 2005 WL 2211108, at *4 (Ohio Ct. App. 2005) (describing a trust for a decedent's child until the age of thirty with distributions prior to trust termination for the child's "health, maintenance, support and education").

320. A trust for this type of scenario might include language to address the possibility that upon both parents' deaths it is not feasible to keep Clifford and the children – or some of them – in the same household. The author would caution against "all-or-

ought to be considered where a household includes minor children and one or more domesticated animals like Clifford.[321]

A second scenario for hybrid purpose trusts can also be considered briefly. Our client is a divorced farmer with three adult children who are not farmers. She wishes to provide for her children and preserve her farm for generations to come. The children are mature and self-sufficient, but there is always the risk of an unforeseen financial catastrophe (a divorce, especially), and so the asset-protection features of spendthrift trusts managed by a reputable corporate fiduciary are attractive, as is the ability to preserve the farm intact. A typical estate plan to achieve these kinds of objectives might be dynastic[322] in jurisdictions that allow perpetual trusts,[323] even if the client and her children are not currently of sufficient means to trigger federal estate tax concerns.[324]

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nothing" language in this regard since Clifford may be placed with a family friend or relative and still provide the children with emotional connections when they visit the dog. But distributions for the purpose of Clifford might be terminated if the trustee concludes that the dog is receiving appropriate care and is no longer providing any benefit to the children.

321. *See, e.g.*, H.B. 1072, 2018 Leg., 93rd Sess. (S.D. 2018) ("Any property may form a part or all of the trust estate, including some, all or an interest in some or all of the property that is the subject or purpose of a purpose trust."). *Compare* UNIF. TRUST CODE § 408 (UNIF. LAW COMM'N 2000) (allowing pet trusts), *with id.* § 409 (allowing noncharitable purpose trusts). Both of the Uniform Trust Code sections also provide: "Property of a trust authorized by this section may be applied *only* to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use." *Id.* §§ 408(c), 409(3) (emphasis added). And: "Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest." *Id*. These sections are concerned with "the problem of excess funds" – such as a multi-million-dollar trust for a goldfish. *Id.* § 408. The overfunded goldfish example is the author's not the Uniform Trust Code's. While the Uniform Trust Code contemplates de-funding a purpose trust with excess funds, it could also be construed as disallowing res purpose trusts where the res is not income-producing. *See id.* Moreover, the admonition that "[p]roperty of a trust authorized by this section may be applied only to its intended use" might be interpreted as prohibiting hybrid purpose trusts. *Id.* §§ 408(c), 409(3).

322. Although a "dynasty trust" is essentially interchangeable with "perpetual trust," the former can refer more generally to a trust "set up primarily to perpetuate the trust estate for as long a period as possible." Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547–548 (1964) (comparing dynasty trusts and caretaker trusts). The motivations for dynasty trusts are typically tax-related. *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 613 (2005) ("Virtually every website or article promoting dynasty trusts gives prominent attention to the tax benefits they offer . . . .").

323. *See generally*, Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003).

324. *See* J. Ronald Skipper, *Should You be Recommending Generation-Skipping Trusts to Your Clients?*, FLA. B.J. Nov. 1996, at 61. Skipper explains:

Dynasty trusts manage wealth over successive generations of descendants.[325] Adding a hybrid purpose provision could help ensure the farm's retention and preservation without running afoul of the unreasonable restraints against alienation doctrine that would jettison any trust provision that simply prohibited the trustee from ever selling or encumbering the farm. The provision might be as straightforward as this:

> In addition to the foregoing provisions for the benefit of my descendants, the trustee shall maintain and preserve the Farm (defined below) so long as practical and feasible. I discourage (but do not prohibit) the trustee from transferring, encumbering, or distributing the Farm or any part thereof in order to best accomplish the foregoing purpose. To those ends, this trust is also a "purpose trust" pursuant to state law provision § *XYZ*.

The aim of "never selling the farm" is not an uncommon one for farmers.[326] But, the aim is a difficult one to achieve. A dynastic res hybrid purpose trust cannot guarantee that a farm is never sold, but it may be the best vehicle for attempting to do so.

g. Artistic Limitations, Virtue, and Vision: Drafting Hints

We are now ready to identify some preliminary considerations with an artistic vision trust, such as the one to be drafted for Willa Cather. One of the more important decisions to be made in drafting a purpose trust is whether to

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> The nontax advantages of these "dynasty" trusts were often of equal importance to the people who created them. The assets in the trust were not subject to the claims of the children's or grandchildren's creditors; thus, the trust assets could not be reached in bulk if a trust beneficiary divorced or suffered a serious financial setback. Additionally, the trust beneficiaries could not affect the disposition of the trust assets at their deaths: The trust assets were not subject to the terms of the beneficiaries' wills. Thus, the family patriarch or matriarch who created the trust could be sure that the trust assets would only be enjoyed by his or her descendants.

Id. at 61–62. As of 2018, the estate and generation skipping transfer tax credits were $11.18 million. Howard M. Zaritsky, *Using the Newly Increased GST Exemption*, EST. PLAN., May 2018, at 46 n.2 (discussing the effects of Pub. Law. No. 115–97, 131 Stat. 2054 (2017)).

325. *See* Mary D. Cascino, *Dynasty Trusts for Everyone*, ILL. B.J., Aug. 2012, at 441, 441 ("To create a dynasty trust, the grantor establishes a trust for the benefit of his descendants (and optionally, his spouse) and funds the trust with assets that will presumably increase in value over time . . . [then] apply his gift and GST exclusion to the gift by filing a gift tax return . . . .").

326. *E.g.*, Clark v. Howe, No. CA 98–1226, 1999 WL 782561, at *2 (Ark. Ct. App. 1999) ("Ms. Brown had always told them to never sell the farm."); Slater v. Slater, 167 N.W. 201, 203 (Iowa 1918) (quoting a letter: "I will never sell the farm as long as I live . . . .").

include the specific underlying motivations of the settlor's gift.[327] Including recitals of the underlying motivations in the trust instrument may better posture the trust in the event of a petition to deviate or reform the substantive provisions of the trust.[328] For example, in *James' Estate*, the court stripped away a direction to accumulate portions of income in a charitable trust.[329] The trust was to last for 400 years.[330] The instrument instructed the trustee to accumulate income for the first twenty years of the trust and then distribute half of it after twenty years.[331] By the 220th year, the trustee was directed to increase income distributions to seventy-five percent of the income and to distribute all accumulated income and principal after 400 years, at which point the trust would terminate.[332] The charitable beneficiary petitioned the court to deviate the terms of the trust, asserting the income accumulations were "unreasonable and illegal," and the Attorney General joined the petition.[333] In ruling that the income accumulation directions were unreasonable, the court noted the absence of any indication of the settlor's aims in wishing to accumulate income:

> The will of Frank James supplies no indication of purpose for the 400[-]year accumulation provision, nor does it, either by express language or by implication, reveal any particular plan or need for retaining accumulations over such an extended period of time. We are satisfied, however, that the settlor intended to benefit the charity rather than to demonstrate by the device of a lengthy charitable accumulation the effect of accumulation of income and the compound interest tables. In reality, were we to sustain the accumulation of wealth in the amount and manner contemplated, we would demonstrate the latter effect rather than implement the settlor's primary charitable intention. We are reluctant to ascribe to testator the paramount desire merely to turn an approximately $50,000 trust fund into a final gift of almost $15,000,000, at the expense of immediate social needs.[334]

A directive to accumulate income can run afoul of the RAA.[335] Pennsylvania law specifically exempted charitable trusts like the ones in *James' Estate*

327. *See* Ausness, *supra* note 116, at 372 (emphasis added) ("[Purpose trust] settlors should be able to prevent courts from reducing the amount allocated to the achievement of *specified* trust objectives . . . .").

328. *Cf.* Eyerman v. Mercantile Tr. Co., 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) (invalidating a testamentary directive to raze the testator's home where "[n]o reason, good or bad, is suggested by the will or record for the eccentric condition"). Left without a motive, the court concluded that the directive "stemm[ed] from apparent whim and caprice . . . ." *Id.*

329. *In re* James' Estate, 199 A.2d 275, 280 (Pa. 1964).

330. *Id.* at 276.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 279.

335. *See infra* Section II.D.1.b.

from the RAA, but the court still voided the income accumulation provisions as unreasonable.[336] In doing so, the court took note of the fact that the settlor had failed to supply any particular reason for wishing to accumulate income.[337] He had not, for example, pointed to capital improvements or other needs that could not be met by drawing on current income.[338] This silence, the court's reasoning suggests, was what enabled deviation from his expressed intentions.[339] Perhaps if Mr. James had recited his motivations, the trust might have avoided judicial rewriting. The court, in fact, justified its deletion of text from James' trust as getting closer to his actual intent; its rewrite better achieved James' intent than James' text.[340] Had James articulated his motivations, perhaps his trust would have better weathered the unnecessary attempts to change it.

On the other hand, including a recitation of particular motivations can also provide leverage for proposals to deviate from the trust's textual provisions. A recited reason of malice or senselessness for a particular instruction would be more likely to result in a court's deviation from the instruction. Joseph Pulitzer's will created a trust for descendants.[341] He withheld from his trustee the power to sell shares of stock in a corporation that published the *World* newspapers, but the trustee successfully petitioned the court for approval to sell the shares after years of large and escalating losses.[342] Pulitzer's trust was silent as to his motivations in directing retention of the *World* newspaper stock.[343] One could speculate that if Pulitzer had instructed his trustee to retain shares in his beloved newspaper empire based on a desire to harm the trust's beneficiaries, the directive would have proved void from inception.[344]

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336. *See James' Estate*, 199 A.2d at 277 ("[T]he statutory provisions under which accumulations of income are declared void shall not apply to accumulations of income for charitable purposes."); *see also* 20 PA. CONS. STAT. AND CONS. STAT. ANN. § 6106 (West 2018).

337. *James' Estate*, 199 A.2d at 279.

338. *Id.* at 279–80.

339. *Id.* at 279.

340. *Id.* ("We conclude . . . that the testator's primary charitable intention is best attained by making available to the beneficiary the income of the trust on a current basis.").

341. *In re* Pulitzer's Estate, 249 N.Y.S. 87, 91 (Sur. 1931).

342. *Id.* at 91–92, 98.

343. *Id.* at 93.

344. *See* UNIF. TRUST CODE § 404 (UNIF. LAW COMM'N 2000) ("A trust and its terms must be for the benefit of its beneficiaries."). This provision may not be drafted around; it is a mandatory rule under the Uniform Trust Code. UNIF. TRUST CODE § 105(b)(3); *see also* Lee-Ford Tritt, *The History, Impact, and Future of the Benefit-of-the-Beneficiary Rule*, EST. TAX & PERS. FIN. PLAN. (Dec. 2014) (describing the controversy surrounding the codification of the benefit-of-the-beneficiary rule). Lee-Ford asserts that "the Benefit-of-the-Beneficiary Rule" is far broader in scope and deeper in significance than the Rule Against Capricious Purposes was ever meant to be." *Id.*; *see also infra* Section II.D.1.d (regarding rules against capriciousness); *c.f.* S.D. CODIFIED

But if the instruction was based on anticipated appreciation of the shares and a desire to increase the wealth of the trust, it seems likely that the instruction would be honored, at least until the aim plainly turned out to be misguided.[345] There is also a firmer basis for deviation from the instruction when share values plummet because a court could reason that deviation is necessary in order to achieve the grantor's stated investment-growth objective. Including the settlor's motives can thus cut two or more ways depending on the circumstances.[346] Perhaps, at a minimum, the adroit drafter could confirm that the settlor's intent is not based on caprice, avarice, or whim.

In addition to recitations of settlor motivation, the purpose trust drafter should consider the dynamics of the successive interests in the trust. Whether by design or default, a remainderman typically claims an interest in the trust once the noncharitable purpose has been accomplished.[347] For example, upon the death of a pet, a pet trust trustee may be instructed to distribute any remaining funds to a named beneficiary. If the trust is silent, the remainderman may be deemed to be the settlor's estate or heirs.[348] This necessarily incentivizes the remainder beneficiaries to challenge what they view as excessive expenditures for the trust's purpose. The remaindermen could also consider a petition to bring the purpose administration to a close when facts would support the assertion that the purpose has been achieved. If the settlor prioritizes the noncharitable purpose over the remaindermen, one option is to grant the trustee or

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LAWS § 55–1–5.1 (2018) ("The terms of an express trust need not be for the exclusive benefit of its beneficiaries, whether or not the beneficiaries are ascertainable.").

345. *But see Pulitzer*, 249 N.Y.S. at 94–95 (reasoning that Joseph Pulitzer's dominant purpose had been to benefit his beneficiaries, not to require the retention of shares out of "mere vanity"). Query whether Pulitzer's investment retention directive would have been enforceable had Pulitzer indicated that his motivations were traceable to sentimental attachments to his newspaper business rather than wealth preservation aims for beneficiaries' benefit.

346. *See* RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b (2001).

347. *E.g.*, Shidon Aflatooni, *The Statutory Pet Trust: Recommendations for a New Uniform Law Based on the Past Twenty-One Years*, 18 ANIMAL L. 1, 50 (2011) ("[R]emainder beneficiaries or successors in interest may contest the validity of an ambiguous statement leaving money for the care of the pet owner's animal."); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 579 (2008) (quoting Siobhan Morrissey, *Wills Go to the Dogs*, A.B.A. J., May 2003, at 24, 25) (cautioning pet trust drafters against naming a pet's caregiver as the remainder beneficiary out of concerns that it "'tempt[s] the caretaker to shorten the pet's life in order to keep the money'").

348. *E.g.*, UNIF. TRUST CODE § 408(c) (UNIF. LAW COMM'N 2000) ("[P]roperty not required for its intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest."); UNIF. PROBATE CODE § 2-907(b) (providing that a pet "trust terminates when no living animal is covered by the trust"); *id.* §§ 2-907(c)(2)(A), (B) (providing that upon termination of a testamentary noncharitable purpose trust, the remainder passes according to the will's residuary clause unless otherwise provided in the will's text).

another individual a special power of appointment over the remainder in order to diminish the standing of persons who disagree with the settlor's aims.[349]

3. A Tricky Income Tax Matter

Although noncharitable purpose trusts have been recognized, in fits and starts, for over a hundred years, authority on their treatment for purposes of the federal income tax is sparse.[350] The taxation of purpose trusts has been described as "complex and not clearly defined."[351] Purpose trusts involve "some tricky if not odd, tax considerations."[352] Many trusts suffer under steeply compressed trust income tax rates, which reach the current maximum of 39.6% at a mere $12,500 in income.[353] A trust may claim a deduction for its distributions.[354] Corresponding tax code sections provide that a beneficiary receiving distributions must report the distributions in her gross income.[355] Distribution of all net trust income is oftentimes preferred for this reason. And with purpose trusts, this is where things get particularly interesting – for how is its trustee to "distribute" income to a purpose? [356]

Revenue Ruling 76-486, published in 1976, provides a partial answer.[357] The ruling continues to be the primary authority for the income tax rules for

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349. *See* JEFFREY N. PENNELL & ALAN NEWMAN, ESTATE AND TRUST PLANNING 281 (2005) ("[T]he powerholder may impress on the class of permissible appointees the need to pay attention to the powerholder lest they be divested of their expectancy by effective exercise of the power in favor of others."). "The provision creating a power should indicate when and how the power is exercisable, whether the property may be appointed on a further trust, in whose favor it may be exercised, and whether the property may be appointed unequally or to the complete exclusion of some permissible appointees." JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING § 10.23 (2014 ed.).

350. Gerry W. Beyer & Jonathan P. Wilkerson, *Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. RICH. L. REV. 1219, 1220–21 (2009).

351. Wendy S. Goffe, *An Introduction to Lesser-Known but Useful Trusts – Part 2*, 37 EST. PLAN., Aug. 2010, at 1, 3.

352. Bove II, *The Purpose of Purpose*, *supra* note 116, at 37.

353. 26 U.S.C. § 1(e) (2012); Rev. Proc. 2016-55, Table 5, 2016-45 I.R.B. 707.

354. 26 U.S.C. §§ 641, 651 (2012).

355. *Id.* §§ 642, 652.

356. Bove II, *The Purpose of Purpose*, *supra* note 116, at 37. Bove explains:

> [W]hat happens to these rules in the case of a purpose trust that distributes income for the upkeep of an automobile or the care of a cat? Obviously neither the car nor the cat will be filing a tax return, and it wouldn't seem fair . . . that the trust should simply be denied the distribution deduction and taxed at the higher trust tax rates, because it is not accumulating the income. On the other hand, to allow a deduction for trust distributions that are not taxed to anyone just will not fly under our tax laws.

Id.

357. *See* Rev. Rul. 76-486, 1976-2 C.B. 192, 1976 WL 36269.

purpose trusts.[358] The IRS reasoned that pet trust distributions to a non-person could not be deductible as distributions because no one would be taxed on them.[359] However, the IRS further reasoned that the trust should not be taxed at the higher trust tax rates because the trustee did not accumulate the income but instead distributed it for pet care costs.[360] The IRS concluded that the trust should instead be taxed at the rate of a married individual filing separately.[361] The reliability of the last portion of this reasoning was weakened when Congress enacted section 1(e) of the tax code, which added a new rate of tax for both trusts and estates.[362] Today, most commentators agree, a purpose trust would be taxed on its distributions to non-persons at the compressed trust income tax rates.[363] The trust would be taxed as if it had not made any distributions.[364] Trust income would suffer under the compressed trust tax brackets even if the trustee had "distributed" all income to the "pet-beneficiary."

Things get even stickier with a hybrid purpose trust.[365] Consider two similar trusts: The first is a typical trust for a testator's two surviving children, which continues until the youngest reaches her thirtieth birthday. The children are both in their early twenties and reside rent-free in a home situated on their deceased parent's farmland, which is now an asset of their trust. The trustee maintains and insures the farmland and leases it to a neighbor. Each month, the trustee distributes the net rental income to the beneficiaries.

The second trust in this hypothetical is a hybrid purpose trust. As in the previous example, the beneficiaries of the trust are the testator's two surviving children. The noncharitable purpose of the trust is to maintain and preserve the testator's farmland, which is an asset of the trust. The trust is also a "res purpose trust."[366] The primary aim of the trust is to support the children, but a secondary purpose is to maintain the farm. The trustee applies income from trust investments to maintain and insure the farm, which is leased to a neighbor. The trustee distributes the net income to the two children.

With both trusts, the income distributed to the children is deductible at the trust level and taxable to the children as income.[367] With the first trust, as the trustee incurs ordinary expenses associated with maintaining and insuring

358. *See* Beyer & Wilkerson, *supra* note 350, at 1226.

359. *See* Rev. Rul. 76-486, 1976-2 C.B. 192, 1976 WL 36269, at *3.

360. *Id.*

361. *Id.* (citing I.R.C. §1(d) (2012) (amended 2017)).

362. I.R.C. § 1(e) (West 2018).

363. Beyer & Wilkerson, *supra* note 350, at 1227–28; Bove II, *The Purpose of Purpose*, *supra* note 116, at 37; *but see* DONALD H. KELLEY ET AL., *Specialty Trusts*, *in* ESTATE PLANNING FOR FARMERS AND RANCHERS § 5:1.50, West (database updated Sept. 2018) ("Distributions would be deductible at the trust level only if made to the caretaker [of an animal] as an individual beneficiary of the trust;" but this creates another problem: "how to require the individual to actually provide care for the animal.").

364. Zenov and Ruiz-Gonzalez, *supra* note 308, at 25.

365. *See* explanation of hybrid purpose trusts *supra* Section II.C.2.f.

366. *See* description of res purpose trusts *supra* Section II.C.2.e.

367. I.R.C. § 662(a) (2012); *see also, generally*, BOGERT ET AL., *supra* note 141, § 268.25 (2017) (summarizing trust income tax rules).

the agricultural property owned by the trust, the trustee may deduct them from otherwise taxable trust income.[368] Should not the second trust – identical to the first except with regards to the additional noncharitable purpose of preserving the farm ground – receive the same treatment?[369]

Revenue Ruling 76-486 did not consider whether a pet trust could deduct any expenses.[370] It certainly seems the IRS contemplated that in calculating its taxable income, a pet trust could deduct the investment losses, the trustee's fees, the investment manager's fees, and the accountant's charge for preparing the trust's tax return.[371] It seems, therefore, that the IRS retained for noncharitable purpose trusts the distinction between distributions and deductible expenses. Typically, a distribution can be distinguished from an expense because an expense represents a value retained within the trust (for example, in repairing fence on trust property, the trustee is preserving and maintaining trust property), or an expenditure outside the trust that represents taxable income to its recipient (for example, paying the trust's income tax preparer for her services), or both.[372] An outer limit on the reasonableness of an expense would permit the deduction of ordinary dogfood but not steak and lobster dinners with a pet trust benefitting a dog.[373] These uncertainties concerning the income tax treatment of noncharitable purpose trusts unfortunately bedevil the kind of planning that Willa Cather might hypothetically pursue.

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368. I.R.C. § 643(b) (2012).

369. Congress has imposed the federal income tax on trusts' net income, resting an allowance for deductions of reasonable expenses as "determined under the terms of the governing instrument and applicable local law." *Id.* Whether a given expense should be charged to income or principal depends on the nature of the expense in question, the terms of the trust, and the particular local accounting principles governing fiduciaries. M. CARR FERGUSON ET AL., FEDERAL INCOME TAXATION OF ESTATES, TRUSTS, & BENEFICIARIES §7.02 (Supp. 2004). Thus, setting aside a portion of income to account for the depreciation of a wasting asset can be appropriate, depending on the trust terms and local law. Levin v. Comm'r, 355 F.2d 987, 988 (5th Cir. 1966); Estate of Little v. Comm'r, 274 F.2d 718, 723–24 (9th Cir. 1960). Generally, "repairs to, taxes on, and other expenses directly attributable to the maintenance of rental property or the collection of rental income are allocated to rental income." 26 C.F.R. § 1.652(b)–3(a) (2017).

370. *See* Rev. Rul. 76-486, 1976-2 C.B. 192, 1976 WL 36269.

371. *But see* Knight v. Comm'r, 552 U.S. 181, 187 (2008) (holding that typically investment advisory fees are deductible only to extent that they exceeded two percent of trust's adjusted gross income).

372. *See generally* BOGERT ET AL., *supra* note 141, § 801.

373. Extending this rationale, some commentators have suggested that pet trusts could mitigate their unfavorable income tax treatment by naming the pet's caretaker as a beneficiary (e.g., a hybrid purpose trust). *E.g.*, Veronica Cerruti, *Unleash Creative Planning Ideas for Clients with Pets*, 42 EST. PLAN. 10, 16 (2015) (explaining that if a pet trust names a pet and human beneficiary/caregiver, "then the human beneficiary would report the trust income distributed out of the trust as personal income, and the trust would be entitled to a distribution deduction for those amounts"); *see also* Christian N. Weiler, *Louisiana Pet Trusts and How to Avoid Some Hairy Situations*, LA. B.J., Feb./Mar. 2017, at 344, 345 ("If a Pet Trust names a caregiver, is that caregiver not also a beneficiary of the Pet Trust since he/she receives funding needed for the day-to-today

D. Stumbling Blocks

As has been already noted, purpose trusts encounter several adversarial doctrines and rules that challenge their existence.[374] The law exempts charitable trusts from the most formidable of these adversaries: RAP and the beneficiary principle.[375] Because of the relief available to charitable purpose trusts, a recurring strategy is to argue that the trust in question qualifies as charitable, thereby escaping the voiding blows of RAP. The sections that follow outline stumbling blocks for charitable purpose trusts and then for noncharitable purpose trusts. Before doing so, brief mention should be made of two historically noteworthy stumbling blocks to realizing settlor intent with regards to charitable trusts. These two old stumbling blocks were exclusive to charitable trusts – the Mortmain statutes and the superstitious uses doctrine. Mortmain (meaning "dead hand") laws were designed to protect individual heirs from being disinherited in favor of a charity.[376] The superstitious uses doctrine functioned to set aside bequests for unorthodox religious purposes.[377] Both are antiquated, in part, perhaps as a reflection of the twentieth century's gradually warming

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maintenance and care of the pet?"). Another option is restricting trustee investments to tax-free municipal bonds. GERRY W. BEYER, ESTATE PLANNING FOR NON-HUMAN FAMILY MEMBERS 18, http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last revised June 2014). Alternatively, could not the trustee of a pet trust without any concurrent ascertainable beneficiaries hire a caregiver for Rover and deduct those caregiver costs as trust expenses? *But see* Barbara Graham and Diane Gary, *Attention Lawyers: Sit, Stay, Plan*, MD. B.J., Mar./Apr. 2010, at 12, 17 (concluding, without authority, that "[e]xpenses incurred for the care of the pet like Pet Caregiver fees, veterinarian care, and pet sitting fees are not deductible"). One pair of commentators asserts: "A caretaker of the animal could not be charged with the tax liability because the caretaker serves only as an agent of the animal . . . ." Zenov & Ruiz-Gonzalez, *supra* note 308, at 24. It is unclear to me how a pet could engage in an agent-principal relationship.

374. Indeed, Professor Austin Wakeman Scott – of "Scott on Trusts" fame – once asserted that noncharitable purpose trusts should not be permitted at all on grounds of public policy. *See* Hirsch, *Freedom*, *supra* note 116, at 2216 (citing AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 124 (4th ed. 1987) ("It is submitted that it is not in accordance with public policy that a decedent should be permitted to control the disposition of his property to this extent."). Professor Mark Ascher, the current editor of the treatise, has stricken this passage. *Id*. (citing 2 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 12.11 (5th ed. 2006)).

375. BOGERT ET AL., *supra* note 141, § 351.

376. MARY F. RADFORD, *Charitable Trusts*, *in* GEORGIA TRUSTS AND TRUSTEES § 5:1, West (database updated Dec. 2017). Mortmain statutes in the United States might limit the portion of an estate that may be devised to charities or impose restrictions on the timing of a will such as invalidating charitable bequests in deathbed wills. W.D. ROLLISON, THE LAW OF WILLS 313–14 (1939).

377. JONES, *supra* note 177, at 11, 83–85.

affections towards charitable bequests or perhaps simply as a recognition that the statutes were ineffective in achieving their aims.[378]

1. Contemporary Stumbling Blocks for Purpose Trusts

The primary stumbling blocks exclusive to noncharitable purpose trusts are those from which charitable trusts are typically exempt, namely RAP, the beneficiary principle, and the largely forgotten RAA.[379] These stumbling blocks will merit close scrutiny in the drafting of a noncharitable purpose trust, as they represent an array of potential objections and traps. The beneficiary principle is resolved with the injection of an "enforcer" who assumes the role of a kind of private attorney general, but RAP and RAA must be considered carefully. After probing these rules, this Section will turn to two additional potential objections to purpose trusts (both charitable and noncharitable alike), namely the rule against unreasonable restraints on alienation and the more amorphous rules against capriciousness.[380]

a. The Rule Against Perpetuities (RAP)

RAP aims to free up the alienability of property otherwise undermined by future interests with unacceptable longevity.[381] Future interests themselves create property market distortions and ought to be contained. Stated another way, "It is socially desirable that the wealth of the world be controlled by its living members and not by the dead."[382] The rule thus frowns on property that remains unmarketable for unreasonable periods of time but does so by stamping out settlor intent while harnessing such complex abstractions that even the

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378. *See* Holland v. Alcock, 16 N.E. 305, 329 (N.Y. 1888) (reasoning that observances such as trusts for the benefit of priests or charities "cannot be condemned by any court, as a matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here"); Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 458 (1992) ("It certainly makes no sense in modern times that families should be protected against charitable organizations and not against anyone else.").

379. *See infra* Section II.D.1. *See generally* Note, *Accumulations in Charitable Trusts*, 41 HARV. L. REV. 514 (1928) (discussing "statutory provisions concerning accumulations for charitable purposes"). "It is usually said that [RAP] does not apply to charitable trusts. But a charitable trust which may not vest within the limits of the rule against remoteness is void." *Id.* at 515 n.5 (citing Inst. for Sav. v. Roxbury Home, 139 N.E. 301 (Mass. 1923); Easton v. Hall, 154 N.E. 216 (Ill. 1926)). *But see* Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 506 n.31 (2006) [hereinafter Sitkoff, *Lurking*] (emphasis added) ("Charitable trusts are exempt from [RAP] *and* the [RAA].").

380. *See infra* Section II.D.1.c & d.

381. *See* Trecker v. Langel, 298 N.W.2d 289, 291 (Iowa 1980) (explaining RAP has the "objective of keeping property freely alienable").

382. SIMES, *supra* note 22, at 59.

most stolid law student may be driven to madness in trying to master them.[383] The rule is simple enough to state: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[384] RAP thus "prevents the creation of any future interest in property which does not vest within twenty-one years after some life or lives presently in being plus the period of gestation if gestation is in fact taking place."[385] The common law judges who mapped RAP in the Duke of Norfolk's Case thought that a donor ought to be able to "provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority" but no more.[386] In application, RAP often conjures "remorseless construction" and frequently results in an "infectious invalidity" of settlor intent.[387]

Two examples will suffice. The first is taken from *Renner's Estate*, where the testator devised the residue of her estate as follows:

> All the rest, residue and remainder of my estate, real and personal, of whatsoever kind and wheresoever situate, I give, devise and bequeath unto my executrix, hereinafter named, IN TRUST, however, for the maintenance of my pets, which I leave to her kind care and judgment, and for their interment upon their respective deaths in the Francisvale Cemetery. Upon the death and interment of the last of my pets to survive, I give, devise and bequeath my entire residue estate so held in trust unto the said Mary Faiss Riesing, absolutely and in fee.[388]

The trust was challenged by the remainderman as violating RAP, but the court explained that the remainder interest in Mary Faiss Riesing was a vested

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383. *In re* Estate of Freeman, 404 P.2d 222, 227–28 (Kan. 1965) (citation omitted).

384. GRAY, *supra* note 1, at 191.

385. *Estate of Freeman*, 404 P.2d at 227. *See generally* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952) [hereinafter, Leach, *Perpetuities in Perspective*]; W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952) [hereinafter Leach, *Perpetuities*]. Professor Leach eloquently ranted,

> If there should be among our rules one which is so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its "conclusive presumptions" are laughable nonsense to any sane man, so capricious that it strikes down in the name of public order gifts which offer no offense except that they are couched in the wrong words, so misapplied that it sometimes directly defeats the end it was designed to further – then in performance of our corporate responsibility we should take corrective action.

Leach, *Perpetuities in Perspective*, *supra*, at 721–22.

386. 6 AMERICAN LAW OF PROPERTY § 24.16 (A. James Casner et al. eds., 1952); *accord* Duke of Norfolk's Case [1682] 22 Eng. Rep. 931.

387. *Estate of Freeman*, 404 P.2d at 231–31.

388. 59 Pa. D. & C. 102 (Orphans' Ct 1946) (quoting will).

interest upon creation of the trust.[389] It is true that the remainderman's interest may not become possessory until after a period in excess of the RAP period has elapsed, but RAP is not concerned with the moment an interest becomes possessory.[390] RAP focuses on the moment an interest must vest.[391] Presumably, even if Mary Faiss Riesing had predeceased the testator's pets, remainder distributions would have been made to her estate. This instability suggests that, as applied to noncharitable purpose trusts, a secondary rule may be operating alongside RAP that requires trust termination rather than vesting within the perpetuities period.[392] If a second, more shadowy, twin to RAP operates on purpose trusts, its possible application to remote trust termination possibilities cannot be overlooked either.[393]

A second example – this one involving RAP's interactions with noncharitable purpose trusts – can be seen in *Searight's Estate*.[394] George Searight died in 1948 with a will providing:

> I give and bequeath my dog, Trixie, to Florence Hand of Wooster, Ohio, and I direct my executor to deposit in the Peoples Federal Savings and

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389. *Id.* at 105–06.

390. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639–40 (1938) [hereinafter Leach, *Nutshell*] ("[RAP] is *not* a rule invalidating interests which *last* too long . . . .") (alterations in original). "The metaphysical common-law notion that a future estate can vest in interest before it vests in possession is incorporated into [RAP]." *Id.* at 647.

391. *See* Hubscher & Son, Inc. v. Storey, 578 N.W.2d 701, 703 (Mich. Ct. App. 1998) ("The rule applies only to nonvested property interests."); Williams v. Watt, 668 P.2d 620, 635 (Wyo. 1983) (Thomas, J., concurring) (citation omitted) ("[T]here is a dual meaning ascribed to the term 'vested.' . . . [T]he secondary meaning of the term 'vested' is transmissible, but . . . [RAP] does not concern itself with this secondary meaning but instead deals only with notions of remoteness of possession."). In some instances, whether an interest "vests" or "becomes possessory" is the same thing. *See* Earle v. Int'l Paper Co., 429 So. 2d 989, 992 (Ala. 1983) ("[E]xecutory interests are by definition not vested until they become possessory . . . .").

392. Hirsch, *Trusts for Purposes*, *supra* note 116, at 931. "Courts unanimously require trusts for definite noncharitable purposes to terminate (rather than vest) within some life in being and twenty-one years." *Id.* Professor Hirsch describes this as "the parallel rule requiring that trusts for noncharitable purposes *terminate* within the perpetuities period . . . ." *Id.* This important observation explains the reasoning underpinning the dual-RAP repeal language found in some states' purpose trust legislation. *See*, *e.g.*, S.D. CODIFIED LAWS § 55-1-20 (West 2018) ("Neither the common law [RAP], . . . nor any common law limiting the duration of noncharitable purpose trusts is in force in this state.").

393. *See* Hirsch, *Trusts for Purposes*, *supra* note 116, at 931–32 (noting that numerous scholars have "deduced that noncharitable purpose trusts are subject to a second, (unnamed) rule, shadowing [RAP], though not identical to it"); Thomas E. Simmons, *A Trust for Ted's Head*, 87 MISS. L.J. SUPRA (2018) (forthcoming 2018) (describing RAP's "sly and shadowy twin" – that is, "the Purpose Trust Rule against Perpetuities (or, to coin an acronym, 'P-TRAP').").

394. *In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950).

> Loan Association, Wooster, Ohio, the sum of $1000.00 to be used by him to pay Florence Hand at the rate of 75 cents per day for the keep and care of my dog as long as it shall live. If my dog shall die before the said $1000.00 and the interest accruing therefrom shall have been used up, I give and bequeath whatever remains of said $1000.00 to be divided equally among those of the following persons who are living at that time, to wit: Bessie Immler, Florence Hand, Reed Searight, Fern Olson and Willis Horn.[395]

The executor acted as trustee, retaining the $1000 fund, and Florence Hand accepted the bequest of Trixie – a dog, incidentally, valued at five dollars.[396] The state inheritance tax authorities challenged the bequest as a means to overturn the estate's inheritance tax calculations.[397] The probate court concluded, however, that although the five-dollar dog was taxable as a succession to Ms. Hand, only the remainder interests could be taxed to the five remaindermen – subject to tax refunds to the extent funds were not consumed for Trixie's care.[398] The Ohio inheritance tax rules subjected bequests to individuals, institutions, and corporations, but no others, to taxes, and the probate court reasoned that Ohio statutes did not levy any tax "upon the succession to any property passing to an animal[.]"[399] The department of taxation appealed the decision, but the appellate court affirmed.[400]

On appeal, the department of taxation asserted that the bequest for Trixie's care was invalid.[401] It advanced two principal arguments: that the bequest was invalid as an "honorary trust" and that it violated RAP.[402] The appellate court dismissed the first argument because Ms. Hand was willing to administer the bequest.[403] Nor, the court reasoned, did the bequest amount to a power of appointment.[404] Turning to the RAP argument, the court calculated that since it would take less than five years to consume seventy-five cents each day even if the $1000 was invested at six percent interest, it was "very apparent" that "such time limit is much less than the maximum period allowed under

395. *Id.*
396. *Id.* at 781.
397. *Id.* at 780.
398. *Id.* at 780.
399. *Id.* at 780, 784.
400. *Id.* at 781, 784.
401. *See id.* at 781.
402. *Id.*
403. *Id.* at 782 (quoting Harry W. Vanneman, 40 OHIO JURIS. § 68) ("[T]he trust does not fail if the trustee is willing to carry it out . . . provided the trust will not continue for a period longer than the [RAP]."). The idea of honorary trusts is unpacked *infra* at Section II.E.1.
404. *Id.* at 784 (citing RESTATEMENT OF PROP.: FUTURE INTERESTS § 318(2) (1944)) (providing that a power of appointment does not include honorary trusts).

[RAP]."[405] Therefore, Trixie's trust was valid and, to the extent funds were expended on Trixie, the bequest was nontaxable.[406]

Searight's Estate's RAP analysis is neat but wrong (although it remains respectable authority in Ohio).[407] The analysis is wrong because RAP requires that a future interest be absolutely certain of vesting within the RAP period and not probably certain.[408] Alternatively, if a remote trust termination is being considered, then the same certainty would be required.[409] If the remaindermen must survive the termination of the trust before their interests vest, then it will not be known whether those interests vest until the death of Trixie.[410] As a respected treatise articulates, "In applying [RAP] to contingent future interests, the question is not: Will the future interest probably vest within the period? Rather it is this: Must it *necessarily* vest within the period, if it vests at all?"[411] A dog is not a measuring life, so the question is whether the dog's life, as a matter of law, will come to an end within twenty-one years.[412] It may not. For example, in *Wood*, it did not matter that as a practical matter the trust would almost certainly terminate within four years.[413] The aims of RAP in operation are certainty and predictability.[414] Theoretically, even a testamentary bequest to vest "when my debts are paid" would violate RAP.[415] A treatise explains, "It is of the essence of [RAP] that we must be certain whether an interest is valid or void."[416] Indeed, if we are to have RAP, then "a social policy involved in determining the validity of an interest at an early date" should also be acknowledged.[417] Therefore, *Searight's Estate* misconstrued the law in order

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405. *Id.* at 783.

406. *Id.* at 784.

407. *See* Vinson v. First Tr. & Sav. Bank, 339 N.E.2d 670, 672 (Ohio Ct. C.P. 1974) (discussing *Searight's Estate*).

408. *See* Hirsch, *Trusts for Purposes, supra* note 116, at 935 ("[C]ourts have usually held invalid trusts to provide support for the lives of pet animals because they *might* continue too long, unless expressly limited to some human life or lives and/or twenty-one years.") (alteration in original); Leach, *Nutshell*, *supra* note 390, at 642 ("A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities.").

409. *See supra* notes 430–31.

410. *See supra* note 394 and accompanying text.

411. 3 SIMES AND SMITH THE LAW OF FUTURE INTERESTS § 1228, West (database updated Jan. 2018) (emphasis added).

412. *See Favor of Animals, supra* note 246, at 1292 ("Although the ingenuity of the commentator could, no doubt, be depended upon to devise a technique for distinguishing crocodiles and crows from dogs, the decision that dogs don't live for purposes of [RAP] may be justified as furthering the simplicity of the rule.").

413. *In re* Wood (1894) 3 Ch. 381, 383. Professor Leach called this the "magic gravel pit" case. Leach, *Perpetuities in Perspective*, *supra* note 385, at 731–32.

414. SIMES, *supra* note 22, at 73. Simes explains that "certainty and predictability" are "at the very heart of [RAP]." *Id.*

415. *Id.* at 64.

416. *Id.* at 66.

417. *Id.*

to accommodate the settlor's intent (and defeat a tax).[418] In states with a "wait-and-see" approach to RAP, George Searight's bequest would also be sustained. But in traditional RAP states, even a pet trust for a mayfly would violate the rule.[419]

Adroit drafters typically include a RAP "savings clause" in instruments that may be subject to the rule, but the savings clause does terminate the trust at a relatively early date.[420] A savings clause may allow a trust subject to RAP to last around ninety years, but this may be inadequate for a pet trust for a parrot (that may live 100 years) or a tortoise (that may live beyond 250 years).[421] It may also be inadequate to accomplish any number of other noncharitable purposes. As dynastic trust drafters have long known, the best solution is to establish a noncharitable trust in a jurisdiction without RAP.[422]

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418. *See* DUKEMINIER & SITKOFF, *supra* note 253, at 425. *See id.* at 428 (emphasis added) ("The assumption of a [six] percent interest rate in Searight's Estate is inconsistent with the common law [RAP], which considers what *might* happen rather than what is likely to happen.").

419. *See, e.g.*, *In re* Estate of McNeil, 41 Cal. Rptr. 139, 141–42 (Ct. App. 1964) (reasoning that a trust to pay $50/week for two dogs violates RAP). The Supreme Court of Virginia has explained the wait-and-see approach to RAP:

> Under [the 'wait-and-see'] doctrine, [RAP] is determined to have been violated or not by taking into consideration events which occur after the period fixed by the rule has commenced. If, upon a later look, the event upon which an interest was made contingent is found to have occurred and the interest has vested or has become certain to vest within the period fixed by the rule, the rule is held not to have been violated.

Lake of the Woods Assoc., Inc. v. McHugh, 380 S.E.2d 872, 875 n.2 (Va. 1989) (alteration in original). *Compare* W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960) (hailing the wait-and-see approach), *with* Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983) (criticizing the wait-and-see approach).

420. The following is an example of a simple perpetuities savings clause: "This trust shall terminate not later than 21 years after the death of the survivor of my issue living on my death . . . ." PRICE & DONALDSON, *supra* note 349, § 10.47. The early termination of the trust pursuant to the savings clause may leave the tortoise without financial support from the trust. Consider this RAP and RAA savings period from George Bernard Shaw's will incorporating a lengthier – but still valid – term by referencing a wider class of measuring lives: "a period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of His late Majesty King George the Fifth who shall be living at the time of my death (hereinafter called 'the special period')." *Re* Shaw [1957] 1 All ER 745.

421. *See In re* Searight's Estate, 95 N.E.2d 779, 783 (Ohio Ct. App. 1950) (fretting that absent RAP, pet trusts might be "established for animals of great longevity, such as crocodiles, elephants and sea turtles.").

422. *See* Brian Layman, Comment, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747, 761–62 (1999); *see also* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356,

b. The Rule Against Accumulations (RAA)

RAA is mostly ignored and unknown today. For these reasons alone, it is potentially nettlesome.[423] It seems that charitable trusts are generally considered exempt from the rule's application, but this conclusion is less than assured in all jurisdictions.[424] The rule derives from the will of Englishman Peter Thellusson who died wealthy in 1797.[425] Thellusson devised the residue of more than six hundred thousand pounds in trust to accumulate for the joint lives of his three sons and his then-living grandchildren before distributing it all to his three oldest surviving descendants.[426] The accumulation, one projection calculated, might reach £140 million over the seventy-five-year estimated life of the trust.[427] The House of Lords applied a RAP analysis to the trust contestants' claims and determined that because the trust would accumulate no longer

373–74 (2005) (noting that "state perpetuities law became a highly salient margin of differentiation" on account of the implementation of the generation skipping transfer tax). "[I]t was only a matter of time until jurisdictional competition sparked a race to abolish [RAP]." *Id*. at 374.

423. *See* Note, *Use of Corporate Device to Effect Accumulation of Estate Income*, 47 YALE L. J. 1026, 1027–28 (1938) (noting that both mandatory trust provisions as well as a trustee's discretionary election to accumulate income can run afoul of RAA). *See generally* BOGERT ET AL., *supra* note 141, § 352 (discussing RAA).

424. Sitkoff, *Lurking*, *supra* note 379, at 506 n.31 (2006) ("Charitable trusts are exempt from . . . [RAA]."). *But see* Tumlin v. Troy Bank & Tr. Co., 61 So. 2d 817, 824 (Ala. 1950) (alterations in original) (quoting Reasoner v. Herman, 134 N.E. 276, 280 (Ind. 1922)) ("Where a charitable gift vests, a direction for accumulation, being for the *management of the fund* and not of the essence of the gift, will not, even if invalid, affect the validity of the gift . . . ."); Brown v. Saake, 190 So. 2d 56, 59–60 (Fla. Ct. App. 1966) (noting that unreasonable accumulations by charitable trusts may be subject to judicial corrective action); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2(2) (1981) (emphasis added) ("An accumulation of trust income under a charitable trust created in a donative transfer is valid *to the extent the accumulation is reasonable* . . . ."). *See generally Accumulations in Charitable Trusts*, *supra* note 379; Note, *Accumulations of Income at Common Law*, 54 HARV. L. REV. 839 (1941).

425. SIMES, *supra* note 22, at 83. Professor Simes' lecture emphasizes that the policy against accumulations derives directly from Thellusson's will, asserting that to discuss the policy and omit the Thellusson will "would be as unthinkable as omitting the part of Hamlet from the play which bears his name." *Id.*

426. *Id.* at 84. *See also* PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW, 134–41 (2002) (describing the will's provisions). Polden notes: "One of the strangest parts in the tale of Peter's will is the story that his fortune was founded largely on the money of guillotined Frenchmen and that the will was his attempt to do right by the heirs of these headless ghosts." *Id*. at 89. "Posthumous ambition, not posthumous avarice, is the likeliest key to the will." *Id*. at 146.

427. SIMES, *supra* note 22, at 84. The projections never came to pass. Thellusson's trust terminated in less than fifty-nine years with – due to trustee missteps and litigation costs – only a modest res. *Id*.

than the lives in being plus twenty-one years, it was valid.[428] But the British public was displeased, and legislation followed that further restrained a settlor's power to accumulate wealth in trust.[429] The law restricted the accumulation of income to any of the following:

> (1) the life or lives of the settlor or settlors; or
> (2) twenty-one years from the death of the settlor or testator; or
> (3) the minority of any person living or *en ventre sa mère* at the death of the settlor or testator; or
> (4) the minority of any person who under the terms of the deed or will directing such accumulations, would, for the time being, if of full age, be entitled to the income as directed to be accumulated.[430]

The legislation remained a part of English law until 2009 when it was repealed.[431] Various forms of the English legislation were adopted by the state legislatures of more than a dozen American jurisdictions in the nineteenth and early-twentieth centuries.[432] Then the tide began to turn. Beginning in the 1920s, the laws were repealed. By the 1950s, nine states still statutorily restricted the duration of accumulations to a period less than the RAP period.[433] Today, some states simply restrict accumulations of income for periods equal to the RAP period.[434] A few others have repealed RAA outright.[435] The compressed income tax brackets of non-grantor trusts generally function to deter income accumulations for contemporary estate planners, even where RAA has

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428. Thellusson v. Woodward (1805) 32 E.R. 1030 at 1035–36.

429. Karen J. Sneddon, Comment, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189, 199–200 (2001).

430. SIMES, *supra* note 22, at 86.

431. Perpetuities and Accumulations Act of 2009, c. 18, §§ 5, 7 (Eng. & Wales); *see also* Sitkoff, *Lurking*, *supra* note 379, at 511 n.24 (noting the English Law Commission suggested repealing RAA in 1998 but as of 2006, Parliament had ignored the recommendation).

432. SIMES, *supra* note 22, at 86, 87 nn.12–19. "The posthumous vanity of Peter Thellusson shocked American lawyers as it had the English." *Id.* at 86–87; *see also* Gertman v. Burdick, 123 F.2d 924, 932 (D.C. Cir. 1941) ("[The argument for RAA] argued that the amount involved in this accumulation ties up too much wealth, and that it lowers the country's purchasing power which is already too small."); Hillyard v. Miller, 10 Pa. 326, 336 (1849) (worrying that a mandatory accumulation trust could "draw into its vortex all the property").

433. SIMES, *supra* note 22, at 88.

434. *E.g.*, CAL. CIV. CODE § 724(a) (West 2018); N.Y. EST. POWERS & TRUSTS §9-2.1(b) (McKinney 2018).

435. *E.g.*, DEL. CODE ANN. tit. 25, § 506 (West 2018) ("No provision directing or authorizing accumulation of trust income shall be invalid."); 765 Ill. COMP. STAT. ANN. 315/1 (West 2018) (repealing RAA as to dynastic trusts); S.D. CODIFIED LAWS § 43-6-7 (2018) ("No provision directing or authorizing accumulation of trust income is invalid. This section is effective and applies to trust instruments whenever created or executed.").

been repealed.[436] Still, the rule of *Thellusson* – measuring impermissible accumulations by the RAP clock – remains in force in some American states.[437]

Today, RAA is mostly ignored.[438] It might be safe to assume that, in the absence of a legislative pronouncement adopting the rule, RAA does not form a part of the underlying common law fabric in American jurisdictions. Some authorities, however, characterize the rule as common law in origin.[439] They reason that RAA applies even in the absence of a statute.[440] Their reasoning is that although RAA was not announced until after American independence, it was just unearthed in 1805.[441] In other words, the rule (in its unearthed state) existed prior to American independence and therefore formed a part of American common law before America's break with England.[442] The *Thellusson* decision labeled RAA "a pure question of equity" suggesting, perhaps, that it existed before it was announced.[443]

Although RAA is frequently measured by the same clock as RAP (twenty-one years plus lives in being) and overlaps to some degree, it is an independent barrier to settlor intent when income accumulation is desired.[444]

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436. *See* I.R.C. § 1(e) (West 2018) (imposing trust income tax brackets); *id.* §§ 665–68 (2012) (describing the "throwback rules" which further deplete the tax benefits of accumulating income in trust); Harry S. Colburn, Jr., *Accumulation Trusts: Recent Developments Restrict but Do Not Eliminate Their Benefits*, EST. PLAN., Jan./Feb. 1986, at 8, 9–13 (discussing income and transfer tax elements to accumulation trusts).

437. Sneddon, *supra* note 379, at 208–09; *cf. Accumulations of Income at Common Law*, *supra* note 424, at 843 (explaining the uncertainty of "whether the permissible period for accumulation or postponement will be measured from the time of the gift or from the inception of the actual accumulation or postponement.").

438. Some scholarship continues to consider RAA. *E.g.*, DUKEMINIER & SITKOFF, *supra* note 253, at 924–28 (introducing the topic); Sitkoff, *Lurking*, *supra* note 379, at 516 (concluding that the concerns underlying the rule have been rendered "obsolete"); Sneddon, *supra* note 429, at 210 ("[C]ourts could surprise drafters and settlors by invoking [RAA] to void trusts.").

439. Gertman v. Burdick, 123 F.2d 924, 930–31 (D.C. Cir. 1941) (proclaiming that RAA with a clock equal to that of RAP's "has been the common law of this country."); *In re* Freeman's Estate, 404 P.2d 222, 233 (Kan. 1965) ("Kansas must follow the common law rule [against accumulations] since we have no statute.").

440. *Freeman's Estate*, 404 P.2d at 233.

441. *E.g.*, Tumlin v. Troy Bank & Tr. Co., 61 So. 2d 817, 824 (Ala. 1950) (considering both statutory and common law bases for RAA).

442. *E.g.*, Kimball v. Crocker, 53 Me. 263, 271 (1865) (following English authority); Sneddon, *supra* note 429, at 201 ("[I]t became settled law that there was indeed a common law [RAA] in America . . . .").

443. *See* Thellusson v. Woodward (1803-13) All ER 30.

444. *See* Sitkoff, *Lurking*, *supra* note 379, at 506–07 ("[RAA] was therefore recognized as a doctrine independent from [RAP], though the accumulations rule's durational limit was that of the applicable perpetuities period.").

While RAP is concerned with remote vesting (or termination), RAA is concerned with remote enjoyment.[445] For example, a trust that directs the trustee to accumulate all income for the life of a pet duck, then distribute the remainder to Donald Trump or his issue per stirpes if he is not then living, violates both rules. Both vesting and accumulation suspension could last longer than a life in being plus twenty-one years. Remember, an animal's life, like the duck here, is not a measuring life. Alternatively, a trust to distribute income to Ivanka Trump for a term equal to the life of a duck and the remainder to Donald Trump or his issue violates RAP but not RAA. And a trust to accumulate income for a term equal to the life of a duck and remainder to Donald Trump or his estate violates RAA but not RAP. There is a lurking problem on account of RAA when it comes to noncharitable purpose trusts – purpose trusts may call for trust distributions to advance a goal or preserve certain property.[446] These may not technically qualify as "distributions" in the traditional sense of the word – or at least in the sense of RAA.[447] If a purpose trust's expenditures for its noncharitable purpose are not distributions, then it would seem to follow that the trustee could be characterized as accumulating income – perhaps unreasonably – thereby triggering RAA.

c. Unreasonable Restraints on Alienation

Unreasonable restraints on alienation are repugnant.[448] Much of the early-twentieth-century case law considering unreasonable restraints arose from pre-*Shelley v. Kraemer* racial covenants banning – if not ownership – non-white occupation of realty.[449] Although Professor Gray is best known for

445. *See id.* at 503, 505, 506 n.31 (unpacking the secondary RAP rule applicable to noncharitable purpose trusts which is concerned not with remote vesting, but remote trust termination).

446. *See, e.g.*, 6A MO. PRAC. SERIES *Legal Forms* § 20:305 (3d ed. 2017) (alteration in original) (directing the trustee, in the context of a pet duck trust form, "pay first from income and then from principal, if required, up to *ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00)* per *month* for the upkeep and maintenance of my pets . . . [and] all expenses incident to *constructing a pond for said pets and a dog-proof pen*"). Professor Sitkoff must be credited with linking the apropos adjective "lurking" to RAA. Sitkoff, *Lurking*, *supra* note 379.

447. *See* discussion of difficult distinction between "distributions" and "expenditures" with purpose trusts in the context of income taxes *supra* Section II.C.3.

448. CAL. CIV. CODE § 711 (West 2018); MONT. CODE ANN. § 70-1-405 (West 2018); N.D. CENT. CODE § 47-02-26 (West 2017). For scholarship on the rule against unreasonable restraints or suspension of the power of alienation see Ralph E. Kharas, *Trusts and Suspension of the Power of Alienation in New York*, 13 N.Y.U. LAW. Q. REV. 191 (1936); Oliver S. Rundell, *Suspension of the Absolute Power of Alienation*, 19 MICH. L. REV. 235 (1921); Horace E. Whiteside, *Suspension of the Power of Alienation in New York*, 13 CORNELL LAW. Q. 31 (1927).

449. *See generally* 334 U.S. 1 (1948); Garrett Power, *Meade v. Dennistone: The NAACP's Test Case to ". . . Sue Jim Crow Out of Maryland with the Fourteenth Amendment"*, 63 MD. L. REV. 773 (2004).

his treatise on RAP, he also authored one on restraints on alienation.[450] Since Gray's treatise and *Shelley*, the doctrine has been largely forgotten except in the context of covenants and due-on-sale clauses.[451] Its potential undermining tendencies with trust planning, however, still remain, especially if the settlor's aim is to direct the trustee to permanently retain title to the settlor's creative works.[452] Perpetual suspension of alienability powers over property held in trust is just the sort of repugnancy targeted by the rule.[453]

Recall that the architecture of a trust grants legal title to the trustee, reserving equitable or beneficial rights in the beneficiary.[454] As the legal owner, the trustee is typically vested with the full and unqualified right to sell, convey, exchange, encumber, and transfer property held in trust subject only to exercising those powers consistent with the trustee's fiduciary obligations.[455] Constraints on a beneficiary's rights to distributions or the imposition of spendthrift protections – banning the beneficiary's alienation of her beneficial interest – do not run afoul of the rule against unreasonable restraints on alienation.[456] Equitable title, by its nature, may be restrained.[457] If, however, the settlor attempts

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450. GRAY, *supra* note 1; *see generally* Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373 (1935).

451. *See, e.g.*, Dawn Inv. Co. v. Superior Court of Los Angeles County, 639 P.2d 974, 978 (Cal. 1982) (holding that a due-on-sale clause in a deed of trust and promissory note constitutes unreasonable restraint on alienation unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment of its security); Streams Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1231 (Ill. 1983) (holding that a covenant requiring condominium owners to become dues-paying members of a sports club was not an unreasonable restraint on alienation); Crowell v. Shelton, 948 P.2d 313, 317 (Okla. 1997) (reversing and remanding a summary judgment determination that a deed restriction required by a decedent trustor which prohibited all residential and commercial development was reasonable).

452. *See, e.g.*, Laska v. Barr, 907 N.W.2d 47, 52 (S.D. 2018) (holding that an indefinite option to purchase constitutes an unreasonable restraint on alienation); Wildenstein & Co. v. Wallis, 756 F. Supp. 158, 163–64 (S.D.N.Y. 1991) (holding that a settlement agreement's "combined exclusive consignment right and right of first refusal" constituted an unreasonable restraint on alienation), *rev'd*, 983 F.2d 1047 (2d Cir. 1992); *see also In re* Byrd, No. 13–03674–8–SWH, 2015 WL 5918754, at *2, *4 (Bankr. E.D. N.C. 2015) (concluding that a right of first refusal violated RAP).

453. *E.g.*, Alexander v. House, 54 A.2d 510, 512 (Conn. 1947) (holding that testatrix's aim to "have her home maintained in perpetuity as a depository for the ashes of herself and her daughter" was invalid as a restraint on alienation).

454. *See supra* Section II.B.

455. UNIF. TRUST CODE §§ 815, 816 (UNIF. LAW COMM'N 2000).

456. Bennett v. Bennett, 75 N.E. 339, 341 (Ill. 1905). "[A] 'spendthrift trust' [is] created for the purpose of providing for the maintenance of [a beneficiary], and at the same time securing it against his improvidence and incapacity for self-protection." *Id.* at 341. "It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors." *Id.*

457. But in England, spendthrift trusts – trusts which impose a restraint on the alienation of the beneficiary's interest – are invalid. Petty v. Moores Brook Sanitarium,

to restrain the trustee's alienation powers to the trustee's legal title, then the rule can operate to defeat those attempts.

In some cases, the courts will avoid the issue by construing language deterring a sale or encumbrance as merely precatory.[458] Where the language cannot be construed as precatory, an attempt to restrain alienation is void.[459] In either case, of course, the effect is to nullify the attempt. For example, in *Caudle v. Smither*, the trust provided that the trustee could sell (or lease) the trust's property only if the trustee, one George McDonald, also sold (or leased) his individual fractional interests in the same property.[460] Because there was "a distinct possibility that McDonald will not lease or sell his individual interest," the court concluded that "such a shackle will prevent the property from being leased or sold."[461] Accordingly, the attempted restraint was invalid.[462] One judge dissented, emphasizing that the settlor had obviously "reposed great confidence in the integrity and judgment of McDonald" and that there ought not to be anything "unreasonable in expressing that confidence in his trust instrument."[463] The majority, however, was unmoved.

d. Rules Against Capriciousness

The final purpose trust stumbling block for consideration are the rules against capriciousness. The rules against capriciousness remain the most formidable foes to achieving the intent of a settlor, such as Willa Cather. Capriciousness is a rather free-floating concept, and one person's integrity-grounded

67 S.E. 335, 356 (Va. 1910), *superseded by statute*, VA. CODE ANN. § 55–19 *as recognized in In re* O'Brien, 50 B.R. 67 (Bankr. E.D. Va. 1985), *repealed by* Act of 2005, ch. 935 (2005).

458. *See, e.g.*, Romme v. Ostheimer, 20 A.2d 406 (Conn. 1941) (finding that a devise of a farm "with the understanding" that the farm "not be sold till the sum of fifteen thousand dollars can be realized" was merely precatory); Sandberg v. Heirs, 40 N.W.2d 411, 413 (Neb. 1950) (holding that a will directing that no mortgage, lien, or other encumbrance be placed upon this land or that it be sold was nonbinding as merely precatory instructions).

459. *E.g.*, Garner v. Becton, 212 S.W.2d 890, 891 (Tenn. 1948); Loehr v. Kincannon, 834 S.W.2d 445, 446–47 (Tex. Ct. App. 1992). *But see* Shriners Hosps. for Children v. First Nat'l Bank of Wyo., 373 P.3d 392, 406, 420 (Wyo. 2016) (upholding a directive in trust for charity and also for the settlors' children that the trustee holds a valuable ranch for the lengthy trust term "with the land remaining open and its use devoted to agriculture and/or preservation" unless economic conditions required the ranch's sale).

460. 427 S.W.2d 227, 228 (Ky. 1968).

461. *Id.* at 230.

462. *Id.*; *accord, e.g.*, *In re* Walkerly's Estate, 41 P. 772, 779–80 (Cal. 1895) (invalidating an attempt to convey property in trust for a surviving spouse with no sale of the trust property to occur during her life).

463. *Caudle*, 427 S.W.2d at 231 (Hill, J., dissenting).

vision might easily be another's cantankerous whimsy.[464] Capriciousness includes public policy concerns.[465] Some public policy trust offenses are both sensible and clearly mapped.[466] Others are less so. Although all trusts are

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464. *See* RESTATEMENT (FIRST) OF TRUSTS § 124 (1935) (requiring the purpose of a noncharitable purpose transfer to not be capricious); *In re* Bailey's Will, 253 N.Y.S. 275, 282 (Surr. Ct. 1931) (holding that conditioning trust distributions upon the family moving to one of two cities within five years void for "uncertainty"); *see also* RESTATEMENT (FIRST) OF TRUSTS § 417 ("Where property is devised or bequeathed upon an intended trust for indefinite or general purposes, not limited to charitable purposes, and there is no definite or definitely ascertainable beneficiary designated, the devisee or legatee holds the property upon a resulting trust for the estate of the testator . . . ."); *id.* § 60 ("An intended trust or a provision in the terms of a trust is invalid if illegal."). Illegal trusts include

> (1) the performance of the intended trust or of the provision involves the commission of a criminal or tortious act by the trustee; (2) the enforcement of the intended trust or provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee; (3) the purpose of the settlor in creating the trust is to defraud creditors or other third persons; (4) the consideration for the creation of the trust is illegal.

Id. § 60 cmt. a.

465. *See, e.g.*, *In re* Estate of James, 199 A.2d 275, 277, 279–280 (Pa. 1964) (finding fault with a 400-year income accumulation mandate in a charitable trust on account of it being "absurd," "unreasonable," "unnecessary, charitably purposeless, and contrary to public policy").

466. Professors Pennell and Newman explain the clear instances of trusts which violate public policy:

> [A] trust may not interfere with familial relations, such as by (1) denying custody of a child (e.g., S creates a trust that will benefit P only after P agrees to grand custody of their child to S), (2) encouraging abandonment of child support . . . or (3) encouraging divorce. And a trust may not call for destruction or waste of trust corpus . . . .
>
> Unreasonable restraints on marriage are also invalid trust purposes. The key is "unreasonable restraints. The breadth and duration cannot be excessive, but some restriction is permissible . . . .
>
> Encouraging marriage or discouraging divorce almost certainly is copacetic, although a marriage might be abusive and the trust constitutes a financial handcuff preventing the beneficiary from breaking free . . . .
>
> Finally, a trust conditioning enjoyment on a beneficiary changing a religious affiliation likely would be an invalid restraint on religious freedom.

PENNELL & NEWMAN, *supra* note 349, at 227.

subject to disqualification on grounds of illegality or public policy,[467] the courts seem to be appreciably less deferential when noncharitable purpose trusts are reviewed.[468] In this context, the underlying motives and purposes of the individual donor are key, as are the practicalities of achieving the settlor's aims. The very power of testamentary freedom is granted by the state so that an individual "may use it for the benefit of other men who survive him; and to this end only can it be validly exercised."[469] This assortment of rules are as paternalistic in their approach as they are unpredictable in their outcomes.[470] A purpose that is, in the court's view, wasteful or useless will not be honored.[471] An aim that is too vague or too indefinite will be ignored.[472] And nearly any purpose, it sometimes seems, might be challenged on public policy grounds.[473] The settlor's plan faces second-guessing by the courts at every turn under the rules against capriciousness.[474] Here, the dead hand is at its most vulnerable and unprotected.

Because the majority of scholarship and jurisprudence on noncharitable purpose trusts in the United States has focused on pet trusts, most of the capriciousness concerns have seen expression in this context. And in the context of pet trusts, capriciousness usually means overfunding.[475] Leona Helmsley's pet trust is the most famous of these examples. She created a testamentary trust for her dog, Trouble, and devised six million dollars to it.[476] The probate court

467. *See* UNIF. TRUST CODE § 404 (UNIF. LAW COMM'N 2000) ("A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.").

468. *See, e.g.*, *In re* Swayze's Estate, 191 P.2d 322, 324–25 (Mont. 1948) (invalidating a testamentary directive to erect, operate, and maintain a hotel as a memorial to the testatrix as invalid for lack of certainty and violating RAP).

469. JOHN W. SALMOND, JURISPRUDENCE 424 (2d ed. 1907).

470. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. m (2003) (citations omitted) ("It is against public policy to enforce a trust provision that would divert distributions or administration from the interests of the beneficiaries to other purposes that are capricious or frivolous . . . [or] detrimental to the community . . . .").

471. Bove II, *The Purpose for Purpose*, *supra* note 116, at 36.

472. *See id.* at 34.

473. Kelly v. Nichols, 21 A. 906, 907, 908 (R.I. 1891) (invalidating a trust to keep a clock in repair); *In re* Gassiot (1901) 70 L.J. Ch. 242 (Eng.) (invalidating a trust to preserve a portrait); Kennedy v. Kennedy (1914) A.C. 215 PC (Can.) (invalidating a trust to maintain the testator's residence). All these instances are grouped as invalidations of noncharitable purpose trusts on account of their capricious motives by Scott and Ascher. MARK L. ASCHER ET AL., 2 SCOTT AND ASCHER ON TRUSTS § 12.11.7 (5th ed. 2006).

474. *But see* Magee v. O'Neill, 19 S.C. 170, 189 (1883) ("The power to give includes the right to withhold or to fix the terms of gift, no matter how whimsical or capricious they may be, only provided they do not in any way violate the law.").

475. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1935).

476. DUKEMINIER & SITKOFF, *supra* note 253, at 427.

reduced the bequest to two million dollars.[477] Legislation authorizing pet trusts typically invites the court to consider partial defunding of pet trusts.[478]

Legislation of noncharitable purpose trusts in overseas jurisdictions has generally been much less narrowly focused on pet trusts. As a result, the rules against capriciousness tend to be more oriented towards trusts for noncharitable purposes other than pets. Bermuda, for example, recognized noncharitable purpose trusts in 1989.[479] It requires the purpose of a noncharitable purpose trust to be "specific, reasonable and possible" and not for any unlawful or immoral purpose.[480] To require that a purpose trust articulate a purpose that is "possible" suggests that courts should consider not overfunding concerns but underfunding. A Bermuda purpose trust for "the promotion of democratic values" may be too vague.[481] A Bermuda trust for "good works" might be too uncertain.[482] A trust to board up a home for too long might be unreasonable.[483] Trusts created to set up schools for prostitutes might be void for illegality.[484] Courts may, at times, seem almost eager to set aside noncharitable purpose trusts, finding them "useless" and therefore void as a matter of public policy.[485] Trusts have been voided where the court determined that its purpose would amount to "a sheer waste of money."[486] Notably, trusts that provide funds for ascertainable beneficiaries or charitable purposes never seem to suffer such scrutiny.

2. The Noncharitable Equivalent to *Cy Pres*

Cy pres can be seen as either a solution or a problem depending upon the judge who wields it. The original bases for reforming a charitable trust under

477. *Id.* "In limiting the trust to $2 million, the court relied on evidence of Trouble's yearly expenses, including $100,000 for security and $8[000] for grooming, and on the dog's life expectancy." *Id.* Despite the reduction, "[p]roponents of pet trusts were delighted." *Id.*

478. *E.g.*, N.Y. EST. POWERS & TRUSTS § 7-8.1(d) (McKinney 2018).

479. Trusts (Special Provisions) Act of 1989, §§ 12–16 (Bermuda 1989), http://www.bermudalaws.bm/laws/Consolidated%20Laws/Trusts%20(Special%20Provisions)%20Act%201989.pdf. Such trusts are "commonly used in relation to asset-financing transactions as a vehicle to hold shares in a company or to purchase and sell or lease a specific asset." JOHN GLASSON, THE INTERNATIONAL TRUST, at A5-17 (2006).

480. Trusts (Special Provisions) Act of 1989, § 13(1).

481. GLASSON, *supra* note 479, at BF-19.

482. *Id.* (citing *In re* How [1930] 1 Ch 66.).

483. *Id.* (citing Brown v. Burdett (1882) 21 Ch D 667.).

484. *Id.* (*citing In re* Pinion [1965] Ch 85 at 105).

485. Brown v. Burdett (1882) 21 Ch D 667, 668.

486. M'Caig v. University of Glasgow (1907) SC 231 (Scot.). This Scottish case voided a trust to provide memorials to family members. *Id.*

cy pres were impossibility, illegality, and impracticality.[487] In a 1617 decision by Sir Francis Bacon, for example, a testator had bequeathed funds to generate income and support six scholars and two fellows at Emmanuel College.[488] The amount of the bequest was, Emmanuel College complained, inadequate for those purposes.[489] Lord Bacon obligingly varied the terms of the bequest to reallocate the income from fellowships to scholarships.[490] He found that the revisions were necessary "in respect of impossibility and inconvenience" so that the "will and meaning of the testator" might be achieved.[491] At the same time, *cy pres* can jettison settlor intent needlessly, as in the case of Dr. Albert Barnes discussed below.[492]

Doctrine also developed to deal with the situation where the testator had left not too little to accomplish an intended charitable purpose but too much ("surplus" cases).[493] More contemporary applications of the *cy pres* impossibility rule might involve a trust to care for freed American slaves or to help find a cure for polio.[494] Charitable bequests to the Catholic Church in seventeenth-century England would face modification on the basis of illegality.[495] A twentieth century court would declare a charitable trust for a park for whites only as illegal.[496] And as for uncertainty, as a prerequisite to *cy pres*, the doctrine could be applied to narrow an overly broad bequest to, for example, "the good of the poor" to support for particular parishes.[497] Certainty with charitable trusts is a relatively low threshold; the bequest need only be sufficiently certain that a court may enforce it.[498]

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487. RESTATEMENT (FIRST) OF TRUSTS § 399 (1935) ("If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible impracticable or illegal to carry out . . . the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.").

488. JONES, *supra* note 177, at 74 (citing Emmanuel Coll., Cambridge v. Eng. (1617)).

489. *Id.*

490. *Id.*

491. *Id.*

492. *See infra* notes 544–45 and the accompanying text.

493. JONES, *supra* note 177, at 90–93. These "surplus" rules of construction generally favored charities. *Id.* at 92.

494. *See, e.g.*, *In re* Estate of Bowne, 173 N.Y.S.2d 723, 728 (Surr. Ct. 1958) (applying *cy pres* where a "hospital has closed its doors because of the mastery achieved by medicine over the once dread disease of tuberculosis").

495. JONES, *supra* note 177, at 80–82. *See also, e.g.*, Da Costa v. De Pas, (1754) 27 Eng. Rep. 150 (Ch.) (varying a then-illegal bequest to form an assembly for the teaching of Jewish faith to a bequest to instruct Christian foundlings instead).

496. Evans v. Newton, 382 U.S. 296, 311–12 (1966) (White, J., concurring); *see also* Home for Incurables v. Uni. of Md. Med. Sys. Corp., 797 A.2d 746, 756 (Ct. App. Md. 2002) (refusing to enforce illegal racially discriminatory condition of charitable bequest).

497. JONES, *supra* note 177, at 88.

498. BOWE & PARKER, *supra* note 139, § 41.8.

Today, *cy pres* has undergone a moderate expansion to encompass charitable trusts that have become not quite impossible but merely wasteful.[499] A case of wastefulness is essentially a modern "surplus" case. The classic case for considering wastefulness as a ground for the application of *cy pres* was the Buck Trust, which was devoted to the needy of Marin County, California.[500] When the trust corpus grew unexpectedly from nine million dollars to over 300 million dollars, it motivated a petition for *cy pres*.[501] In a surplus case, a court may modify a charitable trust when the allocated funds "far exceed what is needed."[502] Yet the idea of *cy pres* is to preserve the donor's original intent insofar as possible.[503] In a sense, *cy pres* might be viewed as necessary to preserve donor intent. As Judge Posner muses,

> [S]ince no one can foresee the future, a rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting

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499. UNIF. TRUST CODE § 413(a). Contemporary jurisprudence is also doing away with the silly common law bifurcation exercise which asks whether the donor had a "general" or a "specific" charitable intent as a prerequisite to *cy pres*. *See* Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the* Cy Pres *Doctrine*, 40 STAN. L. REV. 973 (1988).

500. *See* John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641, 659–61 (1987) (unpublished decision reported therein); Tait, *supra* note 14, at 1689–94 (discussing the Buck Trust litigation).

501. DUKEMINIER & SITKOFF, *supra* note 253, at 773. When Mrs. Buck died, the largest share of her estate was comprised of stock in a privately held oil company. *Id.* "[I]n 1979, Shell Oil won a bidding war and bought the stock in the Buck Trust for $260 million." *Id.* "By 1984, the corpus increased to well over $300 million . . . ." *Id*.

502. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 179 n.164 (2002). A related doctrine – that of deviation – may also permit modification to a charitable trust. While *cy pres* is intended to modify a donor's ends, deviation is primarily aimed at altering the means – the administrative provisions of a charitable trust. PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 460 cmt. a (Tentative Draft No. 2, 2009).

> The traditional difference between *cy pres* and equitable deviation is that *cy pres* presents a more narrowly invoked, but more sweeping, power to alter the actual charitable purpose of a gift (traditionally described as a "substantive" deviation). In contrast, equitable deviation provides a more liberally applied, but narrower, power to deviate not from the charitable purpose itself, but from particular donor directions relating to carrying out that charitable purpose (traditionally described as a departure from an "administrative" term).

John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 729 n.153 (2007) (italics added).

503. *E.g.*, *In re* Shoemaker, 115 A.3d 347, 355 (Pa. Super. Ct. 2015) (quoting *In Re* Estate of Elkin, 32 A.3d 768, 778 (Pa. Super. Ct. 2011)) ("[A]pplication of the doctrine of *cy pres* is imprecise but the endeavor is to find the institution that 'will most nearly approximate the intention of the donor.'").

> modification of the terms of the bequest in the event that an unforeseen change frustrates his original intention.[504]

Arguably, *cy pres* is another element of the bargain between the donor and society by which perpetual charitable trusts with unascertainable beneficiaries are permitted. In this sense, *cy pres* represents additional consideration in the exchange between the community and the settlor in establishing a charitable trust – greater flexibility and accommodations from society in exchange for a public benefit bestowed by the settlor. *Cy pres* arises from the equitable concern with preserving charitable bequests.[505] The aim of *cy pres* is to "to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter."[506]

As noted above, the longer the term of a trust, the more likely it will become outdated and need a freshening up – textually speaking.[507] With charitable institutions and for-profit organizations, such as corporations, amendments to the governing documents are straightforward: Articles and bylaws can be amended by the constituents (typically by a majority vote of the board of directors).[508] With irrevocable trusts, amendments are rarely authorized.[509] *Cy pres* is the most common way a court can amend a charitable purpose trust. Other amendment options (for example, deviation) may be available to both charitable and noncharitable trusts.[510] The availability of *cy pres* – or some form of it – to noncharitable purpose trusts can prove beneficial for both *freshening up* amendments as well as potentially addressing some more critical flaws, such as a violation of RAP or a finding that the purpose is too uncertain.[511]

The three historical bases for *cy pres* (impossibility, illegality, and impracticality) along with its newcomer (wastefulness) map those charitable trust

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504. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 712 (9th ed. 2014). On the other hand, "Some rational donors, mistrustful of judges' ability to alter the terms of a bequest intelligently in light of changed conditions, might prefer to assume the risks involved in rigid adherence to the original terms." *Id.*

505. Obermeyer v. Bank of America, N.A., 140 S.W.3d 18, 22 (Mo. 2004) (en banc).

506. Thatcher v. Lewis, 76 S.W.2d 677, 682 (Mo. 1934).

507. *See supra* Section II.C.1.

508. *But see* Banner Health Sys. v. Long, 663 N.W.2d 242, 250 (S.D. 2003) (recognizing that an implied charitable trust theory regarding donor contributions may impair the ability of a nonprofit corporation's articles of incorporation to be amended).

509. *But see* UNIF. DIRECTED TRUST ACT § 6 cmt. (2017) (explaining that a trust director can be given the power to amend a trust).

510. *See* Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1308 (2010) (italics added) ("[*C*]*y pres* has proven difficult to distinguish from its fraternal twin –equitable deviation.").

511. *But see* Miller v. Teachout, 24 Ohio St. 525, 529 (1874) ("Where a charitable or other trust is so vague, indefinite, and uncertain as to be incapable of being carried out, as made by the donor, our courts will not, nor have they the power to, devise a scheme and establish the trust *cy pres* the testator's intention.").

problems best repaired by means of *cy pres*, especially – but not exclusively – when brought on by obsolescence and changed circumstances.[512] The usual understanding of *cy pres* is that its application is exclusively reserved to charitable trusts.[513] Other possibly less helpful doctrines, such as deviation, are supposed to fill the gaps.[514] In those jurisdictions where deviation is relatively liberal, it may supply the want. But *cy pres* can be particularly helpful for dynastic noncharitable purpose trusts. After all, in their conception, they are similar to charitable trusts: long-term trusts not for a class of individuals but for an aim.[515]

The historical, noncharitable means of trust alteration are reformation and modification, which are two independent doctrines (although the terms are often used interchangeably).[516] Reformation corrects trust terms.[517] If a trust is imperfectly expressed due to mistake or ambiguity, the terms can be modified to more accurately set forth the settlor's intent.[518] When reformation is approved, it is effective ab initio and it affects the beneficiaries retroactively.[519] Typically, reformation requires clear and convincing evidence of the settlor's intent.[520] Modification, by contrast, represents a variation from the original trust terms.[521] Modification is employed to modernize or update a trust, improve on efficiency in trust administration, or address a change in circumstances unanticipated by the settlor.[522] Deviation – a third doctrine – allows courts to depart from the terms of a trust when its administration has become

512. *See* UNIF. TRUST CODE § 413 (UNIF. LAW COMM'N 2000).

513. *In re* Latimer Trust, 78 A.3d 875, 880 (Del. Ch. 2013).

514. *E.g.*, *In re* Pulitzer, 249 N.Y.S. 87 (Sur. 1931) (approving equitable deviation from the administrative terms of Joseph Pulitzer's testamentary trust, which had originally prohibited the sale of any shares in the corporation publishing the *World* newspapers when corporate losses mounted and share prices plummeted, reasoning that the settlor's dominant purpose was to benefit the trust's beneficiaries, not his corporation).

515. *See* Anthony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879, 939 (1999) ("It is in the nature of a purpose trust that in time circumstances may change such that continued adherence to the terms of the trust would not achieve the settlor's original intent."); Hirsch, *Delaware Unifies*, *supra* note 116, at 22 ("Delaware's extension of the cy pres doctrine to noncharitable purpose trusts is particularly commendable . . . ."); Hirsch, *Trusts for Purposes*, *supra* note 116, at 948 n.153 ("On the Isle of Jersey, the cy pres doctrine applies to noncharitable purpose trusts.").

516. *In re* Ethel F. Peierls Charitable Lead Unitrust, 59 A.3d 464, 469–70 (Del. Ch. 2012); RESTATEMENT (THIRD) OF TRUSTS §§ 62, 65 (2001).

517. *Peierls*, 59 A.3d at 470.

518. *Id.*; *see also* RESTATEMENT (THIRD) OF TRUSTS § 62.

519. *See Peierls*, 59 A.3d at 70.

520. Roos v. Roos, 203 A.2d 140, 142 (Del. Ch. 1964).

521. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 65, *with id.* § 62.

522. *In re* Merlin A. Abadie Inter Vivos Trust, 483 So. 2d 1292, 1294 (La. Ct. App. 1986); *In re* Riddell, 157 P.3d 888, 890 (Wash. Ct. App. 2007).

impossible or circumstances unanticipated by the settlor would impair the accomplishment of the trust's aims absent deviation.[523] Deviation typically applies only to administrative modifications, not substantive ones.[524] Decanting – a fourth doctrine – also permits changes to the terms of a trust.[525] Decanting represents a trustee's discretionary authority to distribute trust assets to another trust with different terms than the first.[526] If all the assets are distributed to the new trust, the original trust has essentially been reworded and reframed.[527] With the exception of decanting, each of these four means by which trusts can be modified typically require some level of beneficiary consent, at least where beneficiaries are ascertainable. *Cy pres* is unique insofar as it is not construed on a foundation of beneficiary involvement but is instead premised on attorneys' general input.

Cy pres, unlike deviation-related doctrines, may require a preliminary showing of not just frustration but a general charitable intention on the part of the settlor.[528] Where the settlor's intent was specific – such as directing trust distributions to a particular charity that had dissolved – *cy pres* was unavailable, and the trust simply failed.[529] More recently, the prerequisite of a general charitable intent has been loosened.[530] It seemed to have served as an unhelpful

523. PNC Bank v. N.J. State Soc'y for the Prevention of Cruelty to Animals, 2008 WL 2891150, at *7 (Del. Ch. 2008); RESTATEMENT (THIRD) OF TRUSTS § 66.

524. Wood v. Lincoln Gen. Hosp. Ass'n, 288 N.W.2d 735, 738 (Neb. 1980).

525. *See* UNIF. TRUST DECANTING ACT (2015). Morse v. Kraft, 992 N.E.2d 1021, 1024 (Mass. 2013) (quoting William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 2–3 (2010) ("Decanting is the term generally used to describe the distribution of [irrevocable] trust property to another trust pursuant to the trustee's discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries [of the original trust].").

526. Ferri v. Powell-Ferri, No. MMXCV116006351S, 2013 WL 5289955, at *6 (Conn. Super. Ct. 2013).

527. William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 13 (2010) ("[P]ractitioners can use trust decanting to modernize the terms of a trust, correct drafting errors, or accommodate current administrative or management needs or the needs of the beneficiaries.").

528. *See generally* EDITH L. FISCH, THE *CY PRES* DOCTRINE IN THE UNITED STATES 147–63 (1950) (discussing the general charitable intent prerequisite).

529. *E.g.*, Merrill v. Hayden, 29 A. 949 (Me. 1893) (finding that where a residual trust distribution was to be carried out to the Maine Free Baptist Home Missionary Society which had dissolved and its property transferred to another entity for a different purpose, the legacy lapsed because *cy pres* was unavailable given the settlor's specific charitable intent); John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 133 (2010) ("[T]he donor's intentions must have been broad enough to transcend absolute adherence to the very particular restrictions that the donor placed on the use of the gifted assets now that current circumstances frustrate compliance with those restrictions.").

530. UNIF. TRUST CODE § 413 cmt. (UNIF. LAW COMM'N 2000) (creating a presumption of general charitable intent).

requirement in most cases.[531] *Cy pres* enables the settlor's intent to be effectuated, not thwarted.[532] It demands a return to the mind of the settlor.[533] As the Supreme Court of Wisconsin has explained,

> Only when the alternatives posed by the testator are exhausted and each of them has proved to be impossible, illegal, or impracticable, need the court resort to *cy pres*. In the absence of such necessity, it is error to invoke the doctrine – to do so would permit a court to substitute its judgment and discretion and dispositive intent for that of the testator.[534]

There is some – but not much – authority for applying *cy pres* to noncharitable purpose trusts.[535] In *Edgerly v. Barker*, for example, the Supreme Court of New Hampshire approved the application of *cy pres* to a trust for ascertainable beneficiaries, which violated RAP, by changing the words "age forty" to "age twenty-one."[536] Expansion of *cy pres* to noncharitable trusts, however, so

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531. *Id.* ("Courts are usually able to find a general charitable purpose . . . no matter how vaguely such purpose may have been expressed . . . ."); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (labeling the general intent inquiry artificial and speculative); FISCH, *supra* note 528, at 159 (noting that overemphasis on the general intent requirement has impeded the solutions offered by *cy pres*); Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41, 46 (1989) ("[T]he general intent requirement is not only unclear but mischievous. . . ."); Laird, *supra* note 499, at 977 (asserting that a quest for a general charitable intent is unproductive).

532. *In re* R.B. Plummer Mem'l Loan Fund Tr., 661 N.W.2d 307, 312 (Neb. 2003). In *Plummer*, the court refused to grant the University of Nebraska Foundation's request to modify a trust designed to provide student loans and instead provide scholarships. *Id.* The court found that the facts failed to demonstrate that student loans had become impractical. *Id.* at 313; *accord, e.g.*, *In re* Estate of Berry, 139 N.W.2d 72, 78 (Wis. 1966) (declining to apply *cy pres* under similar facts). The Supreme Court of Wisconsin stated:

> Perhaps greater social good can be accomplished by using these funds for direct grants to students, but it is not for this or any court to determine the relative wisdom of a bequest and to substitute its judgment for that of the testator. The function of the court is to probate wills and not to write them.

Id.

533. *See* Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1197 (2003) ("[*C*]*y pres* demands a return to the mind of the testator . . . .") (italics added).

534. *Estate of Berry*, 139 N.W.2d at 78.

535. *E.g.*, DEL. CODE ANN. tit 12, § 3541 (West 2018). *But see In re* Pierce, 136 A.2d 510, 516 (Me. 1957) ("The doctrine of *cy pres* does not apply to private trusts.") (italics added).

536. 31 A. 900, 916 (1891); *see also* SIMES, *supra* note 22, at 75 (approvingly describing the decision); *accord In re* Estate of Chun Quan Yee Hop, 469 P.2d 183, 187 (Haw. 1970) (reforming a thirty-year contingency down to twenty-one years); *see generally* James Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the*

far seems limited to instances of RAP violations. If RAP can be corrected by *cy pres*, then by extension, RAP-related problems, such as RAA and unreasonable restraints on alienation, seem likely candidates for *cy pres* fixes to noncharitable purpose trusts as well.[537] Traditionally, *cy pres* seemed reserved to purposes that had become difficult or impossible to achieve over time and was not used to correct foundational problems with a trust such as a RAP violation.[538]

Although the availability of *cy pres* (or some variation thereof) to noncharitable purpose trusts is essential to permit the kind of periodic maintenance that ensures fully functioning trusts, the power, like any, is subject to abuse and misapplication.[539] The workings – and potential shortcomings – of traditional charitable trust *cy pres* in action can be seen with two examples. The first is a fairly typical application of *cy pres* in the nineteenth-century case of *Jackson v. Phillips*.[540] In that case, an abolitionist-testator died in 1861, leaving several thousand dollars in trust to fan public sentiment in favor of emancipation.[541] After the Thirteenth Amendment was ratified, the court articulated a new, similar purpose for the remaining funds – promoting the education and support of former slaves.[542] Thus, the trust continued for a purpose as near as possible to

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Rule Against Perpetuities and Trusts for Accumulation, 21 N.Y.U. L.Q. REV. 384 (1946).

537. *See, e.g.*, Oldfield v. Attorney General, 106 N.E. 1015 (Mass. 1914) ("[T]he court will rather apply the doctrine of *cy pres*, where that can be done with due regard to the intention of the founder of the trust, than allow an indefinite or unduly prolonged accumulation of income . . . ."); *In re* Estate of James, 199 A.2d 275, 280 (Pa. 1964) (applying *cy pres* to remedy a charitable trust containing an invalid accumulation of interest provision).

538. *E.g.*, Foshee v. Republic Nat'l Bank of Tex., 617 S.W.2d 675, 678–79 (Tex. 1981) (declining to apply *cy pres* to remedy a trust's violation of RAP). *But see* TEX. PROP. CODE ANN. § 5.043(b) (West 2017) (allowing *cy pres* to remedy RAP problems). The statute "was amended in 1991 to clarify that a noncharitable gift or trust [that] violates [RAP] can be reformed so that it does not violate the rule in order to avoid the confusion created by" cases like *Foshee*. 2 THOMAS M. FEATHERSTON, JR., ET AL., TEX. PRACTICE GUIDE: PROBATE *Cy Pres and the Rules Against Perpetuities* § 13:92, West, (database updated Dec. 2017).

539. *E.g.*, Castle v. Cohen, 676 F. Supp. 620, 628, 628 n.8 (E.D. Pa. 1987) (adopting an approach analogous to *cy pres* to enforce contract with retirement trust trustees which could not be enforced according to its terms), *aff'd and remanded*, 840 F.2d 173 (3rd Cir. 1988).

540. Jackson v. Phillips, 96 Mass. 539 (1876). *Jackson* represents "a fairly straightforward application of *cy pres*." Anton Chaevitch, Note, *When Charity Meets Racism: The Story of* Cy Pres *in the United States and England*, 54 COLUM. J. TRANSNAT'L L. 502, 509 (2016).

541. *Jackson*, 96 Mass. at 541.

542. *Id*. at 599; U.S. CONST. amend. XIII. The court refused to apply *cy pres* to modify the trust's purposes towards the end of achieving voting rights for women. *Jackson*, 96 Mass. at 571.

the original purpose.[543] The second example is the complex, atypical, but instructive case of the Barnes Trust.

Dr. Albert Barnes grew up poor and worked his way through medical school using fees earned as an amateur boxer.[544] He went on to help invent the pharmaceutical Argyrol and amassed a fortune that fed his hobbies, which included collecting impressionist paintings (before impressionism was cool) and African sculptures.[545] He and his agents purchased many works directly from the artists.[546] His collection grew to include canvasses by Modigliani and Miró.[547] In the end, there were 59 works by Matisse, 69 Cézannes, and 181 Renoirs.[548] Barnes had unconventional ideas about art and how to view it.[549] He insisted on education as part of his Argyrol workforce.[550] He also emphasized education as a primary mission of his foundation, which took the form of a school more than a museum.[551] Snubbed by snobs (he was a butcher's son), he refused to let art critics see his collection even after it became celebrated

543. *But see* Thatcher v. Lewis, 76 S.W.2d 677, 678, 684 (Mo. 1934) (refusing to apply *cy pres* to an 1851 trust originally for the purpose of providing "relief to all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West" so that "funds be used to erect a building for the administration of the relief.").

544. JOHN ANDERSON, ART HELD HOSTAGE: THE BATTLE OVER THE BARNES COLLECTION 13 (2013).

545. *Id*. at 20–23, 27; HOWARD GREENFIELD, THE DEVIL AND MR. BARNES 67–71 (1987); *see also* CHRISTA CLARKE, AFRICAN ART IN THE BARNES FOUNDATION: THE TRIUMPH OF L'ART NEGRE AND THE HARLEM RENAISSANCE (2015) (describing the Barnes' African art collection in depth).

546. ANDERSON, *supra* note 544, at 24–27.

547. Jeffrey Toobin, *Battle for the Barnes*, THE NEW YORKER, Jan. 21, 2002, at 34.

548. *Id*.

549. *See id*. Some rooms featured only a single painter, but others featured a mash of styles, and eras of art. *Id.* Barnes aimed to use his art to "redress issues of inequality, particularly racial prejudice . . . ." *Id.*

550. *See id*. ("Barnes' multicultural agenda is what separates his foundation from the other collections turned museums . . . ."); ANDERSON, *supra* note 544, at 34 ("Barnes also rejected the conventional academic scholarship of his day . . . ."); SITKOFF & DUKEMINIER, *supra* note 253, at 777 ("Dr. Barnes had unconventional theories about art education."). *See generally* ALBERT C. BARNES, THE ART IN PAINTING (1925); ALBERT C. BARNES & VIOLETTA DE MAZIA, THE ART OF CEZANNE (1939).

551. Workers at Barnes' Argyrol factory worked six-hour days with two hours each day dedicated to education. Judith F. Dolkart, *To See as the Artist Sees: Albert C. Barnes and the Experiment in Education*, *in* THE BARNES FOUNDATION: MASTERWORKS 9, 17 (Judith F. Dolkart & Martha Lucy, eds., 2012). Workers would listen to texts by authors such as John Dewey and Bertrand Russell. *Id*. Similarly, his foundation "launched educational courses and a robust publishing program." *Id*. at 21.

and barred entry to most all but the "plain people" (Barnes' words).[552] Some critics would sneak into his galleries disguised as miners or chauffeurs.[553]

Barnes died unexpectedly in 1951, leaving an agreement, indenture, and charter for the Barnes Foundation with a number of stipulations for his art collection.[554] Barnes' idiosyncrasies were worked into his foundation but were constrained, however, by the charitable character of the entity.[555] For years afterwards, his handpicked successor, Violette de Mazia, ensured strict adherence to Barnes' original and eccentric vision, although the courts did require greater public access to the collection given its charitable and therefore public-oriented nature.[556] De Mazia had been a strict and faithful disciple during

552. ANDERSON, *supra* note 544, at 9. Barnes desired that "the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access to the art gallery and the arboretum upon those days when the gallery and arboretum are to be open to the public . . . ." Commonwealth v. Barnes Found., 159 A.2d 500, 502 (Pa. 1960) (quoting Dr. Barnes).

553. *See* THE ART OF THE STEAL (MPI Home Video 2010). William Schack relates:

> A man out for a Sunday morning stroll met up with [Dr. Barnes] walking his dogs. In an exchange of small-talk Barnes was so amiable that the man was emboldened to say that he had heard of the fine collection and would like to see it. Barnes's manner stiffened. "I never admit curiosity-seekers to my gallery," he said. That was the usual reply to mere neighbors. "Well then," retorted this one, "you can go to hell. I was only trying to be polite." Barnes at once backed down: "I will be very glad to have you come in any time you want to."

WILLIAM SCHACK, ART AND ARGYROL: THE LIFE AND CAREER OF DR. ALBERT C. BARNES 178 (1960).

554. John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 486, 492–50 (2003); *see also* Barnes Found. v. Keely, 171 A. 267, 268–69 (Pa. 1934) (describing the legal structure Barnes Foundation in a dispute over the foundation's eligibility for charitable exemption from city and school taxes).

555. *See* Wiegand v. Barnes Found., 97 A.2d 81, 86 (Pa. 1953) (Musmanno, J., dissenting). Justice Musmanno, in his dissent, stated:

> Dr. Barnes, in his lifetime, not unlike other geniuses, leavened the force of a powerful personality with the yeast of whim and idiosyncracy [sic]. The Board of Trustees apparently are seeking to perpetuate an idiosyncratic trend . . . . Every one [sic] has the right to dispose of his money, property, and other possession as he chooses, but once he stamps them with a public interest to the extent that they are exempt from public taxation he divests himself of the arbitrary control which was once his.

Id at 86–87. In the end, Barnes' legacy paid a dear price for its charitable tax exemption.

556. Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 673 (1997) ("Adherence to Barnes's intentions was due in large part to the tight-fisted control held by the last trustees Barnes had personally appointed, particularly Violette deMazia [sic]."); *see Barnes Found*., 159 A.2d at 506 ("[T]he trustees of the Barnes

Barnes' lifetime and continued his vision after the doctor's death.[557] She survived him as the "keeper of the Barnes candle" for thirty-eight years.[558] But de Mazia died in 1989.[559] It then came to light that rigid investment restrictions, imposed by Barnes, coupled with the inflation of the previous decades had caused the purchasing power of the foundation's endowment to dwindle.[560] Meanwhile, the institution's infrastructure had aged while the market value (along with the conservation needs, presumably) of its collection had soared.[561] Those weaknesses were pounced on by Philadelphia's officials with ambitions to transform the collection at its outskirts into a downtown tourism bonanza.[562] The officials succeeded.[563] With *cy pres* and a series of court battles,[564] Barnes' unique educational institution in suburban Merion, Pennsylvania, was remade into a major tourist draw in downtown Philadelphia right on Benjamin Franklin Parkway. Barnes' vision had been thoroughly transmogrified from a unique educationally-oriented cultural asset into a slick "urban redevelopment project."[565] Today, a wealthy Philadelphian can even rent the facilities for his daughter's bridal shower.[566] Barnes' singular vision was significantly and needlessly blurred by a politicized *cy pres*.

Foundation may not exclude the public from the art gallery without offering explanation as to why it ignores the expressed intention of Dr. Barnes that the gallery shall, within certain restrictions, be open to the public."); *see also Wiegand*, 374 Pa. at 157 (affirming the dismissal of a complaint about access to the art for lack of standing). Later, the Barnes Foundation agreed to a consent decree that guaranteed public admission on Fridays and Saturdays, but by appointment only. ANDERSON, *supra* note 544, at 82.

557. GREENFIELD, *supra* note 545, at 144–45.

558. ANDERSON, *supra* note 544, at 57.

559. *Id.*

560. *Id*. at 49–50.

561. *Id.*

562. *See* DUKEMINIER & SITKOFF, *supra* note 253, at 778–80 (describing the Barnes relocation plan pursued by "mainstays of Philadelphia philanthropy").

563. ANDERSON, *supra* note 544, at 233-35.

564. *In re* Barnes Found., No. 58,788, 2004 WL 1960204 (Pa. Ct. Com. Pl. Jan. 29, 2004); *In re* Barnes Found., No. 58,788, 2004 WL 2903655 (Pa. Ct. Com. Pl. Dec. 13, 2004); *In re* Barnes Found., 684 A.2d 123 (Pa. Super. Ct. 1996); *In re* Barnes Found., 672 A.2d 1364 (Pa. Super. Ct. 1966).

565. GREENFIELD, *supra* note 545, at 302 (quoting art critic Christopher Knight); *see also* Abbinante, *supra* note 556, at 686 ("The deviations undertaken by the Barnes trustees . . . have effectively transformed the Foundation into a museum . . . .").

566. *See Weddings*, BARNES FOUND., https://www.barnesfoundation.org/host-an-event/weddings (last visited Sept. 1, 2018) ("[T]he Barnes – both inside and out – provides a stunning backdrop for weddings, as well as engagement parties, rehearsal dinners, and bridal showers."). Dr. Barnes would be disappointed. *See* Wiegand v. Barnes Found., 97 A.2d 81, 86 (Pa. 1953) (Musmanno, J., dissenting) (quoting paragraph 33 of the Barnes indenture) (confirming the "democratic and educational" character of Barnes' gift and forbidding "special privileges" such as holding "tea parties, dinners, banquets, dances, musicales or similar affairs" in the buildings of the Barnes Foundation).

One final note on the manner in which the trajectory of long-term trusts can be properly adjusted from time to time as circumstances change is that, short of the rather blunt instruments of deviation variations or *cy pres* to literally change the text of a trust instrument, judicial direction may be sought as to the correct interpretation of that text. In *In Re Pierce*, the Supreme Judicial Court of Maine considered a charitable trust for "the most good to the class of indigent seamen."[567] The original trust corpus was quite modest. Indeed, the heirs of the settlor argued that the trust should fail for indefiniteness and because "the amount available was so small as to render it impossible to carry out the provisions of the trust . . . ."[568] These objections were overruled.[569] Later, the settlor's investment in a start-up leather business organized by a friend ballooned from $3000 to more than $300,000, and a new problem was created.[570] There was an insufficient number of indigent seamen of the settlor's class to allow the distribution of even the trust income.[571] The settlor, Captain Joseph How, had commanded a square-rigged, three-masted vessel.[572] He died in 1870.[573]

Some years after Captain How's death, the trustee filed a petition asking for (1) permission under *cy pres* to expend funds for the benefit of other classes of seamen such as lobstermen and fishermen or (2) construction of the trust term "seamen" as including such other classes of individuals.[574] The remainderman-heirs opposed the petition and argued that the trust failed and reverted to them.[575] The court approved the trustee's petition more as a matter of construing the trust terms than as an application of *cy pres*.[576] The court said, "We reach this conclusion not necessarily through the application of the *cy pres* doctrine [] but rather through an interpretation of the intention of the testator at the time be executed his will."[577] After reviewing dictionary definitions of "indigent" and "class" as well as case law construction of the term "seamen,"

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567. 136 A.2d 510, 512–13 (Me. 1957) [hereinafter *Pierce II*].

568. *Id*.

569. *See id*. The charitable aspect of the trust was not challenged after Captain How's death in 1870 until some forty years later because there were intervening private individual beneficiaries, including the Captain's surviving spouse. *See In re* Pierce, 84 A. 1070, 1071 (Me. 1912). The corpus in 1912 was only about $1500. *Id*.

570. *Pierce II*, 136 A.2d at 513.

571. *Id*. at 514.

572. *Id*. at 512.

573. *Id*.

574. *Id*. at 514. The attorney general took the same position. *Id*.

575. *Id*. at 514–15. The heirs argued (1) that the trust had failed; (2) that Captain How did not have a general charitable intent; and (3) that the trustee's petition to construe or amend the trust was barred under res judicata on account of the earlier decision construing the trust as sufficiently definite. *Id*.

576. *See id.* at 521–522.

577. *Id.* (italics added). *Contra* Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 644 n.74 (1988) (italics added) (characterizing *Pierce II* as having applied "a *cy pres* analysis").

the court concluded that the trustee was free to distribute not only for the benefit of indigent seamen of Captain How's class but also "crewmen of merchant vessels, oil tankers, and fishing vessels."[578] The lesson from *Pierce* is that a petition to construe the terms of a trust may be less radical, and therefore more easily achieved, than a petition to modify the trust's terms under *cy pres*.[579]

E. Noncharitable Purpose Trusts: Recognition Achieved

1. The Evolution: Honorary Non-Trusts

Noncharitable purpose trusts can be traced back several centuries. The earlier historical evolution of noncharitable purpose trusts has been hinted at above, stretching back to the reign of Henry VIII and earlier.[580] This Section outlines the evolution of noncharitable purpose trusts during the twentieth century. The First Restatement of Trusts, promulgated in 1935, took a baby step towards validating settlor attempts to create noncharitable purpose trusts, including trusts to erect or maintain tombstones, the care of graves, the support of pets, and "saying masses in States in which a trust for the saying of masses is not charitable."[581] Section 124 explained that

> [w]here the owner of property transfers it upon an intended trust for a specific non[]charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorized by the terms of the intended trust so to apply the property beyond the period of [RAP], or the purpose is capricious.[582]

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578. *Pierce II*, 136 A.2d at 521–22. "Seamen," the court emphasized, "is a flexible word . . . ." *Id*. (quoting 79 C.J.S. *Seamen* § 1(a), at 490 (currently at 78A C.J.S. *Seamen* § 1, West (database updated 2018)).

579. *See, e.g.*, Hinkley Home Corp. v. Bracken, 152 A.2d 325, 327–28 (holding that underutilization is no grounds for *cy pres*).

580. *See supra* Section II.C.2.a.

581. RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. d (1935). The Restatement noted that in most states, trusts for the saying of masses are held to be charitable. *Id.* cmt. e.

582. *Id.* § 124; *see also id.* § 419(1) ("Where the owner of property gratuitously transfers it inter vivos for a purpose which is not enforceable because there is no definite or definitely ascertainable beneficiary designated, the transferee can properly apply the property to the designated purpose until his authority to make such application is revoked by the transferor or is terminated by the death or incapacity of the transferor.").

> Thus, if the owner of certain animals pays a sum of money to another in trust to care for the animals as long as they live, and neither the transferee nor a third person is given a beneficial interest in the animals or in the money, the transferee can properly apply the money for the care of the animals, but the transferor can at any time terminate the authority of the transferee and can compel him to

Section 124 thus exempted noncharitable trusts from the beneficiary principle but not from the second major bar to their validity – RAP. More significantly, however, section 124 did not recognize noncharitable trusts as actual trusts. Instead, it recognized noncharitable purpose trusts as "honorary" trusts, which is a misnomer because the section clear states that "no trust is created."[583] An unenforceable trust, one might quickly conclude, is no trust at all. But there is a difference. Typically, a trust that is void (say, for violating RAP) cannot be administered by the trustee and simply re-vests in the transferor or passes to the remaindermen.[584] But an honorary trust can be administered so long as the trustee willingly administers it.[585] Thus, noncharitable purpose trusts could be administered so long as the purpose satisfied the "non-capricious" standard, RAP was not violated, and the trustee (actually more a transferee) was willing to administer the trust.[586] With "honorary" trusts, there was, at least, a chance that the settlor's intent might find fulfillment.

Under the First Restatement's construction, a noncharitable purpose trust was especially fragile and subject to the willingness of a trustee (or transferee) to perform.[587] Indeed, the Restatement characterized its recognition of trusts intended to be administered for a noncharitable purpose as non-trusts: "[I]t is more accurate to state that the trustee has a power than it is to state that he holds

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> return the animals and so much of the money as he has not already expended in the care of the animals.

Id. cmt. c. In other words, under the First Restatement reasoning, an inter vivos conveyance to a pet trust would never qualify as a completed gift since the settlor always retained a power of revocation. *See* I.R.C. §§ 2036, 2038 (2012).

583. RESTATEMENT (FIRST) OF TRUSTS § 124.

584. *See, e.g*., First Universalist Soc'y v. Boland, 29 N.E. 524, 525 (Mass. 1892) (holding where property was transferred to a church so long as devoted to certain religious beliefs, then to others, the gift over was too remote, so the church held a fee simple determinable, and when the land was no longer used for specified purposes it would revert to the grantor or his estate).

585. RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. b (reasoning that a legatee can properly apply the property to the designated purpose, "if the purpose is not capricious and there is no violation of the principle of [RAP]"); *see also* UNIF. TRUST CODE § 408 (UNIF. LAW COMM'N 2000) ("[H]onorary trusts … are arguably no more than powers of appointment . . . .").

586. *See* RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. g.

> It is impossible to draw a clear line between purposes which are capricious and those which are not. A purpose is not capricious merely because no living person benefit from its performance . . . . [I]t is capricious to provide that money shall be thrown into the sea or that a field shall be sowed with salt or that a house shall be boarded up and remain unoccupied.

Id.

587. *See Favor of Animals*, *supra* note 246, at 1291 (emphasizing the trustee's "willing[ness] to perform").

upon trust, whether honorary or otherwise."[588] How a transferee's fiduciary obligations figured into this equation was unclear. Since the remainder interest in a noncharitable purpose trust is almost always an ascertainable beneficiary (for example, the settlor's estate or heirs-at-law), the transferee would be charged with a duty of impartiality.[589] The transferee must always balance the interests of the ascertainable remaindermen against the interests of the noncharitable purpose.[590] If the transferee had powers (but no duties) with regard to the noncharitable purpose, it would seem that the duties to the remaindermen would always trump the purpose and compel the transferee to refuse to administer the trust for its noncharitable purpose, thereby accelerating the distributions to the remaindermen.[591] This seems the logical outcome. The Restatement comments, however, failed to map any transferee liability if she chose to delay the remaindermen possession by applying funds to the noncharitable purpose.[592]

2. The Revolution: Enforceable Noncharitable Purpose Trusts

The 1990 amendments to the Uniform Probate Code ("UPC") were the first to provide a template for state legislatures in recognizing noncharitable purpose trusts as trusts.[593] The amendments allowed both for trusts that identify a particular noncharitable purpose as well as for trusts that delegate the selection of noncharitable purposes to the trustee.[594] Amendments by the Uniform Law Commissioners three years later authorized pet trusts.[595] To deal with the RAP problem inherent in pet trusts, the UPC provided that the trust

588. RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. c.

589. *See* UNIF. PROBATE CODE § 2-907(c)(2) (providing that, upon termination of a purpose trust, the trustee will distribute the remainder as provided in the trust or, if the trust is silent, pursuant to the wills' residuary clause where the trust was created in a nonresiduary clause, otherwise to the settlor's heirs); *see also* UNIF. TRUST CODE §§ 408(c), 409(3) (providing that excess property trimmed from a purpose trust by a court will be returned to the settlor or her heirs).

590. *See* RESTATEMENT (FIRST) OF TRUSTS § 183 (providing that a "trustee is under a duty to deal impartially" with beneficiaries); *Id.* § 232 (explaining that where there are successive beneficiaries, "the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.").

591. *Id.* § 124 cmt. a ("[T]he transferee is not under a duty and cannot be compelled to apply the property to the designated purpose . . . ."); *id*. cmt. b (explaining that where the transferee refuses to apply funds to the noncharitable purpose identified by the settlor "he will be compelled to hold it upon a resulting trust for the settlor or his estate.").

592. *See id.* cmt. d.

593. *See* UNIF. PROBATE CODE § 2-907 (amended 1993); Ausness, *supra* note 116, at 351; Hirsch, *Trusts for Purposes*, *supra* note 116, at 916–17.

594. *See* UNIF. PROBATE CODE § 2-907(a) (providing that "a trust for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee" which lack an ascertainable beneficiary is enforceable).

595. Ausness, *supra* note 116, at 352; *see* UNIF. PROBATE CODE § 2-207(b). "[A] trust for the care of a designated domestic or pet animal is valid." *Id.*

would simply terminate upon the death of the last animal "covered by the trust."[596] Other noncharitable trusts would remain subject to RAP and possibly its common law variant.[597] Additional influential provisions in the new code section created the office of a purpose enforcer and allowed a trustee to designate a replacement if the named trustee was unwilling to carry out the terms of the trust – a significant departure from the concept of an "honorary trust."[598] Rather than collapsing the trust if the trustee was unwilling to perform, the UPC provided that another trustee could be appointed.[599]

Ten years after the initial 1990 UPC amendments, the Uniform Trust Code ("UTC") authorized purpose trusts without "a definite or definitely ascertainable beneficiary."[600] The most common use that the UTC contemplated was preservation of a cemetery plot in perpetuity.[601] The general rule under the UTC was that purpose trusts could last no longer than twenty-one years.[602] Most significantly, the UTC – like the UPC – permitted truly enforceable (and not merely honorary) noncharitable purpose trusts.[603] The UTC allowed enforcement powers akin to those of an ascertainable beneficiary to be exercised by a person appointed by the terms of the trust (or by the court, if the trust instrument failed to do so).[604] Courts were invited by UTC section 409 to reduce the amount by which the trust was funded in the event that the trust estate exceeded the sum needed to accomplish the trust's purpose.[605] A separate section of the UTC authorized "pet trusts" with a parallel judicial de-funding invitation and an enforcer provision.[606] The current Restatement of Trusts agrees, treating what the Restatement (First) would have recognized as merely an honorary transfer as a true trust but still jeopardizing their enforcement by conditioning trust administration upon the trustee's willingness to do so.[607]

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596. *Id.* The pet trust durational limitation to pet lives in being would seemingly eliminate any continuing trust after the pet's death to maintain its gravestone. *Cf.* JOHN IRVING, THE HOTEL NEW HAMPSHIRE 190–92 (1981) (wherein a taxidermist preserves a deceased family dog for the family's ongoing enjoyment).

597. *See* UNIF. PROBATE CODE § 2-907; Ausness, *supra* note 116, at 352. *See* the secondary RAP rule applicable to noncharitable purpose trusts *supra* note 392.

598. *See* UNIF. PROBATE CODE § 2-907(c)(4) (providing that the noncharitable purpose "can be enforced by an individual designated for that purpose in the trust instrument").

599. *Id.* § 2-907(c)(7).

600. UNIF. TRUST CODE § 409(1) (UNIF. LAW COMM'N 2000).

601. *Id.* cmt. "The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot." *Id.*

602. UNIF. TRUST CODE § 409(1).

603. *See* Taylor, *supra* note 241, at 428–29 ("[T]he uniform law evolved incrementally from no pet trusts to honorary pet trusts to enforceable pet trusts").

604. UNIF. TRUST CODE § 409(2).

605. *Id.* § 409(3).

606. *Id.* § 408.

607. *See* RESTATEMENT (THIRD) OF TRUSTS § 47 (2001) (characterizing the transferee as a "trustee"); *see id*. cmt. c (citation omitted) (retaining the rule that where "the trustee is unwilling to exercise the power, fails within a reasonable time to do so, or

3. Statutory Approaches: A Selective Survey

The primary trust jurisdictions in the United States are Alaska, Delaware, Nevada, and South Dakota.[608] These states are particularly attractive to settlors because of their favorable state income tax rules and their settlor-favorable trust laws.[609] The paragraphs that follow will briefly summarize these four jurisdictions' purpose trust legislative frameworks and will conclude with a commentary on the Cayman Island's purpose trust legislation. The key elements of a particular state's laws to be considered include the scope and clarity of its purpose trust legislation and the status of its RAP, its RAA, and its rule against unreasonable restraints on alienation.[610] The purpose trust legislation itself should clarify the role of the enforcer, speak to the availability of *cy pres* (or its noncharitable equivalent), and clarify the availability and functionality of hybrid and res purpose trusts. We will begin with Alaska.

Alaska legislatively authorized noncharitable purpose trusts in 1996.[611] Alaska permits enforcement powers to reside in an individual named in the trust or appointed by a court.[612] Alaska's statutes limit the duration of purpose trusts to twenty-one years.[613] Any governing instrument is to be liberally interpreted to carry out the general intent of the transferor.[614] In 1983, Alaska applied the wait-and-see approach to RAP, but, in 2000, Alaska repealed RAP.[615] At the same time, however, some remnants of RAP were modified and left intact.[616] In its current form, Alaska's RAP applies to powers of appointment when "not presently exercisable because a condition precedent is invalid unless, within a period of 1[000] years after its creation, either the

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dies without having done so, ordinarily . . . the property is held in trust for distribution to the testator's successors in interest").

608. *See* Edward J. McCaffrey et al., *The Advantages of Creating Out-of-State Trusts*, L.A. LAW., Sept. 2005, at 19 ("[S]tates such as Alaska, Illinois, New Jersey, South Dakota, and Delaware are positioning themselves as trust-friendly places."); Barry A. Nelson, *Bacardi: The Hangover*, FLA. B.J., Mar. 2014, at 40, 44 (listing Alaska, Delaware, Nevada, South Dakota as the best states for discretionary trusts).

609. *See* RICHARD W. NENNO, PERPETUAL DYNASTY TRUSTS: TAX PLANNING AND JURISDICTION SELECTION 179–209 (2011), https://www.naepc.org/journal/issue10o.pdf.

610. *See* discussion of RAP, RAA, and unreasonable restraints on alienation *supra* Section II.D.1.a–c.

611. H.B. 308, 19th Leg., 2d Sess., 1996 Alaska Sess. Laws 75.

612. ALASKA STAT. § 13.12.907(c)(4) (2017).

613. *Id.* § 13.12.907(a).

614. *Id.* § 13.12.907(b).

615. ALASKA STAT. § 34.27.050 (repealed 2000). *See* discussion of the RAP "wait-and-see" approach *supra* note 419 and accompanying text. States began repealing RAP in 1957. Grayson M.P. McCrouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1295 n.17 (2013). The first state to repeal the rule was Idaho in 1957. *Id.* The second was Wisconsin in 1969. *Id.* South Dakota was third in 1983. *Id*.

616. ALASKA STAT. § 34.27.051.

power is irrevocably exercised or the power terminates."[617] A prohibition against conditions which restrain alienation remains on the books.[618] Suspending the absolute power of alienation for a period longer than the lives of persons in being plus thirty years is impermissible.[619] The power is not suspended if the trustee can sell the property or at least one person can terminate the trust.[620] Limited exceptions apply with regards "to a transfer (1) made outright or in trust for a charitable purpose; (2) to a literary or charitable organization; (3) to a veterans' memorial organization; or (4) to a cemetery corporation, society, or association."[621]

Delaware's authorization of noncharitable purpose trusts is influenced by the UTC and divides the authorization into two statutory sections: one for pet trusts[622] and another for other noncharitable purpose trusts.[623] Alongside these two varieties of trusts are codified provisions for cemetery plot trusts.[624] In addition to recognizing the role of an enforcer, either nominated by the trust instrument or appointed by the court, Delaware's pet trust statute permits any "person who has an interest in the welfare of the animal or animals other than a general public interest" to move the court for appointment as an enforcer.[625] A similar enforcer appointment option exists for other noncharitable purpose trusts.[626] Delaware also defines an "animal" that may be covered by a pet trust; the term "animal" includes "any nonhuman member of the animal kingdom," excluding "plants and inanimate objects."[627]

The "stumbling blocks" for noncharitable purpose trusts in Delaware are relatively manageable. Delaware's abolition of RAP is less expansive than a

617. *Id.* § 34.27.051(a).
618. *Id.* § 34.27.100(a)(1)–(4).
619. *Id.*
620. *Id.* § 34.27.100(b)(2).
621. *Id.* § 34.27.100(c)(1)–(4).
622. DEL. CODE ANN. tit. 12 § 3555 (West 2018) (pet trusts).
623. DEL. CODE ANN. tit. 12 § 3556 (West 2018) (other noncharitable purposes). Interestingly – and uniquely – Delaware does not strictly bifurcate purpose trusts into charitable trusts and noncharitable trusts. Instead, it authorizes charitable trusts and also trusts "for a declared purpose," which "might not be deemed to be for charitable purposes." *Id.* § 3556(a).
624. DEL. CODE ANN. tit. 12 §§ 3551–3553; *see also, e.g.*, *In re* Mary R. Latimer Trust, 78 A.3d 875, 885–86 (Del. Ch. 2013) (declining to reform a trust that directs the maintenance of burial lots); Anderson v. Mount Zion Cemetery Ass'n, 184 A.2d 86, 89–90 (Del. Ch. 1962) (confirming that cemetery property was not encumbered by a restrictive burial trust).
625. DEL. CODE ANN. tit. 12 § 3555(c).
626. *Id.* § 3556(c).
627. *Id.* § 3555(g).

full repeal of the rule – its repeal only applies to interests in trusts.[628] Moreover, as to real property held in trust, the limitations period is 110 years rather than perpetual.[629] Delaware has repealed RAA.[630]

Nevada recognized pet trusts in 2001.[631] Only in 2017, however, did Nevada adopt legislation to recognize other varieties of noncharitable purpose trusts.[632] Under Nevada law, the purpose must "not [be] illegal or against public policy" and must be "stated with sufficient particularity in the trust instrument as to be ascertainable by a finder of fact."[633] A noncharitable purpose trust (other than a pet trust) may be enforced by a trustee, a trust advisor, a trust protector, a person appointed under the terms of the governing instrument, or by the court, but no provision is made for the court to appoint an enforcer.[634] Where the court determines that the value of the trust res exceeds the amount required for the trust's purpose, excess property will be distributed back to the settlor or, if the settlor is deceased, to her successors unless the trust provides otherwise.[635] No provisions for hybrid purpose trusts or res purpose trusts were included in the legislation.

Nevada repealed RAP as it applies to property in 1987.[636] Then, in 2005, Nevada modified RAP to permit vesting or termination of unvested interests within 365 years.[637] When measuring a period from creation of a trust, any language that seeks to disallow vesting or termination of any interest is inoperative to the extent it produces a period of time that exceeds twenty-one years

628. DEL. CODE. ANN. tit. 25 § 503(a) (2017).

629. *Id.* § 503(b).

630. *Id.* § 506 ("No provision directing or authorizing accumulation of trust income shall be invalid.").

631. Assemb. B. 33, 71st Leg., Reg. Sess, 2001 Nev. Stat. 203; *see* NEV. REV. STAT. ANN. § 163.0075 (West 2017).

632. Assemb. B. 314, 79th Leg., Reg. Sess., 2017 Nev. Stat. 311; NEV. REV. STAT. ANN. § 163.006(6) (West 2017). Clumsily, Nevada law recognizes the creation of a trust "only if there is a beneficiary" but deems this requirement satisfied if the trust instrument provides for any "noncharitable trust without an ascertainable beneficiary . . . ." *Id.*

633. Assemb. B. 314, 79th Leg., Reg. Sess., 2017 Nev. Stat. 311.

634. *Id.* It is unclear how a court would enforce a trustee's duties if no person has standing to enforce the trustee's duties and also unclear how a trustee would enforce the trust unless the statute is contemplating a co-trustee or prior trustee seeking to enforce another trustee's obligations.

635. *Id.*

636. *See* NEV. REV. STAT. §§ 111.1031 (2017) (requiring the interest to vest or terminate "no later than 21 years after the death of a natural person then alive."); *but see id.* § 111.1037(7) ("111.1031 does not apply to . . . [a] property interest, power of appointment or arrangement subject to the common-law [RAP] or is expressly excluded by another statute of this state.").

637. S.B. 64, 73rd Leg., Reg. Sess., 2005 Nev. Stat 270; *see also* NEV. REV. STAT. § 111.1031.

after the death of the survivor of the specified lives.[638] Nevada retains a rule against unreasonable restraints on alienation.[639]

Beginning in 2006, South Dakota authorized purpose trusts with a statutory enactment, stating that "a trust may be performed if the trust is for a specific lawful noncharitable purpose."[640] Purpose trusts were described in two statutes: one for pet trusts[641] and another for other noncharitable purpose trusts.[642] Under South Dakota law, a purpose trust could be enforced by a person designated by the trust instrument or appointed by the court.[643] The court could also reduce a trust's funding "if it determines that the amount substantially exceeds the amount required for the intended use."[644] Nothing in the statutes barred the grantor from funding the trust with the property (a res purpose trust), but nothing expressly allowed it either.[645]

South Dakota has repealed RAA.[646] South Dakota also repealed RAP in 1983.[647] A prohibition against conditions that restrain alienation remains.[648] Suspending the absolute power of alienation for a period longer than the lives of persons in being plus thirty years violates the rule.[649] Suspending the power of a trustee to alienate trust property is similarly barred.[650] The trustee must be given the power to sell trust property to avoid the application of this rule.[651] Limited exceptions apply with regards to charitable trusts and cemetery transfers.[652] Thus, under a typical dynastic trust, the trustee's power to sell trust

638. NEV. REV. STAT. § 111.1031(5).

639. *Id.* § 111.860.

640. H.B. 1178, 81st Leg., Reg. Sess., 2006 S.D. Sess. Laws ch. 247 § 1; *see also* S.D. CODIFIED LAWS § 55-1-20 (2018). *See generally* Krogstad & Bock, *supra* note 307, at 376–77 (describing South Dakota's purpose trust legislation).

641. H.B. 1178, 81st Leg., Reg. Sess., 2006 S.D. Sess. Laws ch. 247 § 2; *see also* S.D. CODIFIED LAWS § 55-1-21 (2017) (amended 2018).

642. H.B. 1178, 81st Leg., Reg. Sess., 2006 S.D. Sess. Laws ch. 247 § 3; *see also* S.D. CODIFIED LAWS § 55-1-22 (2017) (amended 2018).

643. S.D. CODIFIED LAWS § 55-1-22.4.

644. *Id.* § 55-1-22.2.

645. *Cf.* DEL. CODE ANN. tit. 12 § 3555(e) (2018) (authorizing the pet for which a pet trust is created to be transferred to the trustee in the event that the pet's designated successor owner disclaims ownership).

646. S.D. CODIFIED LAWS § 43-6-4 (repealed 1998).

647. S.D. CODIFIED LAWS § 43-5-8 (2018) ("The common-law [RAP] is not in force in this state."); *see also* S.D. CODIFIED LAWS § 55-1-20 (2018) (confirming, in the purpose trust context, the inapplicability of common law RAP, "any common law rule limiting the duration of noncharitable purpose trusts" and "any rule restricting the accumulation of income").

648. S.D. CODIFIED LAWS § 43-3-5 (2018).

649. *Id.* § 43-5-1.

650. *Id.* § 43-5-4.

651. *Id.* "[T]here is no suspension of the power of alienation by a trust or by equitable interests under a trust if the trustee has the power to sell, either express or implied, or if there is an unlimited power to terminate in one or more persons in being." *Id.*

652. *See id.* § 43-5-7.

property may be suspended for no longer than a period equal to the lives in being plus an additional thirty years.[653]

In early 2018, the South Dakota Legislature amended and expanded its purpose trust statutes.[654] The changes were part of the South Dakota Governor's Task Force on Trust Administration Review and Reform's annual work product.[655] Three key elements of the statutes will be briefly explicated. First, res purpose trusts are specifically authorized.[656] The statute states, "Any property may form a part or all of the trust estate, including some, all, or an interest in some or all of the property which is the subject or purpose of a purpose trust."[657] Second, hybrid purpose trusts are specifically authorized.[658] When the interests of beneficiaries and the advancement of a purpose are concurrent, the trustee is directed to maintain separate shares – "one for the beneficiaries; and a second for the purposes . . . ."[659] If a trustee fails to do so, the purpose trust is not rendered invalid, but the trustee "may be liable to the beneficiaries for the actual damages caused thereby, if any, for failing to do so."[660] Out of concerns with the uncertainty of how hybrid trusts might be treated for income tax purposes, the task force elected to direct trustees to segregate amounts for beneficiaries and purposes into separate trust shares.[661] The separate shares should be taxed, at least in part, as if they were separate trusts.[662] Third, the

653. *See id.*

654. H.B. 1072, 93rd Leg., Reg. Sess., 2018 S.D. Sess. Laws ch. 275 §§ 2-20 ("An act to revise certain provisions regarding trusts.").

655. *See* Al W. King, III, & Pierce H. McDowell, III, *A Bellweather of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266, 266 n.4 (providing a history of the Trust Task Force).

656. S.D. CODIFIED LAWS § 55-1-20 (2018).

657. *Id.*

658. *Id.* § 55-1-22 (2018).

659. *Id.* § 55-1-22.1.

660. *Id*.

661. E-mail from Frances Becker, member, South Dakota Governor's Task Force on Trust Administration Review and Reform, to author (Nov. 3, 2017, 11:42 CST) (on file with author).

662. *See* Morris Trs. v. Comm'r, 51 T.C. 20, 44–45 (1968), *action on dec.*, 3324–66, 6624–66, 3325–66, 6623–66 (Dec. 24, 1968), *aff'd*, 427 F.2d 1361 (9th Cir. 1970); *see also* 26 C.F.R. § 1.641(a)–(c) (2017) (providing that multiple trusts without substantially independent purposes, the same grantor, the same beneficiary, and having as their principal purpose the avoidance or mitigation of progressive income tax rates will be treated as one trust for income tax purposes). *But see* Edward L. Stephenson Tr. v. Comm'r, 81 T.C. 283, 292 (1983) (reasoning that the foregoing trust consolidation regulations are invalid); Boyce v. U.S., 190 F. Supp. 950, 958 (W.D. La. 1961), *aff'd*, 296 F.2d 731 (5th Cir. 1961) (holding that where trustee did not maintain separate accounts and books, ninety trusts should be consolidated for income tax purposes). Technically, the foregoing authority deals with separate trusts, not separate shares. *See* I.R.C. § 663(c) (2012) ("For the sole purpose of determining the amount of distributable net income . . . in the case of a single trust having more than one beneficiary, substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts."). Separate shares as separate trusts under § 663(c) does not equate to

enforcer has a defined role.[663] Enforcers are deemed to be fiduciaries and, as a default rule, are entitled to reasonable compensation for their role in trust administration.[664] The imposition of this fiduciary duty addresses, in large measure, the concern with the lack of liability for an enforcer who fails to diligently enforce the trustee's obligations to the noncharitable purpose of a purpose trust. Enforcers may be removed for breaching their duties.[665]

Purpose trusts were first recognized not in the United States but in overseas jurisdictions, which market their trust environments as a favorable situs for the wealthy.[666] Although Nauru (in Micronesia) was the first statutory purpose trust legislation jurisdiction, Bermuda was the first to adopt noncharitable purpose trust legislation that received substantial attention.[667] The Cayman Islands' 1997 "STAR trust" legislation is often seen as the most flexible of any jurisdiction.[668] The acronym "STAR" stands for Special Trusts (Alternative Regime) Law.[669] The Cayman Islands expressly authorize both hybrid purpose trusts as well as noncharitable purpose trusts that blend in charitable provisions: "(1) The objects of a special trust or power may be persons or purposes or both . . . (3) The purposes may be of any number or kind, charitable or non[]charitable . . . ."[670] Thus, mixed charitable/noncharitable purpose trusts

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filing separate tax returns for each share or applying the progressive rate structure. *See* 26 C.F.R. § 1.663(c)-1(b)(1) (2017). "The effect of having separate shares exists only in situations in which one beneficiary's income is accumulated, whereas income is distributed to another beneficiary in excess of that beneficiary's income share." JERE D. MCGAFFEY, MCGAFFEY LEGAL FORMS WITH TAX ANALYSIS § 16:23, West (database updated Apr. 2018).

663. S.D. CODIFIED LAWS § 55-1-21.4 (2018) ("The purposes of a purpose trust may be enforced by an enforcer . . . .").

664. *Id.*

665. *Id.* § 55-1-21.5. A purpose trust enforcer can be removed for a serious breach of trust, a lack of cooperation or hostility with the trustee, or "a substantial change in circumstances and removal of the enforcer would best serve the purpose or purposes of the trust." *Id*. The trust "instrument may provide additional procedures for the removal of an enforcer." *Id*.

666. *See* R.F. Martin, Annotation, *Validity, as for a Charitable Purpose, of Trust for Dissemination or Preservation of Material of Historical or Other Educational Interest or Value*, 12 A.L.R.2d 849, West (database updated weekly) (originally published 1950).

667. Duckworth, *supra* note 515, at 936–37.

668. Bove I, *The Purpose of Purpose*, *supra* note 116, at 36 ("[C]ommentators feel that one of the most flexible of the off-shore purpose trust statutes is that of the Cayman Islands . . . "); *see also* Duckworth, *supra* note 515, at 938–40 (summarizing the Cayman Islands purpose trust legislation).

669. Duckworth, *supra* note 515, at 938.

670. C.I. TRUSTS LAW § 99 (2011 rev.), http://www.gov.ky/portal/pls/portal/docs/1/11524845.PDF. However, strangely, ascertainable beneficiaries of a hybrid STAR trust lack any standing to enforce the trustee's duties. *Id.* § 100(1).

are permissible. Enforcers are clothed with fiduciary responsibilities in enforcing a purpose trust.[671] A sort of noncharitable *cy pres* applies when a Cayman Islands purpose trust has become obsolete, impractical, or unlawful.[672] Two limitations of the STAR trust should be noted, however. First, at least one trustee must be a licensed Cayman Islands corporate trustee.[673] Second, a STAR trust may not hold real property of the Cayman Islands.[674] It may, however, own interests in an entity that owns Cayman Islands realty.[675]

F. A Will (and a Testamentary Trust) for Willa Cather

We are now ready to turn to our hypothetical client, Willa Cather, and her wish to keep her private correspondence mostly shielded from public view. Pulitzer Prize-winning Willa Cather is today remembered mostly for her novels set in the homesteading plains of Nebraska, such as *My Antonia*.[676] She is "one of our greatest novelists."[677] When she was growing up, she often wore men's clothes and occasionally adopted the name "William."[678] Throughout her life, the majority of her significant relationships were with women, including Edith Lewis who lived with Cather for thirty-nine years and became her literary executor.[679] Cather neither identified with women's political issues nor called herself a lesbian.[680] She may or may not have had sexual relationships with women. Her sexual identity remains a contentious point for scholars – some highlight what they see as important queer aspects of her fiction, and others minimize or deny those aspects.[681]

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671. *Id.* § 101(2). Typically, a STAR trust "enforcer has the same rights as a beneficiary of an ordinary trust . . . ." *Id.* § 102(a).

672. *Id.* § 104; *see also id.* § 103 (providing that a STAR "trust is not rendered void by uncertainty").

673. *Id.* § 105.

674. *Id.* § 109; Isle of Man Purpose Trusts Act of 1996 § 5 ("No land or any interest in any land in the Island shall be held, directly or indirectly, in a purpose trust."). The author would speculate that this limitation is founded upon the concern that when a res purpose trust owns realty, the trustee is so inherently discouraged from encumbering or transferring the realty res that an unacceptable level of alienability limitations may result. *See* discussion *supra* Section II.C.2.c.ii.

675. C.I. TRUSTS LAW § 109.

676. WILLA CATHER, MY ANTONIA (1918).

677. Christopher Benfey, *Willa Cather's Correspondence Reveals Something New*, NEW REPUBLIC (Oct. 12, 2013), https://newrepublic.com/article/114897/willa-cathers-correspondence-reveals-something-new.

678. SHARON O'BRIEN, WILLA CATHER: THE EMERGING VOICE 96–113 (1987).

679. *See generally* EDITH LEWIS, WILLA CATHER LIVING: A PERSONAL RECORD (1976) (containing Lewis' memoir of her life with Cather).

680. Janet Sharistanian, *Introduction* to MY ANTONIA xiii (1900) (Oxford University Press, 2006).

681. *Compare* Melissa J. Homestead, *Willa Cather, Sarah Orne Jewett, and the Historiography of Lesbian Sexuality*, 10 CATHER STUDIES 3, 27 (2015) (arguing that uncovering "evidence documenting Cather's life as she lived it" might "suggest new

It is unclear why Cather desired her letters to remain private. That they remained private for as long as they did is a testament to the personal commitment of her executors to her wishes rather than the enforceability of Cather's admonitions; it was personal loyalty, not legal mandate, that actually kept her letters private until recently.[682] One might speculate that Cather wished for her sexual orientation to remain private out of her own concerns for privacy and possibly out of her concerns for the privacies of others.[683] Privacy is a value that the law is generally more predisposed towards than autocratic artistic vision, caprice, or whim.[684] On the other hand, perhaps Cather's desires derived instead from the fact that her letters just were not well written. Perhaps – like Jerry Lewis[685] – she wished to preserve her reputation because her personal correspondence was not "up to the standard of Flaubert and Mérimée . . . ."[686] Like Vladimir Narbokov, she may have wished to keep the lid on certain writings simply because of their poor literary quality.[687] Perhaps all of these concerns were in play in varying degrees.

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queer approaches to interpreting her fiction"), *and* Eve Kosofsky Sedgwick, *Across Gender, Across Sexuality: Willa Cather and Others*, 88 S. ATLANTIC Q. 53 (1989) (considering sexuality and gender themes in Cather's short story "Paul's Case"), *with* CHRISTOPHER NEALON, FOUNDLINGS: LESBIAN AND GAY HISTORICAL EMOTION BEFORE STONEWALL 96 (2001) ("[N]ot everyone is going to want to hear that Cather's literary value is utterly related, at every level, to her being a lesbian.").

682. A collection of Willa Cather's letters was published in 2013. *See* SELECTED LETTERS, *supra* note 93. The collection does not reveal any sexual privacies but does confirm Cather's emotional attachments to some women in her life. Benfey, *supra* note 676; Schuessler, *supra* note 29.

683. With the benefit of twenty-first century hindsight, this explanation – sexual privacy concerns – seems less likely. Of the several hundred of her letters are on sale in bookstores between the covers of *The Selected Letters of Willa Cather*, we know that – at least in these letters – there are no intimate revelations, so we might be prepared to speculate that private intimacies weren't the issue. SELECTED LETTERS, *supra* note 93.

684. *See* Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113, 1141 (2016) ("[P]rivacy as quasi-property provides hope for an avenue to predictably understand, frame, and ultimately systemize our moral intuitions about what should be protected at law."). *But see* Tamar R. Lehrich, *To Bedlam and Part Way Back: Anne Sexton, Her Therapy Tapes, and the Meaning of Privacy*, 2 UCLA WOMEN'S L.J. 165, 188 (1992) ("Clear distinctions between art and life rarely may be made when the subject is a writer, poet, or artist.").

685. *See* discussion of Jerry Lewis's wishes to largely secret but preserve his unreleased film, *The Day the Clown Cried supra* Section II.A. (describing Jerry Lewis' wishes to preserve his reputation).

686. Benfey, *supra* note 677 ("[I]t seems likely that Cather wanted her letters, mostly written in haste and on the fly, to remain unpublished for the same reason that she avoided, for the last three decades of her life, lecturing, reviewing, and interviews: she simply didn't have time for such things.").

687. Vladimir Narbokov's unfinished *The Original of Laura* was finally published in 2009 against the author's testamentary directive to destroy it, and critics have been unkind to finally viewing what perhaps should have remained hidden as Narbokov had wished. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES

The foregoing illustrates that a particular wish to manage or control one's artistic works or simply one's surviving correspondence might rest on complicated motivations.[688] Privacy, secrecy, artistic integrity, quality control, or simply generalized discomfort may all be at work. It also demonstrates that there may be complicated motivations for wanting to jettison the author's limitations. Some may simply be curious and prying. Some may just be nosy. Others may have legitimate scholarly aspirations. Still, others may simply be interested on account of their interest in the author and her works.

The precise text of a will and testamentary trust for Willa Cather can now be mapped. Let us attempt to give legal life to Willa Cather's aims concerning her letters. Her will must contain a bequest of all of the physical originals and copies of the letters that she wishes to secrete and preserve. The bequest of letters (and their associated intellectual property rights) will be to the trustee of a testamentary trust. The terms of the trust are contained within Cather's Last Will and Testament. It provides:

> 1. The Trustee shall preserve, protect, and maintain my private correspondence, and the copyright rights thereto (collectively herein, "letters"), as private and neither permit, nor license, nor allow any person to reprint, copy, view, or know the contents of my letters except for limited uses by reputable scholars for legitimate research, as determined by my Trustee in its unfettered discretion.
>
> 2. Edith Lewis shall act to enforce the Trustee's obligations pursuant to section 1, as an enforcer. Upon the death or resignation of an enforcer, the Trustee shall appoint successors if the former enforcer has failed to do so.
>
> 3. Without diminishing the Trustee's powers of sale, I confirm that the Trustee's retention of my letters in trust will advance the Trustee's ability to discharge its duties to preserve, protect, and maintain my letters. The Trustee shall be held harmless for holding my letters as an asset of this trust despite the fact that they may not produce income, appreciate in value, or otherwise represent an acceptable trust investment.
>
> 4. The term of this trust shall be perpetual. In the event of trust termination, however, the Trustee may appoint the remainder to or among such educational organizations as best represent my aims and values, as

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15 n.19 (9th ed. 2013) (quoting Boyd Tonkin, *How to Ruin a Great Writer's Good Name*, INDEPENDENT 28 (Nov. 20, 2009)) (characterizing *The Original of Laura* as having "a train-wreck fascination"). *See generally* VLADIMIR NARBOKOV, THE ORIGINAL OF LAURA (2009).

688. *See* John K. Eason, *supra* note 529, at 130–32 (examining the difficulty with assessing the charitable donor's wishes); Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Pres Doctrine*, 31 CARDOZO ARTS & ENT. L.J. 1, 10 (2012) ("Because the donor is not available for consultation, the court must make an informed guess based on indirect evidence.").

> determined by the Trustee in its unfettered discretion. To the extent the Trustee fails to do so, a court shall appoint the remainder consistent with the foregoing objectives. This is a spendthrift trust.

Let us also incorporate a bequest of the sum of $30,000 to the trust. This sum can be invested and used for trustee costs and other costs in administering the trust. These costs will include safeguarding and insuring the letters and also engaging staff to supervise access to the letters from time to time. Acme Bank and Trust should be named as trustee. The use of a corporate trustee helps ensure continuity over time. We will situs the trust in a jurisdiction with favorable noncharitable purpose trust laws, such as South Dakota or the Cayman Islands.[689] In this way, the majority of stumbling blocks (for example, RAP, RAA, etc.) can be safely avoided.[690]

Willa Cather's testamentary trust would constitute a "res purpose trust" insofar as the trust estate includes the copyright properties and physical letters that the trustee is directed to preserve.[691] It is not strictly a "hybrid purpose trust" insofar as it lacks concurrent beneficiaries.[692] The trust will continue so

689. The amount of cash or liquid assets to be conveyed along with the letters and copyrights ought to be sufficient to (i) reasonably compensate the trustee and the enforcer; (ii) store, insure, and preserve the assets; (iii) pay for administrative costs such as annual tax preparation and recordkeeping; (iv) supervise the access to and use of the letter texts; and (v) pay for any litigation necessary to enforce misuse or infringement. *See* Rahne & Shapiro, *supra* note 44, at 13 ("Aside from any financial recovery, litigation for IP assets in one's estate can honor the original creator's legacy"). The $30,000 conveyed in this hypothetical may be inadequate for any sustained litigation efforts unless administrative costs are kept to a minimum so as to allow the growth of principal. Suing for an injunction to remedy the misuse of Cather's letters would be expensive. For this reason, a greater sum could be conveyed but at the risk that a trust may see the amount as excessive. *See, e.g.*, UNIF. TRUST CODE § 409(3) (UNIF. LAW COMM'N 2000) (inviting a court to defund a purpose trust "to the extent the court determines that the value of the trust property exceeds the amount required for the intended use"). Alternatively, a directive to simply ban all access to the letters – and thereby reduce overhead costs in deciding upon and supervising access – for a period of, say, three decades, would allow an accumulation of income and principal to more sustainable and viable levels.

690. *See* outline of RAP and RAA *supra* Section II.D.1.a & b.

691. *See* description of res purpose trusts *supra* Section II.C.2.c.ii.

692. *See* discussion of hybrid purpose trusts *supra* Section II.C.2.c.iii. Adding concurrent beneficiaries to Willa Cather's testamentary trust would be as straightforward as adding the following sort of provision: "In addition, the trustee may distribute income and principal to Edith Lewis for her support, maintenance, and enjoyment for her surviving lifetime." Adding a beneficiary to a purpose trust helps insulate the trust from overfunding or surplus arguments since it would be typically difficult to ascertain what amounts could be reduced without depleting the availability of trust funds for the beneficiary. Of course, this trust may continue beyond the lifetime of Edith Lewis and, as drafted in this footnote, the trust would cease being a hybrid purpose trust after Lewis' death.

long as it remains financially solvent and the purpose continues to be achievable. Typically, where a purpose becomes unachievable (and assuming the problem cannot be repaired with an application of noncharitable *cy pres* or equitable deviation), the remaining trust assets would be distributed to the testator's estate or heirs.[693] This creates an incentive for the remaindermen to challenge the trust on grounds of capriciousness or for other reasons.[694] Cather's trust, however, grants to the trustee a special power of appointment to direct any remaining funds to educational organizations. In default of the exercise, the court will direct the funds. It is still possible that a judge could rule the trust invalid in its entirety, in which case Cather's residual devisees would have standing to challenge her estate plan. The use of a special power of appointment, however, does help to minimize this problem.[695]

In addition to embodying a successor owner to her literary estate with her own literary aims and values, the use of a trust consolidates ownership and management and avoids fracturing her copyright interests among several owners.[696] A corporate trustee is typically viewed as more sterile and detached from a settlor's peculiar individuality and values than an individual trustee who knew and respected the settlor.[697] Still, a corporate trustee will bring a profes-

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693. *See* DEL. CODE ANN. tit. 12 §§ 3592(2) (2018) (providing that if the trust does not provide for a directive of distributions upon trust termination, the remaining trust assets "shall be distributed as though the trustor had died on the date on which such failure occurred, a resident of the state of Delaware").

694. *See supra* notes 464–79 and accompanying text.

695. *See, e.g.*, UNIF. PROBATE CODE § 2-604(a) (2018) ("[A] devise, other than a residuary devise, that fails for any reason becomes a part of the residue."); *see also In re* Estate of Prynn, 315 A.2d 265, 267 (Pa. 1974) (reasoning that intestate heirs lack standing to challenge specific bequests which, if invalid, would pass according to the residuary clause).

696. *See* Hader, *supra* note 39, at 575–76. Hader explains:

> Unified management and control of a creative person's works and copyrights is essential. Without it, the beneficiaries of an estate might compete with one another in their efforts to exploit the copyrights in the works, and this competition could impair or even destroy the value of the artistic property. Furthermore, effective marketing of artwork, such as paintings or sculpture, could be inhibited if the beneficiaries are unable to reach an agreement on marketing strategy. . . . Even in the absence of potential competition or disagreement among beneficiaries, it may still be preferable to consolidate management and control of the assets in the hands of a fiduciary who will protect the interests of the estate and the beneficiaries and who will have sufficient expertise to exploit the assets properly.

Id.

697. *See* John A. Warwick, *The Ungrateful Living: An Estate Planner's Nightmare – The Trial Attorney's Dream*, 24 LAND & WATER L. REV. 401, 413 n.62 (1989) ("No

sional and objective eye to the administration of the trust. The enforcer provides the personal touch, ideally embodying Cather's aim to correct and guide the trustee's management of the letters. Over time, successor enforcers sharing these same values will be critical to ensuring a long-term achievement of Cather's goals.

Significantly, no underlying motive or purpose has been articulated in the trust. This may ultimately result in a court guessing at her motives or becoming more willing to consider deviation from her aims because her motives were unspoken. On the other hand, articulation of a particular motive may give ammunition to a petition to deviate or even terminate the trust. For example, the trust might have provided: "It is my aim in preserving and secreting these letters to avoid embarrassment to my correspondents so long as they are living." Upon the death of the last of the correspondents, it seems likely that a petition to terminate the trust's restrictions would receive favorable consideration. Alternatively, the trust may have provided: "I wish to maintain the economic and artistic vitality of my published works by closely restricting access to my letters, many or all of which did not receive the same editorial rewriting or attention that I may have wished." Perhaps this sort of aim would result in a more stable trust – one less susceptible to *cy pres*. At any rate, no such aims are articulated in our example.

Let us now extend our hypothetical and consider how this trust may better respond to demands to publish and disseminate Cather's letters to the general public. Let us assume that following Cather's death in 1947, her estate was administered, and ultimately her letters and $30,000 were conveyed to Acme Bank and Trust. Edith Lewis accepted the role of enforcer. The trustee administered the trust without any controversy until 1955 when it received news that one of Willa Cather's addressees was planning to publish selected excerpts from letters she had received from Cather in a scholarly article studying Cather's literary impact. Prodded into action by Edith Lewis, the trust's "purpose enforcer," the trustee directed counsel to serve the addressee with a "cease and desist letter." The addressee replied that the contemplated selective publication fell within the Copyright Act's fair use doctrine.[698] Acting on advice of counsel, the trustee did not litigate the issue and the article – with parts of Cather's letters quoted – was published. Later, in 1960, a second contemplated publication, which clearly fell outside of the fair use safe harbor, was quickly quelled by the trustee. In response to these events, the trustee adopted a rather strict agreement with members of the public allowed to view the letters. Scholars are required to sign an agreement that permits the trustee to more closely regulate the dissemination of the text of Cather's letters.[699]

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matter how hard they try to improve their public image, corporate trustees, like Americans Abroad, are too often stereotyped as 'arrogant' and 'insensitive' to the needs of those around them.").

698. 17 U.S.C. § 107 (2012).

699. The agreement might provide, for example, that the trustee retains the right to review and approve any scholarship that quotes from the letters and provide for a forum selection clause and liquidated damages or injunctive relief for a breach.

Decades passed. The physical letters themselves remained in the trustee's possession, jealously guarded. A successor purpose enforcer had just been appointed when, in 2018, the trustee received a letter from three English professors, including their vitae, asking for permission to read, review, and quote from the letters for research on the structural and intertextual analysis they were conducting on Cather's novel. The trustee promptly replied with a letter denying their request without explanation.

Rather than challenge the trustee's denial, the three frustrated professors filed a *cy pres* petition. The petition asked a chancery court to order a deviation from the trust and permit the free and unrestricted dissemination of Cather's letters. The petition assumed that Cather's purpose in keeping her letters private was to hide her sexual orientation from the public eye after death just as she had during her life. The petitioners noted that as late as the 1980s, Cather scholars referred obliquely to her relationships with certain close female companions as "close friendships."[700] Later critics reduced "Cather's imaginative life [to] a simple matter of repression" and viewed her fiction in uncomplicated terms.[701] But today, critics recognize that claiming her work was "written only in order to express homosexual feelings in disguise" is narrow, reductive, and patronizing.[702] The contemporary view is informed by queer theory and asserts that Cather's sexual orientation is unimportant or at least less significant.[703] The trio of petitioners concluded that today's progressive views of homosexuality undermine Cather's original aims in desiring her sexuality remain covert.[704] The release of her letters, they argued, will advance the integrity and understanding of her fiction.[705] The letters had been secreted long enough.[706]

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700. KATHLEEN D. BYRNE & RICHARD C. SNYDER, CHRYSALIS: WILLA CATHER IN PITTSBURGH 1896–1906, at 42–43 (1980).

701. HERMIONE LEE, WILLA CATHER: DOUBLE LIVES 11 (1989).

702. *Id*.; *see also* JANIS P. STOUT, WILLA CATHER: THE WRITER AND HER WORLD 55 (2000) (asserting that "it does not matter" whether some of Cather's relationships were "physically lesbian").

703. *See* LEE, *supra* note 701, at 192. "[T]he thing not named *remains* unnamable – that is its point. It is not a buried bone to be dug up, but the 'luminous halo, the semi-transparent envelope' of atmosphere and feeling evoked by the writing." *Id*. (alteration in original). *Compare id.*, *with* Sharon O'Brien, *"The Thing Not Named": Willa Cather as a Lesbian Writer*, 9 SIGNS 576 (1984) ("Cather's startling phrase "the thing not named" has another connotation: an aspect of experience possessing a name that the writer does not, or cannot, employ.").

704. *E.g*., Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

705. *See* JOHN P. ANDERS, WILLA CATHER'S SEXUAL AESTHETICS AND THE MALE HOMOSEXUAL LITERARY TRADITION 12–13 (1999) ("[O]ur understanding and appreciation are possibly diminished without an awareness of [Cather's] sexual aesthetics.").

706. *See* RESTATEMENT OF THE LAW OF NONPROFIT ORGANIZATIONS § 440 (Tentative Draft no. 2, 2009) ("[A]fter the passage of a significant period of time following the creation of a charitable trust or gift instrument, the policy of adhering to the terms in the trust or gift instrument increasingly weakens[.]"). The petitioners recognize that Cather's trust is not a charitable purpose trust but cite to the passage of time and its effect upon review of another variety of purpose trusts: charitable ones.

The trustee resisted the petition. The successor enforcer agreed. The trustee asserted that Cather's underlying aim in framing the purpose of her purpose trust was not preserving her sexual privacy postmortem but was instead something more nebulous that was partly based on a simple desire to keep her private communications private and partly based on embarrassment that the letters would be examined for their literary merit, which they lacked (or so Cather thought).[707] The judge questioned the trustee and the enforcer, asking whether – if these had been Cather's aims – they would not have been better achieved by the destruction of the letters? And because Cather had elected not to destroy her copies of the letters, can we assume that at some point she contemplated the release of the letters? After all, it would have been much simpler to destroy the letters than arrange for their perpetual preservation.

After receiving a few exhibits and hearing the arguments of counsel, the judge retired to her chambers to consider the matter. Within a week, she released her opinion and decision in a letter to counsel for the trust and the three English professors. It rejected the petitioners' demand, finding that it had not become illegal, impossible, or impractical to achieve Cather's purposes as set forth in the trust, regardless of whether those purposes were motivated by modesty about the quality of the letters, privacy concerns, or simply a desire to see her letters quoted and utilized only in serious scholarly pursuits. The judge quoted Cather: "The condition every art requires is, not so much freedom from restriction, as freedom from adulteration . . . ."[708] The judge observed that this is an aim with which the law is not offended.[709] In fact, the judge continued, the values of individual autonomy and creativity find support in the core of copyright law. The judge noted, however, that although the trustee had been vested with "absolute" discretion in admitting and denying access to the Cather

707. Cather's motives in secreting her less-than-perfect letters might also be characterized as grounded in economic efficiency. *See* SAX, *supra* note 14, at 257 (explaining that an owner might have a "good economic reason" to destroy or partly destroy their property). Cather may have in mind enhancing the "brand value" of Willa Cather by eliminating evidence of her less successful literary efforts. Access restriction may help to preserve the economic value of her published works (at least until the expiration of copyright). There can also be expressive value in Cather's motives. *Id.* at 259 (citing Strahilevitz, *supra* note 95, at 800–03, 824). By restricting dissemination of her letters, Cather is modulating the shading of her more polished creative works to some degree. However, there is evidence that the literary quality of the letters is quite excellent. *See* Leon Edel, *Editor's Foreword* in E.K. BROWN, WILLA CATHER: A CRITICAL BIOGRAPHY, at xxxiii (1953) ("[Cather's letters] are touched with the cadence, as with the radiance, of her style; they reflect also, as letters can, the directness and generosity and charm of the personality, its courage and steadfastness.").

708. Willa Cather, *Escapism*, *in* COMMONWEAL CONFRONTATIONS: LIBERAL CONVICTIONS, CATHOLIC TRADITION, at 371, 373 (Patrick Jordan and Paul Baumann eds., 1999). Cather wrote this essay in 1936. *Id*. at 371.

709. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

letters, even absolute discretion is reviewable by the chancery court.[710] If the trustee abused its discretion, acted arbitrarily, or failed to adhere to the settlor's intent, the trustee's decision may be reversed by the court.[711] Therefore, the judge's letter concluded with a statement that the petitioners were free to re-frame their petition as a review of the trustee's decision rejecting their request and with a denial of their *cy pres* petition.

Cather's intent governing her letters thus far remains preserved. It would seem that with the proper use of a funded res purpose trust, Cather's privacy and aims concerning her letters could have been better secured. With a purpose trust, the release and publication of her private letters may have been avoided, or at least further delayed.

III. CONCLUSION

This Article has considered in the preceding discussion the extent to which Willa Cather's twin objectives to preserve and partially secrete her letters could be achieved by means of a purpose trust methodology. It has not examined whether Willa Cather herself enjoyed legally recognized rights to achieve postmortem control over her letters. For the most part, an individual's rights die with them.[712] Some narrow exceptions can be noted, such as the right to maintain confidentiality, the right to preserve one's reputation , and the right to control the disposition of one's remains and organs.[713] Perhaps some rights

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710. *See* Bishop v. McNeil, No. Civ.A. 5508, 1999 WL 743489, at *18 (Del. Ch. Sept. 14, 1999).

711. *Id.*

712. Kollar v. Lozier, 669 A.2d 845, 851 (N.J. Super. Ct. App. Div. 1996).

713. *See* N.Y. City Health and Hosps. v. N.Y. State Comm'n of Corr., 969 N.E.2d 765, 769 (N.Y. 2012) (considering the postmortem release of confidential healthcare information of an inmate); DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 38 (2008) (proposing the concept of a "Human Subject" as a repository for after-life rights because "[c]onceptualizing our existence only in terms of the concept of personhood is too narrow an approach and leaves many important human interests unprotected"); Shannon Flynn Smith, Comment, *If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications*, 2013 MICH. ST. L. REV. 1719, 1759–60 (2013) (suggesting a trust to preserve rights of publicity after a celebrity's death); *see also* Kenneth K. Lee, *Attorney-Client Privilege – Dead or Alive?: A Post-Mortem Analysis of Swindler & Berlin v. United States*, *118 S.Ct. 2081 (1998),* 22 HARV. J.L. & PUB. POL'Y 735, 746 (1999) (reasoning that although a postmortem exception to the attorney-client privilege "may not likely affect the candor of most clients, such an exception can have a profound impact on people who expect to die soon"); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763 (2009) ("[R]ecent case law suggests there may be a posthumous right to reproductive autonomy."); Bo Zhao, *Legal Cases on Posthumous Reputation and Posthumous Privacy: History Censorship, Law, Politics and Culture*, 42 SYRACUSE J. INT'L. L. & COM. 39, 43 (2014) ("[T]he protection of posthumous reputation and privacy depends eventually on how a society treats the deceased in general."); Erin Colleran, Comment, *My Body, His Property?:*

or property are so closely tied to personhood that the ability to posthumously control them (beyond mere testamentary freedom) should be extended.[714] Overvaluing concern with chattels may impinge on concern for individuals.[715] But that is a concern this Article has not taken up. Instead, it has considered whether Cather could affect a transfer of chattels and intangible copyrights to an artificial person (a trust) of her own creation, clothing that trust-person with her own articulated values and objectives regarding the care and use of the property it holds. It has not directly asked whether Cather could control her letters from the grave but instead whether she could invest a successor trust-person with directives to accomplish her personal wishes – wishes that have become objectives held by her trustee. It is not Cather's agency but her trustee's agency that has been activated. It is an expressive act as much as the expression which gave rise to the writing of the letters themselves.[716] Attaching strings in the form of use limitations to a testamentary gift may not be effective but investing the new trust-owner with values which mimic the author's may. So long as Cather's intent is deemed neither capricious, illegal, nor uncertain, it is her intent, embodied in her trust, that should control.[717]

We permit testators to devote property for the benefit of their children in a long-term trust arrangement. Willa Cather never had children. In some ways her literary creations may have been comparable to children given the care and attention she devoted to them – just as beloved pets are for some a near equivalent to biological issue. When framed in terms of "dead hand control," the willingness to honor post-mortem restrictions on the use of property held by a trustee is often checked. If presented as an either/or proposition, the rights of

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Prescribing a Framework to Determine Ownership Interests in Directly Donated Human Organs, 80 TEMP. L. REV. 1203, 1220 (2007) ("[W]hile donating an organ results in the separation of personal property from the 'owner,' realizing the owner's future expectation for that property is important to protecting his personhood."); Melissa Gaied, Note, *Data After Death: An Examination into Heirs' Access to a Decedent's Private Online Account*, 49 SUFFOLK U. L. REV. 281, 292 (2016) ("Originally, the right of publicity limited protections to the individual's lifetime; however, over time, states enacted laws to extend its protections beyond death.").

714. *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 36–37 (1993) (proposing a "personhood" model for deeply personal property that is integral to one's identity); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982) ("Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.").

715. *Cf.* Ellen Byron, *Stuffed Animal Herds Need Culling, Too. Experts Are Standing by, Time to Call the Exterminator*, WALL STREET J. (Dec. 6, 2017, 12:26 PM), https://www.wsj.com/articles/is-it-time-for-teddy-to-go-better-call-a-stuffed-animal-exterminator-1512581210 (suggesting that parents blindfold their children's excess stuffed animals before throwing them out as the "eyes give off the energy that they are alive, so if we cover the eyes it won't give off that energy anymore").

716. David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 89 (2012).

717. *See* Schenkel, *supra* note 123, at 200 n.120 ("Allusions to the intent of the donor as the highest normative ideal in trust law pervades the American law of trusts.").

the living vis-à-vis property should prevail over the rights of the dead. This Article would re-frame the issue: To what extent is it socially beneficial to permit the *personal* to survive the *person* vis-à-vis the decedent's creative works?

An examination of the values projected by the recognition of postmortem rights in one's organs, confidentiality, and reputation – concerns tightly aligned with the core of personhood – informs the approach courts will have in permitting Cather to achieve her objectives with her artistic vision trust.[718] Willa Cather's trust presents some knotty problems on account of her particular purpose as articulated in the trust instrument: to permanently suspend and supervise the limited enjoyment or release of property while, at the same time, preserving and maintaining it.[719] Arguably, such an instruction comes perilously close to an instruction to destroy her letters. And also, arguably, Cather's constraints represent a certain degree of waste. Yet these concerns should be stacked against the humanitarian interests in celebrating extreme and idiosyncratic personalities, especially artistic ones, and the goodness that adheres to their creations, their preferences, and their visions.[720] Singular genius, properly embedded in a purpose trust, merits protection.

718. *See* Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 90 (2001) ("[Berg] argue[s] that – given the lack of legal guidance, as well as the theoretical and ethical framework that values both health and privacy – the extent of postmortem confidentiality protections should depend on an analysis of the interests served by confidentiality and the interests served by disclosure.").

719. J.D. Salinger's instruction to refrain from licensing movie rights to his copyrighted works is "easier" because it affects only one aspect of property's alienability – one particular right.

720. *See* Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1059 (2011) ("Property promotes autonomy, security, the ability to make long-term plans, the right to be different.").