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Lawyers learn early in law school that transactions resulting from undue influence are not given legal effect.[1] Many practitioners might even be so bold as to characterize this rule as a universal outcome. To refute such universality, one need only look to the case law surrounding the revocation of revocable trusts. Litigation has arisen in connection with the revocation of trusts to resolve the question whether the grantor, having the power to revoke, succeeded in revoking the trust. Somewhat surprising to many lawyers comfortable with established undue influence doctrine, existing precedent concludes undue influence has no place in determining whether a competent settlor can revoke a revocable trust.[2]

When it comes to gratuitous property dispositions, allegations of conduct amounting to undue influence can arise in a variety of ways. A will's creation or subsequent revocation may be challenged as wrongfully procured. Further, the decedent may have been wrongfully prevented from either executing or revoking a document.[3]

Part I of this article addresses both the will and revocable trust as vehicles to accomplish gratuitous property dispositions. Part II analyzes the requisite mental capacity necessary to convey property during life or upon death. Parts III and IV cover undue influence and the use of constructive trusts as a remedial tool to rectify cases of undue influence. The article next reviews, in Part V, the line of cases addressing wrongful interferences with wills and trusts, including the emerging tortious interference with an

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1. The concept of undue influence originated with the courts of equity as a remedial device. *See* ALLAN FARNSWORTH, CONTRACTS § 4.20 (2d ed. 1990). The undue influence doctrine developed in connection with inter vivos and testamentary gifts. *Id.* § 4.20 at 283 n.1. Transactions may be set aside and the parties restored to their original positions when "one party uses [its] dominant psychological position in an unfair manner to induce the subservient party to consent to an agreement to which he would not otherwise have consented." CALAMARI & PERILLO, THE LAW OF CONTRACTS § 9-9 (2d ed. 1977).

2. *See* Fla. Nat'l Bank v. Genova, 460 So. 2d 895 (Fla. 1984).

3. *See* Latham v. Father Devine, 85 N.E.2d 168 (N.Y. 1949).

expectancy claim. Lastly, the article proposes that because of the existence of available and adequate probate and trust remedies, trust beneficiaries harmed as a result of actions effected through the use of undue influence should first resort to the constructive trust as an equitable remedy before being able to pursue tort claims against the importuning party.

I. GRATUITOUS DISPOSITIONS THROUGH WILLS AND TRUSTS

One should not be surprised that the case reporters are filled with wrongful actions targeted at gifts and testamentary transfers. By tradition, the will was the legal mechanism decedents commonly used to control the testamentary disposition of property acquired during life.[4] In more recent times, few persons would refute that the use of revocable trusts is on the rise.[5]

A revocable living trust is an inter vivos trust created by the settlor, its maker, during the settlor's life, which is revocable and amendable by the settlor. The trustee of the revocable living trust manages the trust property under the terms of the trust agreement for the benefit of the trust beneficiaries. In a typical well-drafted revocable living trust, the trust agreement addresses payments of income and principal to the settlor during the settlor's lifetime, as well as distribution of trust principal upon the settlor's death. The revocable living trust replaces the settlor's will, as to the trust assets, through the provisions addressing the disposition of property upon the settlor's death. While these trust assets pass outside of probate, because they are not subject to the will or intestacy, it is incorrect to conclude revocable trusts are merely probate avoidance devices.[6] For instance, revocable inter vivos trusts can provide significant lifetime property management features in the event the settlor becomes incompetent.

A revocable inter vivos trust bears resemblance to both gifts and wills. An inter vivos trust and a gift both involve the transfer of

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4. Even with the traditional will setting, the will was not the exclusive method. For example, life insurance proceeds would be paid to beneficiaries specified in the insurance policy. Assets owned with rights of survivorship would become the property of the surviving joint tenant.

5. Howard M. Zaritsky, *Estate Tax Payment Provisions in Multiple Documents – Part 3*, 26 EST. PLAN., June 1999, at 232-33; Ronald R. Volkmer, *Interface of Revocable Trust and Will*, 27 EST. PLAN., January 2000, at 43; John Paul Parks, *Varied Duties Face the Successor Trustee of a Revocable Trust*, 19 EST. PLAN., July/August 1992 at 203; *see also* DUKEMINIER & JOHANSON, WILLS, TRUSTS, AND ESTATES 351 (6th ed. 2000).

6. Estate of West v. West, 948 P.2d 351, 355 (Utah 1997) (concluding revocable trust avoids probate of trust assets).

legal title to property.[7] With a will, title remains unaffected until death.[8] The revocable trust is valid and the beneficiaries' interests vest as of creation, subject to divestiture.[9] The revocable trust and will, while providing for the disposition of property at death, permit the settlor/testator to alter the beneficiary designation before death.

An individual may choose to create a revocable trust to avoid probate,[10] to provide for incapacity,[11] to provide for management of assets, or to provide tax benefits. For many individuals, the benefit of lifetime management accorded by revocable trusts provides a broad solution to property management concerns[12] independent of potential incapacity issues. In addition to lifetime management, the revocable trust may provide for asset management after the creator's death for the trust beneficiaries named by the creator.[13]

In general, when a settlor creates a trust it is irrevocable.[14] To be revocable, the settlor must expressly enumerate the power of revocation in the trust agreement.[15] In a minority of states, trusts are revocable by the settlor unless expressly stated to be irrevocable.[16] In contrast to the formal requirements attendant to

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7. The donee of a gift receives both legal and equitable title. *See* Cleveland Trust Co. v. White, 15 N.E.2d 627 (Ohio 1938). A trust beneficiary obtains equitable title with the trustee having legal title to the property. *Id. See also* 38 C.J.S. Gifts § 9; IA SCOTT ON TRUSTS § 57.6, 189-90 (4th ed. 1987); ROUNDS, LORING: A TRUSTEE'S HANDBOOK § 5.1 (Aspen 1999).

8. Nat'l Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 122 (Mass. 1944).

9. Estate of Groesbeck v. Groesbeck, 935 P.2d 1255, 1258 (Utah 1997); Taliaferro v. Taliaferro, 921 P. 2d 803, 811 (Kan. 1996). A beneficiary's interest would be divested in the event the settlor validly exercised the revocation power. There seems to exist the notion that a trust over which the grantor reserves the right to revoke has no legal significance. *See* Ullman v. Garcia, 645 So. 2d 168 (Fla. Dist. Ct. App. 1994). This idea is, at best over simplistic, at worst, legally inaccurate. It fails to take account of the fact that legal title to property has been conveyed and the trust beneficiaries' interests vest. Moreover, it overlooks whether the revocable trust is funded or unfunded during the grantor's lifetime.

10. Probate avoidance is not limited to reasons of costs and delays that may be attendant to formal probate. Individuals may also be motivated by the strong sense of privacy obtained when documents do not have to be filed in the public records.

11. By funding the trust during the lifetime of the individual, the trustee can manage the assets upon incapacity. It should be noted that funding need not be limited to pre-incapacity since a spouse, attorney-in-fact (under an appropriately drafted durable power of attorney), or possibly a conservator could make transfers after the individual becomes incapacitated.

12. Naming a third party to serve as trustee of the revocable trust can alleviate the administrative burdens of investment decisions, record keeping, and accounting.

13. Of course, the creator may simply have directed the trustee to distribute the trust property outright to the named beneficiaries after the owner's death.

14. BOGERT AND BOGERT, TRUSTS § 148; MCGOVERN, KURTZ, AND REIN, WILLS, TRUSTS, AND ESTATES § 5.5 (West 1988).

15. BOGERT AND BOGERT, *supra* note 14, at § 148; MCGOVERN, KURTZ, AND REIN, *supra* note 14, at § 5.5.

16. These states include California, CAL. PROB. CODE § 15400; Oklahoma, and Texas; TEX.

the valid revocation of wills, revocable inter vivos trusts are subject to less stringent rules.[17] Most well drafted revocable trust agreements contain provisions concerning its revocation.[18] If the trust agreement specifies a particular manner required for revocation, the trust revocation is invalid unless the exercise of the power to revoke complies with the specific manner provided.[19] If no specific manner is stated in the trust agreement, the settlor may exercise the power to revoke in any manner sufficient to manifest the settlor's intent to revoke.[20]

A settlor's power to revoke a revocable trust is personal to the settlor and may not be exercised by a successor in interest.[21] An incompetent settlor is unable to revoke a revocable trust.[22] A conservator appointed for a settlor lacks the power to revoke the settlor's revocable trust.[23] Where the settlor has named an agent under a power of attorney, the agent may not revoke the settlor's revocable trust absent specific authorization conferred on the agent.[24]

II. Capacity to Make Gifts and Execute Wills

In order for a will to make a valid testamentary disposition, it must be executed with the requisite mental capacity. Different mental capacity standards apply between contracts and wills. A

Prop. Code § 112.051. *See*, Bogert and Bogert, *supra* note 14, at § 148 n.16.

17. McGovern, Kurtz, and Rein, *supra* note 14, at § 5.5.

18. A typical revocable trust clause reads:

The grantor reserves the right to alter, amend, modify or revoke this trust in whole or in part at any time and from time to time by instrument in writing signed by the grantor and delivered to the trustee. The trustee shall have a reasonable time after receipt of the writing revoking the trust, in whole or in part, in which to deliver the trust property.

19. Bogert, Trusts and Trustees § 1001 (2d ed. Rev.) (citing Underhill v. United States Trust Co., 13 S.W.2d 502 (Ky. 1929)); Bogert and Bogert, *supra* note 14, at §148; 56 Fla. Jur. 2d Trusts § 82 (1985).

20. Bogert and Bogert, *supra* note 14, at § 148; 56 Fla. Jur. 2d Trusts § 82 (1985). However, under Texas law, a trust created in writing must be revoked in writing. Tex. Prop. Code § 112.051(c).

21. Bogert, *supra* note 19, at § 1000 (citing Barlow v. Loomis, 19 F. 677 (C.C. Vt. 1884)); Bogert and Bogert, *supra* note 14, at § 148; 56 Fla. Jur. 2d Trusts § 82 (1985).

22. Freeman v. Lane, 504 So. 2d 1297, 1300-01 (Fla. Dist. Ct. App. 1987); *In re* Bo, 365 N.W.2d 847, 852 (N.D. 1985); Friedrich v. BancOhio Nat'l Bank, 470 N.E. 2d 467 (Ohio Ct. App. 1984); Fratcher, Scott on Trusts § 330 (4th ed. 1989). As the appointment of a conservator is not an adjudication of testamentary incapacity, the ward may possess sufficient capacity to execute a will and revoke a trust. *In re* Conservatorship of Bookasta, 216 Cal. App. 3d 445, 450 (1989).

23. *In re* Bo, 365 N.W.2d at 854.

24. *See* Franzen v. Norwest Bank of Colo., 955 P.2d 1018 (Colo. 1998). By statute, enacted after the execution of the power of attorney in *Franzen*, Colo. Rev. Stat. § 15-14-608(2) provides that "[a]n agent may not revoke or amend a trust that is revocable or amendable by the principal without specific authority and specific reference to the trust in the agency instrument." The statute appears to be more restrictive than *Franzen* in that the decision does not require specific reference to the trust. *See* Kline v. Utah Dep't of Health, 776 P.2d 57 (Utah Ct. App. 1989) (holding settlor's attorney-in-fact could not exercise settlor's power of revocation after the settlor's incapacity).

higher degree of mental competence is required for the transaction of ordinary business and the making of contracts than is necessary for testamentary disposition of property.[25] Gifts, like contracts, require greater competency than testamentary dispositions.[26] One explanation is that "[g]enerally, a grantor, unlike a testator, must cope with another party to the transaction, that is, with a grantee."[27] The testamentary capacity required for wills is a less rigorous standard because it is a unilateral disposition of property.[28] To have testamentary capacity "the testator need only understand the nature and consequences of executing a will, the nature and extent of the property being disposed of, and the identity of the persons who would be considered the natural objects of his bounty and his relations to them."[29] In contrast, the more exacting contract standard, applicable to gifts, requires the person to comprehend and understand the nature of the transaction and be capable of making a rational judgment concerning the transaction in question.[30] The higher standard applicable to gifts reflects the irrevocable nature the gift will have on the future financial security of the donor and those dependent on the donor.[31]

Although wills and gifts similarly may be set aside if obtained by undue influence, there are differing undue influence presumptions for gifts by will and inter vivos gifts.[32] Less is required to raise a presumption of undue influence for inter vivos gifts.[33] Any gift made to a donee who bears a confidential relationship to the donor is presumptively procured by undue influence. The same presumption does not apply to dispositions by will. In the case of wills, there must be more than just the existence of a confidential relationship. There must be a confidential relationship together with an abuse of that relationship in order for the presumption to arise.[34] According to one commentator:

> In a number of states it is said that the equity rule that a

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25. Estate of Baessler v. James, 561 N.W.2d 88, 92-93 (Iowa. Ct. App. 1997); Hamill v. Brashear, 513 S.W. 2d 602, 607 (Tex. Ct. App. 1974).

26. Legler v. Legler, 211 P.2d 233, 247 (Or. 1949); Roberts-Douglas v. Meares, 624 A. 2d 405, 419 (D.C. 1991).

27. *Legler*, 211 P.2d at 247.

28. *In re* Estate of ACN, 509 N.Y.S.2d 966, 969 (N.Y. Sup. Ct. 1986) (holding the creation of a charitable remainder unitrust is a bilateral transaction and settlor's capacity to be judged by a contract standard rather than a wills standard).

29. Rudolf Nureyev Dance Found. v. Noureeva-Francois, 7 F. Supp. 2d 402, 416 (S.D.N.Y. 1998) (citing *In re* Estate of Gearin, 517 N.Y.S.2d 339, 341 (N.Y. App. Div. 1987)).

30. *Rudolf Nureyev Dance Found.*, 7 F. Supp. 2d at 416.

31. RESTATEMENT (THIRD) TRUSTS § 11, comment on subsection (3) (1996) (Tentative Draft No. 1).

32. Anderson v. Meadowcroft, 661 A.2d 726 (Md. 1995).

33. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 GONZ. L. REV. at 58; Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978).

34. Madden v. Rhodes, 626 So. 2d 608, 618 (Miss. 1993).

> presumption or inference of undue influence arises where the party in whom trust and confidence is reposed . . . applies only to transactions inter vivos, and does not apply to gifts by will . . . The reason which is frequently assigned for this rule is that the testator gives only property in which his interest is bound to cease at his death, while a gift inter vivos passes property which the donor would have retained but for the gift.[35]

Further, the courts have recognized that impermissible influence applied in the gift setting may be accepted in a testamentary setting.[36] Another court explains what has become known as the equity rule as follows:

> The basis for this diametrically different rule or burden of proof has rarely, if ever, been stated. The basis would seem to be that it is natural and customary for a person to dispose of his property by will, and therefore he is not unlikely to discuss it with the principal beneficiary; whereas it is unnatural for a person to give away a large portion of his property during his lifetime even to one occupying a confidential relationship. Although, to many, the Equity rule will seem the fairer and better rule, it is too late to question or discard the rule which has been so long established and so recently reiterated in will cases.[37]

Thus, the equity rule creates a presumption against the validity of the gift to the donee and imposes the burden upon the recipient to establish that the gift was freely made, i.e., in good faith and without undue influence.[38] In contrast, for testamentary gifts there is a suspicious circumstances analysis rather than a presumption of invalidity.[39]

For transactions between a husband and wife, there is no

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35. 3 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 29.84, at 600-01 (1961).

36. One court observed:

> In the cases of gifts or other transactions inter vivos, it is considered by courts of equity, that the natural influence, which such relations as those in question involve, exerted by those who possess it, to obtain a benefit for themselves, is an undue influence. The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent.

Anderson, 661 A.2d at 731 (quoting Griffith v. Diffenderffer, 50 Md. 466, 484 (1879)).

37. Williams v. McCarroll, 97 A.2d 14, 21 (Pa. 1953).

38. Oachs v. Stanton, 655 A.2d 965, 968 (N.J. Sup. Ct. App. Div. 1995) (stating "this rule was designed to protect the donor from a voluntary decision induced by the confidential relationship the donor shares with the donee") (citing *In re* Dodge, 234 A.2d 65 (N.J. 1967)); Rich v. Hallman, 143 So. 292, 293 (Fla. 1932).

39. Estate of Baessler, 561 N.W.2d at 93; Shearer v. Healy, 230 A.2d 101, 108 (Md. 1967).

presumption of undue influence arising solely from the marital relationship.[40] To recognize a presumption between spouses would nullify the sentiment that one spouse has a natural claim to the other's property.

III. Undue Influence

The precise parameters of undue influence remain elusive.[41] According to one commentator in addressing undue influence in a wills context:

> Most judicial definitions of undue influence speak of domination of the testator's mind, which substitutes the influencer's volition for that of the testator. The typical test is whether the testator's mind was so controlled as to overpower his free agency and to cause him to make a will that he would not have made if left to his own devices.[42]

Dispositions and documents are not honored if the nominal actor's free agency is destroyed because of the substitution of the influencer's actions for that of the nominal actor.[43] In essence, the "professed action is not freely done but is in truth the act of the one who procures the result."[44] Common elements the courts analyze when determining whether undue influence has been established include:

a. Susceptibility to influence;
b. The influencer's opportunity to influence;
c. The influencer's disposition or willingness to influence;
d. A result that appears to be the product of undue influence.[45]

These elements are applied to ascertain whether the nominal

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40. *In re* Estate of Ewers, 481 P.2d 970, 973-74 (Kan. 1971); Presgrove v. Robbins, 451 P.2d 961, 971 (Okla. 1969); Warner v. Fla. Bank & Trust Co., 160 F.2d 766, 770-71 (11th Cir. 1947); *see also In re* McKittrick Trust, 865 P.2d 1099, 1103 (Mont. 1993). *See also* Rein-Francovich, *supra* note 33, at 42-43 (stating that it is "[e]xtremely rare for a court to find that a confidential relationship exists between spouses even where one is clearly dependent on the other").

41. *See In re* Coley, 280 S.E.2d 770 (N.C. Ct. App. 1981):

> It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

Id. at 772 (citing *In re* Will of Beale, 163 S.E. 684 (N.C. 1932)).

42. Rein-Francovich, *supra* note 33, at 33. *See also* McGovern, Kurtz, and Rein, *supra* note 14, at § 7.3 (West 1988).

43. Rein-Francovich, *supra* note 33, at 33; Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 Ariz. L. Rev. 235, 244 (1996). The undue influence doctrine is not limited to the creation of wills. It may apply to will revocations, gifts, deeds, contracts, and trusts.

44. Loftin v. Loftin, 208 S.E.2d 670, 674-75 (N.C. 1974).

45. Rein-Francovich, *supra* note 33, at 35; Ray D. Madoff, *Unmasking Undue*

actor's conduct and actions resulted from his own free will and agency.[46] To establish undue influence another court states:

> the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist.[47]

The grantor must be subjected to actions "sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will."[48]

A will must be executed with sufficient mental capacity in order to be valid.[49] A will whose execution is procured by undue influence is invalid.[50] As the same degree of mental capacity is required for the revocation of a will as for its creation, a will revocation, which is the product of undue influence, is ineffective.[51]

IV. Trusts and Constructive Trusts

The legal institution of the trust finds its origins within courts of equity.[52] Proceedings involving trusts are within the jurisdiction of courts of equity.[53] Equitable principles govern the beneficiary's

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Influence, 81 Minn. L.Rev. 571, 582-83 (1997); Griffin v. Baucom, 328 S.E.2d 38, 41 (N.C. Ct. App. 1985); *see* 25 Am. Jur. 2d *Duress and Undue Influence* § 35 (1996).

46. As one court has stated:

> The test of undue influence is whether the party exercised his own free agency and acted voluntarily by the use of his own reason and judgment, which may be determined from all the surrounding circumstances, including the relation of the parties, the time and manner of making suggestions or giving advice, the motive, if any, in making suggestions, and the effect upon the party so acting.

Mowrer v. Eddie, 979 P.2d 156, 162 (Mont. 1999) (quoting Frame v. Bauman, 449 P.2d 525, 532 (Kan. 1969), quoting Cersovsky v. Cersovsky, 441 P.2d 829, 833 (Kan. 1968)); Logan v. Logan, 937 P.2d 967, 972 (Kan. Ct. App. 1997).

47. *Rudolf Nureyev Dance Found.*, 7 F. Supp. 2d at 417.

48. McPeak v. McPeak, 593 N.W.2d 180, 187 (Mich. Ct. App. 1999).

49. *In re* Dunn, 500 S.E.2d 99, 103 (N.C. Ct. App. 1998). With respect to testamentary capacity, it has been stated:

> [d]ifferent courts may define this degree of capacity in slightly different terms. As ordinarily stated, however, the essence of what is required is that the testator be able to understand the natural objects of his or her bounty and the nature and extent of his or her property, and be able to understand and make decisions about how he or she wishes to dispose of that property.

Restatement (Third) Trusts § 11, comment on subsection (1) (1996) (Tentative Draft No. 1) (1996).

50. Estate of Auen v. Carson, 35 Cal. Rptr. 2d 557, 565 (Cal. App. Ct. 1994).

51. T. Atkinson, Law of Wills § 84, § 86 (2d ed. 1953); First Citizens Bank & Trust Co. of S.C. v. Inman, 370 S.E. 2d 99 (S.C. Ct. App. 1988) (contesting codicil revocation on undue influence grounds).

52. Bogert, *supra* note 19, at § 1. Most states no longer have separate courts of equity and, as a result, equitable principles are applied in courts of general jurisdiction with legal and equitable jurisdiction. *Id.*

53. Nayee v. Nayee, 705 So. 2d 961 (Fla. Dist. Ct. App. 1998).

remedies,[54] and a constructive trust is one form of equitable remedy.[55] No rigid requirements exist for imposing a constructive trust.[56] Unduly influenced conveyances may result in having a constructive trust imposed.[57] As one commentator has noted, "the imposition of a trust by equity will prevent the person accidentally holding legal title from unjustly enriching himself at the expense of another who in equity is entitled to the property."[58] Another commentator states:

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.[59]

A person receiving property by fraud, duress, undue influence, or violation of a duty arising out of a fiduciary relation to another may be unjustly enriched.[60] In the words of Justice Cardozo:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain beneficial interest, equity converts him into a trustee . . . A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.[61]

Section 184 of the Restatement of Restitution imposes a constructive trust on the property acquired by the unjustly enriched party.[62] Comment (a) to the section makes it applicable to the situation where a decedent is, by fraud or undue influence, induced to revoke a will.[63] In situations involving improperly caused revocations, Comment (d) provides that the person who takes the property as a result of the revocation "holds it upon a constructive

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54. BOGERT, *supra* note 19, at § 870.

55. Hinson v. Hinson, 343 S.E.2d 266, 271-72 (N.C. Ct. App. 1986); 5 FRATCHER, *supra* note 22, at § 462. "Constructive trusts (like other trusts) were historically enforced in equity." MCGOVERN, KURTZ, AND REIN, *supra* note 14, at § 6.2.

56. In re Estate of Cass, 719 A.2d 595, 598 (N.H. 1998).

57. *See* Skidmore v. Back, 512 S.W.2d 223 (Mo. Ct. App. 1974); BOGERT, *supra* note 19, at § 80; FRATCHER, *supra* note 22, at § 462.2. "Where a person acquires property from another by fraud, duress, or undue influence under such circumstances that a third person is entitled to restitution from the transferee, the transferee holds the property upon a constructive trust for the third person." RESTATEMENT OF RESTITUTION § 169.

58. BOGERT, *supra* note 19, at § 474.

59. FRATCHER, *supra* note 22, at § 462.

60. *In re Estate of Cass*, 719 A.2d at 598 (citing FRATCHER, *supra* note 22, at § 462.2).

61. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919).

62. "Where a disposition of property by will or intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust. . . ." RESTATEMENT OF RESTITUTION § 184.

63. RESTATEMENT OF RESTITUTION § 184, cmt. a.

trust for the person who would have taken under the will . . . if it had not been revoked.[64]

Although there is no presumption of undue influence arising strictly from the marital relationship regarding transactions between spouses,[65] a constructive trust has been imposed for the benefit of the wronged spouse.[66]

V. Wrongful Interference with Trust Cases

In *Hoffman v. Kohns*, the decedent's niece sought to have the probate of her elderly uncle's will revoked alleging that the will had been procured through undue influence.[67] In addition, she sought to have the revocation of his revocable inter vivos trust invalidated on the same grounds.[68] The appellate court found that the evidence established that both the will and revocation of the trust were part of a continuing pattern of undue influence exercised by decedent's wife who was thirty years his junior.[69] As a result, both the will and trust revocation were held invalid.[70]

In *Florida National Bank of Palm Beach v. Genova*,[71] Mrs. Genova created and funded a revocable inter vivos trust naming herself and the bank as co-trustees. She retained the income from her trust for life and the remainder was payable, following her death, to the Semanskees.[72] When she was 76 years old, Mrs. Genova married Mark Genova who was 32 years old.[73] Approximately one year later they divorced.[74] As part of the divorce proceeding, the trial judge found one transfer of certain assets Mrs. Genova made to her husband to be based on undue influence.[75] Several months after the divorce, the Genovas remarried and Mrs. Genova, in her husband's presence and on letterhead from his restaurant, wrote a letter to the bank seeking to revoke her trust.[76]

With knowledge of the trial court's findings in the divorce proceeding, and doubts about the validity of the attempted trust revocation, the trustee/bank petitioned the probate court for instructions.[77] Mrs. Genova filed a writ of mandamus in the circuit

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64. *Id.* at § 184, cmt. d (1937).
65. *See* note 45 *supra.*
66. *See* Bohn v. Bohn, 455 S.W.2d 401 (Tex. Civ. App. 1970).
67. 385 So. 2d 1064 (Fla. Dist. Ct. App. 1980).
68. *Hoffman*, 385 So. 2d at 1065.
69. *Id.* at 1068-69.
70. *Id.* at 1069.
71. 460 So. 2d 895 (Fla. 1985).
72. *Id.* at 895-97 n.3.
73. *Id.* at 895.
74. *Id.*
75. *Id.* at 895-96.
76. *Genova*, 460 So. 2d at 896.
77. *Id.*

court ordering the transfer of the trust funds.[78] The Florida district court of appeals reversed the lower court holding, which invalidated the settlor's efforts to revoke the trust, because of the presence of undue influence.[79]

In affirming the court of appeals, the Florida Supreme Court concluded "the principle of undue influence ha[d] no place in determining whether a competent settlor [could] revoke a revocable trust."[80] The court applied a control and contingent interest analysis to support its conclusion validating the revocation without any inquiry into the allegations of undue influence surrounding the revocation. The retention of control through the power to revoke, according to the court, "distinguishes the revocable trust from the other type of conveyances in which the principle of undue influence is applied, i.e., gifts, deeds, wills, contracts, etc."[81] Unlike the donor who relinquishes ownership of the property to the donee at the time of a gift, the beneficiaries of a revocable trust do not come into possession of the trust property until the settlor's death, and their interest is contingent on the settlor failing to exercise the power of revocation.[82] The Florida Supreme Court then expressed its disapproval of the holding in *Hoffman*.[83]

The Florida courts again faced the question of whether a trust revocation was effective irrespective of undue influence in *Freeman v. Lane*.[84] Mrs. Freeman created a revocable trust for herself for life with the trust property to be distributed among her six children after her death.[85] Mrs. Freeman informed the trustee in writing that she wished to revoke the trust, but two of Mrs. Freeman's children told the trustee that her decision to revoke the trust was the product of undue influence of certain other siblings.[86] The trustee then sought a declaratory judgment respecting the trust revocation and trust termination without liability.[87] While the lower court invalidated Mrs. Freeman's attempted revocation on undue influence grounds, the court of appeals applied *Genova* and reversed because that precedent held that undue influence does not prevent revocation of a revocable trust.[88]

Both *Genova* and *Freeman* involved trust revocation challenges

78. *Id.* A trust officer for the bank was aware of the undue influence finding in the settlor's divorce proceeding. *Id.*
79. *Id.*
80. *Id.*
81. *Genova*, 460 So. 2d at 897.
82. *Id.*
83. *Id.* at 897-98.
84. 504 So. 2d 1297 (Fla. Dist. Ct. App. 1987).
85. *Freeman*, 504 So. 2d at 1298.
86. *Id.*
87. *Id.*
88. *Id.* at 1300.

while the settlor was alive. However, by disagreeing with the result in, and expressly rejecting the holding of, *Hoffman*, *Genova* suggests that undue influence challenges to trust revocations will meet defeat whether brought during the settlor's life or after death.

Based on the Florida Supreme Court's reasoning in *Genova*, one commentator has suggested that undue influence may likewise be irrelevant in the creation of a trust.[89] This conclusion follows from the Florida Supreme Court's statement that the named beneficiaries of a revocable trust have interests contingent on the settlor not revoking the trust.[90] Similarly, potential trust beneficiaries' interests are contingent on the grantor's power to create the trust.[91]

A. *Post* Florida National Bank of Palm Beach County v. Genova *Developments*

In *Paananen v. Kruse*,[92] the decedent's will and revocable trust were challenged on the grounds of undue influence after his death.[93] The court of appeals upheld the trial judge in revoking the revocable trust created under undue influence.[94] The court distinguished *Genova* because the settlor had died and the trust "ripened into a testamentary disposition."[95]

In *Ullman v. Garcia*,[96] the appellate court held that during the settlor's lifetime the guardian of an incapacitated settlor could not contest the validity of a revocable Totten trust created by the settlor before incapacity on the basis of undue influence.[97] *Paananen*, and its reliance on *Genova*, and a Florida Statute assisted the court of appeals.[98] Consistent with the statute, both *Paananen* and *Ullman* permit allegations of undue influence in the creation of a revocable trust to be raised in actions commenced after the settlor's death.

The premises underlying *Genova*, a revocable trust is unique and

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89. Englehardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROPERTY, PROBATE AND TRUST JOURNAL, 535, 546 (1991).

90. *Id.* at 546.

91. *Id.*

92. 581 So. 2d 186 (Fla. Dist. Ct. App. 1991).

93. The beneficiaries named in the settlor's 1985 will challenged the settlor's 1987 inter vivos trust. *Paananen*, 581 So. 2d at 187.

94. *Id.* at 188.

95. *Id.* Allegations of undue influence were the only way the estate might regain control of the assets. *Id.* The allegations involved trust creation rather than trust revocation.

96. 645 So. 2d 168 (Fla. Dist. Ct. App. 1994).

97. *Ullman*, 645 So. 2d at 170.

98. The Florida statutes on the effect of undue influence and trust contests provides:

> A trust is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but the remainder of the trust not so procured is valid if it is not invalid for other reasons. *An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable.*

FLA. STAT. ANN. §§ 737.206, 737.2065 (2000) (emphasis added).

unlike other transfers by gift or will and the right to revoke is absolute, are at odds with precedent not addressed by the *Genova* court. As one commentator has noted when comparing revocable trusts and wills, "[u]nder either the trust or the will, the interest of the beneficiaries is both revocable and ambulatory."[99] Either the creation[100] or revocation[101] of a will may be challenged on undue influence grounds. Like undue influence in the making of a will, the exercise of undue influence in procuring the revocation of a will invalidates the revocation.[102] While revocable trusts and wills similarly provide for the disposition of property upon death, the symmetrical application of undue influence to either the creation or revocation of wills is inapplicable to the creation and revocation of revocable trusts under *Genova*. Moreover, if the revocable trust is analogized to inter vivos gifts, as both are conveyances of legal title, gifts that are the product of undue influence of the donee or a third person are invalid and may be set aside.[103]

B. Intentional Interference with an Expected Gift or Inheritance

In *Davison v. Feuerherd*,[104] appellant's stepmother created a revocable trust with assets she had received from her husband, appellant's father. The settlor thereafter formed an intention to name appellant as trust remainder beneficiary and had her attorney prepare a trust amendment to that effect.[105] Appellant alleged that the appellees improperly prevented the settlor from signing the amendment.[106] Although the appellees succeeded at trial, on appeal

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99. John H. Langbein, *The Nonprobate Revolution and Future Laws of Succession*, 97 HARV. L. REV. 1108, 1113 (1984); *Nat'l Shawmut Bank of Boston*, 53 N.E.2d at 122 (distinguishing feature of testamentary disposition is its ambulatory nature until death of maker).

100. *See* Sangster v. Dillard, 925 P.2d 929 (Or. Ct. App. 1996); *In re* Estate of Dankbar, 430 N.W.2d 124, (Iowa 1988); Estate of Auen, 35 Cal. Rptr. 2d 557, 565 (Cal. Ct. App. 1994); Estate of Molera, 100 Cal. Rptr. 696 (Cal. Ct. App. 1972); *see also* CAL. PROB. CODE § 6104 (stating that the execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence); FLA. STAT. ANN. § 731.08 (dictating a will is void if the execution thereof is procured by fraud, duress, mistake, menace or undue influence. Likewise, any part of a will is void if so procured, but the remainder of the will not so procured shall be valid if the same is not invalid for other reasons).

101. *See* Smith v. Moore, 176 So. 2d 868 (Ala. 1965); Estate of Evans v. Priebe, 80 N.W.2d 127 (Neb. 1956); Black v. Black, 240 S.W.2d 458 (Tex. App. 1951); Matter of Dunn, 500 S.E.2d 99 (N.C. Ct. App. 1998). CAL. PROB. CODE § 6104 provides "[t]he execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence." FLA. STAT. ANN. § 731.09 provides "[i]f the revocation of a will, or any part thereof, is procured by fraud, duress, menace or undue influence, such revocation shall be void."

102. *See* 79 AM. JUR. 2D *Wills* § 508 (1975).

103. 25 AM. JUR. 2D *Duress and Undue Influence* § 35 (1996); 38A C.J.S. *Gifts* § 33 (1996).

104. 391 So. 2d 799 (Fla. Dist. Ct. App. 1980).

105. *Id.* at 800.

106. *Id.*

the court recognized a tortious interference action through the appellant's expectation of being a beneficiary of a revocable trust.[107] The appellate court stated:

> with regard to tortious interference claims, no real distinction exists between gifts of inheritance through a will and gifts through a revocable trust. Both forms of giving create only an expectancy in the beneficiary and, in both forms, the donor has the privilege of changing his mind . . . It is the expectancy status to which this theory of liability applies, and both wills and revocable trusts create expectancies.[108]

While *Davison* concerned allegations of interference through undue influence with an amendment to a revocable trust, *Hammons v. Eisert*,[109] a case factually similar to *Genova*, addressed alleged undue influence in causing a settlor of a revocable trust to revoke the trust. The *Hammons* court held:

> the beneficiary of a revocable written trust has a cause of action, at least after the death of the settlor, against a person who, by the exercise of undue influence induces a settlor to revoke the trust and thereby diverts all or part of the trust funds and prevents the beneficiary from receiving that which he would otherwise have received.[110]

Thus undue influence exerted to remove a named beneficiary, or to prevent a beneficiary from being named, is actionable.

Both of the cases mentioned above permit a tortious interference action to be brought after death but the question arises whether an action can be brought before death. *Harmon v. Harmon*[111] was the first case to recognize a wrongful interference action to be brought prior to the testator's death. In that case, the son and expectant legatee of his mother's future estate alleged that his brother and his wife improperly induced his mother to make inter vivos gifts to them.[112] Prior to its decision in *Harmon*, the Maine Supreme Court faced a similar question involving wrongfully induced gifts affecting an expected bequest. In *Cyr v. Cote*,[113] the Supreme Court of Maine permitted the tort claim for damages where it was brought after the testator's death. As a result, *Harmon* extended recognition of the cause of action to actions commenced while the testator is alive and able, at any time before death, to will the property to someone else.

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107. *Id.* at 802.
108. *Id.*
109. 745 S.W.2d 253 (Mo. Ct. App. 1988).
110. *Id.* at 254.
111. 404 A.2d 1020 (Me. 1979).
112. *Id.* at 1021-22.
113. 396 A.2d 1013 (Me. 1979).

In *Carlton v. Carlton*,[114] the court of appeals followed the lead of *Harmon* and allowed an action to be maintained during the testator's lifetime.[115] The *Carlton* court faced a unique situation because the alleged tortfeasor had died while the testators were alive, and, to not allow the plaintiff to bring the lawsuit while the testators were living put the plaintiff at risk of forever losing the cause of action because of the state probate claims statute.[116]

The ability to bring a tortious interference action while the grantor is alive may seem to be contradictory to notions of freedom to change one's mind about beneficiaries named in a will (or trust for that matter). Such freedom is predicated on the absence of wrongful interference. Several considerations support recognition of a lifetime cause of action, including: (1) the alleged injury occurs during the testator's life; (2) the testator's testimony is available; and (3) the availability of other witnesses whose memories are fresher.[117]

VI. Proposed Redress for the Wrongful Interference Scenario: Available Relief in Probate or Trust Proceedings in Lieu of Tort Action

Although the tortious interference action was recognized in *Cyr* and extended in *Harmon*, both decisions notably mention a constructive trust as an appropriate alternative remedy.[118] Moreover, both decisions cite the famous case of *Latham v. Father Divine*.[119] In *Latham*, the will beneficiary wrongfully prevented the testator from revoking the will, and the court imposed a constructive trust in favor of the intended beneficiary even though there was no duly executed will or draft naming the intended beneficiary.[120] Wrongful interference in causing the revocation of a trust naming others as beneficiary provides an even more compelling case in which to impose a constructive trust. Unlike the oral testimony in *Latham*, as to whom the testator sought to name as beneficiary, the trust agreement itself serves as written evidence of the settlor's intent to provide for the named beneficiaries after death.[121]

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114. 575 So. 2d 239 (Fla. Dist. Ct. App. 1991).

115. *Id.* at 241-42.

116. *Id.*

117. *Harmon*, 404 A.2d at 1022, 1025. See Moore, *At the Frontier of Probate Litigation: Intentional Interference with the Right to Inherit*, 7 Prob. & Prop 6 (November/December 1993) and Note, *Intentional Interference with Inheritance*, 30 Real Property, Probate & Trust Journal 325 (1995).

118. *Harmon*, 404 A.2d at 1025; *Cyr*, 396 A.2d at 1018.

119. 85 N.E.2d 168 (N.Y. 1949).

120. *Id.* at 169. Further, the intended beneficiary was not an heir. *Id.* at 171.

121. Without the wrongful interference, prior to death the settlor would of course be free to leave the property to someone else by naming new beneficiaries or revoking the entire trust.

In *Brandin v. Brandin*,[122] the decedent, after marrying his second wife, amended his revocable trust to increase the share of property his new wife would receive upon his death. Following their father's death, the children brought a tortious interference action claiming decedent's second wife unduly influenced the trust amendment. Reasoning from principles relating to the ability to bring a tortious interference action in the wills context and recognition of actions to set aside trusts as the products of undue influence, the appellate court stated:

> [w]e believe the court's policy behind requiring plaintiffs to seek redress through other available and adequate forums, as it does with respect to wills in the probate court, correctly and logically extends to requiring plaintiffs to seek redress through courts of equity for challenges to express trusts. Just as "the probate code . . . purports to provide the exclusive forum for such matters," [j]urisdiction over trusts has always been regarded as one of equity's original and inherent powers . . . . An action to set aside the trust, with the necessary will contest (discussed infra), gave children an adequate remedy. We find that where, as here, plaintiffs can receive an adequate remedy through already existing and appropriate remedies, a tortious interference with inheritance expectancy claim—and its attendant potential for abuse—will not lie.[123]

Probate can provide an adequate remedy for will executions and revocations caused by undue influence. For example, if the contested will were found to result from undue influence, the property would pass by the terms of the prior will or by intestacy if there were no prior will. In contrast, there is no remedy in the probate court for preventing either the execution or revocation of a will. For example, if a decedent were improperly prevented from executing a will, no will exists, and, there would be no probate remedy to rectify the property from passing by intestacy.[124] Similarly, if a testator were wrongfully prevented from revoking an existing will, the probate court cannot remedy the lack of revocation. Where probate fails to provide a remedy, equity may provide a remedy by means of a constructive trust.[125]

Tortious interference claims originated to protect business

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122. 918 S.W.2d 835 (Mo. Ct. App. 1996).

123. *Id.* at 840 (quoting McMullin v. Borgers, 761 S.W.2d 718, 719 (Mo. Ct. App. 1988) (stating that "[w]here . . . a will contest provides essentially the same remedy and prevents any additional damages . . . an action for tortious interference will not lie").

124. With respect to the limits of probate, it has been stated: "Probate can strike from the will something that is in it as a result of fraud but cannot add to the will a provision that is not there nor can the probate court bring into being a will which the testator was prevented from making and executing by fraud." PARKER & BOWLES, PAGE ON WILLS § 14.8.

125. Another possible alternative is a tort action for damages against the wrongdoer.

relations or commercial expectancies, but have also been extended to non-commercial expectancies.[126] The wrongful interference with an expected gift or inheritance has been recognized as a tort in many jurisdictions.[127] The doctrine has been expanded to cover situations beyond gifts and wills. The tort has been applied to non-probate transfers. For example, it has been applied in favor of revocable trust beneficiaries[128] and life insurance beneficiaries.[129] In fact, the Restatement (2d) Torts provides:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.[130]

To succeed with a tort action for wrongful interference, the injured party must establish: (a) the existence of an expectancy; (b) intentional interference with that expectancy; (c) the interference must be "conduct tortious in itself, such as fraud, duress or undue influence;"[131] (d) a reasonable certainty that the expectancy would have been received without the interference; and (e) damages.[132] In recognizing the tort action, however, many courts have stated that the wronged party must either have exhausted probate remedies or show the inadequacy of probate remedies before an action in tort can be brought.[133]

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126. PROSSER & KEETON ON TORTS, § 130 (5th ed. 1984); HARPER, JAMES, & GRAY, LAWS OF TORTS, Vol. 2, § 6.11 (2d ed.); Note, *Intentional Interference with Inheritance*, 30 REAL PROP. PROB. & TR. J. 325 (1995).

127. *See* Mitchell v. Langley, 85 S.E. 1050 (Ga. 1915), Davison v. Feuerherd, 391 So. 2d 799 (Fla. Dist. Ct. App. 1980); Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981); Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978); *Cyr*, 396 A.2d at 1018; King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987); DeWitt v. Duce, 599 F.2d 676 (5th Cir. 1979). *See also* Holt v. First Nat'l Bank of Mobile, 418 So. 2d 77, 79 (Ala. 1982).

128. *See Davison*, 391 So. 2d at 799 (recognizing action for tortious interference by revocable trust beneficiaries); Hammons v. Eisert, 745 S.W.2d 253 (Mo. Ct. App. 1988) (involving beneficiaries of revocable trust suing third party alleging undue influence on trust settlor).

129. *See Mitchell*, 85 S.E. at 1050.

130. RESTATEMENT (SECOND) TORTS § 774(B).

131. *Nemeth*, 425 N.E.2d at 1191. The tortious interference with an expectancy claim does not authorize an independent action for undue influence of duress. *Cyr*, 396 A.2d at 1019 n.7.

132. Doughty v. Morris, 871 P.2d 380 (N.M. Ct. App. 1994) (involving sister suing her brother alleging tortious interference with her prospective inheritance from her mother); *In re* Estate of Knowlson, 562 N.E.2d 277 (Ill. App. Ct. 1990) (involving sisters who brought an action alleging another sister wrongfully interfered with their expectancies from their mother by causing gifts and a will to be made in favor of the other sister).

133. *See* Smith v. Chatfield, 797 S.W.2d 508 (Mo. Ct. App. 1990) (deciding heirs who successfully contested decedent's will were not permitted to bring subsequent tortious interference action against attorney); *McMullin*, 761 S.W.2d at 718 (holding beneficiary named in first will who failed to file a will contest precluded from bringing an action for tortious interference with inheritance); Robinson v. First State Bank of Monticello, 454 N.E.2d 288 (Ill. 1983); DeWitt v. Duce, 408 So. 2d 216 (Fla. 1981) (concluding beneficiaries

By analogy to wills, there are available and adequate remedies available to provide relief to undue influence challenges against either the execution or revocation of revocable trusts. A revocable trust created as the result of undue influence exerted on the settlor may be challenged by bringing an action to have the trust set aside.[134] A similar challenge should be available to contest a revocation brought about through undue influence. Improperly causing the creation or revocation of a revocable trust differs from improperly preventing the creation or revocation of a revocable trust.

In *Paananen*, which was a trust procured through undue influence scenario, the court pointed out the importance of allowing an undue influence allegation because it was the only way for the estate to regain control of the assets.[135] Allegations of undue influence in causing a revocable trust to be revoked present a very different scenario. Rather than being outside of probate with the trust created under undue influence, the assets of the improperly revoked trust become part of the probate estate unless subsequently transferred or consumed during life by the settlor. The beneficiaries, who would have otherwise received the trust assets upon the settlor's death if the revocation had not occurred, may bring what is essentially an action to enforce the trust. In this way the executor can distribute the former trust assets, now in probate, to the parties who would have otherwise received them but for the wrongful interference. In probate court, the wronged beneficiaries can seek to have the court set aside the transfers from the trust and impose a constructive trust on these assets so they can be distributed in accordance with the terms of the trust agreement. Any trust assets distributed to takers other than those named as trust beneficiaries would be subject to a constructive trust, with the takers holding as constructive trustees for the trust beneficiaries.

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who chose to take under will rather than contest it were precluded from bringing a claim for tortious interference with inheritance rights). *See also* Soehnel, *Liability in Damages for Interference with Expected Inheritance or Gift*, 22 A.L.R. 4th 1229 § 4 (1983).

134. *See* Brandin v. Brandin, 918 S.W.2d 835 (Mo. Ct. App. 1996). If the trust is set-aside on the grounds it was procured by undue influence, the assets become part of the probate estate and will pass by will, if one exists, or by intestacy. *See Paananen*, 581 So. 2d at 186 (invalidating revocable trust after settlor's death due to undue influence in its procurement). With regard to the rescission of a trust whose creation was induced by fraud, duress, or undue influence, a leading commentator states:

> In such case the same principles apply as apply to outright gifts. These grounds for rescission or reformation are not peculiar to the law of trusts, although they are not infrequently applied to the creation of trusts. To the extent to which an outright gift can be set aside, a conveyance in trust can be set aside; to the extent to which an absolute devise or bequest can be set aside, a devise or bequest in trust can be set aside.

FRATCHER, *supra* note 22, at § 333 at 396.

135. *Paananen*, 581 So. 2d at 188.

Through the manipulation of causing the settlor to revoke a trust, the disposition of the assets once governed by the trust instrument does not automatically end up in the hands of the influencer. These former trust assets, at death, pass according to the will, if one exists, or by intestacy if no will exists. Of course, the assets could also be the subject of lifetime gifts. Therefore, in all likelihood, the influencer would also need to be involved with these other gratuitous dispositions. However, with the assets displaced from the trust, appropriate probate remedies exist to review these transactions. In this manner, and without necessarily having to look to a tort action, the court can redress the wrong by imposing a constructive trust in order to put the parties in the position they would have been had the wrong not taken place.

Suppose gifts of the former trust assets were induced following the revocation of the trust. Both cases and commentators recognize the availability of the tort action in connection with improperly induced inter vivos transfers. However, the alternative remedies approach would seem, in many instances, to preclude a tort action. While the donor was alive and competent, the donor could seek to have the transfer set aside.[136] If the donor ceased to be competent, an incompetency proceeding could be brought to have a guardian or conservator appointed who could seek to have the gift set aside.[137] After the donor's death, the personal representative of the donor's estate, or beneficiaries of the donor's will, can bring an action to set the gift aside.[138] Therefore, in allowing a tort action, courts may be too quick in assuming matters to be outside of either a probate or trust proceeding. These courts may have been guided by general principles that gifts and assets placed in revocable inter vivos trusts are not probate assets and are not subject to estate administration. The injured parties may be able to bring an action in probate or a separate trust action. In either event, available and adequate remedies should preclude the damage

136. *See* Mowrer v. Eddie, 979 P.2d 156 (Mont. 1999) (involving principal who executed durable power of attorney successfully challenged on undue influence grounds attorneys-in-fact's gifts to themselves); Oachs v. Stanton, 655 A.2d 965 (N.J. Super. Ct. App. 1995) (dealing with donor who brought an action to set aside an inter-vivos transfer of her home to donee); Hicks v. Hicks, 491 So. 2d 346 (Fla. Dist. Ct. App. 1986) (involving grantor who brought action against grantees to set aside a warranty deed).

137. *See* Bryant v. Lawshe, 659 So. 2d 117 (Ala. 1995) (involving conservator of incapacitated ward bringing suit to set aside ward's inter vivos property transfer); Robertson v. Robertson, 654 P.2d 600 (Okla. 1982) (involving incompetent's guardian bringing an action to impose constructive trust on real estate); Majorana v. Constantine, 318 So. 2d 185 (Fla. Dist. Ct. App. 1975).

138. *See* Logan v. Logan, 937 P.2d 967 (Kan. Ct. App. 1997) (involving brother, as executor of his deceased parents' estate, who sued his brother and sister-in-law to set aside inter-vivos transfer parents made to them); Estate of Baessler v. James, 561 N.W. 2d 88 (Iowa Ct. App. 1997) (dealing with decedent's grandchildren who brought an action to set aside decedent's inter vivos transfer of assets and will); Reynolds v. Molitor, 440 A.2d 192 (Conn. 1981).

action in tort.

Brandin is the first court to use the availability of alternative remedies approach in determining whether trust beneficiaries may bring a tortious interference action. In *Davison* and *Hammons*, former beneficiaries of revocable trusts were permitted to bring tort actions for interference with the expectation of being a revocable trust beneficiary. *Davison* involved an amendment to the trust[139] and *Hammons* concerned the revocation of the trust. Neither decision employed the availability of alternative remedies analysis, even though most jurisdictions prohibited a tortious interference with a gift or inheritance action unless a probate action was unavailable or inadequate. The Restatement of Torts, in recognizing the tort action, contains commentary acknowledging the existence of situations where a restitutionary remedy, such as a constructive trust or an equitable lien, is proper.[140]

A constructive trust is an equitable remedy and the body of law governing trusts developed with the courts of equity. By accepting the tort action for damages, the courts have shifted from equitable to legal relief despite equity being the traditional domain for trust matters. There has been a not so subtle shift from an assets action to a damages action. Where the constructive trust provides an adequate remedy, the damage action should be precluded. The constructive trust would apply to the property or the proceeds of the property in the event the property were sold or exchanged. While it would seem that many of the same facts potentially apply to both a constructive trust action and a tort action for damages, plaintiffs should not be able to pursue the more lucrative damage option in cases where a constructive trust can provide them with what they would have received absent the wrongful interference. As one commentator has noted:

> If the party injured by the fraud is one who would otherwise have been a legatee and the fraud took the form of inducing the testator to omit a gift to the aggrieved party and to include a gift to the party practicing the fraud, rejecting the fraudulently procured gift at probate would be ineffective to pass the property to the harmed party. Probate can strike from

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139. *See* Martin v. Martin, 687 So. 2d. 903 (Fla. Dist. Ct. App. 1997) (involving sons who sued their father's second wife alleging that she wrongfully interfered with their inheritance rights through trust amendments reducing the amounts they would receive from their father).

140. The commentary to section 774B provides, in part:

> If, however, the defendant has himself acquired the benefits of the legacy or gift, he is unjustly enriched at the expense of the plaintiff and a remedy is also afforded in restitution. This may consist of holding the wrongdoer to a constructive trust, imposing an equitable lien or subjecting him to a simple monetary judgment to the extent of the benefits thus tortiously acquired.

RESTATEMENT (SECOND) TORTS § 774B cmt. e (1977).

> the will something that is in it as a result of fraud but cannot add to the will a provision that is not there nor can the probate court bring into being a will which the testator was prevented from making and executing by fraud. In such cases, since the remedy in the probate proceeding is inadequate, relief should be granted either in the form of a constructive trust, by permitting the fraudulent gift to stand and holding the defrauder, to whom legal title passes, as constructive trustee for the victim of the fraud, or by giving the aggrieved party an action at law for damages against the defrauder.[141]

As probate actions are the preferred method for resolving will issues,[142] so too should courts of equity and equitable remedies be the preferred method for the resolution of trust matters. In the context of trust disputes, courts need to be more careful in analyzing and crafting remedies within existing and established guidelines before resorting to legal actions for damages.

After learning of undue influence allegations, the trustee in *Genova* petitioned for instructions and the trustee in *Freeman* sought a declaratory judgment. In both cases, the trustees' actions were consistent with its duty of loyalty to the beneficiaries[143] and are to be lauded not faulted. In an effort to carry out its fiduciary duty, the trustee in *Genova* believed the attempted trust revocation was without legal effect when the facts suggested the settlor's exercise of the power of revocation may have resulted from the exercise of undue influence. The trustee was not seeking relief of its fiduciary duties.[144] To the contrary, the *Genova* court provided such relief on its own. To trustees, whether corporate or otherwise, this may come as welcome news to learn that less is required of them as a consequence of *Genova*. However, if allegations of undue influence are to be ignored in connection with trust revocations, the *Genova* decision fails to encourage the responsible actions taken by the trustees. Further, *Genova* appears to relieve the trustee from any responsibility to make inquiry into the circumstances surrounding the settlor's actions targeted at trust revocation. *Cloud v. United States National Bank*,[145] a decision predating *Genova* but not cited in *Genova*, concluded that a trustee has a duty to inquire into the existence of undue influence or incompetency and is liable to the trust beneficiaries if it knew or

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141. 1 BOWE-PARKER, PAGE ON WILLS, § 14.8 at 706-07 (rev. 1961).

142. Note, *Intentional Interference with Inheritance*, 30 REAL PROP., PROB. & TR. J. at 340.

143. RESTATEMENT (SECOND) TRUSTS §§ 170, 206; BOGERT, *supra* note 19, at § 543; BOGERT AND BOGERT, *supra* note 14, § 95.

144. For example, the trustee was not defending an action brought by beneficiaries for breach of its duty. Thus, the case did not involve any assertion that no such duty was owed to the beneficiaries.

145. 570 P.2d 350 (Or. 1977).

should have known of the incompetency of, or undue influence exerted upon, the settlor.[146] Thus, the proper steps the trustee should follow if the revocation of the revocable trust is effected through the use of undue influence becomes less clear.[147]

The law is well settled that a trustee has a duty of loyalty. A trustee's duty requires administering the trust solely in the interest of the beneficiary.[148] If the trust has multiple beneficiaries, the trustee, pursuant to the duty of impartiality, must not favor one beneficiary over another.[149] In *Cloud*, the beneficiaries sued the trustee for making transfers to the elderly settlor in accordance with instructions mailed to the trustee. The trustee was held liable for the transfers under the invalid instructions when it knew or should have known of the settlor's incompetence and undue influence. The evidence showed that settlor's granddaughter while in the back seat of a car with the settlor lying down and unable to speak had placed the settlor's thumbprint on the instruction letter.

The trustee in *Genova*, knowing of the unduly influenced transfers in the divorce proceeding, acted with proper regard for its fiduciary duty and sought instructions concerning the settlor's requested revocation of the trust and withdrawal of trust funds. Despite facts suggesting the cloud surrounding the revocation instruction, the court makes any inquiry by the trustee into the facially valid instruction irrelevant. According to the court, the only concerns of the trustee are: (1) whether the settlor has the power to revoke; and (2) whether that power has been validly exercised.[150] The resulting rule creates a disparity with acts of trust creation that are capable of being set aside based on invalidating causes of fraud, undue influence, or mental incompetence. Duly executed wills and revocable trusts can be unilaterally revoked. The *Genova* rule is also contrary to will revocations being set aside when procured through the exercise of undue influence. The court fails to adequately explain why an unduly influenced trust revocation should be valid when an unduly influenced trust is invalid. The *Genova* court, rather than the trustee, abrogated part of the fiduciary duty of the trustee when it concluded "the trustee's duties to conserve the trust property and manage it wisely for the benefit of the beneficiaries who will receive the trust property at the settlor's death, ends when the settlor exercises his or her right to revoke."[151]

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146. *Cloud*, 570 P.2d at 355-56. Under this standard, a finding of undue influence does not subject the trustee to automatic liability.

147. Zaritsky, *The Use of Revocable Trusts: The Debate Continues*, 15 PROBATE NOTES 244, 245 (1989).

148. RESTATEMENT (SECOND) TRUSTS § 170.

149. *Id.* at § 183.

150. *Genova*, 460 So. 2d at 897.

151. *Id.*

The terms of trust revocation are strictly applied. If the revocable trust specifies a method of revocation, these provisions must be followed in order to bring about a valid revocation.[152] In the event the revocable trust fails to specify any particular method of revocation, the trust may be revoked in any manner sufficiently manifesting the settlor's intention to revoke.[153] The *Genova* court failed to follow the valid exercise prong of its two-part test. A settlor who is unduly influenced to revoke a trust can hardly be treated as sufficiently manifesting an intention to revoke. Under such circumstances, the exercise of the power of revocation is not the valid act of the settlor but the act of the influencing party.

VII. CONCLUSION

Settlor creates a revocable trust and names settlor as income beneficiary for life. After the settlor/income beneficiary dies, the trustee is to distribute the trust property to named beneficiaries. The beneficiaries named as takers following the settlor's death have an equitable interest created at the time the trust comes into existence although enjoyment of the interest is postponed until the settlor's death and although the interest may be divested by the settlor's exercise of the power of revocation.[154] Should the settlor purport to revoke the trust, whether the settlor's decision to revoke the trust is the product of undue influence should make a difference in determining the effectiveness of the revocation. Unfortunately, this is not necessarily the case in light of *Genova*.

While courts have permitted wronged trust beneficiaries to proceed with damage actions in tort, these beneficiaries should be required to pursue available and adequate trust and probate remedies before being able to proceed in tort. The equitable restitutionary remedy of the constructive trust is in keeping with the equitable origins of trusts and is an effective tool to restore the trust beneficiaries to the position they would have been in with respect to the trust assets if no wrong had been committed. In situations where the constructive trust cannot restore the status quo, a tortious interference action may be warranted. For example, to the extent the trust property were consumed or otherwise dissipated or wasted, a tort action would be necessary to make the trust beneficiaries whole.

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152. RESTATEMENT (SECOND) TRUSTS § 330.

153. *Id.* at § 330 cmt. i.

154. *See* Estate of Groesbeck v. Groesbeck, 935 P.2d 1255, 1258 (Utah 1997); Taliaferro v. Taliaferro, 921 P. 2d 803, 811 (Kan. 1996); SCOTT ON TRUSTS § 57.6 (4th ed. 1987).