

An Economic Theory of Trust Modification

Daniel B. Kelly

In this workshop, I will present portions of an ongoing project, “An Economic Theory of Trust Modification,” which has three parts.

First, in the pages that follow, I explore one application of the theory in “Trust Term Extension: An Economic Analysis.” Recently, trust term extension, i.e., extending the duration of a trust, has become a salient issue due to the rise of the “perpetual trust” and an article by Reid Kress Weisbord on trust term extension. Weisbord argues that the law should not allow a trustee to extend the duration of a trust or convert to a perpetual trust, even if a jurisdiction has abolished the Rule Against Perpetuities and even if doing so is consistent with the settlor’s probable intent. While I generally agree with Weisbord’s conclusion, his analysis relies primarily on non-economic reasons. Instead, I provide a number of economic or functional reasons for why trust term extension may be socially undesirable. This analysis also points to the need for a more general theory of trust modification.

Second, I am attempting to develop this general theory in a working paper entitled “An Economic Theory of Trust Modification.” The theory takes seriously the social value derived from effectuating a settlor’s intent; after all, the purpose of private trusts, which exceed \$1 trillion in the U.S., is to facilitate donative transfers over time. However, the theory also recognizes that, at the time of trust formation, settlors face imperfect information. Due to changed circumstances, including changes in both family circumstances and legal rules (such as the tax code), many contingencies are unforeseeable. Moreover, even when foreseeable, settlors do not provide for every contingency in the terms of a trust, as the costs of specifying a contingency may exceed the expected benefits. The theory builds upon my analysis of trust extension (above) but also will incorporate insights from an earlier article, “Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications,” and Robert Sitkoff, “An Agency Costs Theory of Trust Law.”

Third, in a project that is in the research and planning stages, Rob Sitkoff and I hope to explore recent developments in trust modification in a paper tentatively entitled “The New American Trust Law of Modification.” We hope to compare the two traditional theories and forms of trust modification, namely the Clafin doctrine (all beneficiaries consent and not contrary to a material purpose) and equitable deviation (changed circumstances), with trust modification “on the ground” including various new forms of modification, such as decanting and nonjudicial settlement agreements, that lawyers increasingly use in practice.

TRUST TERM EXTENSION: AN ECONOMIC ANALYSIS

*Daniel B. Kelly**

To compete for trust assets following a change in the federal tax code, many states repealed or abrogated the Rule Against Perpetuities (RAP).¹ By repealing the RAP, these states allow a settlor to create a trust that lasts forever: a “dynasty trust” or “perpetual trust.” The motivation for creating such trusts varies. Some settlors may have dynastic desires.² More often, settlors use perpetual trusts to minimize taxes.³ Regardless, settlors have embraced perpetual trusts, with an estimated \$100 billion in trust assets moving into the seventeen states that abolished the RAP as of 2003.⁴ Since then, and despite pointed

* Professor of Law, Co-Director, Law & Economics Program, Notre Dame Law School. For comments, I am grateful to Barry Cushman, Nicole Garnett, Adam Hirsch, Michelle Shakour, Stewart Sterk, Reid Weisbord, and participants at the Notre Dame Law and Economics workshop.

1. See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–78 (2005); see also Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1311–17 (2003) (analyzing role of generation-skipping transfer tax).

2. See Joshua C. Tate, *Perpetual Trusts and the Settlor’s Intent*, 53 U. KAN. L. REV. 595, 611–20 (2005) (discussing motivations for creating perpetual trusts and concluding that “some settlors may have truly dynastic intentions”).

3. See Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2470 (2006) (“[O]ur findings suggest . . . the modern perpetual trust is primarily a creature of the federal transfer taxes.”).

4. Sitkoff & Schanzenbach, *supra* note 1, at 359.

criticism of perpetual trusts from legal scholars and law reformers,⁵ other states have repealed the RAP,⁶ and settlors have continued to create perpetual trusts and move trust assets into non-RAP jurisdictions.

In his thoughtful article, *Trust Term Extension*, Reid Kress Weisbord asks a related question that may arise as a result of these recent developments: “[C]ould the duration of a trust settled in a jurisdiction governed by the Rule Against Perpetuities be extended indefinitely after the jurisdiction’s repeal of the Rule Against Perpetuities?”⁷ Weisbord posits the following scenario: A settlor seeking to create a trust in a state governed by the RAP approaches her estate planning attorney.⁸ The settlor indicates that she wants to include several generations of descendants as beneficiaries, including a number of distant unborn descendants. The attorney advises the settlor that such a trust violates the RAP. Following her attorney’s advice, the settlor executes a trust—

5. See, e.g., Dukeminier & Krier, *supra* note 1; Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* (U. of Mich. Law Sch. Law & Econ. Research Paper Series, Working Paper No. 13-007, 2013), <http://www.ssrn.com/abstract=1975117>; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note, at 564 (AM. LAW. INST. 2011) (“It is the considered judgment of the American Law Institute that the recent statutory movement allowing the creation of perpetual or near-perpetual trusts is ill advised.”).

6. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 895 (9th ed. 2013) (“Today, more than half the states . . . have effectively abolished the Rule as applied to future interests in trust.”).

7. Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 75 (2015).

8. *Id.* at 75–76.

with different beneficiaries—that complies with the RAP. After the settlor dies, the jurisdiction abolishes the RAP, and finally the trustee seeks to extend the trust, consistent with the settlor’s probable intention.⁹

Overall, I think Weisbord is correct in starting his analysis with the settlor’s intent.¹⁰ I also agree with his conclusion: the law should *not* allow a trustee to extend a trust beyond the perpetuities period.¹¹ However, I would suggest a different mode of analysis: an *economic analysis* of trust term extension. As discussed, an economic analysis of trust term extension (as well as trust modification more generally) should analyze the costs of specifying contingencies in a trust, including potential changes in the law, and the error costs and decision costs of discerning a settlor’s probable intent. Thus, after criticizing three of Weisbord’s arguments, I offer a brief economic analysis of trust term

9. Weisbord correctly focuses on the issue of trust extension in the context of decanting. *See id.* at 76 & nn.4–5. However, a similar issue may arise if a trust includes a provision that violated the RAP at time the settlor created the trust but the jurisdiction repeals the RAP. If the case is litigated after the RAP’s repeal, should the court invalidate the interest as violating the RAP or uphold it as being consistent with the settlor’s probable intention? In this case, unlike a case in which the trustee seeks to extend the trust, there is express language in the trust that the settlor prefers an extended trust term.

10. *See id.* at 82 (“The settlor’s intent should be the starting point for any inquiry into the possibility of trust term extension.”).

11. *See id.* at 125 (concluding that trust term extension “should be an exercise of creative thinking rather than creative estate planning” and advocating law reforms to clarify that the trust modification doctrines do not permit perpetual trust conversions).

extension and suggest why economic arguments may provide an alternative yet superior justification for generally not allowing perpetual trust conversions of existing trusts, at least for trusts created before repeal of the RAP was foreseeable. Just as economic insights were useful in analyzing copyright term extension,¹² economic analysis may

12. Because trust extension entails extending the duration of control over property, the issue is analogous to copyright extension in the Copyright Term Extension Act (CTEA), which the Supreme Court reviewed in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). One issue in *Eldred* was whether extending the copyright term by 20 years, from the author’s life plus 50 years to the author’s life plus 70 years, violated the Copyright and Patent Clause. *Id.* at 192–93 (quoting U.S. CONST. ART. I, § 8, cl.8). The premise of the legal challenge, which the Court rejected, was an economic insight: extending copyrights for *existing* works is unnecessary “[t]o promote the Progress of Science,” because authors already had created these works. *See id.* at 254 (Breyer, J., dissenting) (arguing “no one could reasonably conclude that copyright’s traditional economic rationale applies here” because “extension will not act as an economic spur encouraging authors to create new works”); cf. Avishalom Tor & Dotan Oliar, *Incentives to Create Under a “Lifetime-Plus-Years” Copyright Duration: Lessons from a Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437, 438 (2002) (finding that even “CTEA’s prospective extension provides negligible additional incentives to individual authors”). In a footnote responding to this argument, the Court concludes “[c]alibrating rational economic incentives . . . is a task primarily for Congress, not the courts.” *See Eldred*, 537 U.S. at 207 n.15.

Notably, the chief defense of retrospective copyright term extension is a theory based on optimizing a copyright’s current use, not encouraging new works. *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484 (2003). Similarly, one of the goals of allowing trust term extension would be to optimize, from the perspective of the deceased settlor, an existing gift that was conveyed in trust. Yet, while copyright extension seems to implicate only the optimal use of existing works, not the creation of new works, trust extension potentially implicates concerns about both optimizing an existing gift and encouraging new gifts. Specifically, because the primary objective of trust law is to facilitate a settlor’s intent, if a court fails to facilitate a settlor’s probable intent—in this case, either by denying an extension when the settlor would have preferred it or by granting an extension when the settlor would not have preferred it, the court may discourage or alter donative transfers in trust at the outset. *See* Daniel B. Kelly,

be beneficial in evaluating trust term extension.

* * *

In his article, Weisbord relies on several arguments with economic intuitions, including the risk that a court may misinterpret the settlor's intent.¹³ However, three of his arguments for opposing trust term extension are based on reasons that I find less persuasive. Specifically, Weisbord argues that prohibiting trust term extension is necessary (i) to prevent dead hand control by the settlor, (ii) to avoid a potential conflict of interest for the trustee, and (iii) to preserve the existing interests of the beneficiaries.

First, in several places (including the abstract, introduction, Part IV, and conclusion), Weisbord suggests perpetual trust conversions are problematic because they extend dead hand control.¹⁴ Many scholars, including myself, have used the metaphor of the “dead hand” to describe the scope of donor control after death.¹⁵ As with all metaphors,

Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications, 82 *FORDHAM L. REV.* 1125, 1176–80 (2013) (discussing trust modification and termination and problems that may arise “[i]f a settlor knows the beneficiaries can easily convince a court to modify or terminate the trust once the settlor has died”).

13. *See* Weisbord, *supra* note 7, at 98 (detailing the risks of misinterpreting settlor's intent).

14. *See, e.g., id.* at 125 (“Trust term extension, under the illustration presented in this Article, would unfairly resurrect the dead hand . . .”).

15. *See, e.g.,* LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009); RONALD CHESTER, *FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND*

it is important to remember what the metaphor means and does not mean.¹⁶ Historically, the term “dead hand” referred to the *donee*, not the donor.¹⁷ Today, the dead hand refers to the *donor*,¹⁸ and this term may invoke images of a grisly hand reaching from beyond the grave to haunt the living. But dead hand control simply refers to a donor’s ability to control the disposition of property after death. Because the organizing principle of American succession law is the freedom of disposition,¹⁹

(2007); LEWIS SIMES, PUBLIC POLICY AND THE DEAD HAND (1955); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); *see also* Kelly, *supra* note 12, at 1131 (arguing that “debates about the scope of dead hand control are not merely of philosophical or historical interest”).

16. *See generally* EUGENE VOLOKH, ACADEMIC LEGAL WRITING 82, 92–94 (2d ed. 2005) (discussing dangers of using metaphors without attention to their actual meaning).

17. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 67 n.67 (2004) (“Although the power of a donor to control property after his demise is today often called the power of the dead hand, the term ‘dead hand’ originally referred to the *donee*, notably, to a religious corporation that had been granted land.”) (citing SIMES, *supra* note 15, at 2–3); *see also* *Deadhand Control*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Historically, deadhand-control problems concerned devises of land to religious corporations.”).

18. *See* Kelly, *supra* note 12, at 1130 n.18 (“In its modern usage, dead hand control refers to the idea that a person who has died may continue to assert control over his or her property even after death.” (citing FRIEDMAN, *supra* note 15, at 4)).

19. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014) (“The organizing principle of the American law of succession, both probate and nonprobate, is *freedom of disposition*.”). The principle applies in interpreting all donative documents. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1, at 276 (AM. LAW INST. 2003); *see also* DUKEMINIER & SITKOFF, *supra* note 6, at 1 (“The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.”).

donors regularly exercise control over their property after they die, i.e., they regularly exercise dead hand control.²⁰ Indeed, the “distinctive attribute” of a trust is the settlor’s ability to control property after his or her death.²¹ Thus, despite its negative connotations, dead hand control is synonymous with a settlor’s post-mortem control of property.²²

Of course, there are valid arguments for and against dead hand control,²³ and a settlor’s control over property is subject to public policy

20. Accordingly, *Black’s Law Dictionary* defines “deadhand control” as:

The convergence of various legal doctrines that allow a decedent’s control of wealth to influence the conduct of a living beneficiary; esp., the use of executory interests that vest at some indefinite and remote time in the future to restrict alienability and to ensure that property remains in the hands of a particular family or organization. Examples include the lawful use of conditional gifts, contingent future interests, and the *Clafin*-trust principle.

Deadhand Control, BLACK’S LAW DICTIONARY (10th ed. 2014).

21. See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111 (2004) (“The distinctive attribute of a trust is that it can and commonly does perpetuate the settlor’s autonomy after his or her death (hence the dead-hand label).”).

22. A settlor’s post-mortem control of property can, and often does, affect the interests of beneficiaries. For example, rather than an outright gift of property, a donor may create a trust that postpones a distribution until the beneficiary reaches a certain age. By postponing a distribution, the settlor is exercising control over the property in a manner the beneficiary may not like. But trust law facilitates this type of control, and other forms of dead hand control, even when doing so affects the beneficiary’s use and enjoyment of trust property.

23. For a summary of arguments for and against dead hand control, see SHAVELL, *supra* note 17, at 67–70 (describing the general argument favoring dead hand control, incorrect arguments against dead hand control, and valid arguments against dead hand control); see also Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992) (arguing that the costs of dead hand control, including perpetual or long-

limitations, including the RAP (where applicable).²⁴ But arguments for or against donor control need to be made with respect to specific issues, including trust term extension. (Weisbord lists three general criticisms of dead hand control and perpetual trusts.²⁵) Apart from specific arguments, saying that a doctrine may increase (or decrease) dead hand control does not have any normative significance. Although many scholars assume that dead hand control is bad, asserting that a legal reform may involve dead hand control does not tell us anything about whether or not the reform is socially desirable.

Second, in his article, Weisbord suggests that perpetual trust conversions are problematic because they involve a conflict of interest for trustees.²⁶ Weisbord states: “For example, a trustee receiving fees or

lasting trusts, vary depending on the type of control a settlor exercises over trust property).

24. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (discussing policy limitations, including the RAP); see also *Deadhand Control*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The Rule Against Perpetuities restricts certain types of deadhand control, which is sometimes referred to either as the power of the *mortua manus* (dead hand) or as trying to retain property *in mortua manu*.”).

25. See Weisbord, *supra* note **Error! Bookmark not defined.**, at 79 & nn.13–15 (mentioning issues involving changed circumstances, administrative costs, and concentrations of wealth).

26. See *id.* at 87 (“A trustee may have a conflict of interest in seeking to extend the duration of a trust beyond its natural termination.”); *id.* at 112 (“The more relevant inquiry may be whether the financial institutions that profit from administering perpetual trusts should be given modification powers”); *id.* at 125 (“Worse yet, although proponents of trust term extension may purport to represent the interests of the settlor’s dead hand, in many cases,

commissions for its service during the life of the trust would have a financial stake in postponing the trust's termination indefinitely because termination of the trust would result in cessation of the trustee's compensation."²⁷ In the scenario that Weisbord is analyzing, the *trustee* has the power to extend the trust term, i.e., to seek a modification creating a perpetual trust.

The law might avoid a trustee's conflict of interest by authorizing trust extension by a party other than the trustee, such as a permissible beneficiary under the modified trust or trust protector. If the trustee is not the party deciding whether to extend the trust, the trustee has no conflict of interest. Current beneficiaries may oppose a perpetual trust conversion. However, descendants who would be beneficiaries under the modified trust might attempt to modify the trust. Alternatively, the settlor could create a trust protector and grant the protector authority to modify the trust. As Stewart E. Sterk points out, compared to a trustee or beneficiaries, "the trust protector offers what may be an attractive alternative—a person whose primary function is to exercise judgment on behalf of the trust settlor."²⁸ In any case, the basic idea is to give the

such proponents may in fact be financial institutions furthering their own pecuniary interests in administering perpetual trusts.").

27. *Id.* at 87–88.

28. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2767 (2006). The trust protector is necessary

power to request modification of the trust to a party without the same economic incentives as the trustee.

Even if the trustee is the party with the power to extend the trust, there are reasons why the trustee's conflict of interest may not be as problematic as it first appears. As Weisbord notes, a trustee has fiduciary duties.²⁹ The purpose of these duties, including the trustee's duty of loyalty, is to mitigate agency costs.³⁰ Thus, by enforcing the duty of loyalty, courts may deter trustees from extending trusts for opportunistic reasons.³¹ Moreover, in extending a trust, the trustee bears certain costs, including administrative expenses—a perpetual trust can entail thousands of beneficiaries—and litigation risks.³² Such costs,

because, if the settlor is dead, the settlor is unable to modify. However, the settlor may be alive if the settlor executes an irrevocable trust that complies with the RAP, and the state repeals the RAP before the settlor's death. Thus, some settlors may be able to extend the trust if the state permits it.

29. See Weisbord, *supra* note **Error! Bookmark not defined.**, at 88.

30. See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 197, 204 (Andrew S. Gold & Paul B. Miller eds., 2014); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 *BOS. U. L. REV.* 1039, 1045 (2011); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *CORNELL L. REV.* 621, 683 (2004).

31. Likewise, courts have effectively prevented trustees from opposing trust termination for opportunistic reasons. See Sterk, *supra* note 28, at 2767 n.28 (noting that “trustees sometimes challenge the termination of trusts . . . in order to preserve their right to commissions,” but that such challenges are “generally unsuccessful[.]”).

32. See Waggoner, *supra* note **Error! Bookmark not defined.**, at 4–14; Weisbord, *supra* note **Error! Bookmark not defined.**, at 88 n.59; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 692 (8th ed. 2011) (“The transaction costs involved in dynastic trusts can be enormous because of the increase in the number of beneficiaries over time. . . . The trustee of the

which may outweigh the benefits that a trustee expects to receive by continuing to collect fees, can provide a check on trustee opportunism. Thus, from an economic view, it is useful to analyze first whether trust term extension is socially desirable, assuming that a trustee will act pursuant to the settlor's instructions and for the benefit of beneficiaries. Later, we can consider complications, like the idea that trustees may have a conflict of interest.

While Weisbord's worry about a trustee's conflict of interest is a valid concern, it relates more to the political economy of trust law reform than to the social desirability of trust term extension. Just as powerful interests lobbied for the Copyright Term Extension Act,³³ there is a question of who benefits from abolishing the RAP or allowing perpetual trust conversions. Sophisticated trustees, e.g., banks and trust companies, are repeat players with high financial stakes and concentrated interests. As a result, these trustees may have an incentive

dynastic trust would incur large costs in keeping track of the beneficiaries and allocating trust income among them.”).

33. Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); see LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 218 (2004) (discussing lobbying on behalf of the CTEA); John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 508 n.197 (2004) (“The CTEA was widely perceived as having resulted from the lobbying efforts of various large copyright holders, especially the Disney Corporation”); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2236 (2000) (noting that the CTEA is “a prime example of legislation that strongly favored a narrow class of copyright owners”).

to distort the political process in ways that benefit their own interests (or the interests of settlors) at the expense of the public interest (or the interests of beneficiaries).³⁴

Third, in his article, Weisbord opposes trust extension because extending the trust may impair the interests of existing beneficiaries.³⁵

As he notes, converting the current trust into a perpetual trust will diminish the existing beneficiaries' interests.³⁶ For example, rather than receiving a remainder interest in fee simple, existing beneficiaries may receive only a lifetime interest, followed by a remainder in other more distant beneficiaries.³⁷

34. See Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1786 (2014) (“Lawyers and bankers have lobbied for perpetual trusts to attract, or at least to retain, trust business.”); Sitkoff & Schanzenbach, *supra* note **Error! Bookmark not defined.**, at 416–18 (discussing an interest group theory of jurisdictional competition for trust funds); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2117 (2003) (pointing out the “public choice explanation” for the RAP’s repeal: “the beneficiaries of perpetual trusts are concentrated and politically powerful banks and trust companies”); Daniel J. Amato, Note, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. CAL. L. REV. 637, 648–60 (2013) (summarizing the political economy of perpetual trusts).

35. See Weisbord, *supra* note **Error! Bookmark not defined.**, at 112 (“Unlike the prospective authorization of perpetual trusts, retroactive authorization of such instruments would harm incumbent beneficiaries by impairing the value of their interests.”); *id.* at 124 (“Trust term extension would impair existing beneficial interests because, to create a perpetual trust, incumbent residuary beneficiaries would be forced to accept a less valuable lifetime interest in the trust.”).

36. See Weisbord, *supra* note **Error! Bookmark not defined.**, at 95.

37. See *id.* (“Opponents of trust term extension will likely assert . . . that the consequences of trust term extension in this context would impair existing

However, privileging the interests of the existing beneficiaries, while excluding more remote potential beneficiaries, is problematic for at least two reasons. First, it ignores the probable intention of the settlor, who, in the absence of the RAP, may not have given these existing beneficiaries a remainder in fee simple. Second, it ignores the interests of those parties whom the settlor would have designated as beneficiaries if the settlor had anticipated repeal of the RAP. In a jurisdiction that has abolished the RAP, why are close beneficiaries necessarily preferred to the exclusion of distant beneficiaries, even if the settlor would prefer to give each a beneficial interest? To exclude distant beneficiaries entirely, there would have to be a reason why the existing interests are so important that the law would not modify them even if they were contrary to the settlor's intent.

Weisbord suggests there is “a modern trend in trust law of providing greater protection for *living* trust beneficiaries.”³⁸ Yet, as Weisbord notes, this trend (assuming there is a trend) usually concerns a tradeoff between a settlor who is dead and beneficiaries who are living—not

beneficial interests by converting remainders into lifetime interests in order to add new generations of the settlor's issue as permissible beneficiaries . . .”).

38. *Id.* at 78 (emphasis added); *see also id.* at 112–23 (discussing a “modest retreat” from dead hand control). For more discussion of this trend, see Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 226–34 (2011) (discussing the “new direction of the law of future interests and perpetuities”).

living or close beneficiaries versus unborn or distant beneficiaries.³⁹ Conflicts do exist between beneficiaries, including income and remainder beneficiaries.⁴⁰ For this reason, trust and fiduciary law include a duty of impartiality.⁴¹ Under this duty of impartiality, resolving conflicts usually does not turn on which beneficiaries are living or close, or which beneficiaries are unborn or distant, at least in the absence of explicit instructions in the trust.⁴² To be sure, among estate planning lawyers, there is a sense that a settlor is likely to have greater concern for beneficiaries that are more proximate.⁴³ Yet, the

39. See Weisbord, *supra* note **Error! Bookmark not defined.**, at 112–13 (explaining that American trust law used to favor the settlor, but now favors beneficiaries). Plus, at the time the trustee is seeking a modification, i.e., after the jurisdiction abolishes the RAP, some or all of the unborn or distant descendants, whom the settlor would have named in the absence of the RAP, may in fact be living.

40. See, e.g., *Brokaw v. Fairchild*, 237 N.Y.S. 6, 11 (N.Y. Sup. Ct. 1929) (describing a conflict of interest between beneficiaries).

41. See UNIF. TRUST CODE § 803 (UNIF. LAW COMM’N 2000) (“If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”); UNIF. PRUDENT INV’R ACT § 6 (1994) (“If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.”).

42. See UNIF. TRUST CODE § 803 cmt. (“The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder . . .”). Also, the common law preference for construing an ambiguous instrument as creating a vested, rather than contingent, remainder would not apply because a future interest in distant unborn descendants would not necessarily be contingent.

43. For example, if a life beneficiary has received a gift expressed in annuity dollar terms but the interest is inadequate due to inflation, a lawyer may attempt modify the trust by arguing that the settlor wanted to favor the

issue here is not just a matter of privileging closer beneficiaries; rather, it is a matter of *excluding* more remote potential beneficiaries entirely.⁴⁴

The obvious counter is that these unborn or distant beneficiaries are not designated in the terms of the trust. But that is begging the question. There has to be a reason—besides being designated (or not designated) in a trust that was created under the RAP—for preserving the interests of the current beneficiaries while excluding remote beneficiaries whom the settlor would have wanted to include. Of course, there may be economic arguments for excluding more remote beneficiaries. Maybe preserving the interests of existing beneficiaries allows existing beneficiaries to engage in socially beneficial reliance. Maybe there is an endowment effect in which existing beneficiaries are more attached to

life beneficiary over more distant beneficiaries with remainder interests. For more discussion on the idea that settlors will favor more proximate beneficiaries, see William L. Hoisington, *Modern Trust Design: New Paradigms for the 21st Century*, 31 U. MIAMI SCH. L. PHILIP E. HECKERLING INST. ON EST. PLAN. ¶ 604.1, at 6–11 (1997); see also Elliot Stone, *Life Tenant vs. Remainderman: Suggestions for Resolving Traditional Conflicts re Investments, Income and Drafting*, 84 TR. & EST. 530, 531 (1947) (“If the professional draftsman would explain more fully the law and trust management problems to a prospective settlor, he would probably find the settlor’s thinking leaning strongly in favor of maximum benefits for those people closest to him . . .”). *But cf.* Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 729 (1990) (arguing that donors should be “expected to favor more closely related beneficiaries,” but pointing out that, “because the marginal utility of income diminishes, very wealthy transferors should also be expected to wish to spread their gifts out some distance into the future” and that “for the very wealthy, it is genetically natural to attempt to provide life sustaining wealth to distant, unborn descendants and other gene carriers”).

44. I am grateful to Barry Cushman for emphasizing this point.

their interests than potential beneficiaries. Or perhaps there is some other efficiency rationale for excluding remote beneficiaries. But Weisbord gives none.⁴⁵

In short, the arguments based on a settlor's dead hand control,

45. Weisbord does argue that creating new beneficial interests “undermines the trust law requirement of a definite, ascertainable beneficiary.” Weisbord, *supra* note **Error! Bookmark not defined.**, at 97–98. However, even under the definite-beneficiary requirement, trusts for unborn or subsequently ascertainable beneficiaries are valid as long as these beneficiaries are ascertained within the applicable RAP. *See* UNIF. TRUST CODE § 402(b) (UNIF. LAW COMM’N 2000); RESTATEMENT (THIRD) OF TRUSTS § 44 (AM. LAW INST. 2003). As the Uniform Trust Code states: “A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.” UNIF. TRUST CODE § 402(b); *see also* DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 417 (“The beneficiaries need not . . . be ascertained when the trust is created—only ascertainable.”).

In support of his argument, Weisbord cites a footnote from an article by Robert H. Sitkoff in which he says that Sitkoff is “noting the argument that trusts might still be invalidated for want of an ascertainable beneficiary in states that have abolished the Rule Against Perpetuities.” Weisbord, *supra* note **Error! Bookmark not defined.**, at 97 n.109 (citing Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 506 n.32 (2006)). However, in the footnote to which Weisbord cites, Sitkoff is not making a general point that perpetual trusts will necessarily fail for lack of an ascertainable beneficiary. *See* Sitkoff, *supra* note **Error! Bookmark not defined.**, at 506 n.32. Rather, Sitkoff is discussing a very unusual case, *Marsh v. Frost National Bank*, 129 S.W.3d 174 (Tex. App. 2004), in which the trust beneficiaries were purported to be “every American 18 years or older”—a group arguably too indefinite to be ascertainable. *See* Sitkoff, *supra* note **Error! Bookmark not defined.**, at 506 n.32 (quoting *Marsh*, 129 S.W.3d at 176).

More importantly, in a jurisdiction that has repealed the RAP, the requirement that a beneficiary must be ascertained now or in the future “subject to any applicable rule against perpetuities” no longer makes sense. *See* UNIF. TRUST CODE § 402(b). Thus, as Weisbord suggests, “perhaps trust law should revise the ascertainable beneficiary requirement without regard or reference to the Rule Against Perpetuities,” assuming that at least one beneficiary is able to enforce the trustee’s fiduciary duties. *See* Weisbord, *supra* note **Error! Bookmark not defined.**, at 97–98.

trustee's conflict of interest, and beneficiaries' existing interests are not sufficient to reject trustee-proposed trust extension. Labeling donor control as "dead hand" control does not establish whether this type of control is good or bad, for the organizing principle of trust law is the freedom of disposition. While a trustee may have a conflict of interest in deciding whether to modify the trust, the law could authorize trust term extension by another party, such as a beneficiary under the modified trust or a trust protector, who does not have the same economic incentives. Trustees also remain subject to fiduciary duties, including the duty of loyalty, and may have countervailing reasons not to extend the trust. Finally, favoring existing beneficiaries makes sense only if we ignore the interests of those beneficiaries whom the settlor would have chosen to include if the settlor had anticipated repeal of the RAP.

* * *

Analyzing trust term extension from an economic perspective is useful because it emphasizes the real-world consequences of drafting, modifying, and interpreting trusts. These effects include *specification costs*, *error costs*, and *decision costs*. Before analyzing these costs, it is worth noting that the analysis that follows could apply to trust modification in general. While this analysis may provide a general framework for trust modification, I will focus on trust term extension.

The magnitude of the various types of costs will vary depending on the type of modification at issue; thus, nothing in what follows should be construed as a general argument for or against liberalization of trust modification or trust decanting.

The costs of providing for contingencies in the trust are *specification costs*. Because such costs are positive, a settlor will not provide for all contingencies in advance. If a settlor does not specify certain contingencies, there is a potential justification for trust modification. Thus, if a settlor did not anticipate or provide for the RAP's repeal, there is a theoretical justification for trust term extension. The trustee or court may be able to discern the settlor's probable intent, i.e., a settlor's true plans with perfect information, and modify the trust accordingly.

Yet, in attempting to discern what a settlor would have wanted, the trustee or court may make mistakes—*error costs*. For trust term extension, there are two basic types of errors: (i) a court may fail to extend a trust even though the settlor would have preferred a perpetual trust; or (ii) a court may extend a trust even though the settlor would have preferred the current trust. In addition, a court may grant an extension but extend the trust in the wrong way, e.g., the court may incorrectly decide for how long or for whose benefit to extend the

trust.⁴⁶ Finally, the trustee and court will incur *decision costs* in attempting to discern the settlor's probable intent.⁴⁷

To amplify, the issue of trust term extension would not arise if a settlor could anticipate, and explicitly provide for, each contingency in the terms of the trust. If the settlor could specify each contingency in advance, i.e., if the settlor had perfect information and if drafting costs were zero, then the settlor could specify his or her desired distribution for any given situation. Even if circumstances changed or the law developed, the trust could specify what the settlor would want in each situation. For example, “if the RAP applies, then X; if the RAP is modified by the ‘wait and see’ doctrine, then Y; if the RAP is repealed, then Z.” And so on. Like a completely specified contract, a completely specified trust would address any contingency.

Yet, in reality, a settlor cannot specify each contingency in advance. This is so for two reasons: (i) some contingencies are unforeseeable; and (ii) other contingencies, while foreseeable, are too costly to specify.⁴⁸

46. I am grateful to Stewart Sterk for raising this point.

47. See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 865 (2012) (discussing the “trade-off between *error costs*—the costs of misallocating an entitlement—and *decision costs*—the costs of determining how to allocate the entitlement”).

48. See Kelly, *supra* note 12, at 1158–61 (discussing problem of imperfect information in succession law, including unforeseen and not-provided-for contingences).

First, at the time a settlor creates a trust, certain contingencies may be unforeseeable. The settlor of a family trust may not foresee that one of her children will be disabled in a car accident. The settlor of a charitable trust may not foresee that a disease that she hopes to cure will be cured in the near future. Or a settlor may not anticipate a change in the law, e.g., a state may allow a new type of trust like a “pet trust” or statutory purpose trust that the settlor would like to create.⁴⁹ As a result, due to unforeseen changes, “many kinds of future outcomes would not even be contemplated by a person when making provisions for the control of property.”⁵⁰

Second, other contingencies, while foreseeable, may not be provided for in the trust if the costs of addressing the contingency outweigh the potential benefits.⁵¹ The costs of specifying each contingency in the trust are certain and immediate. These costs include drafting costs as well as the time and effort for the attorney and client to discuss the issue

49. See, e.g., UNIF. TRUST CODE §§ 408–409 (2010).

50. SHAVELL, *supra* note **Error! Bookmark not defined.**, at 70; see also POSNER, *supra* note 32, at 700 (noting, in discussing the RAP, that “arrangements for the distant future [are] likely to result in an inefficient use of resources brought about by unforeseen contingencies”). Similarly, in land use planning, when considering whether to adopt a perpetual conservation easement, an owner may be unable to anticipate all contingencies. See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 753 (2002).

51. See Kelly, *supra* note 12, at 1160 (“Donors are incapable of anticipating all future contingencies and, even if they could, it would not be cost-effective to specify each contingency in a will or trust.”).

and for the client to make an informed decision. By contrast, the potential benefit of providing for a contingency is discounted by the small probability of any contingency actually occurring.⁵² Plus, because the benefit may occur at some remote time in the future, the benefit should be discounted by its remoteness in time. Thus, for many contingencies, a settlor or her attorney will not have an incentive to specify the settlor's true detailed plans.⁵³

Some legal changes or developments are foreseeable. However, until recently, especially Delaware's repeal of the RAP in 1995, settlors may not have contemplated that the jurisdiction in which they were creating a trust might abolish the RAP. Even if settlors or their attorneys were aware that repeal was theoretically feasible, they most likely would

52. For contingencies that are more likely, such as the death of a beneficiary, settlors often have an incentive to provide for the contingency in the trust. In addition, the law provides default rules for contingencies that are likely to recur, like a predeceasing beneficiary. *See, e.g.*, UNIF. PROBATE CODE § 2-707 (1990, rev. 2008) (antilapse rule for trusts); *see also* DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 859 (“These default rules of construction do not come into play if the lawyer makes the client’s intent clear by providing expressly what happens if the intended beneficiary does not survive to the time of distribution.”).

53. *See* SHAVELL, *supra* note **Error! Bookmark not defined.**, at 70 (“For individuals to make highly detailed plans for the control of property after death . . . would often be irrational, because the cost of making a detailed provision is borne with certainty, whereas the benefit is discounted by the often extremely small likelihood of the occurrence of a contingency and perhaps by its remoteness in time.”).

have believed the likelihood of repeal was remote.⁵⁴ Thus, given the costs of addressing this contingency, many settlors would not have provided for the RAP's repeal. Importantly, settlors may not have addressed this contingency even though, in the absence of the RAP, these settlors would prefer to extend the trust and include distant unborn beneficiaries.

Of course, the costs of addressing any single contingency, such as a jurisdiction's repeal of the RAP, may not be high. But, *ex ante*, a settlor does not know which factual circumstances or legal rules may change. Therefore, there is a sound economic reason for why settlors may not have provided explicitly for their preferred distribution in the event that a jurisdiction repealed the RAP.

On the other hand, the idea of drafting a clause authorizing trust term extension does not seem particularly burdensome, at least from our present perspective. Weisbord notes the possibility that a settlor could attempt to anticipate this contingency by providing that the trust lasts “for as long as the law would allow[.]”⁵⁵ The type of provision that Weisbord suggests may have a cost: a settlor would bear the risk that

54. *Cf.* DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 889–95 (discussing perpetuities reform in the second half of the twentieth century and early twenty-first century).

55. Weisbord, *supra* note **Error! Bookmark not defined.**, at 76 n.3; *see also id.* at 82 n.25 (noting the possibility of “a trust providing expressly for as many generations of descendants as the law allows”).

the law may change in a way the settlor did not anticipate or desire. For example, if a state shortens the perpetuities period but grandfathers existing trusts, the trust duration might contract, a result that may be contrary to the settlor's probable intention. Instead, a provision might grant discretionary authority to the trustee (or trust protector) to extend the terms of the trust up to the extent permitted under then-applicable law in the event that the jurisdiction were to amend or repeal the RAP. From our present perspective, it does not seem very difficult to draft a boilerplate provision for this contingency.

However, the situation may be different if we consider the issue from the time at which most of these trusts were drafted. While it may seem obvious to provide for trust extension now that a majority of states have abolished the RAP, it was not so obvious at the time these trusts were being drafted. If it was easily foreseeable and the benefits of specifying this contingency exceeded the costs, why didn't more attorneys include such boilerplate even then? More likely, at the time of drafting the original trust, either repeal of the RAP was unforeseeable, or, even if it was foreseeable, settlors and their attorneys did not believe it was worthwhile to provide for this contingency. Thus, although it is possible to draft a provision addressing this contingency (or other legal changes), and although going forward it should be relatively easy to

address repeal of the RAP, the fact that most settlors did not address this contingency suggests that, at least with regard to those trusts created before 1995 or so, repeal of the RAP was unforeseeable or not worth specifying.

Because a settlor will not foresee or address every contingency, the law is unable to facilitate the settlor's true plans if it relies exclusively on the trust itself. To effectuate the settlor's probable intention, a court may need to modify the trust as circumstances change or various contingencies arise: "If, then, the plans that are made for the control of property after death are not reflective of the *true detailed plans* that would have been made if the individuals had the time and ability to consider all possibilities, the state's modification of their plans may sometimes be justified as an attempt to carry out their true plans."⁵⁶ Thus, the incompleteness of the trust provides a potential justification for trust modification, including trust term extension.

Consistent with this analysis, trust law includes the doctrine of equitable deviation. Equitable deviation allows a court to intervene to further the purposes of the trust in situations in which the settlor did not

56. SHAVELL, *supra* note **Error! Bookmark not defined.**, at 70 (emphasis added); *see also* Kelly, *supra* note 12, at 1179 (arguing "there are situations in which modifying or terminating an irrevocable trust might be beneficial, even from the ex ante perspective.").

anticipate a particular contingency.⁵⁷ If the settlor did anticipate the contingency, the court should not intervene to alter the trust.⁵⁸ If the settlor did not anticipate the contingency, the court can intervene through equitable deviation. And, from an economic perspective, the court should intervene if it can do so with a fair degree of accuracy (low error costs) and if discerning the settlor's intent is not too burdensome (low decision costs).

Notably, for modification doctrines, including equitable deviation, the goal is to modify a trust consistent with the settlor's probable intention. The *Uniform Trust Code*, which over thirty states have adopted,⁵⁹ provides: "To the extent practicable, the modification must be made *in accordance with the settlor's probable intention.*"⁶⁰ Thus, if

57. See UNIF. TRUST CODE § 412(a) (2000, rev. 2010) ("The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."); RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003); see also Sitkoff, *supra* note **Error! Bookmark not defined.**, at 663 (noting that equitable "[d]eviation protects the settlor's intentions against frustration by unanticipated changes in circumstances.").

58. It is worth noting that the legal standard ("not anticipated") may not be the same as the economic theory might suggest. Under the economic justification, a trust modification may be desirable even if the settlor "anticipated" a contingency if the settlor had anticipated the contingency but did not provide for it explicitly because of specification costs.

59. See Uniform Law Commission, Trust Code: Enactment Status Map, available at <http://www.uniformlaws.org/Act.aspx?title=Trust+Code> (last visited, July 22, 2015).

60. UNIF. TRUST CODE § 412(a) (2000, rev. 2010) (emphasis added); see also RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a (2003) ("The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.").

circumstances arise that the settlor did not anticipate, courts usually seek to effectuate a settlor's true plans, not what the beneficiaries or court may prefer. And, again, modifying the trust pursuant to the settlor's plans is consistent with economic logic.⁶¹

Of course, there are reasons why a settlor's plans may diverge from what is socially desirable. One reason is if a trust entails an externality.⁶² A trust that creates an interest that lasts in perpetuity may entail a negative externality; indeed, some scholars have argued that one function of the RAP was to reduce externalities arising from perpetuities and perpetual trusts.⁶³ But this externality is not really a

61. Trust law gives settlors a significant degree of freedom in disposing of their trust assets because doing so is likely to maximize social welfare. *See Kelly, supra* note 12, at 1137 (“Overall, effectuating a donor's ex ante interests is often consistent with maximizing social welfare.”). Facilitating donative intent is likely to increase a settlor's welfare during life and may reduce the incentive to alter transfers to circumvent judicial intervention. *See id.* at 1146–58 (discussing ex ante considerations that succession law should incorporate).

62. *See SHAVELL, supra* note **Error! Bookmark not defined.**, at 71; Kelly, *supra* note 12, at 1161–63.

63. *See Dukeminier & Krier, supra* note 1, at 1321–27; T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 284–85 (2000); Waggoner, *supra* note **Error! Bookmark not defined.** at 10–13; *see also* Horowitz & Sitkoff, *supra* note 34, at 1797–98 (discussing historical arguments that perpetuities should be banned to prevent concentrations of wealth that may lead to the corruption of republican political values); Sterk, *supra* note **Error! Bookmark not defined.**, at 2771 *But cf.* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 705 (1986) (“The rule against perpetuities and its kindred rules are not directed toward any kind of externality.”); Horowitz & Sitkoff, *supra* note **Error! Bookmark not defined.**, at 1815 (“It is not obvious . . . that a string of inalienable equitable life estates by way of a perpetual trust will in fact concentrate wealth and

concern for trust term extension because those jurisdictions in which trust term extension is an issue have decided to abolish the RAP.⁶⁴ Thus, to simplify the analysis, we can ignore externality concerns and assume the social objective is to facilitate the settlor's intent.

The difficulty with trust extension is that, in most cases, determining the settlor's true plans would be exceedingly difficult. While some settlors may have wanted perpetual trust conversions, others may not. In this respect, trust extension may differ from trust modification to achieve tax objectives or copyright term extension. For modification to achieve tax objectives,⁶⁵ e.g., a change in the tax code that has adverse effects on certain trusts, most settlors presumably would support

power in individual families, or that if so, a rule against remote vesting of interests is the right instrument of policy for dealing with the externalities of such concentrations.”); Hirsch & Wang, *supra* note **Error! Bookmark not defined.**, at 54 n.218 (1992) (noting that “the federal Generation-Skipping Transfer Tax is now the primary line of defense against intergenerational wealth concentrations, and further modifications could be made to the tax to ensure adequate taxation of prolonged trusts.”).

64. Whether state legislatures considered these concerns in repealing the RAP is another question. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 intro. note, (2011) (“The policy issues associated with allowing perpetual or near-perpetual trusts have not been seriously discussed in the state legislatures.”).

65. *See* UNIF. TRUST CODE § 416 (2000, rev. 2010) (“To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention.”); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 (2003) (“A donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives.”).

modifying the trust to minimize taxes.⁶⁶ Similarly, for copyright term extension, each owner presumably prefers to extend the copyright term.⁶⁷ In both situations, the risk of misinterpreting the owner's wishes is relatively low. By contrast, for trust term extension, the situation is ambiguous—some settlors may have wanted perpetual trusts, while other settlors may not—and, therefore, courts may make mistakes.⁶⁸

The settlor's probable intention is more likely to be ambiguous, even though one of the primary motivations for creating a perpetual trust or converting a trust into a perpetual trust is tax minimization.⁶⁹ The reason for this ambiguity is that a settlor may have countervailing reasons for not wanting to create a perpetual trust. Indeed, even today, while most settlors seek to minimize taxes as much as possible, only a

66. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 cmt. b (“The rationale for modifying a donative document is that the donor would have desired the modification to be made if he or she had realized that the desired tax objectives would not be achieved.”); see also DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 735 (pointing out that “[c]ourts tend to be receptive to petitions seeking to modify or reform a trust to obtain an income or estate tax advantage”).

67. See *supra* note **Error! Bookmark not defined.**

68. Cf. Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 626 & n.84 (2009) (noting that, “in seeking to divine how a testator would have answered a question that was never formally posed, the court could . . . fall victim to error, if not fraud,” and that “in the case of contingencies missing from the will, we must infer what the testator would have intended if he or she *had* considered the contingency, and that is a more problematic exercise”).

69. See Sitkoff & Schanzenbach, *supra* note **Error! Bookmark not defined.**; Schanzenbach & Sitkoff, *supra* note **Error! Bookmark not defined.**

subset of settlors choose to create perpetual trusts. If every settlor who created a trust today was creating a perpetual trust, it would be highly suggestive, though not conclusive, evidence that prior settlors also may have wanted perpetual trusts if they anticipated repeal of the RAP. Yet, because there are reasons for not creating a perpetual trust—and many settlors do not create perpetual trusts—it will not be easy for trustees or courts to determine whether these reasons would outweigh the potential tax benefits of a perpetual trust for settlors who created a trust under the then-applicable RAP.

Ultimately, whether the law should permit trust term extension is an empirical question. It depends on several factors, including the likelihood a court may err in evaluating the settlor’s intent, the magnitude of error costs if the court incorrectly converts (or does not convert) a trust into a perpetual trust, and the magnitude of decision costs in analyzing a settlor’s intent.⁷⁰

Although it is an empirical question, my guess is that the error costs and decision costs of allowing trust term extension are likely to be high. To evaluate a settlor’s probable intent, a court would need to analyze

70. See Kelly, *supra* note 12, at 1160–61 (“[B]ecause courts also lack perfect information, judicial intervention to modify or interpret the terms of a will or trust has significant costs as well, including error costs and decision costs”); cf. Kelly, *supra* note 47, at 879–82 (arguing desirability of harmless error and reformation is an empirical question that depends on false positives (Type I errors), false negatives (Type II errors), and decision costs).

the trust and perhaps extrinsic evidence relating to the settlor's intent. In most cases, courts are unlikely to have very good evidence, from the trust or otherwise, of the settlor's true plans in the absence of the RAP. In some cases, there may be little or no indication of a settlor's intention. In other cases, there may be an indication that the settlor wanted her trust to last for a long time or as long as the RAP allows or that the settlor wanted to minimize taxes,⁷¹ but that evidence does not necessarily suggest that the settlor would prefer a perpetual trust in the absence of the RAP. Even if there is evidence that a settlor approached her attorney to create a trust that violates the RAP (say, an affidavit or notes from the attorney), such evidence does not establish definitively that, at the time the settlor executed the trust, the settlor still preferred a perpetual trust. Moreover, given the difficulties of interpreting evidence about a settlor's true plans (especially when the settlor is dead),⁷²

71. For example, there may be an indication in the trust that the settlor attempted to protect trust assets from a beneficiary's creditors, to maintain trustee supervision of a beneficiary's needs, or to avoid taxes on transfers to future generations. In addition, the settlor may have included a "Kennedy Clause" or other provision attempting to make the trust last as long as possible under the RAP. *See* Weisbord, *supra* note **Error! Bookmark not defined.**, at 82–83; *see also* DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 890–91 (discussing perpetuities saving clauses that incorporate twelve healthy babies, Queen Victoria, and Joseph P. Kennedy as validating lives).

72. *Cf.* DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 327 ("The complication in these matters . . . is the *worst evidence rule* of probate procedure under which the best witness is dead by the time the

decision costs are likely to be quite high for trustees as well as the courts.⁷³ Decision costs are likely to be high for trust term extension in particular because attempting to discern whether a settlor would have preferred a perpetual trust, at a time when repeal of the RAP was not a salient issue, is not an easy determination. Thus, while error costs and decision costs are relevant considerations in any situation involving modification, these costs are likely to be particularly high for trust term extension.

To illustrate, consider a simple numerical example with stylized facts. Suppose there is a 40% chance that the court will interpret the settlor's true plans correctly, either granting an extension if the settlor prefers a perpetual trust or denying it if the settlor prefers the current trust.⁷⁴ If the court interprets the settlor's plans correctly, the settlor benefits as the court is effectuating her preferences as to the disposition of trust property. (We can assume it increases the settlor's happiness ex

issue is litigated. Without live testimony from the testator, discerning the testator's intent can be difficult.”).

73. In addition, allowing trust term extension ex post may entail detrimental effects ex ante, if settlors and their attorneys are less certain about the applicable law at the time they create their trusts. *See Kelly, supra note 12*, at 1176–80. For example, if settlors believe courts will mistakenly extend their trusts, settlors may specify various additional contingences in their trusts, even though the social costs of specifying these additional contingencies exceed the social benefits.

74. Conversely, there is a 60% chance the court will interpret the settlor's true plans incorrectly, either granting an extension even though the settlor prefers the current trust or denying it even though the settlor prefers a perpetual trust.

ante, even though the settlor may now be dead.) Moreover, certain beneficiaries will benefit, even though other beneficiaries will be harmed. Suppose the benefit getting it right (the benefit to the settlor and the net benefit to the beneficiaries) is 20 and decision costs are 15. Here, the expected value of allowing extension ($.4 \times 20 = 8 - 15 = -7$) is negative, so the law should not allow it. Similarly, even if there is a 60% chance of getting it right, the expected value of allowing extension ($.6 \times 20 = 12 - 15 = -3$) is negative. Because the decision costs outweigh the benefits, the law should not allow trust term extension.

Of course, because it is an empirical issue, trust term extension could be desirable in some circumstances. Weisbord asks: “If it is known that the settlor would have wanted a trust to last forever, should the law allow the trustee to petition for an extension of the trust’s duration in perpetuity?”⁷⁵ The answer is “yes.” If a court could conclude that “clear evidence exists to show that the settlor intended to create a perpetual trust, but she was dissuaded from doing so by counsel’s advice regarding the Rule Against Perpetuities,”⁷⁶ then a trustee should seek, and a court should grant, the extension. The existence of clear evidence may make this a relatively easy case, assuming (for the moment) that granting an extension in an easy case does not encourage applications

75. Weisbord, *supra* note **Error! Bookmark not defined.**, at 81.

76. *Id.* at 82.

for extensions in other, less certain cases.

Accordingly, permitting trust term extension might be desirable if the trustee can provide “clear and convincing evidence” that the settlor would extend the trust if the settlor anticipated the RAP’s repeal.⁷⁷ The heightened evidentiary standard of clear and convincing evidence may decrease error costs—by increasing the probability of getting it right—and decrease decision costs—by decreasing litigation costs or eliminating litigation. For example, if there is a 90% chance of getting it right with a benefit of 20 and decision costs are 8, the expected value of allowing extension ($.9 \times 20 + = 18 - 8 = 10$) is positive. Thus, rather than a conclusive presumption against trust term extension, the law might favor a rebuttable presumption against trust extension,⁷⁸ which a trustee could overcome with clear and convincing evidence of a settlor’s

77. Similarly, Professor Boni-Saenz suggests the possibility of a heightened evidentiary standard in his response to Professor Weisbord. See Alexander A. Boni-Saenz, *Baselines in Trust Term Extension*, 67 FLA. L. REV. F. 30, 33 (2015) (“Instead of prohibiting trust term extension altogether, one could merely require clear and convincing evidence of settlor intent to create a perpetual trust before permitting trust term expression under modification doctrines.”).

78. Cf. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 4 (1987) (arguing that “the law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one”).

intent.⁷⁹

However, because I believe the circumstances are likely to be quite rare in which a court will have clear and convincing evidence of the settlor's true plans regarding trust term extension, and because the cost of allowing courts to decide all cases involving extension is likely to outweigh the benefit of these few cases, I would conclude, like Weisbord, that the law should not allow a trustee to extend a trust beyond the perpetuities period.

I should emphasize that, in analyzing trust term extension above and in recommending a conclusive (or rebuttable) presumption against extension, I have assumed that the court is deciding whether to grant a trust extension in which the original trust was created in the distant past. For example, suppose a settlor created the trust in 1970, the settlor died in 1975, and the trustee is seeking to convert the trust into a perpetual trust in 2015. In 1970, repeal of the RAP was likely unforeseeable or so improbable that it would not have been worthwhile for most settlors to address this contingency. As time went on, the possibility of a state's repealing the RAP was increasingly foreseeable, especially after 1995

79. Of course, if the presumption against extension is rebuttable rather than conclusive, the trustee must decide whether to seek an extension, thus reintroducing the issue of the trustee's skewed economic incentives. *See supra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.** and accompanying text.

when Delaware became the first state to repeal the RAP.⁸⁰ (Idaho, South Dakota, and Wisconsin had repealed the RAP prior to 1986 for “reasons unrelated to the GST tax.”⁸¹)

Consequently, a conclusive or rebuttable presumption against extension may not be best for trusts created in the present or more recent past. Given that a majority of states have abolished the RAP, if a settlor creates a trust in a state that has not repealed the RAP, and the state subsequently repeals the RAP, perhaps there should be a presumption in favor of allowing trust extension. The basis for a presumption in favor of trust extension would be that, given the potential tax advantages of converting to a perpetual trust, most settlors, or at least most settlors with significant assets,⁸² would prefer to give

80. Congress initially introduced the generation-skipping transfer (GST) tax in 1976 and amended the GST tax in 1986. Sitkoff & Schanzenbach, *supra* note **Error! Bookmark not defined.**, at 371 & n.42. As Sitkoff and Schanzenbach point out, the link between the GST tax and state perpetuities law was not immediately apparent. However, “[a]s the practicing bar digested the Act and grasped the nature of the GST tax, it became apparent that making use of the transferor’s exemption in a perpetual trust had significant long-term tax advantages.” *Id.* at 373; *see also id.* at 373 n.53 (noting the “learning difficulties” in recognizing the link between the GST tax and perpetual trusts). In 1995 Delaware became “the first state after the enactment of the GST tax to abolish the Rule as applied to interests in trust,” *id.* at 376, and “a movement to allow perpetual trusts took hold in the 1990s,” DUKEMINIER & SITKOFF, *supra* note **Error! Bookmark not defined.**, at 895.

81. Sitkoff & Schanzenbach, *supra* note 1, at 373.

82. Even today, not all settlors create perpetual trusts, even in states that have abolished the RAP. For settlors with trust assets that are unlikely to benefit from the tax advantages of utilizing the GST tax exemption, then the benefits of a perpetual trust may not outweigh the costs, including countervailing reasons why settlors may prefer not to have a perpetual trust.

their trustees discretion to extend the trust if they had provided for the possibility of the RAP's repeal. Under this presumption, settlors with contrary preferences would need to make their desires explicit.

* * *

Overall, I have argued an economic analysis of trust term extension provides a superior justification for rejecting perpetual trust conversions. A settlor may not provide for each contingency in advance, including a legal change like the RAP's repeal, due to specification costs. As a result, there is a justification for allowing trust modification to effectuate a settlor's true plans. Whether, and under what circumstances, to allow trust modification depends not only on specification costs but also on error and decision costs. Yet, in the context of trust extension, it is difficult to distinguish between settlors whose true plans involve a perpetual trust and those that would not. Misinterpreting a settlor's plans involves error costs, as courts may fail to facilitate the settlor's probable intent and give trust property to the wrong beneficiary. Plus, attempting to discern the settlor's intent

For year 2015, the GST tax exemption for an individual is \$5.43 million. *What's New – Estate and Gift Tax*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Whats-New-Estate-and-Gift-Tax> (last updated Aug. 25, 2015). By contrast, those settlors with significant trust assets who may benefit from the GST tax exemption are presumably much more likely to create a perpetual trust. Thus, although it is an empirical matter, it may be that the average settlor with significant assets in a state that has not yet abolished the RAP may prefer to give the trustee (or trust protector) the power to extend the trust in the event that the state subsequently repeals the RAP.

requires a court to incur decision costs. The magnitude of error and decision costs, while an empirical matter, likely militates in favor of categorically rejecting perpetual trust conversions, at least for trusts created in the distant past.

Finally, while I agree with Professor Weisbord's ultimate conclusion, any law reform addressing trust term extension should be careful in crafting the statutory language. Weisbord recommends that the *Uniform Trust Code* be revised "to clarify that modification doctrines—including equitable deviation and modification to achieve the settlor's tax objectives—do not permit the addition of beneficiaries *not identified in the original trust instrument*."⁸³ This recommendation seems overinclusive. There are many reasons why a court, in applying equitable deviation or other modification doctrines, may wish to add a beneficiary not identified in the original trust.

Thus, any law reform might instead clarify that either (i) a trustee shall not petition to extend the duration of a trust beyond the perpetuities period in effect at the time of the trust's creation (a conclusive presumption), or (ii) a trustee shall not petition to extend the

83. Weisbord, *supra* note **Error! Bookmark not defined.**, at 123 (emphasis added); *id.* at 125 (concluding that "drafters of the *Uniform Trust Code* might consider a revision clarifying that modification doctrines do not permit the addition of new beneficiaries not identified in the original trust instrument").

duration of a trust beyond the perpetuities period in effect at the trust's creation unless the trustee establishes by "clear and convincing evidence" that extending the trust term is in accordance with the settlor's probable intention (a rebuttable presumption).⁸⁴ Moreover, any law reform might need to differentiate between trusts created in the distant past, on the one hand, and those created in the present and more recent past, on the other hand. While a conclusive or rebuttable presumption against trust extension may be sensible for trusts created in the distant past, a presumption in favor of extension may provide a superior rule for trusts created in the present and more recent past.

84. If a jurisdiction does not prohibit trust term extension, two other legal issues may arise. First, like perpetual trusts, perpetual trust conversions may be constitutionally suspect in states that prohibit "perpetuities" in their state constitutions. *See* Horowitz & Sitkoff, *supra* note **Error! Bookmark not defined.**, at 1821–22 ("Because text, purpose, and history all suggest that the constitutional proscriptions of perpetuities were meant to proscribe entails, whether in form or in function, and because a perpetual trust is in purpose and in function an equitable fee tail, we conclude that recognition of perpetual trusts is prohibited in states with a constitutional prohibition of perpetuities"). For additional background on the history and function of the entail, see Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 *LAW & HIST. REV.* 277 (2015). Second, like perpetual trusts, perpetual trust conversions could violate the rule against accumulations of income. *See* Sitkoff, *supra* note **Error! Bookmark not defined.**, at 510–13 (discussing whether a perpetual trust that gives a trustee discretion to accumulate income violates the rule against accumulations but concluding "it is unlikely that the rule against accumulations will undermine the growing perpetual trust industry" because some states have enacted legislation abrogating the rule and courts in other states may conclude that abolishing the RAP also reforms the perpetuities period for the rule against accumulations). *But cf.* *White v. Fleet Bank of Me.*, 739 A.2d 373, 380 (Me. 1999) (holding that a "wait-and-see" statutory reform modifying the RAP does not reform the rule against accumulations).

