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# ARTICLES

## THE GHOSTWRITTEN WILL

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*Courts have long assumed, and sometimes explicitly stated, that one's power to make a will is too personal to transfer to another person. This Article demonstrates that such assumptions and statements are inaccurate and harmful. In showing that the ghostwritten will is and always has been a valid (though largely hidden) part of American law, this Article frees legislators, judges, and scholars to consider ways in which direct authorization of the ghostwritten will can serve the needs of a rapidly aging society. In particular, this Article demonstrates that new laws recognizing a principal's power to grant her agent will-making authority would provide far more transparent and efficient results than those springing from older forms of ghostwritten wills.*

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## INTRODUCTION

Although the average lifespan of Americans is significantly longer than it was just three decades ago,<sup>1</sup> science and medicine have yet to moderate the incapacity brought on by various forms of dementia<sup>2</sup> – including Alzheimer’s disease<sup>3</sup> – that often befall the elderly.<sup>4</sup> In the absence of scientific and medical breakthroughs,<sup>5</sup> it appears inevitable that an increasing number of us will live our final days in limbo<sup>6</sup>: a place where time alters the world around us while we are, to varying degrees, unaware of those changes and unable to account for them.<sup>7</sup>

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<sup>1</sup> See NAT’L CTR. FOR HEALTH STATISTICS, DHHS PUB. NO. 2012-1232, HEALTH, UNITED STATES, 2011, at 10 (2012) (observing that between 1980 and 2008, life expectancy at birth in the United States increased for females from seventy-seven to eighty-one years and for males from seventy to seventy-six years). The remaining life expectancy of a sixty-five-year-old American female increased by two years between 1980 and 2009, and the remaining life expectancy of a sixty-five-year-old American male increased by more than three years during that time. *Id.* at 107 tbl.21 (indicating that in 2009, a sixty-five-year-old female could expect to live an additional 20.3 years and a sixty-five-year-old male could expect to live an additional 17.6 years).

<sup>2</sup> See generally NAT’L INST. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., NIH PUB. NO. 11-7737, GLOBAL HEALTH AND AGING 14-15 (2011), available at <http://www.nia.nih.gov/research/publication/longer-lives-and-disability/burden-dementia> (explaining that the risk of dementia increases sharply with age and observing the growing burdens that will result from an aging population in the absence of new strategies for management and prevention).

<sup>3</sup> For a discussion of the current status of research and knowledge concerning Alzheimer’s disease, see *About Alzheimer’s Disease: Alzheimer’s Basics*, NAT’L INST. ON AGING, <http://www.nia.nih.gov/alzheimers/topics/alzheimers-basics> (last visited Mar. 2, 2013). The time between diagnosis of Alzheimer’s disease and death typically ranges from three years to more than a decade. *Id.*

<sup>4</sup> See NAT’L CTR. FOR HEALTH STATISTICS, *supra* note 1, at 11 fig.3 (showing increasing numbers of deaths in the United States between 1998 and 2008 resulting from Alzheimer’s disease); Luran Neergaard, *U.S. Alzheimer’s Plan Looks for Prevention*, COM. APPEAL (Memphis), May 16, 2012, at A1 (stating that 5.4 million Americans currently have Alzheimer’s disease or related dementias and that this number is expected to reach 16 million by 2050).

<sup>5</sup> See *About Alzheimer’s Disease: Alzheimer’s Basics*, *supra* note 3 (explaining that “currently there is no cure” for Alzheimer’s disease).

<sup>6</sup> See NAT’L INST. ON AGING, *supra* note 2, at 14 (suggesting that 115 million people worldwide will be living with Alzheimer’s disease or dementia by 2050); *About Alzheimer’s Disease: Alzheimer’s Basics*, *supra* note 3 (observing that the number of people with Alzheimer’s disease will increase significantly if current population trends continue).

<sup>7</sup> The limbo resulting from substantial mental incapacity is not limited to the elderly. Accidents, disease, and birth defects can cause permanent mental incapacity even in a young person. The legal problems of the incapacitated are largely the same regardless of the age when the incapacity occurs. Who is the substitute decisionmaker? What decisions are within the substitute decisionmaker’s authority? What standards govern the decisionmaking

Among the most significant changes that may occur while an individual is incapacitated are those relating to her family structure and wealth.<sup>8</sup> Such changes can fundamentally alter the distribution of her estate, yet in her incapacity she cannot rewrite her estate plan.<sup>9</sup> Moreover, American law has never permitted an individual to delegate directly her will-making power to another.<sup>10</sup>

Drawing on the common law of wills<sup>11</sup> as well as modern statutory developments in both conservatorship<sup>12</sup> and durable power of attorney laws,<sup>13</sup> this Article explores the history and propriety of permitting a capable individual to designate a ghostwriter to alter her estate plan in the event of her incapacity.<sup>14</sup> The central policy question of this Article is a profound one for a rapidly aging society: Should a capable adult be able through a durable power of attorney to grant her agent specific authority to make, amend, or revoke her will?

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process? Nevertheless, America's elderly population is disproportionately affected by the onset of dementia and Alzheimer's disease.

<sup>8</sup> This Article in no way suggests that everyone who suffers from dementia, Alzheimer's disease, or other mental illnesses is inevitably mentally incapacitated from the onset of the illness or the time of diagnosis. Capacity exists along a spectrum, and the law requires different levels of capacity for different kinds of legal decisions. *See, e.g.*, Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 *IND. L.J.* 1619, 1619 (2008) (citing Michael Gunn, *The Meaning of Incapacity*, 2 *MED. L. REV.* 8, 9 (1994)). A person diagnosed with Alzheimer's disease or dementia may retain full legal capacity in the early stages of the illness. *See id.* at 1620 (observing that with dementia and Alzheimer's disease, individuals may experience a gradual loss of capacity).

<sup>9</sup> Unless otherwise noted, the terms "capacity" and "incapacity" as used in this Article refer to an individual's ability to execute a valid will under state law. *See, e.g.*, *Miller v. Fischer (In re Estate of Oliver)*, 934 P.2d 144, 148-49 (Kan. Ct. App. 1997) (recognizing that different tests for capacity apply in various legal settings and concluding that a person who is under a conservatorship may still have testamentary capacity).

<sup>10</sup> *See infra* notes 51-57 and accompanying text (discussing the common view that an individual's power of testation is nondelegable).

<sup>11</sup> *See infra* Part II.B.1-2 (considering the independent significance doctrine and powers of appointment).

<sup>12</sup> *See infra* Part II.B.3 (explaining Uniform Probate Code section 5-411 and other conservatorship provisions concerning estate planning).

<sup>13</sup> *See infra* Part III (expounding the Uniform Power of Attorney Act and recent developments in durable power of attorney laws).

<sup>14</sup> *See infra* notes 87-97, 120-23, and accompanying text (comparing ways of circumventing existing restriction on delegating will-making power and questioning whether restriction is justified).

## I. SUBSTITUTE DECISIONMAKING: A BRIEF OVERVIEW

Who makes decisions for the person no longer capable of making them herself?<sup>15</sup> In recent decades, the importance of this question has become obvious.<sup>16</sup> Ready or not, society has learned that with large numbers of elderly Americans increasingly unable to make various intensely private and personal decisions for themselves, the decisionmaking process will often end up in the hands of others.<sup>17</sup>

When faced with complex questions of substitute decisionmaking, family members and those interested in the welfare of an incapacitated adult once commonly resorted to judicial proceedings.<sup>18</sup> America had long recognized a state's power to appoint through judicial process a guardian or conservator to make some decisions for an incapacitated ward or protected person.<sup>19</sup> Nevertheless, even after their fiduciary appointment, guardians often had to return to court to obtain explicit authority to make specific decisions such as those relating to life-prolonging medical treatment.<sup>20</sup> Conservators faced similar problems; they too were hardly free in the absence of explicit court approval to make many decisions that the protected person almost certainly would have made had she retained the capacity to do so.<sup>21</sup> Modern statutes

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<sup>15</sup> See *infra* notes 18-32 and accompanying text (discussing substitute decisionmaking for an incapacitated person).

<sup>16</sup> See, e.g., David M. English, *The UPC and the New Durable Powers*, 27 REAL PROP. PROB. & TR. J. 333, 361-62 (1992) (explaining in an early article on durable powers of attorney that the growing number of elderly Americans without close family members was one reason behind the rush of state legislatures to adopt durable power of attorney statutes for health care).

<sup>17</sup> See, e.g., Sally Hurme & Erica Wood, *Third National Guardianship Summit: Standards of Excellence: Introduction*, UTAH L. REV. 1157, 1162 (2012) (observing estimates of 400,000 adults under guardianship in 1988 and 1.5 million pending guardianship cases in 2011).

<sup>18</sup> See, e.g., Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 575 (1996) (describing the importance of guardianship and conservatorship proceedings, particularly before the advent of the durable power of attorney).

<sup>19</sup> Conservatorship and guardianship proceedings can be slow, burdensome, and expensive. See *id.* at 575 n.2. They can also reveal a great deal of intensely private information and can potentially embarrass the respondent. See Naomi Karpand & Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices?*, 37 STETSON L. REV. 143, 182 (2007) ("Guardianship files include sensitive information on health conditions, mental disabilities, finances, and such identifying information as addresses and Social Security numbers.").

<sup>20</sup> See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145, 145 (Ky. Ct. App. 1969) (holding after a discussion of judicial power that the court had power to grant the fiduciary's request that an incapacitated ward undergo kidney removal for transplantation into the ward's brother).

<sup>21</sup> See, e.g., *In re Guardianship of Christiansen*, 56 Cal. Rptr. 505, 511-12 (Cal. Ct. App. 1967) (reversing the trial court and holding that California courts can authorize a fiduciary

give court-appointed fiduciaries more detailed default powers and guidelines for substitute decisionmaking, but they still leave many questions unanswered.<sup>22</sup>

In recent years, durable powers of attorney have significantly reduced the need for guardians and conservators and the judicial process through which those fiduciaries are appointed.<sup>23</sup> By the end of the twentieth century, all states had flexible statutory schemes<sup>24</sup> that recognized the authority of a duly appointed agent to make most decisions that the principal has expressly empowered the agent to make.<sup>25</sup>

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to make gifts from an incapacitated person's estate, but observing holdings or judicial suggestions from other states to the contrary).

<sup>22</sup> See, e.g., Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 747-60 (2012) (discussing the inadequacy of decisionmaking standards in current statutes that fail to recognize that substituted judgment and best interest exist along a continuum).

<sup>23</sup> See Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16 NAT'L ACAD. ELDER L. ATT'Y Q. 20, 20 (2003) (describing the durable power of attorney as "an omnipresent tool of estate planning" and observing its role in avoiding guardianship and other judicial proceedings). Evidence is indisputable that the durable power of attorney now holds a prominent place in the world of estate planning documents. *Id.* A study conducted for AARP in late 1999 indicated that forty-five percent of Americans fifty and older had prepared a durable power of attorney for financial matters and that this percentage had almost doubled since 1991. AARP RESEARCH GRP., AARP, WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 6 (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf> (indicating the results of an AARP survey concerning the extent to which Americans age fifty and older have advance-planning documents such as wills, living trusts, and durable powers of attorney). Interestingly, only sixty percent of respondents in that age group indicated in 1999 that they had a will, and this percentage was similar to that reported in the 1991 AARP survey of Americans age forty-five and older. *Id.* at 5.

<sup>24</sup> See generally Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4-14 (2001) (offering a history of the durable power of attorney and observing that all states had durable power of attorney statutes by 1984).

<sup>25</sup> See, e.g., UNIF. POWER OF ATT'Y ACT §§ 201-17, 8B U.L.A. 97-116 (Supp. 2013) (providing a detailed description of powers that a principal can delegate to an agent by default or by specific grant); 33 A. KIMBERLEY DAYTON ET AL., ADVISING THE ELDERLY CLIENT § 33.6 (2013) (giving a list of citations to durable power of attorney laws across the United States); LORI A. STIEGEL & ELLEN VANCLEAVE KLEM, AARP, POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT (A COMPARISON OF CURRENT STATE LAWS WITH THE NEW UNIFORM POWER OF ATTORNEY ACT) 17-89 (2008), available at [http://assets.aarp.org/rgcenter/consume/2008\\_17\\_poa.pdf](http://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf) (comparing state power of attorney statutes with the Uniform Power of Attorney Act shortly after the latter's promulgation).

The Uniform Power of Attorney Act includes detailed provisions related to the agent appointed to make decisions concerning the principal's estate. Its analog for an agent

The durable power of attorney permits a capable individual – a person who is typically in a better position than a judge to know and anticipate her own needs and wants – to designate who will act for her and to define the parameters of her agent’s authority in the event of her incapacity.<sup>26</sup> As a part of the modern estate plan, a principal can and often does grant very broad powers to an agent named in the principal’s durable power of attorney.<sup>27</sup>

Unless the agent is unwilling to act,<sup>28</sup> acts in bad faith,<sup>29</sup> or cannot act because he is unauthorized to make an important decision under the power of attorney,<sup>30</sup> the need for a guardian or conservator diminishes significantly.<sup>31</sup> Thus, the power of attorney also reduces concerns about cost, delay, and privacy often associated with guardianship and conservatorship proceedings.<sup>32</sup>

Like the literary ghostwriter authorized by the subject to draft her “autobiography,”<sup>33</sup> the modern agent is authorized by a principal to carry on

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appointed to make decisions concerning the principal’s health care is found in a separate act. *See* UNIF. HEALTH-CARE DECISIONS ACT §§ 1-19 (amended 2005), 9 U.L.A. 83-84 (2005) (providing comprehensive legislation concerning healthcare decisionmaking and the authorization of powers of attorney for health care); UNIF. POWER OF ATT’Y ACT § 103(2), 8B U.L.A. at 71 (excluding healthcare decisions from applicability of the act).

<sup>26</sup> *See, e.g.*, UNIF. POWER OF ATT’Y ACT art.1, general cmt., 8B U.L.A. at 67-68 (discussing the drafters’ goal of preserving the freedom of the principal to choose the extent of the agent’s powers and observing that the agent’s authority is not revocable by a unilateral decision of the conservator or other later court-appointed fiduciary).

<sup>27</sup> *See, e.g.*, Andrew H. Hook & Lisa V. Johnson, *The Uniform Power of Attorney Act*, 45 REAL PROP. TR. & EST. L.J. 283, 288-316 (2010) (providing an overview of a broad range of provisions within the Uniform Power of Attorney Act).

<sup>28</sup> The appointment of a successor agent in the power of attorney document can further reduce the likelihood that a conservator or guardian will be needed. *See, e.g.*, UNIF. POWER OF ATT’Y ACT § 111(b), 8B U.L.A. at 77 (stating that even when an agent declines to serve, a successor agent may act if the power of attorney document so provides).

<sup>29</sup> *Id.* § 115(1) (permitting the principal generally to exonerate the agent, but not for breaches of duty committed dishonestly, with improper motive, or with reckless indifference to the purpose of the power of attorney or the principal’s best interest, and precluding exoneration when a provision in power of attorney was included because of an abuse of the confidential or fiduciary relationship with the principal); *Id.* § 114(a)(1)-(2) (imposing a duty upon the agent to act in accordance with the principal’s reasonable expectations or best interest and in good faith).

<sup>30</sup> *Id.* § 114(a)(3) (providing that an agent shall act “only within the scope of authority granted in the power of attorney”).

<sup>31</sup> *See id.* § 108 cmt. (explaining that a later court-appointed fiduciary may be necessary if an agent performs inadequately or breaches his fiduciary duty, though a later court-appointed fiduciary generally “should supplement, not truncate, the agent’s authority”).

<sup>32</sup> *See, e.g.*, Hook & Johnson, *supra* note 27, at 285 (observing that durable powers of attorney are cheaper and simpler than the alternatives of guardianship and conservatorship).

<sup>33</sup> Celebrities, professional athletes, and well-known politicians publish “autobiographies” that are penned largely if not entirely by someone else. *See generally* Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative*

and perhaps complete her life story by fulfilling her wishes<sup>34</sup> and serving her best interest.<sup>35</sup> Today a principal can delegate to her agent decisionmaking authority on life's most important personal<sup>36</sup> and financial matters.<sup>37</sup> She can authorize her agent to refuse or terminate life-prolonging nutrition and hydration;<sup>38</sup> she can authorize her agent to purchase and sell property;<sup>39</sup> she can even authorize her agent to give her estate away during her period of incapacity.<sup>40</sup> Nevertheless, there remains one important area in which states refuse to recognize a principal's delegation of power to an agent: A principal cannot authorize her agent to make, amend, or revoke her will.<sup>41</sup> Why is this so?

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*Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 135-36 (1997) (discussing the use of ghostwriters for autobiographies and observing there is no serious misleading of the public by these efforts).

<sup>34</sup> See, e.g., Herring, *supra* note 8, at 1638 ("Advance directives enable us to make plans for the future and make arrangements about how we will be remembered and live out the end of our lives.").

<sup>35</sup> An agent under a durable power of attorney is like a literary ghostwriter in other ways too. The principal typically chooses her agent with great care, recognizing the importance and difficulties of the agent's task. The agent is someone in whom the principal places confidence and trust. Before the relationship begins or early in the relationship, the careful principal is likely to discuss in detail with the agent how she wishes the agent to proceed in acting for her.

<sup>36</sup> See, e.g., UNIF. HEALTH-CARE DECISIONS ACT §§ 1(6), 2(b) & prefatory note (amended 2005), 9 U.L.A. 84-85, 89, 93 (2005) (recognizing the right of the individual to direct all aspects of medical treatment, including the refusal of treatment leading to death, and further recognizing the individual's right to provide her agent with authority to make all decisions the individual herself could make).

<sup>37</sup> See, e.g., UNIF. POWER OF ATT'Y ACT §§ 204-17, 8B U.L.A. 102-16 (Supp. 2013) (detailing the wide-ranging authority over the principal's assets that the principal may provide to the agent through the simple act of incorporation by reference).

<sup>38</sup> See, e.g., UNIF. HEALTH-CARE DECISIONS ACT prefatory note, 9 U.L.A. at 84 (describing an individual's right to make all medical treatment decisions, including refusal of treatment that is followed by death).

<sup>39</sup> See, e.g., UNIF. POWER OF ATT'Y ACT §§ 204-05, 8B U.L.A. at 109-11 (explaining the wide range of default powers concerning the principal's real property and tangible personal property that the principal may incorporate by reference into the power of attorney document).

<sup>40</sup> See, e.g., *id.* § 217(b), 8B U.L.A. at 123 (providing default rules about gift-making authority and setting limits on an agent's gift-making authority unless the power of attorney provides otherwise).

<sup>41</sup> *Id.* § 201(a), 8B U.L.A. at 104 (listing acts that the agent may undertake only if the principal has given him a specific grant of authority, including creating, amending, revoking, or terminating an inter vivos trust, but excluding making, amending, or revoking a will); see also *id.* art. 2 general cmt., 8B U.L.A. at 104 (stating that a specific grant is required for certain actions "because of the risk those acts pose to the principal's property and estate plan"); Hart v. Garrett (*In re Estate of Garrett*), 100 S.W.3d 72, 76 (Ark. Ct. App.

## II. THE WILL

A. *A Nondelegable Testamentary Power*

State probate laws zealously guard the right of the capable citizen to execute a will.<sup>42</sup> Although few states afford citizens a constitutional right to devise,<sup>43</sup>

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2003) (observing that a principal cannot use a “power of attorney . . . [to] bestow upon the attorney-in-fact the power to create a will on [her] behalf”). *See generally infra* notes 51-55, 70, and accompanying text (discussing statutory and judicial refusal to permit will-making by an agent).

<sup>42</sup> The reported opinions from many states recognize that the right to devise is extremely important. *See, e.g.*, *Grant v. Raymond (In re Estate of Dunson)*, 141 So. 2d 601, 604 (Fla. Dist. Ct. App. 1962) (“The right to dispose of one’s property through the instrumentality of a will is highly valuable, and it is the policy of the law to hold a will good wherever possible.”); *Holland v. Holland*, 596 S.E.2d 123, 127 (Ga. 2004) (“To set aside a will and thus deprive a person of the valuable right to make a will, a stringent standard must be met.” (quoting *Kendrick-Owens v. Clanton*, 524 S.E.2d 237, 237 (Ga. 1999))); *Root v. Morning View Cemetery Ass’n*, 118 N.W.2d 633, 637 (Neb. 1962) (“No right of a citizen is more valued than the power to dispose of his property by will.” (quoting *Benge v. Sutton (In re Estate of Gorthy)*, 100 N.W.2d 857, 864 (Neb. 1960))). Even when recognizing that in most states the right to devise ultimately may be restricted and regulated by the state legislature, some courts have nonetheless noted that the right to devise is not only extremely important, but also perhaps even fundamental. *See, e.g.*, *Fritschi v. Teed (In re Estate of Fritschi)*, 384 P.2d 656, 659 (Cal. 1963) (explaining that “the right to testamentary disposition of one’s property is a fundamental one,” but further stating that the right is “restricted by legislative and social controls”), *superseded by statute*, CAL. PROB. CODE §§ 21350-21356 (West 2011 & Supp. 2013) (“Limitations on Transfers to Drafters and Others.”).

<sup>43</sup> This Article does not explore state constitutional arguments that could *require* a state to recognize a principal’s delegation of her will-making power to her agent. For example, Justice O’Connor, in her concurring opinion in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 289 (1990) (O’Connor, J., concurring), suggested that in matters involving an individual’s liberty interest concerning medical treatment protected under the federal Constitution, the Constitution may require a state to recognize the individual’s duly appointed surrogate. By analogy – at least in the rare state where the right to devise is protected by the *state* constitution – one could plausibly argue that the state is compelled to recognize the principal’s duly appointed will-making surrogate. This is especially so if the right to devise is deemed a natural or fundamental right. *See, e.g.*, *Biart v. First Nat’l Bank of Madison (In re Estate of Ogg)*, 54 N.W.2d 175, 178 (Wis. 1952) (“[T]he right to make a will [is] a sacred right guaranteed by the constitution . . .”). *See generally* Arthur Scheller, Jr., *The Right to Dispose of Property by Will*, 37 MARQ. L. REV. 92 (1953) (discussing Wisconsin’s constitutional right to devise and the effect of statutes that relate to that right).

Although the right to devise is not protected under the federal Constitution or the great majority of state constitutions, one might nevertheless plausibly assert an equal protection challenge when state law refuses to recognize a competent principal’s delegation of her will-making power to her agent. For example, the person with an early diagnosis of adult onset dementia who clearly still has testamentary capacity could argue that the state is treating her differently from other testators by denying her the *future* ability to amend or revoke her will through a carefully selected and duly appointed agent.



the irrefutable trend in American probate law is to simplify will-execution statutes to encourage citizens to die testate.<sup>44</sup> Testamentary freedom is oft said to be a hallmark of American wills law,<sup>45</sup> and indeed one finds that the American testator encounters few limitations in fashioning devises and bequests that satisfy her desires and whims.<sup>46</sup>

Moreover, the will is probably the most personal legal document that an individual will execute.<sup>47</sup> Even when the will is very terse,<sup>48</sup> it inevitably reveals some information unique to the testator.<sup>49</sup> Who was she? What did she value? Whom did she love? How did she view herself and her place in the world? Others might make reasonably well-informed guesses at how an individual without a will would answer these questions; however, only the individual herself can answer those questions with certainty.<sup>50</sup>

Recognizing that each individual is shaped by her singular life experiences, state probate laws traditionally impose an obvious, if unstated, limitation on will execution: No one can make, amend, or revoke the will of another person, and this is so even when that person becomes incapacitated and unable to act for herself.<sup>51</sup> State statutes permit a competent testator to execute a will with a

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<sup>44</sup> See, e.g., UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 143 (Supp. 2013) (providing a “harmless error” rule under which a document failing to comply with the execution requirements of the Uniform Probate Code is nonetheless treated as a valid testamentary document if clear and convincing evidence demonstrates that the decedent intended it to be so).

<sup>45</sup> See, e.g., SUSAN GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 13 (2011) (describing testamentary freedom as both “a cornerstone of American trusts and estates law” and “a bedrock principle”).

<sup>46</sup> Authors observe, however, that testamentary freedom is not unlimited. See, e.g., Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (questioning the extent of America’s commitment to the principle).

<sup>47</sup> *Brimmer v. Hartt (In re Estate of Hartt)*, 295 P.2d 985, 1002 (Wyo. 1956) (“It is, and for many centuries has been, a common thought in our economic system, that to execute a last will and testament is the most solemn and sacred act of a man’s life.”).

<sup>48</sup> For example, the will of the famously laconic United States President Calvin Coolidge stated as follows: “Not unmindful of my son John, I give all my estate, both real and personal, to my wife, Grace Coolidge, in fee simple . . . .” See HERBERT R. COLLINS & DAVID B. WEAVER, *WILLS OF THE U.S. PRESIDENTS* 112 (1976).

<sup>49</sup> See generally Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63 (2009) (discussing will provisions as a direct or indirect reflection of the testator’s life story).

<sup>50</sup> Thus, the law of wills has long striven to respect a testator’s individuality. See, e.g., *Benge v. Sutton (In re Estate of Gorthy)*, 100 N.W.2d 857, 864 (Neb. 1960) (stating that “[n]o right of a citizen is more valued than the power to dispose of his property by will” and further observing the freedom with which the testator is permitted to act).

<sup>51</sup> See *Hart v. Garrett (In re Estate of Garrett)*, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003) (observing that will-making power cannot be delegated); *Smith v. Snow*, 106 S.W.3d 467, 470 (Ky. Ct. App. 2002) (stating that power of attorney to make a will is not permitted in

signature by proxy<sup>52</sup> or to revoke by physical act of a proxy,<sup>53</sup> but they do not permit that testator to give a proxy the testator's will-making power.<sup>54</sup> A court may even state that a testator's power to make a will is so inherently personal that it is necessarily inalienable.<sup>55</sup>

The practical effect of this limitation appears to be that an individual without a will who permanently loses testamentary capacity is destined to die intestate;<sup>56</sup> similarly, the testator who later permanently loses testamentary

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Kentucky and citing an 1899 case to the same effect); *Perosi v. LiGreci* (*In re Perosi*), 948 N.Y.S.2d 629, 634 (N.Y. App. Div. 2012) (observing that one of the few exceptions to the rule that a principal may grant an agent a broad array of powers is execution of a principal's will (citing N.Y. EST. POWERS & TRUSTS § 3-2.1(a)(3) (Consol. 2013))); *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 749 n.2 (Tenn. 2007) (“[O]ther jurisdictions have held that a principal may not use a power of attorney to authorize another to create a will on his or her behalf.”). The rule has also been codified. *See, e.g.*, CAL. PROB. CODE § 4265 (West 2009) (“A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will.”).

<sup>52</sup> *See, e.g.*, UNIF. PROBATE CODE § 2-502(a)(2) (amended 2010), 8 U.L.A. 138 (Supp. 2013) (permitting a testator's signature to be written by another individual who is in the testator's conscious presence and acting at the testator's direction).

<sup>53</sup> *See, e.g., id.* § 2-507(a)(2) (allowing the testator to revoke a will by physical act through another individual who performs the revocatory act in the testator's conscious presence and at the testator's direction).

<sup>54</sup> The Uniform Probate Code, which stands at the forefront of progressive probate schemes, contains no provision that permits a testator to delegate her will-making power to another. *See supra* notes 52-53 (describing the limited role of proxy participation under the UPC to assist the testator in signing the will or performing a physical act of revocation on the will). The Uniform Power of Attorney Act similarly has no provision permitting a principal to delegate her will-making power to her agent. *See infra* notes 169-92 and accompanying text (observing a broad range of “risky” powers that the principal may delegate by specific grant, but excluding the principal's will-making power).

<sup>55</sup> *See, e.g.*, *In re Estate of Garrett*, 100 S.W.3d at 76 (stating that will-making requires “personal performance” and is a power that cannot be delegated (quoting 3 AM. JUR. 2D AGENCY § 21 (2002))); *In re Estate of Runals*, 328 N.Y.S.2d 966, 976 (N.Y. Sur. Ct. 1972) (observing that the “right to make a will is personal to a decedent” and “is not alienable or descendable”).

<sup>56</sup> *Compare In re Garbow*, 591 N.Y.S.2d 754, 756-57 (N.Y. Sur. Ct. 1992) (arguing that, even in the absence of a statute, the court could apply the substituted judgment doctrine to authorize the conservator to establish a trust for an elderly intestate woman lacking testamentary capacity to accomplish her goals), and *In re Estate of Runals*, 328 N.Y.S.2d at 976 (observing that the right to make a will is neither alienable nor descendable), with THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 161 (5th ed. 2011) (commenting that courts “have doubted that they have the power to authorize a conservator or guardian to make, amend, or revoke a will for a protected person” in the absence of express statutory authorization of that power).

capacity is destined to die with that will in effect at death, no matter how outdated the will has become during the period of the testator's incapacity.<sup>57</sup>

But, as the old saw would have it, appearances are not always what they seem.

B. *Circumventing the Nondelegability Rule*

On their face, will-execution statutes support the conclusion that no one can make, amend, or revoke a will for another.<sup>58</sup> Yet careful inquiry reveals that probate law has long provided ways of avoiding the rule of nondelegability.<sup>59</sup> In fact, by using simple common law principles, a knowledgeable, well-advised, or just plain lucky individual who wishes to do so can and always could – perhaps indirectly, but nonetheless quite effectively – grant another the power to make, amend, or revoke her will and determine the distribution of each and every part of her estate.<sup>60</sup> Little-known modern statutory developments have also provided new ways around the rule of nondelegability.<sup>61</sup>

The following discussion examines some specific settings in which a third party can write another person's will even after that person becomes incapacitated.<sup>62</sup> The methods used in these settings are easily accomplished,

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<sup>57</sup> See *infra* notes 138-45 and accompanying text (discussing a case in which neither the court nor the conservator could revoke or amend the will of the incapacitated testator).

<sup>58</sup> See *supra* notes 51-57 (discussing statutes of wills execution requirements).

<sup>59</sup> See *infra* Part II.B.1-2 (expounding on the independent significance doctrine and powers of appointment as two possible ways a testator may indirectly circumvent the rule forbidding delegation of one's testamentary power).

<sup>60</sup> See *infra* notes 71-78 and accompanying text (describing how one testator indirectly delegated her will-making power through a holographic codicil even though she was almost certainly unaware of the formal rules of will execution and the common law exception she managed to satisfy).

<sup>61</sup> See discussion *infra* Part II.B.3 (observing modern developments in conservatorship law).

<sup>62</sup> This Article does not purport to discuss all possible methods of indirectly circumventing the nondelegability rule. Moreover, since the central question of this Article is whether modern laws should permit a testator to delegate her will-making power to someone who can act *after she has become incapacitated*, the Article intentionally ignores those methods that do not permit another to act at that time. For example, the testator's will may provide that her assets are to be distributed pursuant to the terms of her late husband's will. In such a case, the doctrine of incorporation by reference will often suffice to permit distribution of her estate pursuant to the will of the predeceased spouse. See, e.g., UNIF. PROBATE CODE § 2-510 (amended 2010), 8 U.L.A. 154 (Supp. 2013) (“A writing *in existence when a will is executed* may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.” (emphasis added)).

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requiring nothing more than a simple statement of the wishes of the delegating party executed in compliance with the statute of wills.<sup>63</sup>

Because these methods effectively circumvent the nondelegability rule, one question that logically follows is whether permitting delegation of a principal's will-making power in a properly executed power of attorney would be an unwarranted departure from what an individual can already do or, alternatively, would be a more transparent and efficient way of furthering probate law's fundamental goal of effectuating the decedent's distributive intent.<sup>64</sup>

### 1. The Independent Significance Doctrine

If a testator's will provides that her estate should be distributed pursuant to the terms of another person's will, the testator is effectively transferring her will-making power to that other person.<sup>65</sup> Such a transfer seems to fly in the face of the nondelegability rule and current power of attorney laws, which purportedly view one's will-making power as too personal to be alienable.<sup>66</sup> Nevertheless, applying the universally recognized doctrine of independent significance,<sup>67</sup> courts have long enforced provisions that direct distribution of a testator's estate according to the dispositive provisions of the will of someone else.<sup>68</sup>

The doctrine of independent significance permits a court to take into account acts or events that occur *after* the testator makes her will, as long as those acts or events have meaning separate and apart from the distribution contemplated by the testator's will.<sup>69</sup> The Uniform Probate Code explicitly recognizes the

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<sup>63</sup> See discussion *infra* notes 65-164 (discussing the doctrine of independent significance, powers of attorney, and conservatorship laws).

<sup>64</sup> See *infra* notes 189-202 and accompanying text (examining the propriety of permitting a principal to delegate her will-making power to her agent by express grant).

<sup>65</sup> See *infra* notes 71-86 and accompanying text (discussing cases in which the testator included such a provision in her will).

<sup>66</sup> See *supra* notes 47-50 and accompanying text (observing the highly personal nature of will-making).

<sup>67</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.7 cmt. a (1999); 2 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS §§ 19.34-.35 (2003); IA AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS §§ 54.2, 54.4 (4th ed. 1987).

<sup>68</sup> See *supra* note 62 (observing that the doctrine of incorporation by reference is another means of avoiding the nondelegability rule, but that the rule does not permit the incorporated document to be prepared after the testator executes her will); see also *infra* notes 71-78 and accompanying text (commenting on a well-known case from Tennessee in which the testator devised her estate pursuant to the terms of her husband's will that was executed after the testator executed her will).

<sup>69</sup> See *infra* note 70 (providing the Uniform Probate Code provision on independent significance).

execution of another individual's will as an event having independent significance.<sup>70</sup>

In *In re Tipler*,<sup>71</sup> Gladys Tipler executed a holographic codicil providing that the will of her husband, Tippy, would control the disposition of her estate if he predeceased her.<sup>72</sup> Tippy had no will at the time that Gladys executed her codicil;<sup>73</sup> however, several years after Gladys executed her will and codicil, Tippy did execute his will.<sup>74</sup> Tippy then predeceased Gladys.<sup>75</sup> Upon Gladys's

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<sup>70</sup> Both the original and the revised Uniform Probate Code codify the doctrine of independent significance. Section 2-512 provides as follows:

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. *The execution of revocation of another individual's will is such an event.*

UNIF. PROBATE CODE § 2-512 (amended 2010), 8 U.L.A. 156 (Supp. 2013) (emphasis added). The Uniform Probate Code provision has been adopted in a number of states. *See, e.g.*, ALA. CODE § 43-8-141 (1982 & Supp. 2009); ALASKA STAT. § 13.12.512 (2012); ARIZ. REV. STAT. ANN. § 14-2512 (2012); CAL. PROB. CODE § 6131 (West 2009); COLO. REV. STAT. § 15-11-512 (2012); FLA. STAT. § 732.512(2) (2013); HAW. REV. STAT. § 560:2-512 (2010); IDAHO CODE ANN. § 15-2-512 (2009); ME. REV. STAT. ANN. tit. 18-A, § 2-512 (2012); MASS. GEN. LAWS ch. 190B, § 2-512 (2012); MICH. COMP. LAWS ANN. § 700.2512 (West 2002); MINN. STAT. § 524.2-512 (2012); MONT. CODE ANN. § 72-2-532 (2011); NEB. REV. STAT. § 30-2337 (2008); N.J. STAT. ANN. § 3B:3-12 (West 2007); N.M. STAT. ANN. § 45-2-512 (1978); N.C. GEN. STAT. § 31-52 (2011); N.D. CENT. CODE § 30.1-08-12 (2010); S.C. CODE ANN. § 62-2-511 (2009); UTAH CODE ANN. § 75-2-512 (LexisNexis 1993 & Supp. 2012); WIS. STAT. § 853.325 (1997 & Supp. 2012).

As explained in the *Restatement (Third) of Property: Wills and Other Donative Transfers*, not much is required for an act, fact, or event to have independent significance:

An external circumstance has independent significance if it is one that would naturally occur or be done for some reason other than the effect it would have on the testamentary disposition, notwithstanding that it might occur or be done, or did occur or was done, for the purpose of affecting the testamentary disposition. The rationale for the doctrine is that the independent significance of the external circumstance – its lifetime or nontestamentary character – substitutes for attestation even though the circumstance itself is not attested. The circumstance may occur or come into existence before or after the execution of the will or before or after the testator's death.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.7 cmt. a (1999).

<sup>71</sup> *In re Last Will & Testament of Tipler*, 10 S.W.3d 244 (Tenn. Ct. App. 1998).

<sup>72</sup> *Id.* at 246. Gladys's formal will, executed two days prior to her execution of the codicil, left most of her estate to her husband Tippy if he should survive her. *Id.* It did not indicate how her estate should be distributed if Tippy predeceased her. *See id.* Apparently recognizing this potential problem, Gladys executed the holographic codicil. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (indicating that Tippy executed his will six months prior to his death in 1990). The time at which Gladys's codicil and Tippy's will were executed is important. Had Tippy had a will in final form at the time Gladys executed her codicil, the court perhaps would have given effect to Gladys's codicil provision using the doctrine of incorporation by reference. *See supra* note 62 (explaining incorporation by reference). As Gladys's heirs correctly

death her heirs argued that the court could not distribute her estate pursuant to the terms of Tippy's later-executed will.<sup>76</sup> The court rejected the heirs' argument, finding that it could indeed enforce the codicil because Tippy's will was an event of independent significance.<sup>77</sup> Why? Because Tippy's will served to distribute his own estate, an event separate and apart from the distribution of Gladys's estate.<sup>78</sup>

Although modern courts and statutes refuse to allow a principal to delegate her will-making power to her agent in a durable power of attorney,<sup>79</sup> the *Tipler* case demonstrates that a principal can nevertheless effectively circumvent the limitation by executing a will devising her estate pursuant to the terms of her agent's will.<sup>80</sup> As long as the agent has executed a will at the time of the principal's death, the agent's will governs the distribution of the principal's estate.<sup>81</sup> Both the common law doctrine of facts of independent significance and its codification in the Uniform Probate Code mandate this result.<sup>82</sup>

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argued, however, the doctrine of incorporation by reference cannot apply to permit reference to an external document that is not in existence at the time the testator executes her will. *See Tipler*, 10 S.W.3d at 248. Because the doctrine of incorporation by reference did not apply in the case, the court did not have to answer the question of whether a holographic will (such as Gladys's codicil) could incorporate a nonholographic document (such as Tippy's will) under Tennessee law.

<sup>75</sup> *Tipler*, 10 S.W.3d at 246 (stating that Gladys's husband died in 1990 and that Gladys died in 1994).

<sup>76</sup> *Id.* (explaining that Gladys's heirs argued that because the codicil referred to a document not yet in existence it should not be enforced).

<sup>77</sup> *Id.* at 249. Before applying the independent significance doctrine, the court had to determine whether under state law the court could use a nonholographic document (such as Tippy's will) as guidance when the will in question (Gladys's codicil) is holographic. *Id.* The court concluded that the "material provisions" of Gladys's will were indeed in her handwriting and thus applied the doctrine to permit distribution pursuant to Tippy's will. *Id.* at 248-50.

<sup>78</sup> *Id.* at 249-50.

<sup>79</sup> *See infra* notes 170, 174-92 (discussing how the power to make, amend, or revoke a principal's will is not included among the "risky" powers, such as the power of gift-giving, that a principal may delegate by specific grant under the Uniform Power of Attorney Act).

<sup>80</sup> For example, if Gladys had named Tippy her agent under a durable power of attorney and executed the same codicil, Tippy would have had the indirect power of writing Gladys's will. Tippy's power would continue even if he executed his will after Gladys became incapacitated.

<sup>81</sup> Courts have made it clear that when a testator leaves assets in her will pursuant to the will of another, it does not matter whether the testator actually knows the contents of that other person's will. In *First National Bank of Birmingham v. Klein*, 234 So. 2d 42 (Ala. 1970), the testator Maude provided that if her son Clarence should predecease her, his share of her residuary estate should pass to the residuary devisees named under his will. *Id.* at 44. The trial court found that the doctrine of incorporation by reference could not apply, but the state high court noted that "[t]he trial court's findings . . . completely ignore the theory that a devise can be given effect under 'facts of independent significance.'" *Id.* at 45-46. The court

The independent significance doctrine can similarly grant the wish of an individual that, in the event of her incapacity, another person be able to direct the distribution of her estate by will.<sup>83</sup> Thus, if in the *Tipler* case Gladys had become incapacitated after executing her holographic codicil, Tippy's later-executed will would still have served to direct the distribution of Gladys's estate because his will would remain an event of independent significance.<sup>84</sup>

The independent significance doctrine carries one inherent limitation that would not exist in a direct grant of a principal's will-making power to her agent. An individual like Tippy, whose will determines the distribution of another person's estate under the independent significance doctrine, can never be a beneficiary of that other person's estate. To state the obvious, Tippy cannot be the beneficiary of his own will.<sup>85</sup> In contrast, if a principal could

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stated as follows:

Maude Leslie, by the language of her second codicil, gave her son, Clarence, the privilege of naming the beneficiary of that part of her residuary estate which he would have taken outright but for the fact that he died first. The gift by Maude to the 'residuary legatees and residuary beneficiaries' of Clarence's estate under his last will and testament can be upheld without regard to whether Maude knew who had been designated by Clarence in his last will and testament as the 'legatees and beneficiaries' to succeed to that part of Maude's estate which Clarence would have taken but for the fact that he died first.

The principle of naming the 'legatees' and 'beneficiaries' to whom one-third of Maude's residuary estate should go was unlimited, and did not depend for its validity upon Clarence's choice being communicated to Maude.

*Id.* at 46 (citing *Condit v. DeHart*, 40 A. 776 (N.J. 1898)). The *Klein* court also observed that the scenario presented in the case is specifically contemplated in standard treatise law, quoting as follows:

Where A leaves property to such persons as may take the property of B under B's will, the disposition of B's property is a fact of independent significance. B's disposition of his own property has significance quite apart from the effect which it may have on the disposition of A's property. Accordingly it has been held in a number of cases that where A leaves property to such persons as may take under the will of B, whether B survives A or predeceases him, the disposition of A's estate is valid and the persons who take under B's will are entitled to A's estate.

*Id.* at 47 (quoting SCOTT & FRATCHER, *supra* note 67, § 54.4, at 388).

<sup>82</sup> See *supra* note 70 (discussing provisions of the Uniform Probate Code and treatise commentary).

<sup>83</sup> See generally *id.* (describing a Uniform Probate Code provision under which the testator can devise assets pursuant to the will of another regardless of whether the testator later becomes incapacitated).

<sup>84</sup> See *supra* note 81 (observing from case law that the testator's knowledge of the contents of the later-executed document is not a requirement for the doctrine to apply).

<sup>85</sup> Of course, the doctrine of independent significance can apply to any act or event of independent significance. It could include a pour-over provision from the testator's will into a trust over which another person has power to determine the identity of the beneficiaries and their distributions under the trust. In such an instance, the other person could *himself* be a beneficiary. The use of trusts as a way of circumventing the rule of nondelegability is

delegate her will-making power, and if her durable power of attorney specifically granted her agent an unrestricted power to name any beneficiaries, including the agent himself, the agent would be able to include himself as a beneficiary under the principal's will that he writes for her.<sup>86</sup>

Despite the inherent limitation on direct self dealing under the doctrine of independent significance, the doctrine itself imposes no duties upon the person whose will is to determine the distribution of the testator's estate.<sup>87</sup> In the absence of a fiduciary relationship between the testator and other person,<sup>88</sup> or a contract between the two,<sup>89</sup> the other person is generally free to execute a will in favor of whomever he wishes.<sup>90</sup> The other person is not bound to act in the testator's best interest;<sup>91</sup> he has no duty to consider what the testator herself would have wanted;<sup>92</sup> and he owes no duty of loyalty or good faith to the testator.<sup>93</sup>

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important. The trust, however, is a separate legal entity with its own set of default rules. In this Article, the textual discussion of common law tools to circumvent the nondelegability rules instead focuses on the simplest, most direct ways in which an individual can essentially place control of her probate assets in the hands of another person without creating a separate legal entity managed by someone who acquires legal title to those assets.

<sup>86</sup> State laws regarding powers of attorney currently permit a principal to authorize her agent to engage in gift giving and even to include himself as a donee. *See* discussion *infra* Part III.B (discussing the agent's authority to make gifts and to include himself as a recipient of a gift from his principal's estate, as long as there is an explicit instruction authorizing such gifts). Thus, were a principal free to authorize her agent to make, amend, or revoke her will, the principal should also be free to authorize him through a specific grant to include himself as the beneficiary of a will he executes for her.

<sup>87</sup> *See, e.g., supra* notes 71-84 and accompanying text (observing the facts of independent significance doctrine and in no way indicating a confidential, fiduciary, or contractual relationship between a testator and a second testator whose will terms are to govern the distribution of the first testator's estate).

<sup>88</sup> *See* UNIF. PROBATE CODE § 2-512 (amended 2010), 8 U.L.A. 156 (Supp. 2013) (imposing no fiduciary obligations upon second testator when first testator bequeaths assets pursuant to the terms of the second testator's will).

<sup>89</sup> The inclusion of a devise to pass pursuant to the terms of another person's will would not, by itself, entitle a court to presume the existence of an underlying will contract between the two testators. *See id.* § 2-514, 8 U.L.A. at 157 (setting forth the requirements to prove a will contract).

<sup>90</sup> *See supra* note 88 (explaining the absence of fiduciary obligations in the independent significance setting).

<sup>91</sup> *See infra* note 189 and accompanying text (considering the obligation of a fiduciary to act in a principal's or protected person's best interest).

<sup>92</sup> *See infra* note 190 and accompanying text (describing the obligation of a fiduciary to act in accordance with the principal's wishes or expectations).

<sup>93</sup> For example, in *Tipler*, 10 S.W.3d 244 (Tenn. Ct. App. 1998), Tippy was free to leave his assets in his later-executed will to anyone. If Gladys had become incapacitated after executing her codicil and Tippy had then entered into a relationship with someone Gladys had always loathed, Tippy would still have been free to execute his will in favor of his new



In contrast, an agent acting under a power of attorney is a fiduciary who owes certain duties to the principal.<sup>94</sup> Even if the principal were to grant her agent an apparently unfettered, unlimited power to make, amend, or revoke her will, some of those fiduciary duties would still exist because neither the principal nor anyone else can waive them.<sup>95</sup> In light of the fiduciary duties that limit an agent's actions under a durable power of attorney,<sup>96</sup> a direct transfer of will-making power under power of attorney laws would seem to be far superior to an indirect transfer through the common law doctrine of independent significance.<sup>97</sup>

## 2. Powers of Appointment

A testator has also long been able to have someone else decide the distribution of some or all of her probate estate by including a power of appointment in her will.<sup>98</sup> As long as the testator demonstrates her intent to create a power of appointment,<sup>99</sup> the power can arise even though the will's language is less than artful.<sup>100</sup>

Powers of appointment can occur separate and apart from wills, of course.<sup>101</sup> Any competent individual (a donor) can give another person (a donee) a power

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friend – and Gladys's estate would have passed to her.

Had Gladys been able to delegate her will-making power to Tippy *as her agent*, however, it is almost certain that he would not have been able to devise her assets to his new friend unless such a devise served Gladys's best interest or comported with what she herself would have done. *See infra* notes 189-91 and accompanying text (expounding on an agent's mandatory duties under the Uniform Power of Attorney Act).

<sup>94</sup> *See supra* note 29 and accompanying text (discussing the agent's duties and ineffectiveness of certain exoneration provisions).

<sup>95</sup> *See infra* notes 189-91 and accompanying text (describing an agent's obligation to always act in good faith, within his authority, and in conformity with the principal's reasonable expectations).

<sup>96</sup> *See supra* note 29 and accompanying text (explaining the mandatory provisions of the Uniform Power of Attorney Act).

<sup>97</sup> *See supra* notes 87-96 and accompanying text (observing the lack of fiduciary duty in the independent significance scenario).

<sup>98</sup> *See generally* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. a, illus. 1-2 (1986) (stating and demonstrating that a transferor must only manifest intent to create a power of appointment in a transfer that is otherwise effective). For an excellent discussion of modern developments in the law of powers of appointment, see Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 755 (2007).

<sup>99</sup> *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. a, illus. 1-2 (1986).

<sup>100</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.1 cmt. b (2011) (requiring that a donor have intent to create a power of appointment, but observing that such intent need not be manifested by any particular words or phrases).

<sup>101</sup> Powers of appointment are very frequently encountered in conjunction with trusts.

of appointment to determine the distribution of some or all of the individual's property.<sup>102</sup> The donee receives the power and can appoint the property to the permissible recipients (appointees) indicated by the donor.<sup>103</sup> The donor may choose not to limit the class of permissible appointees.<sup>104</sup> If the donee can appoint the property to himself, his estate, his creditors, or his estate's creditors, the power of appointment is deemed to be a general power of appointment;<sup>105</sup> all other powers are considered nongeneral.<sup>106</sup> If the donee fails to exercise the power of appointment, those persons who wind up with the property by default are called takers in default of appointment.<sup>107</sup>

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*See supra* note 85 (discussing generally the use of a pour-over provision in a will to a revocable trust as an alternative way to provide someone else with quasi-will-making power).

<sup>102</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.7 cmt. e (1999) (distinguishing powers of appointment from independent significance). Typically the donor owns the property over which he creates a power of appointment. In some instances, however, the donor creates a power of appointment over property for which he was himself the donee of a power of appointment. *See id.* §§ 17.2 cmt. c, 19.13, 19.14 (2011); 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS § 45.1 (2005 & Supp. 2011) (providing definition of terms relating to powers of appointment).

<sup>103</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.5 (2011) (differentiating exclusionary and nonexclusionary powers).

<sup>104</sup> *Id.* If the donee can appoint to one or more members of a defined, limited group while excluding others, the power is deemed exclusionary. *Id.* An example would be a power that the donee could exercise in favor of "any or all" of the donor's grandchildren. *See id.* at cmt. d. If the donee cannot exclude any group member when making an appointment, the power is nonexclusionary. *See id.* An example would be a power that the donee could exercise in favor of "every one" of the donor's grandchildren. *See id.* at cmt. e. If the language concerning appointment in favor of a defined, limited group is ambiguous, the presumption is that the power is exclusionary. *See id.* at cmt. f.

<sup>105</sup> *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.4, illus. 1-2 (1986) (providing illustrations of a general power of appointment exercisable by deed or by will as distinguished from a nongeneral power of appointment).

<sup>106</sup> *See id.*; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 (2011) (defining general and nongeneral powers of appointment). Because the donee of a presently exercisable general power of appointment can choose to appoint the property to himself at any time, he will routinely be treated as the transferor-owner of that property. *See id.* § 17.4 cmt. f(1) (indicating, for example, that property subject to a presently exercisable general power of appointment is included in the estate of the donee if the surviving spouse elects against his "estate"). In contrast, the donee is not treated as the owner-transferor of a nongeneral power of appointment; rather, the donor is treated as the owner-transferor. *Id.* at cmt. f(2). When the donee receives a general testamentary power of appointment – that is, a power that can only be exercised by will – treatment of the donee is mixed. In some instances the law treats the donee as owner-transferor; in others it treats the donor as the owner-transferor. *Id.* at cmt. f(3).

<sup>107</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.2 (2011) (providing definitions of terminology commonly used when a power of appointment

The power of appointment is a highly flexible estate-planning tool.<sup>108</sup> The donor can make the power presently exercisable by the donee<sup>109</sup> or, instead, can make the power exercisable only by the donee's will.<sup>110</sup> Importantly, the donor can choose to create a "postponed" power of appointment – that is, a deferred power that the donee can exercise only upon the occurrence of a stated event.<sup>111</sup> For example, the donor could provide that the power would be postponed until the event of her mental incapacity to manage her estate.<sup>112</sup>

A Pennsylvania testator, in a handwritten will riddled with misspelled words and incomplete sentences, provided that "Mrs. Hibbert has taking [sic] care of my business for four years and knows all about my estate so she can handle my estate as she sees fit."<sup>113</sup> The court concluded that the testator intended to create a general power of appointment,<sup>114</sup> and thus Mrs. Hibbert could appoint the property to herself to the exclusion of the testator's relatives.<sup>115</sup>

Although at one time scholars and judges often conceptualized the donee as the agent of the donor,<sup>116</sup> the *Restatement (Third) of Property: Wills and Other*

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is created).

<sup>108</sup> See GARY ET AL., *supra* note 45, at 401-02 (discussing flexibility afforded by powers of appointment).

<sup>109</sup> See *supra* note 106 (discussing presently exercisable powers of appointment).

<sup>110</sup> See *supra* notes 105-06 and accompanying text (defining presently exercisable power of appointment and testamentary power of appointment (citing, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 (a), (b) (2011))).

<sup>111</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4(c) cmt. d (defining and describing postponed power of appointment); see, e.g., *In re Trust of Chappell*, 883 N.Y.S.2d 857, 860-64 (N.Y. Sur. 2009) (describing a scenario in which a postponed power of appointment had become a presently exercisable general power of appointment that the donee then failed to exercise).

<sup>112</sup> In this scenario, the donor should of course provide a description of the manner in which her "mental incapacity to manage her estate" is to be determined and state who is to make the determination. Failure to so provide could itself result in squabbles and litigation among those potentially interested in the donor's estate.

<sup>113</sup> *In re Estate of Stewart*, 473 A.2d 572, 573 (Pa. Super. Ct. 1984). There are many similar cases in which courts have found powers of appointment in a will. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. e, reporter's note 7 (1986); see, e.g., *In re Rowlands' Estate*, 241 P.2d 781, 784 (Ariz. 1952); *In re Kuttler's Estate*, 325 P.2d 624, 628 (Cal. Dist. Ct. App. 1958); *In re Estate of Schaaf*, 312 N.E.2d 348, 350 (Ill. App. Ct. 1974); *Townsend v. Gordon*, 14 N.W.2d 57, 61 (Mich. 1944); *Lundie v. Walker*, 9 A.2d 783, 787 (N.J. Ch. 1939); *In re Lidston's Estate*, 202 P.2d 259, 266 (Wash. 1949); see also I AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 7.1.4 (5th ed. 2006) (discussing the disposition of the testator's assets in accordance with the directions of a third person).

<sup>114</sup> *In re Estate of Stewart*, 473 A.2d at 575 ("[T]he testator intended to confer a very general authority, or power, upon appellant . . .").

<sup>115</sup> *Id.* (approving the appellant's wish to appoint herself, not the testator's family, to preside over her estate).

<sup>116</sup> STEWART STERK ET AL., ESTATES AND TRUSTS 753 (4th ed. 2011) ("The donee of a

*Donative Transfers* explicitly rejects this view.<sup>117</sup> The donor's conferral of a power of appointment upon the donee does not impose fiduciary obligations upon the donee.<sup>118</sup> Moreover, modern judicial opinions routinely refuse to treat a power of attorney itself as a power of appointment.<sup>119</sup>

Thus, a donee receiving a presently exercisable general power of appointment through a testator's will has no obligations similar to those imposed upon an agent under a power of attorney.<sup>120</sup> Like the independent significance doctrine discussed in the preceding section,<sup>121</sup> a power of appointment in and of itself is not accompanied by constraints of loyalty or good faith or by a duty to act in the donor's best interest.<sup>122</sup>

Once again, permitting a direct transfer of will-making power from a principal to an agent whose actions are governed by fiduciary standards seems a far more reliable and less dangerous way to ensure that the substitute decisionmaker will distribute the assets of an incapacitated individual in accordance with her known or probable wishes or best interest.<sup>123</sup>

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power of appointment has often been conceptualized as the donor's agent."). Fiduciary powers do, however, exist. For example, a trustee given the power to distribute among a specific group of individuals holds a fiduciary distributive power. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011) (explaining fiduciary distributive powers).

<sup>117</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. j (2011) (distinguishing a power of attorney from a power of appointment and stating that "[a] power of appointment does not create an agency relationship between the donor and the donee of the power").

<sup>118</sup> *See* GARY ET AL., *supra* note 45, at 402 (differentiating between fiduciary powers, such as those held by a trustee, and nonfiduciary powers, such as those held by the donee of a power of appointment).

<sup>119</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. j (2011) ("A power of attorney is not a power of appointment."); Bloom, *supra* note 98, at 760 n.17 ("[A] power of attorney, being a fiduciary power, is not treated as a power of appointment."). If she so wishes, however, a principal may authorize her agent to exercise powers of appointment. *See, e.g., In re Estate of Romanowski*, 771 N.E.2d 966, 971 (Ill. Ct. App. 2002).

<sup>120</sup> *See* GARY ET AL., *supra* note 45, at 402 (discussing distinctions between fiduciary and nonfiduciary duties imposed by law).

<sup>121</sup> *See supra* notes 65-97 and accompanying text (expounding on the independent significance doctrine).

<sup>122</sup> *See supra* notes 87-97 and accompanying text (describing the absence of a fiduciary duty); *see also infra* notes 189-91 and accompanying text (examining an agent's fiduciary duties under a power of attorney).

<sup>123</sup> The testator's inclusion of a presently exercisable general power of appointment such as that in *Stewart* is the most direct way to give a donee the power to determine the distribution of the testator's probate assets. *See In re Estate of Stewart*, 473 A.2d 572, 575 (Pa. Super. Ct. 1984) ("It appears that . . . the testator intended to confer a very general authority, or power, upon appellant . . ."). A less direct way – but one that is encountered far more frequently – is for the testator to use powers of appointment in the context of trusts

### 3. Conservatorship Provisions

In addition to the traditional ways in which an individual can choose a third person to determine, during the period of her incapacity, the distributive plan for her probate estate,<sup>124</sup> states permit conservators or guardians to amend an incapacitated person's nonprobate estate plan.<sup>125</sup> For example, statutes in many states permit a conservator to make, at least in some circumstances, inter vivos distributions from the estate of the protected person as outright gifts;<sup>126</sup> other statutes permit distributions to reduce taxes that would otherwise be owed by the protected person's estate.<sup>127</sup> Focusing on the preeminent goals of conservatorship and using "best interest" principles and substituted judgment<sup>128</sup> to accomplish those goals,<sup>129</sup> courts have also authorized conservators to create trusts with the protected person's assets, thereby changing the nature and amount of assets flowing through her will.<sup>130</sup>

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to have someone else eventually determine the distribution of her probate assets. For example, the Uniform Probate Code permits a testator to devise assets to an existing trust or to a trust created later during her lifetime or at her death, and the fact that the trust is revocable or amendable (or is in fact amended after the testator's death) does not make the devise invalid. *See* UNIF. PROBATE CODE § 2-511(a) (amended 2010), 8 U.L.A. 154 (Supp. 2013). Thus, if the testator devises her assets to a trust over which a third party has the power to determine the identity or distributive shares of beneficiaries, the third party will effectively also determine the distribution of the testator's assets and indirectly engage in making her will.

<sup>124</sup> *See supra* Part II.B.1-2 (discussing the independent significance doctrine and powers of appointment); *see also* Brashier, *supra* note 49, at 86-91 (explaining judicial use of substituted judgment – even in the absence of a statute – to authorize nontestamentary estate planning for an incapacitated individual).

<sup>125</sup> *See, e.g.*, UNIF. PROBATE CODE §§ 5-411, 5-427 (amended 2010), 8 U.L.A. at 289-90, 338 (providing a list of distributions that the conservator can make by default without further court approval and distinguishing those estate planning actions by the conservator that require specific court approval).

<sup>126</sup> *See, e.g., id.* § 5-427(b), 8 U.L.A. at 307 (permitting the conservator to distribute amounts as gifts that the protected person might have been expected to make, but totaling not more than twenty percent of the estate's annual income).

<sup>127</sup> *See, e.g., id.* § 5-411(c)(2), 8 U.L.A. at 289 (allowing the court to authorize various facets of estate planning by a conservator after taking into account the "possible reduction of income, estate, inheritance, or other tax liabilities").

<sup>128</sup> *See generally* Frolik & Whitton, *supra* note 22 (offering an excellent discussion and reinterpretation of best-interest and substituted-judgment standards).

<sup>129</sup> *See id.*; *see also* Brashier, *supra* note 49, at 87 (describing the traditional interpretation of substituted judgment to accomplish the presumed or known intent of the incapacitated person).

<sup>130</sup> *See, e.g., infra* notes 138-45 and accompanying text (commenting on court approval of the conservator's proposed creation of an inter vivos trust, even though the trust would alter the assets that would otherwise have passed through the protected person's will).

Perhaps recognizing these ways in which guardianship and conservatorship laws effectively permit courts to indirectly manipulate a testator's will,<sup>131</sup> the drafters of the Uniform Probate Code eventually began a quiet retreat from the traditional rule that no one can make, amend, or revoke the will of another.<sup>132</sup>

a. *Judicial Approval of Trust Creation upon Petition of Conservator*

For many years, the Uniform Probate Code's conservatorship provisions stated that a court could invest a conservator with "all the powers over the estate and business affairs which the person could exercise if present and not under disability, *except the power to make a will.*"<sup>133</sup> This language and similar restrictive language still exists in the conservatorship statutes of a number of states.<sup>134</sup>

Despite this language, however, judges and conservators can find ways to alter the assets that will pass under the protected person's will.<sup>135</sup> If a conservator can convince the judge overseeing the conservatorship that the protected person's interests or wishes are best served by an inter vivos trust or other will substitute,<sup>136</sup> the judge can order the conservator to place the protected person's assets in the trust or other will-substitute arrangement, and those assets will then pass outside the will at the protected person's death.<sup>137</sup>

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<sup>131</sup> See *infra* notes 133-46 and accompanying text (explaining judicial authorization of inter vivos trusts as a means of indirectly controlling the effects of the will of an incapacitated testator).

<sup>132</sup> See generally Brashier, *supra* note 49, at 63-64, 91-101 (examining the remarkable lack of fanfare concerning the current version of Uniform Probate Code section 5-411(a)(7), UNIF. PROBATE CODE § 5-411(a)(7) (amended 2010), 8 U.L.A. 289 (Supp. 2013), which permits a court to authorize a conservator to "make, amend, or revoke the protected person's will").

<sup>133</sup> UNIF. PROBATE CODE § 5-407(b)(3), 8 U.L.A. 386-87 (1998) (emphasis added) (providing an earlier version of the statute concerning permissible court orders; in contrast, the current version of the statute eliminates the restriction); see *id.* § 5-410, 8 U.L.A. at 288 (describing the powers of the court and removing the limitation concerning the protected person's will-making power that had existed in the pre-1998 statute).

<sup>134</sup> For a sampling of state statutes that still include the restrictive language from the earlier version of the Uniform Probate Code, see ALA. CODE § 26-2A-136(b)(3) (1975); IDAHO CODE ANN. § 15-5-408(b)(3) (2009); NEB. REV. STAT. § 30-2637(3) (2008); N.J. STAT. ANN. § 3B:12-49 (West 2007); S.C. CODE ANN. § 62-5-408(3)(a) (2009); UTAH CODE ANN. § 75-5-408(1)(c) (LexisNexis 1993 & Supp. 2013).

<sup>135</sup> See *infra* notes 138-45 and accompanying text (discussing a North Dakota case in which the court authorized the conservator to engage in nontestamentary estate planning).

<sup>136</sup> For example, a will substitute could serve to avoid the application of the default provisions of antilapse, ademption, and abatement statutes when those statutes would lead to results the protected person would not have wanted.

<sup>137</sup> See *infra* notes 138-46 and accompanying text (explaining how a court that is statutorily constrained from exercising the protected person's will-making power may nonetheless authorize the creation of inter vivos trusts that effectively change the

In *In re Sickles*,<sup>138</sup> a court approved the conservator's request to establish an inter vivos trust for Lloyd and Floyd, twin brothers who were both under conservatorship.<sup>139</sup> Realizing that creation of the trust affected the assets that would otherwise pass through the brothers' wills, a person interested in those wills challenged the court's power to authorize creation of the trust.<sup>140</sup> The court observed that while it had no power to make a will for a person under a conservatorship,<sup>141</sup> it could clearly authorize creation of a revocable trust.<sup>142</sup> Moreover, because serious questions existed about the efficacy of the wills in accomplishing the brothers' known objectives,<sup>143</sup> the court emphasized that authorizing the creation of the trust did not thwart the estate plan,<sup>144</sup> but rather helped to ensure that the brothers' known wishes were accomplished.<sup>145</sup>

As in *Sickles*, judges authorizing conservators to make various forms of inter vivos transfers generally do so with a primary purpose of accomplishing a central aim of conservatorship law: fulfilling the protected person's wishes or, when those wishes are unknown, serving her best interests.<sup>146</sup>

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distribution of the protected person's assets at probate).

<sup>138</sup> *Oliver v. Braaten (In re Conservatorship of Sickles)*, 518 N.W.2d 673 (N.D. 1994).

<sup>139</sup> *Id.* at 675-76 (observing the trial court's approval of the conservator's request to create a "revocable living trust").

<sup>140</sup> *Id.* at 676 ("Oliver then moved to vacate the court's order approving the creation of the revocable living trust.").

<sup>141</sup> *Id.* at 678-79 (quoting a state statute that gave the court all powers over the protected person except the power to make a will); see *supra* notes 133-34 and accompanying text (observing that such language comes from an earlier version of the Uniform Probate Code and is still applicable in several states).

<sup>142</sup> *Id.* at 678-80 ("Although § 30.1-29-08(2) [(section 5-408)] forbids a court from making a will for a protected person, it specifically allows the court to create a revocable trust."). The court observed, however, that it could not authorize the creation of a trust that would "effectively defeat a protected person's estate plan" and "deplete[] the estate that would have otherwise passed to intended beneficiaries." *Id.* at 679.

<sup>143</sup> *Id.* at 679-82 (discussing the uncertainty concerning whether the existing will would accomplish the intent of the protected person).

<sup>144</sup> *Id.* at 679, 681 (explaining that the trial court had found that creating the inter vivos trust "carried out, fulfilled, and preserved the goals and objectives of [the protected person's] estate plan" and concluding that the trial court did not abuse its discretion in authorizing the trust creation).

<sup>145</sup> *Id.* (acknowledging that the trial court, in authorizing the trust, "acted to protect the viability of the brother's intentions").

<sup>146</sup> See, e.g., *id.* at 679 (observing the lower court's findings that trust creation protected assets for the protected person during his life, minimized taxes, and ensured that his charitable goals would be accomplished at death).

b. *Judicial Approval of Will Creation, Amendment, or Revocation upon Petition of Conservator*

As the foregoing discussion demonstrates, judges constrained by the traditional rule that an individual's will-making power is nondelegable can nonetheless, in some instances, use substituted judgment or best-interest considerations to authorize alternative estate plans that circumvent that restriction.<sup>147</sup> In a world with increasing numbers of individuals under a conservatorship for longer and longer time periods, the need to create or amend an estate plan – including a will – for a protected person is also likely to grow.<sup>148</sup> If the prohibition on ghostwritten wills is easily circumvented and the rule itself may hinder the goals of conservatorship law to accomplish the probable wishes of the protected person and to serve her best interest, then why not drop the rule completely?

The current version of the conservatorship provisions of the Uniform Probate Code does exactly that.<sup>149</sup> Under section 5-411 of the code, a conservator can make, amend, or revoke the will of a protected person after obtaining judicial permission.<sup>150</sup> To give courts and conservators such authority statutorily is a remarkable departure from centuries of wills law.<sup>151</sup> Not surprisingly, however, the code does not give courts and conservators carte blanche to ignore the probable wishes of the protected person.<sup>152</sup> The code lists a number of factors that the court “shall” consider before approving a conservator's request to make, amend, or revoke the will of the protected person.<sup>153</sup> These factors are largely common sense, objective factors that serve to ensure that the decision will further the best interests of a reasonable testator.<sup>154</sup>

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<sup>147</sup> See Frolik & Whitton, *supra* note 22 (discussing the best-interest and substituted-judgment standards as existing along a continuum); see also Brashier, *supra* note 49, at 87-91 (discussing evolution of substituted judgment and best interest standards).

<sup>148</sup> See *supra* notes 1-4 (providing statistics on America's aging population).

<sup>149</sup> See UNIF. PROBATE CODE § 5-411(a)(7) (amended 2010), 8 U.L.A. 289 (Supp. 2013) (providing that the conservator may “make, amend, or revoke the protected person's will” after giving notice to the interested person and obtaining express court authorization).

<sup>150</sup> *Id.* (“[U]pon express authorization of the court a conservator may . . . make, amend, or revoke the protected person's will.”). The comment to this section indicates that the will provision is based on statutory developments in California and South Dakota. *Id.* § 5-411 cmt., 8 U.L.A. at 290.

<sup>151</sup> See *supra* notes 51, 55, and accompanying text (explaining judicial opinions indicating that an individual's will-making power is too personal to be alienable or delegable).

<sup>152</sup> See UNIF. PROBATE CODE § 5-411(c), 8 U.L.A. at 289 (listing considerations that the court “shall” make before authorizing acts by the conservator under section 5-411(a)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 5-411(c)(1) to (7), 8 U.L.A. at 289 (listing the factors that a court “shall consider” in “approving a conservator's exercise of the powers listed in subsection (a)”).



Of course, a particular testator may not share the same wishes or worldview with the objective reasonable person.<sup>155</sup> In such a setting, the statute seems to mandate that, to the extent the wishes of the protected person can be ascertained, the conservator and court generally respect those wishes under the principle of substituted judgment, even when those wishes seem at odds with an objective view of her best interest.<sup>156</sup>

A small but growing minority of states has adopted this provision or its approach.<sup>157</sup> In fact, despite its novelty, section 5-411 has slipped into law

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The provisions mandate consideration of the following:

- (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
- (2) possible reduction of income, estate, inheritance, or other tax liabilities;
- (3) eligibility for governmental assistance;
- (4) the protected person's previous pattern of giving or level of support;
- (5) the existing estate plan;
- (6) the protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and
- (7) any other factors the court considers relevant.

*Id.*

<sup>155</sup> For example, a testator may desire a particular distribution of her estate even though she knows it will have adverse tax consequences. *See, e.g., In re Conservatorship of Hart*, 279 Cal. Rptr. 249, 264 (Cal. Ct. App. 1991) (discussing evidence that a wealthy protected person made her decisions "based entirely upon non-tax considerations," but minimizing the effect of that evidence because of California's unusual substituted-judgment statute that focuses primarily on what a prudent person would do).

<sup>156</sup> This point is arguable. *See* UNIF. PROBATE CODE § 5-411(c), 8 U.L.A. at 289. The first sentence of this subsection states that "[t]he court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider *primarily* the decision that the protected person would have made, to the extent that the decision can be ascertained." *Id.* (emphasis added).

<sup>157</sup> *See, e.g.,* COLO. REV. STAT. § 15-14-411(1)(g) (2012); HAW. REV. STAT. § 560:5-411(a)(7) (2007); MASS. GEN. LAWS ch. 190B, § 5-407(d)(7) (2012); MINN. STAT. § 524.5-411(a)(9) (2012); NEV. REV. STAT. § 159.078(1)(a) (2011). The approach originated in California, *see* CAL. PROB. CODE § 2580(b)(13) (West 2002), and South Dakota, *see* S.D. CODIFIED LAWS § 29A-5-420(8) (2004).

Very few states that generally adhere to the traditional rule prohibiting a fiduciary from making the will of an incapacitated person nevertheless empower a guardian to amend the will of the incapacitated person to accomplish tax objectives. *See, e.g.,* FLA. STAT. § 744.441(18) (2012) (permitting a guardian to execute a codicil for a ward when the ward's will demonstrates intent to obtain an estate tax charitable deduction with a split-interest trust, and the ward's objective would not be achieved without a codicil); 755 ILL. COMP. STAT. ANN. 5/11a-18(a-5)(11) (West 2012) (empowering the court to authorize a guardian to execute a codicil in light of changes in tax laws). Article II of the Uniform Probate Code authorizes courts to modify a will to accomplish the testator's tax objectives in a manner not inconsistent with the testator's probable intent. UNIF. PROBATE CODE § 2-806, 8 U.L.A. at 242.

A New Hampshire statute appears to empower courts to authorize a guardian to engage in

without much fanfare.<sup>158</sup> Even in states where section 5-411 has been adopted, it is possible that most conservators are unaware that the supervising court can authorize a conservator to make, amend, or revoke the will of a protected person.<sup>159</sup> Indeed, the will execution provisions of article 2 of the Uniform Probate Code do not cross reference section 5-411,<sup>160</sup> and thus lawyers who regularly draft wills may similarly be unaware of the judicial power under the conservatorship provisions of article 5.<sup>161</sup>

Perhaps the most disturbing aspect of section 5-411 is its failure to allow a capable individual to expressly opt out of its coverage.<sup>162</sup> For example, if a competent testator includes a will provision stating that “under no circumstances shall any court or any individual other than myself amend or

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testamentary planning for the ward consistent with the ward’s wishes. N.H. REV. STAT. ANN. § 464-A:26-a (2004) (permitting planning even for nontax purposes as long as the proposal is consistent with the ward’s wishes or reflects what the ward would likely do). Thus, the New Hampshire statute appears similar to the early statutes upon which Uniform Probate Code section 5-411(a)(7) was based. *See supra* note 150 (mentioning the origins of the approach).

<sup>158</sup> *See infra* note 160 and accompanying text (observing that the conservatorship provision is not even cross-referenced in the will-execution statute of the Uniform Probate Code itself).

<sup>159</sup> Although some casebooks on decedents’ estates now mention this development, apparently none explore it in detail. *See, e.g.,* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 455 (8th ed. 2009) (describing the statute in one paragraph); GALLANIS, *supra* note 56, at 161 (mentioning the statute without examination); STERK ET AL., *supra* note 116, at 941-42 (including the text of the statute in chapter on planning for incapacity).

<sup>160</sup> *See* UNIF. PROBATE CODE § 5-411(b) & cmt., 8 U.L.A. at 289-90 (stating that the drafters did not amend the Uniform Probate Code’s section on execution of wills to allow execution by a conservator). Subsection (b) provides that “[a] conservator, in making, amending, or revoking the protected person’s will, shall comply with [the state’s statute for executing wills].” *Id.* § 5-411(b), 8 U.L.A. at 289. The statutory comment observes that the drafters adopted this approach rather than amend the will execution statute itself to allow explicitly for will execution by a conservator. *Id.* § 5-411(b) cmt., 8 U.L.A. at 290.

<sup>161</sup> *See id.* § 5-411(b), 8 U.L.A. at 289 (authorizing the conservator to make a protected person’s will). A lawyer who is not familiar with state conservatorship laws – and this may well include a lawyer who regularly supervises will executions – is likely to conclude that the only methods of executing a will in the state are those found in the will-execution statute. A better solution than that adopted by the Uniform Probate Code would be to include the will execution provisions in both the conservatorship statute and the will-execution statute. At the very least, the will-execution statute should contain some sort of cross-reference to the conservatorship provision.

<sup>162</sup> *See* Brashier, *supra* note 49, at 98-99 (stating that no formal studies indicate whether most people would favor granting a court the power to make their wills after they become incapacitated, and that the statute is silent on the ability of individuals to opt out). *See generally* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (arguing that default rules should ordinarily be based on the view of the majority).

revoke this will or make a new will for me,” it is not clear that the testator’s language would necessarily trump a conservator’s subsequent attempt to amend or revoke that will or to make a new will for the testator.<sup>163</sup> If the conservator could convince the supervising court that the testator had failed to anticipate fully the testator’s present circumstances and would not want that provision to be enforced had the testator so anticipated those circumstances, then the supervising court might well authorize the conservator to revoke or amend the earlier will or to make a new will for the testator.<sup>164</sup>

In contrast to section 5-411, were durable power of attorney laws to permit a principal to delegate her will-making power to her agent, the principal would have complete control over whether or not to grant the power to her agent.

### III. THE DURABLE POWER OF ATTORNEY

#### A. *A Flexible Alternative to Conservatorship*

Conservatorship proceedings can be cumbersome, expensive, and time consuming; their intrusion into private matters can be humiliating and stigmatizing for the subject of the proceeding and her family.<sup>165</sup> Ultimately, a judge selects the conservator for the protected person and determines the parameters of the conservator’s powers.<sup>166</sup> In marked contrast to conservatorship, the durable power of attorney permits a principal *herself* to choose her substitute decisionmaker and to define his decisionmaking power.<sup>167</sup> Autonomy and privacy are maximized; cost is minimized.<sup>168</sup>

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<sup>163</sup> See *supra* note 156 and accompanying text (discussing the statutory directive that the court should consider primarily the decision that the protected person would have made, but also noting that the court is to consider other more objective factors).

<sup>164</sup> See UNIF. PROBATE CODE § 5-411(c), 8 U.L.A. at 289 (explaining the court’s obligation).

<sup>165</sup> See English, *supra* note 16, at 362 (stating that, at best, conservatorship is a cumbersome alternative).

<sup>166</sup> Today, across the country, judges are ostensibly constrained by the “least restrictive alternative” principle when removing powers from the ward or protected person and placing them with the guardian or conservator. Thus, judges are not to impose a full guardianship or conservatorship when a limited one will suffice. Although reformers agree that the goals underlying the principle are laudable, many question whether the principle has significantly changed the way in which judges actually make guardianship and conservatorship decisions. See, e.g., Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 2-13 (2003) (citing studies and statistics to show that the recommendations from the 1988 Wingspread and 2001 Wingspan conferences have largely gone unfulfilled in guardianship cases involving the elderly).

<sup>167</sup> Courts have recognized that the agent personally chosen by the principal is generally considered to be in a better position than a court-appointed conservator to accomplish the incapacitated person’s wishes. See, e.g., *Wendland v. Wendland*, 28 P.3d 151, 168 (Cal. 2001) (stating that a principal has the “highest degree of confidence” in her agent, while a conservator selected by a judge “cannot be presumed to have special knowledge” of a

Modern durable power of attorney statutes permit a principal to be quite generous in granting authority to her agent.<sup>169</sup> Yet no state permits a principal to authorize her agent to make, amend, or create her will.<sup>170</sup> Why do modern conservatorship laws permit a judge to authorize a conservator to make, amend, or revoke a protected person's will, whereas the most generous of durable power of attorney laws continue to withhold from a capable principal *herself* a power to delegate her will-making authority?<sup>171</sup> It seems unlikely that a court is in a better position than the capable individual to choose a substitute decisionmaker; moreover, any actions an agent might take concerning the principal's will would be subject to judicial review at probate.<sup>172</sup> The difference in these approaches is more puzzling when one notes that many scholars and estate planners generally consider the durable power of attorney a better means than conservatorship to further autonomy, privacy, and efficiency.<sup>173</sup>

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protected person's wishes).

<sup>168</sup> See Boxx, *supra* note 24, at 1-14 (describing the "deceptively simple document" known as the durable power of attorney). See generally LAWRENCE A. FROLIK & ALISON MCCHRYSAL BARNES, *ELDER LAW: CASES AND MATERIALS* 409-33 (5th ed. 2011) (discussing the power of attorney).

<sup>169</sup> See *infra* notes 174-85 and accompanying text (discussing powers that the principal may grant her agent by default under the Uniform Power of Attorney Act).

<sup>170</sup> See BOWE & PARKER, *supra* note 41, § 6.20, at 19 (observing that a principal cannot give an agent the power to create the principal's will). In *In re Estate of Garrett*, 100 S.W.3d 72 (Ark. Ct. App. 2003), the court stated as follows:

[A] power of attorney, durable or otherwise, cannot bestow upon the attorney-in-fact the power to create a will on behalf of a principal. A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon that agent the authority to perform certain specified acts or kinds of acts on behalf of the principal. Under a power of attorney, an agent is "authorized to act with respect to any and all matters on behalf of the principal with the exception of those which, by their nature, by public policy, or by contract require personal performance." The decision of who, what, when, and how one's property is to be distributed upon death is clearly personal and that of the principal alone, and thus falls within the exception.

In *re Estate of Garrett*, 100 S.W.3d at 76 (citing BLACK'S LAW DICTIONARY 1171 (6th ed. 1990)) (quoting 3 AM. JUR. 2D AGENCY § 21 (2002) (citations omitted)); accord *In re Estate of Runals*, 328 N.Y.S.2d 966, 976 (N.Y. Sur. Ct. 1972) (stating that the right to make a will is personal, not alienable). In a few states, the prohibition is statutory. See, e.g., CAL. PROB. CODE § 4265 (West 2009); MO. REV. STAT. § 404.710(7)(1) (2000); WASH. REV. CODE § 11.94.050(1) (2012).

<sup>171</sup> See *supra* note 170 (discussing case law and statutory restrictions on will-making by an agent).

<sup>172</sup> See *infra* notes 198-202 (describing probate authority if the agent were permitted to make, amend, or revoke a will for the principal).

<sup>173</sup> See, e.g., Dessin, *supra* note 18, at 584 (observing that durable powers of attorney became important in the world of estate planning in part because they are viewed as less costly and more flexible than trust and guardianship and conservatorship arrangements). Not everyone agrees. See, e.g., DUKEMINIER ET AL., *supra* note 159, at 449 ("[D]urable powers

The very broad scope of existing durable power of attorney statutes causes one to wonder why the statutes do not permit a specific grant of will-making power. Indeed, one specific power that a principal can grant her agent under current durable power of attorney statutes seems far more dangerous than a power to make, amend, or revoke her will. That power is discussed in the next section.

B. *The Agent's Authority to Make Gifts*

Under modern durable power of attorney statutes, a principal may authorize her agent to perform *almost* any act of estate planning or asset management that she herself could perform if capable.<sup>174</sup> Thus, a principal may grant her agent the authority to establish trusts and other will substitutes with the principal's assets,<sup>175</sup> and the principal may also grant her agent the authority to make gifts from the principal's estate.<sup>176</sup> When a principal wishes to grant her agent nonprobate estate planning powers,<sup>177</sup> however, state courts may refuse to recognize such powers unless the principal has granted them by express language in the power of attorney document.<sup>178</sup>

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are useful for persons seeking a way of dealing with incompetency without creating a trust, but trusts are more flexible and satisfactory for most clients.”).

<sup>174</sup> See, e.g., UNIF. POWER OF ATT'Y ACT § 103 & cmt., 8B U.L.A. 71 (Supp. 2013) (listing delegations of authority excluded from the statute); *id.* § 201(c), 8B U.L.A. at 104 (discussing a power of attorney that grants the agent authority to perform all acts that the principal could perform).

<sup>175</sup> *Id.* § 201(a)(1), 8B U.L.A. at 104 (recognizing a specific grant to “create, amend, revoke, or terminate an inter vivos trust”).

<sup>176</sup> *Id.* (recognizing a specific grant to “make a gift”).

<sup>177</sup> See, e.g., *Praefke v. Am. Enter. Life Ins. Co.*, 655 N.W.2d 456, 460 (Wis. Ct. App. 2002) (refusing to permit the agent to make gifts to herself in the absence of an explicit writing from the principal authorizing such gifts); see also *supra* note 176 and accompanying text (allowing the agent to make gifts from the principal's estate only if there is an express grant of authority in the power of attorney).

<sup>178</sup> See UNIF. POWER OF ATT'Y ACT § 201(a), 8B U.L.A. at 104 (requiring the principal to include express language in order to authorize the agent to engage in certain forms of nonprobate estate planning). In the absence of statutory guidance, courts have often used a rule of strict construction when a question arises concerning the agent's powers. See *Schock v. Nash*, 732 A.2d 217, 227-30 (Del. 1999) (citing court decisions from Alaska, Florida, Hawaii, Iowa, New York, North Carolina, South Carolina, Texas, and Washington adopting a bright-line approach in reviewing powers of attorney). Under a “bright-line” or “flat” rule, courts refuse to consider extrinsic evidence or surrounding circumstances. See, e.g., *King v. Bankerd*, 492 A.2d 608, 611-12 (Md. 1985) (citing authorities indicating that courts usually strictly construe powers of attorney as granting only those powers explicitly stated); *Bienash v. Moller*, 721 N.W.2d 431, 435 (S.D. 2006) (observing that power of attorney grants only those powers specified in the document); *Kline ex rel. Kline v. Utah Dep't of Health*, 776 P.2d 57, 61 (Utah Ct. App. 1989) (indicating that power of attorney must be strictly construed and that the agent's power to transfer property for nominal amounts must derive

Section 201 of the Uniform Power of Attorney Act 2006 (UPOAA) adopts this bright-line rule.<sup>179</sup> For example, the section provides that an agent must have specific authority in the power of attorney to make a gift<sup>180</sup> or to create, amend, revoke, or terminate an inter vivos trust.<sup>181</sup> Further, if the principal provides her agent with a specific grant of this authority without elaboration, the agent cannot create an interest in the property in himself or in any person to

from the language or manifest intent of the document (citing *Huntsman v. Huntsman*, 192 P. 368, 370 (Utah 1920)); *Jones v. Brandt*, 645 S.E.2d 312, 315 (Va. 2007) (stating that “powers of attorney have been strictly construed for over a century” and explaining that such construction is necessary to minimize the potential for agent abuse, which is particularly dangerous with a durable power of attorney). Courts are particularly likely to apply strict construction on matters relating to an agent’s authority to make gifts.

Not all courts agree, however, even when the power in question is an agent’s authority to make gifts to herself. *See, e.g., In re Kislak*, 808 N.Y.S.2d 174, 176 (N.Y. App. Div. 2005) (“[E]ven where a power of attorney does *not* explicitly grant the attorney-in-fact authority to make gifts of the decedent’s property to himself, courts permit the attorney-in-fact to present evidence of the principal’s donative intent.”); *In re Estate of Kurrelmeyer*, 992 A.2d 316, 318-19 (Vt. 2010) (considering extrinsic evidence of the intention of the decedent to determine whether the agent made an improper gift to herself).

In *Kurrelmeyer*, the agent was the principal’s wife. *Id.* at 317. The principal’s son from a prior marriage objected to his stepmother’s actions, arguing that they defeated the provisions of the principal’s will. *Id.* By resorting to extrinsic evidence, the court concluded that the agent’s transfer of property into a trust under which she would benefit substantially did not violate her fiduciary duty or constitute an improper gift or self dealing, even though the power of attorney did not explicitly grant the agent such authority to transfer the property. *Id.* at 319. The extrinsic evidence indicated that the agent’s actions under the power of attorney furthered the “overarching goal” of the principal’s estate plan. *Id.*

A court’s refusal to limit its inquiry to the face of the power of attorney does not mean it will be liberal in recognizing an agent’s power to make gifts. *See, e.g., Schock*, 732 A.2d at 227-31 (rejecting a “bright-line” or “flat” rule, but nonetheless concluding that surrounding circumstances did not support agent’s assertion that she had the power to make unlimited gratuitous transfers). The *Schock* court noted that while use of the bright-line rule would have led to the same result, such a rule “in a future case might unduly restrict the traditional ability of the [court] to consider all the facts and circumstances involved.” *Id.* at 228.

Courts have observed, unsurprisingly, that state statutory language concerning powers of attorney may determine the propriety of the bright-line or flat rule, on the one hand, or a more expansive view, on the other. For example, in *Blin v. Johnson*, No. 1:06-CV-67, 2007 WL 1110520, at \*2-3 (W.D. Ky. Apr. 11, 2007), a federal district court concluded that while a 1999 Kentucky Supreme Court decision had refused to adopt the bright-line rule, statutory changes from the Kentucky legislature in 2000 adopted this rule implicitly.

<sup>179</sup> UNIF. POWER OF ATT’Y ACT § 201(a), 8B U.L.A. at 104 (requiring express language for nonprobate estate planning powers).

<sup>180</sup> *Id.* § 201(a)(2), 8B U.L.A. at 104 (providing that the agent must have express authority under the power of attorney to “make a gift”).

<sup>181</sup> *Id.* § 201(a)(1), 8B U.L.A. at 104 (explaining that the agent must have express authority under the power of attorney to “create, amend, revoke, or terminate an inter vivos trust”).

whom he owes a legal obligation of support;<sup>182</sup> however, this limitation does not apply if the agent is an ancestor, spouse, or descendant of the principal.<sup>183</sup>

Additional limitations apply under the UPOAA when a principal grants specific authority for her agent to make gifts.<sup>184</sup> If the power of attorney does not otherwise provide, then the limitations of section 217 apply by default.<sup>185</sup> Section 217 generally limits the agent to gifts from the principal's assets not exceeding, per donee, the annual federal gift tax exclusion amount.<sup>186</sup> Moreover, the UPOAA requires the agent to determine that any gift he makes is consistent with the principal's known objectives.<sup>187</sup> If the principal's objectives are unknown to the agent, then the agent must ensure that the gifts are consistent with the principal's best interests.<sup>188</sup>

Section 114 of the UPOAA imposes nonwaivable obligations upon an agent to act in good faith,<sup>189</sup> in conformity with the principal's wishes or expectations,<sup>190</sup> and within the scope of the agent's authority.<sup>191</sup> The specific sections pertaining to an agent's power to make gifts from the principal's assets, however, impose no limitations upon the size of a gift or the identity of a donee if the principal expressly grants the agent an unfettered right to make a gift of any size to anyone (including himself) that the agent deems appropriate.<sup>192</sup>

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<sup>182</sup> *Id.* § 201(b), 8B U.L.A. at 104 (forbidding the agent from creating an interest in the principal's property in himself or in an individual to whom the agent owes a legal duty of support without express authority).

<sup>183</sup> *Id.* (creating an exception when the agent is an ancestor, spouse or descendant of the principal).

<sup>184</sup> *Id.* § 201(d), 8B U.L.A. at 105 (stating that grants of authority to the agent to make gifts are subject to section 217 of the UPOAA).

<sup>185</sup> *Id.* (providing an exception to the usual rule that grants of authority to the agent to make gifts are subject to section 217 of the UPOAA in cases where the power of attorney states otherwise).

<sup>186</sup> *Id.* § 217(b)(1), 8B U.L.A. at 123 (authorizing the agent with general authority only to make gifts in an amount per donee "not to exceed the annual dollar limits of the federal gift tax exclusion"). If, however, the principal's spouse agrees to a split gift, the limit on the gift increases to twice the annual federal gift-tax exclusion amount. *Id.*

<sup>187</sup> *Id.* § 217(c), 8B U.L.A. at 123 (requiring that the agent's gifts from the principal's estate be consistent with the principal's objectives if actually known by the agent).

<sup>188</sup> *Id.* (listing factors to be considered in determining best interest).

<sup>189</sup> *Id.* § 114(a), 8B U.L.A. at 85 (stating that the agent has a duty to act in good faith notwithstanding contrary provisions in the power of attorney).

<sup>190</sup> *Id.* (requiring the agent to "act in accordance with the principal's reasonable expectations" notwithstanding contrary provisions in the power of attorney).

<sup>191</sup> *Id.* (mandating the agent to act within the "scope of authority" granted in a power of attorney). These mandatory duties require that the agent act in conformity with the principal's reasonable expectations (or, if those expectations are unknown, to the principal's best interest), in good faith, and within the scope of his authority. *Id.*

<sup>192</sup> *See id.* § 217(b)(1), 8B U.L.A. at 123 (observing no limitations on the agent's power

C. *The Effect of an Agent's Gifts from the Estate*

Whether an agent makes an improper gift from the principal's estate innocently or knowingly, the end result is often the same: the assets are forever gone while the principal is yet alive.<sup>193</sup> An interested person may occasionally learn of the improper transfer and seek removal of the agent and recovery of the assets.<sup>194</sup> Often, however, those parties who would be most interested in protecting the principal and her estate will have no knowledge of the improper distributions until long after they occur because the UPOAA imposes no duty upon the agent to account for his actions.<sup>195</sup> Even in those settings in which the improper distributions come to light quickly after they are made, the assets are often permanently lost.<sup>196</sup> In sum, providing an agent with authority to make gifts inherently carries some degree of risk.<sup>197</sup>

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to determine the size of the gift where the agent has express – and not merely general – authority under the power of attorney). Thus, despite the mandatory obligations of section 114(a), if the power of attorney grants an agent an unfettered right to make a gift of any size that the agent deems appropriate to anyone that the agent deems appropriate with no further direction, it would appear very difficult to second guess or overturn an agent's decision. *See supra* notes 189-91 and accompanying text (discussing mandatory obligations of the agent that the principal cannot waive in the power of attorney document).

<sup>193</sup> *See, e.g.*, *Minnesota v. Columbus*, No. C4-00-1950, 2001 WL 950097, at \*1 (Minn. Ct. App. Aug. 21, 2001) (involving the agent's improper transfer of \$45,000 of the principal's assets under a durable power of attorney that permitted the agent to transfer the assets to herself, leaving the principal destitute and unable to pay nursing home bills). In a relatively early article on financial abuse of the elderly, Carolyn Dessin correctly warned that when the agent has abused her financial powers by making transfers *during the principal's lifetime*, the problem of proving that abuse can be exacerbated after the victim-principal is dead. *See Carolyn L. Dessin, Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 217 (2000).

<sup>194</sup> If the principal is incapacitated and has no one other than her agent who is interested in her welfare, the agent may easily be able to deplete the principal's estate improperly and "get away with it." An unusual case in which the elderly respondent herself brought the defalcations of her agents to light is *In re Guardianship of Mowrer*, 979 P.2d 156 (Mont. 1999). In that case, the centenarian respondent herself objected to the petition of her niece and her niece's husband seeking to be appointed as her guardians and conservators. *Id.* at 158-59. During the proceedings, the court learned that the respondent had given her niece and her niece's husband a power of attorney. *Id.* at 158. After being named the respondent's agents, the couple moved the respondent to another state, isolated the respondent, and transferred well over half a million dollars from the respondent to themselves. *Id.* The state supreme court concluded that the evidence supported a finding of undue influence on the part of the couple. *Id.* at 163.

<sup>195</sup> UNIF. POWER OF ATT'Y ACT § 114(h) & cmt., 8B U.L.A. at 86 (imposing no affirmative duty upon the agent to account "except as otherwise provided in the power of attorney"). The Act mandates an accounting only upon court order or at the request of the principal, other fiduciary of the principal, governmental agency with authority to protect the principal's welfare, or her personal representative or successor in interest to her estate. *Id.*

<sup>196</sup> If the assets remain in the agent's name, they may be recoverable. In many instances,



Indeed, the risk to the principal and her estate from an improper gift by an agent is much greater than the risk from an improper will executed by an agent for the principal.<sup>198</sup> Unlike an inter vivos gift, a will has no effect until the death of the testator.<sup>199</sup> By definition, a will executed by an agent could not diminish the estate of a living principal, and thus all of the principal's assets would remain available if needed for the principal's comfort or care. The risk that an agent's violation of a will-making power would go undetected also pales in comparison to the risk that an agent's wrongful inter vivos gifts would go undetected. Unlike an agent's inter vivos gifts from the principal's estate, an agent's will executed on behalf of the principal would require court approval before the assets could be distributed. The probate process would ensure that interested parties receive notice of the will and have an opportunity to contest that will.<sup>200</sup> Moreover, challengers who can prove that an agent with gift-giving power has breached his fiduciary duty nonetheless often face the considerable tasks of tracing the gift assets and, if the assets still exist, recalling them from the hands of their current holder.<sup>201</sup> In contrast, challengers who can prove that an agent with a will-making power has breached his duty would have neither to trace nor recall estate assets.<sup>202</sup>

#### CONCLUSION

Across the country, will-execution provisions appear to validate a will only if that will was executed by the testator or someone acting in her presence at her direction, and only if the testator possessed testamentary capacity at the time of will execution. In fact, however, individuals have long been able to use

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however, the agent will have already disposed of the assets. *See, e.g.*, *State v. Barendt*, 740 N.W.2d 87, 90-91 (N.D. 2007) (stating that the agent spent some of the principal's money to gamble, purchase illegal drugs, and pay the agent's own debts).

<sup>197</sup> *See* Dessin, *supra* note 193, at 217 (warning of the dangers of permitting an agent to make financial transfers during the principal's lifetime).

<sup>198</sup> *See supra* notes 193-97 and accompanying text (discussing the difficulty of tracing and recalling assets distributed by the agent who has no duty to account to anyone other than an incapacitated principal).

<sup>199</sup> *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 147 (9th ed. 2013).

<sup>200</sup> *See id.* at 46 (explaining that the probate process includes mailing notice to interested parties). Importantly, the agent as a fiduciary would have the burden of demonstrating that the devises in the will for the agent's benefit reflected the principal's known or probable wishes or furthered her best interests.

<sup>201</sup> *See supra* notes 194-97 and accompanying text (describing the difficulties of tracing and recalling assets).

<sup>202</sup> Of course, the need to trace and recall assets can arise even when the agent has a will-making power. But that need would not arise from the will-making power. Instead, it would arise from the agent's improper distributions during the principal's lifetime.

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a ghostwriter – even one who can act after the individual has become *incapacitated* – to accomplish their testamentary goals.

This Article has not suggested that every principal should use a power of attorney to grant her will-making power to her agent. Instead, it has presented substantial arguments that a principal should be able to grant that power if she so wishes. The continuing prohibition on will-making by an agent seems not only illogical, but also patently inefficient, in light of well-established common law tools that permit an individual to delegate her will-making power to a third party nonagent whose actions are unconstrained by fiduciary obligations.

The explicit authorization of ghostwritten wills in modern conservatorship statutes also weighs in favor of permitting a principal to grant her will-making power to her agent. It is patronizing indeed to permit a court to choose who can make, amend, or revoke a protected person's will and yet deny that person herself the power, when competent, to choose her own substitute decisionmaker to make, amend, or revoke her will.

Yet perhaps modern durable power of attorney statutes themselves present the best argument for recognizing the right of a principal to grant her will-making power to her agent. These statutes currently permit a principal to grant her agent a virtually unfettered power to make gifts. Such a power puts the principal and her estate at substantial risk during the principal's lifetime. By comparison, an agent with the principal's will-making power would be far less dangerous to the principal and her estate because distribution of assets under the will would occur only once the principal has died. Moreover, like the traditional will, the ghostwritten will would still be subject to the probate process and the possibility of a will contest.

The practical importance of ghostwritten wills is likely to grow as our elderly population continues to swell and more and more of us spend some part of our final years lacking capacity to amend our estate plan to account for the events that are changing around us. If states were to permit a principal to delegate her will-making power, she would not be likely to do so without deliberating carefully or without placing substantial restrictions on the agent's use of the power. By permitting the principal to grant this power, however, the state would be providing her an additional tool for ensuring that her testamentary wishes are respected.