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“Living” Trusts: The Erosion of Plain Meaning and the Primacy of the Settlor's Intent

Aaron Lyttle

"LIVING" TRUSTS: THE EROSION OF PLAIN MEANING AND THE PRIMACY OF THE SETTLOR'S INTENT

AARON J. LYTTLE[*]

Two dogmas pervade the interpretation and administration of trusts. According to the first dogma, the paramount consideration in interpreting a trust is to carry out the settlor's[1] intent.[2] The second dogma treats a trust like a contract,[3] importing a range of rules from the common law of contacts, including, most importantly, the plain meaning rule.[4] Although briefs and court opinions routinely invoke them as a matter of ritual, both doctrines have declined in importance. Beneficiaries and their lawyers, aided by innovative trust laws, have found a variety of ways to wrest control over irrevocable trusts, whether through liberal interpretation, reformation, or modification procedures. Often, there is no one with the time and incentive to represent the settlor's intent. This may be the inevitable result of a tendency to extend trusts for increasingly long periods of time (even, in some jurisdictions, beyond the duration of the Rule Against Perpetuities).

STANDARD RULES

Courts and lawyers who work with trusts frequently refer to standard maxims of trust interpretation. First, the overarching goal is to carry out the settlor's intent. Like an offeror who may extend an offer to enter into a contract on any lawful terms, however harsh or unfair,[5] the settlor is generally free to dispose of property in any lawful manner he or she chooses.[6] Courts, in turn, have a solemn duty to zealously protect that freedom.[7]

This preference for carrying out the settlor's wishes frequently overrides competing public policy considerations. For example, in *Matter of 1942 Gerald H. Lewis Trust*,[8] the Colorado Court of Appeals recognized

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* Aaron Lyttle is an associate attorney at Long Reimer Winegar Beppler LLP in Cheyenne, Wyoming. He received his J.D. with honors from the University of Wyoming College of Law in 2010.

1. Although individuals who create or transfer property to a trust may be called "grantors" or "trustors," *see* RESTATEMENT (SECOND) OF TRUSTS § 3(1) (1959), this article refers to them as "settlors."

2. *E.g.*, Denver Found. v. Wells Fargo Bank, N.A., 163 P.3d 1116, 1122 (Colo. 2007) (citing Meier v. Denver U.S. Nat'l Bank, 431 P.2d 1019, 1021 (Colo. 1967)).

3. *E.g.*, *id.*

4. *See* 90 C.J.S. *Trusts* § 228 (2015); *Denver Found.*, 163 P.3d at 1126.

5. *See* Butler v. Lembeck, 182 P.3d 1185, 1192 (Colo. Ct. App. 2007).

6. Spencer v. Di Cola, 16 N.E.3d 1, 7 (Ill. Ct. App. 2014).

7. First Nat'l Bank & Trust Co. v. Brimmer, 504 P.2d 1367, 1371 (Wyo. 1973).

8. 652 P.2d 1106 (Colo. Ct. App. 1982).

the policies of promoting marriage and restraining the "element of possessiveness, the desire of the testator to compel fidelity to his memory, even after his death," but concluded that the policy of giving effect to the settlor's intent trumped these interests.[9] The court therefore gave effect to trust terms ceasing payments to a surviving spouse upon her remarriage.[10] The rule is even more drastic in Wyoming, where the Wyoming Supreme Court has held that, until the legislature adopts contrary legislation, settlors are free to use living trusts to disinherit their spouses and sidestep the elective share provisions of the Wyoming Probate Code.[11]

From this perspective, as long as the trust continues to exist, courts and fiduciaries have a solemn obligation to determine what the settlor intended and put that intention into practice. Although the settlor may be long deceased, his or her presence looms like a primordial parent[12] over the family meetings, court battles, and Fourth of July barbecues where questions of trust interpretation often get resolved. Although trust administration may provide for the beneficiaries' well-being, the ultimate goal is to give effect to the settlor's intention.

The paramount goal of carrying out the settlor's intent gives rise to a new question: how do we determine that intent? For years, the simplest way to do so was to incorporate principles from the common law of contracts. First, you determine whether the plain language on the face of the trust instrument (sometimes called the "four corners") is ambiguous.[13] Courts do so not by viewing the words in isolation, but by interpreting the entire trust instrument as a whole.[14] The court also strives to give effect to all trust language, rather than make parts of it superfluous.[15] If the language is ambiguous (i.e. it is susceptible to multiple reasonable interpretations),[16] one may use extrinsic evidence to determine the settlor's intent.[17] For example, a trusted advisor may testify regarding what the settlor intended for his or her trust to accomplish. Otherwise, one must apply the plain meaning of the text as written, no matter how much compelling evidence may exist of the settlor's contrary intent.[18]

If the settlor's intention still defies discovery, one may fall back on a range of canons of construction based on what we think most settlors

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9. *Id.* at 1107 (quoting RESTATEMENT OF PROP. § 426(1) cmt. c (1944)).
10. *Id.* at 1108.
11. *See* In re Estate of George, 265 P.3d 222, 230–33 (Wyo. 2011).
12. *See* SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 92–93 (James Strachey trans., 1922) (1921) (describing the myth of the primordial father, whose will was independent of the horde).
13. Denver Nat'l Bank v. Von Brecht, 322 P.2d 667, 670 (Colo. 1958).
14. Van Gundy v. Van Gundy, 292 P.3d 1201, 1205 (Colo. Ct. App. 2012).
15. *E.g.*, Spencer v. Di Cola, 16 N.E.3d 1, 7 (Ill. Ct. App. 2014); Denver Found. v. Wells Fargo Bank, N.A., 163 P.3d 1116, 1126 (Colo. 2007).
16. *Denver Found.*, 163 P.3d at 1126.
17. 90 C.J.S. *Trusts* § 228 (2015).
18. *Denver Found.*, 163 P.3d at 1126.

would intend. For example, a court may prefer an interpretation that makes the instrument more effective, favors family members, avoids intestacy, or achieves favorable tax consequences.[19] These rules are constructive, in that they affirmatively set forth a settlor's likely intention based on general practice, rather than attempt to discover what the settlor actually intended.[20]

There is much to be said for interpreting trusts like contracts. This approach draws on a longstanding and familiar body of law. It also appears to provide a great deal of predictability.[21] If meaning can be determined from the face of the trust instrument, without consideration of extrinsic evidence of the settlor's intent, then at least in theory, people who have no connection with the person who created the trust can rely on that language. For example, an examiner reconstructing a chain of title in the State of Texas may have no practical way to determine what a North Dakota trust settlor really intended. However, by using dictionary definitions, standard grammatical principles, and general rules of contractual interpretation, the examiner can—in theory—determine the trust instrument's objective meaning and issue a title opinion in reliance on a recorded instrument.

BEYOND PLAIN MEANING

Despite courts' tendency to pay homage to the plain meaning rule as the dominant approach for determining a settlor's intent,[22] the rule has been under attack for years.[23] Early challenges questioned the distinction between latent and patent ambiguities made by strict variations of the rule. Unlike a patent ambiguity, which appears on the face of a trust instrument, a latent ambiguity becomes apparent only by considering extrinsic evidence.[24] For example, a trust term requiring the distribution of "my 180 shares" of Rethrick Construction Co. stock to a beneficiary may be clear and unambiguous on its face.[25] However, extrinsic evidence may reveal that the settlor did not know that a stock split had caused her to own 360 shares of Rethrick Construction. This creates a latent ambiguity because reasonable people can disagree about whether the settlor intend-

19. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.3 (2003).

20. *See* UNIF. TRUST CODE § 112 cmt. (2000).

21. *See* Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643, 660 (1995).

22. *See, e.g.*, *Denver Found.*, 163 P.3d at 1126; Covenant Presbytery v. First Baptist Church, 2015 Ark. App. 417 (2015) (slip op.).

23. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. d Reporter's Note (2003) (citing 9 John H. Wigmore, *Evidence in Trials at Common Law* §§ 2461–62, 2470 (James H. Chadbourn rev. ed. 1981); RESTATEMENT OF PROP. § 242 cmt. c. (1940); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 423–25, 471–73 (1898)).

24. In re Estate of Gross, 646 P.2d 396, 397–98 (Colo. Ct. App. 1981) (citing T. Atkinson, *The Law of Wills* § 60 (2d ed. 1953); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmts. b, c (2003).

25. This example is based on *In re Estate of Holmes*, a will interpretation case. 821 P.2d 300, 304 (Colo. Ct. App. 1991).

ed for the beneficiary to receive exactly 180 shares of stock (as literally stated in the instrument) or all 360 shares (as suggested by the settlor's unawareness of the stock split). Under the traditional approach, such ambiguity would be insufficient to justify the introduction of extrinsic evidence.[26] From this perspective, "180 shares" means "180 shares" and it matters not that the settlor was not more diligent in attending to her investments. However, the modern approach would permit the introduction of extrinsic evidence, including the circumstances surrounding the execution of the instrument, to resolve latent ambiguities regarding the settlor's intent.[27] Colorado courts have long accepted the use of extrinsic evidence to interpret latent ambiguities, even in the more formalized context of will interpretation.[28]

The plain meaning rule has also been relaxed to consider other forms of extrinsic evidence, such as the circumstances surrounding the trust's creation.[29] Some authorities have not shied away from recognizing that such considerations represent a substantial departure from the traditional plain meaning rule.[30] One of the strongest statements can be found in the Third Restatement of Property: Wills & Other Donative Transfers, which permits consideration of a wide variety of circumstances surrounding the trust's creation:

> The necessity for reading the donative document as a whole does not, however, justify the so-called plain meaning rule, which relies solely on the document's text and excludes extrinsic evidence. The plain-meaning rule is archaic because it unduly stresses a supposed ordinary meaning of the words employed. This rule has long been discredited, and is disapproved here, because the text of a document is so colored by the circumstances surrounding its formation that evidence regarding the donor's intention is always relevant.[31]

Even courts that continue to refer to the plain meaning rules frequently accompany the rule with the caveat that the facts and circumstances surrounding a trust's execution are necessarily admissible to determine the

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26. *Cf.* Wolter v. Equitable Res. Energy Co., Western Reg., 979 P.2d 948, 952 (Wyo. 1999) (applying traditional rule to deed reserving mineral royalties).

27. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmt. c (2003).

28. *See* In re Estate of Jenkins, 890 P.2d 188, 190 (Colo. Ct. App. 1994); *In re Estate of Gross*, 646 P.2d at 398.

29. Van Gundy v. Van Gundy, 292 P.3d 1201, 1205 (Colo. Ct. App. 2012) ("We determine the parties' intent from the language of the agreement . . . . We also consider the relevant circumstances in effect at the time the parties entered into the trust agreement.").

30. *See* Day v. Faden, No. G038415, 2008 WL 544308, at *3 (Cal. Ct. App. Feb. 29, 2008) (unpublished).

31. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 cmt. b (2003).

settlor's intent.[32] Although the court will recite the traditional rules of contractual interpretation, it will also accept that evidence from surrounding circumstances, a form of extrinsic evidence, is relevant to determine the settlor's intent.[33]

The plain meaning rule has undergone even more erosion in the context of modern trust reformation. Even courts that claim to hold fast to the rule as a matter of trust interpretation hold that it is inapplicable in an action to reform a trust instrument.[34] Unlike interpretation, which seeks to determine the settlor's intent based on the language of the trust instrument (and possibly the circumstances of its creation), reformation permits a court to directly modify, add, or remove trust language, however clear and unambiguous, if doing so is necessary to correct mistakes in the instrument so as to carry out the settlor's actual intent as determined by extrinsic evidence.[35] Trust reformation can typically be accomplished on broader grounds than general contract reformation. While a contract may generally be reformed on the grounds of a mutual mistake that causes an instrument to not reflect the parties' true agreement,[36] a trust instrument may be reformed based simply on the settlor's mistake of fact or law, whether in the inducement or the execution.[37] In order to reduce the risk of fraudulent testimony, courts typically require that such intent be shown by clear and convincing evidence.[38] Although the Colorado General Assembly has not adopted the Uniform Trust Code (UTC) or a flexible trust reformation statute,[39] courts could conceivably cite the Restatements of Property to permit reformation as a principle of the

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32. *See In re* Dowsett's Estate, 38 Haw. 407, 409–10 (1949); *cf.* Friedman v. Hannan, 987 A.2d 60, 67 (2010) (applying rule to will interpretation); Wells Fargo Bank Wyo., N.A. v. Hodder, 144 P.3d 401, 412 (Wyo. 2006) (applying rule to contractual interpretation).

33. *See* Hillman v. Hillman, 744 N.E.2d 1078, 1080 (Mass. 2001) ("In construing a trust instrument, the court attempts to discern the settlor's intent as expressed by the instrument, read as a whole, in light of the circumstances surrounding its creation."); Wilmington Trust Co. v. Annan, 531 A.2d 1209, 1211 (Del. Ct. Ch. 1987) ("In construing a trust instrument, the court attempts to discern the settlor's intent as expressed by the instrument, read as a whole, in light of the circumstances surrounding its creation."); First Nat'l Bank of Dubuque v. Mackey, 338 N.W.2d 361, 363 (Iowa 1983) ("The goal is to ascertain the settlor's intent. It is to be determined, if possible, from the language of the trust instrument, the scheme of distribution, and the facts and circumstances surrounding its execution.").

34. In re Matthew Larson Trust Agreement Dated May 1, 1996, 831 N.W.2d 388, 397 (N.D. 2013); Becker v. Brozek-Robinson, No. 107,342, 288 P.3d 159 tbl., at *5 (Kan. Ct. App. Nov. 9, 2012) (unpublished); *see also* UNIF. TRUST CODE § 415 cmt. (2000) (describing difference between reformation and interpretation).

35. UNIF. TRUST CODE § 415 cmt. (2000); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. d (2003).

36. Carder, Inc. v. Cash, 97 P.3d 174, 180–81 (Colo. Ct. App. 2003).

37. *In re Matthew Larson Trust Agreement Dated May 1, 1996*, 831 N.W.2d at 394–95.

38. UNIF. TRUST CODE § 415 cmt. (2000) (citing John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Grounds of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982)); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. d (2003).

39. *See* Daniel G. Worthington & Mark Merric, *Which Trust Situs is Best in 2014?*, Tr. & Est., Jan. 2014, at 68 tbl.

common law (as they have done with trust modification, as explained below).

BEYOND THE SETTLOR'S INTENT

Modern trust modification permits even broader changes to irrevocable trust instruments, often in ways that have more to do with the needs of the current generation of beneficiaries than the settlor's wishes. Under the UTC, a court may grant a petition to modify or terminate a trust due to (1) beneficiary or settlor consent, (2) unanticipated circumstances or an inability to effectively administer a trust, (3) uneconomic administration costs from small trusts, and (4) tax objectives.[40] The Second and Third Restatements of Trust both recognize the analogous common law doctrine of equitable deviation, albeit to different degrees.[41]

Many modification doctrines require that the proposed modification be consistent with the settlor's intent. For example, unless the settlor consents, modification or termination upon beneficiary consent cannot be done in a manner that is inconsistent with a trust's material purpose.[42] Modification to carry out the settlor's tax objectives under the UTC must be done "in a manner that is not contrary to the settlor's probable intention."[43] Modification due to unanticipated circumstances must be done "[t]o the extent practicable . . . in accordance with the settlor's probable intention."[44] These doctrines' purpose is not to override the settlor's intent, "but to modify inopportune details to effectuate better the settlor's broader purposes."[45] Similar restrictions exist under common law equitable deviation principles, which have been favorably cited and applied by Colorado courts.[46]

Despite these restrictions, the practice of trust modification frequently diminishes the importance of the settlor's intent. Both the UTC and Restatements of Trust provide that courts should not readily infer material purposes.[47] Rather, litigants and courts must undertake the effort of locating circumstantial or other evidence, whether from express language or "the very nature of design of a trust," to locate a material pur-

40. UNIF. TRUST CODE §§ 411–12, 414–15 (2000).

41. *See* RESTATEMENT (SECOND) OF TRUSTS § 167 (1959) (permitting a trustee to request permission to deviate in response to unforeseeable circumstances impairing the trust's purposes); RESTATEMENT (THIRD) OF TRUSTS §§ 64–66 (2003) (providing broader grounds for deviation, including beneficiary consent).

42. UNIF. TRUST CODE § 411(b) (2000).

43. *Id.* § 416.

44. *Id.* § 412.

45. *Id.* § 412 cmt.

46. *See* Saunders v. Muratori, 251 P.3d 550, 554 (Colo. Ct. App. 2010) (citing RESTATEMENT (THIRD) OF TRUSTS § 66 (2003)). C.R.S. § 15-10-108, which permits the holder of a general power of appointment to represent the interests of beneficiaries subject to that power, appears to contemplate that Colorado law permits modification, termination, and equitable deviation upon beneficiary consent.

47. UNIF. TRUST CODE § 411 (2000) (citing RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, approved 2001)).

pose.[48] In practice, this may make modification permissible, almost by default, unless someone is willing to put the effort into locating evidence of contrary settlor intent. Even spendthrift clauses, long thought to be a prophylactic against attempts by a beneficiary to interfere with the settlor's purpose based on their own (perhaps, in the eyes of the settlor, unwise) judgment,[49] are no longer presumed to create a material purpose.[50] This is because spendthrift clauses are now routinely added to trust instruments with little thought,[51] typically because of the asset protection benefits that they provide.[52] Although a spendthrift clause may nonetheless constitute a material purpose, a party making such allegation will likely have the burden of persuasion.[53]

In a trust modification proceeding, giving effect to the settlor's intent depends on the willingness of a beneficiary, fiduciary, or the court itself to determine and protect that intent. Many states now permit non-adversarial petitions for instructions, in which the beneficiaries and trustees may be in complete agreement regarding the proposed changes. Although there may be virtual representation statutes or guardians ad litem to protect the interests of minor, unborn, or unknown future beneficiaries,[54] there is rarely any person—other than a trustee, court, or beneficiary who happens to remember when grandfather explained his ideas about preservation of principal over glasses of bourbon—with an incentive to represent the settlor's intent for its own sake, rather than as a means toward a particular end. Trustees and other fiduciaries may have substantial conflicts of interest due to their own interests as beneficiaries in the trust. Even institutional trustees, which traditionally may have been adverse to taking any action that could subject them to future liability for not acting in accordance with the terms of the trust instrument, may not provide much of a check if they are wholly controlled by mem-

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48. *Id.* (citing RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, approved 2001)).

49. For examples of the traditional rule treating spendthrift clauses as constituting a material purpose, see RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 1008 (Rev. 2d ed. 1983); Univ. of Me. Found. v. Fleet Bank of Me., 817 A.2d 871 (Me. 2003), *superseded by statute*, Me. Rev. Stat. § 411(3), *as recognized in* In re Pike Family Trusts, 38 A.3d 329 (Me. 2012).

50. UNIF. TRUST CODE § 411(b) (2000) (quoting RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, approved 2001)).

51. *Id.* § 411 cmt.

52. *See* In re Estate of Beren, 321 P.3d 615 (Colo. Ct. App. 2013); UNIF. TRUST CODE § 502(a) (2000); RESTATEMENT (THIRD) OF TRUSTS § 58 ; RESTATEMENT (SECOND) OF TRUSTS § 152–53.

53. *See In re Pike Family Trusts*, 38 A.3d at 332 (finding insufficient evidence of a material purpose); Saunders v. AMG Nat. Trust Bank, 88 Vir. Cir. 389, at *2 (Va. Cir. Ct. 2014) (holding that, given the lack of a statement by settlor or known circumstances, such as a swarm of known creditors around the beneficiary, a spendthrift clause was insufficient to form a material purpose of the trust).

54. *See* COLO. REV. STAT. §15-10-108 (2015) (permitting representation by the holder of a general power of appointment), §15-10-403(5) (providing for appointment of guardians ad litem upon a finding of need); UNIF. TRUST CODE §§ 301 *et seq.* (virtual representation).

bers of a family, as in the case of single-family private trust companies.[55] That leaves the court as the last bastion against thwarting the settlor's wishes. But courts may not be in the best position to undertake that role, particularly if they have heavy caseloads and lack the expertise to second-guess the parties' arguments regarding arcane matters of trust law. In many such cases, the court may rely on the arguments of the parties, rather than conduct a rigorous assessment of whether the modification serves the settlor's purpose.[56]

The decline of the plain meaning rule and reverence for the settlor's intent are not necessarily causes for alarm. The federal generation-skipping transfer tax[57] has created immense incentives for settlors to create trusts that last far longer than the common law rule against perpetuities.[58] This trend has intensified in states that have abolished or substantially relaxed the rule, particularly as it applies to trusts.[59] For example, Colorado law validates a trust interest created after May 31, 2001 if the interest vests or terminates within 1,000 years after its creation.[60]

Although families may achieve significant tax and wealth administration benefits from perpetual or near-perpetual trusts, future generations may chafe under the wishes of a long-dead settlor. Far from being a disaster for trust law, the modern erosion of respect for the settlor's intent may be a necessary correction against settlor's who seek to control the disposition of their property in perpetuity. Some scholars have proposed different methods of using modern modification and termination procedures to reduce the effects of such "dead hand" control.[61] But regardless of what courts and state legislatures do, as long as significant wealth remains held in long-term trusts, beneficiaries, fiduciaries, and their advisors will likely devise ways to correct for excessive dead hand control, even if doing so interferes with settlors' probable intentions.

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55. *See* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth through a Private Trust Company*, 36 ACTEC L.J. 623, (2010).

56. *See* Jonathan Scott Goldman, *Just What the Doctor Ordered? The Doctrine of Deviation, the Case of Doctor Barnes's Trust and the Future Location of the Barnes Foundation*, 39 REAL PROP., PROB. & TR. J. 711, 722–24 734 (2005) (discussing structural biases in favor of courts granting unopposed trustee petitions to deviate from trust terms).

57. *See* 26 U.S.C. § 2613 (2015).

58. In its traditional formulation, the common law rule against perpetuities states that a property interest is invalid unless it must vest within twenty-one years (plus a reasonable gestation period) after some life in being when the interest is created. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

59. *See, e.g.*, Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097–2105 (2003).

60. COLO. REV. STAT. § 15-11-1102.5(1). Although 1,000 years may not seem truly perpetual, it is longer than the entire history of the United States and modern trust law as we know it and is, in practical terms, perpetual.

61. *See generally* Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237 (2015) (proposing that relaxed modification and termination rules be applied after the first generation).