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THE DECLINE OF REVOCATION BY PHYSICAL ACT

Barry Cushman*

Author's Synopsis: The power to revoke one's will by physical act was enshrined in Anglo-American law in 1677 by the Statute of Frauds. It remains the law in Great Britain, in such developed Commonwealth countries as Canada, Australia, and New Zealand, and in each state of the United States of America. Yet the revocation of wills by physical act has become badly out of phase with the law governing nonprobate transfers, which as a general matter requires that an instrument of transfer be revoked only by a writing signed by the transferor. This Article surveys the place of revocation by physical act in the law governing will substitutes, such as payable-on-death designations on bank accounts, transfer-on-death designations on brokerage accounts, life insurance and annuities, beneficiary deeds, and revocable trusts. Revocation by physical act is available with respect to none of the first four types of nonprobate transfer; meanwhile, revocation of revocable trusts by physical act is now effectively defunct in nearly half of the states. Because the donative transfer of most wealth in the United States takes place through will substitutes rather than through the probate system, the role of revocation by physical act in the law of succession is one of diminishing significance. Revocation by physical act is a legal institution in decline, and increasingly an anomaly within the law of gratuitous transfers. The outstanding question is whether, and if so, to what extent and in what form, that anomaly is worthy of preservation.

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I. INTRODUCTION

The power to revoke one's will by physical act was enshrined in Anglo-American law in 1677 by the Statute of Frauds.¹ It remains the law in Great Britain,² in such developed Commonwealth countries as Canada,³ Australia,⁴ and New Zealand,⁵ and in each state of the United States of America.⁶ Yet revocation by physical act creates numerous perplexities in the law, is badly out of phase with the law governing nonprobate transfers,

¹ See An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3, § 6.

² See Wills Act 1837, 1 Vict., c. 26, § 20.

³ See Civil Code of Québec, R.S.Q. 1996, c. 64, art. 767; Succession Law Reform Act, R.S.O. 1990, c. S.26, s 15; The Wills Act, C.C.S.M. 2007, c. W150 s 16(d); Wills and Succession Act, S.A. 2010, c. W-12.2 s 23(1)(c)-(d); Wills, Estates and Succession Act, S.B.C. 2009 c. 13 s 55(1)(c); The Wills Act, S.S. 1996 c. W-14.1 s 16(d); Wills Act, R.S.N.B. 1973, c. W-9, s 15(d); Wills Act, R.S.N.L. 1990, c. W-10 s 11(c); Wills Act, R.S.N.S. 1989, c. 505 s 19(d); Probate Act, R.S.P.E.I. 1988, c. P-21 s 72.

⁴ See *Succession Act 1981* (Qld) pt 2 s 13(e); *Succession Act 2006* (NSW) ch 2 s 11(1)(e); *Wills Act 1997* (Vic) pt 2 s 12(f); *Wills Act 1936* (SA) pt 2 s 22(d); *Wills Act 1970* (WA) pt 5 s 15(c); *Wills Act 2008* (Tas) pt 2 s 15(1)(d); *Wills Act 1968* (ACT) pt 4 sec 21 (b)(iii); *Wills Act 2000* (NT) pt 2 s 13(e).

⁵ See Wills Act 2007 s 16(e).

⁶ See ALA. CODE § 43-8-136(b); ALASKA STAT. § 13.12.507(a)(2); ARIZ. REV. STAT. ANN. § 14-2507(A)(2); ARK. CODE ANN. § 28-25-109(a)(2); CAL. PROB. CODE § 6120(b); COLO. REV. STAT. § 15-11-507(1)(b); CONN. GEN. STAT. § 45a-257; DEL. CODE ANN. tit. 12, § 208; FLA. STAT. § 732.506; GA. CODE ANN. § 53-4-44; HAW. REV. STAT. § 560:2-507(a)(2); IDAHO CODE § 15-2-507(b); 755 ILL. COMP. STAT. § 5/4-7(a)(1); IND. CODE ANN. § 29-1-5-6; IOWA CODE § 633.284; KAN. STAT. ANN. § 59-611; KY. REV. STAT. ANN. § 394.080(3); LA. CIV. CODE ANN. art. 1607(1); ME. STAT. tit. 18-A, § 2-507(2); MD. CODE ANN., EST. & TRUSTS § 4-105(2); MASS. GEN. LAWS ch. 190B, § 2-507(a)(2); MICH. COMP. LAWS § 700.2507(1)(b); MINN. STAT. § 524.2-507(a)(2); MISS. CODE ANN. § 91-5-3; MO. REV. STAT. § 474.400; MONT. CODE ANN. § 72-2-527(1)(b); NEB. REV. STAT. § 30-2332(2); NEV. REV. STAT. § 133.120(1)(a); N.H. REV. STAT. ANN. § 551:13(I); N.J. STAT. ANN. § 3B:3-13(b); N.M. STAT. ANN. § 45-2-507(A)(3); N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(2)(A); N.C. GEN. STAT. § 31-5.1(2); N.D. CENT. CODE § 30.1-08-07(1)(b); OHIO REV. CODE ANN. § 2107.33(A)(1)-(3); OKLA. STAT. tit. 84, § 101(2); OR. REV. STAT. § 112.285(2); 20 PA. CONS. STAT. § 2505(3); 33 R.I. GEN. LAWS § 33-5-10; S.C. CODE ANN. § 62-2-506(a)(2); S.D. CODIFIED LAWS § 29A-2-507(a)(2); TENN. CODE ANN. § 32-1-201(3); TEX. EST. CODE ANN. § 253.002; UTAH CODE ANN. § 75-2-507(1)(b); VT. STAT. ANN. tit. 14, § 11(a); VA. CODE ANN. § 64.2-410(A); WASH. REV. CODE § 11.12.040(1)(b); W. VA. CODE § 41-1-7; WIS. STAT. § 853.11(1m); WYO. STAT. ANN. § 2-6-117(a)(ii); see also D.C. CODE § 18-109(a)(2). Revocation by physical act is also recognized by UNIF. PROBATE CODE § 2-507(a)(2) (amended 2010), 8 pt. 1 U.L.A. 222 (2013) and RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(a) (AM. LAW INST. 1999). All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

has become increasingly anomalous within the law of wills itself, and is in need of reform.

I address most of these issues in forthcoming work.⁷ In this Article, I focus solely on the place of revocation by physical act in the law governing will substitutes, such as payable-on-death (POD) designations on bank accounts, transfer-on-death (TOD) designations on brokerage accounts, life insurance and annuities, beneficiary deeds, and revocable trusts. As discussed below, revocation by physical act is unavailable for the first four types of nonprobate transfer; meanwhile, revocation of revocable trusts by physical act is now effectively defunct in nearly half of the states. Because “[m]ore wealth passes by way of will substitutes than by probate[,]”⁸ the place of revocation by physical act in the law of succession is one of diminishing significance. Thus, revocation by physical act is a legal institution in decline.

II. PAYABLE-ON-DEATH (POD) & TRANSFER-ON-DEATH (TOD) ACCOUNTS

One of the consequences of the “Nonprobate Revolution” has been increased participation by financial intermediaries in the transfer of wealth at death.⁹ These institutions generally are required either by statute or by contract to receive written notification before any modification or revocation of a beneficiary designation on an instrument of nonprobate transfer will be effective.¹⁰ So, for example, the modification or revocation of a beneficiary designation on a POD bank account cannot be effectuated by physical act, but instead requires a writing delivered to the financial institution.¹¹

⁷ See Barry Cushman, *Reforming Revocation by Physical Act* (forthcoming).

⁸ See ROBERT H. SITKOFF & JESSE DUKEMENIER, WILLS, TRUSTS & ESTATES 439 (10th ed. 2017); see also Russell N. James, III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMTY. PROP. L. J. 1, 27–28 (2015) (finding that “estate transfers are largely a nonprobate affair”); John H. Langbein, *Major Reforms in the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12 (2012) (“Most wealth transfer on death today occurs through the nonprobate system, for the simple reason that most personal wealth is now held in financially intermediated account forms that invite nonprobate transfer.”).

⁹ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

¹⁰ See *id.*

¹¹ See ALA. CODE § 5-24-13(a); ALASKA STAT. § 13.33.213(a); ARIZ. REV. STAT. ANN. § 14-6213(a); ARK. CODE ANN. § 23-47-204(e)(3); CAL. PROB. CODE § 5303(b), (c);

The Uniform Transfer on Death Security Registration Act, which has been adopted in forty-four states, provides:

[a] registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary.¹²

COLO. REV. STAT. § 15-15-213(1); DEL. CODE ANN. tit. 5, § 924(b)(1); D.C. CODE § 19-602.13(a); GA. CODE ANN. § 7-1-814; HAW. REV. STAT. § 560:6-105; IDAHO CODE § 15-6-105; 205 ILL. COMP. STAT. § 625/4(a); IND. CODE § 32-17-11-19(b), (c); KAN. STAT. ANN. § 9-1215(c); KY. REV. STAT. ANN. § 391.320(c); ME. STAT. tit. 18-C, § 6-213(1); MINN. STAT. § 524.6-205; MONT. CODE ANN. § 72-6-213(2); NEB. REV. STAT. § 30-2724(a); N.H. REV. STAT. ANN. § 383-B:4-404(b); N.J. STAT. ANN. § 17:161-6; N.M. STAT. ANN. § 45-6-213(A); N.Y. EST. POWERS & TRUSTS LAW § 7-5.2(1), (2) (Totten trust account); N.C. GEN. STAT. § 54B-130.1(a)(1); N.D. CENT. CODE § 30.1-31-10(1); OHIO REV. CODE ANN. § 2131.10; OKLA. STAT. tit. 6, § 901(B)(10); OR. REV. STAT. § 723.482; R. I. GEN. LAWS § 19-9-14.1(i); S.C. CODE ANN. § 62-6-203(a); S.D. CODIFIED LAWS § 29A-6-105; TENN. CODE ANN. § 45-2-704(b)(6); UTAH CODE ANN. § 75-6-105; VA. CODE ANN. § 6.2-609; W. VA. CODE § 31A-4-33a(c). In jurisdictions recognizing POD accounts but not prescribing the method of revocation or amendment, the terms of the contract of deposit would govern. *See, e.g.*, FLA. STAT. § 655.82; LA. STAT. ANN. § 6:1255; MD. CODE ANN., Fin. Inst. § 1-204; MASS. GEN. LAWS ch. 190B, § 6-101; MISS. CODE ANN. § 81-5-62; MO. REV. STAT. § 362.471; NEV. REV. STAT. § 111.807; TEX. EST. CODE ANN. § 113.103; VT. STAT. ANN. tit. 8, § 14205; WASH. REV. CODE § 30A.22.160; WIS. STAT. § 705.02; WYO. STAT. ANN. § 2-1-203. These terms typically require written notice to the financial institution. *See, e.g.*, Bank Servs. Agreement, Branch Banking & Tr., 5 (Aug. 13, 2018), https://www.bbt.com/assets/docs/pdf/bbt-com/customer-service/personal-services-pricing-guide/bank_services_agreement.pdf (“PAYABLE ON DEATH (P.O.D.). . . . You agree that a change in Beneficiary is effective only upon a change to the signature card”); *see also* NEV. REV. STAT. § 111.755 (providing that a contract for nonprobate transfer may require that the transferring entity accept a revocation or change of a beneficiary designation).

¹² UNIF. TRANSFER ON DEATH SEC. REGISTRATION ACT § 10, 8 pt. 3 U.L.A. 389 (2013); *see also* ALA. CODE § 8-6-149(a); ALASKA STAT. § 13.33.310(a); ARIZ. REV. STAT. § 14-6310(A); ARK. CODE ANN. § 28-14-110(a); CAL. PROB. CODE § 5510(a); COLO. REV. STAT. § 15-15-310(1); CONN. GEN. STAT. § 45a-468j; DEL. CODE ANN. tit. 12, § 810(a); D.C. CODE § 19-603.10(a); FLA. STAT. § 711.51(1); GA. CODE ANN. § 53-5-70; HAW. REV. STAT. § 539-10; IDAHO CODE § 15-6-310(1); 815 ILL. COMP. STAT. § 10/10(a); IOWA CODE § 633D.12(1); KAN. STAT. ANN. § 17-49a10; KY. REV. STAT. ANN. § 292.6510(1); MD. CODE ANN., EST. & TRUSTS, § 16-110(a); MASS. GEN. LAWS ch. 190B, § 6-310(a); MICH. COMP. LAWS § 700.6310(1); MINN. STAT. § 524.6-310(a); MISS. CODE ANN. § 91-21-21(1); MONT. CODE ANN. § 72-6-310(1)(a); NEB. REV. STAT. § 30-2744(a); N.H. REV. STAT. ANN.

Such terms and conditions typically require written notice to the registering entity of any revocations or modifications of a beneficiary designation,¹³ thus precluding revocation by physical act. And “[i]f the terms and conditions have nothing on the point,” as the official comment to the Act puts it, “cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.”¹⁴

States that have not adopted the Uniform Act take a similar approach. Indiana’s statute requires that “[a] revocation or change in a beneficiary designation must comply with the terms of any governing instrument, this chapter, and any other applicable law,” and further that “[a] beneficiary designation may not be revoked or changed by a will or trust unless the beneficiary designation expressly grants the owner the right to revoke or change the beneficiary designation by a will or trust.”¹⁵ Missouri’s statute similarly provides that “[a] revocation or change in a beneficiary designation shall comply with the terms of the governing instrument, the rules of the transferring entity[,] and the applicable law,” and that “[a] beneficiary designation may not be revoked or changed by the provisions of a will unless the beneficiary designation expressly grants the owner the

§ 563-C:11(I); N.J. STAT. ANN. § 3B:30-11(a); N.M. STAT. ANN. § 45-6-310(A); N.Y. EST. POWERS & TRUSTS LAW § 13-4.10(a); N.C. GEN. STAT. § 41-49(a); N.D. CENT. CODE § 30.1-31-30(1); OHIO REV. CODE ANN. § 1709.10(A); OKLA. STAT. tit. 71, § 911(A); OR. REV. STAT. § 59.580(1); 20 PA. CONS. STAT. § 6410(a); R.I. GEN. LAWS § 7-11.1-11(a)(1); S.C. CODE ANN. § 35-6-100; S.D. CODIFIED LAWS § 29A-6-310(a); TENN. CODE ANN. § 35-12-111(a); UTAH CODE ANN. § 75-6-311(1); VT. STAT. ANN. tit. 9, § 4360(a); VA. CODE ANN. § 64.2-619(A); WASH. REV. CODE § 21.35.050(1); W. VA. CODE § 36-10-10(a); WIS. STAT. § 705.30(1); WYO. STAT. ANN. § 2-16-111. In addition, MINN. STAT. ANN. § 524.6-309 provides, “A registration in beneficiary form may be canceled by specific reference to the security or the securities account in the will of the sole owner or the last to die of multiple owners, but the terms of the revocation are not binding on the registering entity unless it has received written notice from any claimant to an interest in the security objecting to implementation of a registration in beneficiary form prior to the registering entity reregistering the security.”

¹³ See, e.g., FIDELITY INVESTMENTS, BENEFICIARIES - NONRETIREMENT TRANSFER ON DEATH, 5 (2016), https://www.fidelity.com/bin-public/060_www_fidelity_com/document/s/customer-service/beneficiaries-transfer-on-death.pdf?refpr=benesg12 (“Changes to Beneficiary Designations[.] The account holder may at any time change the named beneficiaries or revoke the designations made under the Agreement. A subsequent Form will revoke a prior designation of beneficiaries when the Form becomes effective (i.e., signed, delivered to, and accepted by Fidelity, and submitted in a form and manner acceptable to Fidelity).”).

¹⁴ UNIF. TRANSFER ON DEATH SEC. REGISTRATION ACT § 6 cmt., 8 pt. 3 U.L.A. 385–86.

¹⁵ IND. CODE ANN. § 32-17-14-16(f)–(g).

right to revoke or change a beneficiary designation by will.”¹⁶ Nevada’s statute provides that “a nonprobate transfer is a matter of agreement between the owner and the transferring entity, under such rules, terms[,] and conditions as the owner and transferring entity may agree,” and contemplates that such a contract may require the transferring entity to accept a revocation or change of a beneficiary designation.¹⁷

III. LIFE INSURANCE & ANNUITIES

In comparison with POD and TOD accounts, the method of revoking or changing the beneficiary designation on a life insurance or annuity contract is not as extensively regulated by statute. However, there are a few areas in which we do find some legislative regulation. Many states have statutes requiring in substance that policies of “industrial life insurance”¹⁸ have a space for the name of the beneficiary designated with a reservation of the right to designate or change the beneficiary after the issuance of the policy, and authorize the policy to provide that no designation or change of beneficiary shall be binding on the insurer until endorsed on the policy by the insurer.¹⁹ Maryland has a similar provision

¹⁶ MO. REV. STAT. § 461.033(3)–(4).

¹⁷ NEV. REV. STAT. § 111.755. Texas authorizes TOD designations on securities but does not prescribe a manner of revocation or modification. *See* TEX. EST. CODE ANN. § 111.052. Maine permits transfer-on-death beneficiary designations to be “canceled or changed at any time by the sole owner or all then-surviving owners,” but does not prescribe any manner of change or cancellation. ME. STAT. tit. 18-C, § 6-306. Instead, the Maine Code authorizes the registering entity to establish the terms and conditions under which it will receive requests for cancellation of previously registered transfer-on-death beneficiary designations. ME. STAT. tit. 18-C, § 6-310(1). Louisiana has not yet enacted a statute concerning TOD designations on securities.

¹⁸ An “industrial life insurance” policy, which is sometimes referred to as a “burial policy” or “street insurance,” is a policy with a small face amount (usually \$1000 or less) where the premiums are collected at the insured’s home on a monthly or weekly basis. *See* Merriam-Webster (2019) <http://merriam-webster.com/dictionary/industrial%20life%20insurance>.

¹⁹ *See* ALA. CODE § 27-16-12; ALASKA STAT. § 21.45.140; ARIZ. REV. STAT. § 20-1312; ARK. CODE ANN. § 23-82-114; DEL. CODE. ANN. tit. 18, § 2915; FLA. STAT. § 627.512; HAW. REV. STAT. § 431:10D-307; IDAHO CODE § 41-1914; 215 ILL. COMP. STAT. 5/229(3); KY. REV. STAT. ANN. § 304.15-150; LA. STAT. ANN. § 22:149(A)(9); ME. STAT. tit. 24-A, § 2514; MICH. COMP. LAWS § 500.4238; MONT. CODE ANN. § 33-20-115; NEV. REV. STAT. § 688A.150; N.J. STAT. ANN. § 17B:25-12; N.M. STAT. ANN. § 59A-20-15; OKLA. STAT. tit. 36, § 4213; OR. REV. STAT. § 743.201; S.D. CODIFIED LAWS § 58-15-27; TENN. CODE ANN. § 56-7-702(a)(14); VT. STAT. ANN. tit. 8, § 3731(11); WASH. REV. CODE § 48.25.150; W. VA. CODE § 33-13-40; WYO. STAT. ANN. § 26-16-113. The relevant Kansas statute provides, “Upon proper written request, a named beneficiary shall be

applicable to all life insurance policies.²⁰ In addition, several states have statutes providing that the owner of a benefit contract provided by a fraternal benefit society shall have the right to change the beneficiary in accordance with the constitution, laws, or rules of the society unless the owner has waived the right by specifically requesting in writing that the beneficiary designation be irrevocable.²¹ Missouri law similarly provides that the beneficiary named in a policy of “stipulated premium”²² life insurance may be changed as may be provided for in the articles of incorporation or bylaws of the insurer.²³ And a handful of states authorize the policyholder to change the beneficiary with the consent of the insurer.²⁴

designated in, or be endorsed on a policy of industrial life insurance, to receive the benefits thereof on the death of the insured, and there shall be reserved the power to change the beneficiary at any time upon proper written request to the company at its home office, accompanied by the policy for endorsement of the change thereon by the company.” KAN. STAT. ANN. § 40-424.

²⁰ See MD. CODE ANN., INS. § 16-212.

²¹ See ARK. CODE ANN. § 23-74-402; CAL. INS. CODE § 11044; COLO. REV. STAT. § 10-14-402(1); CONN. GEN. STAT. § 38a-636(a); IND. CODE ANN. § 27-11-6-2(a); MICH. COMP. LAWS § 500.8180(1); MINN. STAT. § 64B.17(subd. 1); MONT. CODE ANN. § 33-7-521(1); NEB. REV. STAT. § 44-1088(1); N.Y. INS. LAW § 4508(a); N.C. GEN. STAT. § 58-24-80(a); OKLA. STAT. tit. 36, § 2717.1(A); S.D. CODIFIED LAWS § 58-37A-17; TENN. CODE ANN. § 56-25-402(a); TEX. INS. CODE ANN. § 885.304(a); WASH. REV. CODE § 48.36A.170(1).

²² A “stipulated premium” company is defined as follows:

Any corporation, company or association issuing policies or certificates promising money or other benefits to a member or policyholder, or upon his decease to his legal representatives, or to beneficiaries designated by him, which money or benefit is derived from stipulated premiums collected in advance from its members or policyholders, and from interest and other accumulations and wherein the money or other benefits so realized is applied to or accumulated solely for the use and purposes of the corporation as herein specified, and for the necessary expenses of the corporation, and the prosecution and enlargement of its business, and which shall comply with all the provisions of sections 377.200 to 377.460

MO. REV. STAT. § 377.200. Missouri has not permitted the formation of such companies since 1959. MO. REV. STAT. § 377.199; *see also* <http://financial-dictionary.thefreedictionary.com/Stipulated+Premium+Company> (defining stipulated premium insurance company as “[a]n insurance company that charges a policyholder a premium in exchange for an insurance policy, but reserves the right to require another premium to be paid if losses resulting from claims exceed the amount the policyholder contributed in the initial premium”).

²³ See MO. REV. STAT. § 377.310(2).

²⁴ See KY. REV. STAT. ANN. § 299.150(3); NEB. REV. STAT. § 44-370; N.H. REV. STAT. ANN. § 411:31.

A few state statutes require a signed writing to change the beneficiary designation on a policy,²⁵ and some other states have statutes imposing a writing requirement for changing death benefit beneficiary designations on pension or group life insurance contracts for public employees.²⁶ However, most states do not have statutes prescribing the means by which a beneficiary designation on a policy of life insurance may be modified or revoked. Instead, they either explicitly²⁷ or implicitly leave the matter to contract between the insurer and the owner of the policy. Such contracts typically require written notice to the insurer.²⁸ The same is also true of

²⁵ See IND. CODE ANN. § 27-1-12-14(c) ("When the right of revocation has been reserved, the person whose life is insured, subject to any existing assignment of the policy, may at any time designate a new payee or beneficiary, with or without reserving the right of revocation, by filing written notice thereof at the home office of the corporation, accompanied by the policy for suitable indorsement thereon."); MASS. GEN. LAWS ch. 175, § 123 ("No life insurance company shall accept or take action on any written request to change the designation of beneficiary under any policy of life or endowment insurance unless the signature of the person requesting the change is witnessed by a disinterested person."); N.Y. EST. POWERS & TRUSTS LAW § 13-3.2(e) ("A designation of a beneficiary or payee to receive payment upon death of the person making the designation or another must be made in writing and signed by the person making the designation . . ."); OKLA. STAT. tit. 36, § 3604(D) ("The application or any subsequent change of beneficiary designation shall be signed by the individual whose life is to be insured.").

²⁶ See N.J. STAT. ANN. § 43:15C-9; N.J. STAT. ANN. § 43:15C-12; FLA. STAT. § 185.061(9) (municipal police pensions); FLA. STAT. § 175.081(9) (1999) (firefighter pensions); MISS. CODE ANN. § 25-11-103(1)(g).

²⁷ See, e.g., S.C. CODE ANN. § 38-63-220(g) (requiring individual life insurance policies to contain "a provision stating how the beneficiary is designated and how the beneficiary may be changed"); TEX. INS. CODE ANN. § 1103.055 ("An individual of legal age who is insured under a life insurance policy may in writing: (1) in a manner and to the extent permitted by the policy, designate any individual, partnership, association, corporation, or other legal entity as a beneficiary of the policy . . ."); UTAH CODE ANN. § 31A-22-413(1)(b)-(2)(a) ("[N]o life insurance policy or annuity contract may restrict the right of a policyholder or certificate holder . . . if the designation of beneficiary is not explicitly irrevocable, to change the beneficiary without the consent of the previously designated beneficiary. . . . An insurer may prescribe formalities to be complied with for the change of beneficiaries, but those formalities may only be designed for the protection of the insurer."); WIS. STAT. § 632.48.

²⁸ See David Polin, Annotation, *Substantial Compliance with Requirements of Life Insurance Policy Regarding Change of Beneficiary*, 44 AM. JUR. PROOF OF FACTS 3d 377 (1997); Patricia Jean Lamkin, Annotation, *Change of Beneficiary in Group Life Insurance Policy as Affected by Failure to Comply with Policy Requirements as to Manner of Making Change*, 78 A.L.R. 3d 466 (1977); C.T. Dreschsler, Annotation, *Change of Beneficiary in Old Line Insurance Policy by Failure to Comply with Requirements as to Manner of Making Change*, 19 A.L.R. 2d 5 (1955).

group life insurance plans and retirement accounts governed by the federal Employee Retirement Income Security Act.²⁹

Courts generally require alterations to beneficiary designations to be made in accordance with the terms set out in the policy, and many attempted or purported changes have failed due to lack of compliance with the method prescribed by the contract.³⁰ In many instances, however, courts have used the doctrine of substantial compliance to excuse failure to comply strictly with such written notice requirements.³¹ Such relief is generally available in three situations: (1) when the insurer waives strict compliance with its own rules regarding the change; (2) when it is beyond the insured's power to comply literally with the insurer's requirement; or (3) when the insured has done all that he could to effect the change but dies before the change is actually made.³² Under the doctrine of substantial compliance, state and federal courts have excused a wide variety of defects in attempts to change a beneficiary designation.³³ Except perhaps in very rare and exceptional circumstances,³⁴ however, the doctrine has not been employed to license the modification or revocation of a beneficiary designation by physical act.³⁵ The three reported decisions on point serve

²⁹ See Pub. L. No. 93-406, 88 Stat. 829, 875 (1974) (codified at 29 U.S.C. § 1102); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300–03 (2009); *Egelhoff v. Egelhoff*, 532 U.S. 141, 147–50 (2001); see, e.g., UNIVERSITY OF NOTRE DAME GROUP TERM LIFE CERTIFICATE OF INSURANCE, MINNESOTA LIFE INSURANCE COMPANY, <https://hr.nd.edu/assets/20123/und-cert-eff-1-1-2017-class-1.pdf> (requiring requests to change beneficiaries to be made in writing to the insurer and subject to the insurer's approval); FIDELITY NETBENEFITS, <https://login.fidelity.com/ftgw/Fidelity/NBPart/Login/Init> (requiring that beneficiary changes to retirement plans be made in writing).

³⁰ See generally *Lamkin*, *supra* note 28; *Dreschsler*, *supra* note 28.

³¹ See generally *Polin*, *supra* note 28; *Lamkin*, *supra* note 28; *Dreschsler*, *supra* note 28.

³² See generally *Polin*, *supra* note 28; *Lamkin*, *supra* note 28; *Dreschsler*, *supra* note 28.

³³ See generally *Polin*, *supra* note 28; *Lamkin*, *supra* note 28; *Dreschsler*, *supra* note 28.

³⁴ See *infra* notes 63–94 and accompanying text.

³⁵ WIS. STAT. § 632.48(1)(b), which is singular, provides that a change in beneficiary for a life insurance policy or annuity contract may be made by “any act that unequivocally indicates an intention to make the change.” This statute may be interpreted to authorize revocation by physical act, but Wisconsin courts have not yet done so; see *Empire Gen. Life Ins. Co. v. Silverman*, 399 N.W.2d 910, 916 (Wis. 1987) (holding that an attempt to change a beneficiary need not be memorialized in writing, and that a hospitalized insured's oral instructions to his attorney to take the steps necessary to effectuate a change were sufficient to revoke a beneficiary designation). Compare the more recent WIS. STAT. § 853.17, which brings Wisconsin into harmony with the vast majority of states that

to illustrate the divergence between the law of life insurance and the law of wills.

In *Ester v. Prudential Insurance Co. of America*,³⁶ the insured under a group life insurance policy named as his beneficiary a woman whom he planned to marry.³⁷ The insured later married another woman, with whom he discussed changing the beneficiary designation on the policy.³⁸ The terms of the policy required that any change of beneficiary be effected by notification of the insurer through the insured's employer, and that any such change would become effective when the insurer provided due acknowledgement to the insured.³⁹ The insured in *Ester* did not follow the procedure required by the policy, but instead ripped up the certificate naming the original beneficiary and took no further action.⁴⁰ Had the certificate been the insured's will, then this action would have been sufficient to revoke it.⁴¹ Yet the *Ester* court held that the action taken by the insured did not substantially comply with the requirements imposed by the terms of the policy, and that the attempted revocation of the earlier beneficiary designation therefore was ineffective.⁴²

In *Union Central Life Insurance Co. v. Pepe*,⁴³ the insured had designated a beneficiary on his group life insurance policy.⁴⁴ The policy required that any change of beneficiary be effected by written notice in a form acceptable to the insurer.⁴⁵ At the insured's death, his survivors found the insurance certificate locked in his desk drawer at his place of employment.⁴⁶ Upon its presentation to the insurer, his survivors discovered that the name of the original beneficiary had been erased, and

prohibit the change of beneficiary designation in a life insurance policy or annuity contract by will unless the power to do so is provided for in the policy or in the issuing company's by-laws.

³⁶ 299 N.W. 96 (Mi. 1941).

³⁷ *See id.* at 96.

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See, e.g.,* UNIF. PROBATE CODE § 2-507(a)(2), 8 pt. 1 U.L.A. 525 (2013) (authorizing revocation by "tearing").

⁴² *See Ester*, 299 N.W. at 98.

⁴³ 87 Cal. Rptr. 610 (Cal. App. 1970).

⁴⁴ *See id.* at 611-12.

⁴⁵ *See id.* at 612.

⁴⁶ *See id.*

the name of another beneficiary was typed in its place.⁴⁷ Had the certificate been the insured's will, the addition of the new beneficiary would not have been effective because it was not executed with testamentary formalities.⁴⁸ The erasure of the name of the original beneficiary, however, would have been another matter.⁴⁹ Because the certificate was last known to be in the possession of the insured, it would have been presumed that the erasure was performed by the insured with the intent to revoke.⁵⁰ No further evidence would have been required to raise this presumption.⁵¹ And, at least in a jurisdiction permitting partial revocation by physical act, that presumed act, were the presumption not rebutted, would have been sufficient to revoke the original beneficiary designation.⁵²

In *Pepe*, however, the court held that the original beneficiary designation remained in force.⁵³ The court emphasized that there was no evidence that the insured had made the change, observed that the certificate had passed through other hands before its presentation to the company by the substituted beneficiary, and it noted that there was conflicting evidence concerning the state of the certificate at the time it was located in the insured's desk.⁵⁴ Yet the court went on to hold that the change, even if shown to have been made by the insured, would not have been effective, as it did not substantially comply with the method prescribed by the terms of the policy.⁵⁵

In *Androvette v. Treadwell*,⁵⁶ the decedent had signed a group insurance enrollment and record card naming his wife as beneficiary.⁵⁷ Later, at the decedent's request, an employee in the office of the policyholder (the Uniformed Firefighters' Association) erased the wife's name and inserted

⁴⁷ See *id.*

⁴⁸ See, e.g., UNIF. PROBATE CODE § 2-502, 8 pt. 1 U.L.A. 506–07 (2013) (requiring that a will—and modifications to a will—be signed by the testator and either attested by two witnesses or notarized).

⁴⁹ See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 442 (2d ed. 1953).

⁵⁰ See *id.*

⁵¹ See *id.*; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. LAW INST. 1999).

⁵² See, e.g., UNIF. PROBATE CODE § 2-507(a), 8 pt. 1 U.L.A. 525 (authorizing revocation of a will “or any part thereof”).

⁵³ See 87 Cal. Rptr. at 614.

⁵⁴ See *id.* at 613–14.

⁵⁵ See *id.*

⁵⁶ 532 N.E.2d 1271 (N.Y. 1988).

⁵⁷ See *id.*

the name of another woman as beneficiary.⁵⁸ The decedent did not sign the card at the time this change was made, nor did he do so thereafter.⁵⁹ Consider the result had the insurance card been the decedent's will. Because the addition of the new beneficiary was not accompanied by testamentary formalities, it would have been ineffective.⁶⁰ But assuming that the employee followed the decedent's instructions while in the decedent's presence, the erasure of the wife's name would have been an effective proxy revocation by physical act.⁶¹ Nevertheless, though the lower courts found that the change was made at the decedent's direction and reflected his intent, the *Androvette* court concluded the change was ineffective because it failed to comply with the statutory requirement that any change of beneficiary designation be signed by the insured.⁶²

Additionally, two exceptional cases might be read as giving effect to an attempted revocation of a life insurance beneficiary designation by physical act, but on closer inspection it is far from clear that they have done so. In *Glen v. Aetna Life Insurance Co.*,⁶³ Janet Metzger was the insured under a group life insurance policy she held through her employer, the Goodyear Tire & Rubber Co.⁶⁴ The named beneficiary on the policy was her husband, Ivan Metzger.⁶⁵ On April 7, 1941, Janet wrote a letter to Goodyear requesting that on her death the proceeds of the policy be given to her sister Robina Glen because "Metzger has been brutal and unkind to me and his frequent beatings have helped hasten my end."⁶⁶ The letter was signed, sealed, and stamped but never mailed.⁶⁷ On May 1, 1941, Ivan murdered Janet and immediately thereafter committed suicide.⁶⁸ Janet's letter to Goodyear was found in a box of her papers along with the insurance certificate, on which she had crossed out Ivan's name as

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See, e.g.*, UNIF. PROBATE CODE § 2-507(a)(2), 8 pt. 1 U.L.A. 525 (2013) (authorizing revocation by physical act to be performed by someone other than the testator, "in the testator's conscious presence and by the testator's direction").

⁶¹ *See id.*

⁶² *See Androvette*, 532 N.E.2d at 1271.

⁶³ 56 N.E.2d 951 (Ohio Ct. App. 1943).

⁶⁴ *See id.* at 953.

⁶⁵ *See id.*

⁶⁶ *Id.* at 954.

⁶⁷ *See id.*

⁶⁸ *See id.* at 953.

beneficiary and inserted Robina's.⁶⁹ Claims to the proceeds were made by Robina, by the administrator of Janet's estate, by the administrator of Ivan's estate, and by Janet's six other sisters who, along with Robina, were Janet's sole heirs.⁷⁰ The trial court entered judgment for Robina, and the appellate court affirmed.⁷¹

The appellate court's opinion turned on the following premises. First, because the insurer had interpleaded the funds, it had waived any right to insist on strict compliance with the policy's requirements for a change of beneficiary.⁷² Second, it was reasonable to conclude that by writing the letter and changing the beneficiary designation on the policy, Janet had "fully desired and intended to change the beneficiary in her policy of insurance" and that "she anticipated an assassin's malevolence and desired that neither the culprit nor any of his kin should profit from her execution."⁷³ Third, that the only step that Janet had failed to take in changing the beneficiary was to mail the letter and forward the certificate, and that she had instead "placed the letter with her personal papers, which it was reasonable to suppose would reach intact the hands of her personal representative in the event of her death."⁷⁴ Fourth, that the policy itself provided that in the event that the named beneficiary were to predecease the insured the insured's siblings would take equally in preference to the insured's estate.⁷⁵ Robina and her sisters fell within that category, and her sisters, by not appealing from the trial court's judgment, had manifested their lack of objection.⁷⁶

There are two observations worth making about this decision. First, as one commentator has observed, "It seems reasonable to assume that the court in its decision was partly moved by the fact that the insured died by the hand of the original beneficiary."⁷⁷ Indeed, under a modern slayer statute like Uniform Probate Code section 2-803, the beneficiary designation in favor of Ivan would have been revoked by operation of law.⁷⁸ The same

⁶⁹ See *id.* at 954.

⁷⁰ See *id.* at 952.

⁷¹ See *id.* at 953–54.

⁷² See *id.* at 954.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.* at 955.

⁷⁶ See *id.*

⁷⁷ Dreschsler, *supra* note 28, § 17.

⁷⁸ UNIF. PROBATE CODE § 2-803, 8 pt. 1 U.L.A. 624–25 (2013).

result would obtain in a jurisdiction without an applicable slayer statute, which nevertheless remedies the unjust enrichment of a slayer by imposing a constructive trust on him or his successors in interest.⁷⁹ Thus, the revocation of the beneficiary designation, as distinguished from the substitution of Robina, would be dependent not on Janet's physical act, but instead could be derived from applicable statute law or principles of equity.

Second, Janet did not merely strike out Ivan's name on the policy—she also wrote a letter to her employer, which was the joint issuer of the policy, expressing her wish that the beneficiary designation be changed.⁸⁰ Several courts, including a federal court applying the law of the state in which Janet's case was decided,⁸¹ have held that “a valid change of beneficiary is effected where the insured made and signed a request for change of beneficiary and was in the possession of the policy but died before he had an opportunity of mailing the two documents to the insurer.”⁸² In other words, *Glen* might be best understood as a case of substantial compliance with the requirements for revocation of a beneficiary designation. Here again, the facts and the applicable law provide a rationale for the decision that does not rest on the legal efficacy of Janet's physical act.

The second and “most extraordinary case”⁸³ in which a court might be seen as having given a physical act revocation effect is *Northern Life Insurance Co. v. Burkholder*.⁸⁴ However, it is not entirely clear from the opinion that any attempted physical act of revocation was actually involved in the case. The insured had taken out a policy of insurance that made \$3,000 payable to him upon reaching the age of sixty-five or to his estate should he die sooner.⁸⁵ The policy reserved the right of the insured to change the beneficiary by obtaining an endorsement on the policy by the president or secretary of the insurer.⁸⁶ Before his death, the insured handwrote the name of his fiancée “upon a blank space in the policy left

⁷⁹ See Nili Cohen, *The Slayer Rule*, 92 B.U.L. REV. 793, 796 (2012).

⁸⁰ See *Glen*, 56 N.E.2d at 953–54.

⁸¹ See *Schwerdtfeger v. Am. United Life Ins. Co.*, 165 F.2d 928, 928–30 (6th Cir. 1948) (holding that under Ohio law application to change beneficiary filled out five weeks before insured's death but not delivered to insurer until after death is sufficient to change beneficiary).

⁸² Dreschsler, *supra* note 28, § 22[a].

⁸³ *Id.* at § 17.

⁸⁴ 283 P. 739 (Or. 1930), *reh'g denied*, 293 P. 919 (Or. 1930).

⁸⁵ See *id.* at 742.

⁸⁶ See *id.*

for the name of the beneficiary, and immediately preceding the designation of the 'estate' of deceased, already in the policy."⁸⁷ The opinion does not indicate that the insured struck out the earlier beneficiary designation to the estate of the insured. The insured took no further action to change the beneficiary designation.⁸⁸ The court upheld the change on the grounds (1) that the insurer by interpleading the proceeds had waived compliance with the policy's provisions for changing the beneficiary;⁸⁹ (2) that when the insured attempted to make the change, he and his estate had an identity of interest, and thus, "[w]hat he did, his 'estate' through him consented to, and what he did bound his administrator";⁹⁰ (3) that therefore the insured's administrator "had no right to dispute his designation";⁹¹ and (4) that in view of the insured's undisputed intent to make her the beneficiary of the policy, "the equities" were with the insured's fiancée.⁹²

As one commentator has observed, *Burkholder* "is out of line with all the other decisions involving a similar situation."⁹³ And to the extent that *Burkholder* is properly read as having recognized a right to revoke a beneficiary designation in an insurance policy or annuity contract by physical act, that is because American courts generally have rejected such a position.⁹⁴

IV. BENEFICIARY DEEDS

With respect to each of the nonprobate instruments discussed thus far, part of the reason that an alteration or revocation of a beneficiary designation must be in writing is to protect the relevant financial

⁸⁷ *Id.*

⁸⁸ *See id.* at 739–40.

⁸⁹ *See id.* at 743–44.

⁹⁰ *Id.* at 743 (stating that the insured's "'estate' was in effect himself. There was no administrator in existence, and no actual beneficiary in existence, whose consent was required. The contract at the time was a two-party contract, the insurer and the insured. He could forfeit the policy for nonpayment, and there was no 'beneficiary' who could step in and keep up the payments, or claim the right to a paid-up policy equal to the amount of premiums paid. So, between him and his estate, there was no distinction.").

⁹¹ *Id.* at 744.

⁹² *Id.* at 744–45.

⁹³ Dreschsler, *supra* note 28, § 17; *see also id.* at § 4 (describing *Burkholder* as "clearly out of line with the general trend of authority").

⁹⁴ *See id.* at § 17.

intermediary from the risk of liability for mistaken payment.⁹⁵ Yet not all nonprobate transfers involve the participation of a financial intermediary.⁹⁶ Some nonprobate transfers are more like wills in that they rely only upon the participation of a governmental entity for their effectuation.⁹⁷ For instance, in recent years twenty-six states and the District of Columbia have enacted legislation permitting the nonprobate transfer of real estate through a “beneficiary” or “transfer on death” deed.⁹⁸ The deed must be executed and recorded during life, but does not transfer title to the property until the grantor’s death, and remains revocable during the grantor’s life.⁹⁹ Each of these jurisdictions prescribes that such a deed shall be revoked by an executed instrument recorded in the office of the appropriate county recorder,¹⁰⁰ and fourteen of these jurisdictions follow

⁹⁵ See, e.g., *Fink v. Fink*, 64 N.E. 506, 507 (N.Y. 1902) (stating that “such a transaction requires some formalities for the protection of the company, the member, and the beneficiary”).

⁹⁶ See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 9(3), 8B U.L.A. 288–90 (2014).

⁹⁷ See *id.*

⁹⁸ See ALASKA STAT. § 13.48.10; ARIZ. REV. STAT. § 33-405(A); CAL. PROB. CODE § 5600; COLO. REV. STAT. § 15-13-401; HAW. REV. STAT. § 527-1; ILL. COMP. STAT. § 27/1; IND. CODE ANN. § 32-17-14-1; KAN. STAT. ANN. § 59-3501; MINN. STAT. § 507.071; MO. REV. STAT. § 461.025; MONT. CODE ANN. § 72-6-111; NEB. REV. STAT. § 76-3401; NEV. REV. STAT. § 111.655; N.M. STAT. ANN. § 45-6-401; N.D. CENT. CODE § 30.1-32.1-01; OHIO REV. CODE ANN. § 5302.222; OKLA. STAT. tit. 58, § 1252; OR. REV. STAT. § 93.948; S.D. CODIFIED LAWS § 29A-6-401; TEX. EST. CODE ANN. § 114.001; VA. CODE ANN. § 64.2-622; WASH. REV. CODE § 64.80.020; WYO. STAT. ANN. § 2-18-103.

⁹⁹ See UNIF. REAL PROP. TRANSFER ON DEATH ACT §§ 5–6, 9, 8B U.L.A. 285–90.

¹⁰⁰ See ALASKA STAT. § 13.48.070(a); ARIZ. REV. STAT. § 33-405(F); ARK. CODE ANN. § 18-12-608(d); CAL. PROB. CODE § 5632(a); COLO. REV. STAT. § 15-15-405; D.C. CODE § 19-604.11(a); HAW. REV. STAT. § 527-11(a); 755 ILL. COMP. STAT. § 27/55(a); IND. CODE ANN. § 32-17-14-16(j); KAN. STAT. ANN. § 59-3503; MINN. STAT. § 507.071(10); MONT. CODE ANN. § 72-6-121(6); NEB. REV. STAT. § 76-3413(a); NEV. REV. STAT. § 111.697; N.M. STAT. ANN. § 45-6-411(A); N.D. CENT. CODE § 30.1-32.1-08(1); OHIO REV. CODE ANN. § 5302.23(B)(5); OKLA. STAT. tit. 58, § 1254; OR. REV. STAT. § 93.965(1); S.D. CODIFIED LAWS § 29A-6-410; TEX. EST. CODE ANN. § 114.057(a); VA. CODE ANN. § 64.2-630(A); WASH. REV. CODE § 64.80.080(1); W. VA. CODE § 36-12-11(a); WIS. STAT. § 705.15(3); WYO. STAT. ANN. § 2-18-103(f); see also MO. REV. STAT. §§ 461.025 (authorizing beneficiary deeds), 461.033 (providing that a beneficiary designation on a nonprobate transfer may be revoked by a subsequent beneficiary designation and must comply with “the applicable law,” which in the case of real property presumably requires a writing signed by the grantor).

the Uniform Real Property Transfer on Death Act in making explicit their prohibitions on revocation by physical act.¹⁰¹

V. REVOCABLE TRUSTS

Admittedly, part of the reason for requiring that revocation of beneficiary deeds be in writing and recorded is to protect the interests of third parties in the integrity of the title recording system. But when we consider the form of nonprobate transfer that has become the centerpiece of sophisticated modern estate planning—the revocable trust—we find that the function of precluding revocation by physical act is primarily and in many instances entirely evidentiary in nature.

Both the First Restatement and the Second Restatement of Trusts provided that “[i]f the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust only in that manner or under those circumstances.”¹⁰² Thus, “[i]f the settlor reserves a power to revoke the trust by a transaction *inter vivos*, as, for example, by a notice to the trustee, he cannot revoke the trust by his will.”¹⁰³ Likewise, “[i]f the settlor reserves a power to revoke the trust only by will, he cannot revoke it by a transaction *inter vivos*.”¹⁰⁴ And “[i]f the settlor reserves a power to revoke the trust only by a notice in writing delivered to the trustee, he can revoke it only by delivering such a notice to the trustee.”¹⁰⁵ Courts applying this provision have required that the allegedly revocatory conduct comply with the manner specified in the trust document, which often requires written notice delivered to the trustee during the lifetime of the settlor.¹⁰⁶ The result has been the failure of many

¹⁰¹ See UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11, 8B U.L.A. 291–92; ALASKA STAT. § 13.48.070(c); D.C. CODE § 19-604.11(c); HAW. REV. STAT. § 527-11(c); 755 ILL. COMP. STAT. § 27/55(b); IND. CODE ANN. § 32-17-14-16(k); NEB. REV. STAT. § 76-3413(c); NEV. REV. STAT. § 111.697; N.M. STAT. ANN. § 45-6-411(C); N.D. CENT. CODE § 30.1-32.1-08(3); OR. REV. STAT. § 93.965(4); S.D. CODIFIED LAWS § 29A-6-412; VA. CODE ANN. § 64.2-630(C); WASH. REV. CODE § 64.80.080(3); W. VA. CODE § 36-12-11(c).

¹⁰² RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j (AM. LAW INST. 1959); RESTATEMENT OF TRUSTS § 330 cmt. j (AM. LAW INST. 1935).

¹⁰³ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j; RESTATEMENT OF TRUSTS § 330 cmt. j.

¹⁰⁴ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j; RESTATEMENT OF TRUSTS § 330 cmt. j.

¹⁰⁵ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j; RESTATEMENT OF TRUSTS § 330 cmt. j.

¹⁰⁶ See, e.g., *Aiello v. Clark*, 680 P.2d 1162, 1168 (Alaska 1984); *Conservatorship of Irvine*, 47 Cal. Rptr. 2d 587, 592–94 (Cal. Ct. App. 1995); *Hibernia Bank v. Wells Fargo*

attempted or purported trust revocations, a substantial portion of which were alleged to have been effected by the testator's will.¹⁰⁷

Litigants contending that a trust has been revoked by physical act have been similarly unsuccessful. In *Salem United Methodist Church v. Bottorff*,¹⁰⁸ the settlor executed three copies of a revocable living trust.¹⁰⁹ The terms of the trust provided that it could be revoked by a written instrument signed and acknowledged by the settlor and delivered to the trustees.¹¹⁰ At the settlor's death, each of the executed copies of the trust was found with the dispositive provisions of the trust torn away.¹¹¹ The court held that, even assuming that the act of tearing had been performed by the settlor, the trust was not revoked because the settlor had not complied with the method of revocation specified by the trust instrument.¹¹²

An Arizona court's decision rejecting a claim of revocation by physical act nicely illustrates the asymmetry between the law of wills and

Bank Nat'l Ass'n., 136 Cal. Rptr. 60, 62–63 (Cal. Ct. App. 1977); *Cole ex rel. Edgar C. Cole Revocable Tr. v. Cole*, 75 P.3d 1280, 1281–83 (Mont. 2003); *Lourdes College v. Bishop*, 703 N.E.2d 362, 367–70 (Ohio 1997); *In re Reid*, 46 P.3d 188, 190–91 (Okla. Civ. App. 2002); *Ex. rel. Estate of West*, 915 P.2d 504, 506 (Utah Ct. App. 1996); *In re Estate of Button*, 490 P.2d 731, 733–34 (Wash. 1971) (en banc); *In re Estate of Tosh*, 920 P.2d 1230, 1232–33 (Wash. Ct. App. 1996).

¹⁰⁷ See, e.g., *In re Last Will & Testament of Tamplin*, 48 P.3d 471, 473–74 (Alaska 2002); *Gall v. Union Nat'l Bank of Little Rock*, 159 S.W.2d 757, 761 (Ark. 1942); *In re Estate of Lindstrom*, 236 Cal. Rptr. 376, 381–85 (Cal. Ct. App. 1987); *Rosenauer v. Title Ins. & Tr. Co.*, 106 Cal. Rptr. 321, 322 (Cal. Ct. App. 1973); *Brown v. Int'l Tr. Co.*, 278 P.2d 581, 583 (Colo. 1954); *In re Estate of McCreath*, 240 P.3d 413, 418 (Colo. App. 2009); *Merchants Nat'l Bank of Aurora v. Weinold*, 160 N.E.2d 174, 177 (Ill. App. Ct. 1959); *In re Estate of Sanders*, 929 P.2d 153, 158–62 (Kan. 1996); *Gamage v. Liberty Nat'l Bank & Tr. Co.*, 598 S.W.2d 463, 464 (Ky. Ct. App. 1980); *Leahy v. Old Colony Tr. Co.*, 93 N.E.2d 238, 240 (Mass. 1950); *Conn. Gen. Life Ins. Co. v. First Nat'l Bank*, 262 N.W. 2d 403, 405 (Minn. 1977); *In re Estate of Kovalyshyn*, 343 A.2d 852, 856–57 (N.J. Prob. Div. 1975); *In re Estate of Henning*, 282 A.2d 786, 788 (N.J. Super. Ct. Ch. Div. 1971); *In re Berry's Tr.*, 194 N.Y.S.2d 223, 225 (Sup. Ct. Tompkins Co. 1959); *Chase Nat'l Bank v. Tomagno*, 14 N.Y.S. 759, 761 (Special Term New York Co. 1939); *Magoon v. Cleveland Tr. Co.*, 134 N.E.2d 879, 882 (Ohio Ct. App. 1956); *In re Shapley's Deed of Tr.*, 46 A.2d 227, 228 (Pa. 1946); *Union Tr. Co. v. Watson*, 68 A.2d 916, 918–19 (R.I. 1949); *Cohn v. Cent. Nat'l Bank of Richmond*, 60 S.E.2d 30, 31–34 (Va. 1950); *Funk v. Funk*, 598 P.2d 792, 795 (Wash. Ct. App. 1979); *One Valley Bank v. Hunt*, 516 S.E.2d 516, 520–21 (W. Va. 1999); *In re Estate of Lohrie*, 90 P.2d 1030, 1034 (Wyo. 1997).

¹⁰⁸ 138 S.W.3d 788 (Mo. Ct. App. 2004).

¹⁰⁹ See *id.* at 791.

¹¹⁰ See *id.* at 790.

¹¹¹ See *id.* at 792.

¹¹² See *id.* at 793–95.

the law of trusts. In *Matter of Estate and Trust of Pilafas*,¹¹³ the decedent had executed a pour-over will and a funded revocable living trust.¹¹⁴ The trust provided that it could be amended or revoked by a signed writing delivered to the trustee.¹¹⁵ The settlor retained the originals of both the will and the trust.¹¹⁶ At the settlor's death, one of his heirs, who was specifically excluded as a beneficiary of the trust, searched the settlor's home and was able to locate neither the will nor the trust.¹¹⁷ Applying the presumption that a will last known to be in the testator's possession that cannot be found at the testator's death has been destroyed with the intention to revoke, the court held that the will had been revoked.¹¹⁸ But because the trust could be revoked only in the manner specified in the trust instrument, and because no writing had been delivered to the trustee, the fact that the trust could not be found was of no legal consequence, and the trust remained in effect.¹¹⁹ Thus, identical facts produced divergent legal outcomes.

Sometimes a settlor reserves the power to revoke the trust, or the state's law treats trusts as presumptively revocable, but the trust instrument does not specify the manner in which it may be revoked. Under such circumstances, the First and Second Restatements provided that "the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust."¹²⁰ The relevant comment lists as possible such manifestations "communicating to the trustee his decision that the trust be revoked"; "the execution and delivery to the trustee of a new trust instrument declaring a trust different from that declared in the original trust instrument"; and communicating the decision to revoke "to the beneficiaries or to third parties."¹²¹ The comment goes on to caution that

¹¹³ 836 P.2d 420 (Ariz. Ct. App. 1992).

¹¹⁴ See *id.* at 421.

¹¹⁵ See *id.* at 421–22.

¹¹⁶ See *id.* at 422.

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 422–23.

¹¹⁹ See *id.* at 423–25.

¹²⁰ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i (AM. LAW INST. 1959); RESTATEMENT OF TRUSTS § 330 cmt. i (AM. LAW INST. 1935).

¹²¹ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i; RESTATEMENT OF TRUSTS § 330 cmt. i.

[o]rdinarily, however, the failure of the settlor to communicate his decision or to attempt to communicate it to the trustee indicates that his decision to revoke the trust is not definitive, and that he merely intends to revoke the trust at some time in the future; and in such a case there is no effective revocation of the trust until the settlor takes such further steps as indicate a definitive decision by him that the trust be revoked.¹²²

The First and Second Restatements thus provide for methods of revocation other than a signed writing delivered to the trustee during the lifetime of the settlor, but at the same time they anticipate that the revocation will be evidenced by communication to some third party.¹²³ Following this authority, courts have held that trusts may be revoked by oral statements made to others where the evidence of intent to revoke was "substantial,"¹²⁴ or where such evidence was "clear and convincing."¹²⁵ Under such circumstances, courts following the First and Second Restatements also have permitted revocation by will,¹²⁶ by the execution of a later trust,¹²⁷ and by withdrawing the corpus of the trust.¹²⁸

There are no reported cases, however, in which a court has held that such a trust was revoked by physical act. And though one Kansas judge has argued in a concurring opinion that a declaration of trust that cannot be found at death should be presumed to have been revoked by the settlor by physical act,¹²⁹ no reported majority opinion takes that position. Indeed, the trial court in *Bottorff* held that "the evidence presented was insufficient

¹²² RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i; RESTATEMENT OF TRUSTS § 330 cmt. i.

¹²³ RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i; RESTATEMENT OF TRUSTS § 330 cmt. i.

¹²⁴ *Poltz v. Tyree*, 705 P.2d 1229, 1231 (Wash. Ct. App. 1985).

¹²⁵ *Gabel v. Manetto*, 427 A.2d 71, 73 (N.J. Super. Ct. App. Div. 1981).

¹²⁶ See *Sanderson v. Aubrey*, 472 S.W.2d 286, 286-88 (Tex. App. 1971).

¹²⁷ See *Lambdin v. Dantzebecker*, 181 A. 353, 356-57 (Md. 1935); *In re Estate of Knezek*, 727 N.Y.S.2d 180, 181-82 (N.Y. 3d App. Div. 2001).

¹²⁸ See *Waldron v. Commerce Union Bank*, 577 S.W.2d 669, 675 (Tenn. Ct. App. 1978).

¹²⁹ See *In re Estate of Ingram*, 510 P.2d 597, 608 (Kan. 1973) (Schroeder, J., concurring) ("Revocation of a written trust declaration, as in the case of a will, may be accomplished by burning or destroying the instrument with the intention to revoke the instrument, unless otherwise indicated in the document creating the trust. Under the circumstances it must be presumed that [the settlor] revoked the trust . . .").

to support the conclusion that the distributive provisions were torn out by the settlor with the intent to revoke the trust”¹³⁰ The court based this conclusion on findings that persons other than the settlor had access to the trust instruments before and after his death, and that the settlor had never expressed any intention to change the distributive scheme set out in the trust instruments.¹³¹ Note again the difference here between the law of wills and the law of trusts. The court did not suggest, as would have been the case had the document in question been a will, that a presumption of revocation by physical act arose, and then was rebutted. It held instead that “the evidence adduced at trial is not sufficient to support a presumption that decedent tore the amended trust with intent to revoke.”¹³² In other words, the party alleging revocation had not sustained its burden of proof.

The Third Restatement modifies the law of revocation in three important ways. First, it does not require strict compliance with the method of revocation specified in the trust instrument.¹³³ Instead, substantial compliance with that method is sufficient.¹³⁴ So, for example,

if a settlor reserves the power to revoke the trust ‘only by a notice in writing delivered to the trustee,’ revocation requires the delivery of such a notice to the trustee. It is sufficient delivery, however, if the notice is mailed to the trustee by the settlor even though it is not received by the trustee until after the settlor’s death.¹³⁵

Second, substantial compliance is required only if the trust expressly makes the specified method the exclusive means of revocation.¹³⁶ Third, if the trust does not specify a method of revocation, or does not expressly make that method exclusive, then the trust may be revoked “in any way

¹³⁰ 138 S.W.3d 788, 789 (Mo. Ct. App. 2004).

¹³¹ See *id.* at 793–94 n.7.

¹³² *Id.* (quoting the decision of the trial court). One scholar has observed that extending the presumption of revocation to funded revocable trusts that cannot be found at death would be “problematic” because it “would raise questions such as when the trust was revoked and what effect its revocation had on transactions the trustee engaged in with respect to the trust property.” Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. PROB. & TR. J. 523, 540–41 (2008). While this is true of deeds of trust, it leaves unexplained why the presumption is not extended to revocable declarations of trust, which function like a will.

¹³³ See RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. i (AM. LAW INST. 2003).

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ See *id.*

that provides clear and convincing evidence of the settlor's intention to do so."¹³⁷ The Restatement lists three examples of conduct that would meet this standard. First, "the power can be exercised by a will or codicil that is executed after the creation of the trust and remains unrevoked at the settlor's death, and that refers expressly to the trust or the power or that otherwise clearly manifests the settlor-testator's intent to exercise the power."¹³⁸ Second, if "the settlor writes a letter to the trustee stating that the trust is revoked and mails the letter but dies before it is received by the trustee, the revocation is effective."¹³⁹ Third, "a power of revocation or amendment may be exercised by the settlor's execution and delivery to the trustee of a new trust instrument expressing the present intention to establish a trust different from that prescribed by the original terms of the trust."¹⁴⁰

The Third Restatement thus liberalizes the law of revocation by written instrument through its adoption of a substantial compliance standard and its provision for alternative means of revocation where the trust's terms do not expressly make a method of revocation exclusive.¹⁴¹ At the same time, however, the Third Restatement appears to diminish the possibilities for revocation of a trust by physical act. First, it does not list any physical act as an example of the kind of conduct that might satisfy the prescribed standard. Second, and relatedly, it raises the evidentiary standard from sufficient¹⁴² to "clear and convincing."¹⁴³ Of course, it is possible that a revocation by physical act could meet that standard if, for example, it had been witnessed by multiple competent and disinterested witnesses. But it would be the extraordinary unwitnessed physical act that could satisfy such a demanding threshold.¹⁴⁴ One would suspect, for

¹³⁷ *Id.* cmt. h.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Kirschbaum v. Wennett*, 806 N.E.2d 440, 445–46 (Mass. App. Ct. 2004) (invoking the Third Restatement's doctrine of substantial compliance in upholding amendment by writing); *In re Wendland-Reiner Tr.*, 677 N.W.2d 117, 121 (Neb. 2004). Compare *In re Donald Hyde Tr.*, 858 N.W.2d 333, 340–41 (S.D. 2014) (holding that there was not clear and convincing evidence that the settlor intended a codicil to modify a revocable trust).

¹⁴² See RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. i (AM. LAW INST. 1959); RESTATEMENT OF TRUSTS § 330 cmt. i (AM. LAW INST. 1935).

¹⁴³ RESTATEMENT (THIRD) OF TRUSTS § 63.

¹⁴⁴ See C. Shawn O'Donnell, Note, *Exploring the Tennessee Uniform Trust Code*, 38 U. MEM. L. R. 489, 511 (2008) ("It is questionable whether a settlor can accomplish

example, that cases in which the sole evidence of revocation is that the trust was last known to be in the settlor's possession and after her death could not be found would not meet the standard. Similarly, cases in which a trust instrument last seen in the settlor's custody is found after her death with a revocatory act performed upon it would appear to fall short. And because the Third Restatement places the burden of proof on the party claiming revocation, that party is not aided by a presumption of revocation in such cases. The Third Restatement thus would appear to widen the divergence between the law of wills and the law of trusts concerning revocation by physical act.

A recent South Dakota decision¹⁴⁵ expressly follows the Third Restatement on this issue, while decisions antedating the Third

revocation of a trust by physically destroying the trust instrument, which is an accepted form of revocation of a will. Physical destruction of the trust instrument coupled with clear and convincing evidence of the settlor's intent to revoke the trust should suffice. Nevertheless, the practice is questionable because revocation of a will cannot 'affect an existing fiduciary relationship,' whereas revocation of a trust 'terminate[s] an already existing fiduciary relationship' with the trustee." While it is true that revocation of a trust terminates an existing fiduciary relationship with respect to deeds of trust, this does not provide a ground for treating the physical act revocation of a revocable declaration of trust as "questionable."

¹⁴⁵ See *In re Donald Hyde Tr.*, 858 N.W.2d at 340–41. An earlier South Dakota statute suggested a similar approach. See S.D. CODIFIED LAWS § 55-3-6 (1998) ("If the declaration of trust reserves a power of revocation to the trustor, the trust may be revoked if the power is strictly pursued.").

Restatement from Hawaii,¹⁴⁶ Idaho,¹⁴⁷ Illinois,¹⁴⁸ and Rhode Island¹⁴⁹ have followed the First and Second Restatements. These provisions of the Restatements are themselves of diminishing significance, however, as all but seven of the states now have statutes prescribing permissible means of trust revocation.¹⁵⁰ Nevertheless, the substance of the Third Restatement's revocation provisions remains important, as those provisions replicate the relevant provisions of the widely adopted Uniform Trust Code (UTC).¹⁵¹

¹⁴⁶ See *Miller v. First Hawaiian Bank*, 604 P.2d 39, 42 n.5 (Haw. 1979) ("Where a settlor reserves a power to modify a trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.") (quoting RESTATEMENT (SECOND) OF TRUSTS § 331, cmt. D (1959); BOGERT, TRUSTS & TRUSTEES § 993 (2d ed. 1962)).

¹⁴⁷ See *Walter E. Wilhite Revocable Living Tr. v. N.W. Yearly Meeting Pension Fund*, 916 P.2d 1264, 1270 (Idaho 1996) ("When a settlor provides for the mechanism by which the power of revocation is to be exercised, these procedures must be followed for there to be a valid revocation.") (citing GEORGE C. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS § 148, at 535 (5th ed. 1973); RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j (AM. LAW INST. 1959)).

¹⁴⁸ See *Estate of Bantsolas v. Bantsolas*, 878 N.E.2d 1227, 1230 (Ill. App. Ct. 2007); see also *Parish v. Parish*, 193 N.E.2d 761, 766 (Ill. 1963) ("It is elementary that if the method of exercising a power of modification is described in the trust instrument, the power can be asserted only in that manner.") (citing BOGERT, TRUSTS & TRUSTEES § 993 (2d ed. 1962); RESTATEMENT OF THE LAW OF TRUSTS § 331 (AM. LAW INST. 1935)).

¹⁴⁹ See *Carrellas v. Carrellas*, No. N.C. 2002-0665, 2001 WL 34094252 at *2 (R.I. Super. Ct. May 21, 2001) (stating power to revoke can be exercised "only in the particular manner stated" in the trust). The law in Connecticut, Nevada, and Oklahoma is unclear.

¹⁵⁰ ALA. CODE § 19-3B-602; ALASKA STAT. § 13.36.340; ARIZ. REV. STAT. ANN. § 14-10-602; ARK. CODE ANN. § 28-73-602; CAL. PROB. CODE § 13401; COLO. REV. STAT. § 15-3-602; DEL. CODE ANN. tit. 12, § 3545; D.C. CODE § 19-1306.02; FLA. STAT. § 736.0602; GA. CODE ANN. § 53-12-40; IND. CODE § 30-4-3-1.5; IOWA CODE § 633A.3102; KAN. STAT. ANN. § 58a-602; KY. REV. STAT. ANN. § 386B.6-020; LA. STAT. ANN. § 9:2051; ME. STAT. tit. 18-B, § 602; MD. CODE ANN., EST. & TRUSTS, § 14.5-602; MASS. GEN. LAWS ch. 203E, § 602; MICH. COMP. LAWS § 700.7602; MINN. STAT. § 501C.0602; MISS. CODE ANN. § 91-8-602; MO. REV. STAT. § 456.6-602; MONT. CODE ANN. § 72-38-602; NEB. REV. STAT. § 30-3854; N.H. REV. STAT. ANN. § 564-B:6-602; N.J. STAT. ANN. § 3B:31-43; N.M. STAT. ANN. § 46A-6-602; N.Y. EST. POWERS & TRUSTS LAW § 7-1.17; N.C. GEN. STAT. § 36C-6-602; N.D. CENT. CODE § 59-14-02; OHIO REV. CODE ANN. § 5806.02; OR. REV. STAT. § 130.505; 20 PA. CONS. STAT. § 7752; S.C. CODE ANN. § 62-7-602; S.D. CODIFIED LAWS § 55-3-6; TENN. CODE ANN. § 35-15-602; TEX. PROP. CODE § 112.051; UTAH CODE ANN. § 75-7-605; VT. STAT. ANN. tit. 14A, § 602; VA. CODE ANN. § 64.2-751; WASH. REV. CODE § 11.103.030; W. VA. CODE § 44D-6-602; WIS. STAT. § 701.0602; WYO. STAT. ANN. § 4-10-602.

¹⁵¹ See RESTATEMENT (THIRD) OF TRUSTS § 63 cmts. h & i (AM. LAW INST. 2003) ("The positions here are also consistent with Uniform Trust Code section 602.").

Section 602 of the UTC provides:

(c) The settlor may revoke or amend a revocable trust:

- (1) by substantial compliance with a method provided in the terms of the trust; or
- (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
 - (A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
 - (B) any other method manifesting clear and convincing evidence of the settlor's intent.¹⁵²

The UTC thus contemplates the validity of revocation by physical act in two situations: first, where the settlor has provided for revocation by that method in the terms of the trust; and second, where the revocation is performed under conditions manifesting clear and convincing evidence of the settlor's intent to revoke. The official comment to section 602 observes the following:

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however.¹⁵³

A number of jurisdictions have adopted the UTC's revocation provision into their state codes, either verbatim¹⁵⁴ or in substance.¹⁵⁵ Yet

¹⁵² UNIF. TRUST CODE § 602(c) (amended 2018), 7D U.L.A. 218 (2018).

¹⁵³ *Id.* at cmt.

¹⁵⁴ See ARK. CODE ANN. § 28-73-602(c); D.C. CODE § 19-1306.02(c); FLA. STAT. § 736.0602(3); KAN. STAT. ANN. § 58a-602(c); KY. REV. STAT. ANN. § 386B.6-020(3); ME. STAT. tit. 18-B, § 602(3); MD. CODE ANN. EST. & TRUSTS § 14.5-602(c); N.M. STAT. ANN. § 46A-6-602(C); TENN. CODE ANN. § 35-15-602(c); UTAH CODE ANN. § 75-7-605(3).

¹⁵⁵ See MASS. GEN. LAWS ch. 203E, § 602(c); MO. REV. STAT. § 456.6-602(3) (requiring that a revoking subsequent will or codicil identify the trust being revoked or the

nearly as many states have either introduced or retained statutory provisions permitting revocation only by a subsequent writing, or adapted UTC section 602 in such a manner that a subsequent writing is required. The Georgia Code provides that "[a]ny revocation or modification of an express trust shall be in writing and signed by the settlor."¹⁵⁶ The New York Code requires a signed writing for the creation, modification, or revocation of any *inter vivos* trust.¹⁵⁷ The Texas Code requires that "[i]f the trust was created by a written instrument, a revocation, modification, or amendment of the trust must be in writing."¹⁵⁸ The Louisiana Code provides that a revocable trust may be revoked only by a testament or "by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the person who makes the [revocation] . . . or by the affidavit of one of the attesting witnesses."¹⁵⁹ The Delaware Code requires a writing to revoke a revocable living trust, providing the following:

terms being amended); N.H. REV. STAT. ANN. § 564-B:6-602(c); N.D. CENT. CODE § 59-14-02(3) (requiring that a revoking subsequent will or codicil expressly refer to the trust); OHIO REV. CODE ANN. § 5806.02(c) (permitting revocation by subsequent will or codicil only if the power to do so is reserved in the trust instrument); OR. REV. STAT. § 130.505(3) (excluding revocation by subsequent will or codicil); VT. STAT. ANN. tit. 14A, § 602(c); VA. CODE ANN. § 64.2-751(C); W. VA. CODE § 44D-6-602(3); WIS. STAT. § 701.0602(3); WYO. STAT. ANN. § 4-10-602(c).

¹⁵⁶ GA. CODE ANN. § 53-12-40(c).

¹⁵⁷ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.17 ("(a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument. (b) Any amendment or revocation authorized by the trust shall be in writing and executed by the person authorized to amend or revoke the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (a) of this section, and shall take effect as of the date of such execution."). N.Y. EST. POWERS & TRUSTS LAW § 7-1.16 similarly permits revocation of an *inter vivos* trust "by an express direction in the creator's will which specifically refers to such lifetime trust or a particular provision thereof."

¹⁵⁸ TEX. PROP. CODE § 112.051(c).

¹⁵⁹ LA. STAT. ANN. § 9:2051. "An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed." LA. CIV. CODE art. 1833.

the creation, modification or revocation of a trust whereby a person other than the trustor acquires or is divested of an interest in the trust the possession or enjoyment of which is contingent upon surviving the trustor shall be void unless such creation, modification or revocation be: (1) In a writing executed by the trustor . . . and witnessed in writing in the trustor's presence by at least 1 disinterested person or 2 credible persons, or (2) In a writing executed by a trustee who is a disinterested person without regard to whether any other person, including the trustor, has executed the writing.¹⁶⁰

Under the statutes of Alabama,¹⁶¹ Alaska,¹⁶² Arizona,¹⁶³ California,¹⁶⁴ Indiana,¹⁶⁵ Iowa,¹⁶⁶ Michigan,¹⁶⁷ Minnesota,¹⁶⁸ Mississippi,¹⁶⁹ Montana,¹⁷⁰ Nebraska,¹⁷¹ New Jersey,¹⁷² North Carolina,¹⁷³ Pennsylvania,¹⁷⁴ South Carolina,¹⁷⁵ and Washington,¹⁷⁶ revocation by physical act is permitted only if that method of revocation has been reserved in the terms of the trust instrument. If it has not, then a writing (typically signed) by the settlor is required.¹⁷⁷

Thus, twenty-one jurisdictions either make a subsequent writing the exclusive method by which a trust may be revoked, or else permit physical act revocation only in the highly unlikely event that the terms of the trust provide for that method of revocation. In nearly half of the states, therefore, a subsequent writing is effectively the only means by which a trust may be revoked.

Two features of the statutes requiring revocation by writing deserve special mention. First, most of them, including those of Arizona,¹⁷⁸

¹⁶⁰ DEL. CODE ANN. tit. 12, § 3545(a).

¹⁶¹ See ALA. CODE § 19-3B-602(c) (permitting revocation by "substantial compliance with a method provided in the terms of the trust," or, "if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive," by later will or codicil, or by "any other method manifesting clear and convincing evidence of the settlor's intent; provided, however, that a written revocable trust may only be amended and revoked by a later written instrument delivered to the trustee").

¹⁶² See ALASKA STAT. § 13.36.340(a) (permitting revocation by "(1) substantial compliance with a method of modification or revocation provided in the trust instrument; or (2) a writing, other than a will, signed by the settlor and delivered to the trustee during the lifetime of the settlor, except that, if the trust instrument expressly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked under this paragraph").

¹⁶³ See ARIZ. REV. STAT. ANN. § 14-10602(C) (authorizing revocation by (1) "substantial compliance with a method provided in the terms of the trust," or (2) "[i]f the terms of

the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by either: (a) A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust," or "(b) Any other writing signed by the settlor manifesting clear and convincing evidence of the settlor's intent").

¹⁶⁴ See CAL. PROB. CODE § 15401(a) (allowing revocation "by compliance with any method of revocation provided in the trust instrument," or by "a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation").

¹⁶⁵ See IND. CODE § 30-4-3-1.5(c) (permitting revocation by complying "with a method provided in the terms of the trust," or, "[i]f the terms of the trust do not provide a method or the terms of the trust provide a method that is not expressly made the exclusive method to revoke or amend the trust," by a later will or codicil or by "any other method that: (i) is in writing; and (ii) manifests clear and convincing evidence of the settlor's intent").

¹⁶⁶ See IOWA CODE § 633A.3102(3) (providing for revocation by "compliance with any method specified by the terms of the trust," or "[u]nless the terms of the trust expressly make the method specified exclusive, then either of the following: (1) By a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime. (2) By a later will or codicil expressly referring to the trust and which makes a devise of the property that would otherwise have passed by the terms of the trust").

¹⁶⁷ See MICH. COMP. LAWS § 700.7602(3) (permitting revocation by substantial compliance with any method specified in the trust, but where a written trust does not specify a method of revocation, or does not expressly make a specified method of revocation exclusive, then it may be revoked only by "another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust"). If an oral trust does not specify a method of revocation or does not expressly make a specified method of revocation exclusive, then it may be revoked by any method manifesting clear and convincing evidence of the settlor's intent to revoke. See *id.*

¹⁶⁸ See MINN. STAT. § 501C.0602(c) (permitting revocation by "substantial compliance with a method provided in the terms of the trust," or, "if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive . . . if the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust"). Oral trusts may be revoked "by any other method manifesting clear and convincing evidence of the settlor's intent." *Id.*

¹⁶⁹ See MISS. CODE ANN. § 91-8-602(c) (permitting revocation by "substantial compliance with a method provided in the terms of the trust," or, "[i]f the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive," by a later will or codicil or by "[a]ny other method manifesting clear and convincing evidence of the settlor's intent; however, a written revocable trust may only be amended and revoked by a later written instrument delivered to the trustee").

¹⁷⁰ See MONT. CODE ANN. § 72-38-602(3) (permitting revocation by "substantial compliance with a method provided in the terms of the trust," but "if the terms of the trust do not provide a method," then only "by a writing delivered to the trustee manifesting clear and convincing evidence of the settlor's intent").

¹⁷¹ See NEB. REV. STAT. § 30-3854(c) (permitting revocation "by substantial compliance with a method provided in the terms of the trust," but "if the terms of the trust do

not provide a method or the method provided in the terms is not expressly made exclusive,” the trust may be revoked only by a subsequent will or codicil, or by another “instrument evidencing an intent to amend or revoke the trust signed by the settlor, or in the settlor’s name by some other individual in the presence of and by the direction of the settlor”). The section further provides that “[t]he instrument must have an indication of the date of the writing or signing and, in the absence of such indication of the date, be the only such writing or contain no inconsistency with any other like writing or permit determination of such date of writing or signing from the content of such writing, from extrinsic circumstances, or from any other evidence.” *Id.*

¹⁷² See N.J. STAT. ANN. § 3B:31-43(c) (permitting revocation by “substantial compliance with a method provided in the terms of the trust,” or “if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive,” by a later will or codicil or by “any other writing manifesting clear and convincing evidence of the settlor’s intent”).

¹⁷³ See N.C. GEN. STAT. § 36C-6-602(c) (permitting revocation by “substantial compliance with a method provided in the terms of the trust; or [i]f the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive” the trust may be revoked only by a later will or codicil or by “[a]ny other written method delivered to the trustee manifesting clear and convincing evidence of the settlor’s intent”). A trust created orally may be revoked by oral statement to the trustee. *See id.*

¹⁷⁴ See 20 PA. CONS. STAT. § 7752(c) (permitting revocation by “substantial compliance with a method provided in the trust instrument or if the trust instrument does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by a later writing, other than a will or codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust instrument”).

¹⁷⁵ See S.C. CODE ANN. § 62-7-602(c) (permitting revocation “by substantial compliance with a method provided in the terms of the trust; or if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by: a later will or codicil that expressly refers to the trust, manifesting clear and convincing evidence of the settlor’s intent,” or by “any other written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor’s intent”). Orally created trusts may be revoked by oral statement to the trustee. *See id.*

¹⁷⁶ See WASH. REV. CODE § 11.103.030(3) (permitting revocation “by substantial compliance with a method provided in the terms of the trust; or [i]f the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive,” by a subsequent will or codicil or by “[a] written instrument signed by the trustor evidencing intent to revoke . . .”).

¹⁷⁷ Eleven of these states—Alabama, Arizona, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Pennsylvania, and South Carolina—have in other respects adopted the Uniform Trust Code. *See* DUKEMINIER & SITKOFF, WILLS, TRUSTS & ESTATES 390 (10th ed. 2017).

¹⁷⁸ *See* ARIZ. REV. STAT. ANN. § 14-10602(C).

Delaware,¹⁷⁹ Georgia,¹⁸⁰ Indiana,¹⁸¹ Louisiana,¹⁸² Michigan,¹⁸³ Minnesota,¹⁸⁴ Nebraska,¹⁸⁵ New Jersey,¹⁸⁶ New York,¹⁸⁷ Pennsylvania,¹⁸⁸ Texas,¹⁸⁹ and Washington,¹⁹⁰ do not require that the writing be delivered to the trustee. A trustee without notice of the revocation typically is protected from liability by a separate section providing that such a trustee is not liable to the settlor, the settlor's successors in interest, or the beneficiaries for distributions made and other actions taken on the assumption that the trust had not been revoked.¹⁹¹ The required writing may serve to notify a third party trustee, but such notice is not necessary in order for the revocation to be effective. Thus, the primary function of the writing is *evidentiary*—to prove that the trust was in fact revoked.

Second, it is undoubtedly true that those statutes that do require that the revocatory writing be delivered to the trustee address a legislative concern to provide notice of revocation to the fiduciary.¹⁹² But it is

¹⁷⁹ See DEL. CODE ANN. tit. 12, § 3545(a).

¹⁸⁰ See GA. CODE ANN. § 53-12-40(c).

¹⁸¹ See IND. CODE ANN. § 30-4-3-1.5(c).

¹⁸² See LA. STAT. ANN. § 9:2051.

¹⁸³ See MICH. COMP. LAWS § 700.7602(3).

¹⁸⁴ See MINN. STAT. § 501C.0602(c).

¹⁸⁵ See NEB. REV. STAT. § 30-3854(c).

¹⁸⁶ See N.J. STAT. ANN. § 3B:31-43(c).

¹⁸⁷ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.17.

¹⁸⁸ See PA. CONS. STAT. § 7752(c).

¹⁸⁹ See TEXAS PROP. CODE § 112.031(c).

¹⁹⁰ See WASH. REV. CODE § 11.103.030(3).

¹⁹¹ See, e.g., ARIZ. REV. STAT. ANN. § 14-10602(F); IND. CODE ANN. § 30-4-3-1.5(g); MICH. COMP. LAWS § 700.7602(7); MINN. STAT. § 501C.0602(g); NEB. REV. STAT. § 30-3854(g); N.J. STAT. ANN. § 3B:31-43(g); 20 PA. CONS. STAT. § 7752; WASH. REV. CODE § 11.103.030(7); see also LA. STAT. ANN. § 9:2051(A) (“[R]evocation is not effective as to a trustee until a copy of the authentic act or a copy of the acknowledged act is received by him.”); N.Y. EST. POWERS & TRUST LAW § 7-1.17(b) (“Written notice of such amendment or revocation shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment or revocation is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which same shall take effect.”).

¹⁹² See UNIF. TRUST CODE § 602 cmt. (amended 2018), 7D U.L.A. 219 (2018). (“There is also a need to protect trustees against the risk that they will misperceive the settlor’s intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlors intent. To protect trustees

important to note that the comparatively smaller number of statutes requiring delivery, which includes those of Alabama,¹⁹³ Alaska,¹⁹⁴ California,¹⁹⁵ Iowa,¹⁹⁶ Mississippi,¹⁹⁷ Montana,¹⁹⁸ North Carolina,¹⁹⁹ and South Carolina,²⁰⁰ do not confine their coverage to deeds of trust with third-party trustees. The delivery requirement applies also to declarations of trust where the revoking settlor also serves as the trustee.²⁰¹ Under such circumstances, providing notice by delivering a revocatory writing to the trustee would be redundant—the trustee doesn't need to be informed of the revocation because the trustee is the very person who executed it. Again, therefore, the sole function of the writing requirement in such a situation is evidentiary—to prove the fact of the revocation. As they do for all other will substitutes, these jurisdictions require that trust revocations be *evidenced* by a writing executed by the settlor.

In recognition of the role that revocable living trusts play as will substitutes, the UTC has imported a number of rules from the law of wills into the law of trusts. For example, section 603(b) treats revocable living trust beneficiaries like will beneficiaries by providing that they have no cognizable interests in the trust while it remains revocable.²⁰² Section 601 unifies the capacity standards for wills and revocable living trusts.²⁰³ Section 604(a)(1) prescribes the same three-year period of limitations for

against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document.”).

¹⁹³ See ALA. CODE § 19-38-602(c).

¹⁹⁴ See ALASKA STAT. § 13-36-340(a).

¹⁹⁵ See CAL. PROB. CODE § 15401(a).

¹⁹⁶ See IOWA CODE § 633A.3012(3).

¹⁹⁷ See MISS. CODE ANN. § 91-8-602(c).

¹⁹⁸ See MONT. CODE ANN. § 72-38-602(3).

¹⁹⁹ See N.C. GEN. STAT. § 36C-6-602(c).

²⁰⁰ See S.C. CODE ANN. § 62-7-602(c).

²⁰¹ See RESTATEMENT (THIRD) OF TRUSTS cmt. a (AM. LAW INST. 2003).

²⁰² See UNIF. TRUST CODE § 603(b) (amended 2018), 7D U.L.A. 227 (2018) (“To the extent a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.”). Some states that have not adopted the UTC provision have reached the same result through decisional law. See, e.g., *Hoelscher v. Sandage*, 462 N.W.2d 289, 291 (Iowa Ct. App. 1990); *In re Malasky*, 736 N.Y.S.2d 151, 152 (N.Y. App. Div. 2002); *Moon v. Lesikar*, 230 S.W.3d 800, 804 (Tex. App. 2007).

²⁰³ See UNIF. TRUST CODE § 601, 7D U.L.A. 216 (“The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”).

contesting a revocable living trust as UPC section 3-108(a) does for wills.²⁰⁴ UTC section 505(a) brings the rights of creditors of deceased settlors of revocable living trusts into harmony with the rights of estate creditors,²⁰⁵ as does UPC section 6-102.²⁰⁶ Similarly, UPC section 2-804 revokes dispositions and fiduciary appointments in favor of an ex-spouse both for wills and for revocable living trusts,²⁰⁷ and section 2-803 disqualifies any beneficiary of a will or revocable living trust who feloniously and intentionally kills the testator or settlor.²⁰⁸ Perhaps most controversially, UPC section 2-707 extends antilapse statute treatment to interests in revocable living trusts.²⁰⁹ In all of these respects, the law of wills and the law of revocable living trusts is more similar today than it ever has been before. Particularly as enacted by state legislatures, by contrast, the law of revocation has grown only more dissimilar.

VI. CONCLUSION

In sum, neither contracts with POD designations, nor brokerage accounts with TOD designations, nor beneficiary deeds, nor life insurance policies, nor annuity contracts may be revoked by physical act. In nearly half of the states, revocable trusts may not be revoked by physical act, and there are no reported decisions in which a court has held that a trust has been so revoked. The law of nonprobate transfers thus has largely rejected the longstanding testamentary law authorizing revocation by physical act. In an era in which the law of wills and the law of will substitutes is becoming increasingly harmonized, the option to revoke one's will by physical act has become increasingly anomalous. The outstanding question is whether, and if so, to what extent and in what form, that anomaly is worthy of preservation.

²⁰⁴ See *id.* at § 604(a)(1); UNIF. PROBATE CODE § 3-108(a) (amended 2010), 8 pt. 2 U.L.A. 40 (2013).

²⁰⁵ See UNIF. TRUST CODE § 505(a), 7D U.L.A. 201 (permitting estate creditors to reach the assets of decedent's revocable living trust if probate assets are insufficient to satisfy claims).

²⁰⁶ See UNIF. PROBATE CODE § 6-102, 8 pt. 2 U.L.A. 357-61 (permitting estate creditors to reach the assets of decedent's revocable living trust if probate assets are insufficient to satisfy claims).

²⁰⁷ See UNIF. PROBATE CODE § 2-804, 8 pt. 1 U.L.A. 330-35.

²⁰⁸ See UNIF. PROBATE CODE § 2-803, 8 pt. 1 U.L.A. 323-30.

²⁰⁹ See UNIF. PROBATE CODE § 2-707, 8 pt. 1 U.L.A. 299-315.