CHICAGO ESTATE PLANNING COUNCIL

Post-Mortem Administration and Planning:

The Relevance of Probate in a Revocable Trust World

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BLEAK HOUSE

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it.

Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. There are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be--as are they not?—ranged in a line in a long matted well (but you might look in vain for Truth at the bottom of it) between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them.

. . . which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give -- who does not often give -- the warning, "Suffer any wrong that can be done you rather than come here!"

-Charles Dickens

CEPC

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I. History of Probate

A. Probate Defined

1. "The action or process of proving before a competent judicial authority that a document offered for official recognition and registration as the last will and testament of a deceased person is genuine."[1]

2. "The act of proving that an instrument purporting to be a will was signed and otherwise executed in accordance with legal requirements, and of determining its validity thereby…also, the combined result of all the procedural acts necessary to validate a will."[2]

3. "Judicial process whereby the will of a deceased person is presented to a court and an Executor or Administrator is appointed to carry out the will's instructions."[3]

B. Formal rules of descent and inheritance have existed at least since King Hammurabi of Babylon inscribed his code of law in stone. The Code of Hammurabi provided rules such as: "If a man take a wife and she bear him children and that woman die, her father may not lay claim to her dowry. Her dowry belongs to her children."[4] It also contemplated that real property could be devised by will: "If a man give to his wife field, garden, house or goods, and he deliver to her a sealed deed, after (the death of) her husband, her children cannot make claim against her. The mother after her (death) may will to her child whom she loves, but to a brother she may not."[5]

C. The ancient Romans adhered to a system of universal succession – where the heirs and beneficiaries of an estate would assume a decedent's assets and liabilities, such that the rights and duties of the decedent merged completely with the heirs'. This meant that an heir could inherit a loss, or that a healthy estate could become immediately insolvent upon merging with that of a bankrupt heir. The only way to avoid such a result would be for the heir to renounce the inheritance entirely.[6]

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[1] "probate." Merriam-Webster.com. Merriam-Webster, 2017. Web. January 10, 2017.
[2] Gifis, Steven H. *Barron's Law Dictionary, Third Edition*, Barron's Education Series, Inc., 1991.
[3] Downes, John, and Jordan Elliot Goodman. *Dictionary of Finance and Investment Terms, Second Edition*, Barron's Education Series, Inc., 1987
[4] Hammurabi, The Code of Hammurabi King of Babylon [-2250] at § 162, by Robert Francis Harper (Chicago: University of Chicago Press, 1904).
[5] *Id.* at § 150.
[6] Glendon, Mary Ann, et al. "Roman Law." Encyclopedia Brittanica (Dec. 2011).

D. Intestate succession in ancient Rome favored the decedent's family – children under his power (*potestas*) and/or a wife under his power (*manus*) and, if none, then the nearest relatives in the male line of descent. By 530 A.D., under Justinian the Great, the rules of intestacy had evolved to favor a decedent's descendants, then parents, siblings, half-blood siblings and nearest relatives in the female line of descent, in that order.

E. Roman citizens were required to leave a certain share of property to their children, but they could also make testaments, appointing one or more heirs to succeed to the rest of their estate. These testaments took effect immediately and were irrevocable. Initially, they were nuncupative, declared publicly before witnesses. Later, a formal writing signed by the testator and seven witnesses was required.

F. Prior to 1066 A.D., there is evidence that wills were used in England to devise both real and personal property at death.[7] These wills typically involved large gifts to bishops and other men of the church, for the sake of the testator's soul. The following excerpts are taken from early Anglo-Saxon wills:

1. Will of Wulfric (died circa 1004 A.D.): *And I grant to Archbishop Ælfric the land at Dumbleton along with the other, for my soul, in the hope that he may be a better friend and supporter of the monastery which I have founded… I grant Ufegeat the estate at Norton in the hope that he may be a better friend and supporter of the monastery. And I grant to my poor daughter the estate at Elford and at Oakley, with all that now belongs there, as long as her life lasts, and after her death, the land is to go to the monastery at Burton.*[8]

2. Will of Wynflæd (circa 950 A.D.): *She bequeaths to the church her offering…and to the refectory two silver cups for the community; and as a gift for the good of her soul a mancus of gold to every servant of God…And she bequeaths to her daughter Æthelflæd her engraved bracelet and her brooch, and the estate at Ebbesborne and the title-deed as a perpetual inheritance to dispose of as she pleases; and she grants to her the mend and the stock and all that is on the estate except what shall be given from it both in men and stock for the sake of her soul…And to Ælfwold her two buffalo-horns and a horse and her red tent. And she bequeaths to Eadmær a cup with a lid, and another to Æthelflæd, and prays that between them they will furnish two fair goblets to the refectory for her sake. And she bequeaths to Æthelflæd, daughter of Ealhhelm, Ælfhere's younger daughter, her double badger-skin gown, and another of linen or else some linen cloth...Then she makes a gift to Æthelflæd of everything which is unbequeathed, books and such small things, and she trusts that she will be mindful of her soul…and also the homestead if the king grant it to her as King Edward granted it to Brihtwyn her mother.*[9]

[7] *See generally.*, Whitelock, Dorothy. "Anglo Saxon Wills."
[8] *Id.* at 47.
[9] *Id.* at 11-15.

3. *In Terrorem* Clause from the Will of WulfGyth (Circa 1046 A.D.) - And he who shall detract from my will which I have now declared in the witness of God, may he be deprived of joy on this earth, and 'may the Almighty Lord who created and made all creatures exclude him from the fellowship of all saints on the Day of Judgment, and may he be delivered into the abyss of hell to Satan the devil and all his accursed companions and there suffer with God's adversaries, without end, and never trouble my heirs. Of this King Edward and many others are witnesses.

I. After the Norman Conquest, under the feudal system there were three estates below the King: (1) the church, (2) the nobility (large landowners and knights), and (3) the peasantry. The power to devise complete legal title in land was reserved to the King alone, and each estate received limited rights in land from him.

J. Peasants, for example, received the right to use land in "socage tenure" only – paying for their land in rent or crops. They could not devise their land by will, as socage tenure passed automatically from one generation to the next according to set rules of intestacy.[10] These rules were notoriously unfair – allowing for the widow to take only a one-third life estate (called a "dower"), and awarding the remainder of the estate to the decedent's eldest male heir ("primogeniture"). Additionally, although debts did not typically survive the death of the borrower or the lender, the heir succeeding to the decedent's estate was required to pay a tax ("feudal incident") on the inheritance.[11]

K. The concept of a trust developed in the 1300s, under the reign of King Edward III, as a way to transfer real property interests and to defeat the harsh rules of dower and primogeniture. Under the so-called "feoffment to uses" the owner of land (feoffer) would convey it to a friend or relative (feoffees to uses) with instructions to hold the land for his benefit during his lifetime, then for his wife's benefit for life and then, ultimately, to give the land over to others, *e.g.* to his children in equal shares.

L. It was imperative that a feoffer choose a feoffee of good conscience and prudence because this system of feoffment to uses, while widespread, existed without any formal approval or protection at law. The common law courts would not decide ambiguous directives, nor would they step in to enjoin a rogue feoffee who disregarded his feoffers wishes and used the land for his own benefit instead. Where the common law failed, however, it appears that canon law may have filled the gaps, with some protection available through the church.

M. A primitive "probate" system for the distribution of personal property at death had started to take shape in the ecclesiastical courts.[12] This system provided for the appointment of a personal representative to authenticate testamentary documents for

[10]Haertle, Eugene M. "The History of the Probate Court." 45 Marquette L. Rev. 546 (1962).
[11] Langbein, John H. "Why Did Trust Law Become Statute Law in the United States?" 58 Ala. L. Rev. 1069, 1071-72 (2007).
[12] Jurisdiction over the distribution of a decedent's personal property was given to the church in 1215 in the Magna Charta of John. At the time, religious beliefs required a person to donate at least part of his property to the Church at his death, for the good of his soul. Thus, the Church had a definite interest in overseeing these matters. Haertle, Eugene M. "The History of Probate Court." 45 Marquette L. Rev. 546 (1962).

the court. This process came to be known as "probating" the will, derived from the Latin *probatum* "a thing proved," or *probare* "to try, test, prove."[13] After probating the will and paying a bond, the personal representative would step into the decedent's shoes to martial and distribute the decedent's personal property, returning to the court once finished to account for the actions taken.[14] If there was no will, then the bishop would take charge of the decedent's property himself and distribute it.

N. The acts of the ecclesiastical courts were controlled by a Registrar, and recorded by a Scribe. The first recorded "Probate Acts" thus were not statutes, but the records written in the Ex Officio Act books detailing the names of decedents, executors or administrators, notices of grants of execution upon inventories, values of goods, fees charged, and any claims made against the goods of the deceased.[15]

O. From the cases recorded in the Canterbury Act books, it appears that some ecclesiastical courts may have actually enforced feoffments to uses as well. For example, the Canterbury records reflect that the Canterbury court excommunicated the feoffees to uses of a man named John Roger, after the feoffees confessed to violating Roger's directions to convey his land, windmill and grange to his widow.[16]

P. It is unclear whether this practice was widespread or, perhaps, exclusive to the county of Kent.[17] Even in the Canterbury Act books, there is no evidence of whether the courts could award money damages to the feoffer's heirs or order other remedies against defaulting feoffees beyond "canonical penalties" (*i.e.* excommunication) and specific performance (which would be possible only where the defaulting feoffees were still in possession of the land).[18] Even with specific performance, however, the ecclesiastical courts only had jurisdiction *in personam* over the feoffees and not over the freehold land itself.

Q. In 1540, the English Parliament enacted the Statute of Wills, allowing for land held in fee simple to be devised freely by will. The Statute of Frauds, enacted in 1677, codified familiar formalities required for the execution of wills: that the devise be in writing, signed by the testator (or by someone else in his presence and at his direction) and in the presence of credible witnesses.

R. The ecclesiastical courts retained jurisdiction over the probating of wills and appointing of executors or administrators into the early 1800s, but the authority to construe wills and oversee the administration of decedents' estates had long since

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[13] www.etymonline.com/index.php?term=probate

[14] Horton, David. "In Partial Defense of Probate: Evidence from Alameda County, California." *The Georgetown Law Journal, Volume 103, Issue 3*, March 2015, p. 614.

[15] Haertle, Eugene M. "The History of Probate Court." 45 Marquette L. Rev. 546, 549 (1962).

[16] Helmholz, R. H. "The Early Enforcement of Uses." 79 *Columbia L. Rev.* 1503, 1505 (Dec. 1979).

[17] *See* Helmholz, R. H. "The Early Enforcement of Uses." 79 *Columbia L. Rev.* 1503, 1509, 1510 (Dec. 1979). Helmholz explains that, unlike the rest of England where the system of primogeniture predominated, the customary system of inheritance in Kent was gavelkind – where all male children shared equally in a decedent's lands. Thus, he surmises "[i]t may be that the uncertainty of gavelkind (*i.e.* which child would get what land) made uses that allowed the devise of land, and disputes over them, especially common in Kent."

[18] Helmholz, R. H. "The Early Enforcement of Uses." 79 *Columbia L. Rev.* 1503, 1509 (Dec. 1979).

passed to the chancery courts. By enactment of the Court of Probate Act in 1857, jurisdiction over probate matters was taken from the ecclesiastical courts completely, leaving them only to decide matters pertaining to the church itself.

S. Meanwhile, the settlers who established the American colonies brought English common law with them, as modified by the Statute of Wills and Statute of Frauds. The transition was not necessarily smooth. Among the first settlers, there were no practicing lawyers and, for some time, there were also no independent courts either. After bad experiences with the law and the courts in England, they came to America wanting to be left alone and "avoided as much as possible all connection with the law and all persons seeking to pursue the practice of the profession of the law."[19] Prior to the Revolutionary War, the probate and administration of estates of deceased colonists were sometimes proved in the Probate Courts of London or Scotland.

T. When the first county courts in the colonies were established in 1639, they were presided over by clergymen, businessmen, doctors and men trained in various professions other than the law. Eventually, with the appearance of a land-holding aristocracy and wealthy class of businessmen, (some) began to see the need for a competent and stable judicial system.

U. When probate matters were eventually relegated to the courts – sometimes designated probate courts, other times orphans' courts, prerogative courts or surrogates' court – there was no uniformity among them. They differed from one another in more than just name, with regional differences in process, procedure, legal standards and types of practitioners. Substantive laws also varied by jurisdiction with regard to forced spousal shares, rights of women to inherit or devise real property and to do so without their husband's consent, the right to disinherit a child without good cause, and the validity of nuncupative and holographic wills. There were also disparities regarding whether a slave owner could grant freedom to his slaves in his will or bequeath personal property to a slave.

V. Matters dealt with in probate courts were generally not adversarial, especially given that in appearing before the court, the parties were often somber and hoping only to move on quickly and in a manner that honored and respected the wishes of the decedent or incompetent ward. Most matters did not require formal hearings, trials, or strict adherence to rules of civil procedure.

W. But with the rising complexity of estates, American probate courts began requiring that personal representatives exhaust a list of formulaic cautionary procedures beginning with formal appointment, notice to beneficiaries and creditors (both known and unknown), accountings and appraisals, and mandatory waiting periods to allow creditors to come forward before the representative could distribute a decedent's estate. Although intended to protect estates and their beneficiaries, these formal procedures could be time consuming and expensive, sometimes inordinately so in the case of a small estate.

[19] Limbaugh, Rush H. "Sources and Development of Probate Law." 1956 Wash. U. L. Q. 419, 431-32 (1956).

II. History of Revocable Living Trusts: How and when did we become a "Revocable Trust World?"

A. British Common Law: From the Crusades to Colonization

1. Revocable *inter vivos* or living trusts date back to the Crusades.[20] The concept developed when land was the primary form of wealth. By placing title to land in an *inter vivos* trust, wealthy landowners could convey a beneficial interest in property outside of the prevalent system of primogeniture (testamentary distribution that favored the first-born son). Further, since the transfer to the trust occurred during the settlor's life, the settlor would die without owning the land, which meant that the settlor's death did not trigger a transfer that would be subject to primogeniture or feudal death taxes.[21]

2. Because family members would remain on the land and continue to manage it, the trustee's only real function was to transfer legal title upon the settlor's death in accordance with the terms of the trust.[22] When landed nobleman left England to fight in the Crusades, they deeded their vast estates to trusted individuals to manage them in their absence.[23]

3. As these surviving Crusaders returned to England to reclaim their property, many found their "trusted" caretakers unwilling to relinquish it. With no precedent for divided ownership of property at Common Law, caretakers, who held legal title to the property, usually prevailed in court against the returning Crusaders. Defeated landowners appealed to the King who directed their grievances to the Lord Chancellor.[24]

4. The Lord Chancellor established the Court of Chancery to hear these cases and decide them by fairness or "equity," and it was the Court of Chancery that first established the concept of divided ownership of property between "legal" title and "beneficial" or "equitable" title.[25]

5. Over time, *inter vivos* trusts evolved from tools used to protect nobility from losing their estates to caretakers into tools used to avoid losing their estates to feudal taxation or confiscation by the Crown. The noble beneficiaries argued,

[20] Period between 1095, A.D. and 1291, A.D. when Christian armies from Western Europe sought to conquer Muslim forces in Middle East. History.com/topics/crusades. A&E Networks Television, LLC, Web. Jan. 20, 2017
[21] Feder, David and Robert Sitkoff. "Revocable Trusts And Incapacity Planning: More Than Just A Will Substitute". Elder Law Journal 24.1 (2016) at p.6.
[22] *Id.*
[23] Wikipedia contributors. "History of Equity and Trusts." *Wikipedia, The Free Encyclopedia.* Wikipedia, The Free Encyclopedia, Web. Jan. 22, 2017.
[24] *Id.*
[25] *Id.*

often successfully, that as "beneficiaries," they did not actually own the property and therefore could not be taxed on it at death.[26]

6. When King Henry VIII of England took the throne in 1509, he realized that if legal title to property was transferred to a group of trustees, as was often the case, and tax was only assessed upon the transfer of legal title, these trusts effectively deprived the Crown of revenue because not all of the trustees would die at the same time and additional trustees could be appointed to replace deceased trustees without the need for a transfer of legal title.[27]

7. King Henry VIII responded with the creation of the Statute of Uses which sought to equate the "use" of land by beneficiaries with "legal title," thereby rendering the transfer of beneficial use or ownership as equivalent to a transfer of legal title for tax purposes. King Henry VIII originally brought the statute before parliament in 1529, but could not get it passed in the House of Commons and the House of Lords until 1536, possibly because so many members of parliament also happened to own land.[28]

8. Not long after the death of King Henry VIII in 1547, the Chancery Court ruled that the Statute of Uses did not apply to land that was leased and since most land was leased, people again began to use trusts to transfer beneficial use of land to family members without being subject to tax.[29]

9. As the British Empire expanded to the New World and began to exploit new sources of revenue for the Crown, the Crown became less dependent on feudal taxes and therefore more tolerant of the use of trusts designed to avoid such taxes.[30]

10. As Kings and Queens and Lord Chancellors came and went throughout the 17th and 18th centuries, equitable rules and the laws of trusts became increasingly unpredictable such that in 1765, Professor William Blackstone began to argue that the court of equity should no longer be separated from the common law courts of England.[31]

11. The immediate impact of Blackstone's argument (and his influence) was that Chancellors sought standardization and consistency of equitable principles in the Court of Chancery. Their efforts, however, had the opposite effect because the entire premise of the Court of Chancery was that its equitable rules were designed to be less rigid than the strict laws of property at Common Law. As result, efforts

[26] Wikipedia contributors. "English Trust Law." Wikipedia, The Free Encyclopedia. Wikipedia, The Free Encyclopedia, Web. Jan. 22, 2017.
[27] *Id.*
[28] Wikipedia contributors. "Statute of Uses." Wikipedia, The Free Encyclopedia. Wikipedia, The Free Encyclopedia, Web. Jan. 22, 2017
[29] Wikipedia contributors. "English Trust Law." Wikipedia, The Free Encyclopedia. Wikipedia, The Free Encyclopedia, Web. Jan. 22, 2017
[30] *Id.*
[31] *Id.*

to bring consistency to equitable rules led to cumbersome and arcane proceedings that tied up matters in the Court of Chancery for years.[32]

12. In 1853, Charles Dickens published the novel, "Bleak House," which chronicled the fictional case of *Jarndyce v Jarndyce*, a Chancery Court matter about wills that nobody understood and that dragged on for years. The *Jarndyce* case was fiction, but it was inspired by real Chancery Court cases, some of which took more than 15 years to resolve.[33]

13. The popularity of "Bleak House," arguably led to passage of the Supreme Court of Judicature Act of 1873, which merged the courts of Equity and Common Law. Equitable principles still prevailed over Common Law rules in the case of a conflict, but the separate identity of courts sitting in equity had ended. However, the concept of equitable trusts survived the merger because trust law principles, as then understood, were codified in parts of the British Commonwealth in an effort to ease the burden of administration. [34]

B. Early Use of Revocable *Inter Vivos* Trusts in the Colonies and in the United States

1. The first known use of a revocable *inter vivos* trust in American colonies pre-dated U.S. independence from England.[35]

2. Francis Fauquier, a British nobleman, a colonial Lieutenant Governor, and an official representative of the British Crown in the Colony of Virginia, feared that property he acquired for himself during his time in Virginia could be subject to confiscation by the British Crown.

3. In 1765, Fauquier hired a Virginia lawyer, Patrick Henry, to create what became the first revocable *inter vivos* trust in the Colonies. The primary purpose of Fauquier's trust was to prevent the British Crown from confiscating his property in Colonial Virginia.

4. Between independence from the British Crown and the beginning of the 20th century, the use of revocable *inter vivos* trusts in the United States, as it had been the case in the colonial era and in England, was largely relegated to holding title to land in which the settlor and his family retained beneficial ownership during life. Further, the settlor and the family typically remained on the land so as had been the case in England, the trustee's most important function was to transfer legal title upon the settlor's death.[36] As the industrial revolution started to take hold in the late 1800's and early 1900's, the United States began its transition from an agrarian economy fueled by land to an industrial economy fueled by hard

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Marsocci, Kathy. "A Quick History of Revocable Living Trusts." Living Trust Law Firm. The Law Offices of Jeffrey G. Marsocci, PLLC, 14 Apr. 2010. Web. 20 Feb. 2017.
[36] Feder and Sitkoff at p. 4.

assets and working capital. This in turn led to a migration of American people from rural, agricultural communities to urban industrial centers, which was accompanied by a migration of American wealth accumulation from land to liquid financial assets.

C. Revocable *Inter Vivos* Trusts as "Will Substitutes" in the United States – 1940 - 1965

1. Will Substitutes - The concept of Revocable *Inter Vivos* Trusts as "will substitutes" began showing up with some frequency in U.S. case law in the in the 1930's. Initially, many courts refused to enforce trusts as will substitutes because they did not satisfy the formalities necessary to qualify as valid "testamentary" transfers.[37]

2. Lifetime Transfers - Courts that allowed revocable *inter vivos* trusts to serve as will substitutes opined that beneficiaries acquired a *"present interest"* upon the creation of the trust. This meant that the transfer took place when the trust was created rather than at death, thereby negating a need for testamentary formalities.[38] The concept of a lifetime transfer of a "present interest" is what keeps the assets out of the probate estate, but as discussed more below, it is this same concept that has the potential to confer standing upon contingent remainder beneficiaries to question the terms of the trust and/or challenge the actions of the trustee during the settlor's lifetime.

3. Shift to Fiduciary Management of Liquid Financial Assets – As the accumulation of wealth in the twentieth century evolved from land ownership to investments in liquid financial assets, settlors began looking to trusts as vehicles for the professional management of liquid financial assets across multiple generations. This use of trusts required trustees to be granted broad transactional and administrative powers that went far beyond the maintenance, upkeep and preservation of real property.[39]

4. Opportunity for Banks and Corporate Fiduciaries – When banks and corporate trustees served as executor or personal representative to handle death-related administration, their role did not necessarily require ongoing fiduciary management of assets across multiple generations and they were typically limited to charging a one-time fee for death-related administration. However, as the role of the trustee began to include the fiduciary management of liquid financial assets, banks and corporate fiduciaries realized that the recognition by courts of revocable trusts as will substitutes created an opportunity for them. In addition to death-related administration, banks and financial services firms expanded their personal trust services to meet the increasing demand for fiduciary management of real estate and liquid financial assets across multiple generations, which in turn

[37] Horton at p. 620.
[38] *Id.*
[39] Feder and Sitkoff at p. 6.

led to more annual fees for these services for as long as they continued to manage the trust assets.[40]

5. Growth of Personal Trust Asset Management by Corporate Trustees. During this period of time, increased use of revocable *inter vivos* trusts, particularly among wealthier families, resulted in an increase in the value of personal trust assets managed by corporate fiduciaries from $21 Billion in 1940 to $144 Billion in 1963.[41]

6. Revocable Trusts more common among the wealthy until 1965. For wealthy individuals and families, the case law allowing *inter vivos* revocable trusts to serve as will substitutes provided an effective tool for keeping certain information about their fortunes private. Further, use of a corporate fiduciary for this purpose was a luxury that people of modest means may not have been able to afford.

D. Revocable *Inter Vivos* Trusts as Estate Planning Tools for the Masses – 1965-present – The Birth of the *Dacey* Trust

1. In 1965, Norman Dacey self- published his book "How to Avoid Probate!" It was a scathing critique in which he argued "that probate serves no purpose, takes too long, and permits lawyers and personal representatives to enrich themselves at the expense of decedents and their loved ones."[42] Dacey, who was a mutual fund salesman and not a lawyer, advocated using trusts to avoid probate, and would advise his clients on how to do so without the assistance of legal counsel. His book, which he initially self-published, was written largely in response to charges brought against Dacey by the Connecticut Bar Association for unauthorized practice of law. Dacey's book went on to sell 1.5 million copies,[43] on its way to edging out Masters and Johnson's *Human Sexual Response,* to become the best-selling non-fiction book in the United States in 1966.[44] This led more than one commentator to assert that in 1966 at least, probate avoidance was more popular than sex.

2. Quoting Professor Richard V. Wellman, Dacey argued that "probate…is perhaps the most hated and feared of all American legal institutions."[45] The popularity of Dacey's book no doubt fueled the "scores of articles in newspapers and law journals that echoed Dacey's criticisms."[46] Critics of the probate system find no shortage of flaws and they argue that it is designed for both personal representatives and their attorneys to collect fees for what often amounts to quite simple and routine work. Additionally, probate records are public, meaning that intimate family affairs are exposed to anyone and everyone willing to troll the court records. They further argue that the wheels of justice often turn slowly in

[40] Horton at p. 621
[41] *Id.*
[42] *Id.*
[43] *Id.* at p. 608
[44] *Id.* at p. 621
[45] Dacey, Norman F., How to Avoid Probate!, 8th Edition, Collier Books 1990, p. 20.
[46] Horton at p. 608.

probate and that decedents' estates are stuck in the purgatory of probate court during the mandatory claims period, but can remain there for decades thereafter, especially if the personal representative is required to open ancillary probate estates to deal with real property in other jurisdictions.[47]

3. Dacey's book was a Do-It-Yourself manual that was available only in paperback, was printed on oversize pages laid out in columns like a magazine, and the last 200 pages consisted of fill-in-the-blank forms and templates that readers could use to create their own trust documents.[48]

4. Today, for those willing to give it a chance, probate can be far less oppressive than the dysfunctional purgatory described in Dacey's account. Many states have enacted streamlined procedures for small estates, family settlement agreements, common form probate and unsupervised or independent estate administration.

5. Dacey's book began as a rant against what he viewed as a corrupt system of collusion between greedy lawyers and crooked/exploitive/unscrupulous/unethical courts that preyed on grieving families for generations and prevented people like Dacey from sharing the secrets of probate avoidance. The assumption that probate avoidance was the cure for every possible evil associated with death-related administration was baked into Dacey's thesis as if it were an irrefutable fact that probate is the cause of everything that can possibly go wrong in a family after someone dies.[49]

6. Notwithstanding the many practical reasons for most clients to create and use revocable living trusts as an integral part of their estate plans, avoiding probate is consistently cited as the primary reason for the use of revocable living trusts. A simple Google search for the "Top 10 Reasons for Revocable Living Trusts" produced about 275,000 hits. Of the 10 websites that showed up on the first page of the search results, 7 of them cited probate avoidance as the number one reason why clients need to create revocable trusts.

7. To be clear, revocable trusts and other methods of transferring assets at death outside of the probate system (e.g. joint tenancy; transferrable-on-death accounts; and beneficiary designations) are important tools that help streamline the process of death-related administration. However, one of the worst consequences of revocable trusts and other non-probate methods of transferring assets at death is that they tempt "people into the mistake of thinking that avoiding probate is the equivalent of estate planning."[50]

[47] Dacey at pp. 20-22
[48] Horton at p. 621
[49] *See* Dacey at pp. 23-37.
[50] Langbein, John. "The Twentieth-Century Revolution In Family Wealth Transmission". Occasional Papers from the University of Chicago Law School 25 (1988): 29. Web. 16 Mar. 2017.

III. Why We Recommend Revocable Living Trusts

A. Consolidation of Assets and Centralized Management During Life – The evolution of wealth accumulation from real estate to liquid financial assets has fueled the demand for the professional management of these assets across multiple generations.[51] In the days when trusts held mostly real estate for the benefit of the settlor and the settlor's family, the trustee did not need the expansive and complicated list of powers and duties that are commonly written into the modern trust agreements that we are accustomed to seeing today. However as the assets held in trusts became more complicated and less tangible, trustees began to need broader and more complicated powers related to investment management, asset retention, lending and borrowing, proxy voting, distributions and tax elections, to name a few. This expansion of trustee powers necessitated an enhanced system for the protecting the interests of the trust beneficiaries from the potential to abuse these broad powers. In short, fiduciary management of intangible trust assets comprised largely of liquid financial assets of has developed into a very complex system for the retention and transfer of wealth across multiple generations.[52] Revocable living trusts therefor allow grantors to centralize the management and control of all of their assets into a single entity that they can control as long as they are alive and competent and that should facilitate a smoother transition of that control to their successor trustee(s) upon their death or disability.

B. Disability Protection – If the grantor of a revocable living trust can no longer manage the trust assets, a successor trustee can take over with little or no court involvement or supervision. [53]

C. Easier Access to Assets Post-Death – Assets placed in revocable living trusts prior to death do not require court involvement or approval for a successor trustee to access them and begin the process of death-related administration.

D. Privacy Protection – By keeping assets out of the probate estate, details as to the nature and value of those assets do not become a part of the public record because they do not need to be listed on the inventory of estate assets that must be filed with the probate court. Further, the trust assets will also be excluded from any accountings that may have to be filed with the probate court.

1. No public record is required for the creation and funding of a revocable living trust during life.

2. Unlike wills, revocable living trusts do not become public documents upon the death of the grantor.

3. At death, the trustee of a revocable trust will be required to disclose trust asset and liability information to the beneficiaries and other interested parties and will also

[51] Feder and Sitkoff at p. 5.
[52] Feder and Sitkoff at p. 6.
[53] *Id.*

be required to prepare annual trust accountings. However, in the absence of a trust contest or a lawsuit alleging a breach of a fiduciary duty by the trustee, the asset information and the accountings are not likely to be included as a part of any court filing that would require public disclosure.

E. Fewer Formalities and No Witnesses. In most jurisdictions, revocable living trusts are not subject to the formal attestation requirements of wills and codicils. As a result, revocable living trusts are easier to create, amend or revoke during life. While this is usually a good thing for purposes of efficiency and convenience, it can also create confusion around whether a trust has actually been created or amended.

F. More Control Over Assets at Death

1. In many states, including Illinois, renunciation of a will by a spouse to force an elective share, only applies to estate assets. However, several states have enacted so-called "augmented estate" statutes that may broaden the class of assets that are reachable by a surviving spouse seeking to renounce the will and claim an elective share of the decedent's assets.

2. Assets transferred to a revocable trust prior to death are protected from some claims that only apply to estate assets, such as

   a. Statutory Custodial Claims brought by family members who cared for the decedent.[54]

   b. Surviving Spouse and Dependent Child's Award.[55]

G. Eliminate Need for Probate in *Multiple* Jurisdictions

1. Transferring property located in non-domiciliary states into a revocable living trust prior to death eliminates the need for ancillary probate in the state where that property is located, even if probate is necessary or desired in the state where the decedent was domiciled.

2. Some states impose residency requirements on executors (or require non-resident executors to appoint registered agents) while trustees of revocable trusts can usually act even if they did not share a domicile with the decedent.

H. Formal Probate Can be Avoided – While Norman Dacey and his disciples would argue that avoiding a formal probate proceeding is the greatest benefit associated with the creation and funding of revocable trusts, we have deliberately chosen to include it as the last on our list of the benefits associated with revocable trusts. We agree that having the option to avoid a formal probate proceeding is in fact a benefit of dying with a fully funded revocable trust. However, we think that the value of that benefit has been greatly exaggerated and that is has been a source of great confusion and

[54] 755 ILCS §5/18-1.1.
[55] 755 ILCS §§ 5/15-1 and 5/15-2.

anxiety for clients who have been conditioned to hate and fear probate. Nevertheless, if most or all of the decedent's assets were formally assigned or transferred to a revocable living trust during the decedent's lifetime, then a formal probate proceeding can be avoided.

IV. Drawbacks and Challenges of Revocable Living Trusts

A. Set-up Costs

1. Drafting – The legal fees associated with drafting a separate revocable living trust are not all that different than the cost of including testamentary trust provisions in the will. However, a pourover will and a separate revocable living trust are likely to take more time to draft than a simple will that distributes all of the assets outright to heirs and/or legatees.

2. Asset Transfers - Retitling of assets can be time-consuming and costly, and may require additional legal fees to make sure that asset transfers are done properly.

B. Title Issues

1. Automobiles and Personal Property - Transferring title in vehicles or other personal property to a revocable living trust might make it more difficult or costly to insure that property and some states do not allow vehicles to be titled in the name of a trust;

2. Real Estate – For married couples, the transfer of a residence to the revocable trust of one of the spouses will require them to give up the protections afforded by holding title to the property in tenancy by the entireties.

3. Partnerships, LLC's and Closely Held Corporations – Transfer of an interest in a closely held business entity to a revocable trust may involve:

   a. Written approval of the partners, officers, directors and/or the managers of the business entity;

   b. Modification of agreements that govern the ownership of the entity; and

   c. Review and approval outside legal counsel and/or CPA for the business entity.

C. Post-Death Income Tax Issues

1. Estates can choose their own tax years (fiscal vs. calendar) and they are not required to make estimated income tax payments for the first 2 years after death.

2. Revocable Living Trusts must be qualified under Section 645 of the Internal Revenue Code and then affirmatively elect (via a timely filing of IRS Form 8855) to be treated like estates for federal income tax purposes at death. In the absence

of the so-called "645 Election," revocable trusts that become irrevocable upon the death of the grantor must file calendar year fiduciary income tax returns and may be required to make quarterly estimated income tax payments.

3. State income tax treatment of irrevocable trusts, post-death, will vary from state to state, while state income tax treatment of estates tends to be more consistent

D. Post-Death Asset Collection and Consolidation – Certified Letters of Office or Letters Testamentary issued by a probate court are often more effective for consolidating and collecting banking and investment management accounts. Banks and financial services firms like to see certified letters of office and are often confused when presented with a "trust abstract" and a letter of direction signed by the attorney and/or the successor trustee.

E. Less Protection from Courts

1. Asset Protection - Probate assets enjoy a level of protection from creditors' claims via statutory claims periods that, if adhered to, can cut off all claims against the estate after a finite period time.

2. Forum Access and Availability - Probate courts often provide a convenient and readily available forum for resolving disputes in estate and trust matters and probate judges typically have more experience with these issues than judges sitting in chancery or in other divisions. In the absence of a probate proceeding, stand-alone trust disputes require a separate cause of action, typically in chancery court, where the judge may not be as familiar with the Trusts and Trustees Act.

F. Lack of Statutory Protection for Beneficiaries and Lawful Heirs

1. In some states, a divorced spouse may not be automatically disinherited in the absence of an amendment to the revocable trust. However, this is less of a concern in Illinois because the Illinois Trusts and Dissolutions of Marriage Act effectively revokes the terms of a revocable trust that apply to a spouse in the event of a divorce by treating the divorced spouse as having predeceased the grantor for purposes of administering the trust.[56]

2. Anti-lapse statutes designed to protect the interests of direct lineal descendants may not apply to assets transferred to a revocable living trust prior to death.

G. Lack of Clarity as to What Constitutes an "Amendment"

1. A codicil executed in accordance with statutory attestation requirements and in the absence of fraud or duress should effectively modify or amend the terms of a will.

[56] 760 ILCS § 35/1.

2. The effectiveness of a written document that purports to amend or modify the terms of a revocable living trust is less certain and easier to dispute such that even an informal, letter written by the settlor and signed, "Love, Mom" may constitute a valid amendment to a revocable trust.[57]

H. Immediate Rights of Beneficiaries to Challenge the Trust During Grantor's Lifetime

1. For some time now, Illinois guardianship courts have been in the business of estate planning for disabled wards, allowing the guardian of the estate to petition the court to determine the wishes of the ward as best as they can be determined.[58] Guardianship and chancery courts have also entertained challenges to executed wills and trusts on the basis of undue influence or lack of capacity while the settlor or testator is still living. The law in this area is still evolving. At this point, it appears that beneficiaries under an existing revocable trust have standing to defend or challenge any change to their status,[59] but beneficiaries under a will do not.[60] On January 20, 2016, the Illinois Supreme Court granted leave to appeal in *Trzop v. Hudson*, suggesting that additional clarity would be on the horizon to address this important standing question. Unfortunately, the grantor in the *Trzop* case died before the matter could be heard by the Illinois Supreme Court so the issue was moot.

2. Illinois courts have yet to rule on whether the outcome of such trust contest litigation during the grantor's life will bar parties by collateral estoppel or res judicata upon the death of a ward or an incapacitated grantor insofar as those issues were or could have been litigated in the guardianship or chancery court prior to death. For an interesting case on this issue holding that the parties to the lifetime litigation were barred from further challenges following the ward's death, see *Murphy v. Murphy*, 164 Cal.App.4th 376, 78 Cal.Rptr.3d 784 (2008).

I. What Revocable Living Trusts CANNOT Do

1. Reduce Estate Tax Liability – While revocable trusts can be very effective tools for estate tax *planning*, particularly for married couples and for anyone looking to create and fund perpetual, GST-exempt trusts at death, revocable trusts are not the only tool for this purpose and they do not reduce the overall estate tax liability for married couples or for individuals.

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[57] *Whittaker v. Stables*, 791 N.E.2d 588 (2003).
[58] 755 ILCS 5/1 la-18.
[59] *In re Estate of Michalak*, 404 Ill.App.3d 75, 934 N.E.2d 697, 343 Ill.Dec. 373 (1st Dist. 2010)
[60] *Estate of Henry v. Wemple*, 396 Ill.App.3d 88, 919 N.E.2d 33, 335 Ill.Dec. 512 (1st Dist. 2009). See also *In re Estate of Ostern*, 2014 IL App (2d) 131236, ¶27, 23 N.E.3d 391, 387 Ill.Dec. 699 (while beneficiary has no interest in will until testator dies, beneficiary of trust has interest moment trust is created); *Trzop v. Hudson*, 2015 IL App (1st) 150419, 43 N.E.3d 178, 397 Ill.Dec. 851 (disinherited beneficiaries under amendment to inter vivos trust had standing to bring action against current beneficiary during settlor' s lifetime challenging validity of amendment)

2. Guarantee the Avoidance of Probate – Placing assets into a revocable trust prior to death allows the trust *assets* to be excluded from a formal probate proceeding and may provides some level of privacy as to the nature and the value of the assets. However, the mere creation of a revocable trust, whether it is funded or not, does not automatically eliminate the need for a formal probate proceeding even in situations in which the probate estate has no assets. Further, most "supplemental proceedings" that are brought following the grantor's death are likely to involve the revocable trust.

3. Provide Asset Protection During Life or at Death – A revocable living trust does absolutely nothing to protect the grantor's assets because the grantor can revoke or amend the trust at any time, the grantor is the sole beneficial owner of the assets titled in the name of the trust and even if the grantor chooses not to act as trustee, the grantor ultimately retains complete control of the trust assets.[61] Further, since revocable trust assets are subject to federal and state estate taxes and almost always allow the trustee to use trust assets to pay debts, expenses and fees incurred during the course of death-related administration, revocable trusts provide little or no asset protection at death.

4. Eliminate Work and Costs of Death-Related Administration – Revocable Trusts do not automatically settle themselves after the grantor's death though a surprising number of beneficiaries seem to think so. Even if a formal probate proceeding is unnecessary, the successor trustee(s) will still have a lot of work to do before the beneficiaries get their money and they will still need to hire professionals such as attorneys, CPA's and financial advisors. Further, depending on the size of the trust and the nature of the assets, the successor trustee(s) may also have to hire valuation professionals and professional asset managers, particularly if the assets include real estate and/or interests in closely held businesses. Finally, the successor trustee(s) are also entitled to fees for their services, their expertise (in the case of attorneys and corporate fiduciaries) and for the personal financial risk associated with serving as a trustee.

V. What's the deal with probate?!?!

A. How Probate Can Help? – Probate serves many practical purposes including, among other things, providing a forum for conflict resolution, creditor protection and clearing title. We also know that, for better or worse and for a variety of reasons, relatively few estates actually end up in probate court. For example, in his study of probate cases filed in Alameda County, California for county residents who died in 2007, Professor David Horton found that of the 9,319 residents of Alameda County who died in 2007, only 668 (or 7%) of the decedents' estates ended up opening probate.[62]

[61] Craig, Susanne, and Eric Lipton. "Trust Records Show Trump Is Still Closely Tied to His Empire." *The New York Times* 4 Feb. 2017, National ed.: A1. Print. The fact that Donald J. Trump is no longer acting as a trustee of his revocable trust does not change the fact that the trust remains fully revocable, the assets in it are held exclusively for his personal benefit and he still has complete control over those assets because of his power to revoke.
[62] Horton at p. 627.

1. Conflict Resolution – One of the arguments in favor of probate avoidance is that since a relatively small number of wills and trusts are actually contested, probate adds little or no value. However, as noted in greater detail below, probate court litigation is by no means limited to will and trust contests. Of the 668 probate estates that were the subject of Professor Horton's study, 83, or 12%, involved litigation of some sort. While 12% seems like a high number, Horton notes that it is relatively modest when compared to the number of deaths that occurred. He also points out that in addition to will contests, disputes that arose in the estates that he studied included questions about the identity of the personal representative, objections to the exercise of fiduciary duties, claims to recover estate property, grievances around heirship and actions seeking interpretation of ambiguities in the testamentary documents.[63]

2. Creditor Protection – Professor Horton's research also found that more than 200 creditors filed claims in 266 of the 668 estates that he studied. Collectively, these claims amounted to about $19.5 million or 4% of the gross value of all of the assets held in all 668 estates. However, the court records further indicated that the aggregate amount of the claims that were satisfied totaled only $9 million or less than 50% of the alleged value of the claims that were filed.[64] While this is one study in one county in one year, these numbers seem to indicate that in probate court, claims of legitimate creditors will be protected to the extent that an estate has sufficient assets to satisfy them.

3. Clearing Title and Facilitating Asset Transfers – While revocable trusts, joint tenancy and transfer-on-death deeds (in certain jurisdictions) have made it much easier for decedent's to transfer ownership of real property outside of probate, Professor Horton's study found that 54% of the value of all of the assets that passed through probate in his study consisted of real estate.[65] Since residential real estate is still the most valuable asset that most people own when they die, and since not all testators can avail themselves of joint tenancy or transfer-on-death deeds and since even those who create revocable trusts often fail to retitle their real estate, the probate court will continue to play a critical role in the delivery of clear title to real estate.

4. Final Determination of Heirship – If there is any question as to the identity of the lawful heirs of a decedent, the Probate Court is the most appropriate forum for resolving those questions. The rules of Descent and Distribution under Article II of the Illinois Probate Act can help fiduciaries determine the identities of the decedent's lawful heirs. However, that determination is based on very traditional definitions of family and it relies on the actual knowledge of the person willing to sign an Affidavit of Heirship under penalties of perjury. If the decedent did not come from a "traditional" family, had a child or children out of wedlock and/or by multiple spouses or partners, and helped raise children who were not their

[63] *Id.* at 629-630.
[64] *Id.* at 636.
[65] *Id.* at p. 638.

biological children and whom they never adopted, establishing heirship can be tricky. Further, if a decedent was raised by someone other than his or her biological parents and/or was never legally adopted or given up for adoption, the definition of a lawful heir can get even murkier. In the absence of an "Order Declaring Heirship" entered by the appropriate probate court, the trustee of the decedent's revocable trust runs the risk of failing to identify all of the members of a class or classes of individuals with standing to challenge the will or trust and/or questions the actions of the fiduciaries.[66]

5. Appointment of Guardian for Minors and Beneficiaries with Disabilities – Revocable trusts typically include provisions that require distributions for minors and persons with disabilities to be retained in trust. However, if a will does not contain a "facility of payment clause" and substantial distributions end up going outright to a minor or to a disabled person, a probate proceeding could be required for the formal appointment of the guardians who may be needed to manage those assets.

6. Formality of Discharge – Upon the completion of the death-related administration of a deceased person's revocable trust, there is no formal certificate of discharge issued to the trustee. While trustees typically obtain releases, receipts and approvals of their accountings upon the termination and distribution of the trust assets, executors receive formal Orders of Discharge that are filed with the probate court and that put the world on notice that the executor has completed his or her work on the estate and has been formally discharged by the probate court.

B. How Probate Can Hurt?

1. Added Expense – A perception exists that probate adds substantially to the financial cost of death-related administration of estate and trusts. While this can certainly be true in cases where the death-related administration requires substantial supervision and involvement by the probate court, the reality is that expedited or limited probate proceedings, which are available in nearly every state, dramatically simplify the process and often involve nothing more than a modest filing fee and two short trips to the courthouse.[67] Unless the heirs or beneficiaries are fighting, a probate administration is usually done in about 6-9 months. As to cost, simple wills can certainly be less expensive to draft than revocable trusts, but simple wills provide virtually none of the flexibility that can be incorporated into a revocable trust and none of the real or potential lifetime benefits. The reality is that the legal and fiduciary fees and other administrative expenses associated with complex death-related administration of estates and trusts will still be necessary even in the absence of a formal probate proceeding.

[66]An example of the confusion that can arise around heirship is the concept of "Equitable Adoption" whereby a child may be treated a lawful heir of a non-biological parent who never legally adopted the child. These rules vary from state to state, but the definitive Illinois case on the subject is *DeHart vs. DeHart*, which can be found at 986 N.E.2d 85, 89 (Ill. 2013).

[67]"Independent Administration," the term for the expedited probate proceeding used in Illinois probate courts, has become the default form of probate administration in Illinois and is described in detail in Article XXVIII of the Illinois Probate Act at 755 ILCS §§5/28-1 – 5/28-12.

Further, the filing fees imposed by probate courts, particularly in situations in which the probate estate has little or no assets, typically add up to *hundreds* of dollars, which is far less than the public perception. Further, most corporate fiduciaries charge the same fee for death-related administration, regardless of the need for probate.

2. Public Proceeding – Probate court files are certainly accessible to the public and occasionally provide fodder for prying eyes, particularly if the decedent was a celebrity who died intestate.[68] However, if the document admitted to probate is a pourover will that bequeaths all of the probate assets to the decedent's revocable trust *and* the probate assets consist of old clothes, used furniture, a 3-year-old car and a small brokerage account that the decedent forgot to transfer to his revocable trust before he died, then how much privacy is the decedent really giving up?

3. Unreasonable Delay – "Complaints about probate's length conveniently ignore the complexity involved in handling someone else's affairs after they die."[69] Even in the absence of a formal probate proceeding, it typically takes about 1-2 years to complete all of the death-related administration and often longer if the estate is required to file a federal estate tax return. While partial distributions of estate and trust assets can often occur within the first year following the death of the grantor/testator, the probate proceeding itself is rarely the cause of any delay. Most delays are caused by challenges associated with collecting, consolidating and valuing estate and trust assets, illiquidity of estate and trust assets, the need to use available cash for the payment of debts, expenses and taxes, acrimony among the beneficiaries and legatees, the need to extend the deadline for filing an estate tax return (if one is due) and any kind of litigation or potential litigation involving the estate or trust.

VI. To Probate or Not to Probate: That is the Question

A. Mandatory Probate - If the probate assets include personal property with a value in excess of $100,000 or any real property, regardless of the value of the real property, then formal probate is required in Illinois, and the nominated executor has 30 days from the date upon which she is notified of the nomination to initiate probate proceedings or decline the appointment in writing.[70]

B. Family Feuds; Sibling Rivalry; Wicked Stepparents and other Red Flags – At the first hint of any tension or disharmony among any persons or entities with a real or potential economic interest in the estate (including the beneficiaries of any trust that has an interest in the estate), the executor should initiate formal probate proceedings even if probate would not be mandatory.

[68] McKeeman, Carly. "'I Never Meant To Cause You Any Sorrow' – Lessons From Prince On Intestacy". ABA for Law Students. N.p., 2016. Web. 11 Mar. 2017.
[69] Horton. at p. 652.

[70] 755 ILCS §§5/6-3(a) and 5/25-1(a).

C. Definition of "Interested Person" under the Illinois Probate Act includes heirs, legatees and nominated fiduciaries, but can also include un-related fiduciaries or legatees who may have been named in a previously revoked will or codicil. [71]

D. Notice Requirements - Probate puts all interested parties on notice and starts the 6-month will contest period running as soon as the will has been admitted,[72] however, no notice is required for legatees and nominated executors under a prior "revoked" will, unless they have standing as heirs or known creditors. (Query: If a nominated executor under a prior revoked will was the testator's attorney, should a claims notice be sent to the attorney in case of a potential claim for unpaid fees?)

E. Claims Periods - Probate shortens the period for filing claims against the estate (and by extension, the revocable trust) to 6 months from first date upon which notice is published for unknown creditors or 3 months from the date upon which actual written notice is provided to known creditors.[73] There are effectively **five** statutes of limitations in Probate Court the can be applied to Revocable Trusts when the pourover will is admitted to Probate

1. Unknown creditors have six months from date upon which notice is first published to file their claims against the estate or the revocable trust.

2. Known creditors (or creditors whose identities are reasonably ascertainable) may file their claims against the estate or trust upon the later to occur of the date six months following first date of publication or three months from the date of delivery or mailing of the actual written notice.[74]

3. Known creditors who do not receive actual written notice have two years to file their claims.

4. In the absence of notice, the claims of creditors are generally barred beyond two years following the date of death.

5. Claims filed with Executor (but not court) – If the executor disallows a claim against the estate or trust, files the disallowance with the court along with a notice of disallowance to the claimant, the claimant must file the claim with the court within two months of the date indicated in the notice of disallowance.

F. Probate Petition Can Be Filed by ANYONE -"*Anyone* desiring to have a will admitted to probate must file a petition therefore in the court of the proper county" (emphasis added).[75] The term "Anyone" means that anyone, whether or not they

[71] 755 ILCS §5/1-2.11.
[72] 755 ILCS §8-1(a).
[73] 755 ILCS §§5/18-3 and 5/18-12.
[74] *See* Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478,108 S. Ct. 1340,99 L. Ed. 2d 565,1988 U.S., which held that if the identity of a creditor is known to or reasonably ascertainable by an executor, then actual written notice by mail, or other means certain to ensure actual notice, is required.
[75] 755 ILCS §5/6-2.

have an economic interest under the decedent's will or they are an Interested Person pursuant to the Probate Act.[76]

1. If somebody other than the nominated executor or an ally of the nominated executor files the probate petition, then the nominated executor must react or risk ceding control over the process to the petitioner

2. Creditors might petition to get a will admitted if their claim is big enough and if they feel the need to take steps to protect their claim

3. Disinherited heirs as well as legatees and fiduciaries named in prior revoked wills or codicils may petition for the probate of the testator's last will for no other reason than to contest it. Query, however, whether someone who signs the petition to get a will admitted to probate may later be estopped from bringing a petition to contest the admission of that same will.

4. As the 6-month will contest period does not begin to run until the will has been admitted to probate, an executor could be forced to defend a will contest many years after the testator has died. This will be the case even if claims are barred because more than 2 years has passed since the testator's death.[77]

5. Certainty, clarity and control over the process are three things that the executor cannot afford to relinquish, particularly when heirs, legatees and other interested parties transform themselves into litigants.

G. Decedent in a Risky Profession - If the decedent operated a business or provided a service that carried with it a higher than normal risk of claims for personal or professional liability (whether or not such claims have merit), then formal probate should be given serious consideration even if it would not otherwise be mandatory.

1. Personal and professional liability claims often do not arise until long after the incident giving rise to the claim has occurred so executors will usually have no way to know if such claims are out there when the testator dies.

2. The statutes of limitations on such claims usually run for two years, but can be even longer, depending upon the type and nature of the claim, which means that a liability claim arising out of an incident that occurred a year before the testator's death may not be filed for up to a year or more after the death.

3. Getting the will admitted to probate and publishing notice to unknown creditors and claimants allows the executor to shorten those limitations periods and retain a level of certainty, clarity and control over the process even if such a claim is filed.[78]

[76] 755 ILCS §5/1-2.11.
[77] 755 ILCS §§5/8-1(a) and 5/18-12(b).
[78] 755 ILCS §§5/18-3 and 5/18-12.

4. For professional decedents or decedents who owned and operated their own businesses, probate must be considered if any of the following facts are present:

    a. The business or profession required the decedent to carry professional liability insurance in the ordinary course of business;

    b. The decedent owned a business that was operated as a sole proprietorship or as a general partnership without an entity in place to protect the decedent's non-business assets;

    c. The decedent failed to adhere to the necessary formalities of any entity that he or she may have formed to provide protection from personal liability;

    d. The decedent owned or operated a business that was open to or easily accessible by the general public in the ordinary course of its business or had a large number of employees; or

    e. The decedent owned or operated a business or entity that did not carry sufficient liability insurance coverage relative to standards set by the industry or profession in which the business or entity was operated.

H. Disinherited Heirs – If the testator's will does not include a legacy for an individual or individuals who would have received a share of estate if the decedent had died intestate,[79] then probate should be considered even if it would not otherwise be mandatory. If the disinherited heir is aware that he or she has been disinherited and understands and accepts the reasons for the disinheritance, then probate may not be necessary if it is not otherwise mandatory. Some examples include the following:

    1. Disinherited heirs are the children of the decedent and the surviving spouse is the parent of the "disinherited" children.

    2. Disinherited heirs under the will are beneficiaries of a revocable trust that will receive the residue of the probate estate.

    3. The marriage between the decedent and the surviving spouse was a second marriage, but both spouses had agreed to a division of assets whereby the survivor could end up with something less than his or her intestate share and children from any prior marriages are aware of the arrangement.

    4. The heir is wealthy in his or her own right and does not need or want the inheritance.

    5. The heir is a spendthrift, is receiving some sort of public assistance and/or has significant creditor problems such that any inheritance would be immediately attached and claimed by the creditors of the heir.

[79] *See* 755 ILCS §5/2-1.

6. Informed and Agreeable Prior to Death, but Skeptical After - Even in situations where the disinheritance was intentional, agreed upon, communicated, and seemingly understood and accepted by all of the affected heirs, probate might still be worthy of consideration, particularly if a disinherited heir shows any signs of a possible revocation of his or her previous understanding, acceptance or consent. (My dad had HOW MUCH money?!?!?)

I. Blended Families - Where the decedent was a party to a "second marriage" and the surviving spouse is not the biological or adoptive parent of all of the decedent's children, probate can be very helpful, particularly if there are any signs of tension or misunderstanding between the surviving spouse and any of the decedent's children who are not the biological or adoptive children of the surviving spouse.

J. "Insolvent" Probate Estate – An insolvent estate is not likely to hold assets with a value in excess of $100,000, but it could, and it could also hold real estate or other encumbered assets. Even if probate is not mandatory and even if it might seem counterintuitive for an insolvent estate, court orders approving the estate accountings and the payment of administrative expenses, taxes and fees along with court orders approving the abatement or complete disallowance of any claims or legacies will provide the highest level of protection from personal liability for the executor or the administrator.

K. Pour over Will to a Revocable Trust – It is often the case that the successor trustee of a decedent's revocable trust will have the authority to use trust assets to satisfy legitimate claims against the decedent's estate to the extent that the assets in the probate estate are not sufficient, but not always. It is also often the case that even when the trust agreement allows the trustee of the decedent's revocable trust to satisfy claims against the estate, the trust agreement may not compel the trustee to do so.

1. Rolling 3-year period for Objections to Trust Accountings - Trust beneficiaries entitled to an accounting effectively have a rolling three-year limitations period for the filing of objections to the accounting.[80] Since the trustee's duty to account continues until the trust terminates, the length of the trust's period of exposure to claims or objections related to the trust accounting can far exceed the length of the limitations periods provided to executors or administrators under the Probate Act.

2. Application of Will Contest Period to Inter Vivos Revocable Trust - The Illinois Code of Civil Procedure and the Illinois Probate Act contain provisions that place limitations on actions against revocable inter vivos trusts that receive probate assets pursuant to the terms of a pour over will, but the will must be admitted to probate. If the pour over will is admitted to probate, the period of time to bring an action to set aside or contest the validity of the inter vivos revocable trust is limited to the same 6-month period of time provided by the Illinois Probate Act to contest the validity of the will.[81]

[80] 760 ILCS §5/11(a).
[81] 735 ILCS §5/13-223 and 755 ILCS §5/8-1(f).

L. Confirm the Exercise (or Non-Exercise) of a Testamentary Power of Appointment – It is not absolutely necessary for the will to be admitted to probate in order to confirm the exercise or non-exercise of a testamentary power of appointment over outside trust property, but probate provides the highest level of protection for the trustee responsible for the administrations and distribution of the trust property that is subject to the power.[82]

1. Trustee of trust holding assets subject to the power may insist on probate.

2. Trustee may proceed on the assumption that the power was not exercised if, within three months after the power holder's death, the trustee has no actual knowledge of the existence of a valid will.[83]

3. Even if there is a valid will that does not exercise the power, probate of the will can still protect the executor and the trustee.

4. The trustee of a trust that is subject to the testamentary power may still be protected in the absence of probate, but probate could also preempt litigation between the members of the class of permissible appointees and the takers in default. [84]

M. Probate Court is a Convenient Forum if an Unanticipated Controversy Arises – Will and trust contests and contested claims are not the only controversies that arise in probate court.

1. Citation Actions and Reverse Citation Actions – Executors and administrators may need to file citations on behalf of the estate to recover assets or discover information that is necessary for the proper administration of the estate in which case formal probate will be necessary while other parties may need to file citations to recover assets and information from the Estate.[85]

2. Disputes Over Heirship – If the decedent had a child or children born out of wedlock, then probate should be given serious consideration, particularly if a male decedent had multiple children born to different mothers. Further, if a person claiming to be a biological child of the decedent surfaces after the decedent's death and was previously unknown to the rest of the family, then probate will be necessary in order to establish and/or confirm heirship.

3. Enforcement of "Slayer Statute" – In the event that any heir, legatee, beneficiary, surviving joint tenant, appointee or other recipient entitled to a property or other beneficial interest as due to the death, has intentionally or unjustifiably caused the death, then any interest of the person causing the death will pass as if the person causing the death had predeceased. While a person convicted of 1st or 2nd Degree

[82] 755 ILCS §5/4-2(c).
[83] *Id.*
[84] *Id.*
[85] 755 ILCS §§5/16-1 – 5/16-3.

Murder is conclusively presumed to have caused the death, a criminal conviction is not required to enforce the "Slayer Statute." In the absence of a criminal conviction or a criminal court proceeding, the probate court would be the appropriate jurisdiction in which to bring such a proceeding.[86]

4. Action to Eliminate the Interest of a Parent Neglecting a Child – An action to prevent a parent from inheriting from a minor or dependent child when the parent had willfully neglected or failed to support that child prior to death would also be brought in the probate court.[87]

5. Action to Eliminate the Interest of a Perpetrator of Elder Abuse – Actions to prevent exploiters, abusers or other individuals engaged in willful neglect of elderly or disabled persons from receiving a benefit from their victims are also brought in probate court.[88]

6. Holdover Tenants or Family Members Who Refuse to Vacate Real Estate – Even if the real estate is an asset of the decedent's inter vivos revocable trust, if the trust is the beneficiary of the estate, a citation action filed in probate court to recover the asset and force the removal of the recalcitrant family member or tenant may be the most efficient way to proceed.

7. Leases, Sales, Mortgages or Pledges of Estate Assets – While probate may not be absolutely necessary to lease, sell, mortgage or pledge an asset, particularly if the property is held as an asset of the decedent's inter vivos revocable trust, probate court approval of such transactions may prevent future disputes over the subject assets from arising and/or provide a convenient forum for all parties to any dispute that does arise.

8. Resolution of Disputes over Fees and Expenses – Even in situations where fees are agreed to early on in the process of death-related administration and expenses are reasonably and accurately estimated, interested parties can always change their minds. If there is already a probate estate opened and an executor or administrator appointed, then such late-stage disputes can often be resolved more quickly and efficiently and all parties will have the protection of a court order once such disputes have been resolved.

9. Completion of Business Transactions Initiated by Decedent Prior to Death – While such transactions may not result in litigation, if they do, the Probate court has broad jurisdiction and can serve as the forum for the resolution of disputes arising out of such transactions.

10. Continuation or Initiation of Litigation to Which Decedent is or was a Party – Wrongful death actions, suits to quiet title to real estate and other matters that the executor or administrator may need to pursue on behalf of the estate will require a

[86]755 ILCS §5/2-6.
[87]755 ILCS §5/2-6.5.
[88]755 ILCS §§5/2-6.2 and 2-6.6.

formal probate proceeding even though the value of the claim or claims might not be immediately ascertainable.

11. Ancillary Administration – If ancillary administration is required in another jurisdiction because the decedent owned property that was physically located in that jurisdiction and that was titled in the decedent's own name as of the date of death, a probate proceeding must be initiated in the jurisdiction in which the decedent was domiciled at death even if there are no other probate assets. Ancillary administration in a foreign jurisdiction typically cannot be initiated without valid letters of office or letters testamentary issued in the decedent's jurisdiction of domicile at death.

12. Supplemental Proceedings – As courts of general jurisdiction, probate courts have broad jurisdiction to provide a forum for the resolution of just about any dispute or lawsuit to which the testator was a party to during life or that the estate had become a party to as a result of the testator's death. In addition, local court rules often list certain causes of action and proceedings for which the probate court would be the most appropriate jurisdiction. In Cook County, for example, the local court rules expressly state that the Probate Division is the appropriate jurisdiction for the following Supplemental Proceedings or Actions that are germane to the administration of the decedent's estate:

    a. An action to contest a will or a trust

    b. An action to enforce a contract to make a will

    c. An action to construe a will or trust, or to appoint a trustee of a trust to which any part or all of the estate is distributable

    d. Any other action or proceeding affecting the estate or trust or arising under a Uniform Transfers (or Gifts) to Minor Act[89]

VII. Are Trusts that Become Irrevocable at Death Truly "Irrevocable"?

A. Illinois Virtual Representation Statute[90]

1. Trust and estate disputes like other types of contested matters settle more often than they go to trial.

2. Practitioners need skills to draft settlement agreements that bind all of the interested parties.

3. The 2015 amendments to the Illinois statute provide greater certainty on what types of matters can be settled and expands the ways minors, the unborn and the disabled can be represented

[89] Cook Cty. Ct. R. 12.1(c).
[90] 760 ILCS §5/16.1.

4. The 1993 version of the Illinois statute required all primary beneficiaries to be adults and not incapacitated. This imposed significant limitations. For example, it would not apply to a typical spray trust.

5. The 2015 version imported much broader concept of virtual representation, deleted the confusing two types of class representation and made the application more intuitive.

6. Two Types of Representation

    a. Individual: Person may represent minors, the unborn and the disabled if (a) no conflict of interest and (b) in case of a representative who is not a guardian, agent or parent, must have substantially similar interest[91]

    b. Class: If all "primary beneficiaries" are either adults with "legal capacity" or have reps, they may bind all others with successive, contingent, or future interests[92]

7. The 2015 statute eliminates questions over "disabled" by substituting "has legal capacity." A person lacks legal capacity if (a) adjudicated under §11a-2 of Probate act or (b) written determination by physician that person cannot make prudent financial decisions.[93]

8. Individual Representation Hierarchy after the 2015 Revisions

    a. Guardian of the Estate

    b. Agent Under a Power of Attorney

    c. Parent (If no conflict)

    d. Other Beneficiary with a "Substantially Similar Interest."

9. "Substantially Similar" interest standard in 2015 revision vs. "Substantially Identical" interest standard in 2010 statute

    a. Example: Trusts for Settlor's grandchildren are presumptive remainder beneficiaries, but terms of the trusts vary as to income provisions or withdrawal ages. Under the 2015 revision one grandchild could bind others, despite the difference in following trust provisions.

10. Representative May Represent Other Beneficiaries

[91] 760 ILCS §5/16.1(a)(1).
[92] 760 ILCS §5/16.1(a)(2).
[93] 760 ILCS §5/16.1(a)(3)(C).

a. 2010 Stat. was unclear as to whether Beneficiary 1 could be represented by Beneficiary 2's rep

b. 2015: Beneficiary 1 can be represented by Beneficiary 2's guardian, agent or parent if 1 and 2 have substantially similar interests and no conflict of interest

11. Necessary Parties for a Binding Non-Judicial Settlement Agreement[94]

a. All "interested persons" or those who would have to be joined in a court proceeding, including trust protectors and advisors if their interests are affected;

b. All successor, contingent and future beneficiaries rather than just those who would become primary beneficiaries by surviving;

c. The burden of the 2015 revision's broadening of the class of necessary parties is offset by the increased ease in finding representatives

12. Class Representation Under the 2015 Revisions

a. If all "primary beneficiaries" are adults with legal capacity or have representatives, they may bind all successor, contingent or future interests

b. "Primary beneficiary" is either (a) currently eligible to receive income or principal or (b) a Presumptive Remainder Beneficiary

c. Presumptive Remainder Beneficiary is one who would be eligible to receive income or principal if trust terminated or if all current beneficial interests ended

13. Overlap Between Individual and Class Representation

a. Class representation is achieved if all primary beneficiaries have capacity or proper representatives;

b. If the interests of current beneficiaries and remainder beneficiaries are different, then in some cases, there may only be a need for one representative from each class with substantially identical interests and no conflicts.

B. Decanting - The Illinois Decanting Statute (760 ILCS 5/16.4) went into effect on January 1, 2013. The statute allows a trustee to distribute trust assets from one trust to another in certain circumstances, essentially permitting the trustee to modify the terms of the first trust because the terms of the first trust and the second trust will typically be different.

1. Who Has the Ability to Decant?

[94] 760 ILCS §§5/16.1(d)(1) and (2).

a. The trustee must be an "authorized trustee" (other than the grantor) who has the authority to distribute principal to one or more current beneficiaries
b. The scope of the trustee's power to decant depends on whether the trustee has "absolute discretion"
c. A trustee has absolute discretion if the trustee's right to distribute principal to or for the benefit of the beneficiaries is not limited or modified in any manner
d. The power to distribute principal for purposes such as welfare, best interests, or happiness constitutes absolute discretion

2. Decanting By Trustee With Absolute Discretion

   a. A trustee with absolute discretion may decant to a second trust for the benefit of one or more of the current beneficiaries of the first trust and for the benefit of one or more successor and remainder beneficiaries of first trust.

   b. A trustee with absolute discretion may grant one or more of the current beneficiaries of the first trust a power of appointment over the second trust as long as the beneficiary being granted the power of appointment was eligible to receive the principal of the first trust outright.

3. Decanting By Trustee Without Absolute Discretion

   a. In the absence of absolute discretion, a trustee may decant only if the first trust and the second trust have the same income and principal distribution language, and the same current, successor and remainder beneficiaries. Further, if the first trust grants a power of appointment, the second trust must grant the same power with the same permissible appointees.

   b. A trustee without absolute discretion can decant a disabled beneficiary's interest in a trust to a supplemental needs trust if the trustee determines that doing so is in the beneficiary's best interests and the remainder and successor beneficiaries are either the disabled beneficiary’s estate or the same remainder and successor beneficiaries to the disabled beneficiary’s interest under the first trust.

4. Administration of “Decanted” Trust

   a. The term of the decanted trust may be longer than that of the first trust. However, the decanted trust is subject to the same rule against perpetuities period as the first trust unless the first trust expressly permits the trustee to lengthen the perpetuities period.

   b. The decanted trust can be a new trust created by the trustee or a new or existing trust created by the settlor of the first trust. Generally, the settlor of the first trust will be treated as the settlor of the decanted trust.

5. Exercise of Trustee's Power to Decant

    a. A trustee's exercise of the decanting power must be made by a written instrument, signed and acknowledged by the trustee and filed with the records of the first trust and the second trust.

    b. Court approval for the decanting is not required unless

        i. There are one or more competent current beneficiaries of the first trust;
        ii. There are one or more competent presumptive remainder beneficiaries of the first trust;
        iii. The trustee sends notice of the proposed decanting to all competent current and presumptive remainder beneficiaries of the first trust, and
        iv. No beneficiary objects to the decanting within 60 days of notice

    c. If a charity is a current or presumptive remainder beneficiary of the first trust, the trustee must also give notice to the Illinois Attorney General's Charitable Trust Bureau

    d. A trustee may choose to petition the court for permission to decant

    e. If a beneficiary objects to the proposed decanting within 60 days of the trustee's notice, the trustee or the beneficiary can petition the court to modify, approve or deny the proposed decanting. In the event of an objection, the burden is on the trustee to prove that the proposed decanting furthers the purposes of the first trust.

6. Trustee’s Responsibility for Decanting

    a. A trustee who exercises the power to decant must do so in the trustee's fiduciary capacity in furtherance of the purposes of the first trust

    b. A trustee may exercise the power to decant whether or not there is a current need to distribute the principal of the first trust

    c. A trustee has no duty to exercise the power to decant, inform the beneficiaries of the availability of the decanting statute or review the trust to determine whether the trust should be decanted

VIII. Conclusions

A. Continuity of asset management for an incapacitated grantor is probably the most compelling argument for the creation and funding of revocable living trusts.

B. "Probate Avoidance" is neither the functional equivalent nor the primary goal of "Estate Planning." While revocable trusts play an important role in facilitating the transfer of assets at death, "probate avoidance" is probably one of the least compelling arguments for the creation and funding of revocable trusts. Patrick Henry never said, "Give me probate avoidance, or give me death!"

C. Keeping assets out of the probate estate is not the same thing as avoiding probate.

D. Revocable trusts can be effective tools for keeping asset information and dispositive provisions private. However, in order to keep the asset information private at death, the assets have to be transferred to the trust during life. Further, the privacy of the dispositive provision is limited to the number of beneficiaries and other interested parties who will be entitled to full transparency upon the grantor's death.

E. For clients who own real property in multiple states, conveying those properties a revocable trust during life will minimize the number of jurisdictions in which formal probate proceedings will be needed.

F. Contrary to the myths perpetuated by Norman Dacey, probate is *not* a corrupt enterprise that exists to protect the interests of lawyers, to steal money and time from grieving families, and to prevent people like Dacey from speaking the truth about the conspiracy between lawyers and probate court judges.

G. Probate provides a fixed timetable and a convenient forum to dispense with claims, will contests and other disputes that may arise after a person has died. Further, the proliferation of local statutes that allow for independent administration along with the increased availability of payable-on-death (POD) and transferrable-on-death (TOD) tools that require neither a will nor a trust, have helped streamline the probate process in most jurisdictions and reduce the volume of assets that actually pass through probate estates.

H. Tools such as virtual representation and decanting provide significant flexibility for beneficiaries after a trust has become irrevocable, but trustees of testamentary trusts created and funded upon the death of a testator also have access to those tools. On the flipside, the proliferation of these tools has also changed the meaning of the term, "irrevocable" as it relates to trusts.

I. Revocable trusts are not perfect and some jurisdictions have even permitted challenges to revocable trusts while the grantor is still alive and the interests of the non-grantor beneficiaries have not fully vested.

APPENDIX A

Checklist to Determine the Need for Formal Probate in Illinois

1. Does the value of the assets titled in the name of the decedent alone at death and not payable on death by operation of law to a named beneficiary (other than to the decedent's estate) exceed $100,000?

2. Is there disharmony among the heirs, legatees or other interested parties that could potentially lead to a will contest or other litigation against the estate?

3. Was the decedent in a risky profession (i.e. law, medicine, etc.) or did the decedent have an ownership interest (either individually or through a trust or other entity) in risky assets (i.e. commercial or residential real estate) that may result in claims from unknown creditors that are not immediately identifiable or ascertainable?

4. Has the decedent disinherited any heirs pursuant to the terms of the will and/or a revocable trust to which the residue of the probate estate is payable?

5. Are their insufficient assets in the estate such that legitimate claims of creditors may need to be disallowed or reduced or such that specific legacies may need to be eliminated or partially abated?

6. Are there debts owed to the decedent or assets owned by the decedent that may necessitate the opening of a probate estate in order to pursue litigation or a citation action in order to collect them?

7. Is there a need to initiate or continue litigation on behalf of the decedent for a personal injury, wrongful death or some other cause of action to which the decedent may have been a party?

8. Did the decedent possess a testamentary power of appointment that may require probate in order to affect the exercise or non-exercise of said power?

9. Is there a family member or tenant who is refusing to vacate real estate owned the estate or by the revocable inter vivos trust?

10. Will ancillary administration in a foreign jurisdiction be required?

11. Are there any out-of-wedlock children or other persons claiming heirship who have surfaced since the decedent's death or who were previously unknown to the decedent's other heirs?

12. Are there any other reasons why the executor may need to shorten the period for claims against the estate from two years (from the date of death) to six months (from the date of publication of notice to unknown creditors)?

13. Is there something that just doesn't smell right?

The Lawyers Know Too Much
Carl Sandburg (1878–1967)

THE LAWYERS, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand Wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers hauling a lawyer's bones.