

Use and Problems of Will-substitute Trusts: An Analysis of Revocable Trusts in the United States

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The settlor of what is called will-substitute trusts provided by Article 90 of the Japanese Trust Code can terminate or amend the trust without the consent of the beneficiary or trustee in certain circumstances. There is a controversy as to whether an adult guardian of a settlor who is under a legal incapacity, or a voluntary guardian acting on behalf of such a settlor, may exercise the settlor's power to terminate or amend the trust. The first purpose of this presentation is to clarify the standard by which an adult guardian or a voluntary guardian of the settlor may exercise the incapacitated settlor's power to terminate or amend the will-substitute trusts by examining the statutes, cases and the Restatement of the Law concerning the revocable trusts in the United States. I argue that an adult guardian or a voluntary guardian of the settlor should be able to terminate or amend the trust only if the action will serve or protect the principal's own needs by taking into consideration such factors as the purpose of the trust, the circumstances under which the trust was created, the extent of the discretion of the trustee, and the financial state of the settlor.

Secondly, we need to address the problem of effective oversight to enforce the duties of the trustee after the settlor-beneficiary of a will-substitute trust loses its capacity. Usually it is an adult guardian or a voluntary guardian of the settlor who has a power and duty to

monitor the acts of the trustee during the settlor's incapacity. In the United States, however, under §603 (a) of the Uniform Trust Code promulgated in 2000, "While a trust is revocable and the settlor has capacity to revoke the trust, right of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor". It recognizes the beneficiary's right to enforce fiduciary duties of the trustee following the incapacity of the settlor. Though the majority of the states deny beneficiary standing during the settlor's incapacity, some states recognize such standing in the same way as the Uniform Trust Code of 2000. There are also several academic arguments for recognizing the presumptive standing of the beneficiary to enforce the trust in the event of the settlor's incapacity. Therefore, I suggest that it can be an effective way to confer a remainder beneficiary the right to monitor the trustee's acts in order to strengthen the trust's oversight structure especially when the primary purpose of the trust is to devise the property to the remainder beneficiary.