THE TRUST TRANSFER PROBLEM*

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For decades, a single tactic has dominated American estate planning. By transferring assets to a revocable living trust ("rev trust"), individuals can bypass the notoriously slow, expensive, and public probate system. But because rev trusts operate privately, there is no data on how well they function. This Article conducts the first empirical study of trial-level matters involving rev trusts—a review of 1,568 cases filed between 2014 and 2020 in San Francisco—and finds that a surprising number of rev trusts do not achieve their objectives. The culprit is what we call the "trust transfer problem": during their lives, settlors often fail to satisfy the finicky rules that govern the conveyance of property into their rev trusts. This little-noticed breakdown in the inheritance process is so pervasive that it accounts for a quarter of the cases in our dataset.

The Article then reveals that the trust transfer problem causes three kinds of harm. First, at the bare minimum, survivors must obtain an order from the trust department that the settlor intended property to belong to the trust. Having to take this step undercuts the benefits of probate avoidance by causing delays, generating costs, and exposing intimate details about the settlor or their loved ones. Second, the trust department sometimes denies requests to retitle assets in the name of the trust, sending the property into probate—the very regime that rev trusts are designed to avoid. Using another hand collected dataset of San Francisco probate administrations from the same timeframe, we follow these cases through this extra level of judicial review and find that they invariably drag on for years and incur thousands of dollars in fees. Third, in extreme situations, even this double dose of court intervention can be insufficient to convey possessions into the trust. This outcome thwarts the settlor's dispositive choices by effectively disinheriting the trust's beneficiaries.

Finally, the Article proposes a straightforward solution to the trust transfer problem. It argues that this issue is endemic because the law assumes that non-transferred property does not belong to a rev trust and requires interested parties

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to prove otherwise. But this is backwards. Almost every settlor intends their rev trust to contain everything they own. Thus, states should pass laws declaring that the mere act of executing a rev trust showcases the settlor's intent to funnel all of their assets into it when they die. This forgiving approach would better serve decedents' wishes, reduce burdens on estates and the judicial system, and bring this area into alignment with the functionalism of modern inheritance doctrine.

INTRODUCTION

Joyce and James Ngai planned to divide their assets among their children equally but give their adult son the right to continue living in their home.[1] Samuel and Alvina Lee wanted to pass land in San Francisco to their only child, Alvin.[2] Aidan and Nuala Neilan chose five charities to receive money when the first spouse died.[3]

The Ngais, Lees, and Neilans each executed revocable living trusts ("rev trusts").[4] For more than half a century, rev trusts have been the marquee estate planning tool.[5] This movement began in 1965, when Norman Dacey published

1. *See* Petition for Order Confirming Trust Assets, Exhibit A at 3, *In re* Joyce & James Ngai 2001 Trust, No. PTR-152-98756 (Cal. Super. Ct. July 13, 2015) [hereinafter Ngai Petition].

2. *See* Petition for Order Confirming Assets of Trust Estate at 4–5, *In re* The Lee Revocable Trust, No. PTR-14-297773 (Cal. Super. Ct. July 25, 2014) [hereinafter Lee Petition].

3. *See* Petition for Order Confirming Trust Assets, Exhibit 1 at 5–6, *In re* The Neilan Family Trust, No. PTR-14-297415 (Cal. Super. Ct. May 8, 2014) [hereinafter Neilan Petition].

4. *See* Ngai Petition, *supra* note 1, at 4; Lee Petition, *supra* note 2, at 2–3; Neilan Petition, *supra* note 3, at 2.

5. *See* LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 500 (3d ed. 2002) ("[R]evocable trusts, are staples of the estate planner's

How to Avoid Probate!.[6] Dacey claimed that probate—the court-supervised inheritance system that governs the possessions of people who either make wills or die intestate—is painfully slow, wildly expensive, and, like all processes rooted in the judiciary, a matter of public record.[7] Dacey then showed readers how they could bypass probate by executing a rev trust.[8] Surprisingly, Dacey's manuscript went the mid-twentieth-century version of viral.[9] He first had to beg stores near his home in Connecticut to carry it, but it eventually became the bestselling nonfiction book of 1966.[10] The second-bestselling entry that year was called *The Human Sexual Response*, which inspired the joke that dodging probate had become "more popular than sex."[11]

Dacey's sleight of hand works like this. A trust arises when its creator (a "settlor") transfers property to a trustee, who must manage and distribute it as directed.[12] Once the settlor conveys something to the trustee, it no longer belongs to the settlor[13]—even if the settlor makes themselves initial trustee and beneficiary, reserves the power to revoke the trust, and specifies who will receive the trust assets after they pass on.[14] This tactic of forsaking wealth on paper pays off down the line because probate only governs rights or items that someone owns at death in their personal capacity.[15] So if a settlor transfers

inventory."); Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 82 (2015) ("[I]t has become popular wisdom that revocable trusts are a necessary staple of every estate plan.").

6. *See generally* NORMAN F. DACEY, HOW TO AVOID PROBATE! (5th ed. 1993) (advocating the use of revocable living trusts as an alternative to probate). To be clear, interest in the trust as an estate-planning vehicle predated Dacey. *See* A. James Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108, 109 (1960) ("The revocable *inter vivos* trust is one of the widely employed vehicles for the avoidance of probate." (emphasis added)).

7. *See* DACEY, *supra* note 6, at 23–28.

8. *See id.* at 44–50.

9. *See* Edwin McDowell, *Book Notes*, N.Y. TIMES (Mar. 7, 1990), https://www.nytimes.com/1990/03/07/arts/book-notes-459190.html [https://perma.cc/83A4-97C6 (staff-uploaded, dark archive)].

10. *See id.*

11. Harold G. Wren, Book Review, 42 NOTRE DAME L. REV. 445, 447 n.17 (1967).

12. Trusts are "essentially a gift, projected on the plane of time and so subjected to a management regime." Bernard Rudden, Book Review, 44 MOD. L. REV. 610, 610 (1981). Although some people make testamentary trusts, which arise out of wills and thus are subject to probate, we focus on living trusts, which, as the name implies, become effective *during* the settlor's lifetime. *See, e.g.*, *In re* Estate of Dower, 2021 MT 245, ¶ 15, 405 Mont. 443, 495 P.3d 1083.

13. *See, e.g.*, Bell v. Estate of Bell, 181 P.3d 708, 714 (N.M. Ct. App. 2008) ("After funding the Trust, Decedent no longer owned those assets because they became the property of the Trust and because the title to the assets was thus in the Trustee.").

14. *See* Zackary C. Nehls, Note, *Death Is Certain but Probate Is Optional: How To Transfer Wealth and Dodge Creditors Using a Revocable Trust*, 65 ST. LOUIS U. L.J. 431, 433 (2021) ("Titling assets in a revocable trust has no practical effect on ownership and control . . . ."); Kent D. Schenkel, *The Trust-As-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 46–47 (2013) (explaining that rev trusts "avoid[] probate" while "allow[ing] one to retain control until death").

15. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1(a) (A.L.I. 1999) ("The probate estate consists of property owned by the decedent at death . . . .").

everything to themselves as trustee during life, then they will leave nothing subject to probate when they die.[16]

The Ngais, Lees, and Neilans tried to follow this blueprint. Each couple signed a trust instrument: a document declaring that they held their assets as co-trustees for their benefit during their lives while retaining the power to revoke this arrangement.[17] The trust instruments also stated that, when the first spouse died, the survivor would become sole trustee and beneficiary, and that when the second spouse died, the trust would become irrevocable and a successor trustee would take over and handle and distribute the remaining property as instructed.[18] Like most such writings, the trust instruments ended with an appendix called "Schedule A" that listed the possessions that were held in trust.[19] Finally, the Ngais and Lees—but not Aidan Neilan, as we will discuss—signed "pour-over" wills, which leave anything that remains outside the trust at the settlor's death to the successor trustee.[20] Pour-over wills ensure that assets that a settlor accidentally fails to retitle while alive flow into the trust after they pass away.[21] Because pour-over wills, like all wills, must go through probate, they are a precaution that, ideally, will never be needed.[22]

However, years later, when these settlors began dying, their loved ones discovered that these seemingly unremarkable estate plans suffered from a latent defect. The Ngais, Lees, and Neilans had failed to transmit assets from themselves in their personal capacities to themselves as trustees.[23]

For example, the Ngais tried to retitle their home by recording a deed stating that they conveyed it "to [their] revocable trust."[24] But they had made a drafting error. Their deed granted title from "James H.F. Ngai and Joyce Yuk

16. *See* DACEY, *supra* note 6, at 45–49; RESTATEMENT (THIRD) OF TRS. § 25 cmt. a (A.L.I. 2003) ("[P]robate administration is not required for assets transferred to the trustee *inter vivos* . . . ." (emphasis added)); MYRON KOVE, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 1061, Westlaw (database updated May 2025) ("[S]ince assets titled in the name of the trust are no longer in the settlor's name, there is no need for probate to determine ownership.").

17. *See* Ngai Petition, *supra* note 1, Exhibit A at 1–4, 9–10; Lee Petition, *supra* note 2, Exhibit 1 at 1–7, 44; Neilan Petition, *supra* note 3, Exhibit 1 at 1–4, 33.

18. *See* Ngai Petition, *supra* note 1, Exhibit A at 7–9; Lee Petition, *supra* note 2, Exhibit 1 at 20–37; Neilan Petition, *supra* note 3, Exhibit 1 at 4–31.

19. *See* Ngai Petition, *supra* note 1, Exhibit B at 24; Lee Petition, *supra* note 2, Exhibit 1 at 45; Neilan Petition, *supra* note 3, Exhibit 1 at 35–45.

20. *See* Ngai Petition, *supra* note 1, Exhibit F at 1–4; Petition for Probate of Will and for Letters Testamentary attach. 3e(2) at 2–8, Estate of Lee, No. PES-14-297958 (Cal. Super. Ct. July 7, 2016); *see also infra* text accompanying note 63.

21. *See* GEORGE M. TURNER, GERRY W. BEYER & JAMES M. KOSAKOW, REVOCABLE TRUSTS § 26:1 (5th ed. 2025).

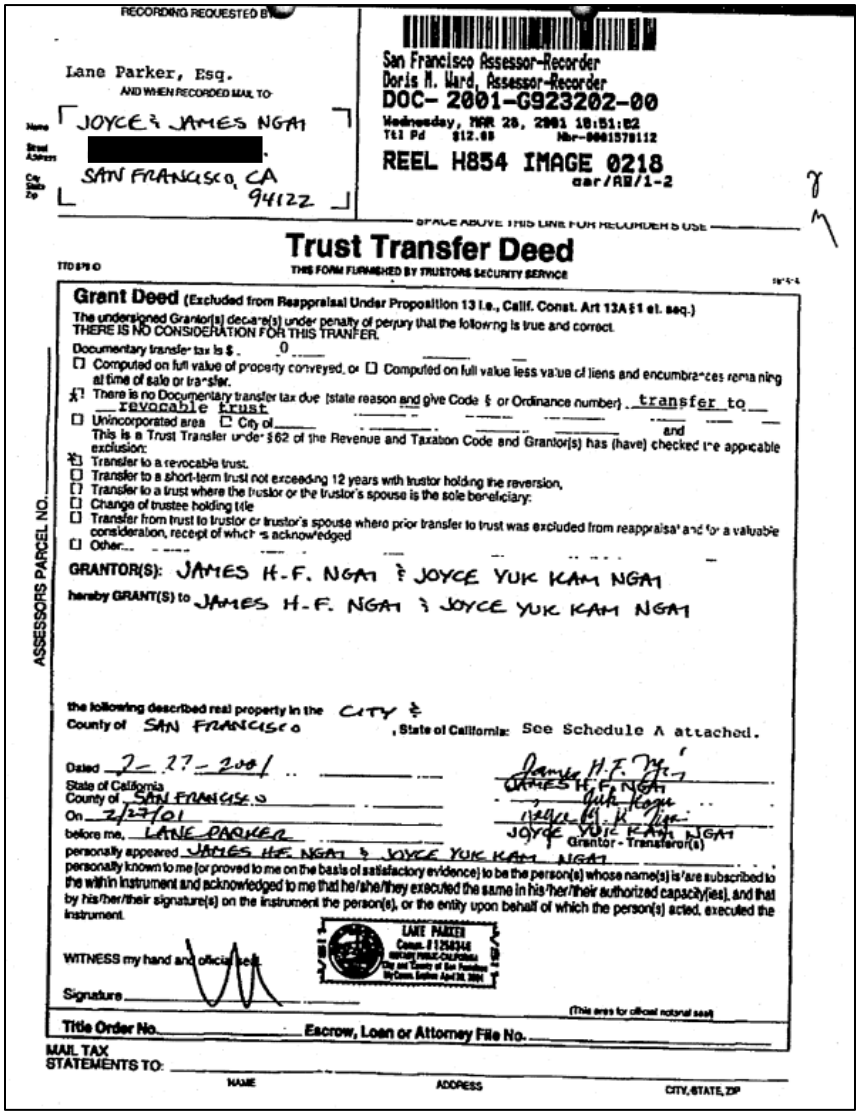
22. *See* MICHAEL J. GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (Melissa Riveglia & Betty L. Dickinson eds., 2005).

23. *See* Ngai Petition, *supra* note 1, at 4–5; Lee Petition, *supra* note 2, at 2; Neilan Petition, *supra* note 3, at 2–4.

24. Ngai Petition, *supra* note 1, Exhibit D.

Kam Ngai" to "James H.F. Ngai and Joyce Yuk Kam Ngai," omitting the critical words "as trustees" after their names appeared the second time.[25] Thus, they had inadvertently transferred their residence from themselves as individuals to themselves as individuals.

Figure 1: The Ngais' Failed Trust Transfer Deed[26]



RECORDING REQUESTED BY

Lane Parker, Esq.

AND WHEN RECORDED MAIL TO

JOYCE & JAMES NGAI

[redacted]

SAN FRANCISCO, CA 94122

San Francisco Assessor-Recorder
Doris M. Ward, Assessor-Recorder
DOC- 2001-G923202-00
Wednesday, MAR 28, 2001 10:51:02
Tel Pd $12.00 Nbr-0001578112
REEL H854 IMAGE 0218
car/RE/1-2

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Trust Transfer Deed

THIS FORM FURNISHED BY TRUSTORS SECURITY SERVICE

Grant Deed (Excluded from Reappraisal Under Proposition 13 i.e., Calif. Const. Art 13A §1 et. seq.)

The undersigned Grantor(s) declare(s) under penalty of perjury that the following is true and correct.
THERE IS NO CONSIDERATION FOR THIS TRANFER.

Documentary transfer tax is $ 0

☐ Computed on full value of property conveyed, or ☐ Computed on full value less value of liens and encumbrances remaining at time of sale or transfer.

☒ There is no Documentary transfer tax due (state reason and give Code § or Ordinance number) transfer to revocable trust

☐ Unincorporated area ☐ City of _____ and

This is a Trust Transfer under §62 of the Revenue and Taxation Code and Grantor(s) has (have) checked the applicable exclusion:

☒ Transfer to a revocable trust.
☐ Transfer to a short-term trust not exceeding 12 years with trustor holding the reversion.
☐ Transfer to a trust where the trustor or the trustor's spouse is the sole beneficiary.
☐ Change of trustee holding title
☐ Transfer from trust to trustor or trustor's spouse where prior transfer to trust was excluded from reappraisal and for a valuable consideration, receipt of which is acknowledged
☐ Other

ASSESSOR'S PARCEL NO.

GRANTOR(S): JAMES H.F. NGAI & JOYCE YUK KAM NGAI

hereby GRANT(S) to JAMES H.F. NGAI & JOYCE YUK KAM NGAI

the following described real property in the CITY & County of SAN FRANCISCO, State of California: See Schedule A attached.

Dated 2-27-2001

James H.F. Ngai
JAMES H.F. NGAI
Yuk Kam Ngai
JOYCE YUK KAM NGAI
Grantor - Transferor(s)

State of California
County of SAN FRANCISCO
On 2/27/01
before me, LANE PARKER
personally appeared JAMES H.F. NGAI & JOYCE YUK KAM NGAI
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

LANE PARKER
Comm. # 1256346
NOTARY PUBLIC-CALIFORNIA
City and County of San Francisco
My Comm. Expires April 28, 2004

WITNESS my hand and official seal.

Signature _____

(This area for official notarial seal)

Title Order No. _____ Escrow, Loan or Attorney File No. _____

MAIL TAX STATEMENTS TO: _____
NAME ADDRESS CITY, STATE, ZIP

25. *Id.*

26. Throughout this Article, we have redacted sensitive information such as addresses and social security numbers from the images.

The Lees apparently did not even understand that they needed to deed their real estate into their rev trust.[27] It was easy to see how they might have made this mistake. For one, their trust instrument implied that they had already changed title, announcing that the trust was "the recipient of all their assets."[28] Moreover, the Lees had created a notarized "affidavit of trust": a short document that they could send to third parties such as banks and ask them to "transfer our property . . . to the [t]rust."[29] Because the Lees had already signed these formal legal papers, they may not have realized that they needed to go further and also execute a deed for the parcel.[30] Finally, a blessing of rev trusts—that they do not alter a settlor's power over their property in any meaningful way[31]—turned out also to be a curse. The fact that the Lees still held the land in their personal capacities made no difference to their day-to-day lives and only surfaced after they had passed away, when it was too late for them to fix the blunder.[32]

27. *See* Lee Petition, *supra* note 2, at 3.

28. *Id.* Exhibit 1 at 4.

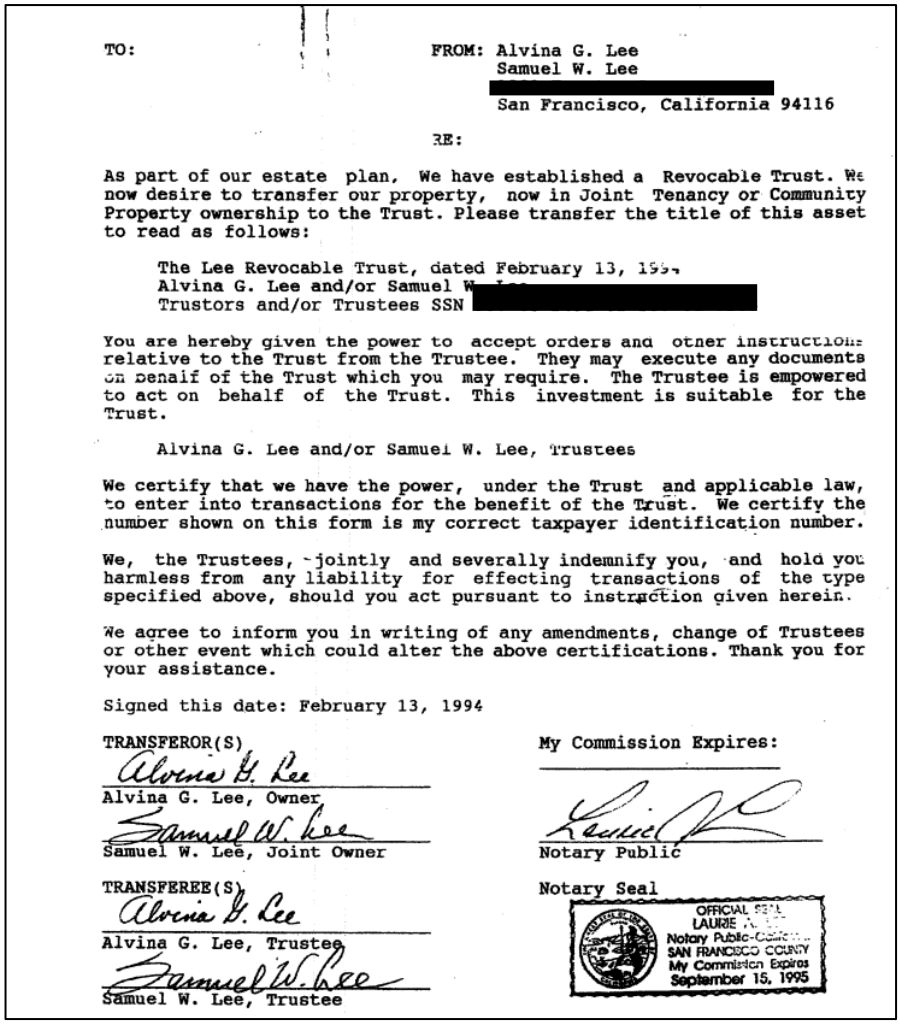
29. *Id.* Exhibit 6a.

30. *See id.* at 3 (alleging that the Lees "undoubtedly believed that the mere act of executing the . . . [t]rust automatically transferred the house to the trust").

31. *See supra* text accompanying note 14.

32. *See* Lee Petition, *supra* note 2, at 1–2.

Figure 2: The Lees' Affidavit of Trust[33]



TO:

FROM: Alvina G. Lee
Samuel W. Lee
[redacted]
San Francisco, California 94116

RE:

As part of our estate plan, We have established a Revocable Trust. We now desire to transfer our property, now in Joint Tenancy or Community Property ownership to the Trust. Please transfer the title of this asset to read as follows:

The Lee Revocable Trust, dated February 13, 199-
Alvina G. Lee and/or Samuel W. [redacted]
Trustors and/or Trustees SSN [redacted]

You are hereby given the power to accept orders and other instructions relative to the Trust from the Trustee. They may execute any documents on behalf of the Trust which you may require. The Trustee is empowered to act on behalf of the Trust. This investment is suitable for the Trust.

Alvina G. Lee and/or Samuel W. Lee, Trustees

We certify that we have the power, under the Trust and applicable law, to enter into transactions for the benefit of the Trust. We certify the number shown on this form is my correct taxpayer identification number.

We, the Trustees, jointly and severally indemnify you, and hold you harmless from any liability for effecting transactions of the type specified above, should you act pursuant to instruction given herein.

We agree to inform you in writing of any amendments, change of Trustees or other event which could alter the above certifications. Thank you for your assistance.

Signed this date: February 13, 1994

TRANSFEROR(S)
Alvina G. Lee
Alvina G. Lee, Owner
Samuel W. Lee
Samuel W. Lee, Joint Owner

TRANSFEREE(S)
Alvina G. Lee
Alvina G. Lee, Trustee
Samuel W. Lee
Samuel W. Lee, Trustee

My Commission Expires:

Notary Public

Notary Seal

OFFICIAL SEAL
LAURIE [illegible]
Notary Public-California
SAN FRANCISCO COUNTY
My Commission Expires
September 15, 1995

The Neilans' survivors found themselves in a similar situation. Aidan, the first spouse to die, had owned twenty-three financial accounts in his individual capacity.[34] He had not asked the eight different institutions that held these funds to change the account titles to him and Nuala as trustees.[35]

Stories like these rarely see the light of day. Although rev trusts are "probably the most ubiquitous estate planning tool," one reason they are so

33. Lee Petition, *supra* note 2, at 67.

34. *See* Neilan Petition, *supra* note 3, at 2–3.

35. *See id* at 3–4.

popular—that they pass wealth privately—also shields them from research.[36] Individuals who make wills or die intestate leave a paper trail that casts light on their experience in the probate system.[37] But rev trusts pass wealth off of the grid.[38] Indeed, conventional wisdom dictates that "a typical trust today avoids the inside of a courtroom unless litigation arises."[39] This means that virtually all scholarship about rev trusts focuses on the tiny fraction of cases that spark disputes, do not settle, go up on appeal, and result in a reported opinion.[40] Remarkably, we have no idea how well the dominant contemporary estate planning strategy works for the overwhelming majority of settlors and their families.

This Article fills this gap and finds that an alarming number of rev trusts are flawed. Its centerpiece is the first empirical study of trial-level cases stemming from rev trusts: an original, hand-collected dataset of 1,568 matters that appeared on the San Francisco Superior Court's docket between January 1, 2014, and December 31, 2020. A staggering twenty-six percent of these filings—including those that brought the Ngais, Lees, and Neilans to our attention—sought a court order determining that a now-deceased settlor had intended to convey property to themselves as trustee while alive.[41] Trust and estates lawyers call these "*Heggstad* petitions" after an influential appellate court opinion, *Estate of Heggstad*,[42] that held that a settlor placed real estate into his rev trust by listing

36. Bradley E.S. Fogel, *Trust Me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS U. L.J. 805, 806 (2014).

37. Because probate files are such rich resources, they have served as the basis for many empirical studies. *See, e.g.*, MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 44–45 (1970) (examining probate records from Cuyahoga County, Ohio); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (studying 187 estates from Michigan and 100 estates from London); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (surveying ninety-seven estates from 1953 and seventy-three estates from 1957 from Illinois); David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627–52 (2015) (reporting on the probate process in a large California county); Richard R. Powell & Charles Looker, *Decedents' Estates—Illumination from Probate and Tax Records*, 30 COLUM. L. REV. 919, 923–25 (1930) (analyzing data about estate administration from New York); Robert A. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 596 (1974) (surveying four Minnesota counties in 1969); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 55–56 (1985) (surveying probate records in California, Florida, Maryland, Massachusetts, and Texas); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393–94 (reviewing records from several periods in Wisconsin).

38. *See* Frances H. Foster, *Trust Privacy*, 93 CORN. L. REV. 555, 557 (2008) ("[R]evocable trusts, including those that continue for decades after the settlor's death, are private.").

39. Robert B. Niles-Weed & Robert H. Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, 97 TUL. L. REV. 1013, 1035 (2023).

40. *See infra* text accompanying notes 134–35.

41. *See* Ngai Petition, *supra* note 1, at 5–6; Lee Petition, *supra* note 2, at 5–6; Neilan Petition, *supra* note 3, at 5–6.

42. 20 Cal. Rptr. 2d 433 (Ct. App. 1993).

it on Schedule A.[43] The fact that *Heggstad* petitions constitute a plurality of trust cases reveals that settlors persistently fail to fund their rev trusts during their lives. We call this little-noticed but rampant issue the "trust transfer problem."[44]

Our research elucidates that the trust transfer problem causes three kinds of harm. First, if nothing else, survivors must file a *Heggstad* petition to get an order from the trust department that a now-deceased settlor meant to convey property to their trust.[45] Although judicial intervention only seems to confirm the glaringly obvious—there is rarely doubt about the settlor's intent to transmit the omitted possessions through the trust—it diminishes the benefits of probate avoidance by causing delays, generating expenses, and exposing intimate details about families.[46] For instance, simply because the Ngais did not write "as trustees" on their deed, their successor trustees had to file a *Heggstad* petition to place their home in trust, a process that entailed spending months in court, paying what was likely thousands of dollars in lawyers' fees, and disclosing sensitive facts in the trust instrument about the beneficiaries.[47]

Second, and even worse, some botched trust transfers turn out to be irreparable. We found that judges typically ignored persuasive evidence that a settlor had meant to fund their rev trust and denied *Heggstad* petitions if the text of the trust instrument did not mention the missing possession.[48] This funneled the estate into probate—the very regime the settlor had wanted to avoid. Consider the fate of the Lees' real property.[49] For unclear reasons, the Schedule A at the end of their trust instrument was blank.[50] After the Lees died, Alvin, their successor trustee and only child, bolstered his *Heggstad* petition with a letter from the Lees' counsel declaring that "it was clearly [the Lees'] desire to . . . transfer[] the property into the trust."[51] Yet, although nobody opposed Alvin's filing—in fact, because he was his parents' sole beneficiary and intestate

43. *Id.* at 436. We discuss *Heggstad* in depth *infra* text accompanying notes 149–62.

44. There appear to be just two references to the trust transfer problem in the literature. First, as part of a thoughtful article questioning whether rev trusts always help settlors avoid probate, Bradley Fogel asserts that "[s]ettlors very rarely transfer all of their property" to themselves as trustee. Fogel, *supra* note 36, at 812. However, Fogel does not cite authority for this claim—likely because there is nothing on point. Second, in a precursor to this project, one of us has observed that there have been several published appellate decisions dealing with partially funded "incomplete trusts." David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 578, 581–83 (2017) (observing also that seventeen percent of a sample of testate estates stemming from deaths in Alameda County, California in 2007 were pour-over wills, which suggests that "something went dramatically wrong with a settlor's effort[s]").

45. *See infra* text accompanying note 195.

46. *See infra* text accompanying notes 206–13.

47. *See* Ngai Petition, *supra* note 1, Exhibit A at 3 (suggesting that the Ngais were concerned about their adult son's ability to live outside of their home).

48. *See infra* text accompanying notes 230–31.

49. *See supra* text accompanying notes 27–32.

50. *See* Lee Petition, *supra* note 2, Exhibit 1 at 45.

51. *Id.* at 65.

heir, no one would even have had *standing* to object[52]—the court refused to grant relief.[53]

We leveraged another dataset to see what happened next in matters like the Lees'. We collected 3,073 probate administrations from San Francisco during the same 2014–2020 timeframe. We found that an astonishing thirty-one percent of testacies (cases involving wills) featured a pour-over will that was necessary to fully fund a trust.[54] In fact, we were able to trace many unsuccessful *Heggstad* petitions from our trust research into probate.[55] For example, after the Lees' estate spent resources in a fruitless attempt to obtain relief in the trust department, their home went through probate under Alvina's pour-over will, emerging only after two years had passed and the lawyers had billed $16,000.[56] Overall, the probates that stemmed from failed trust transfers took an average of 639 days to complete while incurring a mean of $23,228 in executors' and attorneys' fees.[57] These figures confirm that settlors frequently die without having conveyed assets to themselves as trustees and that their estates pay the price.

The third and most extreme consequence of the trust transfer problem is that the settlor's substantive estate planning choices are thwarted. The core principle of U.S. inheritance law is testamentary freedom: the idea that people have the right to decide who receives their property and how much they get.[58] Yet sometimes neither a *Heggstad* petition in the trust department nor a proceeding in probate is enough to transfer property into the trust, which can violate the settlor's intent by disinheriting the trust beneficiaries.[59] The Neilans' estate illustrates this dark possibility. Recall that they wanted five charities to receive gifts after the first member of the couple passed away.[60] Yet they had

52. In general, only an "interested person," who has a financial stake in the outcome of a matter, can participate in an inheritance dispute. *See* David Horton, *Probate Standing*, 123 MICH. L. REV. 1, 7–8 (2024). Because Alvin would inherit the land regardless of whether it was placed in trust, nobody else had skin in the game.

53. *See* Order Denying Petition to Confirm Assets of Trust Estate at 1, *In re* The Lee Revocable Trust, No. PTR-14-297773 (Cal. Super. Ct. 2014) [hereinafter Lee Order].

54. As we discuss *infra* in Subsection II.B.2, *infra*, not every pour-over will in probate transmits assets to a trust. Our calculations thus exclude pour-over wills that were probated for other reasons.

55. *See id.*

56. *See* Order for Final Distribution and Settling First and Final Report of Status of Administration of Executor; for Waiver of Statutory Executor's Fees; for Allowance of Attorneys' Fees; and for Waiver of Account at 2–6, Estate of Lee, No. PES-14-297958 (Cal. Super. Ct. 2016).

57. *See infra* Subsection II.B.2.

58. *See, e.g.*, Fantin v. Fantin, No. FSTCV166027439S, 2017 WL 4872858, at *21 (Conn. Super. Ct. Sep. 6, 2017) ("Americans consider testamentary freedom to be among our country's cherished rights."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 877 (2012) ("The guiding principle of inheritance law is one of testamentary freedom, holding that the owner of property during life has the power to control its disposition at death.").

59. *See infra* text accompanying notes 256–63.

60. *See supra* text accompanying note 3.

listed specific stocks and bonds on Schedule A that they had later transferred into the accounts that were held in Aidan's name.[61] As a result, the court denied their successor trustee's *Heggstad* petition because the accounts in Aidan's name were merely "derived from" assets itemized on Schedule A but did not actually appear on that document.[62] And although settlors usually backstop their rev trusts with pour-over wills, Aidan had not done so.[63] Thus, the non-trust property flowed through probate to his intestate heirs—not to the beneficiaries of his rev trust, such as the charities.[64] This perverse result can occur any time a settlor with no pour-over will leaves something valuable to a non-family member.[65] If the settlor never conveys the asset to themselves as trustee and their successor trustee strikes out in the trust department, the intestacy statute will defy the settlor's wishes by giving the property to their spouse or descendants.[66]

Finally, the Article proposes a solution to the trust transfer problem. It argues that the issue is so widespread because the law uses the wrong default rule. Courts assume that assets do not belong to a rev trust and require parties to demonstrate otherwise.[67] Nevertheless, background principles are supposed to be majoritarian—to mirror what most people want—and settlors invariably intend rev trusts to hold their entire estate.[68] Thus, we argue that state legislatures should enact statutes that treat the creation of a rev trust as manifesting the settlor's intent to fund it with everything they own in their individual capacity when they die. Although this may sound radical, one jurisdiction, Nevada, has passed a similar law.[69] Our thesis would also pay important dividends for ordinary people and their loved ones by sparing successor trustees from having to file *Heggstad* petitions, reducing the number of pour-over wills in probate, and avoiding accidental disinheritance.[70] Lastly,

61. *See* Memorandum of Points and Authorities Regarding Petition for Order Confirming Trust Assets at 3–4, *In re* Neilan Family Trust, No. PTR-14-297415 (Cal. Super. Ct. Apr. 16, 2014).

62. *Id.* at 1; Order Denying Petition to Confirm Trust Assets at 1, *In re* Neilan Family Trust, No. PTR-14-297415 (Cal. Super. Ct. May 8, 2014) [hereinafter Neilan Order].

63. *See* Declaration in Response to Examiner's Notes at 1, *In re* Neilan Family Trust, No. PTR-14-297415 (Cal. Super. Ct. Apr. 16, 2014).

64. *See id.* at 2 (distinguishing Aidan's trust beneficiaries from the intestate heirs). In the interest of full disclosure, we could not confirm what happened to the non-trust assets in this case because the Neilans lived outside of San Francisco and thus Aidan's estate did not surface in our review of probate records. *See* Neilan Petition, *supra* note 3, Exhibit 5; *see also infra* note 246 (discussing why trust cases from San Francisco often spawn probate matters in other counties).

65. *See infra* text accompanying notes 256–63.

66. *See infra* text accompanying notes 256–63.

67. *See infra* note 155.

68. *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1061 (2004) ("[M]ajoritarian defaults as the exclusive means of achieving public policy within the arena of gratuitous transfers.").

69. *See* NEV. REV. STAT. ANN. § 146.070(1)(b); *infra* text accompanying notes 294–99.

70. *See infra* Section III.B.

it would harmonize trust transfer rules with other reforms in the field of inheritance law that seek to facilitate a decedent's intent.[71]

A clarification may be helpful at the outset. It is probably more accurate to say that our research uncovers *two* trust transfer problems. The first occurs when settlors fail to *formally* change title. For instance, the Ngais and Lees did not deed their real property to themselves as trustees and Aidan Neilan never changed ownership of his accounts.[72] This oversight usually goes undetected until the settlor dies and a third party refuses to recognize the successor trustee's authority over assets that still belong to the settlor as an individual.[73] For instance, a potential buyer of the settlor's house might discover that the successor trustee does not have the right to sell it or a bank could refuse to release funds to the trust beneficiaries.[74] The settlor's inability to formally change title is what prompts the successor trustee to file a *Heggstad* petition.[75]

The second trust transfer problem rears its head when the trust department denies *Heggstad* petitions for fastidious reasons.[76] As we will explain, a *Heggstad* petition asks the court to find that the settlor *informally* changed title by mentioning an asset in their estate plan.[77] Some such requests, like the Ngais', can essentially be rubber-stamped.[78] Indeed, since the Ngais' trust instrument contained instructions regarding their house, the judge concluded that they had meant to place the property in trust and granted their successor trustee's *Heggstad* petition without a hearing.[79] But the Lees and the Neilans were less fortunate. Because the Lees' Schedule A was blank and the Neilans' trust instrument did not list the missing accounts, the court determined that they failed to informally change title and denied their successor trustees' *Heggstad* petitions.[80] It is in cases like these—when settlors neither formally nor informally change title—that their estates end up in probate and the beneficiaries of their trust may be disinherited.[81]

The Article includes three parts. Part I provides background. It first describes how rev trusts became "the central document of an estate plan."[82] It

71. *See infra* text accompanying notes 109–22, 288–90.

72. *See supra* text accompanying notes 27–35.

73. *See infra* text accompanying notes 313–15.

74. *See infra* text accompanying notes 313–15.

75. *See infra* text accompanying notes 313–15.

76. *See infra* text accompanying notes 230–43.

77. *See infra* notes 161–63 and accompanying text.

78. *See* Order Confirming Trust Asset at 3, *In re* Ngai 2001 Tr., No. PTR-15-298756 (Cal. Super. Ct. 2015) [hereinafter Ngai Order].

79. *See* Ngai Petition, *supra* note 1, at 4; Ngai Order, *supra* note 78, at 3. Of course, the Ngais did not get off scot-free: as we mentioned, their estate's diversion into the court system cost them and their survivors time, money, and privacy. *See supra* text accompanying note 44.

80. *See* Lee Order, *supra* note 53, at 1; Neilan Order, *supra* note 62, at 1.

81. *See supra* Subsection II.B.2.

82. RESTATEMENT (THIRD) OF TRS. § 25 cmt. a (A.L.I. 2003).

then shows that there is little concrete evidence about how well rev trusts serve settlors and their loved ones. Part I concludes by surveying the complicated rules that govern whether settlors either formally or informally transmitted their possessions into their rev trusts. Part II reports the results of our study. It highlights three points. First, our data is riddled with *Heggstad* petitions and requests to probate pour-over wills, revealing that both varieties of the trust transfer problem are all too common. Second, courts deny *Heggstad* petitions for formalistic reasons that have little bearing on the settlor's intent. Third, the law as it currently exists undermines settlors' wishes and can have serious repercussions for their beneficiaries. Part III presents and defends our thesis. It reveals why legislation mandating that property a settlor owns in their personal capacity at death passes into their rev trust would be a graceful solution to both trust transfer problems.

I. THE REV TRUST REVOLUTION

This Part lays the groundwork for the rest of the Article. It begins by detailing the broader movement that led to the rise of rev trusts and explaining why we know so little about the average settlor's experience. It then outlines the arcane principles that control whether a settlor owns property as an individual or as a trustee.

A. *The Rise of Rev Trusts*

This Section examines how rev trusts went mainstream. It reveals that this shift is part of a broader series of changes in inheritance law, such as the decline in Wills Act formalities and probate's fall from grace. It also shows how rev trusts have privatized the once public succession process.

Traditionally, the field of decedents' estates was not user-friendly. To be sure, its first principle is what we will call "substantive" testamentary freedom: the idea that people have an almost "unrestricted right to dispose of their property as they please."[83] Oddly, though, courts tried to achieve this goal through "harsh and relentless formalism."[84] For example, in many states, the only way to create a will was to satisfy the Wills Act, which required testators to sign or acknowledge posthumous dispositions of property before two

83. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (A.L.I. 2003); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("[U]nder a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.").

84. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) [hereinafter Langbein, *Substantial Compliance*].

witnesses who were in the same room.[85] Courts took these statutes literally, invalidating would-be wills that parties signed in the wrong place[86] or at different times during the same day.[87] In a seeming contradiction, judges who followed this rubric of "strict compliance"[88] opined that they were protecting "the interests of the decedent"[89] by preventing wrongdoers from offering "a fraudulent and supposititious will instead of the real one."[90]

Similarly, probate—the gauntlet through which most estates passed—took caution to quixotic extremes.[91] To protect the decedent's family and creditors, courts played an active role in supervising estate administration.[92] Personal representatives needed judicial approval before performing routine tasks like hiring appraisers, selling land, and distributing assets.[93] Due to this bureaucratic

85. *See, e.g.*, *In re* Neil's Estate, 39 So. 2d 801, 801 (Fla. 1949); Bioren v. Nesler, 78 A. 201, 202 (N.J. 1910). The statutes governing these cases mirrored the original Wills Act, which the British Parliament passed in 1837. *See* Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng., Wales & N. Ir.). In addition, some jurisdictions permitted holographic wills, which did not need to be witnessed, but had to be handwritten and signed by the testator. *See, e.g.*, Estate of Billings, 1 P. 701, 701 (Cal. 1884). However, courts also demanded rigid adherence to these elements, invalidating would-be holographs for a single typewritten or stamped word. *See, e.g.*, *In re* Thorn's Estate, 192 P. 19, 22 (Cal. 1920).

86. *See, e.g.*, *In re* Schiele's Estate, 51 So. 2d 287, 290 (Fla. 1951); Succession of Hoyt, 303 So. 2d 189, 189 (La. Ct. App. 1974); *In re* Estate of Glace, 196 A.2d 297, 300 (Pa. 1964).

87. *See, e.g.*, *In re* Emart's Estate, 165 P. 707, 710 (Cal. 1917).

88. *See, e.g.*, Appeal of Lane, 17 A. 926, 927 (Conn. 1889) ("Certain formalities of execution and attestation are prescribed as prerequisites to the validity of a will, and without compliance with which it is no will at all, although it is clearly a wish."); Gardner v. Balboni, 588 A.2d 634, 637 (Conn. 1991).

89. *In re* Estate of Harty, 148 N.Y.S. 1052, 1052 (Sur. Ct. 1914).

90. Savage v. Bowen, 49 S.E. 668, 669 (Va. 1905).

91. To be clear, not every death resulted in a probate case. *See* Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 35 (1964) (observing that small estates are often "settled extra-judicially"); Dunham, *supra* note 37, at 244 ("Only 15 per cent of all deaths are followed by estate proceedings in [p]robate [c]ourt."). Nevertheless, individuals who owned more than meager estates either died intestate or made wills and thus left property subject to probate. *See* Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3, 6 (2008) (surveying probate files from 1893 Los Angeles and finding that fifty-six percent were intestacies); Powell & Looker, *supra* note 37, at 923 (studying probate records from New York and Kings Counties, New York, from 1914 to 1929 and determining that there were roughly twice as many intestacies as testacies); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 195 (1969) ("[T]he catchy words, 'estate planning,' . . . used to mean will drafting.").

92. *See* Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2267 (2015) ("[T]he traditional process was [thought to be] necessary to protect the survivors of the decedent, including widows and orphans."); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1117 (1984) [hereinafter Langbein, *Nonprobate Revolution*] (explaining that one of probate's main functions is "paying off the decedent's debts").

93. *See* Thomas E. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425, 425 (1943) ("[Courts oversee] the setting up of the will, appointment of the personal representative, filing of bond and inventory by the latter, granting of allowances for support of the family, notice to creditors to present their claims, and settlement of accounts of the administration . . ."); *see also* Ward & Beuscher, *supra* note 37, at 406 n.19 (listing the steps in probate).

process, "[t]he transfer of wealth on death typically involve[d] the formal intervention of the state to a degree not true of *inter vivos* transfers."[94]

But as the twentieth century elapsed, these stiff traditions increasingly drew fire. Commentators attacked the norm of demanding rigorous adherence to the Wills Act.[95] They accused courts of creating a "snare for the ignorant and the ill-advised" by not bending even when there was no doubt that a document was voluntary and genuine.[96] They also floated a range of alternatives, such as eliminating the attestation mandate for wills[97] or paying more attention to the purposes of the statute rather than its text.[98] Eventually, this cohort rallied around a solution championed by John Langbein, who urged policymakers to allow probate judges to forgive trivial mistakes during the execution process.[99] Today, the Uniform Probate Code, the Restatement (Third) of Property, and twelve states have adopted some version of this "harmless error rule," which allows courts to enforce a document that does not satisfy the Wills Act if there is clear and convincing evidence that the decedent intended the document to be their will.[100]

Yet the most dramatic change involved the mechanics of the inheritance process. The catalyst was Norman Dacey's *How to Avoid Probate!*, which we mentioned earlier, and which overcame its inauspicious origins to become "one of the most successful books ever published."[101] Three of Dacey's criticisms of probate have garnered enough consensus to be encoded as conventional

94. Ward & Beuscher, *supra* note 37, at 394.

95. *See, e.g.*, Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 202 (1989); Gulliver & Tilson, *supra* note 83, at 9–13; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 543 (1990); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 49 (1985).

96. Langbein, *Substantial Compliance*, *supra* note 84, at 531.

97. *See* Lindgren, *supra* note 95, at 543.

98. *See generally* Langbein, *Substantial Compliance*, *supra* note 84 (arguing that courts should apply the concept of substantial compliance to the Wills Act instead of requiring literal compliance).

99. *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 54 (1987) [hereinafter Langbein, *Excusing Harmless Errors*].

100. *See* UNIF. PROB. CODE § 2-503 (amended 2010), 8 U.L.A. 215 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999); CAL. PROB. CODE § 6110(c)(2); COLO. REV. STAT. § 15-11-503; HAW. REV. STAT. § 560:2-503; MICH. COMP. LAWS § 700.2503; MINN. STAT. § 524.2-503; MONT. CODE ANN. § 72-2-523; N.J. STAT. ANN. § 3B:3-3; OHIO REV. CODE ANN. § 2107.24; OR. REV. STAT. § 112.238; S.D. CODIFIED LAWS § 29A-2-503; UTAH CODE ANN. § 75-2-503; VA. CODE ANN. § 64.2-404. Admittedly, despite the harmless error rule's common-sense appeal, it has not been widely enacted. Courts in most jurisdictions still insist on strict compliance. *See, e.g.*, *In re* Estate of Washington, No. M202201326COAR3CV, 2023 WL 4886935, at *1 (Tenn. Ct. App. Aug. 1, 2023); Stanley v. Stanley, No. TTD-CV-225016237-S, 2024 WL 807422, at *1 (Conn. Super. Ct. Feb. 20, 2024); Caveglia v. Heinen, 359 So. 3d 745, 748 (Fla. Dist. Ct. App. 2023).

101. McDowell, *supra* note 9; *see also supra* text accompanying notes 6–11.

wisdom. First, the process is interminable.[102] Indeed, studies show that most estates do not wrap up for about a year and a half, and outliers linger in the system for far longer.[103] Second, probate's fee structure seems like a shakedown.[104] In some jurisdictions, personal representatives and attorneys receive a fixed percentage of the gross estate value,[105] which in routine cases entitles them to compensation that is "astronomical in relation to the time spent . . . on the matter."[106] Third, probate cases, like all court files, are "a matter of public record."[107] Thus, they are accessible by "heirs, thieves, reporters, and 'inquiring minds' alike."[108]

The legal system responded by adopting a variety of reforms designed to facilitate what we will call "procedural" testamentary freedom: the right to opt out of probate.[109] For one, courts essentially decided to ignore the tension between the use of rev trusts as "will substitutes" and the fact that these devices are rarely attested by witnesses.[110] For example, in the leading decision of *Farkas v. Williams*,[111] the Illinois Supreme Court concluded that the creation of a rev trust gives beneficiaries a "present interest" in the property and thus does not trigger a transfer at death that must satisfy the Wills Act.[112] This reasoning leaves much to be desired. After all, how can beneficiaries have a fixed stake in

102. *See, e.g.*, Charles Dent Bostick, *The Revocable Trust: A Means of Avoiding Probate in the Small Estate?*, 21 U. FLA. L. REV. 44, 47 (1968) ("Probate abhors speed.").

103. *See* Dunham, *supra* note 37, at 271–72 (finding that probate estates in Illinois took an average of more than fifteen months to close); Ward & Beuscher, *supra* note 37, at 403 (determining that probate estates in Wisconsin usually terminated in less than a year but occasionally lasted as long as 7.5 or 18 years).

104. *See* DACEY, *supra* note 6, at 23 ("The probate system . . . is essentially a form of private taxation levied by the legal profession upon the rest of the population.").

105. *See Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, 13 REAL PROP. PROB. & TR. J. 238, 238 (1978) (explaining that many jurisdictions "generally set the attorney's fee at a percentage of the value of the assets of the probate estate").

106. DACEY, *supra* note 6, at 24 (quoting Leo Kornfeld); Richard V. Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 547 (1981) ("[S]uccession costs . . . are notoriously higher in the United States than in other countries.").

107. Edward C. King, *Trusts as Substitutes for Wills: Advantages and Disadvantages of "Living Testamentary Dispositions*," 73 TR. & EST. 389, 390 (1941).

108. Foster, *supra* note 38, at 557.

109. This movement also drove interest in nonprobate devices other than rev trusts, such as life insurance and pay-on-death accounts. *See, e.g.*, John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12–16 (2012) [hereinafter Langbein, *Major Reforms*] (observing that "most personal wealth is now held in financially intermediated account forms that invite nonprobate transfer"). However, these mechanisms only govern specific pools of money and thus cannot enable the kind of comprehensive estate planning that rev trusts permit. *See* Bostick, *supra* note 102, at 47.

110. Langbein, *Nonprobate Revolution*, *supra* note 92, at 1125. A handful of cases from the 1930s and 1940s refused to enforce trusts on the grounds that they made dispositions that were "testamentary in character." Betker v. Nalley, 140 F.2d 171, 173 (D.C. Cir. 1944); Smith v. Simmons, 61 P.2d 589, 590 (Colo. 1936); Coon v. Stanley, 94 S.W.2d 96, 99 (Mo. 1936).

111. Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955).

112. *See id.* at 608.

an arrangement that the settlor can freely revoke?[113] But by straining to honor procedural testamentary freedom, *Farkas* was hardly alone. To the contrary, the opinion was part of a broader trend in which "courts sympathize[d] with people who want[ed] to avoid probate."[114]

Moreover, lawmakers encouraged settlors to backstop their rev trusts with pour-over wills by passing the Uniform Testamentary Additions to Trusts Act ("UTATA").[115] Before the UTATA, it was not clear that pour-over wills complied with the Wills Act.[116] Unlike conventional wills, which expressly name beneficiaries, pour-over wills devise property to people named in the trust, "which in most cases is a document that is not executed in accordance with [the Wills Act] formalities."[117] The UTATA resolved this confusion by permitting pour-over wills to funnel assets to the successor trustee.[118]

113. As *Farkas* admitted, "It is difficult to name this interest." *Id.* at 603; *see also* Langbein, *Nonprobate Revolution*, *supra* note 92, at 1128 ("The odor of legal fiction hangs heavily over the present-interest test.").

114. Langbein, *Nonprobate Revolution*, *supra* note 92, at 1129; *see also* David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute*, 24 ELDER L.J. 1, 22 (2016) ("The real issue in *Farkas* was a question of policy in legal institutional design."). State legislatures ultimately endorsed that trend by expressly validating nonprobate transfers as "nontestamentary," a reform that provided a more transparent mechanism to exempt rev trusts from the Wills Act's formal execution requirements and the procedural burdens of probate. UNIF. PROB. CODE § 6-101.

115. UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT (UNIF. L. COMM'N 1960).

116. *See, e.g.*, Austin Wakeman Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521, 544 (1930).

117. UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT, prefatory note (UNIF. L. COMM'N 1991) ("The validity of a pour-over devise or bequest was . . . in doubt because of the general requirement that the ultimate beneficiaries of a testator's estate can only be validly designated in a document executed in accordance with the special statutory formalities for a validly executed will."). Initially, courts tried to finesse the issue by applying the doctrine of incorporation by reference, which allows a will to draw its meaning from an extrinsic writing—even one that is unwitnessed—if the writing is in existence when the testator executes the will. *See, e.g.*, *In re* Rausch's Will, 179 N.E. 755, 757 (N.Y. 1932). But this was a clumsy solution. For one, settlors could not amend their trusts because the new instrument would postdate the creation of the pour-over will. *See* President & Directors of Manhattan Co. v. Janowitz, 260 A.D. 174, 179 (N.Y. App. Div. 1940). Likewise, incorporation by reference would make the *trust* part of the *will*, ignoring the settlor's wish to do the opposite and pour the *will* into the *trust* and sending the estate into probate. *See* Wells Fargo Bank & Union Tr. Co. v. Superior Ct. in & for Marin Cnty., 193 P.2d 721, 724 (Cal. 1948). To avoid these bizarre results, other courts used the acts of independent significance doctrine, which allows a testator to make the disposition of property hinge on external events such as the person who cares for them at death or the papers found in a particular drawer. *See, e.g.*, Canal Nat. Bank v. Chapman, 171 A.2d 919, 921, 922 (Me. 1961) (describing the execution and amendment of a trust as "facts of independent significance" and observing that there is "no solid ground for refusing to give effect to the intention of the testator"). Ultimately, lawmakers concluded "that the cleanest and most reliable way of dealing with the pour-over problem was through enabling legislation—hence the promulgation of UTATA." UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT, prefatory note (UNIF. L. COMM'N 1991).

118. *See* UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT § 1 (UNIF. L. COMM'N 1991) ("A will may validly devise property to the trustee of a trust established or to be established . . . ."); *In re* Blount,

Then, in the 1990s, policymakers amended the UTATA to foreclose a possibility that could doom the standard rev trust/pour-over will arrangement. Under trust law's longstanding "res" requirement, "a trust is not created until it receives property."[119] This rule wreaked havoc when a settlor died without conveying anything to the trustee. In that situation, the unfunded rev trust never came into existence and could not receive assets from the pour-over will, sending the entire estate into intestacy.[120] To avert that worst-case scenario, the revised UTATA clarified "that the receptacle 'trust' need not have been established (funded with a trust res) during the decedent's lifetime, but can be established (funded with a res) by the devise itself."[121] Reforms like these helped the rev trust blossom into "a legally accepted substitute for the will as the central document of an estate plan."[122]

Here, our history of rev trusts runs into an obstacle that is itself part of the story. The spread of these devices made it hard to glean insight into the inheritance process. The contrast with probate could not be starker. When an individual makes a will or dies intestate, their estate passes through the court system and is preserved in amber.[123] Researchers can observe decedents' personal characteristics and wealth,[124] the terms of wills,[125] whether creditors tried to collect debt,[126] and the process's length and cost.[127] But trusts exist in a

438 B.R. 98, 103 (Bankr. E.D. Tex. 2010) (explaining that devises under a pour-over will "'shall be added to the corpus of [the] trust to be administered as a part thereof and shall thereafter be governed by the terms and provisions of the instrument establishing such trust'") (quoting TEX. PROB. CODE § 58a (Vernon 2003)).

119. UNIF. TR. CODE § 401 cmt. (UNIF. L. COMM'N 2023); RESTATEMENT (SECOND) OF TRS. § 66 (1959) ("A trust cannot be created unless there is trust property of such a nature as to be the proper subject of a trust[.]).

120. *See* RESTATEMENT (SECOND) OF TRS. § 54 cmt. f (A.L.I. 1959).

121. UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT § 1 cmt. (UNIF. L. COMM'N. 1991).

122. RESTATEMENT (THIRD) OF TRS. § 25 cmt. a (A.L.I. 2003).

123. *See supra* text accompanying note 37.

124. *See, e.g.*, Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2614–15 (2020) (contrasting the age, estate size, race, and gender of testate and intestate decedents from Alachua County, Florida).

125. *See, e.g.*, Dunham, *supra* note 37, at 253–56 (observing that decedents in Illinois generally left property to their spouses and descendants).

126. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 135 (2016) (examining the relationship between decedents who died with debt and heirs and beneficiaries who borrowed against their expected inheritance).

127. *See, e.g.*, SUSSMAN ET AL., *supra* note 37, at 238–45 (reporting that cases in Ohio sometimes dragged on for five years or more and that attorneys' fees were "the most significant expense"). Ironically, one of probate's disadvantages—its lack of privacy—has allowed empirical scholars to expose its other downsides, like its duration and expense. *See, e.g.*, Ward & Beuscher, *supra* note 37, at 403–04 (finding that low-value estates in Wisconsin took longer to close and cost disproportionately more than their wealthier counterparts).

proverbial black box. For starters, trust instruments are private.[128] Moreover, unlike personal representatives, trustees do not need to get judicial approval before acting, which means that trust administration happens behind closed doors.[129] As a result, "[e]mpirical studies of . . . trusts have been few and far between."[130]

Most of what we know comes from two imperfect sources. The first is federal law. Institutional trustees that are part of the Federal Reserve must disclose their number of accounts, assets, income, expenses, and losses.[131] These statistics are eye-popping—as of 2010, these firms were managing $870 billion—and reinforce the perception that "[m]ost wealth transfer on death today occurs through the nonprobate system."[132] But this view from 30,000 feet offers little insight into how trusts operate on the ground. Second, there is no shortage of reported judicial decisions involving trusts. These cases can be valuable sources of information. In fact, we will rely on them in our next Section to discuss the principles that govern transfers of property to a trust.[133] Yet they are not representative: few trusts degenerate into litigation and even fewer result in a judgment that goes up on appeal and produces an opinion that appears on Westlaw or Lexis.[134] For these reasons, more than half a century after Dacey's book became a sensation, "most of the information we have about trust provisions, trust planning goals, [and] trust successes . . . is anecdotal."[135]

128. *See* Foster, *supra* note 38, at 566 ("Trust law has placed such a premium on privacy that it has denied trust beneficiaries as well as the general public access to the trust instrument."); Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 329 (2017) ("There is no public registry of trusts in the United States.").

129. *See* Niles-Weed & Sitkoff, *supra* note 39, at 1034–35 (observing that a core goal of the Uniform Trust Code is "to keep administration of trusts outside of the courts" (quoting David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 158 (2002) (emphasis added))).

130. Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931, 936–37 (2017). Hofri-Winogradow's work is a rare exception: it reports the results of a survey of 434 professional trustees about issues such as trust duration and the prevalence of various clauses in trust instruments. *See id.* at 936, 978–94; Adam S. Hofri-Winogradow, *Contract, Trust, and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 169–98 (2017).

131. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 387–88 (2005) (using this data to show how states competed for trust funds by abolishing the Rule Against Perpetuities). Likewise, the IRS publishes data about the income earned, deductions claimed, and tax paid by trusts. *See* IRS, STATISTICS OF INCOME: ESTATES AND TRUSTS, 2001 TO 2013, https://www.irs.gov/pub/irs-soi/13EstatesAndTrustsOneSheet.pdf [https://perma.cc/8LZH-JXLH].

132. Langbein, *Major Reforms*, *supra* note 109, at 12.

133. *See infra* Section I.B.

134. *Cf.* Deborah S. Gordon, *Engendering Trust*, 2019 WIS. L. REV. 213, 233 (2019) (observing that reported opinions involve "trusts that have necessarily failed in some major respect so that they end up in court").

135. *Id.* at 231–32.

In sum, although rev trusts have become the primary conduit for intergenerational wealth transmission, we do not know how well they serve settlors and their loved ones. Moreover, as we explain next, an unsettling pocket of appellate decisions suggests that settlors may not always fully fund their trusts.

B. *The Law of Trust Transfers*

This Section zooms in on the black letter law that governs transfers to rev trusts. It shows that these rules are simultaneously forgiving and merciless. On the one hand, thanks to the leading case of *Estate of Heggstad*, settlors can retitle possessions merely by listing them in their estate plan.[136] On the other hand, when judges decide whether a settlor has transmitted assets to themselves as trustee, they apply the same punishing formalism that once animated their interpretation of the Wills Act.

A primer on trust funding can frame this discussion. Rev trusts are empty vessels that only govern property that a settlor feeds into them.[137] There are three conventional ways to funnel assets into a rev trust (an act that we refer to as *formally* changing title).[138] First, because the Statute of Frauds insists that conveyances of land be enshrined in a signed writing, settlors use deeds.[139] These documents are tailored to satisfy the Statute because they describe the real estate and are signed by both the grantor and grantee.[140] Second, for things that are amenable to ownership titling but not public recordation, such as financial accounts, settlors ask the institution to change the name of the owner to themselves as trustee.[141] Third, settlors assign personal property to their rev

136. *See* Estate of Heggstad, 20 Cal. Rptr. 2d 433, 436 (Ct. App. 1993); *see also infra* text accompanying notes 149–163.

137. *See* UNIF. TR. CODE § 401 cmt. (UNIF. L. COMM'N 2023) (detailing the rules that govern trust creation); Schenkel, *supra* note 14, at 40 ("It is generally understood that property must initially be 'transferred' to the trustee in order for the trust to govern its disposition.").

138. *See supra* text accompanying notes 72–75.

139. *See, e.g.*, Carne v. Worthington, 200 Cal. Rptr. 3d 920, 926 (Ct. App. 2016) (explaining that "the applicable statute of frauds[] requires a writing demonstrating that the real property is held in trust" and that, "[a]ccording to the 'form of title' presumption, the description in a deed as to how title is held is presumed to reflect the actual ownership interests in the property").

140. *See, e.g.*, Elsaesser v. Mountain W. IRA FBO Chester Pipkin IRA, No. 21-35080, 2022 WL 542556, at *1 (9th Cir. Feb. 23, 2022) ("This deed satisfies the statute of frauds because its description adequately describes exactly what is being conveyed."). Although new owners often record deeds—an act that protects them from competing claims of ownership—the instrument is effective without this step. *See, e.g.*, Malamed v. Sedelsky, 80 A.2d 853, 856 (Pa. 1951) ("*Delivery* is all that is necessary to pass title, *recording* is only essential to protect by constructive notice any subsequent purchasers, mortgagees and new judgment creditors.").

141. *See, e.g.*, *Funding Revocable Trusts*, 50 EST. PLAN. 31, 35 (2023) (instructing settlors to "[p]rovid[e] a letter of instruction . . . directing the bank to re-title the existing account and giving the bank specific instruction for the new title in the trustee's name").

trust.[142] As noted, in an ideal world, a settlor will ferry everything through these mechanisms to their rev trust and die owning nothing in their personal capacity.[143]

But one can easily imagine why some of these tasks might slip through the cracks. After all, they occur *after* the settlor has signed their estate plan—a thick stack of papers that already seems to express their intent to transmit property through their rev trust.[144] The mere fact that they must take these extra, burdensome steps is counterintuitive.[145] In addition, a settlor is extremely unlikely to discover that they did not finish the job. As noted, executing a rev trust does not seem to change anything in the settlor's day-to-day life.[146] For instance, whether a settlor's house belongs to them in their personal capacity or as trustee, they pay the same bills, enjoy the same pride of ownership, and exercise the same nearly unfettered control over it.[147] Thus, over the past three decades, there has been a steady trickle of caselaw dealing with partially unfunded rev trusts.[148]

The authority on point is inconsistent. In one crucial way, judges have made it relatively easy for a settlor to retitle assets. The lynchpin here is a California court of appeals' 1989 opinion in *Estate of Heggstad*.[149] Halvard Heggstad executed a pour-over will and a rev trust, naming himself as trustee and his son, Glen Heggstad, as successor trustee.[150] The trust listed an interest in an office park in the Silicon Valley on Schedule A, but Halvard never deeded it to himself as trustee.[151] A month after Halvard created this estate plan, he married Nancy Rhodes Heggstad, and a year later, he died.[152] There was no dispute that Nancy—who did not take anything under the terms of Halvard's will or trust—was entitled to her intestate share of Halvard's probate estate as an accidentally omitted spouse.[153] But the (literal) million-dollar question was

142. An assignment is either a gift or a contract that conveys assets "from one person (the assignor) to another (the assignee) [and] which confers a complete and present right in the subject matter to the assignee." Liberty Transp., Inc. v. Massachusetts Bay Ins. Co., 208 A.3d 330, 335 (Conn. Ct. App. 2019) (quoting Am. First Fed., Inc. v. Gordon, 164 A.3d 776, 781 (Conn. Ct. App. 2017)). As we will discuss *infra* note 165, although assignments should formally change title to assets, third parties do not always treat them as legally effective.

143. *See supra* text accompanying notes 15–16.

144. *See supra* text accompanying notes 28–30.

145. *See infra* text accompanying notes 284–85.

146. *See supra* text accompanying note 14.

147. *See supra* text accompanying note 14.

148. *See infra* text accompanying notes 164–79.

149. Estate of Heggstad, 20 Cal. Rptr. 2d 433, 436 (Ct. App. 1993).

150. *See id.* at 434.

151. *See id.*

152. *See id.*

153. *See id.*

whether the stake in the Silicon Valley property belonged to Halvard's probate estate or to his trust.[154]

Heggstad provided an answer by synthesizing two esoteric strands of property law. The court first recognized that the name on the title does not definitively prove ownership. Instead, this designation "raise[s] a mere rebuttable presumption" that the property belongs to the named individual.[155] Thus, Halvard's failure to deed his interest in the office park was not conclusive.[156] The court then explained that the singular nature of rev trusts opened the door for settlors to retitle property in an unconventional way.[157] Settlors typically gift assets from themselves as an individual to themselves as trustee.[158] Gifts require (1) the donor's intent to make a gratuitous transfer and (2) delivery, which occurs when the donee accepts the property or a proxy for it, such as keys to a house.[159] But in a "declaration" of trust, where the settlor names *themselves* as initial trustee, the delivery prong is unnecessary because the same person is the giver and the recipient.[160] Accordingly, *Heggstad*'s logic continued. To fund a rev trust, a settlor need only display their wish to do so—an act they can perform by listing the property on Schedule A.[161] Finally, applying this insight, the court held that Halvard's trust instrument served as the functional equivalent of a deed by showcasing his intent to transfer the assets on Schedule A, including his interest in the Silicon Valley land, to himself as trustee.[162]

154. *See id.*

155. Ames v. Robert, 131 P. 994, 995 (N.M. 1913); CAL. EVID. CODE § 662 ("The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."). Admittedly, *Heggstad* does not expressly discuss this principle. But later cases have recognized that it is the appropriate starting place for *Heggstad*'s analysis. *See* Carne v. Worthington, 200 Cal. Rptr. 3d 920, 926 (Ct. App. 2016).

156. *See Heggstad*, 20 Cal. Rptr. 2d at 435.

157. *See id.* at 435–37.

158. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632 (1995) ("Trusts are gifts."); Fogel, *supra* note 36, at 807–08 (discussing the typical rev trust in which the settlor also serves as the initial trustee).

159. *See, e.g.*, Courts v. Annie Penn Mem'l Hosp., Inc., 111 N.C. App 134, 138, 431 S.E.2d 864, 866 (1993) ("In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery.").

160. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS) § 6.2 cmt. d (2003) ("When the subject of an intended gift is already in the possession of the donee, the donor is not required to retrieve the property in order to redeliver it to the donee. The donor need only manifest intent that the property belongs to the donee.").

161. *See Heggstad*, 20 Cal. Rptr. 2d at 436 ("[A] written declaration of trust by the owner of real property, in which he names himself trustee, is sufficient to create a trust in that property, and that the law does not require a separate deed transferring the property to the trust.").

162. *See id.* at 435. Moreover, Halvard's signature on the trust instrument satisfied the Statute of Frauds, which merely requires "a written instrument conveying the trust property" to be signed by either the settlor or the trustee. CAL. PROB. CODE § 15206(a)–(b); *Heggstad*, 20 Cal. Rptr. 2d at 435 ("Here, the written document declaring a trust in the property described in Schedule A was signed by the decedent at the time he made the declaration . . . .").

Heggstad established an alternative path to funding a trust—one that, as noted, we will refer to as *informally* changing title.[163] Courts throughout the country soon held that mentioning anything on Schedule A or an assignment to the trustee brought it into the trust.[164] This meant that even if a settlor had not formally changed title by signing a deed or renaming an account, the successor trustee could try to claim the property by filing a "*Heggstad* petition."[165]

Bizarrely though, many of the recent opinions dealing with trust transfers elevate form above substance. Courts find that settlors owned assets as individuals at death even if there is "clear and unmistakable" proof that the settlors intended otherwise.[166] This ruthlessness permeates both the formal and

163. *See supra* note 77. To be clear, the idea that a settlor could informally change title simply by creating a trust predates *Heggstad*. *See, e.g.*, DeLeuil's Ex'rs v. DeLeuil, 74 S.W.2d 474, 476 (Ky. Ct. App. 1934) (observing that settlors "can completely divest [themselves] of legal ownership of property without an actual transfer of the legal title by creating a valid trust and constituting [themselves] as trustee"). But *Heggstad* appears to be the first decision to apply that principle in the common situation in which a settlor fails to formally change title but mentions the asset on Schedule A.

164. *See, e.g.*, Ladd v. Ladd, 323 S.W.3d 772, 777–78 (Ky. Ct. App. 2010) (recognizing that settlors may informally change title to assets by listing them on Schedule A); Hatch v. Lallo, No. 20642, 2002 WL 462862, at *2 (Ohio Ct. App. Mar. 27, 2002) ("The mere declaration that property is held in trust, without transfer of the legal interest or title to the property, is sufficient to create a trust."). California courts have been especially lenient. *See, e.g.*, Kucker v. Kucker, 120 Cal. Rptr. 3d 688, 690–91 (Ct. App. 2011) (finding that a general assignment "show[s] that the [t]rustor intended to transfer all of her personal property to the [t]rust"); Ukkestad v. RBS Asset Fin., Inc., 185 Cal. Rptr. 3d 145, 147, 150 (Ct. App. 2015) (holding that trust instrument's nonspecific reference to the settlor's "right, title and interest in . . . his real and personal property, . . . wherever situated" informally changed title to the trust because "it is a simple matter of referring to publicly available records to determine [the settlor's] real estate holdings" as of the date of the trust's creation).

One caveat is necessary. As noted, *Heggstad* applies to declarations of trust, in which the settlor and the trustee are the same person. *See supra* text accompanying notes 160–61. But it is unclear whether the opinion also extends to trusts that name *someone other than the settlor* as the initial trustee. *Compare* Carne v. Worthington, 200 Cal. Rptr. 3d 920, 929 (Ct. App. 2016) (holding that even when the settlor selected a third party as the initial trustee, "no separate deed was required in order for real property to become subject to a trust"), *and* Davies v. Codney (*In re* Living Tr. of David Francis Davies III), 522 P.3d 427, 432 (Nev. 2022) (same), *and* Dudek v. Dudek, 246 Cal. Rptr. 3d 27, 38 (Ct. App. 2019) (reaching the same conclusion with respect to a life insurance policy that appeared on Schedule A), *with* Cate-Schweyen v. Cate, 15 P.3d 467, 473 (Mont. 2000) (opining that when the settlor names a third-party trustee, "the trust document itself is insufficient to serve as an instrument of conveyance"), *and In re* Estate of Washburn, 158 N.C. App. 457, 461–62, 581 S.E.2d 148, 151 (2003) (determining that settlors who choose other people as initial trustees must formally change title to stock to place it in trust). We will not dwell on this split in authority, because as we discuss *infra* text accompanying note 202, we find that settlors rarely name other people as initial trustee.

165. Pickens v. Paulson, No. CIV. A. 06-336, 2007 WL 4224400, at *1 (E.D. Ky. Nov. 27, 2007). To be clear, successor trustees may have to file a *Heggstad* petition to gain control of assigned property. The reason is more practical than legal. Third parties treat deeds and the name on financial accounts as authoritative proof of ownership but do not always see assignments the same way. *See, e.g.*, *Kucker*, 120 Cal. Rptr. 3d at 690. Thus, even though an assignment is a tried-and-true method of changing title, the successor trustee may still need to obtain a court order that an asset belongs to the trust.

166. K&W Children's Tr. v. Estate of Fay, 503 P.3d 569, 574 (Wash. Ct. App. 2022) (quoting Acuity, A Mut. Ins. Co. v. Planters Bank, Inc., 362 F. Supp. 2d 885, 892 (W.D. Ky. 2005)).

informal title-changing contexts. An example of the former is *Ford v. Reddick*,[167] in which the settlor's attorney-in-fact tried to deed her land into her trust.[168] In the space on the deeds for the grantee's name, the attorney-in-fact wrote "the trust" rather than "the trustee."[169] A Georgia court of appeals held that this understandable slipup was fatal to the attempted conveyance.[170] Similarly, in *Homan v. Estate of Homan*,[171] the Indiana Court of Appeals erected a high barrier for successor trustees who try to demonstrate that a settlor informally changed title.[172] The settlor died without deeding his 300-acre farm to himself as trustee.[173] Although his rev trust's Schedule A was mysteriously blank, his trust instrument featured detailed instructions on how his successor trustee should manage this resource after he died.[174] Nevertheless, the court determined that the farm belonged to the settlor's probate estate, reasoning that "the question is not whether the owner 'intended' to place the property in trust but whether the property was, actually, 'placed in trust.'"[175] Thus, courts have adopted a zero tolerance policy for innocuous errors.

Heggstad also cannot help with assets that settlors acquire after signing a rev trust. This timing limitation is specific to rev trusts. Wills become effective at the testator's death and typically have "residuary clauses," which give away anything not mentioned elsewhere.[176] As a result, wills sweep within their ambit whatever the testator happens to own when they pass away, including possessions they obtained post-execution.[177] But rev trusts only include things

167. 735 S.E.2d 809 (Ga. Ct. App. 2012).

168. *See id.* at 809.

169. *See id.* at 809–10.

170. *See id.* at 810 (concluding that "[a] deed that does not properly designate a grantee does not convey title"); *cf.* Fogel, *supra* note 36, at 823 n.13 ("[I]t is technically incorrect to say the settlor transfers property to the trust. Instead, the settlor transfers property to the trustee of the trust to hold in trust."). The state legislature has since overruled *Ford*. *See* Act of May 3, 2018, No. 366, § 4, 2018 Ga. Laws 262, 266 (codified at GA. CODE ANN. § 53-12-25(a)) (declaring that courts should deem transfers to a "trust" "to have been made to the trustee of such trust"). This change makes it easier for lay people to formally change title. Notably, though, Georgia appears to prohibit informally changing title. *See* GA. CODE ANN. § 53-12-25; Gibson v. Gibson, 801 S.E.2d 40, 48 (Ga. 2017) ("A brokerage account should bear the name of the trustee in order to be held in trust.").

171. 121 N.E.2d 1104 (Ind. Ct. App. 2019).

172. *Id.* at 1107.

173. *See id.* at 1105.

174. *See id.* at 1106.

175. *Id.* at 1107.

176. *See, e.g.*, Roth v. Newpol, 77 N.E.3d 881, 883 (Mass. App. Ct. 2017) (discussing language found in "[a] typical residuary clause").

177. Courts treat possessions "acquired after [the testator] made the will . . . 'as if possessed at the making of the will, unless a contrary intention appears.'" *In re* Estate of Skwarlo, No. 3135 K-33, 2001 WL 312451, at *3 (Del. Ch. Mar. 12, 2001) (quoting DEL. CODE ANN. tit. 12, § 206); Aldrich v. Basile, 136 So. 3d 530, 534 (Fla. 2014) ("[A] will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will." (quoting FLA. STAT. § 732.6005(2))).

that are "'transferred' to the trustee."[178] Thus, even if a settlor wants their entire estate to belong to their rev trust, they must "reaffirm" their intent to include each new piece of property.[179]

To conclude, reported appellate decisions on trust funding cut in two directions. *Heggstad* empowers successor trustees to cure a settlor's failure to formally retitle assets. But much of the authority on point recalls the bad old days in which inheritance law was synonymous with "intent-defeating formalism."[180]

* * *

Rev trusts are labor-intensive. Settlors must formally retitle their property, or their successor trustees must file a *Heggstad* petition to prove that the settlor achieved that result informally. Do these processes usually go smoothly or are the reported appellate decisions involving trust transfer breakdowns the tip of an enormous iceberg? Because "gathering empirical evidence about trusts is 'tricky,'" lawmakers, judges, scholars, and practitioners have no idea.[181] Accordingly, the next Part fills this void by reporting the results of a study of seven years of trial-level trust and probate records.

II. EMPIRICAL STUDY

This Part is the Article's centerpiece. It first describes our data and then highlights three findings: (1) settlors often fail to fully fund their trusts, forcing successor trustees to pursue *Heggstad* petitions, (2) these filings often fail for nitpicky reasons, and (3) both species of the trust transfer problem cause unnecessary harm.

A. *Data Description*

The San Francisco Superior Court offers an online "calendar search" tool that lets visitors view its docket for a particular day. We used this interface to generate a list of every action heard in the court's civil divisions—which include complex litigation, family, small claims, and traffic—between January 1, 2014

178. Schenkel, *supra* note 14, at 40 n.4.

179. Ladd v. Ladd, 323 S.W.3d 772, 779 (Ky. Ct. App. 2010). This is true even if the trust expresses the settlor's intent to include after-acquired property. *See* Rose v. Waldrip, 730 S.E.2d 529, 535 (Ga. 2012) ("[T]he [c]ourt must examine whether the settlor later confirmed [their] prior intent to hold such property in trust."); Karras v. Karras, 76 N.E.3d 706, 713 (Ohio Ct. App. 2016) (refusing to depart from "the general rule that later-acquired property is not trust property").

180. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 873–74 (1992).

181. Gordon, *supra* note 134, at 232 (quoting Danaya Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 354–55 (2017)).

and December 31, 2020.[182] We identified trust and probate matters by the prefix of their case number: the former start with "PTR" and the latter begin with "PES." After dropping duplicates, we had collected 1,568 trust entries and 3,073 probate administrations.

A sketch of how California handles inheritance-related proceedings may be useful. Somewhat confusingly, a single judicial branch known as the "probate division" hears trust cases *and* oversees property left by individuals who made wills or died intestate.[183] Thus, there are some similarities between what we are branding the "trust department" (the probate division entertaining a trust-related "PTR" matter) and "probate court" (the probate division managing a "PES"-designated will or intestacy). For example, the same judges preside[184] and the California Probate Code governs, with the state Code of Civil Procedure plugging holes when there is no Probate Code provision on point.[185] Also, the trust department and probate court are more inquisitorial than adversarial.[186] Court staff called "examiners" flag problematic issues and ask parties to address them in supplemental briefs.[187] If these responses are unpersuasive, judges will deny relief—even if nobody has objected and all stakeholders have stipulated to the request.[188]

182. *See Case Calendar*, SUPER. CT. OF S.F., https://webapps.sftc.org/cc/CaseCalendar.dll?=&SessionID=234265FB7A045EF3B4DD02F420AB8711094F2C46 [https://perma.cc/7JKB-9EN5].

183. *See Probate* Court, SUPER. CT. OF S.F., https://sf.courts.ca.gov/divisions/probate-court [https://perma.cc/N6FA-5396]. The probate division also has jurisdiction over conservatorships and guardianships. *See id.*

184. *See* Memorandum, SUPER. CT. OF S.F., https://sf.courts.ca.gov/system/files/general/pj-judicial-assignments-effective-21012025.pdf [https://perma.cc/75KP-QSVT] (listing two judges as hearing all "probate" matters).

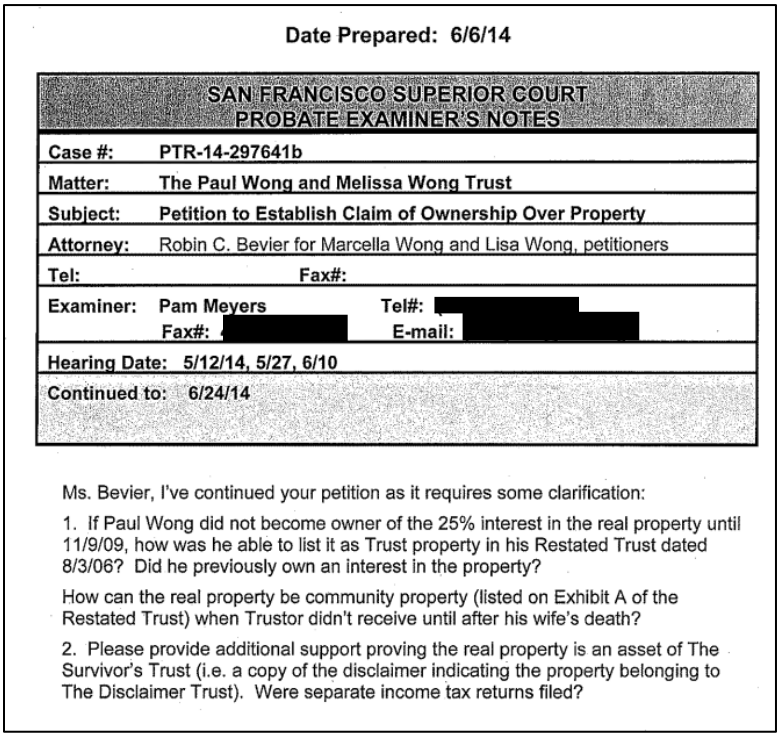
185. *See, e.g.*, Swaithes v. Superior Ct., 261 Cal. Rptr. 41, 45 (Ct. App. 1989) ("[W]hen no special rule has been provided in the Probate Code, the general rules of practice in the Code of Civil Procedure are applicable in procedural matters in probate court.").

186. An inquisitorial proceeding features active judges who "investigate the facts and develop the arguments." Sims v. Apfel, 530 U.S. 103, 111 (2000).

187. Unfortunately, the examiners' notes do not appear in the online court docket. However, parties occasionally attached them to their filings addressing the examiners' comments. *See, e.g.*, Supplement to Petition for Order Determining Title to Personal Property at 7, *In re* The John and Solange Faugenet Living Trust, No. PTR17300940 (Cal. Super. Ct. July 17, 2017). In addition, even when the examiners' concerns were not in the record, we could almost always tell what they were by reading the responsive pleadings. *See, e.g.*, Supplemental Declaration of Anthony F. Varnhagen in Response to Examiner Notes and in Support of Petition of Trustee for Order Confirming Assets to Trust and Ownership Interests in Real Property at 2, *In re* The Frances W. Varnhagen Revocable Trust, No. PTR15299212 (Cal. Super. Ct. May 24, 2016) (implicitly indicating that the examiners had asked for clarification of a complicated ownership issue).

188. *See supra* text accompanying notes 51–53.

Figure 3: Example of an Examiner's Note[189]



Date Prepared: 6/6/14

SAN FRANCISCO SUPERIOR COURT
PROBATE EXAMINER'S NOTES

Case #:	PTR-14-297641b
Matter:	The Paul Wong and Melissa Wong Trust
Subject:	Petition to Establish Claim of Ownership Over Property
Attorney:	Robin C. Bevier for Marcella Wong and Lisa Wong, petitioners
Tel:	Fax#:
Examiner:	Pam Meyers Tel#: [redacted] Fax#: [redacted] E-mail: [redacted]
Hearing Date:	5/12/14, 5/27, 6/10
Continued to:	6/24/14

Ms. Bevier, I've continued your petition as it requires some clarification:

1. If Paul Wong did not become owner of the 25% interest in the real property until 11/9/09, how was he able to list it as Trust property in his Restated Trust dated 8/3/06? Did he previously own an interest in the property?

How can the real property be community property (listed on Exhibit A of the Restated Trust) when Trustor didn't receive until after his wife's death?

2. Please provide additional support proving the real property is an asset of The Survivor's Trust (i.e. a copy of the disclaimer indicating the property belonging to The Disclaimer Trust). Were separate income tax returns filed?

Nevertheless, trust and probate cases also diverge. In many ways, trust matters resemble general civil litigation in the sense that parties decide whether to seek judicial assistance and then control the path of the case.[190] In contrast, probate is more rigid. If someone dies owning $184,500 or less, their survivors can collect their inheritance by sending a notarized "small estate affidavit" to the person or institution that holds the property;[191] otherwise, however, probate jurisdiction is *mandatory*.[192] In addition, in probate, personal representatives

189. Declaration in Response to Probate Examiner's Notes at 4, *In re* Paul Wong & Melissa Wong Trust, No. PTR-14-297641 (Cal. Super. Ct. June 19, 2014).

190. *See* CAL. PROB. CODE § 17209 ("The administration of trusts is intended to proceed expeditiously and free of judicial intervention."); *id.* § 16242(b) (giving trustees the power to "[s]ettle a claim by or against the trust"); *infra* Subsection II.B.1 (finding evidence of parties settling and abandoning *Heggstad* petitions).

191. *See Small Estate Affidavit to Transfer Personal Property*, CALIF. CTS. SELF-HELP GUIDE, https://selfhelp.courts.ca.gov/probate/small-estate [https://perma.cc/3ULU-X2TL]. The $184,500 figure applies to decedents who passed away on or after April 1, 2022. *See id.* If the person died before that date, the cutoff for the small estate procedure is $166,250. *See id.* As of January 1, 2025, California has extended this exemption to primary residences worth $750,000 or less. *See* CAL. PROB. CODE § 13151.

192. *See id.* § 13100.

must march through a series of prescribed steps, such as itemizing the decedent's assets and seeking judicial approval of a final report that includes a request for personal representatives' and attorneys' fees.[193]

Our coding protocols were as follows. When we encountered a *Heggstad* petition in the trust department, we read every pleading and gathered as much information as we could, including the case length, the petitioner's identity, the nature of the missing property, the reason the settlor had not formally changed title, the scope of Schedule A, whether the examiners had asked the parties to address any topic, and the outcome. Our review of probate cases was more surgical. Simply pulling the petition for probate and the final report and account gave us access to our points of interest: whether the matter was necessary to pour assets into a rev trust, and, if so, how many days the case took and the amount the personal representatives and the lawyers charged.[194]

B. *Results*

This Section reports the results of our research, starting with the trust department and then shifting to probate. It demonstrates that existing trust transfer law impairs settlors' procedural and substantive testamentary freedom.

1. Trust Data

The trust department files elucidate that settlors often fail to formally change title. Parties opened 1,586 trust cases in San Francisco County during our research period. This includes the entire sprawling universe of trust-related issues, from bare-knuckle brawls over trust validity or whether a trustee had breached their fiduciary duties to uncontested matters such as requests to approve an accounting or fill a vacancy in the office of the trustee. Nevertheless, 419 matters (26%) were *Heggstad* petitions.[195] Thus, more than one in four entries on the trust department's docket sought to remedy a settlor's failure to formally convey assets to their rev trust.

A skeptical reader might point out that San Francisco County boasts more people with college degrees and far higher real property values than the rest of

193. *See id.* § 8800(a) (requiring "[t]he personal representative [to] file with the court clerk an inventory of property to be administered in the decedent's estate together with an appraisal of property in the inventory"); *id.* § 12200 (governing petitions for approval of a final account).

194. It was not always obvious whether a decedent's survivors had petitioned to probate a pour-over will to transfer assets to a trust or for some other reason. *See infra* text accompanying note 244. Accordingly, we often had to read other filings in matters featuring pour-over wills.

195. This includes sixteen *Heggstad* petitions that a party filed during other litigation. In addition, two matters featured more than one *Heggstad* petition. When there were multiple *Heggstad* petitions, we coded each filing separately, as if it were its own case.

the country.[196] These idiosyncrasies could make its residents particularly likely to execute rev trusts: arguably, well-educated individuals are less intimidated by complex estate planning, and anyone who owns a house has a nest egg to transmit to their loved ones after death.[197] In turn, this could inflate the number of failed trust transfers in our data, making the problem seem worse than it is.

We agree with this critique to a point. It would not be shocking if sophisticated estate planning is especially common in affluent and highly credentialed urban areas. Yet even if San Francisco County is ground zero for rev trusts, that should only impact the *raw number* of *Heggstad* petitions, not the *percentage of cases* that feature such a filing. The latter statistic, which we report above, has nothing to do with rev trust usage rates: if San Franciscans create these documents more than their peers, there would be an increase in both the numerator (trust department cases related to failed trust transfers) and the denominator (all trust department matters). Accordingly, we doubt that these issues are specific to San Francisco.

The *Heggstad* petitions we unearthed shared several common threads. Ninety-eight percent of petitioners were successor trustees,[198] 97% of trusts were "declarations" (where the settlor also serves as initial trustee),[199] and 94% of settlors had signed a pour-over will.[200] These are hallmarks of the standard rev trust/pour-over will arrangement that lawyers reflexively recommend.[201] This indicates that current law regularly shunts garden variety estate plans into the court system.[202]

196. *Compare QuickFacts: San Francisco County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/sanfranciscocountycalifornia [https://perma.cc/W9N6-QJRF] [staff-uploaded archive] (finding that 60% of San Francisco County residents have a college degree, 93% of householders have broadband access, and the median home value is roughly $1.4 million), *with QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/VET605222 [https://perma.cc/C3GM-JRP5 (staff-uploaded archive)] (determining that the corresponding figures for the U.S. are 35%, 91%, and about $300,000).

197. *Cf.* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2550 (2020) (conducting a nationally representative survey of 1,975 people and finding that people who graduated from college or graduate school were more likely to create a will).

198. Nine petitioners were beneficiaries (2%), and one was the assignee of a trustee (<1%).

199. One case did not reveal whether the trust was a declaration. As mentioned, the law governing transfers to third party trustees is unsettled. *See supra* text accompanying note 166. But because this scenario seems rare, we will not explore it further.

200. Whether the settlor had created a pour-over will was only apparent in 333 cases.

201. *See supra* text accompanying notes 4–22.

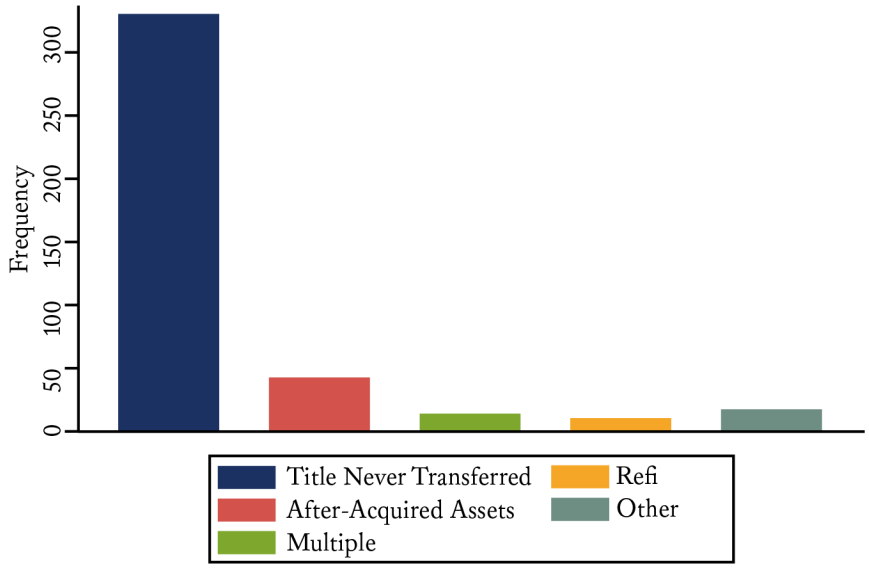
202. The missing assets in 95% of matters were either land or financial accounts (or both). Forty-three percent featured land as the sole omitted asset and 39% involved missing financial accounts only. Another 8% had both. Other types of property included interests in businesses, royalty streams, promissory notes, and even a "Yak-3 Russian warplane." Petition for Order Determining Title to Real and Personal Property at 6, *In re* William R. Montague Trust, No. PTR20303915 (Cal. Super. Ct. May 25, 2022).

There were three basic ways in which settlors had failed to formally change title. First, in 79% of matters, the settlor had never executed a deed for land or renamed a financial account ("title never transferred" cases).[203] Second, 10% of the time, a settlor *had* successfully placed something in their rev trust but later removed it. The underlying possession was typically the settlor's house, which they transferred back to themselves as an individual to refinance their mortgage ("refi" cases).[204] Third, 3% of settlors had signed their rev trust and then obtained more property ("after-acquired asset" cases). In addition to these archetypes, 3% of filings involved a miscellaneous glitch ("other" cases) and 4% featured more than one transfer problem ("multiple" cases).

203. Some title never transferred cases involved property that appeared on an assignment. *See, e.g.*, Petition by Trustee of Inter-Vivos Trust to Establish Claim of Ownership Over Property at 4, *In re* The Chester M. Cuquet Family Trust, No. PTR14297418 (Cal. Super. Ct. Apr. 30, 2014). This is confusing, because assignments are sufficient to formally transfer title, which should make *Heggstad* petitions unnecessary. *See supra* text accompanying note 142. Unfortunately, however, third parties tend to be more skeptical of assignments than other formal title-changing mechanisms such as deeds or the name in which an account is held. *See supra* text accompanying note 165.

204. Apparently, lenders refuse to refinance real estate held in a rev trust. *See* THOMSON REUTERS, MEMORANDUM TO CLIENT: FUNDING REVOCABLE JOINT TRUST (CA) W-000-2744, (2026). And although "[m]ost lenders also provide the deed to transfer the property back into the trust as part of the loan closing process[,] . . . the settlor must ask for this service." *Id.* For an example of the rare case in which a settlor transferred property into and then out of a rev trust for purposes other than refinancing, see Petition for Order Confirming Trust Assets at 2–3, *In re* The Virgil Prater and Betty E. Prater 1991 Trust, No. PTR-20-303868 (Cal. Super. Ct. Apr. 21, 2021) (alleging that the settlor transferred money from a trust-held bank account to a non-trust-held savings account to take advantage of a higher interest rate).

Figure 4: Types of Transfer Problems



Ironically, *Heggstad* petitions erode some of the benefits of probate avoidance. For one, trusts are meant to expedite the succession process, but the need to go to court adds an unwelcome detour. As Table 1 reveals, the average *Heggstad* petition lasted 156 days,[205] which is about five months.[206] Yet 7% of cases did not resolve within a year, and 1% spanned more than three years.[207] Thus, having to prove that the settlor informally changed title can funnel the estate into a frustrating limbo.

205. As we mentioned *supra* text accompanying note 195, sixteen *Heggstad* petitions were filed during other litigation. For these cases, we ignored the overarching dispute, which often spanned more than a year, and focused exclusively on the number of days needed to resolve the *Heggstad* issue.

206. This figure understates the average delay because it excludes abandoned *Heggstad* petitions, some of which were pending for longer than five months.

207. Not surprisingly, these sluggish cases included the rare *Heggstad* petitions that sparked objections. For instance, one contested *Heggstad* petition went up on appeal where it was dismissed for lack of standing. *See* Hewlett v. Campos-Sazo, No. A154711, 2019 WL 3986016, at *3 (Cal. Ct. App. Aug. 23, 2019). Another contested *Heggstad* petition was appealed but the litigant was "subject to a 'prefiling order' . . . under the vexatious litigant statutes" and thus could not prosecute the appeal. Order Disallowing Prosecution of Appeal and Dismissing Appeal Pursuant to Vexatious Litigant Statutes at 1–2, McMahan v. Hewlett, No. A157973, PTR-19-302520 (Cal. Super. Ct. 2020). Finally, other matters were delayed when petitioners had to hire a genealogist to identify the settlors' heirs (who were entitled to notice of the proceeding). *See* Second Supplement to Petition for Order Determining Title to Personal Property at 1–3, *In re* The Patricia J. Eng Revocable Living Trust, No. PTR-16-299551 (Cal. Super. Ct. Aug. 1, 2016).

Table 1: *Heggstad* Petition Case Length (in Days)

Mean	Std. Dev	Median	Min	Max	N
156	176	105	13	1,374	363
Note: We omitted the 51 *Heggstad* petitions that were abandoned, three cases that were dismissed on procedural grounds, and two cases that lacked information about the outcome.					

In addition, seeking judicial intervention drives up the cost of trust administration. Almost every *Heggstad* petitioner hired counsel. Unfortunately, unlike probate records, trust department files do not disclose the amount of attorneys' fees in any given case. For whatever it is worth, one file contained a contract in which a lawyer charged the successor trustee $4,000 to initiate the process.[208] This dovetails with our intuition that merely preparing the moving papers generates a bill of at least several thousand dollars.

Finally, although "many see privacy as an essential feature of the revocable trust,"[209] this advantage dissolves when the successor trustee must pursue a *Heggstad* petition. Over 99% of these filings disclosed the trust instrument. This occasionally publicized things that the deceased settlor likely did not want known, like financial details,[210] delicate family dynamics,[211] or health information about living people.[212]

208. *See* Petition Under Probate Code Section 850(a)(3) to Confirm Assets Belonging to Trustee of Decedent's Revocable Trust at 9, *In re* Janet Sollod, No. PTR-17-301071 (Cal. Super. Ct. July 20, 2017).

209. Foster, *supra* note 38, at 563.

210. For example, petitioners sometimes tried to file redacted versions of the trust instrument that omitted financial details only to have the court order them to provide the original document. *Compare* Petition for Order Confirming Assets of Trust Estate at 10, *In re* Moriguchi Revocable Trust, No. PTR-16-299979 (Cal. Super. Ct. July 12, 2016) (redacting financial details), *with* Petition for Order Confirming Assets of Trust Estate at 21, *In re* Moriguchi Revocable Trust, No. PTR-16-299979 (Cal. Super. Ct. Sep. 12, 2016) (providing unredacted financial details).

211. *See* Opposition of Ana Robledo to Petition of Jasmine Jones-Herring for Order Designating that Certain Real Property and Personal Property Belongs to the Justin Winfrey Revocable Living Trust at 2, *In re* The Justin Winfrey Revocable Living Trust, No. PTR-20-303987 (Cal. Super. Ct. Jan. 15, 2021) (alleging that the settlor had a minor son); Reply of Petitioner Jasmine Hones Herring to Opposition of Ana Robledo to Petitioner's Amended Petition for Order that Certain Real and Personal Property Belongs to the Justin Winfrey Revocable Living Trust and Points and Authorities at 3, *In re* The Justin Winfrey Revocable Living Trust, No. PTR-20-303987 (Cal. Super. Ct. Feb. 26, 2021) (contending that the settlor had never acknowledged paternity).

212. *See* Memorandum of Points and Authorities: In Support of Motion to Seal Record at 1–2, *In re* 2002 Berg Finnegan Family Trust, No. PTR-14-298347 (Cal. Super. Ct. Apr. 9, 2015) (revealing an elected official's health diagnosis).

Heggstad petitions achieved mixed results. Only 5% drew any kind of objection.[213] However, recall that trust department matters are inquisitorial, and judges need to be persuaded that relief is warranted even if there is no opposing party.[214] Thus, as Table 2 reveals, courts granted 70% of these requests in full, 8% in part, and denied 8%. In addition, 13% of petitioners abandoned their cases and 2% settled.[215]

Table 2: Case Outcomes by Transfer Problem

	Relief Granted in Full	Relief Granted in Part	Relief Denied	Settled	Abandoned	Total
Title Never Transferred	236 (73%)	21 (6%)	19 (6%)	6 (2%)	43 (13%)	325
Refi	34 (79%)	0 (0%)	3 (7%)	2 (5%)	4 (9%)	43
After-Acquired Assets	2 (14%)	1 (7%)	9 (64%)	0 (0%)	2 (14%)	14
Other	10 (91%)	0 (0%)	0 (0%)	0 (0%)	1 (9%)	11
Multiple	6 (33%)	10 (56%)	0 (0%)	1 (6%)	1 (6%)	18
Total	288 (70%)	32 (8%)	31 (8%)	9 (2%)	51 (13%)	411
Note: This chart excludes eight cases: seven that were dismissed on procedural grounds such as improper venue or jurisdiction and one in which the outcome was unclear.						

The most common type of case, title never transferred, had a 72% success rate. In some of these matters, there was a convincing explanation for why a settlor had not formally changed title. Some people simply ran out of time,

213. Thirty-six cases (9%) featured a contest of some kind. But only twenty of them involved an objection to the *Heggstad* petition.

214. *See supra* text accompanying notes 186–87.

215. The existence of a contest made little difference in the result. In the twenty cases in which someone filed an objection to a *Heggstad* petition, petitioners won five times, settled eight times, abandoned four matters, and lost three times (but twice without prejudice on procedural grounds).

dying six days,[216] five days,[217] two days,[218] one day,[219] or even a few hours after they signed their estate plan.[220] Others fell prey to obscure legal nuances. Mimicking the mistake from *Ford v. Reddick*, the Georgia case we discussed above,[221] several settlors deeded real estate to their trust rather than to themselves as trustees of their trust.[222] Finally, third parties sometimes dropped the ball. For example, Paul Schiebold was gravely ill, and so his lawyer brought several draft documents to his house, including an assignment of his estate to himself as trustee.[223] But before Paul could sign the writing, a taxi that was waiting at the curb "honked it[]s horn[,] at which point the attorney, and all present, other than family, took their papers and left."[224] Nobody discovered this oversight during Paul's life.[225]

216. *See* Petition for Order Confirming Trust Assets at 2, *In re* The James A. James Revocable Trust, No. PTR-18-301878 (Cal. Super. Ct. Sep. 11, 2018).

217. *See* Petition for Order Confirming Ownership of Trust Property at 1–2, *In re* Vishwas Narurkar Trust, No. PTR-22-305550 (Cal. Super. Ct. Aug. 3, 2022).

218. *See* Order Confirming Certain Assets to Trust and Denying Confirmation of Others at 2, *In re* Carol Copsey Revocable Trust, No. PTR-18-301718 (Cal. Super. Ct. 2018).

219. *See* Petition for Order Confirming Trust Property at 1, *In re* Anne Liss Trust, No. PTR-18-301817 (Cal. Super. Ct. Apr. 17, 2018); Petition for Confirmation of Trust Assets at 1, *In re* Wong Family Trust, No. PTR-19-302605 (Cal. Super. Ct. Feb. 15, 2019).

220. *See* Petition for Order Determining Title to Personal Property at 1–2, *In re* Pearce Living Trust, No. PTR-14-298094 (Cal. Super. Ct. Sep. 17, 2014).

221. *See supra* text accompanying notes 167–70.

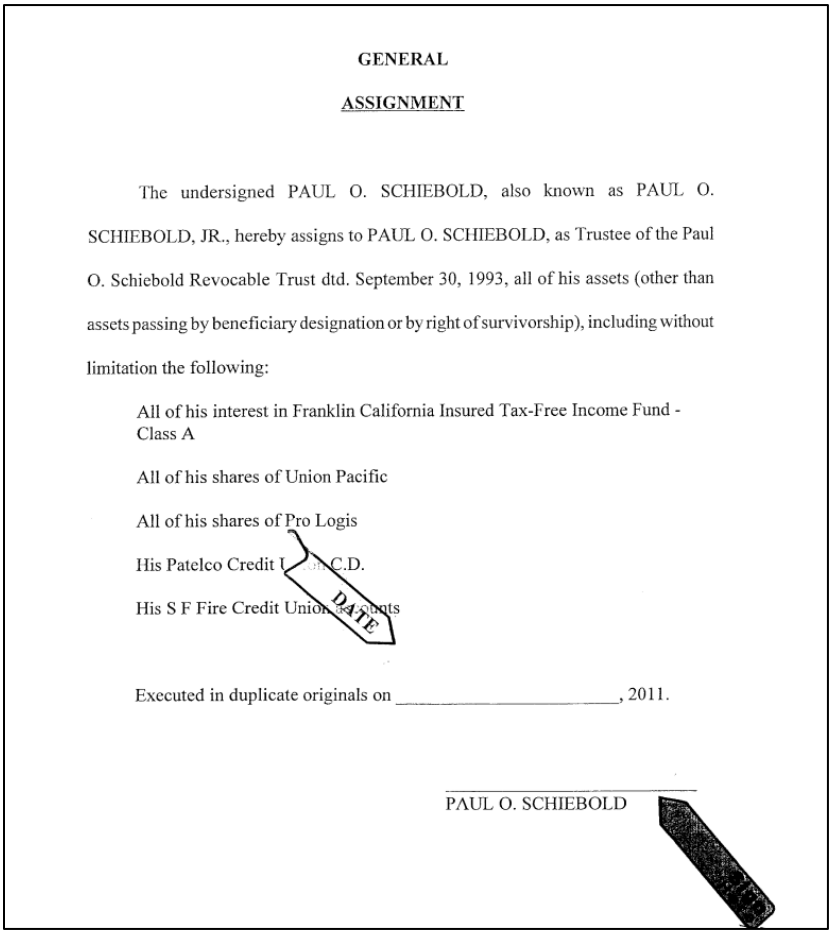
222. Petition Regarding Title to or Possession of Trust Property at 3–4, *In re* Richard and June Quinn Trust, No. PTR-15-299331 (Cal. Super. Ct. Dec. 1, 2015); Petition for Order Confirming Trust Assets at 2, *In re* Knowles Family 2015 Trust, No. PTR-18-301871 (Cal. Super. Ct. May 4, 2018).

223. *See* Petition Declaring that Settlor's Interest in Personal Properties Are Owned by Trust, Exhibit 7 at 1, *In re* Trust of Paul O. Schiebold, No. PTR-14-297874 (Cal. Super. Ct. July 3, 2014).

224. *Id.*

225. *See id.* at 5, 9.

Figure 5: Paul Schiebold's Unsigned Assignment[226]



GENERAL

ASSIGNMENT

The undersigned PAUL O. SCHIEBOLD, also known as PAUL O. SCHIEBOLD, JR., hereby assigns to PAUL O. SCHIEBOLD, as Trustee of the Paul O. Schiebold Revocable Trust dtd. September 30, 1993, all of his assets (other than assets passing by beneficiary designation or by right of survivorship), including without limitation the following:

All of his interest in Franklin California Insured Tax-Free Income Fund - Class A

All of his shares of Union Pacific

All of his shares of Pro Logis

His Patelco Credit U... C.D.

His S F Fire Credit Union Accounts

DATE

Executed in duplicate originals on _____, 2011.

_____

PAUL O. SCHIEBOLD

However, other cases where title never transferred took place in an evidentiary vacuum. Some successor trustees alluded to obstacles that might have prevented the settlor from executing a deed or assignment or renaming an account, such as suffering from a nonspecific illness.[227] But others could not even marshal that kind of proof. Because an average of twelve years passed between the creation of the trusts in our dataset and the filing of the *Heggstad*

226. *See id.* at 50.

227. *See, e.g.*, Petition for Instructions and Confirming Trust Assets at 2, *In re* The Charles J. Brown Trust, No. PTR-15-299214 (Cal. Super. Ct. Oct. 15, 2015) (asserting that the settlor "was ill, and was not able to complete the transfer").

petitions, it may have been impossible to excavate the settlor's thoughts and motivations.[228]

Ultimately, this made little difference, because judges ignored extrinsic evidence and resolved title never transferred matters by focusing on the text of the estate plan. Courts granted *Heggstad* petitions if the settlor had mentioned the missing asset on either Schedule A or an assignment to the trustee,[229] and rejected them when these writings were missing or drafted narrowly.[230]

Crucially, this textualist rubric meant that courts denied relief even when settlors had almost certainly intended a property to belong to their rev trust. For example, Eliza Scudder executed a do-it-yourself rev trust that did not mention any property.[231] On the day she died, she logged into her banking app and renamed her accounts "Eliza Scudder 1997 Trust"[232]—an act that did not have any legal significance.[233] Because there was no Schedule A, and she had not executed an assignment, the court denied her successor trustee's *Heggstad* petition.[234]

Likewise, Mary and Adolph Battaini executed a rev trust with a Schedule A that listed "[a]ll real property of every kind and character situated in the City and County of San Francisco."[235] Their estate planner apparently did not realize

228. *See, e.g.*, Petition for Order Confirming Trust Assets at 1–2, *In re* Margaret Jane Carter Trust, No. PTR-14-297925 (Cal. Super. Ct. 2014) (alleging that "[t]itle to certain accounts was not formally changed to the name of the [t]rust during [t]rustor's lifetime") [hereinafter Carter Petition]; Verified Petition for Order Confirming Trust Asset at 2–3, *In re* Byron Flanders and Gayle Flanders Revocable Trust, No. PTR-20-304017 (Cal. Super. Ct. 2021) ("Unfortunately, the [r]eal [p]roperty was not transferred by recorded deed to the [t]rust.") [hereinafter Flanders Petition].

229. *See, e.g.*, Carter Petition, *supra* note 228, at 2 ("the assets . . . [we]re all held in accounts which are listed on Schedule A"); Order Confirming Trust Assets at 1–2, *In re* Margaret Jane Carter Trust, No. PTR-143-297925 (Cal. Super. Ct. 2014) (granting the *Heggstad* petition); Flanders Petition, *supra* note 228, at 6–7 (observing that the omitted property appeared on Schedule A); Order Confirming Trust Asset at 1–2, *In re* Byron Flanders and Gayle Flanders Revocable Trust, No. PTR-20-304017 (Cal. Super. Ct. 2021) (granting the *Heggstad* petition).

230. *See, e.g.*, Lee Petition, *supra* note 2, at 3, Exhibit 1 at 35; Order Denying Petition to Confirm Assets of Trust Estate, *In re* The Lee Revocable Trust, No. PTR-14-297773 (Cal. Super. Ct. 2014) (denying *Heggstad* petition when Schedule A was blank). Likewise, petitioners often abandoned *Heggstad* petitions after they encountered pushback from the examiners about the property's absence from Schedule A or an assignment. *See, e.g.*, Declaration of Bonnie Basso at 2, *In re* The Basso 2016 Living Trust, No. PTR-18-302399 (Cal. Super. Ct. Feb. 21, 2019) (acknowledging that the settlors inadvertently "[n]ever drafted, created[,] nor attached any schedule" to the rev trust).

231. *See* Petition for Order Confirming Title of Trust Property, Exhibit A, *In re* The Eliza Scudder 1997 Trust, No. PTR-18-302112 (Cal. Super. Ct. Aug. 2, 2019).

232. *See id.* at 2–3; Supplemental Declaration in Support of Petition for Order Confirming Title of Trust Property at 1–2, *In re* The Eliza Scudder 1997 Trust, No. PTR-18-302112 (Cal. Super. Ct. Nov. 20, 2019).

233. *See* Order Denying Petition to Confirm Title of Trust Property at 1–2, *In re* The Eliza Scudder 1997 Trust, No. PTR-18-302112 (Cal. Super. Ct. 2019).

234. *See id.*

235. *See* Petition for Order that Asset Constitutes Trust Asset at 1, Exhibit A at 54, *In re* The Adolph & Mary Battaini 1992 Revocable Trust, No. PTR-16-299642 (Cal. Super. Ct. Mar. 30, 2016) [hereinafter Battaini Petition].

that they lived in the San Francisco-adjacent city of Burlingame.[236] Although the trust told the trustee to distribute the Battainis' "principal residence" and their children submitted sworn statements that the Battainis "intended to fund the [t]rust with all of their assets," the court declined to order the property into the trust.[237] Thus, in title never transferred cases, the language of the estate plan was king.

Conversely, judges did not agree how to analyze refi matters. Most accepted the successor trustee's unsupported claim that the settlor did not realize that they needed to deed their house back to themselves as trustee after they obtained their mortgage.[238] Therefore, if the house appeared on Schedule A or an assignment to the trustee, the court was satisfied.[239] This lenient approach helped petitioners win full relief in 79% of refi cases. But other judges were more demanding. They discounted the probative value of Schedule A or an assignment—which merely reflected the settlor's intent *when they executed their rev trust*—and insisted on proof that the settlor meant to return the real estate to the trust *after* obtaining the mortgage.[240]

Finally, *Heggstad* petitions in after-acquired property cases faced strong headwinds. Courts granted full relief just 14% of the time.[241] As in the title never

236. *See* Memorandum of Points & Authorities in Support of Petition for Order that Asset Constitutes Trust Asset at 1, 3–4, *In re* The Adolph & Mary Battaini Revocable Trust, No. PTR-16-299642 (Cal. Super. Ct. May 2, 2016).

237. *Id.* at 3–4; Battaini Petition, *supra* note 235, at 4.

238. *See, e.g.*, Petition for an Order to Appoint Trustee and Confirm Assets to Revocable Trust at 3–4, *In re* Toku Umehara Trust, No. PTR-14-297853 (Cal. Super. Ct. June 25, 2014); Order Appointing Trustee and Confirming Assets to Revocable Trust, *In re* Toku Umehara Trust, No. PTR-14-297853 (Cal. Super. Ct. Nov. 4, 2014).

239. *See, e.g.*, Petition for Order Confirming Trustee and Trust Assets; And Petitioners' Memorandum of Points and Authorities in Support of Petition for Order Confirming Trustee and Trust Assets at 3, *In re* The Patricia Kwong 2002 Trust, No. PTR-19-303094 (Cal. Super. Ct. Aug. 12, 2019) (alleging that the settlor's house appeared on Schedule A); Order Confirming Trustee and Trust Assets at 1–2, *In re* The Patricia Kwong 2002 Trust, No. PTR-19-303094 (Cal. Super. Ct. 2019) (granting the *Heggstad* petition).

240. *See, e.g.*, Supplement to Petition Regarding Title to or Possession of Trust Property at 2–3, *In re* Domingo V. Badong and Alvie R. Badong 1996 Trust, No. PTR-15-298480 (Cal. Super. Ct. Jan. 30, 2015) (asserting that the settlor believed that deeding the real estate to himself as an individual "was just a formality required by the financing company"); Order Denying Petition Regarding Title to or Possession of Trust Property at 1–2, *In re* Domingo V. Badong & Alvie R. Badong 1996 Trust, No. PTR-15-298480 (Cal. Super. Ct. Aug. 14, 2015) (finding insufficient evidence that the real property was an asset of the trust); *see also* Order Denying Petition to Confirm Assets to Revocable Trust at 1–2, *In re* The Hom Family Revocable Trust, No. PTR-18-301865 (Cal. Super. Ct. 2018) (denying *Heggstad* petition in refi case because "no showing was made that the [t]rustors created a trust over the real property after removing it from the [t]rust to refinance.").

241. The rare petitioner victories usually involved rogue judges who enforced forward-looking assignments of a settlor's "right, title[,] and interest in any and all assets . . . *hereafter acquired*." Supplemental Memorandum of Points & Authorities in Support of Petition for Order Confirming Title to Property at 2, *In re* The Williams Trust, No. PTR-14-297617 (Cal. Super. Ct. June 30, 2014)

transferred milieu and most refi matters, judges focused like a laser on Schedule A or an assignment to the trustee and routinely denied relief because these documents usually did not list things the settlor did not then own.[242]

To conclude, *Heggstad* petitioners do not always prevail. The next section mines our probate data to explore the impact on survivors when a successor trustee is not able to prove that a settlor informally retitled property.

2. Probate Data

Our analysis of files from San Francisco County Probate Court illuminates these issues from a different angle. First, it demonstrates that many wills in the system are pour-overs and thus are shadows cast by thwarted formal trust transfers that could not be cured by *Heggstad* petitions. Second, it brings the harm of probate into sharp relief. At best, survivors wait longer and pay more for their inheritance; at worst, the missing asset passes through intestacy to people other than the trust beneficiaries.

One of our most striking findings is also one of the simplest: although pour-over wills are supposed to be nothing more than a backup, they are ubiquitous in probate. Between January 1, 2014, and December 31, 2020, parties opened 1,421 testate estates (those in which the decedent had made a will). A whopping 442 (31%) featured a pour-over will that was necessary to transmit omitted assets to a trust.[243] As mentioned, an executor only needs to probate

("The [a]ssignment indicates that the [t]rustors' intended that all of their property, *including any subsequently acquired property*, be part of the [t]rust." (emphasis added)); *see* Order Confirming Title to Property at 1–2, *In re* The Williams Trust, No. PTR-14-297617 (Cal. Super. Ct. 2014) (granting the *Heggstad* petition). As noted *supra* text accompanying note 179, courts require settlors to reaffirm their desire to place anything in trust that they obtain post-execution. *See also* Supplement to Petition for Order Confirming Trust Assets at 4, *In re* Vincent A. Blake Trust, No. PTR-18-301967 (Cal. Super. Ct. Oct. 12, 2019) (asking the petitioner to provide "[l]egal authority for making a general assignment 'effectively prospectively' to assets acquired after the date of execution").

242. *See, e.g.*, Petition of Katherine Louise Grimes for Order Confirming Title of Personal Property to Revocable Living Trust at 2–3, *In re* The Edith C. Zollman Revocable Living Trust, No. PTR-15-299277 (Cal. Super. Ct. 2015) (alleging that the settlor sold her house, which appeared on Schedule A, moved into assisted living, and intended the bank accounts into which she deposited the sales proceeds to be held in trust even though they "were NOT listed as [t]rust assets"); Order Denying Petition of Katherine Louise Grimes for Order Confirming Title of Personal Property to Revocable Living Trust at 1–2, *In re* The Edith C. Zollman Revocable Living Trust, No. PTR-15-299277 (Cal. Super. Ct. 2016) (refusing to grant relief).

243. To be clear, there are 544 pour-over wills in our data. However, survivors sometimes probate these wills for reasons that have nothing to do with failed trust transfers. For example, testators can use a pour-over will to exercise a power of appointment (invoking a right given under someone else's estate plan to say who gets that person's property). *See, e.g.*, *In re* Estate of Scott, 77 P.3d 906, 910 (Colo. App. 2003). Likewise, an executor appointed under a pour-over will might open a probate matter to bring or defend against a lawsuit involving the decedent or activate the statute of limitations for creditors to pursue claims against estate. *See, e.g.*, Petition for Final Distribution on Waiver of Account, Waiver of Fees to Executor, and Waiver of Fees to Attorney for Ordinary Services at 1–2, *In*

such a will if the settlor died owning something as an individual and the successor trustee either lost or abandoned a *Heggstad* petition.[244] Moreover, by cross-referencing the name of the decedent, we were able to track 46 of the 114 (40%) failed filings from our trust research into probate.[245] These bright red flags reveal that both varieties of the trust transfer problem are pervasive.[246]

The probate files also illustrate the pernicious effects of failing to obtain relief in the trust department. For one, in flagrant disregard of the settlor's procedural testamentary freedom, these estates had to go through the much-reviled probate system. Our data reinforce why settlors sought to avoid the process. Table 3 displays information about case length and fees for probates that were required to fully fund a trust. It shows that the average matter lasted

re The Estate of Gemma Ruth Paybarah, No. PES-20-303520 (Cal. Super. Ct. Oct. 2, 2024) (explaining that opening a probate permitted the executor "to initiate and pursue a wrongful death case"). We excluded the 102 probate administrations with pour-over wills that did not ultimately transfer assets to a trust.

244. *See supra* text accompanying notes 21–22.

245. One might wonder why there is so little overlap between our trust and probate data. Indeed, we did not locate probate matters resulting from most of the denied or abandoned *Heggstad* petitions in our trust research. At the same time, we identified hundreds of other petitions to probate pour-over wills. What explains this divergence?

There are three likely explanations. The first relates to venue. California requires trust matters to be filed where the trustee manages the trust but probate cases to be heard where the decedent lived. *See* CAL. PROB. CODE §§ 17005(a), 17002(a). These locations often differ. For example, we found many *Heggstad* petitions where the settlor did not reside in San Francisco County. *See, e.g.*, Petition for Order Determining Title to Real Property at 2, *In re* The Lane Family Trust, No. PTR-15-298658 (Cal. Super. Ct. Apr. 2, 2015) (featuring a settlor from Lakeport, California). If the court denied relief, there would be no corresponding probate case in our research because the executor would need to file the decedent's pour-over will elsewhere. On the flip side, most of the pour-over wills in the San Francisco probate department likely began as *Heggstad* petitions in some other county's trust department. Second, recall that California exempts estates worth less than $184,500 from probate. *See supra* text accompanying note 191. Thus, even if a petitioner failed to obtain relief in the trust department, there would be no need to probate the pour-over will if the value of the omitted asset fell below this threshold. *See, e.g.*, Supplemental Declaration of Margaret Mary Dillon in Support of Petition to Find That Assets Are Property of Trust Under Probate Code §§ 17200(b)(4), 850(a)(3), & 856 at 2, *In re* Patrick Dillon & Catherine Dillon Revocable Trust, No. PTR-17-300659 (Cal. Super. Ct. Mar. 29, 2017) (reporting that the settlor had not formally changed title to property that was worth less than the probate cutoff). Third, it often takes time for a decedent's survivors to file a probate case after they fail in the trust department. As a result, *Heggstad* petitions that were either rejected in full or part or abandoned in 2020 may have spawned petitions to probate pour-over wills in 2021 or later, which is beyond the scope of our data collection.

246. Other recent studies of probate records have also found pour-over wills (although they have not discussed the trust transfer problem). *See* Wright & Sterner, *supra* note 181, at 363 (finding that 22% of wills in Alachua and Escambia Counties were pour-overs); Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 259 n.246 (2019) (discovering pour-over wills in a review of probate files from Hamilton County, Ohio but not disclosing the number of such wills); Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 U.C. DAVIS L. REV. 2561, 2588 n.150 (2020); Mark Glover, *Boilerplate in Pour-over Wills*, 103 IOWA L. REV. ONLINE 138, 143 (2018) (calculating that 5% of a sample of wills from Sussex County, New Jersey were pour-overs); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1121 (2015) (determining that 21% of testate estates in Alameda County, California, featured pour-over wills).

for 639 days[247] and generated $23,228 in executors' and attorneys' fees.[248] Thus, losing or abandoning a *Heggstad* petition and winding up in probate costs the estate two precious resources: time and money.

Table 3: Probate Matters Stemming from Failed Trust Transfers

	Mean	St. Dev.	Median	N
Case Length	639	429	523	455
Attorney & Executor Fees	$23,228	$40,711	$13,500	449
Note: We based these calculations on the 472 cases in which property passed to a trust in probate. This includes 462 pour-over wills, two non-pour-over wills, and four intestacies. Seventeen of these matters are missing data on case length and 23 lack information about fees.				

In addition, recall that the norm of requiring strict compliance with the Wills Act has faced decades of criticism for its potential to undermine a decedent's substantive testamentary intent.[249] Scholars cite horror stories in which a probate court refuses to enforce a would-be will for some inconsequential flaw, casting the estate into intestacy and disinheriting the testator's chosen beneficiaries.[250] The classic example is probably *In re Groffman*,[251] in which Charles Groffman signed a lawyer-drafted instrument dividing his assets among several family members.[252] But Groffman violated the Wills Act by acknowledging the writing to two friends seconds apart, rather than simultaneously.[253] Although the court was "satisfied that the document does represent the testamentary intentions of the deceased," it struck down the

247. This is an undercount, because eleven long-running pour-over will cases remained unresolved as of January 2025. *See, e.g.*, Probate Opposition/Objection to Accounting Petition re: Accounting #1, Report, Fees, Final Distribution filed by Objector Iva Thompson, Estate of Gennette Trammel, No. PES-17-301488 (Cal. Super. Ct. Sep. 4, 2024).

248. Notably, 283 executors and 43 attorneys waived their fees.

249. *See supra* text accompanying notes 95–100.

250. *See supra* text accompanying notes 95–100.

251. *In re* Groffman [1969] 1 WLR 733 (P.D.A.) at 733–34 (Eng.).

252. *See id*.; *see also* Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269, 274 (2019) (discussing *Groffman*); Langbein, *Excusing Harmless Errors*, *supra* note 99, at 3–4 (same); Lindgren, *supra* note 95, at 549 n.51 (same).

253. *See Groffman*, 1 WLR at 739.

purported will, giving all of Groffman's property to his sole intestate heir, his second wife.[254]

Similarly, we found that the trust transfer rules can rewrite a settlor's estate plan. In 1% of the *Heggstad* petitions we studied, the settlor failed to formally or informally transfer title to an asset, there was no pour-over will, and the trust beneficiaries were not the settlor's intestate heirs. When these black stars aligned, the omitted property passed through intestacy to people who were not supposed to receive it.

Robert Cowan's estate reveals how the trust transfer problem can warp a settlor's distributional choices.[255] Robert had two adult children, Robert Jr. and Rhonda.[256] He signed a rev trust that listed his house on Schedule A, gave successive life estates in the property to his brother, Julius, and his niece, Gena, and named his granddaughter, Ashley, as a contingent beneficiary.[257] He also deeded his home to himself as trustee.[258] Six years later, he conveyed the asset back to himself as an individual to refinance it.[259] Apparently, Robert told Rhonda and his lawyer that he still held the house in trust.[260] After Robert died, his successor trustee filed but then abandoned a *Heggstad* petition.[261] Because Robert had no will, his children inherited his house in intestacy, and his trust beneficiaries—Julius, Gena, and Ashley—took nothing.[262]

254. *See id.* at 108–09, 111.

255. *See* Petition for Order Confirming Trust Assets at 13–14, *In re* The Robert L. Cowan, Sr. Revocable Trust, No. PTR-17-301164 (Cal. Super. Ct. Aug. 28, 2017).

256. *See id.* at 3.

257. *See id.* at 2–3.

258. *See id.* at 2.

259. *See id.*

260. *See* Memorandum of Points and Authorities Supporting Trust Administrator, Rhonda Hamilton's, Petition for Order Confirming Trust Assets at 3, *In re* The Robert L. Cowan, Sr. Revocable Trust, No. PTR-17-301164 (Cal. Super. Ct. Aug. 28, 2017).

261. *See* Petition for Order Confirming Trust Assets, Calendar or Nov-15-2017, Off Calendar Per Court, *In re* The Robert L. Cowan, Sr. Revocable Trust, No. PTR-17-301164 (Cal. Super. Ct. Nov. 15, 2017), https://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=PTR17301164&SessionID=5981EC781262079820EC55E2BF49257900F4689F [https://perma.cc/HN47-8D9E].

262. *See* Order for Final Distribution on Waiver of Account and Statutory Compensation at 2, *In re* Robert Cowan Sr, No. PES-18-301919 (Cal. Super. Ct. 2020). Because Rhonda executed a disclaimer, Robert Jr. took the entire intestate estate. *See* Petition for Final Distribution on Waiver of Account and For Statutory Compensation at 3, *In re* Robert Cowan Sr, No. PES-18-301919 (Cal. Super. Ct. Dec. 23, 2019). Likewise, Lillie Williams wanted to leave a non-relative $1,000 and a boat. *See* Petition for Order Confirming Successor Trustees and Trust Asset at 3, 10, *In re* The Lillie Bea Williams Revocable Living Trust, No. PTR-18-301920 (Cal. Super. Ct. May 22, 2018). But she made her own trust and failed to attach Schedule A. *See id.* at 4. Accordingly, the court denied the successor trustees' *Heggstad* petition. *See* Order Denying Petition for Order Confirming Successor Trustees; Trust Assets and Trust Beneficiaries, *In re* The Lillie Bea Williams Revocable Living Trust, No. PTR-18-301920 (Cal. Super. Ct. 2018). The estate then passed through intestacy, disinheriting the non-relative. *See* Order for Final Distribution; Approving First and Final Report and Account of Administrator; and Allowing Statutory Fees and Cost[s] for Administrator; and Statutory Fees and

* * *

Trust transfer doctrine harms people in three ways. First, it forces successor trustees to file *Heggstad* petitions. This pit stop in the court system saddles the estate with some of the delay, cost, and publicity that the settlor tried to avoid. Second, because the result of *Heggstad* petitions hinges on the text of the estate plan, survivors sometimes come away empty-handed for reasons that are unrelated to the settlor's intent. When the trust department denies a request in full or in part or the petitioner abandons their claim, the property descends into the netherworld of probate. Third, if the settlor neither formally nor informally changed title and did not execute a pour-over will, the omitted asset will pass to their intestate heirs rather than the beneficiaries of their trust. This result rearranges the settlor's estate plan, violating their substantive testamentary freedom.

For these reasons, the legal system should change its approach to trust transfers. The next Part explains how it should do so.

III. PROPOSAL

Currently, settlors must change title to each of their assets to place them in their rev trust. Instead of this clumsy system, the law should deem rev trusts to contain not only everything that settlors transfer to themselves as trustee during life, but also any property that they own in their individual capacity at death. That is, rev trusts should function like pour-over wills that operate without the need for probate. This rule would reflect what most settlors want, reduce the burden on a decedent's survivors and the court system, and harmonize trust law with the anti-formalist spirit that has inspired similar doctrinal changes.

A. *Abolishing the Trust Transfer Requirement*

Under *Heggstad*, the execution of a rev trust expresses the settlor's intent to convey the property on Schedule A to the trustee. We propose that the law go one step further. As this Section explains, states should enact statutes that treat a settlor's creation of a rev trust as signaling their desire to fund it upon their death with any assets remaining in their individual name.[263]

For one, liberating settlors from having to change title would drastically improve outcomes in situations when someone was unable to convey an asset to

Cost[s] to Attorney for the Administrator at 5–6, *In re* The Estate of Lillie Williams, No. PES-19-302637 (Cal. Super. Ct. 2020).

263. Our rule would need to come from the legislature. Indeed, it would change how property passes upon death and thus conflict with the Wills Act and, in cases involving land, the Statute of Frauds. *See supra* text accompanying notes 85, 139–40. Only lawmakers—not courts—have the power to partially overrule those mandates.

themselves as trustee because of an unexpected calamity, legal technicality, or third party's mistake.[264] For example, Jeanette Berger and Vera Pearce died mere hours after signing their rev trusts, and Jesus Sotelo suffered a massive stroke three days after he put pen to paper.[265] June Quinn mistakenly conveyed her real estate to "the [t]rust" rather than to "her and her husband[] as [t]rustees."[266] Fuko Kinoshita mailed a deed to the San Francisco County Recorder's Office only to have it disappear.[267] Under existing law, survivors must file a *Heggstad* petition despite smoking gun evidence that these settlors did not mean to die owning assets in their individual capacities.[268] Our proposal would abolish this step. By placing a settlor's property in their rev trust upon death, it would end the delay, cost, and publicity of having to seek a remedy in the trust department.

Our approach would be especially valuable when the settlor likely wanted an asset to belong to their trust, but it does not appear on Schedule A or an assignment. As we mentioned, courts deny *Heggstad* petitions in these situations, sending the estate into probate and sometimes foiling the settlor's substantive testamentary freedom.[269] These harsh results flow from bad luck: the unhappy accident that the documents that earmark property for the trust are missing or narrowly written.[270] Our solution makes these defects irrelevant. It recognizes that gaps in Schedule A or an assignment are almost certainly unintentional and mends them by transferring possessions to the rev trust upon the settlor's death.

Consider Magnhild Franusich's estate.[271] In 2004, Magnhild executed a rev trust that listed two of her three pieces of real property on Schedule A.[272] Magnhild's lawyer declared under oath that she discovered this oversight but died before she could revise Schedule A or deed the third parcel to herself as

264. *See supra* text accompanying notes 217–27.

265. *See* Petition for Order Determining Title to Personal Property at 3, *In re* Pearce Living Trust, No. PTR-14-298094 (Cal. Super. Ct. Sep. 17, 2014); Petition for an Order to Confirm Successor Trustee and Trust Assets at 2, *In re* The Jeanette Ann Berger Trust, No. PTR-16-299723 (Cal. Super. Ct. Apr. 26, 2016); Petition for Order Confirming Successor Trustee, Confirming Trust Asset, and Disavowing Title or Interest in a Nonasset at 1–3, *In re* The Jess M. Sotelo Revocable Trust, No. PTR-16-300146 (Cal. Super. Ct. Sep. 2, 2016).

266. Petition Regarding Title to or Possession of Trust Property at 3–4, *In re* Richard and June Quinn Trust, No. PTR-15-299331 (Cal. Super. Ct. Dec. 1, 2015).

267. *See* Petition for Order Confirming Validity of Trust; Confirming Trustee; and Confirming Assets to Revocable Trust at 1–2, *In re* Fukuo Kinoshita Trust, No. PTR-17-301393 (Cal. Super. Ct. Nov. 14, 2017).

268. *See supra* text accompanying notes 139–49.

269. *See supra* text accompanying notes 49–53, 232–38.

270. *See supra* text accompanying notes 49–53, 232–38.

271. *See* Petition and *Heggstad* Petition to Transfer Real Property into Trust, *In re* The Magnhild Santora Franusich Living Trust, No. PTR-15-299164 (Cal. Super. Ct. Sep. 28, 2015).

272. *See id.* at 3.

trustee.[273] But because the land did not appear on Schedule A, the court denied her successor trustee's *Heggstad* petition.[274] Then, in probate, the referee (who values property) had trouble appraising the estate.[275] Thus, it was not until 2018—more than four years after Magnhild had passed away—that the probate matter concluded, and the asset flowed into the trust.[276] The attorney and executor fees for the probate were $85,431.[277] Our rule would have spared Magnhild's survivors from this nightmare by deeming the third parcel to belong to the trust despite the fact that she never formally or informally changed title.[278]

Admittedly, in many matters, there is no evidence about the settlor's state of mind. In the title never transferred context, successor trustees may have no clue why, years ago, the settlor did not execute a deed or an assignment or reach out to their bank.[279] Likewise, in the refi- and after-acquired asset milieu, the pivotal question is not whether the settlor initially wanted property to be part of their rev trust, but what they intended years later when they either deeded

273. *See* Declaration Supporting Petition and *Heggstad* Petition to Transfer Real Property into Trust at, 2 *In re* The Magnhild Santora Franusich Living Trust, No. PTR-15-299164 (Cal. Super. Ct. Sep. 30, 2015).

274. *See* Petition and *Heggstad* Petition to Transfer Real Property into Trust Probate Code Section 17200, Calendar of Mar-15-2016, Denied, *In re* Magnhild Santora Franusich Living Trust, No. PT-15-299164 (Cal. Super. Ct. Mar. 15, 2016), https://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=PTR15299164&SessionID=E8798816D61037EA2CAF833F34CD8A61FD65E331 [https://perma.cc/C5X6-GFDX]; Second Amended Petition for Final Distribution on Waiver of Accounting and Distribution into the Trust and to Take Judicial Notice of Stipulation to Place Property into Trust in Trust Case; For Statutory Attorney and Executor Compensation at 3, *In re* Estate of Franusich, No. PES-16-299630 (Cal. Super. Ct. Sep. 17, 2018).

275. *See* Report on Status of Administration of Estate at 2, Estate of Franusich, No. PES-16-299630 (Cal. Super. Ct. Mar. 2, 2018).

276. *See* Order for Final Distribution on Waiver of Account and Approving Statutory Compensation, *In re* Estate of Franusich, No. PES-16-299630 (Cal. Super. Ct. 2018).

277. *See id.* at 4.

278. Abolishing the trust transfer requirement might also help insulate estates from probate disputes concerning the pour-over will. For example, the estate plan of pop singer Michael Jackson included a rev trust that apparently did not designate his music catalogue as trust property, an omission that left valuable assets to pass via his pour-over will to the trust. Estate of Jackson, No. B328505, 2024 WL 3884219 (Cal. Ct. App. Aug. 21, 2024). Several years after Jackson's death, but before distribution of any probate property into the trust, Jackson's mother filed a petition challenging the executors' power to enter into a $500 million transaction for the sale of music rights; she claimed that Michael told his family that his music "assets should never be sold" and that the pour-over will required "the executors to transfer to the trust the estate's assets largely as they existed at the time of Michael's death." *Id.* The court disagreed, holding that the pour-over will authorized the proposed transaction. *Id.* at *6. But that round of litigation might have been avoided entirely if, as we propose, non-trust assets flow to the trust automatically upon the settlor's death.

279. *See supra* text accompanying notes 228–29.

their home back to themselves in their individual capacity or came into possession of something new.[280]

Nevertheless, our everything-to-the-trust approach should apply even when there is no concrete proof that the settlor wanted property to belong to their rev trust. When the legal system can only guess about the parties' wishes, it tries to establish a default principle that mirrors their probable preferences.[281] It is far more plausible that settlors intend their rev trusts to control their entire estate than to think that they would rather be responsible for populating it with particular objects or rights on an à la carte basis. For one, recall that 94% of settlors in San Francisco County executed a pour-over will, which ultimately gives all of their property to their successor trustee.[282] This is a telltale sign that a supermajority of settlors wants their rev trusts to include *everything*, including whatever remains in their probate estate. That is precisely what our proposal achieves. Likewise, the rationale for keeping whatever a settlor owns in their individual capacity at death outside of the trust—that they did not execute a deed or an assignment or retitle accounts—is exceedingly weak. Indeed, a settlor's inaction is likely meaningless. As we mentioned, many settlors probably never even realize that they must formally change title because they believe that their estate plan is complete once they sign it.[283] Indeed, several successor trustees in our data echoed this point, arguing that settlors invariably "assume[]" that these documents are "sufficient to transfer [their] assets."[284] Moreover, the odds are low that settlors will uncover this mistake as time rolls on.[285] Their only hint that ownership has not changed is that the words "as trustee" do not appear after their name on title.[286] For these reasons, the best background rule is that rev trusts absorb all of the settlor's property.

280. *See supra* text accompanying notes 241, 243. In addition, in refi and after-acquired asset cases, settlors generally lack counsel at the relevant time, which deprives survivors of a potentially fertile source of proof. *See* Petition to Determine Ownership of Real Property in Trust and Confirming Successor Trustee at 4–5, No. PTR-16-300409, *In re* Elaine V. Silverman Revocable Trust Agreement (Cal. Super. Ct. Dec. 6, 2016) (featuring a refinancing that occurred three years after the settlor signed the trust in which the drafting lawyer "was never consulted").

281. *See supra* text accompanying note 68.

282. *See supra* text accompanying note 201.

283. *See supra* text accompanying notes 144–45.

284. Petition for Order Confirming Title to Personal Property at 54, *In re* George R. Gans Living Trust, No. PTR-17-301105 (Cal. Super. Ct. Aug. 4, 2017); *see also* Petition for Order Confirming Trust Assets at 2–3, *In re* The Gregory J. Ismarin Trust, No. PTR-19-302947 (Cal. Super. Ct. June 20, 2019) (alleging that the settlor "clearly believed that the 'transfer language' in his own trust was sufficient to change title").

285. *See supra* text accompanying notes 31–32, 143–44.

286. This is why estate planners believe that "many clients . . . forget or overlook the final step of changing title." Declaration of John Peter Harbour, Esq. in Support of Petition for Order Confirming Title to Trust Property at 2, *In re* The Ken and Joyce Chan Living Trust, No. PTR-16-299916 (Cal. Super. Ct. July 7, 2016). Making matters worse, transferring assets can be daunting. As one *Heggstad*

It is also instructive to compare our proposal to the harmless error movement in wills law. As discussed, a dozen jurisdictions have abandoned the longstanding norm of requiring strict compliance with the Wills Act.[287] Instead, they allow probate courts to enforce documents that violate the statute when there is clear and convincing proof that the decedent meant to execute a will.[288] This trend reflects the burgeoning recognition that "the formal requirements governing will execution have the capacity to defeat the very intent they were designed to further."[289] Similarly, we urge legislatures to facilitate a decedent's wishes by relaxing the rules that govern conveying assets to a rev trust. The destination of property should not hinge on whether a deed, assignment, or Schedule A recites magic words.

Moreover, our approach stands on firmer ground than the harmless error rule. Harmless error legislation raises concerns about judicial economy. Mandating strict compliance with the Wills Act deters parties from trying to probate unsigned or unwitnessed documents, like draft wills, letters, or diary entries.[290] But by erasing these bright-lines, harmless error laws have the potential to overwhelm probate courts with petitions to deem random scraps of paper to be industrial-strength wills.[291] Critically, our rule would have the opposite effect. If the execution of a rev trust gives everything the settlor owns as an individual at death to their successor trustee, there would be no need for survivors to file *Heggstad* petitions or to probate pour-over wills. If the San Francisco County files are indicative, our reform would slash the volume of cases in trust departments and probate courts by a quarter and a third respectively.[292] Thus, our rule has the advantages of harmless error statutes without the downsides.

Finally, although our proposal would change decades of settled law, it is not totally unprecedented. Nevada recently passed a novel statute that roughly

petition observed, "each institution ha[s] its own rules and forms" and thus it "take[s] a significant amount of time to complete each individual transfer." Petition for Order Confirming Successor Trustee and Trust Assets at 31, *In re* The Harry J. Fong Revocable Trust, No. PTR-17-301203 (Cal. Super. Ct. Sep. 13, 2017).

287. *See supra* text accompanying note 100.

288. *See supra* text accompanying note 100.

289. Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 4 (2016).

290. *See, e.g.*, C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 705 (1991) (describing the "the perpetual tension between the testator's privilege of free testation and the perceived need to limit the issues that must be resolved after the testator's death").

291. *See, e.g.*, Mark Glover, *In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron*, 73 WASH. & LEE L. REV. ONLINE 289, 296 (2016) (noting that harmless error creates a risk "that proponents of noncompliant wills will flood the courts").

292. *See supra* text accompanying notes 195, 244.

resembles ours.[293] The Silver State has long permitted estates worth less than $100,000 to be "set aside," which means that they flow through a streamlined version of probate that requires only one pleading and hearing.[294] In 2020, lawmakers extended this sleek procedure to property that passes under a pour-over will:

> If a decedent's will directs that all or part of the decedent's estate is to be distributed to the trustee of a nontestamentary trust established by the decedent and in existence at the decedent's death, the portion of the estate subject to such direction may be set aside without administration.[295]

This rule pays off in two ways. First, if a settlor fails to formally change title, their survivors can either transmit the missing asset to the trust via either (1) a *Heggstad* petition in the trust department, or (2) a pour-over will under the "set aside" process.[296] Second, estates with narrow or missing Schedule As or assignments—which are not eligible for relief under *Heggstad*—do not have to endure a full-fledged probate.[297] Instead, the successor trustee can claim the property through "a single petition and a single noticed hearing before the probate court, rather than the several petitions, hearings, and other procedural steps required in even the simplest of probate administration[s]."[298] Accordingly, one state has recognized that trust transfer doctrine needs to be modernized.

Although the Nevada statute is a quantum leap in the right direction, it does not go far enough. For one, it is unclear whether the "set aside" mechanism is faster or cheaper than pursuing a *Heggstad* petition.[299] Both options require survivors to file a pleading and wait for the judge to issue an order.[300]

293. *Compare* NEV. REV. STAT. § 146.070(1)(b) *with supra* text accompanying note 263 (showing similarities between the suggested statutory scheme and Nevada's approach).

294. *See* Edmund Gorman, *Where There's A (Pour-Over) Will, There's A Way: Nevada's New Approach to Avoiding Probate with Revocable Trusts*, NEV. LAW., Nov. 2022, at 14, 16.

295. NEV. REV. STAT. § 146.070(1)(b). To initiate the "set aside" process, a petitioner must wait for 30 days after the settlor's death and then file a pleading that lists the value of the property, the decedent's debts, and the names of the heirs or beneficiaries. *See id.* § 146.070(8).

296. *See* Gorman, *supra* note 294, at 16.

297. *See id.* at 15–16.

298. *Id.* at 16; *see also Minutes of the Meeting of the Assembly Committee on Judiciary: Hearing on Assemb. B. 318 and Assemb. B. 339*, 2021 Assemb., 81st Sess. 4 (Nev. 2021) (statement of Alan Freer, Co-Chair, Legislative Committee of the Probate and Trust Section, State Bar of Nevada, explaining that the statute "comports with the general directive of probate and trust statutes to ensure that administration is speedy and efficient with the least cost to the parties").

299. As noted, a petitioner cannot file a "set aside" proceeding until thirty days have passed from the settlor's death. *See supra* note 297. It is also unclear how the estate fiduciary and attorneys get compensated. *Cf.* NEV. REV. STAT. § 150.0605 (allowing a probate court to "order reasonable attorney's fees and costs to be paid from the assets being set aside directly to the attorney for the petitioner" but also stating that this rule applies "when the estate's value does not exceed $100,000").

300. *See supra* text accompanying notes 206–08, 296–300.

Conversely, subject to caveats discussed below, our intervention would totally eliminate the need to go to court.[301] Likewise, because the Nevada legislation only provides a shortcut for property passing under a pour-over will, it cannot help anyone who did not execute such a document.[302] To be sure, as we have emphasized, it appears that fewer than one out of ten settlors fall into that camp.[303] However, the absence of a pour-over will also causes the most draconian byproduct of the trust transfer problem: when the non-transferred assets pass through intestacy, potentially cutting out the trust beneficiaries.[304] Unlike the Nevada law, our safety net catches *everything*—pour-over will or not—and prevents this unfortunate outcome.

Therefore, state lawmakers should deem signing a rev trust to be an expression of intent to transfer anything remaining in the settlor's individual name at death to the successor trustee. Next, we consider, but ultimately reject, counterarguments.

B. *Counterarguments*

This final section identifies and rebuts two potential criticisms of our proposal.

First, one might worry that our legislation could sow confusion about ownership. This uncertainty could arise in several ways. For starters, some settlors have more than one rev trust. They supplement their general rev trust with a special needs trust for a disabled beneficiary, a pet trust for a beloved animal, or a personal residence trust.[305] Which rev trust would our statute fully fund? Similarly, our all-to-the-trust view might seem to turn a blind eye to the fact that some possessions should not be held in trust. Lawyers advise their clients to keep 401(k) and individual retirement accounts ("IRAs") in their own names: these assets already pay their designated beneficiaries at death and putting them in a trust causes adverse tax consequences.[306] Finally, our approach

301. *See infra* text accompanying notes 314–20.

302. *See supra* text accompanying notes 296–97.

303. *See supra* text accompanying note 201.

304. *See supra* text accompanying notes 256–63.

305. *See, e.g.*, Laura J. Martin, *Pet Trust Taxation*, 34 OHIO PROB. L.J. 10 (May/June 2024) (asserting that "[n]early all [p]et [t]rusts are revocable, and most are not funded during the pet owner's lifetime"); Melanie Bradford Holliman, *Special Needs Trusts: What You Need to Know to Help Your Clients and Avoid Client Complaints*, 80 ALA. LAW. 343, 347 (2019) (stating that "[a] third-party special needs trust may be created through a revocable living trust, a testamentary special needs trust or a standalone special needs trust"); *Can Someone Set Up Multiple Living Trusts?*, STOUFFER LEGAL (June 2, 2021), https://stoufferlegal.com/blog/can-someone-set-up-multiple-living-trusts [https://perma.cc/8924-GGBB] (discussing personal residence trusts, which grant a life estate to a dwelling's current inhabitant).

306. *See* Dalia Ramirez, *What Should You Not Put in a Living Trust?*, NERDWALLET (Dec. 1, 2025), https://www.nerdwallet.com/article/investing/estate-planning/what-not-to-put-in-a-living-trust [https://perma.cc/YYL4-C5QR].

could penalize outsiders by lulling them into a false belief that a settlor owns something in their personal capacity. For instance, someone could agree to buy a deceased person's house from their personal representative or try to collect a debt from their probate estate. But if it turned out that the decedent executed a rev trust, the purchaser would have acquired nothing, and the creditor's efforts would have been for naught.

These are phantom concerns. For one, settlors with multiple rev trusts are rare.[307] As a result, our rule sensibly shifts the burden of transferring title from most settlors to a few idiosyncratic individuals. Moreover, because 401(k)s and IRAs distribute their proceeds as a matter of contract law to their beneficiaries when the accountholder dies,[308] they are immune from our proposal. We would give whatever remains in the settlor's probate estate to their successor trustee, but funds from 401(k)s and IRAs are not included in that pot.[309] Lastly, there already are safeguards against third parties being duped by transfers into a trust. *Heggstad* and our proposed expansion of it merely recognize that the creation of a trust can retitle assets between the parties to the trust.[310] To be effective against others, the trust instrument needs to be recorded, which provides fair notice to prospective buyers and creditors.[311]

Second, a critic might contend that our solution would have no practical impact. Unfortunately, third parties routinely refuse to recognize that successor trustees have power over possessions to which the settlor never formally

307. No settlor in our data seems to have executed more than one rev trust. The closest anyone came was a settlor who had signed both a rev trust and an irrevocable trust. *See* Petition for Confirmation of Transfer of Real Property to Trust and Memorandum of Points and Authorities at 1–3, *In re* John Paul Clay Irrevocable Home Trust, No. PTR-14-297672 (Cal. Super. Ct. 2014). Because our proposal only governs rev trusts, this combination of estate planning mechanisms would not cause mischief.

308. David Bergmann, *Beneficiaries and Inheriting a Retirement Account*, FPA PLANNERSEARCH, https://www.plannersearch.org/financial-planning/beneficiaries-and-inheriting-a-retirement-account [https://perma.cc/2Y3D-8EQG].

309. *See* Ozimkoski v. Comm'r, 112 T.C.M. (CCH) 666, 2016 WL 7362679 at *4 (2016).

310. *See* Carne v. Worthington, 200 Cal. Rptr. 3d 920, 929–30 (Ct. App. 2016) ("[F]ormalities prescribed for the creation of a recordable document, or otherwise for protection of or from third parties, need not be satisfied in order to make a valid donative transfer, that is, one that is effective as between the transferor and the transferee(s).") (quoting RESTATEMENT (THIRD) TRS.: GEN. PRINCIPLES § 16 cmt. b. (A.L.I. 2020).

311. *See* Estate of Heggstad, 20 Cal. Rptr. 2d 433, 436 n.7 (Ct. App. 1993) ("We hasten to note, however, that to be effective as to strangers, the declaration of trust must be recorded."). The bona fide purchaser doctrine protects buyers who do not have actual or constructive notice that their contractual partner lacks authorization to sell property. *See* Zissler v. Saville, 240 Cal. Rptr. 3d 590, 600 (Ct. App. 2018); U.C.C. § 8-502 (A.L.I. & UNIF. L. COMM'N 2023) ("An action based on an adverse claim to a financial asset . . . may not be asserted against a person who acquires a security entitlement . . . for value and without notice of the adverse claim."). Thus, assuming that the trust instrument is not recorded, the bona fide purchaser rule would protect anyone who purchases an asset from the settlor's probate estate after the settlor's death: without recordation, the buyer would have no reason to know about the automatic transfer to the trustee. *See* OC Interior Servs., LLC v. Nationstar Mortg., LLC, 213 Cal. Rptr. 3d 395, 406 (Ct. App. 2017) (explaining why "[t]he law protects innocent purchasers").

changed title. Indeed, we uncovered scores of cases in which outsiders were unmoved by the fact that something titled in the settlor's name appeared on Schedule A or an assignment to the trustee.[312] These prospective buyers of real estate or holders of funds insisted that survivors file a *Heggstad* petition to receive a ruling that the land or accounts belonged to the trust.[313] Indeed, as one petitioner put it, "it is very difficult to get [third parties] to do anything that is not explicitly stated in [a] court order."[314] Therefore, giving successor trustees dominion over everything a settlor owns in their personal capacity at death might not have any real-world effect. Instead, just as now, third parties would require survivors to go to court to obtain a decree that the settlor had informally retitled property.

But we are less cynical about how third parties would respond. One reason they currently demand a judicial opinion before surrendering property to the successor trustee is that the law generates unpredictable results. Indeed, as we have documented, the trust department might deny a *Heggstad* petition on any number of fussy grounds.[315] Accordingly, an outsider who releases an asset based on their own reading of Schedule A or an assignment to the trustee runs the risk of being wrong. However, our proposal eliminates this danger. We would make the mere existence of a rev trust the only proof required to entitle the successor trustee to collect anything titled in the settlor's name. This simple rule would make the parties' rights clear without judicial involvement.

Also, lawmakers could help successor trustees obtain assets from third parties by creating a state-sanctioned, downloadable affidavit of trust. As we briefly mentioned, some settlors use affidavits of trust—which are signed and notarized and provide basic information about the trust—when they ask financial institutions to retitle accounts in the settlor's name as trustee.[316] Likewise, in California, if a decedent's probate estate is worth $184,500 or less, their survivors can inherit directly from whomever holds the funds by sending

312. *See, e.g.*, Petition for Order Confirming Trust Assets at 1–3, *In re* Declaration of Trust of Jane Rees, No. PTR-16-300028 (Cal. Super. Ct. 2016) (explaining that an entity refused to release funds to the successor trustee without a court order because of a minor typo in the account title).

313. *See*, *e.g.*, Petition for Order Determining Title to Personal Property at 4–5, 6, *In re* The John and Solange Faugenet Living Trust, No. PTR-17-300940 (Cal. Super. Ct. June 8, 2017) (explaining that one financial institution "will not release the [settlor's] funds unless there is a judicial determination by a court of competent jurisdiction" that the trustee has authority over them).

314. Supplemental Declaration of Petitioner David Katz Responding to Probate Examiner's Notes Re Petition for Order Confirming Trust Assets at 3, *In re* The Diane Silber-Cohen Revocable Trust, No. PTR-17-300621 (Cal. Super. Ct. Mar. 23, 2017).

315. *See supra* text accompanying notes 232–43.

316. *See supra* text accompanying note 29; Lagae v. Lackner, 996 P.2d 1281, 1283 n.3 (Colo. 2000) (explaining that an affidavit of trust "identifie[s] the trustees[] and confirm[s] the authority of the trustees").

them a small-estate affidavit.[317] This document informs the recipient that state law requires them to relinquish the property but also exonerates them from liability if they do so.[318] Borrowing this model to create an accessible and official form would normalize a successor trustee's assertion of authority over trust property and improve the odds that third parties would comply.

CONCLUSION

For many individuals, a rev trust will be the most important document they sign. However, by analyzing tens of thousands of pages of filings from seven years of trust and probate matters, this Article has revealed that rev trusts suffer from a pervasive flaw. Settlors often do not take the steps required to transfer assets to themselves as trustee. If nothing else, this forces their survivors to file *Heggstad* petitions, sending the estate through a quasi-probate process in the trust department. And in about twenty percent of matters, the consequences are far worse: the property must go through probate or even pass to people who are not the settlor's intended beneficiaries. Both eventualities burden the settlor's survivors, and both are avoidable.

Legislatures can stem this tide by declaring that any possessions that remain in the settlor's individual name at death vest in the successor trustee. This reform would be a logical next step in the legal system's efforts to effectuate procedural and substantive testamentary freedom, such as harmless error laws, judicial decisions that squared rev trusts with the Wills Act, and the UTATA.[319] It would also align trust transfer doctrine with what most settlors want, eliminate the need for *Heggstad* petitions, make rev trusts iron-clad probate avoidance mechanisms, and ensure that ordinary people and their loved ones do not become victims of inheritance law's infamous formalism.[320]

317. *See supra* text accompanying note 191. The person making the request also must enclose the decedent's death certificate, proof of ownership, and a copy of their driver's license. *See Small Estate Affidavit to Transfer Personal Property*, CAL. CTS. SELF-HELP GUIDE, https://selfhelp.courts.ca.gov/probate/small-estate [https://perma.cc/5FQG-KMWM]; CAL. PROB. CODE § 13101.

318. *E.g.*, *Affidavit for Collection of Personal Property*, SACRAMENTO CNTY. PUB. L. LIBR. (Apr. 28, 2025), https://saclaw.org/wp-content/uploads/2023/03/form-affidavit-collection-pers-prop-op.pdf [https://perma.cc/V87W-LWPT]; *see* CAL. PROB. CODE § 13106.

319. *See supra* text accompanying notes 100, 109–22.

320. *See supra* Section III.A.