THE PRICE OF PRIVACY AT DEATH

NATALIE BANTA LYNNER

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Abstract: In the United States, privacy at death is not a right; privacy at death is a privilege purchased through the use of a trust. The legal system grants privacy at death but only to those who can afford it. The vast majority of Americans, those who devise their assets through wills or die intestate, must engage in a public probate proceeding that exposes the details of their estates to the public. The result is a dual-track system of succession—one that sells privacy to the ultra-wealthy and one that requires full transparency for everyone else. Over the past two decades, state legislatures and courts have strengthened estate privacy in trust law by eliminating trust registration requirements, enhancing protections of trusts in land records, and creating silent and perpetual trusts. These reforms have been lauded as promoting efficiency and honoring decedent intent. They have been adopted with little public scrutiny and have disproportionately benefited wealthier individuals, enabling the transfer of assets in secrecy and (in some cases) facilitating fraud, abuse, and/or lack of accountability. This Article examines the legal and policy foundations of trust and estate privacy, highlighting how the current system exacerbates economic inequality and denies privacy at death to most Americans. It advocates for reform to both curb abuse and expand privacy interests after death. First, the Article proposes requiring modest disclosures in trust administration to protect beneficiaries and deter misconduct. Second, it argues that privacy protections should be expanded for those who use the probate system. By addressing the asymmetries in privacy access at death and proposing reforms on both sides of the succession divide, this Article offers a new framework for evaluating the role of privacy at death. With trust law increasingly becoming the domain of the wealthy and probate records increasingly becoming digitized and easily searchable, this is a pivotal moment to grant privacy at death to all.

INTRODUCTION

For most Americans, the transfer of property at death is a public matter. An individual's property is distributed in our probate system, which is an open court proceeding. Both the contents of decedents' estates and the identities of their heirs or beneficiaries become a matter of public record. The probate system favors transparency and open proceedings in our democratic system. Yet,

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for those who can afford it, privacy after death is purchasable. By turning to trusts and other nonprobate transfers, wealthy individuals can bypass probate altogether thereby preserving their estate privacy and keeping their financial legacies secret. Trust privacy is used both during life and after death, but its significance grows after death because the alternative is complete public disclosure through the probate system.

Estate privacy is open to all, but, as a practical matter, only those who can afford to hire an attorney, create a trust, and pay for ongoing trust management of their estate gain estate privacy protections. The traditional probate system of succession and the newer nonprobate system of succession are therefore at odds when it comes to privacy. Trusts and nonprobate transfers allow settlors[1] to keep their property transactions private during life and to maintain privacy after death. This article assumes trusts are generally used by those who have more wealth to transfer at death and can afford legal services.[2] It assumes that wills are often used by those who have less wealth to transfer at death.[3] Those who do not engage in any estate planning die "intestate," which means that their property will be distributed in probate court according to state intestacy law.[4] A recent survey revealed that two-thirds of Americans do not engage in estate planning.[5] Out of the one-third of adults who have an estate plan, 75% used wills and about 19% used trusts.[6] Privacy is one of trusts' primary advantages over wills and intestacy and has become one of the main reasons why individuals choose to create trusts to manage their estate transfer at death.[7]

Ironically, the poorest Americans also escape probate and its attendant public exposure through streamlined procedures for small estates.[8] States offer summary administration for estates under a certain value (ranging from

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[1] A "settlor" is an individual who creates a trust. *Settlor*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[2] Sasha Berson, *Estate Planning Law Statistics: Top Trends and Insights for [2026]*, GROW LAW (Feb. 3, 2025), https://growlaw.co/blog/estate-planning-law-statistics [perma.cc/J2AA-HWK2] (noting that over 60% of people with between $3 to $5 million in assets have or plan to have trusts, with that figure increasing to over 81% of people with more than $10 million in assets).

[3] *Id.*; *see also* Emily S. Taylor Poppe & Megan Doherty Bea, *Legal Actuation: How Ex Ante Legal Behavior Drives Inequality*, 58 LAW & SOC'Y REV. 353, 366–67 (2024) (reporting that 50% of Americans who report wealth of at least $150,000 have a will).

[4] Craig Parker, *What Is Intestate? Understanding the Difference Between Probate and Intestate*, TR. & WILL (July 29, 2025), https://trustandwill.com/learn/intestate [perma.cc/K6F8-CAQB].

[5] Lorie Konish, *67% of Americans Have no Estate Plan, Survey Finds. Here's How to Get Started on One*, CNBC (Apr. 11, 2022), https://www.cnbc.com/2022/04/11/67percent-of-americans-have-no-estate-plan-heres-how-to-get-started-on-one.html [perma.cc/PJN6-LR3N].

[6] Sarah Jones, *Estate Planning Statistics to Read Before Writing Your Will*, LEGAL ZOOM, https://www.legalzoom.com/articles/estate-planning-statistics [perma.cc/8UND-YEFK] (Feb. 14, 2026).

[7] RESTATEMENT (THIRD) OF TRS. § 27 cmt. b(1) (A.L.I. 2003).

[8] *Small Estates Laws and Procedures: 50-State Survey*, JUSTIA https://www.justia.com/probate/probate-administration/small-estates/small-estates-laws-and-procedures-50-state-survey/ [perma.cc/VE68-T8LD] [hereinafter *Small Estates Laws and Procedures*].

$25,000 to $200,000).[9] These decedents also retain privacy as their estates are not subject to public disclosure through a court proceeding. But this limited privacy is not by design; it is a side effect of having too little property to transfer to require a formal, court-supervised proceeding. As we will see in this Article, state legislatures and practitioners have increased trust privacy protections in recent years and avoided discussing any similar privacy protections for wills or intestacy.[10] As a result, estate privacy laws favor a small percentage of Americans and ignore the vast majority of Americans who do not take advantage of trust protections or who are ineligible for summary administration.

Trusts are a significant tool that the wealthy use to keep their transactions private and confidential in a way that middle-class and lower-class Americans cannot afford to access.[11] Our system of inheritance is based on wealth preservation, but it has catered to the needs and desires of wealthy Americans.[12] Succession law has exacerbated the growing inequalities in our system by giving benefits and privileges to the wealthy and ignoring others.[13] The poor are getting poorer, the wealthy are getting wealthier, and the middle class is shrinking.[14] Granting privacy protections to trusts but not to probate transfers shrouds the transfer of wealth and creates a system that is unjust.

Privacy in property transactions must satisfy a delicate balance between curbing abuse and protecting a cherished right. Privacy allows secrecy and secrecy can aid illegal transactions. Money laundering; illegal drug, sex, and arms trafficking; and tax fraud can be forwarded through private transactions. Trusts are often used as a primary tool to keep property private, even at the potential cost of shielding illegal transactions. There are, however, many legitimate reasons for privacy in estate planning and property transactions during life such as protecting vulnerable individuals, incentivizing children, and planning for unique family situations. As this Article will show, trust privacy is enshrined in our legal system and strongly supported by state law.[15] Although the right to privacy is relatively new, financial privacy has long been desired and sought in society. People consider privacy part of their property right—the right to own property is the right not to have to publicly disclose how much

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[9] *Id.*

[10] *See infra* Part II.

[11] *See* Mark Henricks, *Average Cost of a Will vs. Living Trust*, SMART ASSET, https://smartasset.com/estate-planning/cost-of-living-trust-vs-will [perma.cc/ACF8-8497] (Jan. 7, 2026) (explaining that trusts tend to be more expensive to create and administer than wills).

[12] *See infra* Part II.

[13] Felix B. Chang, *How Should Inheritance Law Remediate Inequality?*, 97 WASH. L. REV. 61, 61 (2022).

[14] Rakesh Kochhar & Stella Sechopoulos, *How the American Middle Class Has Changed in the Past Five Decades*, PEW RSCH. CTR. (Apr. 20, 2022), https://www.pewresearch.org/short-reads/2022/04/20/how-the-american-middle-class-has-changed-in-the-past-five-decades/ [perma.cc/2DSS-RLWY].

[15] *See infra* Part II.D.

property one owns.[16] Our legal system promotes transparency to sustain democracy, ward off corruption, and create an efficient economy; it also grants an unprecedented amount of privacy to those who use trusts in order to protect settlors' reputations and their wealth.[17] This delicate balance has been examined before, especially in the context of property ownership during life.[18] This Article, however, reexamines trust and estate privacy as a whole and advocates for reform both on the trust and wills sides of the equation. Professor Foster wrote a seminal piece on trust privacy fifteen years ago in which she argued that "uncritical acceptance of trust privacy ultimately impeded and distorted reform," despite what she called the human costs of trust privacy.[19] She correctly predicted that states would ultimately create stronger privacy protections.[20] This Article continues the forgotten story of trust privacy, focusing on the estate privacy evolution that has occurred within the last fifteen years.

Part I considers the origins of estate privacy through the lens of financial privacy under the British common law.[21] This Part highlights a few examples of how using trusts enables the wealthy to conduct stealthy transactions outside of the public eye during their lives. It distinguishes between trust privacy during life and at death, and it analyzes the various ways that privacy at death is both used to further an individual's financial goals and used to hide illegal acts.

Part II explores how state legislatures and courts have strengthened estate privacy protections through trusts in the last two decades.[22] It traces the demise of trust registration, the increased protections of trusts in land records, the rise of silent trusts, perpetual trusts, and common law privacy protections granted by state courts. It argues that through this legislation and case law, states have commodified privacy after death and sold it to those wealthy residents who can afford the privilege of privacy while ignoring those who cannot.

Part III advocates for trust privacy reforms to address concerns regarding fraud, money laundering, and other illegal acts, as well as a probate reform to address disparities between those who use trusts and wills.[23] By reforming trusts to require a minimum amount of disclosure at death to interested parties, the law honors privacy at death and still gives beneficiaries and heirs an opportunity to hold a trustee accountable. By reforming probate law to allow an executor or administrator of the estate to seal the probate inventory or file an affidavit instead of the inventory, a decedent's privacy interests will be protected from the

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[16] Frances H. Foster, *Trust Privacy*, 93 CORN. L. REV. 555, 563–64 (2008).

[17] *Id.*

[18] *See generally id.*

[19] *Id.* at 559, 566.

[20] *See infra* Part II.C.

[21] *See infra* Part I.

[22] *See infra* Part II.

[23] *See infra* Part III.

public at large. As technology makes probate records more accessible in their electronic format, this becomes a pressing reform for state legislatures to enact.

Although succession law's purpose is to facilitate wealth transfers from one generation to another and, therefore, uphold and even exacerbate wealth disparity, legislatures and courts must address the ways in which inheritance law favors the wealthy to the detriment of all others. This Article highlights the growing divide between public and private succession and points to the serious consequences of commodifying privacy and reinforcing wealth inequality. This Article examines estate privacy as a whole and ultimately argues that granting privacy to those who use probate creates a fairer inheritance system while still honoring an individual's right and privilege to privately transfer her property at death using a trust. By reforming both probate and trust law, we can ensure that privacy at death is a privilege of succession for all.

I. PRIVACY BOOM

Trusts were not initially used for privacy. The precursor to a trust, the use, was used to avoid feudal law and protect property interests of the family.[24] Trusts were used to escape taxation and the law of primogeniture.[25] In the literature of the origin of the trust, privacy is not mentioned as a factor in developing the modern trust.[26] In a way, privacy developed as one of the preferred elements of a trust unintentionally.[27] By definition, a trust is a private legal relationship that bifurcates ownership and imposes fiduciary duties.[28] No governmental entity needs to approve the creation or distribution of property under a trust.[29] A trustee has legal authority to transfer property much like property held in sole ownership.[30] A trustee, like an individual owner of property, has privacy over the financial holdings of a trust.[31] In contrast to a trust, a will is a public legal arrangement where an executor needs court authority to transfer

[24] John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2151–52 (2016); William D. Rollison, *The History of Estate Planning*, 37 NOTRE DAME L. REV. 160, 162 (1961).

[25] CHANTAL STEBBINGS, THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND, at xi (Cambridge Univ. Press ed., 2002).

[26] *See id.* at 8 (discussing the way the trust was used in the family to provide for their well-being and preserve class status).

[27] *See id.* at 5 ("Since the trust was a purely private arrangement, with no requirements of registration and with significant fluctuations in the value of trust funds, it is impossible to state with accuracy how much property was held in trust in the nineteenth century.").

[28] *Trust*, BLACK'S LAW DICTIONARY, *supra* note 1.

[29] *Id.*

[30] *Trustee*, BLACK'S LAW DICTIONARY, *supra* note 1.

[31] *Id.*

property.[32] Because a will is submitted to court through a probate system, it becomes part of the public record of court proceedings.[33] Our common law and First Amendment give the public a right of access to court proceedings.[34] This strong interest in public court records is difficult to override.[35] The only reliable way to keep estate matters private is to go outside of the court system by using a nonprobate transfer. The point of a trust is to distribute wealth privately outside of a public court system and, therefore, by its nature, is a private transfer. Probate as a public court proceeding does not receive any privacy protections. This distinction, although perhaps not as relevant at the beginning of the evolution of the trust, has become more prominent and relevant in people's decisions to choose a revocable trust over a will.[36] This Part traces the development of trust privacy during life and trust privacy after death. It analyzes why a trust is a preferred legal tool to preserve privacy and anonymity in transactions during life and after death and reflects on the costs of trust privacy.

A. Trust Privacy During Life

The desire for financial privacy is nothing new.[37] Financial privacy has long been valued in Western civilization as a critical component of individual liberty.[38] Philosophers have argued that privacy is a fundamental policy of civi-

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[32] Matthew Jarrell, *Will vs. Trust: Which Is Right for You?*, INVESTOPEDIA, https://www.investopedia.com/articles/personal-finance/051315/will-vs-trust-difference-between-two.asp [perma.cc/LMQ8-KVFT] (Sep. 8, 2025).

[33] *See* Booth Newspapers, Inc. v. Cavanaugh, 166 N.W.2d 546, 549 n.13 (Mich. Ct. App. 1968) ("Probate records are judicial records and may become public records after proceedings are completed and entered."); *In re* Estates of Zimmer, 442 N.W.2d 578, 581–85 (Wis. Ct. App. 1989) (finding a public right to inspect records of any court of law, including probate courts).

[34] U.S. CONST. amend I; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (recognizing that the public and the press has a constitutional right to attend criminal trials); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067–71 (3d Cir. 1984) (applying *Richmond* to civil proceedings).

[35] *See infra* Part III.B.

[36] *See* Fulp v. Gilliland, 988 N.E.2d 204, 207 (Ind. 2013) ("Revocable trusts have become popular estate planning tools and substitutes for wills because they allow settlors to avoid probate and guardianship, to have greater privacy, and to manage their assets."); *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 485 (Iowa 2013) ("Although settlors use revocable trusts instead of wills to dispose of their property at death for a variety of reasons, two of these reasons—avoiding probate and protecting privacy—stand out as relevant to our interpretation of whether a beneficiary should be entitled to receive an accounting for a period during which the trust was revocable."); Dixon v. Dixon, 905 N.W.2d 748, 752 (N.D. 2018) ("Two of the main reasons settlors use revocable trusts are to avoid probate and to protect their privacy by limiting who may gain access to their financial information. State law therefore provides this privacy benefit for settlors of revocable trusts." (citation omitted)).

[37] *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1190 (2004) ("Historically, as a matter of etiquette, one's financial affairs were very much one's own affairs. One did not talk about money matters unless absolutely necessary . . . . The only persons whose finances were routinely revealed to the public were insolvents and bankrupts.").

[38] Howard S. Erbstein, *Palm Trees Hide More Than Sunshine: The Extraterritorial Application of Securities Laws in Haven Jurisdictions*, 13 DICK. J. INT'L L. 441, 448 (1995).

lized society[39] and is a "natural feeling of every human being."[40] Early Roman and Germanic law had principles of bank secrecy.[41] Although Roman law did not name a right to privacy, the concept of privacy was embedded in different areas of Roman law.[42]

Trust privacy has roots in the common law of Great Britain. The common law acknowledged an implied contract between a banker and client that the banking matters would be kept confidential.[43] In the seminal 1924 case, *Tournier v. National Provincial and Union Bank of England*, the Court of Appeal of England and Wales recognized this implied duty of confidentiality and also established a duty to disclose if compelled by law, the bank, or client consent.[44] Former British colonies around the world codified bank confidentiality to protect secrecy in financial dealings and to compete with other jurisdictions for business.[45] Jurisdictions that do not derive law from British common law still share a view that there is an implied contractual term requiring bank secrecy.[46] For example, the Napoleonic code penalized disclosure of secrets, and numerous other jurisdictions have codified a requirement of bank secrecy.[47] Financial privacy and combatting corruption are always at odds. Jurisdictions that are seen as tax havens strengthen privacy laws at the detriment of foreign governments inquiring as to whether an individual's finances are in violation of a foreign government's laws.[48]

Many state courts in the United States have held that banks and customers have an implied contract of secrecy.[49] The Supreme Court has not recognized a constitutional right to financial privacy. In 1976, in *United States v. Miller*, the Supreme Court held that a bank customer had no reasonable expectation of

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[39] Philip R. Wood, *International Law of Bank Secrecy*, *in* 5 CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS 407, 407 (Robert C. Effros ed., 1998).

[40] Bernardo Periñán, *The Origin of Privacy as a Legal Value: A Reflection on Roman and English Law*, 52 AM. J. LEGAL HIST. 183, 184 (2012). *Contra* Whitman, *supra* note 37, at 1154, 1155 ("If privacy is a universal human need that gives rise to a fundamental human right, why does it take such disconcertingly diverse forms? . . . [A]ll the evidence seems to suggest that human intuitions and anxieties about privacy differ.").

[41] Erbstein, *supra* note 38, at 448.

[42] Periñán, *supra* note 40, at 184.

[43] Tournier v. Nat'l Provincial & Union Bank of Eng. [1924] 1 KB 461 (AC) at 461 (Eng.); Douglas J. Workman, Comment, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675, 679 (1982).

[44] *Tournier*, 1 KB at 461.

[45] Workman, *supra* note 43, at 679.

[46] Wood, *supra* note 39, at 407.

[47] *Id.* at. 414.

[48] Workman, *supra* note 43, at 679–80.

[49] *See, e.g.*, Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961) (holding that bank breached implied contract of secrecy in disclosing to customer's employer that customer's checks had been returned); Milohnich v. First Nat'l Bank of Mia. Springs, 224 So. 2d 759, 760 (Fla. Dist. Ct. App. 1969) (holding that bank violated duty of secrecy by disclosing to third parties how much was in an account).

privacy in account information held by a bank, and, therefore, any bank records the government obtained in a criminal proceeding did not violate the Fourth Amendment.[50] Congress responded two years later by passing the Right to Financial Privacy Act.[51] The Right to Financial Privacy Act establishes a process for the federal government to obtain a customer's financial records from a bank.[52] It does not limit banks from disclosing financial information to other private parties or to state and local governments.[53]

Although there may not be federal protection of financial records, several states have continued to find a right to privacy in financial records under state constitutions. In 1991, in *Utah v. Thompson*, the Utah Supreme Court found that under the Utah Constitution, bank customers have a right to reasonably assume that the financial information they submit to banks will remain private.[54] Similarly, in 1983, in *People v. Jackson*, an Illinois court found that the Illinois Constitution protected a defendant's bank records from unreasonable search.[55] In some states, protection stems from the common law in contract or tort and prohibits banks from giving information to the government as well as third parties without consent or a proper subpoena. In 1979, in *Suburban Trust Co. v. Waller*, for example, a Maryland appellate court held that bank customers had a right to confidentiality as to their financial information.[56] In 1990, in *Burford v. First National Bank in Mansfield*, a Louisiana appellate court held a bank's disclosure of a financial statement to a customer's ex-spouse was grounds for a suit against the bank for an invasion of privacy.[57] In addition, states have passed consumer protection acts that protect bank customers' financial information from being disclosed to third parties without consent.[58]

The trust, although not necessarily tied to a financial intermediary, also imported similar expectations of confidentiality. Trusts were widely used in the early twentieth century in the United States as an attractive alternative to corporations.[59] Trusts had more favorable terms for businesses than the more onerous incorporation statutes at the time.[60] The genesis of "antitrust law" owes

[50] United States v. Miller, 425 U.S. 435, 442, 446 (1976).

[51] 12 U.S.C. §§ 3401(3), 3402, 3403(a).

[52] *Id.*

[53] *Id.*

[54] State v. Thompson, 810 P.2d 415, 418 (Utah 1991).

[55] People v. Jackson, 452 N.E.2d 85, 90 (Ill. App. Ct. 1983).

[56] Suburban Tr. Co. v. Waller, 408 A.2d 758, 764 (Md. Ct. Spec. App. 1979).

[57] Burford v. First Nat'l Bank in Mansfield, 557 So. 2d 1147, 1151 (La. Ct. App. 1990).

[58] CAL. FIN. CODE § 4052.5 (West 2026) ("Except as provided in Sections 4053, 4054.6, and 4056, a financial institution shall not sell, share, transfer, or otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without the explicit prior consent of the consumer to whom the nonpublic personal information relates."); COLO. REV. STAT. §§ 6-1-1301 to -1313 (2026); VA. CODE ANN. §§ 59.1-575 to -585 (2023).

[59] Morley, *supra* note 24, at 2164.

[60] *Id.* at 2163.

its existence to the business trusts that controlled the American marketplace.[61] As Professor Morley explains: "Unlike a corporation, a trust could be formed privately, without any public filings. A trust thus did not always show up in the state records of business organizations. The trust also flew under the radar of both state and federal tax records."[62] Again, the practical element of being privately formed granted the business owners confidentiality and privacy that would not have been obtained using a different legal arrangement. Trusts that were used for estate planning also achieved confidentiality by virtue of creating a private arrangement for property distribution after death. Although not clearly stated or codified, the fiduciary duties owed by a trustee to a settlor most likely include a duty to keep the settlor's financial affairs private.[63] In dealing with the property of a trust, financial institutions, insurance companies, and buyers of trust property may request access to the trust document, but they are bound by the same privacy expectations as discussed above. Trust privacy is expected and perhaps one of the defining aspects of a revocable trust.[64]

A common contemporary use of revocable trusts is holding property in trust and engaging in real estate transactions through trusts. Settlors seek privacy to protect information about their property and wealth from the general public. Using trusts and shell companies as owners of properties protects settlors' identities, reputations, or the extent of their wealth from the public eye. Settlors can define their public and private selves by using trusts to shield property and financial decisions from public scrutiny.

The growing trend of using trusts and shell companies to purchase luxury real estate in the United States highlights the importance of privacy granted by these instruments.[65] The *New York Times* reported in an investigative article in 2015 that over half of the residential real estate purchases over five million dollars in the United States used a shell company and/or a trust to purchase luxury property.[66] Buyers and sellers use shell companies and trusts created in the names of their accountants, lawyers, or relatives to shield their own identi-

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[61] *Id.* at 2164.

[62] *Id.* at 2166.

[63] AMY MORRIS HESS & GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 541 (2025) [hereinafter THE LAW OF TRUSTS AND TRUSTEES].

[64] Foster, *supra* note 16, at 563 (stating that "many see privacy as an essential feature of the revocable trust").

[65] *See* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [perma.cc/JW3K-DDVT] (highlighting the tools wealthy buyers use to keep their identities hidden, "[b]ehind the dark glass towers of the Time Warner Center looming over Central Park, a majority of owners have taken steps to keep their identities hidden, registering condos in trusts, limited liability companies or other entities that shield their names").

[66] *Id.*

ty.[67] The *New York Times* reported that none of the real estate agents, lawyers, accountants, or owners of the buildings want to know where the money is coming from.[68] Even the interior of the building at the heart of the *New York Times* investigation, the Time Warner Center, reveals no identifying information such as a resident's name on a mail slot.[69] Because these transactions are made in cash, no mortgage documents, bank documentation, or other forms of financial accounting required by disclosure laws trace ownership.[70] States generally require conveyances of real property to be recorded in a state recording system in order to gain priority over other conveyances.[71] If a trust is used, however, the owner of the property is the trust, not the settlor of the trust. Trust privacy ensures that the true owner is not listed in a state recording system.

Ownership of luxury property in the United States gives individuals symbolic respectability. Both foreign and domestic buyers of luxury real estate depend on the legal system and stable economy that the United States provides. The criticism of this practice stems from the allegation that some of the purchasers of luxury real estate have criminal backgrounds, engage in money laundering, or have avoided creditors.[72] When Russia invaded Ukraine and sanctions were imposed on Russian elites,[73] it became clear that many of them owned property in the United States, increasing attention on Russian property ownership in the West.[74] Absent a criminal investigation or international sanctions, using trusts and shell companies generally allows individuals to engage in these real estate transactions secretly.

There are, however, many legitimate reasons to keep the ownership of personal property private. Buyers worry that they will not get a fair price if a seller knows their fame and wealth or vice-versa. Buyers worry about their safety in revealing their identity and having the public have access to where they live. Political threats against lawmakers and their family members contin-

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id*.

[71] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 149.

[72] Heidi Przybyla & Christine Haughney, *Russian Money Flows Through U.S. Real Estate*, NBC NEWS (Mar. 2, 2022), https://www.nbcnews.com/business/real-estate/russian-money-flows-us-real-estate-rcna17723 [perma.cc/Z4EX-EW4Q].

[73] Fatima Hussein, *The US Is Now Allowed to Seize Russian State Assets. How Would That Work?*, AP NEWS, https://apnews.com/article/russia-ukraine-treasury-sanctions-assets-congress-0a3bc97a2d6d77ce3650c767db6ea7ed [perma.cc/255N-4K6E] (May 10, 2024).

[74] Giacomo Tognini, *A Guide to All The Outrageous Mansions and Estates Owned by Sanctioned Russian Billionaires*, FORBES, https://www.forbes.com/sites/giacomotognini/2022/03/05/a-guide-to-all-the-outrageous-mansions-and-estates-owned-by-sanctioned-russian-billionaires/ [perma.cc/4WNS-3X62] (Apr. 1, 2024).

ue to rise.[75] Several lawmakers and judges have been targeted at their homes—locations found in our public recording system where deeds are recorded in the homeowners' names and easily accessible on the internet. The nation was horrified when Speaker Nancy Pelosi's husband was physically attacked in their San Francisco home in October of 2022.[76] Representative Pramila Jayapal (D-Wash) had an armed man appear at her house several times shouting and threatening her safety.[77] Another individual broke a window at Senator Susan Collins' (R-MN) home in Maine.[78] Tragically, an armed man posing as a deliveryman shot and killed the son and wounded the husband of a federal judge in New Jersey at their home.[79] Trust privacy in real estate transactions can play an important role in providing public figures with security and must be balanced against the concerns cited above of using real estate to engage in illegal activity.

B. Trust Privacy at Death

Because trust privacy during life mimics an individual's financial privacy during life, the value of trust privacy is greatly increased at death. As explained above, if an individual uses a will or nothing at all, at death property will transfer via probate.[80] Because probate is a public proceeding, an individual loses the financial privacy she had during life upon her death. The way to avoid the loss of privacy at death is to use a trust or other nonprobate transfer.[81] A trust often combines all of an individual's assets (whether they are classified as probate or nonprobate assets) into one comprehensive plan that ultimately avoids any interference by a probate court, unless the integrity of a trust or trustee is challenged by the beneficiaries.[82] Most people who use a revocable trust do so to ensure privacy after death in furthering their financial and estate planning

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[75] Catie Edmondson & Mark Walker, *One Menacing Call After Another: Threats Against Lawmakers Surge*, N.Y. TIMES (Feb. 9, 2022), https://www.nytimes.com/2022/02/09/us/politics/politician-death-threats.html?action=click&module=RelatedLinks&pgtype=Article [perma.cc/JED6-Y5BR].

[76] Catie Edmondson, *Pelosi Attack Highlights Rising Fears of Political Violence*, N.Y. TIMES (Oct. 29, 2022), https://www.nytimes.com/2022/10/29/us/politics/paul-pelosi-political-violence.html?searchResultPosition=5 [perma.cc/8ZV6-8P8W].

[77] *Id.*

[78] *Id.*

[79] Neil Vigdor, Aimee Ortiz & Kevin Armstrong, *Husband and Son of a Federal Judge Are Shot in New Jersey*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/nyregion/shooting-nj-judge-esther-salas.html [perma.cc/6YLM-VLMT].

[80] If an individual has no estate planning documents at death, he or she dies intestate. Intestate estates go through probate court. Court proceedings, estate inventories, and names of heirs and beneficiaries become part of a public court record. Greg Depersio, *Wills: How They Go from Probate to Public Record*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/101915/when-are-beneficiaries-will-notified.asp [perma.cc/4BLL-M5TE] (Oct. 14, 2024).

[81] Common nonprobate transfers include life insurance policies, retirement accounts, pay on death accounts, property held in joint tenancy, and transfer on death deeds. *Nonprobate Property*, BLACK'S LAW DICTIONARY, *supra* note 1.

[82] *Trust*, BLACK'S LAW DICTIONARY, *supra* note 1.

goals.[83] In fact, the allure of a private arrangement to dispose of assets at death has become one of the main selling points of using a trust for estate planning rather than a will.[84]

More and more assets are transferred at death using nonprobate transfers that specifically rely on financial intermediaries such as pay-on-death bank accounts, stock or retirement accounts with beneficiary designations, and insurance policies.[85] These financial intermediaries give their clients privacy, whether protected by the common law, state constitution, or federal law. Privacy is also expected by customers, and financial companies advertise their commitment to their customers' privacy and desire to safeguard personal information.[86] The outcome of the law and industry standard in this area is that nonprobate transfers are accorded a high degree of privacy. Nonprobate transfers receive privacy and probate transfers do not.

Nonprobate transfers, including trusts, have become the main system used to transfer wealth at death.[87] A desire for privacy has not necessarily driven the nonprobate revolution, but privacy in death transfers has been a well-received consequence of using nonprobate transfers.[88] Nonprobate transfers were celebrated as an alternative to the probate system, which was criticized as a cumbersome and expensive way to transfer wealth at death. The success of nonprobate transfers demonstrated that a court proceeding was not necessary

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[83] *See* Fulp v. Gilliland, 988 N.E.2d 204, 207 (Ind. 2013) ("Revocable trusts have become popular estate planning tools and substitutes for wills because they allow settlors to avoid probate and guardianship, to have greater privacy, and to manage their assets."); *In re* Trust No. T-1 of Trimble, 826 N.W.2d 474, 485 (Iowa 2013) ("Although settlors use revocable trusts instead of wills to dispose of their property at death for a variety of reasons, two of these reasons—avoiding probate and protecting privacy—stand out as relevant to our interpretation of whether a beneficiary should be entitled to receive an accounting for a period during which the trust was revocable."); Dixon v. Dixon, 905 N.W.2d 748, 752 (N.D. 2018) ("Two of the main reasons settlors use revocable trusts are to avoid probate and to protect their privacy by limiting who may gain access to their financial information. State law therefore provides this privacy benefit for settlors of revocable trusts." (citation omitted)).

[84] *Id.*; *see also Why Are Trusts Frequently Used in Estate Planning?*, AM. HERITAGE CREDIT UNION (May 2, 2024), https://blog.americanheritagecu.org/why-are-trusts-frequently-used-in-estate-planning [perma.cc/L2PJ-WLGB] (highlighting privacy as a reason to use a trust for estate planning).

[85] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

[86] *Privacy Notices and Choices*, BANK OF AM., https://www.bankofamerica.com/security-center/privacy-overview/ [perma.cc/YTH4-9WGE] ("Your privacy is important to us."); *Capital One Online Privacy Policy*, CAP. ONE, https://www.capitalone.com/privacy/ [perma.cc/Z64Q-MLHH] ("We're in the business of keeping your money and information safe."); *Privacy Policy*, J.P. MORGAN, https://www.jpmorgan.com/privacy#:~:text=We%20do%20not%20seek%20to,have%20your%20prior%20explicit%20consent [perma.cc/6NEJ-78SB] (Sep. 2025) ("We take our responsibility to protect the privacy and confidentiality of your information, including personal information, very seriously.").

[87] Langbein, *supra* note 85, at 1108.

[88] *Id.* at 1116 ("[T]he decision to organize any function as a judicial proceeding is inconsistent with the interests that ordinary people regard as paramount when they think about the transmission of their property at death: dispatch, simplicity, inexpensiveness, privacy.").

for transferring wealth.[89] The purposes of probate could be fulfilled without probate: nonprobate transfers could clear title, protect creditors, and distribute property to intended beneficiaries without court supervision.[90] Creditors generally do not use probate to ensure the decedent's debts are paid. In many situations, the survivors voluntarily pay off a decedent's debts.[91] In addition, many creditors of consumer debt have required a security interest in an asset to ensure that payment is made with no need to use probate.[92] Probate is still used to ensure debts are paid when a decedent's survivors are unwilling or unable to pay. If debts are not paid from nonprobate assets, creditors can still threaten legal action. Creditors on the whole, however, have not objected to the use of nonprobate transfers and the privacy of these transfers has not been a hurdle for creditors to receive payment.[93]

Another reason nonprobate transfers have risen in popularity is because the nature of wealth changed. Wealth used to be held primarily in land and most people knew who owned the land.[94] There was no need to keep the transfer of the land private at death because everyone expected a new resident and neighbor on the property. In today's age, wealth is not primarily held in land. American wealth is held in financial assets like stocks, bonds, bank accounts, mutual funds, insurance, and retirement accounts.[95] These financial assets do not need a court supervised proceeding to transfer at death, and most Americans consider them to deserve more privacy than owning real property.

C. Trust Privacy Considerations

There is tension between privacy and transparency in transferring property at death. Some may argue the dead should not receive any privacy protections because property is for the living. They may argue that probate ensures that the public is aware of how much wealth is being transferred and to whom and that transparency staves off corruption and equalizes the treatment of indi-

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[89] *See id.* ("As Richard Wellman, the principal draftsman of the UPC, forthrightly declared: 'The assumption that administration of an estate requires a judicial proceeding is as doubtful as it is costly.'").

[90] *Id.* at 1117.

[91] *Id.* at 1121.

[92] *Id.* at 1122; *see also* Morley, *supra* note 24, at 2171 (describing how business trusts administer debts in insolvency).

[93] Langbein, *supra* note 85, at 1125 ("If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system. Instead, they have acquiesced without struggle, as have the most powerful of creditor-like agencies, the federal and state revenue authorities.").

[94] John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988).

[95] *Financial Accounts of the United States—Z.1*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/releases/z1/ [perma.cc/PJ83-ZUTY] (Mar. 19, 2026) (noting that American households owned $55.7 trillion in corporate equities and $48.2 trillion in household real estate as of 2024).

viduals at death. This Article takes a different approach and argues that financial privacy has long been honored and supported. The default rule should be one of privacy even after death because financial matters have generally been confidential.[96] The only reason probate is not private is because it is a court proceeding, and court proceedings are presumed to be public for policy reasons unrelated to estate planning and privacy.[97] There is no inherent need, however, to know about people's finances when they die. Privacy in probate should be honored like it is when using trusts. Many Americans desire privacy after death, for a variety of reasons. Some wish to use trusts to shield their property from public scrutiny during life. Some wish to use trusts to keep the extent of their property private when they die, avoiding probate and a will that would require public disclosure. Others choose to employ trusts to keep their testamentary decisions secret from other beneficiaries or heirs of the estate. Some use trusts to shield assets from creditors or engage in other illegal acts. This Section analyzes the different ways trust privacy is used and the challenges each method faces; it argues that the same policy considerations that induce people to use a trust apply equally to probate privacy.[98]

1. Privacy from the Public

For a variety of reasons, Americans do not enjoy talking about money or sharing their financial information.[99] In a recent survey, only seventeen percent of parents who earned more than one hundred thousand dollars a year had told or planned to tell their children how much they earned a year or their net worth.[100] One-third of those who responded to the survey said that their earnings were "none of their [children's] business."[101] Middle-class Americans also share a reluctance to discuss money, but according to some experts, often do so under the fear that they might lose the financial independence that they have.[102] Working-class Americans tend to more openly discuss their finances

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[96] *See supra* Part I.A.

[97] *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) (discussing the "beneficial effects of public access to civil judicial proceedings" such as testimonial trustworthiness, enhancing the quality of justice, increasing respect for our judicial system).

[98] *See infra* notes 99–164 and accompanying text.

[99] Joe Pinsker, *Why So Many Americans Don't Talk About Money*, THE ATLANTIC (Mar. 2, 2020), https://www.theatlantic.com/family/archive/2020/03/americans-dont-talk-about-money-taboo/607273/ [perma.cc/RR7L-J3FS] ("Many Americans do have trouble talking about money—but not all of them, not in all situations, and not for the same reasons. In this sense, the 'money taboo' is not one taboo but several, each tailored to a different social context.").

[100] *Id.*

[101] Joe Pinsker, *Rich People Rarely Tell Their Kids How Much Money They Make*, THE ATLANTIC (June 25, 2015), https://www.theatlantic.com/business/archive/2015/06/rich-parents-talk-kids-about-money-income/396779/ [perma.cc/4633-UT84].

[102] Pinsker, *supra* note 99.

and the challenges of earning low wages.[103] In one survey conducted by APCO Insight, people responded that they were "more comfortable talking about marriage problems, mental illness, drug addiction, race, sex, politics, and religion than they are about money."[104] Of course, these are gross generalizations and cannot be applied to individuals, but the lack of desire to share financial information speaks to the popularity in using trusts to shield people's estates from the inquiring public at their death.

One compelling reasons why people seek privacy after death using trusts is to protect their reputations and the reputations of their families. Probating a will can reveal many secrets that a family would like to keep private. A popular reality television show aired in the early 2010s entitled *The Will: Family Secrets Revealed*.[105] The show followed the estates of famous individuals and explored the mystery of disinheritance, secret children, unknown love affairs, and the actual value of a decedent's assets.[106] When people use wills, they lose privacy and control over their reputations. Anyone who is interested in the estate—journalists, curious neighbors, extended family members—is able to learn how much money the decedent had, what debts and lifestyle the decedent enjoyed, and who received the inheritance.[107] The more money an individual has, the more public interest an estate plan generates. In the case of Charles Kuralt, a well-known news anchor, his will revealed that he had had a thirty-year extra-marital affair with another woman that his wife and family knew nothing about.[108] If an individual uses a will as opposed to a trust, he or she will have no control over his or her reputation at death. The more famous or interesting a person is, the more attention his or her probate proceeding will receive.[109] The recent death of *Friends* star Matthew Perry, for example, received attention on multiple platforms when his will left one million dollars worth of personal property to his living trust named after a Woody Allen char-

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[103] *Id.*

[104] CAP. GRP., CONFRONTING THE MONEY TABOO 1 (2018), https://www.capitalgroup.com/content/dam/cgc/shared-content/documents/reports/MFGEWP-062-1218O.pdf [perma.cc/F9DN-F83D].

[105] Gerry W. Beyer, *Series Premiere of The Will: Family Secrets Revealed Tonight*, WILLS TRS. & ESTS. PROF BLOG (Nov. 3, 2010), https://willstrustsestates.lawprofessorsblogs.com/2010/11/series-premiere-of-the-will-family-secrets-revealed-tonight.html [perma.cc/CZZ5-RTGZ].

[106] *Id.*

[107] Natalie M. Banta Lynner, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 944 (2016).

[108] *In re* Estate of Kuralt, 15 P.3d 931, 932 (Mont. 2000).

[109] *See* GEORGE M. TURNER, 1 REVOCABLE TRUSTS § 59:4.4 (5th ed. 2019) ("By definition, the probate system is intended to be a public vehicle. The spectacles of people's lives, finances, and family relationship as well as nonfamily relationships, are so notorious that they need not be reviewed."); *see also* Andrea Mandell, *7 Legendary Stars Who Died Without Wills: Aretha Franklin, Prince and More*, USA TODAY (Aug. 22 2018), https://www.usatoday.com/story/life/people/2018/08/22/legendary-stars-who-died-without-wills-aretha-franklin/83550424/ [perma.cc/FN4P-LFPT] (chronicling the estates of famous people who died without any estate planning).

acter that played a pivotal role in his childhood.[110] News articles reported that his parents, half-siblings, and ex-girlfriend were listed as trust beneficiaries in his 2009 will and that he had expressly disinherited any children that he may have had.[111] A public hearing is scheduled at the Stanley Mosk Courthouse in Los Angeles and will most likely be widely covered in the media.[112] The attention bestowed on the rich and famous reveals that privacy in estate planning is of critical interest to the wealthy.

Individuals can largely avoid public attention like this and control their public and private reputation by creating a trust.[113] Creating a trust can also aid a settlor in protecting the reputation of an entire family, avoiding disclosure of extra-marital relationships, the existence of non-marital children, and family disagreements. A trust can make provisions regarding a beneficiary's impending divorce, substance abuse, gambling addiction, or other unsavory facts about a beneficiary that have influenced a settlor's testamentary decisions. This deep-seated desire to control one's own reputation underpins several areas of law, and creating a trust is the best tool an individual has to protect her privacy and the privacy of her family after death.

Another aspect of controlling one's own reputation is controlling one's identity by using a private trust both during life and after death. It is possible that the trust's beneficiaries could reveal aspects of a settlor's identity that he does not want to reveal. Identity factors such as sexual orientation, race, education level, gender, political persuasion, religion, or criminal record could be revealed in a will but be protected by a trust. Several scholars have explored the use of anonymity or the right of privacy in the context of business entities.[114] Trusts have received less attention on this front, but arguably have similar privacy concerns and protections. Like business entities, trusts protect the identity of the settlor from public disclosure and the distributions that the settlor chooses to make. Professor Moon describes the ability of anonymous

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[110] Kevin Dolak, *Matthew Perry's Trust Draws Name from Late Actor's Treasured Childhood Memory with Mother*, HOLLYWOOD REP. (Mar. 12, 2024), https://www.hollywoodreporter.com/news/general-news/matthew-perry-trust-woody-allen-film-estate-will-1235850814/ [perma.cc/SG5Z-LLPS].

[111] Johnni Macke, *Matthew Perry's Will Revealed, Names Half-Siblings as Beneficiaries of His Alvy Singer Living Trust*, US WKLY. (Mar. 11, 2024), https://www.usmagazine.com/celebrity-news/news/matthew-perrys-will-names-half-siblings-as-beneficiaries-of-trust/ [perma.cc/WU26-JZR8].

[112] Dolak, *supra* note 110.

[113] Foster, *supra* note 16, at 569–70. ("Trust privacy responds to this deeply personal need to define one's own public and private selves.").

[114] *See generally* William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425 (2022) (identifying privacy as a critical consideration of modern business entities); Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275 (2015) (analyzing different kinds of organizations and the claim of a constitutional right to privacy in response to Professor Pollman's article); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014) (exploring whether corporations have or should have the right to privacy and concluding that most corporations should not).

companies to garner capital for unpopular business ideas such as funding the development of a drug used in medical abortion and the clinical trials to support it.[115] In a similar vein, settlors of trusts could give to unpopular charities without the risk of subjecting themselves or their family to harassment or online abuse. Professor Moon also highlights the reality that "many Black entrepreneurs conceal information of their business ownership" to avoid "the misperception that their products or services are only for Black consumers—or racism by potential investors, consumers, and business partners."[116] Settlors may choose to give without revealing their race or other identity factors that they feel could be used against them or their families.

Privacy from the public affords the most control over property. If a trust is unchallenged, no one will know how much property the settlor had and how he or she decided to distribute it. Unless there is a breach of fiduciary duties, there is no public oversight of private trusts. Many settlors desire privacy as a way to enhance their control of their property after death. In addition, settlors choose to use a trust to reduce the likelihood of their estate being a target of litigation, fraud, or theft. Settlors worry that unscrupulous individuals will take advantage of their beneficiaries if the amount of money they receive is public information. As discussed above, financial privacy has long been accorded to the wealthy.[117] Using a trust at death is an extension of the privacy protections they have enjoyed during life. Public figures, celebrities, and the wealthy use non-disclosure agreements regularly to prevent information about their income, relationships, personality, health, or other personal details from being publicly disclosed.[118] Trust privacy is one of many legal mechanisms that work to protect the wealthy from public intrusions they do not wish to bear.

Digital assets may be a realm where trust privacy can play a significant role in protecting a decedent's information and reputation from being widely disseminated. If the assets are placed in trust, a trustee has the right to manage the accounts after death and the ability to delete or disseminate them according to the desires of the deceased.[119] Many states have passed the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which gives the digital asset companies the default ability to control digital assets after death unless a decedent has opted out of those policies with an affirmative estate planning

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[115] Moon, *supra* note 114, at 1461–62.

[116] *Id.* at 1463.

[117] *See supra* notes 1–14 and accompanying text.

[118] Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1112 (2020); *see also* James Rufus Koren, *Want to Work in Hollywood? Here's the Kind of Nondisclosure Agreements You Have to Sign First*, L.A. TIMES (Oct. 31, 2017), https://www.latimes.com/business/la-fi-hollywood-nondisclosure-20171026-story.html [perma.cc/TNG7-7MMN]; Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [perma.cc/RP6V-LM7U].

[119] *Trust*, BLACK'S LAW DICTIONARY, *supra* note 1.

document.[120] Creating a trust for those assets will shift the decision-making authority from the company to the trustee, which presumably many people would find advantageous. Digital assets are expanding and accounts are overflowing with data and information about the deceased.[121] Setting up a trust with a reliable trustee to manage the deceased's digital world will become more and more important as our world continues to shift to the digital realm and could be especially important to public figures to protect their reputational privacy after death.

Lastly, trust privacy is significant to protect vulnerable individuals. Disclosure of death, assets, and beneficiaries could put public figures, domestic abuse victims, and those that lack legal capacity at risk. Public figures need privacy to protect themselves from the public and perhaps angry or violent members of the public who may not like a public figure's actions. Domestic violence victims may need to protect their privacy at death, especially when it relates to the location of their children or the existence of a new relationship. Those with diminished capacity need to be protected from being targeted by those who would exploit them. Safety is a paramount concern of privacy and in many ways trust privacy can enhance the safety of individuals who find themselves in difficult situations.

These policy considerations of protecting privacy at death from the public gaze that have encouraged more people to use trusts apply equally to those who use a will. Dignity, reputation, family privacy are all considerations that should be honored when an individual uses a will to manage an estate. The ability to protect privacy at death should not only be granted to those who can afford to use a trust.

2. Privacy from Beneficiaries

Another reason settlors choose to employ private trusts instead of public wills to maintain privacy among their beneficiaries. Often this move is intended to reduce litigation among beneficiaries. Settlors may be especially interested in maintaining trust privacy when their family is a blended family or where their children receive unequal shares of the estate. There are countless other

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[120] *See Fiduciary Access to Digital Assets Act, Revised*, UNIF. L. COMM'N (2015), https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 [perma.cc/Q2T9-Q26J].

[121] Emma Connor, *Technology—Probate: The Digital Executor: Managing Online Assets in Modern Estate Planning*, AM. BAR ASS'N (Dec. 30, 2025), https://www.americanbar.org/groups/real_property_trust_estate/resources/probate-property/2026-january-february/digital-executor-managing-online-assets-modern-estate-planning/ [perma.cc/D4ZK-FRSN] (acknowledging the importance of digital assets in estate planning and the numerous accounts decedents hold); Victoria J. Haneman, *The Law of Digital Resurrection*, 66 B.C. L. REV. 1569, 1571 (2025) (describing the "vast amount of digital data" stored online about the living that may be used to create a digital clone of the dead); Banta Lynner, *supra* note 107, at 928–30 (tracing the proliferation of digital asset accounts).

situations where a settlor may choose a private trust to manage family dynamics. If a settlor creates separate trusts, beneficiaries will not be able to access information about any trust other than their own. The hope is that without information about how a settlor's assets have been distributed, the threat of litigation among beneficiaries decreases.[122] Wealth transfer may be smoother if a family chooses to have open communication about a settlor's goals with each beneficiary before death. If a settlor chooses to not tell beneficiaries about his or her estate and strategically employs a trust, beneficiaries will not be able to know the full scope of the settlor's finances.

In extreme situations, a settlor may choose to use a private trust in order to prevent violence breaking out among beneficiaries. The *Restatement (Third) of Property* specifically extended the slayer rule[123] to apply to the "felonious and intentional killing" of trust beneficiaries with an implicit acknowledgement that knowing the amount of money in a trust has the power to motivate murder of beneficiaries to increase one's share of an estate.[124] Maintaining privacy among beneficiaries may also help prevent beneficiaries from becoming targets of abuse and neglect by family members as well as targets of fraud or theft from outsiders. The National Council on Aging has stated that up to five million older Americans are abused each year and the annual loss by victims of financial abuse is at least $36.5 billion.[125] Keeping the extent of an individual's wealth private could aid vulnerable individuals from being victims of fraud and exploitation.

Another reason settlors want to create private trusts is to prevent beneficiaries, usually their children, from knowing just how much money they stand to inherit. The *Restatement (Third) of Trusts* acknowledges that a settlor may want to limit the information a beneficiary receives "to lessen the risk . . . of adverse effects upon youthful [] or troubled beneficiaries about whose motivation or responsibility the settlor has concerns."[126] The rise of silent trusts (discussed below) is a response by many states to this desire by settlors to keep their children from knowing the extent of a wealth transfer until they reach a certain age.[127]

[122] *See* Foster, *supra* note 16, at 573 ("Trust privacy allows settlors to prevent not only potential challengers but also beneficiaries and creditors from knowing that the trust exists. In so doing, privacy can reduce future litigation and its associated costs."(footnote omitted)).

[123] The slayer rule is a principle of civil law that prevents an individual who kills the decedent without justification from benefiting from the decedent's death. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. a (A.L.I. 2003).

[124] *Id.* cmts. c, m.

[125] *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (July 8, 2024), https://www.ncoa.org/article/get-the-facts-on-elder-abuse [perma.cc/QXN8-C6P5].

[126] RESTATEMENT (THIRD) OF TRS. § 82 cmt. e (A.L.I. 2007).

[127] *See infra* Part II.C.

Using a trust can keep certain information about a family's wealth private from the very people who are listed as beneficiaries. Privacy can be used to reduce litigation, abuse, fraud, and theft. It can also be employed to encourage a settlor's children to continue to pursue meaningful education and work. Settlors use trusts to maintain the financial privacy they enjoyed during life after death.

3. Privacy from Creditors

Some believe that using a trust can aid a settlor in avoiding creditors at death. The law has been clear that creditors are protected whether a settlor uses a trust or a will.[128] Upon a settlor's death, creditors may make claims against a settlor's trust and a trustee will be compelled to satisfy the claim from the trust. A difficulty creditors may have in making their claim against a trust, however, is that creditors generally have no right of notice like they do in a probate proceeding.[129] Trustees generally have no duty to inform creditors of the death of the settlor or publish notice.[130] The law presumes that creditors will act with diligence to protect their own interests. In addition, some states have stringent time limitations for a creditor to bring a claim after the death of the settlor.[131] These time limits vary from state to state.[132] Creating a trust allows the possibility of keeping information from creditors in a way that probate forbids.

Although traditional law prohibits a settlor from shielding assets from creditors by placing those assets in a trust, many states have recently passed legislation to change this paradigmatic law.[133] Nearly twenty states allow what is called a self-settled asset protection trust.[134] The asset protection trust allows a settlor to have a beneficial interest in a trust that creditors cannot reach. Privacy becomes paramount in asset protection trusts as a trust prevents creditors from discovering the extent of a settlor's wealth and from accessing any of a settlor's assets in trust to satisfy a debt. Some states have made exceptions for certain creditors, like a spouse or child, to allow them to recover from an asset protection trust.[135] Other states allow a tort victim or involuntary creditor to seek reimbursement from a perpetrator's trust.[136] Still other states provide no

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[128] *See In re* Est. of Nagel, 580 N.W.2d 810, 812 (Iowa 1998) (holding that a creditor can reach a settlor's revocable trust); State St. Bank & Tr. Co. v. Reiser, 389 N.E.2d 768, 771 (Mass. App. Ct. 1979) (same).

[129] *Creditors' Rights vs. Trustees' Protections*, AM. COLL. TR. & EST. COUNS. (Oct., 2021), https://actecfoundation.org/podcasts/creditors-rights-vs-trustees-protections/ [perma.cc/V62B-9295].

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 719 (Wolters Kluwer 11th ed., 2022).

[134] *Id.* at 720.

[135] *Id.* at 719.

[136] *Id.*

exceptions whatsoever.[137] Self-settled asset protection trusts can be a powerful tool to prevent creditors from attaching an interest to a settlor's assets and maintain privacy against a creditor's inquiries.

Trusts are not intended to keep information private from creditors, but with state laws that do not require notice to creditors at the death of a settlor in conjunction with short limitation periods for creditors to bring a claim and the rise of self-settled asset protection trusts, trusts have become a potential tool to be used to avoid creditors.

4. Privacy Enabling Abuse and Fraud

A trust allows a settlor to put funds into an account legally owned by a trustee (a person or an entity) that then distributes the funds to beneficiaries. The trust, therefore, offers anonymity to the settlor and complete privacy to the beneficiaries and trust. This allows the origin of the funds to be obfuscated and the identity of the owners to be concealed.[138] These conditions are ripe for money laundering and other fraudulent transactions. The trust allows for unprecedented flexibility and privacy in the management of an estate, but those very strengths can be misused for nefarious ends.

Historically, it has been argued that there were relatively few instances of trust fraud compared to the number of trusts that were in operation in the United Kingdom in the nineteenth century.[139] It is hard to know how many trusts are currently in operation because the information is private. Federal law requires reports by banks and other trust institutions that are part of the Federal Reserve System.[140] These reports show that about $1.13 trillion was held in about 645,000 private and charitable trusts in 2020.[141] That number does not take into account any trust that is an individual or private company that does

[137] *Id.*

[138] *Risks Associated with Money Laundering and Terrorist Financing*, FED. FIN. INST. EXAMINATION COUNCIL, https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/18#:~:text=As%20in%20any%20account%20relationship,trust%20and%20asset%20management%20activities [perma.cc/E8YL-RFYM]; FIN. ACTION TASK FORCE, FATF REPORT: MONEY LAUNDERING USING TRUST AND COMPANY SERVICE PROVIDERS 9–10 (2010), https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Money%20Laundering%20Using%20Trust%20and%20Company%20Service%20Providers..pdf.coredownload.pdf [perma.cc/UT9N-L3DA].

[139] *See* STEBBINGS, *supra* note 25, at 163–64 ("The number of deliberate and fraudulent transgressions by trustees was not known, though it was generally agreed that they were relatively few in the context of all breaches of trust. The nature of the original relationship between the trustees and the beneficiaries within each individual trust to some extent determined the likelihood of fraud. . . . Educated and wealthy beneficiaries were not in practice the principal victims of fraud or indeed of incompetence . . . . It was the poorer and less educated beneficiaries of smaller trusts, small tradesmen for example, or the vulnerable such as widows, who did not have these advantages and were easy prey for unscrupulous or careless trustees." (footnotes omitted)).

[140] 12 U.S.C. § 248(a)(2).

[141] SITKOFF & DUKEMINIER, *supra* note 133, at 403.

not report to the Federal Reserve.[142] There is an almost unfathomable amount of wealth held in trust funds in the United States, and, although there are instances of pervasive and sizeable abuse and fraud, our trust system continues to operate without existential threats of abuse and fraud.

The privacy of trusts, however, allows a more convenient way for bad actors to access funds and abuse the powers a trust provides. Privacy in trusts allows, for example, fraudulent trustees to deplete a trust before anyone can find out about the theft, especially in cases where there are vulnerable settlors or beneficiaries. The Internal Revenue Service (IRS) has stated there has been an increase of abusive trust tax evasion schemes that are accomplished by a network of promoters.[143] The IRS warns that taxpayers and promoters of such abusive trust arrangements will be subject to civil and/or criminal penalties.[144]

In 2000, Congress held a hearing on the danger of living trust scams.[145] Living trusts were being sold to low-income seniors.[146] The living trusts were expensive and unnecessary and put an individual at risk of further exploitation.[147] States have recently issued warnings to consumers against purchasing living trusts due to their potential for fraud.[148] The Texas State Bar has issued a warning to senior consumers stating: "Living trust sales are a growing area of consumer fraud. Con artists make millions of dollars every year selling unnecessary trusts. Each year thousands of consumers lose from $500 to $10,000 through the purchase of living trusts."[149]

In addition, states have warned against trust account theft and have issued warnings about counterfeit checks.[150] Theft, fraud, or embezzlement of a trust fund occurs.[151] A trust gives a trustee power and control to take advantage of a

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[142] *Id.*

[143] *Abusive Trust Tax Evasion Schemes—Facts (Section 1)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-facts-section-i#:~:text=Online%20Learning,of%20income%20subject%20to%20tax [perma.cc/6HNG-N5HR] (Sep. 5, 2024).

[144] *Id.*

[145] *See generally Death Planning Made Difficult: The Danger of Living Trust Scams: Hearing Before the S. Special Comm. on Aging*, 106th Cong. (2000).

[146] *Id.* at 2 (statement of Charles Grassley, Chairman, S. Special Comm. on Aging).

[147] *Id.* at 1.

[148] *Fraudulent Living Trusts*, L.A. CNTY. DIST. ATT'Y'S OFF., https://da.lacounty.gov/seniors/financial-fraud/fraudulent-living-trusts#:~:text=Many%20%E2%80%9Ctrust%20specialists%E2%80%9D%20tell%20seniors,should%20have%20a%20living%20trust [perma.cc/G4AJ-XSSS]; *Beware of Living Trust Scams*, PA. ATT'Y GEN., https://www.attorneygeneral.gov/protect-yourself/consumer-advisories/beware-of-living-trust-scams/ [perma.cc/X3VA-N2J4].

[149] TEX. YOUNG LAWS. ASS'N & STATE BAR TEX., LIVING TRUST SCAMS AND THE SENIOR CONSUMER 2 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Free_Legal_Information2&Template=/CM/ContentDisplay.cfm&ContentID=32573#:~:text=It%20is%20easy%20enough%20to,poorly%20drafted%20or%20inappropriate%20trusts [perma.cc/29KD-92RS].

[150] *How Prevalent Is Trust Account Fraud?*, IOWA JUD. BRANCH, https://www.iowacourts.gov/opr/attorneys/attorney-practice/practice-information/trust-accounts/how-prevalent-is-trust-account-fraud/ [perma.cc/62KG-Y6R9].

[151] *See, e.g.*, *id.*; TEX. YOUNG LAWS. ASS'N & STATE BAR TEX., *supra* note 149.

client's money. With full privacy and access, a trustee can more readily commit financial crimes. Recent news stories show the seriousness and vulnerability of certain trust accounts. In Wisconsin in 2023, a lawyer pleaded guilty to stealing $1.6 million from a client's trust fund.[152] In Missouri in 2024, a man pleaded guilty to embezzling $400,000 from a trust fund under his control.[153] There are several examples of trustees embezzling from a child's trust fund or from a trust after a settlor has died.[154] The IRS has posted several news accounts of attorneys and trustees embezzling millions of dollars from clients' trust accounts.[155] Again, however, considering the scope and amount of money in trust funds, even these instances of fraud are small in comparison.

Trusts are also attacked for being vehicles of the wealthy to avoid estate tax.[156] A popular trust among the wealthy is known as a grantor retained annuity trust, or GRAT.[157] A GRAT trust allows a settlor to put a certain amount of money into a fixed-term, irrevocable trust.[158] The settlor receives an annuity stream over the term of the trust and the remainder is to be distributed to

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[152] *Reedsburg Attorney Pleads Guilty to Embezzling Over $1.64 Million from Client's Trust Accounts*, IRS (June 14, 2023), https://www.irs.gov/compliance/criminal-investigation/reedsburg-attorney-pleads-guilty-to-embezzling-over-1-point-64-million-from-clients-trust-accounts [perma.cc/3RFN-BZQT].

[153] *Springfield CPA Pleads Guilty to Stealing $400,000 from Trust Fund*, IRS (Apr. 29, 2024), https://www.irs.gov/compliance/criminal-investigation/springfield-cpa-pleads-guilty-to-stealing-400000-from-trust-fund [perma.cc/56PQ-FYY5].

[154] Ray Brewer, *Former Lawyer Sentenced for Embezzling from Child's Trust Fund*, WMUR 9, https://www.wmur.com/article/former-lawyer-to-be-sentenced-for-embezzling-from-childs-trust-fund/23320204 [perma.cc/4VYD-Y67E] (Sep. 19, 2018); Kelsey Gibbs, *Fallen State Trooper's Daughter Speaks Out on Attorney Going to Prison for Stealing from Clients*, NEWS CHANNEL 5 NASH., https://www.newschannel5.com/news/attorney-sentenced-for-stealing-more-than-1m-from-clients-trust-funds [perma.cc/3N5V-ACTZ] (Apr. 22, 2019); *Stamford Man Admits Theft of $800K from Trust Account*, GREENWICH FREE PRESS (Dec. 6, 2023), https://greenwichfreepress.com/news/government/stamford-man-admits-theft-of-800k-from-trust-account-210623/ [perma.cc/5ETH-QQC5]; Katie Sergent, *West Michigan Man to Face Trial for Alleged Embezzlement from Family Trust*, NEWS CHANNEL 3 (Jan. 18, 2024), https://wwmt.com/news/local/david-white-union-city-trust-embezzlement-300000-beneficiaries-finances-income-expenses-records-probate-court-order-department-attorney-general-dana-nessel-oakland-branch-county-west-east-michigan [perma.cc/GD69-3ETZ].

[155] *Orange County Tax Attorney Pleads Guilty to Underreporting $1.68 Million in Income, Including Funds Embezzled from Client's Family Trust*, IRS (Nov. 2, 2023), https://www.irs.gov/compliance/criminal-investigation/orange-county-tax-attorney-pleads-guilty-to-underreporting-1-point-68-million-in-income-including-funds-embezzled-from-clients-family-trust [perma.cc/728T-PVKE]; *San Bernardino County Man Sentenced to 14 Years in Federal Prison for Multimillion-dollar Investment Fraud and Cheating on His Taxes*, IRS (Aug. 30, 2022), https://www.irs.gov/compliance/criminal-investigation/san-bernardino-county-man-sentenced-to-14-years-in-federal-prison-for-multimillion-dollar-investment-fraud-and-cheating-on-his-taxes [perma.cc/TA95-AQSM].

[156] Jeff Ernsthausen, James Bandler, Justin Elliot & Patricia Callahan, *More Than Half of America's 100 Richest People Exploit Special Trusts to Avoid Estate Taxes*, PROPUBLICA (Sep. 28, 2021), https://www.propublica.org/article/more-than-half-of-americas-100-richest-people-exploit-special-trusts-to-avoid-estate-taxes [perma.cc/ED2T-3KG8].

[157] Julia Kagan, *Grantor Retained Annuity Trust (GRAT): Definition and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/g/grat.asp [perma.cc/VQK6-AY94] (Apr. 10, 2025).

[158] *Id.*

whomever the settlor chooses.[159] The gift is a future interest and does not qualify for the annual gift tax exclusion.[160] Congress has allowed this trust to avoid gift tax consequences.[161] It is estimated that GRAT trusts have cost the U.S Treasury over one hundred billion dollars.[162] Trusts can legally help ultra wealthy Americans avoid taxes. Because they are private, however, there is no reliable data on how widespread the use of these trusts is. The existence of trusts used to shield wealth from taxation, even if allowed by federal law, is not favorably regarded by the public and is seen as a form of abuse.[163] Recently, an act named "The Getting Rid of Abusive Trusts Act" has been proposed in the United States Senate to curb the use of GRAT trusts and make them less useful for the ultra-wealthy to avoid federal taxation.[164]

Abusive trust practices occur and privacy enables these practices to be shrouded from law enforcement and victims of the fraud. Congress has warned the public about some abusive practices but has enabled other practices by expanding the privileges of trusts.[165] Reform should be focused on ensuring that those who have an interest in trusts are notified and can monitor trustees' actions.

II. Trust Privacy's Growing Protections

Scholars and legislatures voiced concerns about trust privacy, including illegal money laundering, corruption, fraud or scams perpetrated by the trustee or settlor, and shielding money from beneficiaries or intestate heirs.[166] There was talk of privacy reform, but in the last decade, states have instead doubled down on privacy protections.[167] Trust registration has fizzled out in most states, states have passed affirmative trust protections in land records, silent trusts are on the rise, and case law has demonstrated a strong commitment to trust privacy.[168] This Part explores how state legislatures and courts have bolstered trust privacy protections during the last two decades to favor wealthy set-

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Ernsthausen et al., *supra* note 135.

[163] *Abusive Trust Tax Evasion Schemes—Talking Points*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-talking-points [perma.cc/29EW-ZC22] (Sep. 5, 2025).

[164] *Wyden, King Introduce Bill to Close Major Tax Loophole Involving High-Value Trusts*, U.S. Senate Comm. on Fin. (Mar. 20, 2024), https://www.finance.senate.gov/chairmans-news/wyden-king-introduce-bill-to-close-major-tax-loophole-involving-high-value-trusts [perma.cc/9NAK-K68E].

[165] *Death Planning Made Difficult: The Danger of Living Trust Scams*, *supra* note 145, at 1–2 (statement of Charles Grassley, Chairman, S. Special Comm. on Aging); Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* 1–2 (U. Mich. Law & Econ., Research Paper No. 13-015, 2016), http://dx.doi.org/10.2139/ssrn.2326524.

[166] Foster, *supra* note 16, at 588.

[167] *See infra* notes 169–302 and accompanying text.

[168] *See infra* notes 169–302 and accompanying text.

tlors and to increase trust business in their jurisdictions. It demonstrates that the political will of the American people is to enhance privacy protections at death and argues that this protection should extend to privacy protections when using a will.

A. The Death of Trust Registration

Several states first passed trust registration laws in the 1970s.[169] For a time, it seemed that a growing number of jurisdictions would require a trustee to register a trust with a state. One of the ideas behind the trust registration requirement was to require some sort of public notice for creditors of those who died with property held by trusts.[170] In addition, registration is required for corporations, limited-liability companies, and limited partnerships, so it seemed like trustees should also be required to notify the state of the trust's existence in order to receive favorable legal protections.[171] The Uniform Probate Code bolstered the practice with model language requiring trust registration in a trust's principal place of administration in its 1993 version.[172] More trust registration laws were passed in the late 1990s and early 2000s.[173]

States have different degrees of registration requirements. Alaska, Kentucky, and Idaho have statutes requiring testamentary trusts, inter vivos trusts, and oral trusts to be registered.[174] In Alaska, for instance, registration requires the name of the testator or the name of the settlor and original trustee to be compiled on a certain form.[175] For an oral trust, the source of funds, the time and manner of creation of the trust, beneficiaries, and time of performance must all be disclosed.[176] If a trustee fails to do so, the trustee is subject to removal as trustee, potentially denied compensation, or subject to court fees.[177] Failure to register a trust subjects a trustee to personal jurisdiction.[178] In other

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[169] ALASKA STAT. § 13.06.005 (2025) (originally passed in 1976); HAW. REV. STAT. § 560:8-101 (2025) (originally passed in 1976); IDAHO CODE § 15-7-101 (2025) (originally passed in 1971); ME. STAT. tit. 18-A, § 7-101 (repealed 2003) (originally passed in 1979); NEB. REV. STAT. § 30-3816 (2026) (originally passed in 1974).

[170] Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 882 (2007).

[171] Andres Knobel, *The Case for Registering Trusts—and How to Do It*, TAX JUST. NETWORK 3 (Nov. 3, 2016), https://www.taxjustice.net/wp-content/uploads/2013/04/Registration-of-Trusts_AK.pdf [perma.cc/X4VS-7D6Z].

[172] UNIF. PROB. CODE § 7-101 (UNIF. L. COMM'N 1993).

[173] COLO. REV. STAT. § 15-5-205 (2026); KY. REV. STAT. ANN. § 386B.2-050 (West 2025); MICH. COMP. LAWS § 700.7202 (2026); MO. REV. STAT. § 456.027 (2025); S.D. CODIFIED LAWS § 55-1-56 (2026).

[174] § 13.36.005; § 15-7-101; KY. REV. STAT. ANN. § 386B.2-050 (West 2025).

[175] *See, e.g.*, *Registration of Trust*, ALASKA CT. SYS, https://public.courts.alaska.gov/web/forms/docs/p-200.pdf [perma.cc/B7VA-W4RJ].

[176] § 13.36.010.

[177] *Id.* § 13.36.020.

[178] *Id.*

jurisdictions, registration is not required unless a beneficiary requests that a trustee do so.[179] Other jurisdictions have statutes that make trust registration voluntary.[180] Even in states that do require a trust to be recorded, the absence of recording a trust does not invalidate a trust itself.[181] Recordation is not a required element of a valid trust.[182]

In jurisdictions that have trust registration provisions, a trust will be subject to the jurisdiction of that state.[183] Trust registration does not disclose information that would be helpful to state law enforcement such as who are the beneficiaries of a trust or what property is funding the trust.[184] Generally, a trustee files a statement with a state that declares a trustee's name and address, a date of the trust's creation, and a grantor's name.[185] Jurisdiction can be established without registration if the beneficiaries or creditors are located in that jurisdiction.[186] In South Dakota, for example, registration is sealed and kept confidential absent a court order authorizing the settlor, a trustee, a trust advisor, or a trust protector to obtain a certified copy of the registration.[187]

In many respects, trust registration was a minor reform that did not counter many of the policy concerns of trust privacy. Trust registration offers limited transparency that does not aid beneficiaries or law enforcement in ensuring that the trust is not used fraudulently or illegally. Trust registration has lost steam, even in the few jurisdictions that adopted it. There are few enforcement mechanisms in the handful of states that require it.[188] Moreover, several states have recently repealed or modified trust registration statutes. Notably, in 2021, Hawaii repealed its trust registration statute.[189] Colorado repealed the law that required trust registration in 2018[190] and enacted an optional registration regime.[191] North Dakota repealed its trust registration statute in 2007.[192] Maine repealed its trust registration provision in 2003[193] and specifically passed a

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[179] MICH. COMP. LAWS. § 700.7202 (2026).

[180] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 149; COLO. REV. STAT. § 15-5-205 (2026); MO. REV. STAT. § 456.027 (2025); S.D. CODIFIED LAWS § 55-1-56 (2026).

[181] *See, e.g.*, § 13.36.020 (listing the consequences of a trustee's failure to register a trust, of which invalidation is not one).

[182] *Id.*

[183] *E.g.*, NEB. REV. STAT. § 30-3819 (2026); § 456.027; IDAHO CODE § 15-7-103 (2025).

[184] *E.g.*, § 13.36.010; § 15-7-102.

[185] § 13.36.010; § 15-7-102.

[186] *See* UNIF. TR. CODE § 107 (UNIF. L. COMM'N 2023) (noting that a trust's jurisdiction may be governed by the jurisdiction with the most significant ties to the trust).

[187] S.D. CODIFIED LAWS § 55-1-58 (2026).

[188] *See* Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1249 (2018).

[189] HAW. REV. STAT. § 560:7-101 (repealed 2021).

[190] COLO. REV. STAT. § 15-16-101 (repealed 2018).

[191] *Id.* § 15-5-205 (2026).

[192] N.D. CENT. CODE ch. 30.1-32 (repealed 2007).

[193] ME. STAT. tit. 18-A, § 7-101 (repealed 2003).

statute stating that the court does not have a role in administrating a trust unless petitioned by an interested party.[194] As these recent repeals show, states that adopted registration provisions are trending away from trust registration. The practice never truly challenged trust privacy and is nearly abolished.

Although a trust functions much like other business entities, most states do not require registration.[195] Trust registration, even in the states that have it, largely is not mandatory, nor do the states enforce registration. It is a toothless statute. Trust privacy remains well-protected. Ultimately, language in the Uniform Probate Code requiring registration was dropped when the Uniform Trust Code (UTC) was adopted.[196] Instead of requiring a minimal amount of notice as is required of other legal entities, most states have refrained from passing any registration laws that would make a difference in curbing abuse and fraud. And in the past decade, even the states that moved to reform trust privacy in this modest way have backtracked and reverted to no trust registration.

B. Protecting Trusts from Disclosure in Land Records

Most states require conveyances of real property to be recorded in order to have protection under state recording acts.[197] A transaction involving real property held in trust would, therefore, have to be recorded in order to gain priority over subsequent transactions.[198] Statutes require conveyances of land to be recorded in state land records in order to obtain priority over other claims. If a trustee fails to record a transfer of property in trust and a settlor conveys the property to a bona fide purchaser, it is possible that a trust could lose the real property under state recording acts.[199] These ancillary laws to trusts regarding property registration could possibly defeat the privacy that trust law affords. Where an instrument affecting the title to land exists, states require the owner to have his or her name listed in the property records of the

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[194] Maine adopted the Uniform Trust Code in 2003 through ME. STAT. tit. 18-B, § 201 (2025). This repealed the section relating to trust registration. ME. STAT. tit. 18-A, § 7-101 (repealed 2003).

[195] Craig Park, *Legal Trusts—What You Need to Know*, TR. & WILL, https://trustandwill.com/learn/what-is-a-legal-trust [perma.cc/C8EB-S68Y].

[196] *See* UNIF. PROB. CODE § 7-101 (UNIF. L. COMM'N 1969) ("The trustee . . . shall register the trust in the Court of this state at the principal place of administration."); UNIF. TR. CODE, *Prefatory Note* (UNIF. L. COMM'N 2003) ("Except for its provisions on trust registration, Article VII is superseded by the Uniform Trust Code.").

[197] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 149.

[198] Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 729 (2006).

[199] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 149; *id.* § 595 ("Ordinary prudence requires a trustee who receives a conveyance of such a property interest to promptly register or record the interest. . . . so that a later recorded conveyance to a second transferee from the settlor cannot cut off the rights of the trustee.").

state.[200] In some jurisdictions, if property is held in trust, then a trustee must record the entire trust or a summary of dispositive provisions of the trust. Land records are often a matter of public record, which means that anyone may search and find a trust document or a summary of a trust document. Several states saw this as a threat to privacy and passed legislation that allowed a trustee to file a certificate of trust or an affidavit that a trust exists.[201] By doing so, the dispositive provisions of a trust remain private and a minimal filing asserts that a trust exists on the land records of a state.

Mortgages are also subject to the recording acts. To the extent that a trustee takes a mortgage, a trustee must record the mortgage in order to get priority over a subsequent claim.[202] In addition, federal mortgage disclosure laws require banks to collect, report, and disclose information regarding the mortgages that they issue.[203] Lenders may then require a full trust document to be disclosed as part of the mortgage process.[204] A lender's internal polices usually safeguard personal information and documentation submitted as part of the lending process; however, because a mortgage must be recorded, it becomes possible to trace the name of the owner of the property through public records. The timing of transactions and trust formation would be a critical component of attempting to keep information private. If a buyer needs financing, then a buyer has fewer privacy rights than a buyer who can close the transaction with cash. Again, this disparity demonstrates how privacy in property transactions is for sale. Privacy is a commodity that only those who do not need to obtain a mortgage can fully appreciate.

C. The Rise of Silent Trusts and Perpetual Trusts

States are taking an affirmative step to increase privacy protections of a trust by waiving the right of the beneficiary to receive information about a trust and by reforming the Rule Against Perpetuities. Both reforms cut at the heart of trust common law and enable the wealthy to pass property across generations without transparency or oversight.

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[200] COLO. REV. STAT. § 38-35-109 (2026); DEL. CODE ANN. tit. 12, § 3538 (2026); IND. CODE § 32-21-3-1 (2026); IOWA CODE § 558.41 (2026); OHIO REV. CODE ANN. § 5301.25 (West 2026).

[201] IOWA CODE § 614.14 (2026); MICH. COMP. LAWS. §§ 565.431 (2026) to .436 (repealed 2018); MINN. STAT. §§ 501B.56 (repealed 2015), 508.62 (2025); MISS. CODE ANN. § 91-9-7 (repealed 2014).

[202] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 595.

[203] *See, e.g.*, Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1677f.

[204] *See, e.g.*, *Selling Guide*, FANNIE MAE (Oct. 31, 2017), https://selling-guide.fanniemae.com/sel/b2-2-05/inter-vivos-revocable-trusts [perma.cc/UE2E-NG7Q] (specifying the details of a trust required for eligibility of a loan).

As a matter of trust common law, the existence of a trust must be disclosed to beneficiaries of a trust.[205] Allowing beneficiaries to know about a trust and to be informed about the dealings of a trust are essential to their responsibility to enforce a trustee's fiduciary duties. A trust is a fiduciary relationship between the legal owner of the property, the trustees, and the equitable owners of the property, the beneficiaries.[206] The common law has traditionally viewed the trustee's fiduciary duty to inform and account as essential to a trust.[207] Only with full notice of a beneficiary's interest may the fiduciary responsibilities of a trustee be enforced.[208] In addition, a core fiduciary duty of a trustee is the duty to inform and account.[209] The duty to inform and account has been upheld in many cases as part of a state's common law.[210] The UTC states that the trustee "shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[211] It continues that "a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust."[212] The UTC in most situations does not allow settlors to waive a trustee's duty to inform and account; beneficiaries must be made aware of the terms of a trust.[213] As originally presented, the UTC allowed a settlor to prevent a beneficiary from learning of the existence of the trust until a beneficiary reached age twenty-five.[214] Practitioners objected to this rule knowing that it would be contentious; the UTC drafting committee

[205] RESTATEMENT (THIRD) OF TRS. § 82 cmt. e (A.L.I. 2007) ("[O]ne's enforcement of his or her rights as a trust beneficiary normally requires an awareness not only of the trust's existence but also of the terms of the trust.").

[206] *Trust*, BLACK'S LAW DICTIONARY, *supra* note 1.

[207] *See In re* Guardianship & Conservatorship of Sim, 403 N.W.2d 721, 736 (Neb. 1987) ("Any notion of a trust without accountability is a contradiction in terms."); RESTATEMENT (THIRD) OF TRS. § 82 cmt. e (A.L.I. 2007) (noting that although a settlor may limit the duty to disclose, a settlor may not prevent beneficiaries from requesting information necessary to protect their interest in the trust).

[208] RESTATEMENT (THIRD) OF TRS. § 82(1)(a) ("A trustee has a duty .°.°. promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship.").

[209] *Id.* §§ 82, 83.

[210] *See, e.g.*, McNeil v. McNeil, 798 A.2d 503, 510 (Del. 2002) (holding trustees had a duty to inform beneficiaries that they were not remainder beneficiaries, despite the fact that the settlor had told them they were remainder beneficiaries); *In re* Alice Shotwell Gustafson Revocable Living Tr., No. 268552, 2007 WL 4248561 (Mich. Ct. App. Dec. 4, 2007) (holding that a beneficiary was entitled to a copy of a trust document); *In re* Baird, 204 P.3d 703, 706 (Mont. 2009) (holding that the trustee was required to file annual accountings); Wilson v. Wilson, 690 S.E.2d 710, 716 (N.C. App. 2010) (holding that a trust document could not waive the duty to inform and account).

[211] UNIF. TR. CODE § 813(a) (UNIF. L. COMM'N 2023).

[212] *Id.*

[213] *Id.* § 105(b)(8)-(9).

[214] *Id.*

put several provisions in brackets to indicate that a state could forego the adoption of the specific language.[215]

It has become clear that settlors do not necessarily want beneficiaries of a trust to know about the trust. Often when parents make a great deal of money in their lifetimes, they are reluctant to tell their children of their net worth and the sizeable inheritance that the children will one day receive. Settlors want to create a trust but keep the existence of the trust from the beneficiaries and waive a trustee's duty to inform and account. States have responded by allowing what is called a silent trust.[216] Settlors want their financial affairs at death to be confidential for a variety of personal reasons. They may hope that their children will reach an age of maturity before their children know how much money they inherited from their parents. Settlors may hope not knowing about their wealth will encourage their children to work hard to develop their own wealth and professional success without relying on funds from a trust. Settlors may fear that if their children knew how much they would inherit, their children would be disincentivized to pursue higher education or employment. Perhaps a child struggles with substance abuse or other impediments and settlors do not want them to know about the trust. Settlors may also fear that their newly-wealthy children would become victims of fraud, theft, or frivolous lawsuits. As a practical matter, it is possible that a silent trust could actually increase litigation as beneficiaries are unhappy about not being aware of the trust. Children are generally aware in some way when they are raised with family money. Not knowing the details of their family's finances could cause them to overspend and rely on more trust money than is actually available. Without exposure to wealth, it may be harder for them to learn how to properly manage and preserve it. All of these factors go into a client's consideration of whether to use a silent trust.

As a legal matter, the risk of a silent trust is that the beneficiary will not be able to scrutinize or observe a trustee's investment and management decisions.[217] Some settlors prefer this arrangement if a family business is involved and they do not want their children to question a trustee's decisions. Other settlors see this as a main disadvantage of a trust. If no one is monitoring the trustee, it is possible that a trustee will mismanage the trust and that mismanagement will not be discovered until long after a trustee's mismanagement. Because beneficiaries do not have any knowledge about the trust and cannot en-

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[215] *See id.* § 105 cmt. a ("Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact [these sections] with any uniformity.").

[216] Bob Carlson, *The Pros and Cons of Silent Trusts*, FORBES (Oct. 21, 2024), https://www.forbes.com/sites/bobcarlson/2024/10/21/the-pros-and-cons-of-silent-trusts/ [perma.cc/B5FJ-96ER].

[217] *Id.*

force a trustee's fiduciary duties, many have argued that a "silent trust" cannot in fact be considered a trust at all.[218]

Nevertheless, in order to generate trust business and give settlors the opportunity and flexibility to keep information from the beneficiaries, several states have passed legislation to allow a silent trust and affirmatively waive a trustee's duty to inform and account in certain circumstances.[219] Alaska, Delaware, New Hampshire, South Dakota, Nevada, Ohio, and Michigan have all passed laws expressly allowing a settlor to eliminate the trustee's duty to inform and account to the beneficiaries of a trust.[220] Most of these states opted to enact this reform at the time that the UTC was being debated in the early 2000s. Notably, Michigan expressly adopted silent trust language in 2024.[221] It

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[218] *See, e.g.*, Wilson v. Wilson, 690 S.E.2d 710, 715 (N.C. App. 2010) ("Any notion of a trust without accountability is a contradiction in terms." (quoting *In re* Guardianship & Conservatorship of Sim, 403 N.W.2d 721, 736 (Neb. 1987))); Wood v. Honeyman, 169 P.2d 131, 164 (Or. 1946) ("If a fiduciary can be rendered free from the duty of informing the beneficiary concerning matters of which he is entitled to know . . . equity has been rendered impotent."); THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 965 ("At the heart of every trust is a fiduciary relationship between the trustee and the beneficiary. Accountability of the trustee to the beneficiary is, in turn, at the heart of their fiduciary relationship. Thus, there is a fundamental and irreconcilable contradiction in a settlor purporting to create a trust with respect to which the trustee is not to be accountable.").

[219] Kent D. Schenkel, *Silent Trusts Are Trending: Will They Hold Trustees to Account?*, 47 ACTEC L.J. 107, 107 (2021); Steven M. Burke et al., *New Hampshire: Why the Granite State Still Rocks at Trust Administration*, EST. PLAN. J., Mar. 2020, at 1, 1, https://www.mclane.com/wp-content/uploads/New_Hampshire_Why_the_Granite_State_Still_Rocks_at_Trust_Administration_-_Estate_Planning_-_March_2020.pdf [perma.cc/GB5U-G84M] ("New Hampshire continues to be a premier location for establishing and administering trusts. The state's progressive trust code, revised frequently to remain relevant and at the forefront of trust law, is often cited as the primary reason individuals and families choose New Hampshire as the location for their trusts.").

[220] *See* ALASKA STAT. § 13.36.080(b) (2025) (stating "the settlor of a trust may exempt a trustee from the duties under (a)" to inform and account); DEL. CODE ANN. tit. 12, § 3303(a) (2026) ("[T]he terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts, and trust administration, including . . . the rights and interests of beneficiaries, including, but not limited to, the right to be informed . . . ."); N.H. REV. STAT. ANN. § 564-B:1-105 (2026) (stating "the terms of a trust prevail over any provision of this chapter except . . ." and not listing the duty to inform and account as an exception); S.D. CODIFIED LAWS § 55-2-13(3) (2026) ("The trustor, trust advisor, or trust protector, may, by the terms of the governing instrument, or by providing written directions to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to a trust."); NEV. REV. STAT. § 163.004(1) (2025) (allowing for trust instruments to "expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries in any manner that is not illegal or against public policy, including, without limitation: (a) the right to be informed of the beneficiary's interest for a period of time"); OHIO REV. CODE ANN. § 5801.04(C) (West 2026) ("[T]he settlor, in the trust instrument, may waive or modify the duties of the trustee [to inform and account] . . . . The waiver or modification may be made only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any notices, information, or reports otherwise required under those divisions to be provided to the current beneficiaries."); MICH. COMP. LAWS § 700.7409a(1) (2026) (allowing a twenty-five year period of nondisclosure "if the terms of a trust . . . are embodied in a trust instrument that clearly express the settlor's intent that 1 or more items of prime disclosure information should be withheld . . . from 1 or more of the trust beneficiaries").

[221] MICH. COMP. LAWS § 700.7409(a).

is likely that more states will follow suit as a silent trust allows settlors more privacy than traditional law allows and can be helpful in certain circumstances.

Despite the clear mandatory language in the UTC about the trustee's duty to inform and account, most states that adopted the UTC omitted the provisions that would require a trustee to inform beneficiaries of the existence of a trust or allow beneficiaries to request a report from the trustee.[222] States vary widely on the language that they adopted on the duty to inform and account, but the trends show that state legislators support movement towards silent trusts and allowing settlors more privacy in their trusts than common law allows. States did not uniformly accept the UTC's traditional approach. Most states simply omitted the sections mandating disclosure.[223] Several states allowed a designated representative of a beneficiary to receive notice under a trust document.[224] These states presumably allow a silent trust when it comes to beneficiaries because a surrogate will be able to monitor a trustee's actions. This is especially beneficial while a beneficiary is below a certain age. Other states did not apply the age limit of twenty-five to restrict notification to beneficiaries or changed the age.[225] A few states retained the mandatory language of the UTC and expressly do not allow silent trusts. These jurisdictions have followed the traditional common law rule that trustees have a mandatory duty to inform and account to the qualified beneficiaries.[226]

The theoretical issue of whether a silent trust is a valid trust is still brewing in the discussion. North Carolina is a UTC jurisdiction that omitted the mandatory provisions of disclosure in its adoption of the North Carolina Trust Code. In 2010, in *Wilson v. Wilson*,[227] decided by the Court of Appeals of North Carolina, a trust was challenged that expressly waived the duty of the trustee to inform and account to any beneficiary. The beneficiaries alleged that the trustee violated fiduciary duties of prudence and investment.[228] The trustees argued that they had no duty to disclose how they were managing the trust

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[222] Schenkel, *supra* note 219, at 107.

[223] ARK. CODE ANN. § 28-73-105 (2025); KAN. STAT. ANN. § 58a-105 (2026); MASS. GEN. LAWS ch. 203E, § 105 (2026); MINN. STAT. § 501C.0105 (2025); MONT. CODE ANN. § 72-38-105 (2025); N.C. GEN. STAT. § 36C-1-105 (2025); N.D. CENT. CODE § 59-09-05 (2026); 20 PA. CONS. STAT. § 7705 (2026); S.C. CODE ANN. § 62-7-105 (2026); TENN. CODE ANN. § 35-15-105 (2026); UTAH CODE ANN. § 75-7-105 (West 2025); VT. STAT. ANN. tit. 14A, § 105 (2025); VA. CODE ANN. § 64.2-703 (2024); W. VA. CODE § 44D-1-105 (2026); WIS. STAT. § 701.0105 (2026); WYO. STAT. ANN. § 4-10-105 (2026).

[224] CONN. GEN. STAT. § 45a-499e(b)(7) (2026); KY. REV. STAT. ANN. § 386B.1-030(2)(j) (West 2025); ME. STAT. tit. 18, § 105(3)(B) (repealed 1979); MISS. CODE ANN. § 91-8-105(d)(2)-(3) (2026); MO. REV. STAT. § 456.1-105(3) (2025); OHIO REV. CODE ANN. § 5801.04 (B)(14)(C) (West 2026).

[225] HAW. REV. STAT. § 554D-813 (2025); N.J. STAT. ANN. § 3B:31-5(b)(7) (West 2025); MISS. CODE ANN. § 91-8-105(d)(2)-(3) (2026).

[226] ALA. CODE § 19-3B-105(b)(8) (2026); ARIZ. REV. STAT. ANN. § 14-10105(B)(8) (2026); MD. CODE ANN., EST. & TRS. § 14.5-105 (West 2026); NEB. REV. STAT. § 30-3805(b)(8) (2026).

[227] 690 S.E.2d 710, 711 (N.C. Ct. App. 2010).

[228] *Id.*

citing the express terms of the trust document and the fact that North Carolina had omitted the portions of the UTC that would have required mandatory disclosure.[229] The court, however, found that the omission of the mandatory rule did not override the common law requirement that trustees must be accountable to the beneficiaries and act in good faith.[230] It held that the information the beneficiaries sought was reasonably necessary to enforce their rights under the trust.[231] There is little additional case law interpreting the omission of the UTC mandatory provisions, but this case questions the validity of silent trusts without limit or exception. North Carolina, even without an express mandatory duty to report, refused to allow a trust to exist without accountability. As silent trusts continue to develop, it is imperative that they have some safeguards, such as a surrogate or a time limit to ensure that they are valid trusts and do not become an instrument of fraud and abuse.

Even in states that do not have an express statutory allowance for a silent trust, creative lawyers in the state may attempt to create a silent trust in other ways. No state expressly prohibits a beneficiary surrogate, so it is possible to draft a trust that requires notice and accounting to someone who stands in the place of a beneficiary until a beneficiary reaches a certain age or another reasonable limited time. Trusts have always been used as a flexible instrument, pushing the limits of what statutory law may allow. And, as discussed above, several states already allow a beneficiary surrogate to be named to receive information and accountings from a trustee.[232] The risk, however, is that a court could find that a trustee was in violation of the duty to inform and account to named qualified beneficiaries under a state's statute and that a surrogate did not meet the definition of a qualified beneficiary. At the time of this publication, no case doing so has been found. It is likely that practitioners and bar associations will continue to pass legal reforms to allow silent trusts in specific situations.

Another way for settlors to employ silent trusts is to establish the trust in a jurisdiction that allows them. Choice of law provisions allow settlors to create a trust in the state of their choosing as long as they use a trustee located in that state, have trust property in the state, or have an "abode" in the state.[233] A resident of state A, for example, can continue to reside in state A and establish a trust over his or her property in state A, but choose to have state B's law apply to a trust and have a trustee manage the trust from state B. Many states allow silent trusts or, at the very least, do not prohibit silent trusts, so the use of silent trusts could continue to increase by settlors choosing to establish a silent

[229] *Id.* at 711–12.
[230] *Id.* at 715.
[231] *Id.* at 716.
[232] *See supra* note 224 and accompanying text.
[233] UNIF. TRUST CODE § 403 (UNIF. L. COMM'N 2023).

trust in the jurisdiction of their choice. One of the reasons to establish a flexible trust code is to disincentivize trust business from leaving a state via choice of law provisions in the trust itself. It remains an option for those settlors who live in a state that does not allow a silent trust.[234]

As discussed above, there are many reasons why a settlor may desire to have a silent trust. A silent trust, however, is not the only way that settlors can encourage certain behavior from their beneficiaries. A more effective option may be to create an incentive trust, which would create certain conditions or criteria for a beneficiary to meet in order to receive trust funds.[235] Incentive trusts may encourage education, promote a particular lifestyle, encourage charitable activity, or incentivize a particular career.[236] Incentive trusts may also discourage substance abuse, criminal behavior, or certain addictions.[237] Incentive trusts may create their own hurdles or difficulties regarding reform or inflexibility, but if settlors are concerned by the activities or lifestyles of their beneficiaries, they could choose to use an incentive trust to try to modify their behavior.

Regardless, silent trusts are on the rise. Silent trusts are yet another example of how state legislatures and practitioners are accommodating more privacy for settlors, even when that privacy challenges traditional notions of what constitutes a trust. The prevailing notion that trust law should promote the freedom of disposition, that is the principle that a property owner has broad authority to decide who receives her property at death and on what terms, results in law that allows for silent trusts. Although silent trusts open the door for increased fraud, the desire to give settlors the privacy they demand is strong enough for jurisdictions to change traditional trust common law. As discussed above, there may be several good reasons to keep information from a beneficiary until he or she is able to handle the property transfer. Ultimately, however, the rise of silent trusts shows another trend of state law increasing privacy protections for those who can afford it.

Another significant change in state trust law that expands the reach of trust privacy is that many states have reformed the Rule Against Perpetuities by allowing what is called a perpetual trust.[238] The Rule Against Perpetuities under the common law enforced a limit on dead hand control of about 100

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[234] Settlors choose different law to apply to their trusts for a variety of reasons, not just for silent trusts. *See* Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213, 219 (2002) (noting settlor intent is the primary factor in a court's determination regarding the applicable law governing a trust).

[235] Julia Kagan, *Incentive Trust: What It Is, How It Works, Example*, INVESTOPEDIA, https://www.investopedia.com/terms/i/incentivetrust.asp [perma.cc/98PN-3A5P] (Oct. 21, 2020).

[236] Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 453 (2006).

[237] *Id.*

[238] SITKOFF & DUKEMINIER, *supra* note 133, at 919.

years.[239] A perpetual trust, also known as a dynasty trust, allows a settlor to control assets indefinitely and pass assets down through generations.[240] In the last twenty years, perpetual trusts have been authorized in over half of the states.[241] States have done so at the behest of lawyers and bankers who wanted to generate more trust business by giving the settlors the opportunity to have their trusts last for a significantly longer time than they would under the Rule Against Perpetuities.[242] Much of the discussion and criticism of perpetual trusts has been on the concentration of wealth and the risk of creating family dynasties.[243] Trust privacy has not seriously been examined since the rise of perpetual trusts across the nation, but perpetual trusts strengthen trust privacy by making it a permanent fixture in distributing assets. In states that allow trusts to distribute assets in perpetuity, it can be done secretly and privately. This lack of transparency in distributing wealth in perpetuity threatens common law norms and practices. Privacy in the administration of the trust could be tolerated for the duration of the trust with the knowledge that the future interest would eventually vest. Without the Rule Against Perpetuities there is no meaningful limit on trust privacy.

D. The Enduring Commitment to Privacy in State Common Law

With few exceptions, trust privacy continues to be well protected in state common law. State courts see revocable trusts as vehicles to ensure privacy. In 2021, in *Sacks v. Dissinger*, the Massachusetts Supreme Court remarked that "revocable trusts have become such popular will substitutes precisely because they typically remain out of probate, providing greater administrative ease and privacy."[244] Case law in the last ten to fifteen years demonstrates a strong commitment to trust privacy. Again and again, courts have upheld the privacy interests of settlors. Despite calls for reform, concerns about abuse and fraud, or policy concerns that might lessen privacy protections under the common law, current trust privacy remains enshrined in our legal system with very few exceptions.[245] This Section analyzes (1) the trends in case law protecting trust

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[239] Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORN. L. REV. 157, 159 (1990).

[240] Kagan, *supra* note 235.

[241] SITKOFF & DUKEMINIER, *supra* note 133, at 919.

[242] Grayson M. P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1301–02 (2013).

[243] Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1326 (2003); Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 19 (U. Mich. L. Sch., Research Paper No. 259, 2012), https://repository.law.umich.edu/law_econ_current/76/ [perma.cc/Q8S9-AK62].

[244] 178 N.E.3d 388, 396 (Mass. 2021).

[245] Foster, *supra* note 16, at 564, 616–19.

privacy, (2) the most common situations where trust privacy arises, and (3) the exceptions to trust privacy that have been observed in the last two decades.

In several cases, beneficiaries have requested an accounting or information about a revocable trust while a settlor is still alive. Courts have uniformly held that beneficiaries of a revocable trust are not entitled to information about a trust while a settlor is alive.[246] The settlor may revoke a trust at any time and remove beneficiaries' interest in a trust. Thus, not only do beneficiaries not have access to information about a trust, they cannot challenge the actions of a trustee or the management of the trust while a settlor is alive. In *Malasky*, a 2002 case decided by the New York Supreme Court, Appellate Division, for example, a husband and wife created a revocable trust with the remainder going to the children of the husband's first marriage.[247] After the husband died, the remainder beneficiaries requested information from his wife about how the trust was managed from the time the trust was created to the date of the father's death.[248] The court held that the trust was revocable and the wife could manage the trust as she wished and did not need to account to the beneficiaries.[249] Similarly, in *Fulp v. Gilliland*, a 2013 case decided by the Supreme Court of Indiana, a woman held the family farm in a revocable trust with the remainder going to her three children.[250] She sold the farm to one of her sons, and her daughter objected to the sale.[251] The court held that the woman's daughter could not challenge her actions, that the woman only owed a duty to herself, and that she was "entitled to use the Trust assets for her own benefit."[252] The court acknowledged that a revocable trust gave the settlor "greater privacy . . . to manage [her] assets."[253]

Although courts acknowledge that the main reason to use a revocable trust is to protect a settlor's privacy, the right to privacy may be waived by a settlor while a settlor is alive and the trust is revocable.[254] If a settlor wants to give beneficiaries the right to accounting, he or she is free to do that.[255] Like-

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[246] *See, e.g.*, Wallace v. Fant as cotrustee of Fant Fam. Tr., 304 So. 3d 209, 210 (Ala. 2020) ("In other words, while a settlor of a revocable trust is alive, beneficiaries other than the settlor have no right to receive an accounting of the trust assets . . . ." (Sellers, J., concurring)); Fulp v. Gilliland, 998 N.E.2d 204, 209 (Ind. 2013); *In re* Malasky, 736 N.Y.S.2d 151, 153 (App. Div. 2002); Babbitt v. Superior Court, 201 Cal. Rptr. 3d 353, 357 (Ct. App. 2016).

[247] *In re Malasky*, 736 N.Y.S.2d at 152.

[248] *Id.*

[249] *Id.* at 153.

[250] 998 N.E.2d at 206.

[251] *Id.* at 205.

[252] *Id.* at 209.

[253] *Id.* at 207.

[254] Dixon v. Dixon, 905 N.W.2d 748, 752 (N.D. 2018).

[255] *Id.* ("State law therefore provides this privacy benefit for settlors of revocable trusts. But people may waive rights and privileges which are conferred by statute and are intended for their benefit.").

wise, if a settlor limits the remainder beneficiaries' rights to receive information about a lifetime trustee and beneficiary, courts have upheld a settlor's wishes.[256]

One of the more interesting questions in recent years about trust privacy in common law is whether it extends after the death of a settlor. When a settlor dies, a trust becomes irrevocable and the named beneficiaries are entitled to an accounting and information about the trust.[257] Oftentimes, beneficiaries want to know how a settlor's money was spent prior to a settlor's death and how a trustee managed the trust. They want to protect trust funds from any potential mismanagement of a trustee. The states that have addressed this issue have been sensitive to the privacy issues at play, but there is a split of authority on how much privacy to grant after a settlor's death.

In 2012, the Supreme Court of California in *Estate of Giraldin* addressed this issue and maintained that beneficiaries had no interest in the property to enforce during a settlor's lifetime.[258] After a settlor's death, however, the court found that beneficiaries could enforce a trustee's fiduciary duties to a settlor to the extent that the breach harmed the beneficiaries' interest.[259] Thus, after a trust becomes irrevocable and a settlor has died, beneficiaries may petition the court for information regarding trust assets and transactions during the time a trust was revocable and a settlor was alive.[260] In subsequent years, however, California courts have failed to extend *Giraldin* to other situations.[261] Most importantly, in 2016's *Babbitt v. Superior Court*, where a settlor had appointed himself to be the trustee instead of someone else, a California appellate court distinguished *Giraldin*.[262] In *Babbitt*, the court held that a probate court did not have authority to order a trustee to provide information about a trust during the time a settlor was alive as long as there is no claim that the settlor was incapacitated or subject to undue influence.[263] A California court also declined to extend *Giraldin* to a case that claimed elder abuse.[264] California's broad holding that a beneficiary could invade the privacy of an irrevocable trust to ensure that the trustee acted according to his or her fiduciary duties has been limited in subsequent years.[265]

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[256] *See* Schwalm v. Schwalm, 213 N.E.3d 618, 623 (Mass. App. Ct. 2023) ("In prioritizing his privacy, William provided Karen with limited obligations toward the children as remainder beneficiaries, to avoid just the situation at issue here.").

[257] UNIF. TR. CODE § 813 (UNIF. L. COMM'N 2023).

[258] 290 P.3d 199, 204 (Cal. 2012).

[259] *Id.*

[260] *Id.* at 201.

[261] Tepper v. Wilkins, 217 Cal. Rptr. 3d 111, 117 (Ct. App. 2017).

[262] Babbitt v. Superior Court, 201 Cal. Rptr. 3d 353, 355 (Ct. App. 2016).

[263] *Id.*

[264] *Tepper*, 217 Cal. Rptr. 3d at 117–18.

[265] *Id.*; *Babbitt*, 201 Cal. Rptr. 3d at 355.

In 2015, in *Tseng v. Tseng*, the Supreme Court of Oregon similarly found that beneficiaries could receive information about a revocable trust once a settlor was dead to the extent needed to enforce their interests.[266] It reaffirmed, however, that while a settlor was alive, beneficiaries had no right to information about a settlor's revocable trust.[267] Similar to *Giraldin*, in *Tseng*, the beneficiaries sought information after the settlor's death concerning the time the trust was revocable and a settlor was not the trustee. The settlor had appointed two of his sons to be co-trustees.[268] The year before the settlor died, approximately $1.8 million was transferred out of the trust, leaving little in the trust.[269] The beneficiaries, the settlor's other children and second wife, requested more information about the transfer, especially whether the settlor made or authorized the transfer, and the court granted the request.[270] A few other states that have addressed this issue have held that when a settlor of a revocable trust is not the trustee, beneficiaries may pursue an accounting against the trustee for the trustee's administration before and after the settlor's death.[271]

Trust privacy, however, is strictly protected in several other jurisdictions that have considered the same issue—whether privacy extends beyond the death of the settlor.[272] In 2013, in *Trimble*, the Iowa Supreme Court held that a third-party trustee had no duty to account to a beneficiary for the period of time that a trust was revocable, before a settlor died.[273] The court noted that there was no evidence that the trustee was "guilty of malfeasance, fraud, or abuse."[274] The court reasoned that one of the reasons settlors use revocable trusts is to control who has access to their financial information after death.[275] It ultimately held that:

> Settlors of a revocable trust should be entitled to the same privacy for predeath transactions as they would if they used a will. . . . [and] the settlor's interest in privacy favors a bright-line rule denying beneficiaries the right to an accounting for the period when the trust is revocable.[276]

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[266] 352 P.3d 74, 75 (Or. Ct. App. 2015).

[267] *Id.* at 80.

[268] *Id.* at 76.

[269] *Id.* at 77.

[270] *Id.* at 78.

[271] *See* Davis v. Davis, 889 N.E.2d 374, 380 (Ind. Ct. App. 2008); Siegel v. Novak, 920 So. 2d 89, 95 (Fla. Dist. Ct. App. 2006) (deciding the case under New York law); Brundage v. Bank of Am., 996 So. 2d 877, 882 (Fla. Dist. Ct. App. 2008); Taylor v. Taylor, 381 P.3d 428, 433 (Colo. App. 2016).

[272] *See infra* notes 273–287 and accompanying text.

[273] *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 478 (Iowa 2013).

[274] *Id.*

[275] *Id.* at 486.

[276] *Id.* at 487.

Upholding trust privacy was one of the key factors in the Iowa Supreme Court's opinion.[277] The court in *Trimble* distinguished *Giraldin* on the grounds that in *Trimble* there was no claim that the trustees breached any fiduciary duties or harmed the beneficiaries.[278] It is possible that the decision would change if there were claims of trustee malfeasance like there were in *Giraldin* or *Tseng*.

In 2011, in *In re Stephen M. Gunther Revocable Living Trust*, a Missouri Court of Appeals came to a similar resolution as the Iowa Supreme Court.[279] A settlor had named a third-party trustee in 1997 but then changed his mind and named himself as a trustee in 2006.[280] After he died, his beneficiaries wanted an accounting from the trust's inception to the time that the settlor became trustee.[281] The court held that a trustee had no duty to account to the beneficiaries for the time period during the settlor's life.[282] Other jurisdictions have followed suit and found that a trustee does not owe fiduciary duties to the beneficiaries until a settlor dies.[283] Even in cases where beneficiaries have a claim of breach of fiduciary duties against a third-party trustee for actions taken during a settlor's life, courts have been hesitant to give beneficiaries standing to bring a claim for the actions of a trustee during a settlor's life when a settlor dies.[284] Although some jurisdictions have allowed beneficiaries to access information about a settlor's transactions and finances while property was held in a revocable trust, these courts have required a showing of a third-party trustee and suspicious circumstances. Most courts have honored a settlor's privacy when using a revocable trust, even after death.

Courts have even granted privacy protections to an incapacitated individual during her life.[285] In 2010, in *In re Kemp*, a woman was incapacitated in an accident and a third party was named as trustee of her property.[286] Her brother requested access to the trust to ensure that the trustee was abiding by his or her fiduciary duties, but the Louisiana Court of Appeal maintained that, in the ab-

[277] *Id.* at 485.

[278] *Id.* at. 489.

[279] 350 S.W.3d 44, 44 (Mo. Ct. App. 2011).

[280] *Id.* at 44–45.

[281] *Id.* at 45.

[282] *Id.* at 47.

[283] *See* Boyd v. Boyd, 57 So. 3d 1169, 1176 (La. Ct. App. 2011) (finding no duty to account to a beneficiary for transactions that occurred before survivor's death); *In re* Malasky, 736 N.Y.S.2d 151, 153 (App. Div. 2002) (finding no duty to account to beneficiaries when joint settlor died by other joint settlor who was still alive); *In re* Hubbard, No. 1 CA-CV 10-0673, 2012 WL 4088679, at 5 (Ariz. Ct. App. 2012) (finding fiduciary duties to the beneficiaries began after death).

[284] *See, e.g.*, Lewis v. Star Bank, Butler Cnty., 630 N.E.2d 418, 422 (Ohio Ct. App. 1993); Stanton v. Wells Fargo Bank Mont., 152 P.3d 115, 121 (Mont. 2007).

[285] *In re* Kemp, 32 So. 3d 1050, 1057 (La. Ct. App. 2010).

[286] *Id.* at 1051–52.

sence of any evidence that the woman's needs were not being met, she had a right to privacy under the trust regardless of her capacity.[287]

States continue to uphold trust privacy, but there are a few exceptions. The first exception is discussed above, where a few jurisdictions have allowed beneficiaries to access information about a revocable trust after the settlor has died.[288] One of the main exceptions to trust privacy is when the trust itself is litigated. To the extent necessary, a trust document becomes part of a court record and, therefore, becomes public information.[289] But courts have maintained privacy protections to the extent possible in litigation. For example, in 2022's *Blakefield v. Franklin*, a California appellate court refused a discovery request for beneficiaries who were not parties to the suit.[290] It held that to disclose the beneficiaries' interest in trust property would be to disclose their identity and that they had a reasonable expectation of privacy.[291] Similarly, in another California case, a court held that a discovery request relating to a beneficiary of a trust was not allowed.[292] The court found that the plaintiffs had not made a showing that the trust information was relevant to the cause of action or defense and without that, the trust remained private.[293] Another common situation where trust privacy prevents discovery requests is in divorce proceedings. Often, a divorcing spouse wants information about a family trust.[294] Courts allow a divorcing spouse information regarding the spouse's interest in the trust and the income the spouse is expected to receive, but courts do not allow broader disclosure.[295] In *Noble v. Noble*, decided by the Supreme Court of Vermont in 2020, for example, the husband issued a discovery request to the trustee of his wife's family trust.[296] The wife's father held a power of appointment that gave him the right to give all of the assets to the wife, but that interest was not vested and was subject to the power and control of the wife's father.[297] Therefore, the husband was not entitled to any information about the trust.[298] Thus, even though litigation can threaten the privacy of a trust, generally courts maintain trust privacy to the extent possible.

Another exception to trust privacy is that a trustee is responsible for submitting information about a trust to tax authorities on both a federal and state

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[287] *Id.*

[288] *See supra* notes 257–284 and accompanying text.

[289] Foster, *supra* note 16, at 563.

[290] No. 34-2019-00253627, 2022 Cal. Super LEXIS 23885, at *11 (Super. Ct. Apr. 6, 2022).

[291] *Id.* at *10.

[292] Fromberg v. Lane, No. CVPS2201758, 2022 Cal. Super LEXIS 97646, at *5 (Super. Ct. Dec. 5, 2022).

[293] *Id.*

[294] *E.g.*, *In re* Marriage of Williamson, 172 Cal. Rptr. 3d 699, 713 (Ct. App. 2014).

[295] *Id.* at 712–13.

[296] 251 A.3d 541, 543 (Vt. 2020).

[297] *Id.*

[298] *Id.*

level.[299] A trustee must file a tax return reporting income, deductions, gains, losses, etc.[300] The return does not require a trustee to submit the full trust document, but it does require disclosure about what kind of trust is at play and the names of the trust, fiduciary, and income that is held for future distribution.[301] States also require income tax returns when a trust generates income.[302] None of this is public information, but it does still require disclosure of trust income to the government in order to pay taxes.

As a practical matter, third parties, such as banks, financial institutions, insurance companies, or a purchaser of property often request a copy of the trust instrument from a trustee. Although a trustee is not legally obligated to disclose the trust document, a bank or purchaser may refuse to do business with the trust unless it has a copy of the document. Oftentimes, attorneys advise trustees to send the trust document to the third party in order to facilitate the transaction.[303] Again, this kind of disclosure is not public disclosure, and banks and other financial entities generally pride themselves on keeping their client's information secure. A blanket claim of trust privacy, however, will not prevent third parties from seeking information about the trust as they choose to conduct business with the trust.

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Trust privacy remains an important aspect of estate planning. Minor attempts to encourage trust registration have mostly failed. States have expanded trust privacy by protecting trusts from being disclosed in land records. States have doubled down on trust privacy protections and expanded privacy by allowing silent trusts and perpetual trusts. Courts, meanwhile, have continued to uphold privacy protections under the common law. Presumably, states have expanded trust privacy to submit to the settlor's desire to keep his or her wealth and finances private in a variety of ways during and after death. When an individual uses a will, by contrast, everything about the estate can be revealed in the public records after a testator dies. There is no privacy protection granted. States have ignored any discussion of granting similar privacy protections to wills. When an individual uses a trust, states continue to ensure that a

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[299] THE LAW OF TRUSTS AND TRUSTEES, *supra* note 63, § 265.

[300] *Id.*

[301] *E-file for Estates and Trusts*, IRS, https://www.irs.gov/e-file-providers/estates-and-trusts [perma.cc/XG4P-T3EL] (Sep. 15, 2025). Estate tax form 706 will have to be filled out if the decedent's gross estate exceeds a certain amount. For taxable year 2023 that amount was $12,920,000. *Id.*

[302] *See* Richard W. Nenno, *Planning to Minimize or Avoid State Income Tax on Trusts*, 34 ACTEC J. 131, 131 (2008) ("Most states impose a tax on the income of trusts . . . ."); *see also, e.g.*, Walmart Real Est. Bus. Tr. v. County of Anoka, 931 N.W2d 382, 386–87 (Minn. 2019).

[303] *See, e.g.*, *Does the Bank Need a Copy of Your Trust?*, AMERIESTATE, https://ameriestate.com/estate-planning/does-the-bank-need-a-copy-of-your-trust/ [perma.cc/KA28-WWA9]; *Do I Have to Give the Bank a Complete Copy of My Trust?*, SMITH BARID, https://smithbarid.com/2012104do-i-have-to-give-the-bank-a-complete-copy-of-my-trust-html/ [perma.cc/XXN4-LNWW].

settlor's estate remains private. The power of a revocable trust, which gives all the advantages of a will, continues to thrive under state law.

III. Privacy Reform: Problems and Solutions

Trust privacy presents two significant problems that should be addressed by requiring more disclosure from trusts and less disclosure in probate. The first problem trust reform needs to address is that trust privacy enables money laundering, crime, secret property transactions, and other fraudulent acts. Recent federal reforms are aimed at trying to curb financial fraud through trusts and could be a pattern for more extensive reporting requirements at the state level when an individual using a trust dies.[304] The second problem to consider is that trusts are generally used by the wealthy and, therefore, the privacy accorded to trusts is a privilege that is available only to the wealthy as they create trusts. Those who use probate (through wills or intestacy) are generally those with fewer means, and their estates become a matter of public record at their death. A disparity of privacy between the wealthy and less well-off continues to grow in our system. Certain probate reforms could be enacted to extend a similar dignity to those who use a will or die without any estate planning documents. This Part advocates for both approaches.

A. Trust Reform

One of the main criticisms of trust privacy is that trusts are used in conjunction with shell companies to conduct illegal activity, namely, money laundering, financing terrorism, and tax fraud. Trust reform to combat illegal activity may be most efficient at the federal level. In 2021, Congress passed the Corporate Transparency Act (CTA), giving the Financial Crimes Enforcement Network (FinCen) the power to create reporting rules to combat corruption.[305] FinCen began accepting beneficial ownership reports on January 1, 2024.[306] The law was quickly challenged. On March 1, 2024, the U.S. District Court for the Northern District of Alabama declared the CTA unconstitutional as an act of congressional overreach.[307] It enjoined application of the CTA with respect to the National Small Business Association and its members.[308] In December 2025, the

[304] *See infra* notes 305–326 and accompanying text.

[305] *See generally* Corporate Transparency Act, Pub. L. No. 116-283, 134 Stat. 338 (2021).

[306] Fin. Crimes Enf't Network, U.S. Dep't Treasury, An Introduction to Beneficial Ownership Information Reporting (2024), https://fincen.gov/sites/default/files/shared/BOI-Informational-Brochure-April-2024.pdf [perma.cc/5TRJ-NQLY].

[307] Nat'l Small Bus. United v. Yellen, 721 F. Supp. 3d 1260, 1289 (N.D. Ala. 2024), *rev'd and remanded sub nom.*, Nat'l Small Bus. United v. U.S. Dep't of the Treasury, 161 F.4th 1323 (11th Cir. 2025).

[308] *Id.*

Eleventh Circuit Court of Appeals upheld the constitutionality of the CTA as a valid exercise of Congress's power to regulate interstate commerce.[309]

Although the CTA was upheld by the Supreme Court, the Treasury Department issues regulations to enforce it.[310] On March 21, 2025, FinCen announced that it would no longer require entities created in the United States to report beneficial ownership information.[311] FinCen may announce a change to its enforcement policy in the future and its final revised rules may not be as expansive as what was described in the press release, but for now the reporting requirements do not apply to United States shell companies or trusts.[312]

The CTA is controversial. Proponents of CTA argue that anonymous shell companies are a weakness in enforcing anti-money-laundering laws and that the bill has been in the works for many years to provide some kind of response to illegal activity.[313] Proponents also argue that the CTA places the United States more in line with what other governments require.[314] Critics of the law argue that the CTA impacts small businesses that make less than five million dollars in annual sales and have fewer than twenty employees, and those businesses are not major contributors to money laundering and terrorist financing.[315] They also argue that those who engage in money laundering and other illegal activities are not going to report the entities to FinCen, and that this law disproportionately affects law abiding citizens.[316]

Although the current administration is not enforcing the CTA for domestic entities, the CTA applies to some trusts—to the extent that a trust owns twenty-five percent or more of an entity that is required to report beneficial owners under the CTA, a trustee is responsible for reporting to FinCen.[317] The CTA requires reporting entities to provide beneficial owners' full legal names, dates of birth, current residential or business street addresses, and identification numbers from passports or drivers' licenses.[318] Beneficial owners are broadly defined in the act[319] and will most likely include the trustee, the bene-

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[309] *Nat'l Small Bus. United*, 161 F.4th 1323, 1333 (11th Cir. 2025).

[310] *Id.* at 1327.

[311] *Beneficial Ownership Information Reporting*, FIN. CRIMES ENF'T NETWORK, U.S. DEP'T TREASURY, https://www.fincen.gov/boi [perma.cc/QDV9-FGD3] (Mar. 26, 2026).

[312] *Id.*

[313] Jack Hagel, *Defense-Bill Override Paves Way for Overhaul of Anti-Money-Laundering Rules*, WALL ST. J. (Jan. 1, 2021), https://www.wsj.com/articles/defense-bill-override-paves-way-for-overhaul-of-anti-money-laundering-rules-11609542221?mod=article_inline [perma.cc/5GKK-CTMQ].

[314] *Id.*

[315] The Editorial Board, Opinion, *The Coming Deluge for Small Business*, WALL ST. J. (Nov. 19, 2023), https://www.wsj.com/articles/the-coming-deluge-for-small-business-cta-laundering-congress-a6694a82?mod=Searchresults_pos2&page=1 [perma.cc/B88F-ERLQ].

[316] *Id.*

[317] 31 U.S.C. § 5336(a)(3)(A).

[318] *Id.* § 5336(a)(1).

[319] *Id.* § 5336(a)(3) ("The term 'beneficial owner' . . . means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or

ficiaries of the trust, the settlor, and any other individuals named in the trust who hold certain powers like a trust protector. The CTA is the most significant invasion of trust privacy by the government we have seen in modern law. To be clear, the CTA does not require public disclosure; it requires disclosure to the government. Government regulators and United States law enforcement will have access to a registry of this information.[320] Financial institutions, however, will be able to submit requests for information from the database with consent from their clients in order to comply with due diligence requirements.[321] State, local and even foreign governments will also be able to request information from the database.[322]

The CTA has the potential to put more pressure on trust privacy. First, it will directly impact trusts that hold these reporting entities challenging trust privacy in a new way. Second, to the extent that it is feasible, people may turn to using trusts instead of shell companies to avoid the reporting requirements of CTA. If there is evidence of an increased number of trusts being used to avoid CTA reporting requirements, the CTA will likely be expanded to encompass trusts of a certain size into the umbrella of reporting entities. Once FinCen has the regulatory framework for disclosures of this kind, it will be easier for the government to require a similar disclosure of all trusts. The CTA could be groundbreaking for being the first kind of regular trust reporting to the federal government. The CTA has created a federal disclosure requirement, procedure, registry, and enforcement mechanism that could be applied to American trusts in the future. Because this information is intended to be available to private and public entities, the CTA could substantially chip away at traditional trust privacy and give the government some idea of the scope of trusts in America.

The CTA is akin to the state level registration laws that have lost ground in recent years. Both require disclosure to the government, although in different forms. States have demonstrated an unwillingness to commit to trust registration laws, and it is unlikely that disclosure reform will be successful on a state level. It is more likely that the federal disclosure requirements will be the path forward in fighting corruption and illegal activity through the use of trusts.

The other problem that privacy enables is that unscrupulous trustees have the power to defraud the trust and beneficiaries. Trustees can steal from the trust before anyone knows what has happened. In order to address this concern, states should consider a mandatory trust disclosure at death. This form of disclosure would be patterned after what probate law requires in most states: a trustee would disclose to the beneficiaries and legal heirs of the estate that a

otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity . . . .").

[320] *Id.* § 5336(c)(2)(B) ("Scope of Disclosure by FinCEN.").

[321] *Id.*

[322] *Id.*

trust exists, that a trustee has been named and accepted the trusteeship, and that they are or are not a beneficiary of the trust.[323] The policy behind such a reform would be that beneficiaries would be able to enforce their rights under the trust and heirs who are not beneficiaries would be given a chance to contest the trust if there were legal grounds to do so. In addition, such reform would ensure that beneficiaries to revocable trusts receive similar treatment as beneficiaries to a will. Revocable trusts are seen as will substitutes and can be modified or revoked up until the point of death, just like a will. Because revocable trusts are intended to be will substitutes, beneficiaries and heirs should receive similar notification of an estate property transfer. Although a will must be made public in a court proceeding, a trust will remain shielded from public disclosure. This minimal reform would only allow a settlor's heirs and trust beneficiaries to be notified that the irrevocable trust exists and allow them to protect any rights they may have.

Only one jurisdiction has reformed trusts to grant beneficiaries and heirs this kind of disclosure. California requires a trustee to "provide a true and complete copy of the terms of the irrevocable trust" to "any beneficiary of the trust who requests it, and to any heir of a deceased settlor who requests it. . . ."[324] California's reform was at first met with resistance but has subsequently become the accepted process for trust disclosure in the state.[325] California's requirement that a trustee provide the trust to those who request it also cuts down on the trustee's work, ensuring that a trustee cannot be liable for failing to give notice to a beneficiary or heir who is not known to the trustee.

Although states have moved away from transparency in trust administration by foregoing trust registration laws and allowing silent trusts,[326] a minimal disclosure requirement at death could make great strides in allowing those who have an interest in the estate to protect it. Silent trusts could still be allowed in limited circumstances, i.e., a specific time length or until a beneficiary reaches a certain age, but the general rule would encourage disclosure to the beneficiaries and heirs of an estate at death. States should require notice to be sent to the beneficiaries and intestate heirs at a settlor's death that there is a trust, that it is operative, and that they are or are not beneficiaries of the trust. The same policy arguments that support transparency in our probate system support transparency in trust management. Incorporating this procedure from the administration of wills

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[323] Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 554–55 (2008) ("While wills may be probated in some states without notice to heirs and devisees, generally the heirs and devisees will be notified of the administration proceedings and entitled to receive a copy of an inventory and appraisal of the estate's assets." (footnotes omitted)).

[324] CAL. PROB. CODE. § 16061.5 (West 2026).

[325] *See* Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV. 1877, 1914–15 (2000) (noting resistance from attorneys who represent trustees).

[326] *See supra* Parts II.A & II.C.

could result in fewer cases of fraud or abuse after the death of the settlor and give vulnerable beneficiaries or heirs a chance to protect their interests.

B. Wills Reform

Trusts are accorded a substantial and almost unchallenged degree of privacy. Because revocable trusts are intended to be a will substitute and obtain many of the protections of probate law, the degree of privacy accorded to trusts and not wills seems patently unfair. Revocable trusts and wills are intended to do the same thing—transfer assets to beneficiaries upon death. Wills become public documents; trusts remain private documents and, in many cases, can be private from beneficiaries themselves. Trust privacy after death is well-settled and justified in our law. This Article advocates for a limited form of disclosure of trust assets after death; it also advocates for a greater grant of privacy to those who use wills.[327]

Wills and intestacy—the probate system—are generally used by those with fewer resources and assets.[328] Generally, most wealthy individuals and families use trusts to distribute their assets outside of the probate system. As this Article has shown, those who are able to afford the legal counsel to create a trust and pay for ongoing trust administration are granted a much higher degree of privacy. Estate privacy has become another commodity for sale in the estate planning market.

An unintentional effect of our probate system is that in most states, an estate that falls below a certain value (usually less than one hundred thousand dollars) retains estate privacy.[329] A majority of states allow a form of summary administration for small estates, a procedure that technically is not a probate proceeding and therefore is not a matter of public record.[330] The reasoning for allowing some form of small estate procedure is not based on privacy. Rather, states recognize that probate can be costly and slow; when an estate is under a certain value, a court does not need to be involved to distribute the assets. In many states, therefore, the smallest estates are granted privacy because they do not go through the probate system, but any estate that exceeds the threshold will be fully disclosed to the public. This is an unusual privacy result.[331] The

[327] This Article acknowledges a practical reality that states may be more willing to reform a probate rule to grant more privacy rather than reform trust law to mandate less trust privacy.

[328] *See* Daniel de Visé, *Facing Mortality, More Americans Wrote Wills During the Pandemic. Now, They're Opting Out*, USA TODAY (Apr. 3, 2024), https://www.usatoday.com/story/money/2024/04/03/fewer-americans-writing-a-will/73170465007/ [perma.cc/T6ZB-U2LC] (explaining that 40% of Americans who lack wills do so because they believe they do not have enough assets to justify the cost).

[329] *Small Estates Laws and Procedures*, *supra* note 8.

[330] *Id.*

[331] *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 12 (2017) (arguing that "wealth is a condition for privacy rights and that, lacking wealth, poor mothers do not have any privacy rights").

poorest Americans are granted estate privacy almost by accident, while the richest Americans purchase privacy protections through trusts. States should be more intentional about the public disclosure of wills. If the smallest estates remain private largely by accident and the largest estates remain private by using a trust, we need to consider granting a similar property protection to midrange estates.

Currently, probate proceedings are sealed only for extraordinary circumstances. In 1992, the Seventh Circuit Court of Appeals noted that "[j]udicial proceedings are not closed whenever the details are titillating, and open only when the facts are so boring that no one other than the parties cares about them."[332] The most famous case regarding the sealing of a will was *Estate of Hearst*, decided in 1977 by the California Second District Court of Appeal.[333] Beneficiaries of the estate of William Randolph Hearst made an argument that probate documents would expose their identities and details of the property estate that would make them a target to a radical organization related to the kidnapping of Patricia Hearst.[334] The Hearst family was a prominent and well-known family at the time that had become the target of terrorist attacks.[335] The district court denied the beneficiaries' petition to seal the record based on the argument that it did not have authority to seal probate records.[336] The California court of appeals reversed the district court, holding that if beneficiaries were in "serious danger of loss of life or property" due to the public access of the probate files, then a court would have the authority to temporarily seal the files.[337] More recently, an Oklahoma county judge sealed a probate proceeding when the testator allegedly had been stabbed by his son.[338] The judge held that the father's will should be sealed because it could potentially have a negative impact on the son's right to a fair trial.[339]

Cases regarding sealing probate files are rare, attesting to the extraordinary nature of such an order. In 1989, in *In re Estates of Zimmer*, the trial court sealed a probate action where a minor was accused of killing his parents, but the Court of Appeals of Wisconsin found that there was no compelling reason

[332] *In re* Krynicki, 983 F.2d 74, 77–78 (7th Cir. 1992).

[333] 36 Cal. Rptr. 821, 821 (Ct. App. 1977).

[334] *Id.* at 822–23.

[335] *Id.* at 825.

[336] *Id.* at 822.

[337] *See id.* at 825 ("If indeed it were established that beneficiaries . . . would be placed in serious danger of loss of life or property as a consequence of general public access to the Hearst probate files, then the court would have the power to protect the beneficiaries' interests by temporarily denying public access to those files.").

[338] *Will of Slain Oklahoma Labor Commissioner Costello Is Sealed*, PUB. RADIO TULSA (Sep. 20, 2015), https://www.publicradiotulsa.org/local-regional/2015-09-20/will-of-slain-oklahoma-labor-commissioner-costello-is-sealed [perma.cc/85KE-G5EF].

[339] *Id.*

to seal the file and released it.[340] Generally, an argument for sealing a record based on financial privacy, even with concerns about a family's safety, will not be enough to seal a record.[341] In 2004, in *A.P. v. M.E.E.*, the Illinois Appellate Court denied a family's motion to seal the entire court record of the dispute on the grounds that the family settlement agreement contained private, detailed information about the family trusts and business units.[342] The *Chicago Tribune* sought access to this record, and the court reversed the trial court's blanket sealing of the records, requiring a more document-specific analysis.[343]

Case law indicates that state courts are not going to seal probate records based on a general policy of fairness or privacy after death. Although judges have discretion to seal records for specific policy reasons, probate privacy has never been one of those accepted reasons.[344]

To remedy this inequality, in part, states should amend their probate law to grant a modicum of privacy to those who use the probate system. States can do this by allowing one important document of the probate proceeding, the inventory, to be sealed and, therefore, out of the public eye. Generally, a personal representative or executor of an estate must file what is called an "inventory."[345] An inventory of the estate lists the assets and liabilities of the decedent giving notice to the executor, court, beneficiaries, heirs, and creditors.[346] Creditors then know of the assets that are available to pay their claims. Heirs and beneficiaries of the estate know in what property they may have a claim. The probate court considers the inventory before finalizing the distribution of an estate.[347] An inventory is filed with a court and becomes public record. Reforming the law to seal an inventory at a party's request could give a substantial amount of privacy to the estates in probate proceedings, mimicking the extent of privacy that trusts are afforded. The rest of the proceeding would remain public. In order for this reform to be effective, creditors, heirs, and beneficiaries must still receive notice of the proceeding and information contained

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340 442 N.W.2d 578, 583 (Wis. Ct. App. 1989).

341 *In re* Krynicki, 983 F.2d 74, 78 (7th Cir. 1992).

342 821 N.E.2d 1238, 1243, 1248 (Ill. Ct. App. 2004).

343 *Id.* at 1242, 1251–52.

344 Courts allow identities to remain private when protecting the privacy of minors, rape victims, and other vulnerable parties. *Id.* at 1252. In some situations, state law requires court records to remain confidential. Examples of this include juvenile court proceedings, mental health commitment proceedings, adoption and paternity proceedings, domestic violence protection orders, psychological evaluations and drug and alcohol treatment records, and social security numbers and financial account numbers. Kristine Cordier Karnezis, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R. 3d 598 (1978); *Accessing Court Documents—Journalist's Guide,* U.S. CTS., https://www.uscourts.gov/statistics-reports/accessing-court-documents-journalists-guide#sealed_documents [perma.cc/CL8X-NBWF].

345 Rebecca Lake, *What Is Included in an Estate Inventory?*, SMART ASSET, https://smartasset.com/estate-planning/what-is-included-in-an-estate-inventory [perma.cc/RA5B-22KX] (Feb. 26, 2025).

346 *Id.*

347 *Id.*

in the inventory that they need to make their claims, but the size of the estate and specific assets held by the testator would no longer be a matter of public record and knowledge. The inventory would not be able to be pulled by any interested neighbor or journalist in the area. Privacy after death would be honored both for those who use a revocable trust and those who use a will, while still protecting the interests of creditors, heirs, and beneficiaries.

One jurisdiction so far has recognized the need so far to protect the privacy of those who use a will. In 2011, the Texas Legislature authorized a procedure to allow an executor to file an affidavit instead of a detailed inventory.[348] In order to do so, certain conditions must be met. First, there must be no unpaid debts to creditors except for "secured debts, taxes, and administration expenses."[349] Second, the executor must state in the affidavit that all debts have been paid and that all beneficiaries "have received a verified, full, and detailed inventory."[350] Third, the affidavit must be filed within the same time period that the inventory would have been due to the court.[351] The code also allows "any person interested in the estate, including a possible heir of the decedent [or] a beneficiary under a prior will" to receive a copy of the inventory upon their written request to the executor[352] and allows the executor to provide a copy of the inventory to "any person the independent executor believes in good faith may be a person interested in the estate."[353]

The reform offered in Texas balances the policy interests at play by only allowing the affidavit to substitute for the inventory if there are no creditors who would need notice of the inventory. It also allows heirs at law who may not receive a distribution under a will to have access to an inventory to protect any interest they may have. Lastly, it gives the inventory to the beneficiaries who receive a distribution. It protects the privacy of the estate from those who are merely curious about the deceased's financial affairs. States should follow Texas's lead and adopt similar legislation to protect a decedent's privacy if a decedent uses a will as opposed to a trust.

In many ways, privacy is merely an unintended consequence of two systems created to distribute property at death: probate and nonprobate. As a public proceeding in open court, probate requires transparency and public disclosure. Probate proceedings are public due to a different set of values supporting transparency in our judicial and democratic system—not necessarily because we believe the public must be aware of how much wealth is being transferred and to whom it is being transferred upon an individual's death. Society has

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[348] TEX. EST. CODE ANN. § 309.056(b) (2025).
[349] *Id.*
[350] *Id.*
[351] *Id.*
[352] *Id.* § 309.056(c)(1).
[353] *Id.* § 309.056(c)(2).

long valued financial privacy, and the law has evolved to protect financial privacy at death through trusts and other nonprobate transfers. The very existence of the nonprobate system affirms society's desire to offer privacy at death, and it is not in our best interest to offer it only to those who can afford it. The privacy disparity between those who use a trust and those who use a will is too great. There is no reason to demand public financial disclosure at death if one uses a will as opposed to a revocable trust. In fact, a revocable trust is intended to be a will substitute and receive the same treatment as a will in most situations.[354] The only difference is that it does not go through probate. Legislation allowing inventory lists to be substituted by a sworn affidavit or to be sealed gives wills privacy protections that have only been granted to trusts. Trusts get many protections offered under probate law to wills; wills should get a degree of privacy protection that states offer to trusts.

Privacy after death is even more important today because of the phenomenal growth of electronic access to probate files. Technology has made the public nature of probate and wills even more revealing and accessible. Before electronic filing, individuals who wanted access to a probate file would generally have to go to the courthouse where a probate action was filed and make a request for the record. With digitized records, individuals can easily search for probate records and obtain wills, estate inventories, final accountings, and other petitions. These court records could provide names and contact information of beneficiaries, creditors, and the executor. If a will is contested, a record could also include complaints, discovery requests and responses, transcripts, depositions, hearings, and court decisions. This is an extensive amount of information available in the public sphere and accessible from anywhere in the world. Ultimately, probate records reveal who has received assets from an estate and how much they received. This information potentially puts a beneficiary in a vulnerable position as he or she could become a target of fraud, theft, or unwanted public attention. As more and more probate records are being digitized and publicly available, the need for privacy protections has become more pressing.

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The proposals for reform in this Part are not mutually exclusive. Reforming trusts to require more disclosure and wills to require less disclosure will result in these tools having more parity under the law. At an individual's death, if he or she used a trust, the law should require a trustee to disclose to beneficiaries, heirs, and creditors that a trust has been established, and they should be able access to the information they need to protect their rights. Likewise, at an individual's death, if he or she used a will, the law should allow an executor to seal an inventory or to file an affidavit instead of an inventory and give the

[354] SITKOFF & DUKEMINIER, *supra* note 133, at 471, 473–75.

inventory only to those interested parties, beneficiaries, heirs, and creditors, who request the information. In both reforms, information will be available to those who need it most to protect their rights, but all decedents will be granted a degree of privacy after death regardless of whether an individual had the financial and legal resources to create a trust.

CONCLUSION

In the last twenty years, state legislatures have steadily expanded privacy protections for trusts while leaving probate law largely untouched, ignoring the privacy needs of the majority of Americans who cannot afford trust and nonprobate estate planning. State legislatures have given an extraordinary amount of estate privacy to trusts and have quietly but powerfully continued to strengthen and reinforce privacy norms. Enhancing trust privacy has been part of a broader trend by state legislatures to reform trust law to accommodate wealthy individuals and generate more trust business in their respective states. The decline of trust registration, and the enhanced protection of trusts in land records, silent trusts, self-settled asset protection trusts, and perpetual trusts are all legal reforms to ease the transfer of wealth from one generation to the next without time limit, transparency, or oversight. Trust privacy has become enshrined in our legal system and is almost a sacred entitlement for the wealthy. The same entitlements should be available in the probate system.

Privacy at death comes at a cost. A trust allows for unprecedented flexibility and privacy in the management of an estate, but those very strengths can be misused to conceal fraud, theft, and abuse. To address these concerns, this Article advocates reforming trusts in a way that respects privacy but requires disclosure to interested parties at death so that they can protect their property rights under a trust and hold a trustee accountable.

Although the wealthy have enjoyed fortified privacy protections at death, those who rely on wills or die without any estate plan remain fully exposed to public scrutiny. In the era of digital records and instant public access, the probate process has become even more revealing, accessible, and intrusive. This Article advocates expanding privacy interests in a probate proceeding by allowing an executor or administrator to either seal an inventory or file an affidavit in lieu of an inventory, thus diminishing the public disclosure required in a probate proceeding while maintaining disclosure requirements to those who have an interest in the estate.

Privacy at death can no longer be a commodity sold only to the wealthy. The imbalance of privacy at death is structural and must be reformed by state legislatures. This Article calls for balanced reform: increased accountability within trust law and enhanced privacy protections within probate. Privacy at death should not be a matter of economic privilege alone. A more just and equitable system would honor privacy at death for all as an essential part of our American succession system.