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## The Dark Side of Trusts: Challenges to Chinese Inheritance Law

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# THE DARK SIDE OF TRUSTS: CHALLENGES TO CHINESE INHERITANCE LAW

FRANCES H. FOSTER\*

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## INTRODUCTION

On October 1, 2001, China's first Trust Law went into effect.<sup>1</sup> Drafters and commentators hail trusts as "ideal mechanisms"<sup>2</sup> for future management and transmission of wealth in China.<sup>3</sup> They claim trusts can promote both donative freedom<sup>4</sup> and family responsibility<sup>5</sup> by giving Chinese citizens maximum flexibility to provide for loved ones.<sup>6</sup> Trusts,

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1. Zhonghua Renmin Gongheguo Xintuo Fa [Trust Law of the People's Republic of China] art. 74 (Apr. 28, 2001), in *Guowuyuan Gongbao*, no. 20, 16 (2001) [hereinafter Trust Law] (stating that the Trust Law enters into effect on Oct. 1, 2001). For an English-language translation of the Trust Law, see *PRC, Trust Law*, CHINA L. & PRAC., June 2001, at 22. It should be noted that the Chinese legal system did contain limited provisions on trusts prior to the new legislation. See Walter Hutchens, *The PRC's First Trust Law: Trusts Without Chinese Characteristics?*, CHINA L. & PRAC., June 2001, at 18, 18 (discussing provisions on entrustment contracts in the 1999 Contract Law and regulations on financial trust companies). "[N]o prior statute spelled out the basic parameters of trust relationships, and courts often struggled to determine the right standards to apply." *Id.*

2. *Guanyu Zhonghua Renmin Gongheguo Xintuo Fa Caoan Yantao Hui Zongjie [Summary Report of the Symposium on the Draft Trust Law of the People's Republic of China]* [hereinafter *Summary Report*], in *ZHONGGUO XINTUO FA—QI CAO ZILIAO HUIBIAN [THE CHINESE TRUST LAW—MATERIALS ON THE DRAFTING PROCESS]* 169, 169 (Zhu Shaoping & Ge Yi eds., 2002) [hereinafter *MATERIALS ON THE DRAFTING PROCESS*].

3. Interestingly, the use of trusts for private management and disposition of wealth was not one of the drafters' original goals for the law; it became "important" only later in the drafting process. Immanuel Gebhardt & Holger Hanisch, *Zhongguo Xintuo Fa Zonglan [An Overview of the Chinese Trust Law]*, in *MATERIALS ON THE DRAFTING PROCESS*, *supra* note 2, at 1, 5. From the start, the principal goal of the Trust Law has been to provide a legal framework for China's commercial trust industry. See Financial and Economic Committee of the National People's Congress, *Xinxi Beijing Ji Zhuyao Taolun Wenti [Background Information and Main Issues for Discussion]* [hereinafter *Background Information*], in *MATERIALS ON THE DRAFTING PROCESS*, *supra* note 2, at 179 (discussing the legislative history of the Trust Law); *China's Trust Law to Take Effect 1 October*, XINHUA, Sept. 29, 2001, available at LEXIS, Asiapc Library, BBCMIR File (emphasizing the role of the new Trust Law in promoting "legal support" and development of China's trust industry). Chinese drafters and commentators recognize that trusts may be used in a variety of other contexts as well. See ZHOU XIAOMING, *XINTUO ZHIDU DE BIJIAO FA YANJIU [COMPARATIVE LAW RESEARCH OF TRUST SYSTEMS]* 47-61 (1996) (discussing civil law, commercial, employee-benefit, charitable, and political trusts); Zhang Xiaocai, *Bu Liaojie Xin Xintuo Ni Hui Sunshi Hen Duo [If You Do Not Understand the New Trusts, You Stand to Lose a Lot]*, RENMIN RIBAO, May 27, 2001, available at <http://www.peopledaily.com.cn> (discussing a variety of trusts that may be used by enterprises, individuals, and government departments).

4. Zhou Xiaoming, *Queli Xintuo Zhidu De Xianshi Yiyi [The Practical Significance of Establishing a Trust System]*, in *MATERIALS ON THE DRAFTING PROCESS*, *supra* note 2, at 21, 22 (stating that trusts are an "ideal method" for a property owner to ensure property is distributed after his death in accordance with his wishes).

5. *Summary Report*, *supra* note 2, at 169 (stating that trusts can "promote family responsibility").

6. Indeed, Chinese commentators cite "flexibility" of trusts as the key reason for the spread of trusts from common law to civil law countries. WANG QING & GUO CE, *ZHONGHUA RENMIN GONGHEGUO XINTUO FA TIAOWEN QUANSHI [ANNOTATED ARTICLES OF THE TRUST LAW OF THE PEOPLE'S REPUBLIC OF CHINA]* 1 (2001) ("Because the flexibility of the trust for management of property is without parallel in other legal systems, Japan, Korea, and other countries with the continental [civil] law system have also introduced it and enacted trust laws."); Li Qunxing, *Xintuo De*

they say, can ensure effective management of property for the young, incompetent, or inexperienced.<sup>7</sup> Trusts can protect family wealth from incursions by profligate heirs.<sup>8</sup> Trusts can enable a dying father to plan for his young children's changing financial and health needs after his death.<sup>9</sup> Trusts can provide a steady stream of income to multiple generations of family members.<sup>10</sup> Trusts can even encourage China's newly wealthy to donate their fortunes to charity.<sup>11</sup>

A recent Chinese commentator on the Trust Law summed up the potential value of trusts with the so-called "American saying" that the services trusts provide are "beyond the limits of the imagination."<sup>12</sup> As this Article will argue, China must anticipate that those services are not always laudable.

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*Falu Xingzhi Yu Jiben Linian [The Legal Nature and the Basic Concept of the Trust]*, 22 FAXUE YANJIU [STUDIES IN LAW], no. 3, 118, 118 (2000) (stating that "flexibility . . . has made the trust system a worldwide trend"). Drafters of the Trust Law drew heavily on this foreign precedent. See ZHOU, *supra* note 3 (published version of a drafter's doctoral dissertation providing a detailed analysis of trust law in common law and civil law countries). See also WANG & GUO, *supra*, at 1 (stating that the Trust Law is a legal transplant from abroad). This use of foreign models is by no means unique to the trust context. Since the early twentieth century, China has based much of its codification and legal reform efforts on foreign models (especially civil law models). See generally William C. Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China*, 48 HARV. INT'L L.J. 309 (1987); William Jones, *Sources of Chinese Obligation Law*, 52 LAW & CONTEMP. PROBS. 69 (Summer 1989).

7. See, e.g., SHI Tiantao & Yu Wenran, XINTUO FA [TRUST LAW] 1-2 (1999) (discussing the use of trusts to provide for children who are minors and incapable of managing property); Zhou, *supra* note 4, at 22, 23 (emphasizing the advantages of trusts for management of property on behalf of those who lack "sufficient mental or other capacity" and "the ability to operate and manage [assets] themselves").

8. See, e.g., SHI & YU, *supra* note 7, at 1 (discussing the use of trusts for protecting property from adult children who might "squander" it); WANG & GUO, *supra* note 6, at 120-21 (summarizing spendthrift and other restrictive trust provisions that prevent a beneficiary from "squandering trust benefits").

9. See, e.g., Zhang, *supra* note 3 (citing the example of a dying father who wants to ensure that after his death the poorer child will end up with two-thirds of his assets and the wealthier child will receive one-third of his assets and explaining that trusts, unlike intestate succession and wills, allow assets to be "divided up according to set guidelines" at a later time).

10. See, e.g., SHI & YU, *supra* note 7, at 1-2 (discussing the use of trusts to pay income to one family member for her lifetime and then to other family members for their lifetimes); Zhang, *supra* note 3 (stating that the wealthy "through testamentary trusts, can hand their assets down through the generations").

11. See, e.g., Gebhardt & Hanisch, *supra* note 3, at 5 (stating that supporters of the draft Trust Law emphasized that trusts might encourage China's "newly rich . . . to donate considerable sums for charitable endeavors").

12. Zhang, *supra* note 3. The author does not indicate the original source. Most likely, that source is Austin W. Scott. 1 AUSTIN W. SCOTT, THE LAW OF TRUSTS §1 (William F. Fratcher & Mark L. Ascher eds., 4th ed. 2000) ("The purposes for which trusts are created are as unlimited as the imagination of lawyers.").

This Article presents the dark side of trusts.<sup>13</sup> It points to the very real challenges that trusts may pose to China's distinctive inheritance system. Experience in our own country reveals that the world of trusts includes murderous beneficiaries,<sup>14</sup> thieving trustees,<sup>15</sup> and despicable settlors.<sup>16</sup> Settlers use trusts to leave their nearest and dearest destitute,<sup>17</sup> to defraud their spouses of marital property rights,<sup>18</sup> to control their survivors' behavior from beyond the grave,<sup>19</sup> and to evade taxes,<sup>20</sup> creditors,<sup>21</sup> and

13. 1 SCOTT, *supra* note 12, § 1 (referring to the “darker side of the picture” in discussing uses of trusts).

14. *See, e.g.,* Hulett v. First Nat'l Bank & Trust Co., 956 P.2d 879 (Okla. 1998) (considering rights to a testamentary trust where a beneficiary murdered his mother, the trust settlor).

15. *See, e.g.,* State v. Jacobson, 876 P.2d 916 (Wash. Ct. App. 1994) (finding that a trustee engaged in “theft”).

16. The offshore asset protection trust appears to be a particularly favored device of such settlors. *See, e.g.,* FTC v. Affordable Media, L.L.C., 179 F.3d 1228 (9th Cir. 1999) (involving a “telemarketing duo” who transferred profits gained from a fraudulent Ponzi scheme into a Cook Islands trust); Debra Baker, *Island Castaway*, 84 A.B.A. J. 54 (Oct. 1998) (discussing the use of offshore asset protection trusts to defraud spouses of marital property rights). Several U.S. jurisdictions also now allow perpetual asset protection trusts. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 879-80 (3d ed. 2002) (describing asset protection trust legislation in Alaska, Delaware, Nevada, and Rhode Island). For extended discussion of asset protection trusts, see Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 32-38 (1996); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

17. *See, e.g.,* *In re Estate of Johnson*, 397 So.2d 970 (Fla. Dist. Ct. App. 1981) (involving an attempted conveyance of homestead property into a revocable inter vivos trust to circumvent a minor child's rights to homestead protection). *See also* Friedberg v. Sunbank/Miami, N.A., 648 So.2d 204, 206 (Fla. Dist. Ct. App. 1994) (denying a surviving spouse's and a child's claims to assets in a revocable inter vivos trust). The court stated:

[W]e are troubled by this result. This case involves a long term, intact marriage. We find it strange that a divorced spouse is entitled . . . to reach assets in a revocable, *inter vivos* trust but a loving, devoted spouse is not . . . [T]he amicus brief stated that a citizen has “a constitutional right to be a mean-spirited . . . curmudgeon” and that there are “no statutory impediments to developing an estate plan that cuts out the spouse.”

*Id.* (citations omitted). To make matters worse, conventional protections for children unintentionally omitted by will may not apply to trusts. *See* Robbins v. Johnson, 780 A.2d 1282, 1284 (N.H. 2001) (holding that the pretermitted child statute does not apply to trusts).

18. *See, e.g.,* *Dunnwind v. Cook*, 697 N.E.2d 485, 488 (Ind. Ct. App. 1998) (involving a trust created for the “sole purpose of . . . prevent[ing] Husband from effectively exercising his statutory right as a subsequent surviving spouse to the [decendent's] assets”) (citing trial court findings).

19. *See, e.g.,* *In re Estate of Romero*, 847 P.2d 319, 320 (N.M. Ct. App. 1993) (concerning a testamentary trust provision leaving use of the testator's residence to his fiancée “so long as she remains unmarried and does not cohabit with an unrelated adult male” and to his minor sons “provided their mother does not reside there also”). *See generally* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273.

20. *See, e.g.,* *Muhich v. Comm'r*, 238 F.3d 860, 864 (7th Cir. 2001) (involving a “sham trust” for tax purposes); *United States v. Estabrook*, 78 F. Supp. 2d 558, 560-61 (D. Tex. 1999) (setting aside the taxpayers' revocable trust as a fraudulent transfer).

21. *See, e.g.,* *Cohen v. Comm'r of Div. of Med. Assistance*, 668 N.E.2d 769, 778 (Mass. 1996) (involving a self-settled trust the court characterized as “the pure case of a trust with no other purpose

family support obligations.<sup>22</sup> Chinese inheritance practice suggests that a similar cast of characters may soon emerge in the Chinese trust context as well.<sup>23</sup>

As I have discussed elsewhere,<sup>24</sup> Chinese inheritance cases demonstrate that greed, ingratitude, caprice, and prejudice transcend national and cultural boundaries. The difference is that Chinese inheritance law, unlike our own, has responded with an array of flexible remedies to punish the bad,<sup>25</sup> reward the good,<sup>26</sup> and protect the needy<sup>27</sup> and the caring.<sup>28</sup> This Article argues that China's new Trust Law puts these responses at risk.

Part I identifies the root of the problem. It contends that the Trust Law introduces private<sup>29</sup> gratuitous trusts that could have a profound impact on future disposition of decedents' wealth in China. Yet, the Trust Law fails to provide adequate guidelines regarding the application of inheritance law to these trusts. Parts II and III show that this failure threatens to undermine three innovative features of China's existing inheritance system—the special schemes for recognizing behavior, support, and gender equality in

than to defeat Medicaid ineligibility standards”).

22. See, e.g., *L.W.K. v. E.R.C.*, 735 N.E.2d 359 (Mass. 2000) (holding that assets in a father's inter vivos trust could be reached to satisfy his posthumous support obligation toward his disinherited minor child); *In re Marriage of Perry*, 68 Cal. Rptr. 2d 445, 446-48 (Cal. Ct. App. 1997) (holding that assets a father placed in a living trust were part of his “estate” and could be used to satisfy his child support obligation).

23. See, e.g., Case No. 9, in *YI AN SHUO FA: JICHENG FA [USING CASES TO EXPLAIN LAW: INHERITANCE LAW]* 18 (Li Qizhi et al. eds., 1986) [hereinafter *USING CASES*] (involving a son who hacked his father to death with an axe while his father was asleep because he “harbored hatred in his heart” after his father denied his request for 2000 yuan and instead gave him a “stern lecture”); Case No. 41, in *id.* at 75 (concerning a “calculating” testator who disinherited his mentally and physically disabled daughter so that she would be supported at state expense rather than out of his estate); *JICHENG FA ANLI XIANG JIE [DETAILED EXPLANATION OF INHERITANCE CASES]* 148 (Cui Qinglan et al. eds., 1990) [hereinafter *DETAILED EXPLANATION OF INHERITANCE CASES*] (involving a testator who wrote a will a few months before her death disinheriting her eighty-year-old husband and leaving her entire estate to her former husband's nephew) [hereinafter *Li Zhi v. Qian Mao*].

24. Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199 [hereinafter Foster, *Linking Support and Inheritance*]; Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998) [hereinafter Foster, *Behavior-Based Model*].

25. See Foster, *Behavior-Based Model*, *supra* note 24, at 85-102.

26. See *id.* at 102-17.

27. See Foster, *Linking Support and Inheritance*, *supra* note 24, at 1217-39.

28. See *id.* at 1239-54. This flexible approach is by no means unique to the inheritance context. For an insightful analysis of the role of judicial discretion in the Chinese legal system, see Margaret Y. K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581 (1999).

29. This Article deals only with private gratuitous trusts. China's Trust Law also contains provisions on charitable trusts. Trust Law, *supra* note 1, arts. 59-73. See Hutchens, *supra* note 1, at 20 (summarizing the Trust Law's “fascinating chapter” on charitable trusts and concluding that “[d]espite the requirements for regulatory approval and supervision, the invitation to establish charitable trusts is welcome and could stimulate a new, interesting kind of foreign direct investment in China”).

distribution of estates. Part IV concludes that China must address potential abuses of trusts for transmission of private wealth. Otherwise, China risks a future trusts and estates system, not unlike our own, that leaves the fate of the living to the vagaries of the dead.

## I. A TALE OF TWO TRUSTS: THE UNCERTAIN INTERPLAY OF CHINESE TRUST LAW AND INHERITANCE LAW

Under China's Trust Law, two basic types of private gratuitous trusts may have an impact on distribution of a decedent's estate—testamentary trusts and inter vivos trusts. As this Part will show, the Trust Law fails to provide adequate guidance regarding the applicability of inheritance law to either type of trust.

### A. Testamentary Trusts

Testamentary trusts [*yizhu xintuo*] are trusts created by will.<sup>30</sup> The Trust Law contains a single, skeletal directive on the applicability of the Inheritance Law to such trusts. Article 13 states: "Establishment of a testamentary trust shall comply with the Inheritance Law's provisions on wills."<sup>31</sup> This language clearly refers to will execution requirements, such as signature, date, testamentary capacity, and attestation.<sup>32</sup> It is uncertain, however, whether other Inheritance Law regulations and restrictions on wills extend to testamentary trusts. Annotated commentary to Article 13 suggests this broader reading. The authors include Inheritance Law provisions on modification and revocation of wills, treatment of multiple wills, and special restrictions on testamentary disposition to protect surviving family members and dependents.<sup>33</sup> The authors do not address judicial interpretations of the Inheritance Law, however. For example, the Chinese Inheritance Law requires that heirs who commit heinous acts against the decedent or another heir forfeit their intestate succession rights.<sup>34</sup> In practice, courts have interpreted this provision liberally and extended it to the wills context as well.<sup>35</sup> Does this "unworthy heir"

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30. See WANG & GUO, *supra* note 6, at 31 (defining a testamentary trust as a trust the settlor "established in his will").

31. Trust Law, *supra* note 1, art. 13.

32. See Zhonghua Renmin Gongheguo Jicheng Fa [Inheritance Law of the People's Republic of China] (Apr. 10, 1985), in *Fagui Huibian 1* (1985) [hereinafter Inheritance Law]. For will execution requirements, see *id.* arts. 17-18, 22.

33. WANG & GUO, *supra* note 6, at 31.

34. Inheritance Law, *supra* note 32, art. 7.

35. See Foster, *Behavior-Based Model*, *supra* note 24, at 87-94. It should be noted that Chinese

disqualification now apply to *all* beneficiaries named in a will, including those with only a remote remainder interest in a testamentary trust? The Chinese Trust Law provides no guidance as to how to approach difficult issues of this sort.

### *B. Inter Vivos Trusts*

Inter vivos trusts [*shengqian xintuo*] are trusts created by the settlor during her lifetime that may continue after her death.<sup>36</sup> Article 15 of the Trust Law expressly authorizes such trusts. It provides that unless the deceased settlor was the sole beneficiary of the inter vivos trust, “the trust shall survive and the trust property shall not become part of the settlor’s estate.”<sup>37</sup> In China, trust “survival” is potentially limitless. Despite advice to the contrary,<sup>38</sup> Trust Law drafters opted not to include a Rule Against Perpetuities or other restriction on trust duration.

The Trust Law provides no directive whatsoever regarding the application of the Inheritance Law to inter vivos trusts. Yet, if U.S. practice is any guide,<sup>39</sup> this type of trust is likely to have a greater impact

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law formally gives courts only limited powers to interpret legislation and “Chinese doctrine firmly rejects the doctrine of precedent (*pan li*), denying any binding force to judicial decisions.” STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 282-85 (1999); see Nanping Liu, “Legal Precedents” with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court, 5 J. CHINESE L. 107 (1991) (discussing the Chinese approach to precedent). Nonetheless, China may be “in a transition period from complete reliance on statute law to a mixed system of statute and case law.” Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145, 216 (1993). In recent years, China has increasingly published and distributed collections of edited cases with analytical discussion by judges and scholars to provide guidance on application of statutory provisions to concrete cases. Foster, *Linking Support and Inheritance*, *supra* note 24, at 1205-06; Liu, *supra*, at 118-19. Consistent judicial interpretation of the Trust Law may be particularly important. See Hutchens, *supra* note 1, at 21 (emphasizing that the Trust Law provides private causes of action rather than “rely[ing] mainly on administrative enforcement” and thus “the use of a trust will be influenced by the degree to which People’s Courts can provide predictable outcomes in trust cases”).

36. See ZHOU, *supra* note 3, at 110-15 (discussing inter vivos trusts from a comparative law perspective).

37. Trust Law, *supra* note 1, art. 15.

38. See, e.g., François Barriere, *Dui Di Wu Zhang de Pinglun: Xintuo de Biangeng He Zhongzhi* [Comments on Chapter V: Modification and Termination of Trusts], in MATERIALS ON THE DRAFTING PROCESS, *supra* note 2, at 149, 152-53 (recommending that the Trust Law restrict the maximum duration for private trusts and discussing the common law rule against perpetuities and ninety-nine year limits in France’s draft trust law).

39. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108-09, 1113-25 (1984) (arguing that “[t]he law of wills and the rules of descent no longer govern succession to most of the property of most decedents” and discussing the dominant role of revocable inter vivos trusts and other will substitutes in gratuitous transfer of assets). Note that the Chinese inter vivos trust does not fit neatly under either a “revocable” or “irrevocable” category. The Trust Law permits the settlor to revoke the trust if the settlor is the sole



on distribution of decedents' wealth than its testamentary counterpart. Through an inter vivos trust, a settlor can effectively transfer all property out of her estate during life and bypass inheritance law restrictions on disposition, including protections for her neediest survivors.<sup>40</sup> Apparently, in China as well as the United States,<sup>41</sup> a settlor will be able to do so in relative secrecy. Although China, unlike the United States,<sup>42</sup> does require all trusts to be "in written form,"<sup>43</sup> it mandates registration of trust property only "to the extent required by relevant laws and administrative regulations."<sup>44</sup> China even imposes on the trustee an explicit fiduciary duty of confidentiality.<sup>45</sup> Article 33 of the Trust Law requires the trustee "to maintain the confidentiality of the settlor, the beneficiary, and the particulars of and documentation connected with [the trustee's] management of trust affairs."<sup>46</sup> Thus, the depletion of the settlor's estate may come as a nasty posthumous surprise to her survivors.<sup>47</sup>

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beneficiary, the beneficiary materially infringes the rights of the settlor, the beneficiary consents, or "another circumstance stipulated in the trust instrument arises." Trust Law, *supra* note 1, arts. 50, 51.

40. See *infra* Part III.A (discussing protections for needy survivors).

41. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 390-91 (6th ed. 2000) (discussing the advantages of revocable inter vivos trusts for "persons desiring secrecy").

42. Most American states, for example, allow oral trusts of personal property. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS, AND ESTATES* 202 (2d ed. 2001) ("In most states oral trusts of personal property are valid . . ."). For an extended comparative discussion and rejection of oral trusts for China, see ZHOU, *supra* note 3, at 110-15, 204-05.

43. Trust Law, *supra* note 1, art. 8. *But see* Gebhardt & Hanisch, *supra* note 3, at 7 (discussing the Supreme People's Court's use of a "constructive trust" in an unjust enrichment case).

44. Trust Law, *supra* note 1, art. 10. Although this provision is supposed to "protect the rights and interests of third parties," WANG & GUO, *supra* note 6, at 24, a basic problem exists. China did not have "explicit regulations" on registration in place at the time of the Trust Law's enactment. Li Xianpu & Li Xianming, *Xintuo Pinzhong Kaifa Sheji Ji Xiangguan Falu Wenti* [The Development and Design of a Variety of Trusts and Related Legal Issues] 5, 14 (Aug. 15, 2002) (unpublished conference paper) (on file with author). This reference to laws and regulations that have yet to be issued or are "unspecified" is not unique to the registration context. See Hutchens, *supra* note 1, at 19 (stating that "the Trust Law retains some of the maddening vague characteristics of PRC legislation—every list of requirements ends with the customary catch-all phrase that amounts to 'such other things as we think of later'" and describing Article 8 requirements for trust establishment to include "a writing that can be a trust contract, a will or another document acceptable under (unspecified) laws or regulations").

45. The confidentiality requirement emerged late in the drafting process. See Zhang Xuwu, *Quanguo Ren Da Falu Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Xintuo Fa (Caoan)" Shenyi Jieguo de Baogao* [Report on the Results of the Examination of the "(Draft) Trust Law of the People's Republic of China" by the Law Commission of the National People's Congress] (Apr. 24, 2001), in *Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao*, no. 4, 323, 325 (May 15, 2001) (proposing addition of the trustee duty of confidentiality language at the request of Standing Committee members, regions, and government departments). For discussion of the U.S. "duty of confidentiality," "an incident of the trustee's duty of loyalty," see CHARLES E. ROUNDS, JR., *LORING: A TRUSTEE'S HANDBOOK* §§ 5.4.1, 6.2.3 (2002).

46. Trust Law, *supra* note 1, art. 33.

47. This problem of hidden assets already occurs in China. See Liu Zuo, *Issues Concerning the*

China faces two major questions in the future: (1) how to recapture assets of an inter vivos trust for inheritance purposes and (2) to what extent existing wills doctrines and rules apply to an inter vivos trust that is effectively a “will substitute.”<sup>48</sup> These questions have challenged our own inheritance system for decades and remain unresolved today.<sup>49</sup> As Parts II and III will show, the stakes are even higher for China. The answers to these questions may well determine the fate of China’s distinctive approach to inheritance.

## II. TRUSTS AND THE BEHAVIOR-BASED MODEL OF INHERITANCE

China has implemented an approach to inheritance that our own country is only beginning to explore—a “behavior-based model of

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*Imposition of Inheritance Tax in China*, CHINA LAW 78, 80 (Dec. 2000) (“[A]lthough there have occurred a large number of people possessing large quantities of personal property, these people and their property are largely scattered, and much of the property has been well hidden (particularly financial property that is not completely under real names).”). Secrecy of trusts may disserve settlors as well as survivors. For example, it may undermine the Chinese Trust Law requirements that a settlor have the capacity (legal and mental) to establish a trust and do so free from outside coercion. Trust Law, *supra* note 1, art. 19 (stating that the settlor must have “full civil law capacity”); *id.* art. 5 (requiring “voluntariness”). See WANG & GUO, *supra* note 6, at 14, 52-53 (stating that the Trust Law requires that “[n]o unit or individual whatsoever should employ improper measures of coercion, compulsion, or force” and that every settlor has legal and mental capacity). In the United States, some settlors deliberately use revocable inter vivos trusts, however, to avoid mental capacity challenges. See Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1094-95 (1980) (discussing the use of revocable trusts by testators who want to “achiev[e] certainty of testamentary disposition”). As Professor Fellows observes:

Although expectant heirs may challenge a revocable trust for mental incompetency, fraud, or undue influence, potential challengers are much less likely to know that that trust exists than that a will exists. The settlor of the trust need not publicly disclose its existence.

*Id.* at 1094.

48. See Langbein, *supra* note 39, at 1109 (characterizing revocable trusts as one of the “[f]our main will substitutes” and stating that “[w]hen properly created, each is functionally indistinguishable from a will—each reserves to the owner complete lifetime dominion, including the power to name and to change beneficiaries until death”). For an extended discussion of will substitutes, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 7 (Tentative Draft No. 3, 2001).

49. See generally RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (Tentative Draft No. 3, 2001) (text, comments, and notes discussing “applications of will doctrines to will substitutes”); RESTATEMENT (THIRD) OF TRUSTS § 25 (Tentative Draft No. 1, 1996) (text, comments, and notes analyzing applications of testamentary rules and doctrines to revocable inter vivos trusts and conflicting approaches to recapture of assets for spousal and creditor’s rights); Grayson M. P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123 (1993) (discussing the trend in the Uniform Probate Code to integrate laws governing wills and will substitutes). See also UNIF. TRUST CODE § 112 & cmt. (2001), 7C U.L.A. 35 (Supp. 2002) (extending “rules of construction that apply . . . to the interpretation of and disposition of property by will” to revocable and irrevocable trusts “as appropriate” and noting the inconsistent approaches legislatures and courts take in various jurisdictions).

inheritance.”<sup>50</sup> Chinese inheritance law recognizes both misconduct and exemplary conduct by the decedent’s survivors. It factors in a broad range of misconduct. It excludes altogether claimants who commit the most serious crimes against the decedent’s person—murder, abandonment, and maltreatment “under serious circumstances.”<sup>51</sup> The Chinese son who hacked his father to death with an axe,<sup>52</sup> the mother who deserted her two small children,<sup>53</sup> and the son and daughter-in-law who drove an elderly woman to suicide by beating, cursing, starving, and refusing her heat and medical treatment<sup>54</sup> all lost rights to inherit from their victims. Chinese inheritance law also bars claimants for offenses that “infringe the decedent’s lifetime wishes”<sup>55</sup>—forging, tampering with, or destroying the will under serious circumstances.<sup>56</sup> It even disqualifies claimants for murdering another heir in a battle over the estate.<sup>57</sup>

Chinese inheritance law gives courts flexible remedies to respond to lesser as well as severe forms of misconduct toward the decedent.<sup>58</sup> In cases of neglect or abuse that do not reach the level of “serious circumstances” required for forfeiture, Chinese courts can<sup>59</sup> and do reduce the wrongdoer’s intestate share of the estate. For example, one court denied a woman’s claim to inherit her sister’s entire estate as sole intestate heir.<sup>60</sup> The court ultimately awarded her only miscellaneous household furnishings because “she did not visit her older sister for more than a decade when old lady Qi was elderly and ill many times.”<sup>61</sup>

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50. See generally Foster, *Behavior-Based Model*, *supra* note 24.

51. Inheritance Law, *supra* note 32, art. 7(1), (3).

52. See Case No. 9, *supra* note 23, at 18.

53. See Inheritance Case No. 19, in ZHONGHUA RENMIN GONGHEGUO XIANXING FALU PANLI FENXI QUANSHU [THE COMPLETE VOLUME OF ANALYSES OF CURRENT LEGAL PRECEDENTS OF THE PEOPLE’S REPUBLIC OF CHINA] 113 (1995) [hereinafter CURRENT LEGAL PRECEDENTS].

54. See Case No. 12, in USING CASES, *supra* note 23, at 22.

55. Li Huawu, *Dui Shiyong Sangshi Jichengquan de Jidian Renshi* [Some Thoughts About the Applicability of Forfeiture of Inheritance Rights], FAXUE [JURISPRUDENCE], no. 4, 35, 35 (1986).

56. Inheritance Law, *supra* note 32, art. 7(4). For an extended discussion of judicial applications of Article 7(4), see Foster, *Behavior-Based Model*, *supra* note 24, at 92-94.

57. Inheritance Law, *supra* note 32, art. 7(2) (requiring forfeiture of inheritance rights for “killing another heir in fighting over the estate”).

58. See Foster, *Behavior-Based Model*, *supra* note 24, at 99-102 (discussing remedies for less severe misconduct toward family members).

59. See Inheritance Law, *supra* note 32, art. 13, para. 4 (stating that “when the estate is distributed, heirs who had the capacity and resources to provide support and did not fulfill their support duties should receive no share or a smaller share”). For an extended discussion of how courts have liberally interpreted this provision in practice, see Foster, *Behavior-Based Model*, *supra* note 24, at 100-01.

60. See DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 119 (reproducing the case) [hereinafter Old Lady Qi case].

61. *Id.* at 120.

China's behavior-based model of inheritance also gives courts broad discretion to readjust intestate distribution of estates to recognize contributions to the decedent's welfare by family members,<sup>62</sup> relatives by marriage,<sup>63</sup> and nonrelatives<sup>64</sup> alike. In China, unlike other countries worldwide, the exemplary neighbor or friend may inherit at the expense of those "closest" to the decedent by blood alone.<sup>65</sup>

As Section A will show, China's Trust Law contains limited behavior-based remedies for the settlor. It fails to address, however, the larger question of how claimants' conduct—bad or good—affects distribution of trust assets after the settlor's death. Sections B and C will demonstrate that these gaps threaten to undermine China's behavior-based model of inheritance.

#### *A. The Trust Law's Behavior-Based Remedies for the Settlor*

Article 51 of the Trust Law continues in the behavior-based tradition by providing the settlor remedies to respond to beneficiary misconduct. Article 51(1) stipulates that the settlor may change a beneficiary or even revoke the trust if that beneficiary "materially infringes the rights of the settlor."<sup>66</sup> Article 51(2) also permits the settlor to change a beneficiary (but not revoke the trust) if that beneficiary "materially infringes the rights of other co-beneficiaries."<sup>67</sup> Annotated commentary indicates that the "infringes the rights" [*qin quan*] language encompasses a wide variety of misconduct—acts that "injured the settlor's [or co-beneficiaries'] person, property, etc."<sup>68</sup> The commentary points out that since the wrongdoer could be civilly or even criminally liable for such acts, it would be "unfair" to allow him "to continue to enjoy trust benefits that the settlor

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62. See Inheritance Law, *supra* note 32, art. 13, para. 3 (allowing courts to award a larger than intestate share to any heir who performed "the main duty of support" or "lived with the decedent").

63. See *id.* arts. 10, 12 (giving courts discretion to elevate to intestate heir status steprelatives who supported the decedent and widowed daughters- or sons-in-law who "fulfilled the main duty of support toward the decedent").

64. See *id.* art. 14 (providing that courts can award an "appropriate" legacy to "a person who is not an heir but provided considerable support to the decedent").

65. See Foster, *Behavior-Based Model*, *supra* note 24, at 111-12 (discussing cases distributing substantial legacies to worthy nonrelatives). For an example of such a case, see Old Lady Qi case, *supra* note 60, at 119 (awarding all but the decedent's household furnishings to a neighbor who looked after the decedent "with meticulous care" for nearly twenty years).

66. Trust Law, *supra* note 1, art. 51(1). For a critique of this provision, see Barriere, *supra* note 38, at 149-50.

67. Trust Law, *supra* note 1, art. 51(2).

68. WANG & GUO, *supra* note 6, at 129.

created for him.”<sup>69</sup>

It should be noted, however, that, like the Inheritance Law’s forfeiture provisions, Article 51’s behavior-based remedies are available only in cases of the most serious misconduct toward the settlor or co-beneficiaries. The Trust Law contains no counterparts to the Inheritance Law’s responses to less severe misconduct. Indeed, annotated commentary to Article 51(1), (2) makes a point of emphasizing that settlor modification and revocation of trusts are available only where the beneficiary’s “behavior . . . reach[es] the level of ‘material’”<sup>70</sup> infringement of the settlor’s or co-beneficiaries’ rights. The commentary suggests some flexibility in choice of remedy, however. It states that Article 51 gives the settlor discretion to decide which remedy to adopt “based on actual conditions.”<sup>71</sup> The commentary indicates that the settlor may even have the flexibility to reduce the wrongdoer’s benefits rather than eliminate those benefits altogether.<sup>72</sup>

Although the Trust Law explicitly provides remedies during the settlor’s life to penalize beneficiary misconduct, it stipulates no corresponding remedies after the settlor’s death. This omission threatens to undermine the behavior-based model of inheritance by treating misconduct differently for disposition of a decedent’s assets by trust rather than intestate succession or will. Under current law, trusts may effectively allow the wrongdoer to profit from her wrong.

### *B. Promoting Inheritance by the Unworthy*

The Trust Law fails to address even the most heinous crime the Inheritance Law penalizes—murder of a benefactor.<sup>73</sup> When the settlor expires at the hands of the beneficiary, so too do the Trust Law’s remedies for beneficiary misconduct. There now exists no settlor to exercise Article 51 rights to change the beneficiary or revoke the trust. This raises the troubling question of whether the slayer retains her trust interest. The Trust Law provides no guidance.

In practice, the answer initially may turn on whether the trust was a testamentary trust or an inter vivos trust that survived the settlor’s untimely demise. As discussed above,<sup>74</sup> Article 13 stipulates that

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69. *Id.*

70. *Id.* (stating that this restriction “should be emphasized”).

71. *Id.* at 130.

72. *Id.*

73. Inheritance Law, *supra* note 32, art. 7(1).

74. *See supra* note 32 and accompanying text.

testamentary trusts are governed by the Inheritance Law's provisions on wills. Although the Inheritance Law does not expressly extend its Article 7 forfeiture provisions to will beneficiaries, the Supreme People's Court has so ruled.<sup>75</sup> Thus, a slayer arguably loses benefits in a trust "established" in a will.

The impact of homicide on an inter vivos trust interest may prove even more problematic in practice. That has certainly been true in the United States, where to this day no consensus exists regarding the applicability of so-called "slayers statutes" to inter vivos trusts or other will substitutes.<sup>76</sup> Drafters of the most recent version of the Uniform Probate Code ultimately addressed the issue by explicitly including trusts and other will substitutes and adding a broad catch-all provision: "A wrongful acquisition of property or interest by the killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong."<sup>77</sup>

In China, some precedent exists for extending Inheritance Law forfeiture provisions beyond intestate succession and wills. For example, one court cited the "spirit" of Article 7 to nullify a woman's rights to inherit her former adoptive father's entire estate under a valid bequest and support agreement.<sup>78</sup> The court stressed that Ms. Zhao had not only failed to perform "well" her promise to feed and clothe Mr. Xie but also "infringed Xie's personal rights and legal property rights" by "beat[ing] and curs[ing] him" and stealing his furniture.<sup>79</sup> The court's focus on "infringement of rights" is consistent with current Trust Law requirements for settlor remedies to address beneficiary misconduct.<sup>80</sup> Thus, using similar reasoning, future courts could well decide to extend the Inheritance

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75. Zuigao Renmin Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Jicheng Fa" Ruogan Wenti de Yijian [Opinion of the Supreme People's Court on Certain Matters Concerning the Implementation of the "Inheritance Law of the People's Republic of China"] art. 12 (Sept. 11, 1985), in Zuigao Renmin Fayuan Gongbao, no. 4, 9 (1985) [hereinafter Inheritance Law Opinion].

76. See generally RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 (Tentative Draft No. 3, 2001) (text, comments, and notes setting out the "slayer" rule and analyzing inconsistent statutory and judicial precedent); MCGOVERN & KURTZ, *supra* note 42, at 68-74 (discussing conflicting approaches to barring slayers from taking under intestacy, will, or will substitute).

77. UNIF. PROBATE CODE § 2-803(f) (2000), 8 U.L.A. 214 (Supp. 2000). The title of Section 2-803 reveals its unusually broad sweep: "Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations."

78. See ZHONGHUA RENMIN GONGHEGUO JICHENG FA QUANSHI [THE ANNOTATED INHERITANCE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 188, 189 (Zhou Xianqi ed., 1995) [hereinafter ANNOTATED INHERITANCE LAW] (reproducing case).

79. *Id.* at 189.

80. See *supra* notes 66-68 and accompanying text.

Law's "most severe legal sanction"<sup>81</sup> still further beyond its original intestate context to penalize the most "unworthy" trust beneficiaries.

Even if China resolves the issue of applicability of Article 7 forfeiture provisions to testamentary and inter vivos trusts, additional questions remain. The peculiar division of property ownership under trusts creates new fact patterns that the architects of China's distinctive approach to misconduct could not anticipate.

For example, if a beneficiary kills the settlor, what is the impact on alternate takers? Suppose the settlor creates the very type of trust commentators recommend—a trust to protect and transmit family wealth through the generations.<sup>82</sup> If the settlor is murdered by her only son, the initial income beneficiary, are her son's children disqualified as well for the 'sins of their father'?<sup>83</sup> What about unborn descendants? Some American courts have in fact adopted such a sweeping rule. They have disqualified the slayer and all persons related to the slayer, including unborn children, in order to prevent the slayer from receiving "indirect benefits."<sup>84</sup> This approach would seem to comport with Chinese intestate succession practice as well.<sup>85</sup> Chinese courts have even preferred escheat of the victim's estate to the state or a collective organization over inheritance by the wrongdoer's relatives.<sup>86</sup> In the trust context, however, this "indirect" punishment of the wrongdoer violates the settlor's express wishes. It thus puts the behavior-based model in direct collision with one of the principal rationales for trusts—donative freedom.<sup>87</sup> Donative

81. Li, *supra* note 55, at 36.

82. See *supra* notes 4-10 and accompanying text.

83. See *Misenheimer v. Misenheimer*, 325 S.E.2d 195, 198 (N.C. 1985) (allowing a slayer's children to inherit the slayer's share and stating that "[w]hile it may be true that 'the gods visit the sins of the fathers upon the children,' Euripides, *Phrixus* (see also *Exodus* 20:5; Shakespeare, *Merchant of Venice* III v 1), this Court will not do so").

84. *In re Estate of Safran*, 306 N.W.2d 27, 37 (Wis. 1981) ("The rule that persons directly related to the murderer are disqualified with him, is premised on the indirect benefits that would thereby flow to the murderer himself.").

85. See Inheritance Case No. 19, *supra* note 53, at 113 (stating that lineal descendants of an heir who forfeited inheritance rights under Article 7 do not inherit); Inheritance Case No. 425, in MIN SHANG FA XIN LEIXING ANLI JINGXI [ESSENTIAL ANALYSIS OF NEW TYPES OF CIVIL AND COMMERCIAL LAW CASES] 1201 (Liu Zhixin et al. eds., 1996) [hereinafter NEW TYPES OF CIVIL AND COMMERCIAL LAW CASES] (stating that children should not inherit Article 7 wrongdoer's share by representation). It should be noted, however, that the Supreme People's Court exempts two categories of lineal descendants from forfeiture of inheritance rights—descendants who "are unable to work and have no source of income" and descendants who "performed considerable support duties toward the decedent." Inheritance Law Opinion, *supra* note 75, art. 28.

86. See, e.g., Case No. 10, in USING CASES, *supra* note 23, at 19 (ruling that murderers and their heirs lost inheritance rights resulting in escheat of the estate to a collective).

87. See Lusina Ho, *Xintuo Lifa Bu Yi Cao Zhi Guoji* [Trust Legislation Should Not Be Acted Upon in Undue Haste], 1 BEIDA FALU PINGLUN [PEKING UNIVERSITY LAW REVIEW], no. 2, 618, 634

freedom may well prevail.

Trust ownership creates other complexities for China's behavior-based model. Consider, for example, the case of a man who bludgeons his brother to death<sup>88</sup> (or carves him into eight pieces and buries him under a fruit tree<sup>89</sup>) in a battle over their father's assets. In the intestate succession context, the slayer forfeits his rights to his father's estate under Article 7(2) of the Inheritance Law ("killing another heir in fighting over the estate").<sup>90</sup> In the trust context, however, the answer is not as obvious. If the father/settlor is still alive, he clearly has the right under Article 51(2) of the Trust Law to remove the slayer as trust beneficiary.<sup>91</sup> Murder of a co-beneficiary meets even the most stringent definition of a "material" infringement of a co-beneficiary's rights.<sup>92</sup>

After the father/settlor's death, however, it is uncertain whether the slayer will pay for his crime with loss of his property rights as well as his freedom.<sup>93</sup> In the United States, characterization of the slayer's trust interest as "contingent" or "vested" could determine the outcome.<sup>94</sup> That is, if the slayer would not receive the interest but for the death of the victim, he forfeits the interest.<sup>95</sup> If the slayer's crime simply accelerated the slayer's enjoyment of an interest he already possessed, then he does

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(1998) (stating that "[t]he basic principle of the trust system is that a property owner has the freedom to dispose of his own property" and showing that this principle "could potentially conflict with other principles").

88. See DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 18, 20 (reporting an Article 7 forfeiture case in which one brother "savagely bludgeoned his brother to death" with a wooden cudgel).

89. See Case No. 10, *supra* note 86, at 19 (reporting an Article 7 case in which two brothers murdered their younger brother, carved him into eight pieces, and buried him in the backyard under a fruit tree).

90. Inheritance Law, *supra* note 32, art. 7(2).

91. Trust Law, *supra* note 1, art. 51(2).

92. See *supra* text accompanying note 70 (discussing "material" requirement).

93. In some of the Chinese inheritance cases, the slayers escaped the death penalty and received a sentence of "death with reprieve." Others were not as fortunate. See, e.g., Case No. 9, *supra* note 23, at 19 (involving a slayer who received "death with reprieve" because he voluntarily surrendered himself to the authorities); Case No. 10, *supra* note 89, at 20 (stating without explanation that one of the two brothers who killed their youngest brother received the death sentence and the other received death with reprieve).

94. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmt. n (Tentative Draft No. 3, 2001) (distinguishing between the situation where an indefeasibly vested remainder trust beneficiary kills the life tenant and where a contingent remainder beneficiary kills the life tenant); MCGOVERN & KURTZ, *supra* note 42, at 72-73 (distinguishing between vested remainder and contingent remainder cases).

95. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmt. n illus. 9 (Tentative Draft No. 3, 2001). Another possibility is that "the court could wait to see if B [the slayer] outlives A's [the victim's] normal life expectancy." MCGOVERN & KURTZ, *supra* note 42, at 73 (citing *In re Moses' Estate*, 300 N.E.2d 473 (Ill. App. Ct. 1973) as an example).



not forfeit the interest.<sup>96</sup> If China adopts a similar distinction,<sup>97</sup> definitions of private property rights could once again trump behavioral considerations in disposition of decedents' wealth.

### *C. Ignoring the Claims of the Worthy*

Chinese inheritance law explicitly rewards exemplary conduct toward the decedent, regardless of whether the estate is distributed by intestacy, will, or contract. Trusts promise to frustrate these innovative schemes for recognizing survivors' "acts of care."<sup>98</sup>

#### *1. Circumventing Intestate Remedies*

China's Inheritance Law gives courts broad discretion to readjust intestate distribution of estates to reflect claimants' actual contributions to the decedent's financial, physical, and emotional welfare during life as well as funeral arrangements after the decedent's death.<sup>99</sup> This scheme encompasses all of the decedent's meritorious survivors, irrespective of their family status. Thus, in marked contrast to the situation in the United States,<sup>100</sup> a model Chinese son who stayed at home to care for his elderly, ill father could receive five times more than his brothers who were too "busy at work" to visit or even write letters to their father.<sup>101</sup> A widowed daughter-in-law who "willingly bore [the] burden" of looking after a man so grief-stricken at his son's death that he became ill and bedridden for a decade could be elevated to intestate heir status.<sup>102</sup> Even a neighbor could

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96. See MCGOVERN & KURTZ, *supra* note 42, at 72-73 ("If B's [the slayer's] remainder was vested he ought not to forfeit it . . ."). The slayer's "enrichment from accelerating his remainder could be avoided by postponing his enjoyment for the duration of [the victim's] normal life expectancy," however. *Id.* at 72; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (Tentative Draft No. 3, 2001) § 8.4 cmt. n illus. 8 (stating that the slayer "receives the remaining corpus, which is the present value of the remainder interest determined actuarially").

97. The Chinese Trust Law provides only a broad definition of beneficiary as "a person entitled to enjoy the benefits of a trust." Trust Law, *supra* note 1, art. 43, para. 1. It fails to deal with such basic issues as income versus remainder interests and the rights of unborn beneficiaries, let alone vested versus contingent interests. See WANG & GUO, *supra* note 6, at 112-14, 116-17 (discussing these gaps).

98. I borrow this term from Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 514 (1996) (stating that the "current law of undue influence . . . does not adequately account for acts of care").

99. See Foster, *Linking Support and Inheritance*, *supra* note 24, at 1241-45 (discussing and citing cases).

100. See *id.* at 1239-40, 1244-45 (contrasting American and Chinese approaches).

101. Case No. 30, in USING CASES, *supra* note 23, at 55, 55-56.

102. See FAXUE ANLI JINGXUAN [SELECTED LAW CASES] 84, 84 (Li Liangpin et al. eds., 1994) [hereinafter SELECTED LAW CASES] (reproducing case).

end up with the bulk of a decedent's estate to recognize her two decades of "meticulous care."<sup>103</sup>

Trusts present both indirect and direct threats to China's innovative remedies. First, trusts can circumvent the basic prerequisite for the Inheritance Law's flexible readjustment scheme—an intestate estate for courts to distribute. If a settlor transfers property during life into an *inter vivos* trust, she depletes or even eliminates that estate.<sup>104</sup> Thus, unless China adopts future measures to locate and recapture trust assets after the settlor's death, courts may be effectively precluded from recognizing survivors' acts of care toward an intestate decedent.

Second, trusts promise to expand a significant current exception to the behavior-based distribution of estates. In practice, courts have decided that freedom of testation supersedes intestate reward schemes.<sup>105</sup> As a result, if a decedent leaves a valid will that expresses his genuine wishes—no matter how misguided or capricious—that will preempts courts from rearranging his estate plan to reflect his survivors' good deeds. One case analysis summed up this restriction: "It should be made clear that even if an heir performed duties toward the decedent, the decedent can, nonetheless, make a will leaving his or her estate to another person. To be effective, the will need only conform with the requirements stipulated in the Inheritance Law."<sup>106</sup>

Under this exception to the behavior-based model of inheritance, a mother could disinherit her younger son who helped defray her living expenses for nearly twenty years, simply because on a given day she "felt her elder son was very kind to her."<sup>107</sup> Similarly, a father could disregard the twelve years of extraordinary support his sons provided to their father, stepmother, and half-siblings and leave them nothing but his advice to "live independently, relying on their own labor, and become good children of China."<sup>108</sup>

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103. Old Lady Qi case, *supra* note 60, at 119.

104. *See supra* Part I.B.

105. At least one case commentary has rejected this view, however. *See* MIN SHANG FA SHIWU YANJIU: JICHENG JUAN [A STUDY OF CIVIL AND COMMERCIAL LAW PRACTICE: INHERITANCE VOLUME] 50 (Yang Zhenshan ed., 1993) [hereinafter CIVIL AND COMMERCIAL LAW PRACTICE] (stating that it is "impermissible" to use wills to disinherit "people who performed the main duties of support, especially . . . female heirs who performed the main duties of support"). The Inheritance Law expressly gives wills precedence over intestate succession. Inheritance Law, *supra* note 32, art. 5.

106. *See* Case No. 85, in ZHONGGUO MINFA JIAOXUE ANLI XUANBIAN [COLLECTION OF CHINESE CIVIL LAW CASES FOR TEACHING] 201, 201 (1996) [hereinafter COLLECTION OF CASES FOR TEACHING].

107. Case No. 33, in USING CASES, *supra* note 23, at 61, 61-62.

108. Case No. 85, *supra* note 106, at 201, 201.

Chinese commentators have defended such outcomes on the grounds that application of intestate remedies would be “inappropriate” and would “blu[r] the distinction between intestate succession and testate succession.”<sup>109</sup> This rationale would seem to extend also to disposition of assets by a valid testamentary trust. Annotated commentary to the Inheritance Law articulates a broader principle that could encompass inter vivos trusts as well: “The testator has the right to transfer his own property to whomever he wishes. As long as he does not violate legal prohibitions, others cannot interfere.”<sup>110</sup>

## 2. Restricting Enforcement of Will Provisions for Worthy Survivors

In China, will dispositions in favor of caregivers—family and nonfamily alike—are considered “both legal and appropriate.”<sup>111</sup> Courts apply will execution requirements liberally to enforce informal, unconventional, and defective wills that recognize beneficiaries’ contributions to the testator’s welfare. They uphold unwitnessed, handwritten wills (holographic wills),<sup>112</sup> audiotaped wills,<sup>113</sup> oral wills,<sup>114</sup> and proxy wills<sup>115</sup> that reward support of the decedent. One Shanghai court even allowed a will despite “defects” in its “witnessing document.”<sup>116</sup> The

109. *Id.* at 202.

110. ANNOTATED INHERITANCE LAW, *supra* note 78, at 76 (defending the testator’s right to devise his estate to his son and omit his daughter).

111. DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 154.

112. *See, e.g.*, Case No. 37, in USING CASES, *supra* note 23, at 68, 69 (upholding a will that disinherited the testator’s granddaughter for “unfilial” behavior, left six gold rings to her “neighbor who looked after [her] during illness,” and devised the remainder of her estate to the “Municipal Children’s Welfare Foundation to educate those who do not understand respect for the elderly, do not cherish the elderly, and have regard only for money”). *See* Inheritance Law, *supra* note 32, art. 17, para. 2 (allowing holographic wills that are “in the testator’s handwriting, signed, and dated”).

113. *See, e.g.*, Case No. 38, in USING CASES, *supra* note 23, at 70, 74 (upholding an audiotaped will devising the estate to the decedent’s grandchild who supported her). *See* Inheritance Law, *supra* note 32, art. 17, para. 4 (allowing audiorecorded wills that have at least two witnesses).

114. *See, e.g.*, Inheritance Case No. 15, in ANLI XUANBIAN [COLLECTION OF CASES] 141, 142 (1986) [hereinafter COLLECTION OF CASES] (upholding an oral will in favor of a neighbor who supported the decedent). *See* Inheritance Law, *supra* note 32, art. 17, para. 5 (allowing oral wills “under emergency circumstances” if witnessed by at least two witnesses).

115. *See, e.g.*, CIVIL AND COMMERCIAL LAW PRACTICE, *supra* note 105, at 103 [hereinafter Yu Lai v. Yu Jing & Chen Xia] (enforcing a proxy will devising the decedent’s entire estate to the two individuals who cared for the testator during illness). Wu Yuzhi dictated the will to her *danwei* leader. *Id.* He wrote and signed the will, which she and two witnesses then signed. *Id.* The court declared the will valid but required allocation of a mandatory share from the estate to Wu’s minor son. *Id.* at 104. For a discussion of mandatory share protections, see *infra* Part III.A. *See* Inheritance Law, *supra* note 32, art. 17, para. 3 (allowing wills written by a witness on a testator’s behalf so long as that witness writes, dates, and signs the will and the testator and at least one other witness sign the will).

116. Case No. 1, in ‘95 SHANGHAI FAYUAN ZUI XIN ANLI JINGXUAN [‘95 SELECTION OF THE SHANGHAI COURTS’ LATEST CASES] 1, 2 (Li Guoguang et al. eds., 1995).

court emphasized that the beneficiaries had been the testator's principal caregivers during his final bout with lung cancer and had arranged and paid for his funeral.<sup>117</sup>

China's Trust Law could undermine this liberal enforcement of will dispositions for a decedent's most worthy survivors. The new legislation requires that all trusts, including testamentary trusts, be "in written form."<sup>118</sup> Unlike oral wills (and contracts<sup>119</sup>), oral trusts are void. Chinese scholars and drafters attribute this difference to the "continuous nature" of trust management or disposition of property and the complexity it creates in relations among trust parties.<sup>120</sup> They also point to the particular problems of supervising and enforcing trusts in China.<sup>121</sup> They claim written trusts "protect trust parties' legal rights and interests" and "prevent disputes."<sup>122</sup>

Although these arguments for excluding oral trusts are well-founded, exclusion may lead to some peculiar results in practice. In effect, form rather than substance determines whether the testator/settlor is able to reward exemplary conduct. For example, suppose a testator makes a valid oral will in favor of two neighbors who tended to her every need during life. If she leaves an outright legacy to one neighbor but puts money in trust for the other neighbor, apparently only the first neighbor would take.

China also faces the problem of defining what constitutes "written form." Annotated commentary indicates that testamentary trusts in holographic or proxy wills will meet the writing requirement.<sup>123</sup> It does not mention trusts in audiotaped wills, however. Yet, audiotaped wills, like oral wills, are expressly permitted by the Inheritance Law.<sup>124</sup> The status of trusts in videotaped, faxed, or electronic format is equally uncertain. Article 11 of China's Contract Law defines "written form" broadly to "refe[r] to written contract, letter, electronic text (including telegraph, wire, facsimile, electronic data exchange, or electronic mail), and any

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117. *Id.*

118. Trust Law, *supra* note 1, art. 8.

119. Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the People's Republic of China] art. 10 (Mar. 22, 1999), in Fagui Huibian, vol. 1, 4, 6 (1999) [hereinafter Contract Law] (permitting oral contracts except in limited cases). *See also* Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law of the People's Republic of China] art. 56 (Apr. 12, 1986), in Fagui Huibian 1, 13 (1986) (allowing civil juristic acts in oral as well as written or other form).

120. WANG & GUO, *supra* note 6, at 19.

121. *Id.*; ZHOU, *supra* note 3, at 110-15, 204-05.

122. WANG & GUO, *supra* note 6, at 19.

123. *Id.* at 31.

124. *See supra* notes 113-14.

other means that conveys the contents in visible form.”<sup>125</sup> Given the different treatment of oral trusts and oral contracts, however, it is unclear to what extent courts will apply this expansive contractual definition of “written form” in the trust context.

### 3. *Conflicts with Contractual Disposition of Estates*

Chinese inheritance law actively promotes<sup>126</sup> the use of so-called “bequest and support agreements,” under which one party promises to leave all or part of his estate to another party in exchange for “lifetime support and burial after death.”<sup>127</sup> As in the wills context, courts enforce these agreements liberally in practice to reward exemplary conduct toward the decedent. If the supporting party entered into the arrangement in good faith and “scrupulously observe[d]”<sup>128</sup> its terms, courts make every effort to recognize that party’s contributions to the decedent’s welfare even where the agreement is informal, oral, defective, or prematurely terminated by the other party.<sup>129</sup>

Under Chinese inheritance law, these contractual arrangements for disposition of a decedent’s wealth have the highest legal status.<sup>130</sup> They override intestacy rules<sup>131</sup> and conflicting will provisions.<sup>132</sup> As a result, bequest and support agreements with a distant relative or nonrelated individual or organization—be it a nephew,<sup>133</sup> village collective,<sup>134</sup> or the

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125. Contract Law, *supra* note 119, art. 11.

126. See Inheritance Case No. 428, in NEW TYPES OF CIVIL AND COMMERCIAL LAW CASES, *supra* note 85, at 1211, 1213 (stating that the bequest and support agreement “should be vigorously developed and promoted” because it “lightens the burden on society . . . [and] can also encourage the younger generation to support the elderly and nurture the disabled and minors”).

127. Inheritance Law, *supra* note 32, arts. 31, 32.

128. ANNOTATED INHERITANCE LAW, *supra* note 78, at 189 (stating in an appellate opinion that “the supporting party also should scrupulously observe the agreement and perform support duties”).

129. See Foster, *Linking Support and Inheritance*, *supra* note 24, at 1252-53 (discussing liberal enforcement of bequest and support agreements).

130. See Case No. 57, in USING CASES, *supra* note 23, at 104 (case commentary stating that “[t]he bequest and support agreement has the highest legal force of the five methods for transferring estates”).

131. See Inheritance Case No. 428, *supra* note 126, at 1213 (asserting that bequest and support agreements have a higher legal status than intestate succession).

132. See Inheritance Law Opinion, *supra* note 75, art. 5 (stating that if the decedent’s bequest and support agreement and will “are in conflict, [the estate] is disposed of in accordance with the agreement, and the will that conflicts with the agreement is entirely or partially void”).

133. See Case No. 88, in COLLECTION OF CASES FOR TEACHING, *supra* note 106, at 209 (enforcing an elderly widow’s bequest and support agreement with two nephews and denying her daughter’s intestate succession claim).

134. See, e.g., Case No. 57, *supra* note 130, at 103 (enforcing a bequest and support agreement with a village collective organization and rejecting the decedent’s daughter’s intestacy claim).

Wooden Junk Transport Cooperative<sup>135</sup>—have trumped inheritance claims by even the decedent’s children.

Trusts promise to create significant conflicts with these contractual approaches for rewarding the decedent’s worthy survivors. The basic problem is that Chinese law has yet to specify where trusts rank in the hierarchy of schemes for disposing of a decedent’s assets. This omission may well raise numerous questions in practice.

For example, suppose a settlor enters into a bequest and support agreement under which she promises to devise one-half of her estate to the supporting party. Two years later, she creates a trust that effectively transfers all her assets to a trustee to manage on behalf of someone other than the supporting party. If the supporting party fulfills his obligation to provide lifetime care, who takes the decedent’s assets after her death?

If the trust is a testamentary trust, the court may decide to extend the Supreme People’s Court’s directive for resolving conflicts between wills and bequest and support agreements. That directive states that where the documents “are in conflict, [the estate] is disposed of in accordance with the agreement, and the will that conflicts with the agreement is entirely or partially void.”<sup>136</sup>

If the trust is an inter vivos trust, however, challenging questions arise. First, are assets in an inter vivos trust part of the decedent’s “estate” for purposes of a bequest and support agreement? As discussed above, the Trust Law explicitly excludes such assets from the settlor’s estate except where the settlor is the sole beneficiary.<sup>137</sup> Second, can a supporting party under a bequest and support agreement reach trust assets as a “creditor”<sup>138</sup> of the settlor? Third, if a supporting party does qualify as a creditor, what is the likely impact on the trust? Can the trust be “nullified” under Article 12 as a trust “establish[ed]” by the settlor that “prejudices the interests of her creditors”?<sup>139</sup> Or does the trust remain valid with respect to the one-half of the settlor’s assets that is not distributed pursuant to the bequest and support agreement? Note that even if the trust is “nullified,” the

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135. See CIVIL AND COMMERCIAL LAW PRACTICE, *supra* note 105, at 177, 178 (ruling that the decedent’s bequest and support agreement with the Wooden Junk Transport Cooperative supersedes the decedent’s will devising her entire estate to her daughter).

136. Inheritance Law Opinion, *supra* note 75, art. 5.

137. See *supra* note 37 and accompanying text. The general rule is that once the agreement becomes effective, the supported party “has no rights to distribute his estate in another way [or] to give it to a third party.” Liu Nanzheng & Zhang Peilin, *Yizeng Fuyang Xieyi Chu Tan* [Preliminary Exploration of Bequest and Support Agreements], FAXUE YANJIU [STUDIES IN LAW], no. 3, 6, 8 (1985).

138. See Trust Law, *supra* note 1, art. 17, para. 1.

139. *Id.* art. 12, para. 1.

supporting party may not be adequately rewarded for his acts of care. The Trust Law stipulates that “nullification shall not affect the trust benefits already obtained by a bona fide beneficiary.”<sup>140</sup>

Suppose, instead, the settlor creates the trust prior to entering into the bequest and support agreement. If the trust is a testamentary trust, the date the settlor made the trust is irrelevant. Under Chinese law, the trust does not become effective until after the settlor’s death.<sup>141</sup> If the trust is an inter vivos trust, however, the timing becomes important. An inter vivos trust can be valid prior to the bequest and support agreement and legally dispose of all of the supported party’s assets.<sup>142</sup> This situation reveals further gaps in the Trust Law that threaten to undermine the bequest and support agreement courts and scholars argue “deserves the utmost encouragement.”<sup>143</sup> The key question the Trust Law leaves unanswered is whether a supporting party has any claim whatsoever to assets transferred into a valid inter vivos trust that predates a bequest and support agreement. If not, how does someone entering into such an agreement discover whether the other party in fact has property to devise at death?<sup>144</sup> Unfortunately, the Trust Law is silent on this issue as well. Although Chinese law provides expansive information rights to settlors and beneficiaries,<sup>145</sup> it has yet to resolve the information issues that will confront outsiders dealing with trust parties.<sup>146</sup>

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140. *Id.* art. 12, para. 2.

141. The trust must also be accepted by the trustee. *Id.* art. 8, para. 3. *See* WANG & GUO, *supra* note 6, at 31 (stating that “[a] testamentary trust refers to a trust that the settlor during his lifetime established in his will and after his death became effective”).

142. An inter vivos trust becomes effective during the settlor’s lifetime and may survive the settlor’s death. *See supra* note 37 and accompanying text.

143. Case No. 57, *supra* note 130, at 104 (case commentary stating that the bequest and support agreement “deserves the utmost encouragement”).

144. This need for information about assets held in trust could arise in another context as well—where the supporting party enters into a bequest and support agreement with someone who turns out to be the beneficiary of a spendthrift or other protective trust that restricts transfer of the beneficiary’s trust interest and creditors’ rights to reach the trust interest. *See* Trust Law, *supra* note 1, arts. 47, 48 (providing that if restrictive provisions exist in the trust document, trust benefits cannot be used to discharge an insolvent beneficiary’s debt or transferred).

145. *See id.* art. 20 (providing information rights for the settlor); *id.* art. 49 (extending Article 20 rights to the beneficiary). *See* WANG & GUO, *supra* note 6, at 53-55 (discussing information rights).

146. *See* Li & Li, *supra* note 44, at 5 (discussing the dangers for third parties dealing with trusts due to the lack of a system for public recording of trusts).

An early commentator on China's 1985 Inheritance Law expressed concern about the possible dangers of exalting freedom of testation.<sup>147</sup> He pointed out that "wills frequently reflect the testator's goodness or evil, joy or disgust at a given moment" and can create serious unfairness and conflict.<sup>148</sup> He took comfort, however, in the fact that the "overwhelming majority of inheritance [cases] are handled on the basis of intestate succession" and that "very few cases" involve disposition of assets by will.<sup>149</sup> The author cautioned that intestacy must retain its dominant position or else "harmful" results would ensue.<sup>150</sup> By adding trusts to its scheme for donative transfer of wealth, China may have opened the door to still further inequity and erosion of its distinctive behavior-based system of inheritance. As Part III will show, trusts could also undermine the inheritance system's mechanisms to promote support and gender equality.

### III. TRUSTS, SUPPORT, AND GENDER EQUALITY

The architects of China's Inheritance Law sought to use inheritance to accomplish two ambitious, "distinctively Chinese" goals: (1) to encourage private support of dependents and (2) to improve the status of women in Chinese society.<sup>151</sup> Trusts could frustrate both goals.

#### A. Challenges to Support Protections

China explicitly links support and inheritance.<sup>152</sup> It uses inheritance to reward those who provide support and to protect those who need support.<sup>153</sup> As Part II.C. has shown, trusts challenge existing mechanisms for recognizing survivors of the first support relationship—the exemplary claimants who contributed to the decedent's welfare.<sup>154</sup> This Part will argue that trusts present threats as well to schemes that respond to survivors of the second relationship—the needy survivors whom the decedent supported (or should have supported) during life.

Chinese intestacy rules give courts broad discretion to readjust intestate

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147. See Zhang Peilin, *Tantan Jicheng Fangshi* [Discussing Inheritance Methods], FAXUE [JURISPRUDENCE], no. 3, 26, 26-27 (1986).

148. *Id.* at 26-27.

149. *Id.* at 27.

150. *Id.*

151. *Law on Inheritance Pushes Equal Rights*, CHINA DAILY, Jan. 16, 1985, at 1 (legislators emphasizing that support and gender equality were goals of the draft Inheritance Law).

152. See Foster, *Linking Support and Inheritance*, *supra* note 24, at 1217-54.

153. See *id.*

154. See *supra* Part II.C.



shares to reflect need as well as desert.<sup>155</sup> Courts can and do provide larger than intestate shares to heirs who are “unable to work” and “whose lives are especially difficult.”<sup>156</sup> Courts have awarded most or even all of the estate to a ten-year-old schoolgirl,<sup>157</sup> a mentally ill son,<sup>158</sup> and an elderly, disabled widow.<sup>159</sup> Chinese intestacy law also ensures that dependents outside the immediate family circle do not have their lives unduly disrupted by the decedent’s death.<sup>160</sup> In China, a needy sister,<sup>161</sup> an “old and weak”<sup>162</sup> grandmother, and even a destitute old man in the countryside to whom the decedent had voluntarily contributed ten yuan per month<sup>163</sup> all could inherit.

As discussed above,<sup>164</sup> trusts threaten intestate schemes by restricting or even eliminating the estate that courts have available to distribute to needy survivors. China has responded to this problem in the wills context by creating a limitation on donative freedom. It requires that wills reserve “mandatory shares” for “heirs who are unable to work and have no source of income”<sup>165</sup> and for children born after the decedent’s death.<sup>166</sup> China’s Supreme People’s Court has directed that any will that does not reserve such shares is partially void and can dispose of only the property that remains after satisfying the shares.<sup>167</sup> In practice, courts have applied mandatory share provisions to rescue a wide variety of disinherited family members, including a severely disabled daughter,<sup>168</sup> a minor son,<sup>169</sup> a

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155. See Foster, *Linking Support and Inheritance*, *supra* note 24, at 1230-39.

156. Inheritance Law, *supra* note 32, art. 13, para. 2.

157. See ANNOTATED INHERITANCE LAW, *supra* note 78, at 94-95 (reporting case). The court also used Article 13 to award larger than intestate shares to the decedent’s elderly and ill parents. *Id.* at 95.

158. See, e.g., Case No. 28, in USING CASES, *supra* note 23, at 52, 53.

159. See, e.g., DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 105, 106-07 [hereinafter *Yu Hu v. Wang Chunlan*] (awarding the bulk of the decedent’s estate under Article 13, paragraph 2 to the decedent’s widow who was elderly, infirm, unable to work, and destitute).

160. See Inheritance Law, *supra* note 32, arts. 10, 12, 14 (providing remedies for blended and extended family members and nonrelatives).

161. See DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 116, 116 (reproducing a case in which a court ruled that the decedent’s elderly, ill, and destitute sister was entitled to an “appropriate” share of the estate).

162. *Id.* at 115, 115 (reproducing Old Lady Li case).

163. *Yu Hu v. Wang Chunlan*, *supra* note 159, at 105-07.

164. See *supra* Part II.C.1.

165. Inheritance Law, *supra* note 32, art. 19.

166. *Id.* art. 28.

167. Inheritance Law Opinion, *supra* note 75, art. 37.

168. See CIVIL AND COMMERCIAL LAW PRACTICE, *supra* note 105, at 140, 141 [hereinafter *Wang Jianshu v. Liu Zhen*] (holding a will partially void because it did not reserve a mandatory share for the decedent’s disabled daughter); Case No. 41, *supra* note 23, at 75, 76 (declaring a will void that disinherited the decedent’s mentally and physically disabled daughter).

169. *Yu Lai v. Yu Jing & Chen Xia*, *supra* note 115, at 105.

ninety-one-year-old mother,<sup>170</sup> and a surviving spouse so destitute she was forced to sell her deceased husband's old fur-lined jacket to survive.<sup>171</sup>

Dependents disinherited by trust rather than will may suffer a very different fate. In a surprising gap, China's new Trust Law does not expressly extend mandatory share protections to trusts. At best, it does so indirectly and to testamentary trusts only. As discussed above,<sup>172</sup> Article 13's stipulation that "establishment" of testamentary trusts must comply with the Inheritance Law's "provisions on wills" may or may not encompass the Inheritance Law's mandatory share as well as will execution requirements.

If mandatory share protections are applied to testamentary trusts, significant questions remain. Professor Lusina Ho raised one such question in her 1998 critique of the draft Trust Law—whether such trusts are "completely or partially void."<sup>173</sup> She noted that in the wills context courts must resolve this issue on a case-by-case basis.<sup>174</sup> Thus, she warned that "trusts that might not satisfy Article 19 of the 'Inheritance Law' [the mandatory share provision] could potentially go through lengthy litigation before their status is determined."<sup>175</sup>

Property questions arise as well. For example, suppose the decedent leaves property in trust for a minor or mentally disabled family member. Will property in trust be seen as the equivalent of outright ownership for mandatory share purposes? What if the individual entitled to a mandatory share is only one of several trust beneficiaries? Chinese inheritance practice indicates that mandatory share property can be managed by a third party as agent for the dependent survivor.<sup>176</sup> Moreover, one commentator has stated that "the decedent has complete freedom to specify which property should be reserved for heirs."<sup>177</sup>

Another property issue concerns contributions to the mandatory share. If a testamentary trust is included in a will that devises other property outright to legatees, it is unclear which assets are used to satisfy the mandatory share. Potentially, the share could come from the trust first, from the legatees first, or from the trust and legatees on a pro rata basis.

Finally, the enforcement of mandatory share rights against

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170. Case No. 1, *supra* note 116, at 3.

171. Inheritance Case No. 20, in *COLLECTION OF CASES*, *supra* note 114, at 146, 146-47.

172. *See supra* notes 31-33 and accompanying text.

173. Ho, *supra* note 87, at 634.

174. *Id.*

175. *Id.*

176. *See, e.g.*, Wang Jianshu v. Liu Zhen, *supra* note 168, at 141.

177. *Id.* at 142 (case analysis).

testamentary trusts is uncertain. If a trust is involved, does a claimant have to bring formal action under the Trust Law as a “creditor”?<sup>178</sup> Or will courts continue to address mandatory share issues on a case-by-case basis in disputes regarding distribution of decedents’ estates?

As for dependents omitted by inter vivos trusts, their fate is even more precarious. Although commentators in the inheritance context have indicated that limits on freedom of testation, including mandatory share requirements, may also apply to donative transfers other than wills,<sup>179</sup> the final version of the Trust Law did not adopt that position. Yet, only a year earlier, a high-level symposium of Chinese and foreign trust experts had specifically highlighted the dangers inter vivos trusts could pose to mandatory inheritance rules.<sup>180</sup> The experts recommended adding a new provision to the Trust Law that would have given qualifying survivors creditors’ rights “if the settlor died within a certain period after establishing the trust.”<sup>181</sup> They argued that this amendment would “ensure that [survivors] have the right to challenge the trust and protect their inheritance rights.”<sup>182</sup> Perhaps the Chinese courts ultimately will expand the Trust Law’s definition of “creditor” in this way to respond to the plight of the settlor’s neediest survivors.

### *B. Threats to Gender Equality*

In 1985, Chinese legislators proclaimed that a fundamental objective of the new inheritance legislation was “to insure equality between the sexes.”<sup>183</sup> Since that time, inheritance has emerged as an important tool not only to recognize women’s legal property rights but also to combat “feudal, patriarchal”<sup>184</sup> notions of the status of women in the Chinese

178. Trust Law, *supra* note 1, arts. 12, 17.

179. *See, e.g.*, Case No. 41, *supra* note 23, at 76 (commentary on a mandatory share case stating that the Inheritance Law’s “limits on freedom of testation” do not apply only to “testate succession”).

180. *Summary Report*, *supra* note 2, at 172. Interestingly, unlike the English translation, which used the term “mandatory inheritance regulations,” *id.* at 511, the Chinese text of the report referred broadly to rules relating to intestate heirs that “must not be circumvented.” *Id.* at 172. Thus, its recommended remedy for decedents’ survivors might encompass cases where inter vivos trusts depleted intestate estates that would otherwise be distributed to worthy or needy heirs. *See supra* Parts I.B, II.C.1 & text accompanying note 164.

181. *Summary Report*, *supra* note 2, at 172.

182. *Id.*

183. *Law on Inheritance Pushes Equal Rights*, *supra* note 151, at 1. *See also* Guanyu “Zhonghua Renmin Gongheguo Jicheng Fa (Cao An)” de Shuoming [Explanation of the “(Draft) Inheritance Law of the People’s Republic of China”], RENMIN RIBAO, Apr. 14, 1985, at 4, 4 (speech by Wang Hanbin discussing the draft Inheritance Law’s efforts “to protect women’s inheritance rights”).

184. Inheritance Case No. 10, in COLLECTION OF CASES, *supra* note 114, at 137, 137 (case analysis describing “adoption” of a relative’s son to ensure a male inherits as “a pure and simple evil

family, economy, and society. In inheritance law and practice, China has sought to promote gender equality through two principal mechanisms: intestate succession and marital property schemes. Gaps in the Chinese Trust Law could put both mechanisms in jeopardy.

### 1. *Defeating Intestate Approaches for Promoting Gender Equality*

In an early analysis of the new law, Zhou Xianqi remarked that “from beginning to end, the Inheritance Law is permeated with the principle of gender equality.”<sup>185</sup> Nowhere is that commitment to gender equality more evident than in the law’s intestate succession chapter. The chapter opens: “Men and women have equal inheritance rights.”<sup>186</sup>

Post-1985 inheritance cases reveal that gender discrimination remains a serious problem in China. Fathers try to cut out daughters by “adopting” a relative’s son to inherit the family business.<sup>187</sup> Brothers insist their married sisters are “spilled water,”<sup>188</sup> “outsiders”<sup>189</sup> with no rights to family

legacy of the feudal, patriarchal clan system”).

185. Zhou Xianqi, *Shi Lun Wo Guo Jicheng Fa de Xingzhi he Tedian* [*Preliminary Discussion of the Nature and Special Characteristics of Chinese Inheritance Law*], FAXUE YANJIU [STUDIES IN LAW], no. 5, 32, 34 (1985).

186. Inheritance Law, *supra* note 32, art. 9. Subsequent articles explicitly make male and female family members of the same relationship to the decedent equally eligible to inherit, *id.* art. 10 (granting equal status to sons and daughters, fathers and mothers, brothers and sisters, grandfathers and grandmothers), and give special recognition to support contributions by widowed daughters- and sons-in-law. *Id.* art. 12. Other intestate provisions use gender-neutral terms. *See, e.g., id.* art. 11 (giving “lineal descendants” rights to inherit shares of deceased parents by representation); *id.* art. 13 (readjusting intestate shares to reflect support needs or contributions of an “heir”); *id.* art. 14 (stating that a “person” who was in a support relationship with the decedent can receive an “appropriate” amount from the estate).

187. *See, e.g.,* Inheritance Case No. 10, *supra* note 184 (denying the inheritance rights of a nephew “adopted” by the decedent to inherit the family business at the expense of the decedent’s daughter). *See* JICHENG FA LUJIE SHIYONG YU ANLI PINGXI [UNDERSTANDING APPLICATIONS OF INHERITANCE LAW AND CASE ANALYSES] 57-58 (Gao Yan & Liu Yuling eds., 1996) [hereinafter UNDERSTANDING APPLICATIONS] (discussing the Chinese traditional practice of adopting a relative’s son for inheritance purposes).

188. *See, e.g., Tradition in the Shadow of Modern Legal Practice: Continuity and Change in the Delivery of Justice in China (I)*, 31 CHINESE L. & GOV’T 74 (Sept.-Oct. 1998) (Ethan Michelson ed. & trans.) (reproducing a May 18, 1995 letter to a Chinese newspaper legal advice column by a daughter whose brothers claimed that “girls who marry are spilled water, so the estates of parents can only be divided by sons, and there is no share for daughters”).

189. Inheritance Case No. 3, *in* COLLECTION OF CASES, *supra* note 114, at 130, 131 (involving a son who claimed “if there is a male, the estate goes to the male, if there is no male, it goes to the female” and “a daughter who marries becomes an outsider”). In another case, a son argued unsuccessfully that his married sister had no inheritance rights because his parents had given her money when she married. Case No. 1, *in* UNDERSTANDING APPLICATIONS, *supra* note 187, at 177, 178.

property.<sup>190</sup> In-laws likewise argue that their sons' widows forfeit inheritance rights upon remarriage.<sup>191</sup> One son even disputed his elderly mother's claim to family property on grounds that she stayed at home and "never worked."<sup>192</sup>

In each situation, Chinese courts and commentators have used intestacy as a legal and didactic mechanism to address gender discrimination and the mindset that perpetuates it.<sup>193</sup> They have emphasized that intestacy rules governing both entitlement to inherit and special recognition of support needs and contributions apply across the board to *all* Chinese citizens.<sup>194</sup>

Under China's new Trust Law, can the father "imbued with the feudal ideology that men are superior to women"<sup>195</sup> now do by trust what he cannot do by intestate succession—transfer all assets to his son and ignore even his most devoted daughter? Or is a trust of this sort void on legal or public policy grounds? The Trust Law does not directly address this question.<sup>196</sup> Precedent in the wills context suggests that discriminatory trusts may well be upheld. Despite early views that discriminatory wills

190. It should be noted that although most of the disputes involve married daughters, occasionally siblings argue that a married son who lives with his wife's family has no inheritance rights. *See, e.g.*, Case No. 77, in *COLLECTION OF CASES FOR TEACHING*, *supra* note 106, at 180 (three brothers claiming that their brother who had lived with his wife's family for more than a decade "should not receive a share of [their parents'] estate" because "[t]his was the same as a daughter marrying out of the family").

191. *See, e.g.*, ANNOTATED INHERITANCE LAW, *supra* note 78, at 94-95 (reporting a case in which parents-in-law claimed unsuccessfully that because their son's widow remarried she could not inherit her deceased husband's estate).

192. *Yu Hu v. Wang Chunlan*, *supra* note 159, at 106.

193. *See, e.g.*, Case No. 1, *supra* note 189, at 177-83 (case and analytical commentary discussing gender discrimination in inheritance); CIVIL AND COMMERCIAL LAW PRACTICE, *supra* note 105, at 41-46 (same).

194. *See* Zhang Yongen, *Yi Bu Juyou Zhongguo Tese de Jicheng Fa* [An Inheritance Law with Chinese Characteristics], 25 FAXUE JIKAN [LEGAL STUDIES QUARTERLY], no. 3, 33, 35 (1985) (discussing the full range of Inheritance Law provisions "recognizing and protecting women's equal rights of inheritance" and promoting "the constitutionally prescribed principle of gender equality"). In several cases, courts apply both entitlement and support provisions in distributing intestate estates. *See, e.g.*, *Yu Hu v. Wang Chunlan*, *supra* note 159, at 105 (recognizing an elderly, infirm widow's entitlement to marital property and first order intestate heir status and also factoring in her special support needs).

195. Inheritance Case No. 19, in *COLLECTION OF CASES*, *supra* note 114, at 145, 145-46 (referring to a father who disinherited his minor daughter by will).

196. The Trust Law requires a "lawful trust purpose," Trust Law, *supra* note 1, art. 6, and contains a general statement that when trust parties "engage in trust activities, they must comply with laws and administrative regulations, respect the principles of voluntariness, fairness, and good faith, and not infringe the interests of the state or society." *Id.* art. 5. The Trust Law provides that a trust is void if "[t]he trust's purpose violates laws or administrative regulations or harms the public interest." *Id.* art. 11(1). It does not specify whether a trust that discriminates on the basis of gender falls within these provisions.

violate law and “socialist morality,”<sup>197</sup> the general consensus today is that donative freedom prevails even at the expense of gender equality.<sup>198</sup> The daughter disinherited by will thus has no rights to her father’s estate unless she is sufficiently young, disabled, or destitute to qualify for mandatory share protection.<sup>199</sup> The daughter disinherited by trust, however, may not have even that protection.<sup>200</sup>

Because China has not adopted a Rule Against Perpetuities or any limitation on trust duration,<sup>201</sup> trusts present even greater challenges than wills to gender equality. For example, suppose the settlor restricted trust beneficiaries to male descendants with male children. In so doing, the settlor could exercise the ultimate “dead hand”<sup>202</sup> control from beyond the grave and create a financial incentive for generations of family members to have male rather than female children. This condition would not only conflict with intestacy’s gender-neutral rules.<sup>203</sup> It would also fly in the face of China’s “one child per family” population planning policy and

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197. See, e.g., Zhang, *supra* note 147, at 26-27 (stating that a will that disinherits a daughter who supported the testator and leaves the entire estate to a son who provided little or no support violates law and socialist morality). See also CIVIL AND COMMERCIAL LAW PRACTICE, *supra* note 105, at 50 (stating that it is “impermissible” to use wills to disinherit “people who performed the main duties of support, especially . . . female heirs who performed the main duties of support”).

198. See ANNOTATED INHERITANCE LAW, *supra* note 78, at 76:

It should be emphasized that when handling inheritance issues the principle that men and women have equal inheritance rights is a principle only for intestate succession. One cannot use this principle for handling testate succession. When a testator by will devises his estate to his son and does not devise his estate to his daughter, this cannot be said to infringe the principle that men and women have equal inheritance rights. Moreover, it does not invalidate the will. The testator has the right to transfer his property to whomever he wishes.

199. See *supra* notes 165-71 and accompanying text (discussing the mandatory share).

200. See *supra* note 172 and accompanying text (discussing the failure of the Trust Law to address the applicability of mandatory share protection to trusts).

201. See *supra* note 38 and accompanying text. For analyses of possible approaches other than the Rule Against Perpetuities to “curtai[l] . . . dead hand control of wealth,” see DUKEMINIER & JOHANSON, *supra* note 41, at 854-56 (discussing Canadian and English reforms and possible variations); Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545 (1988) (proposing a statutory rule to terminate trusts after 125 years).

202. For extended discussion of the notion of “dead hand” control, see generally LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Adam J. Hirsch & William K. S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992). Perpetual trusts promote maximum dead hand control. For example, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has calculated that an average settlor who created a trust for her descendants would have 3.4 million living beneficiaries 500 years after creation of the trust. Verner F. Chaffin, *Georgia’s Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 20 (2000) (citing NCCUSL Jan. 2000 press release). Nonetheless, because of the recent trend to restrict or even repeal the Rule Against Perpetuities, perpetual trusts increasingly “exist unmolested and undenounced” in the United States. Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 601 (2000).

203. See *supra* text accompanying note 186.

efforts to persuade citizens that daughters and sons are equally valuable.<sup>204</sup> It would continue to do so as long as trust assets remained. Or, suppose the settlor created a trust that included his surviving spouse and female descendants as beneficiaries but only so long as they remain unmarried. If valid, this trust would effectively defeat rules requiring intestate distribution of wealth to female claimants regardless of marital status.<sup>205</sup>

U.S.<sup>206</sup> and Chinese<sup>207</sup> experience suggests that such trust provisions are by no means obscure hypotheticals. China faces difficult questions ahead in deciding where to strike the balance between donative freedom and gender equality.

## 2. *The Uncertain Impact of the Trust Law on Marital Property Rights Schemes*

The skeletal Trust Law also raises troubling questions for China's second inheritance mechanism for promoting gender equality—marital property rights. Under the Chinese Inheritance Law, the surviving spouse—husband or wife—is entitled to one-half of all “jointly-owned

204. See Tyrene White, *Domination, Resistance and Accommodation in China's One-Child Campaign*, in CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 102, 111 (Elizabeth J. Perry & Mark Selden eds., 2000) (discussing an “education campaign” aimed at “repudiating the feudal idea that males . . . were superior to females . . . and insisting on the equal value of a boy or girl”). China initiated its “one-child” policy over twenty years ago. For extended discussion of this policy, see CHINA'S ONE-CHILD FAMILY POLICY (Elisabeth Croll et al. eds., 1985); PENNY KANE, *THE SECOND BILLION: POPULATION AND FAMILY PLANNING IN CHINA* (1987). After lengthy delay, China's legislature finally enacted the first national Law on Population and Family Planning on December 29, 2001. Zhonghua Renmin Gongheguo Renkou yu Jihua Shengyu Fa [Law of the People's Republic of China on Population and Family Planning] (Dec. 29, 2001), in Guowuyuan Gongbao, no. 4, 5 (2002). Abuses of the one-child policy, such as female infanticide, infant abandonment, and sex-selective abortion through use of ultrasound technology, have contributed to a skewed “ratio of 117 boys born to every 100 girls, much higher than the international average of 106:100.” *China Passes Law on Population Control and Family Planning*, AGENCE FRANCE PRESSE, Dec. 29, 2001, in LEXIS, Asiapc Library, Curnws File; see Li Yongping & Peng Xizhe, *Age and Sex Structures*, in THE CHANGING POPULATION OF CHINA 64, 68-74 (Peng Xizhe & Guo Zhigang eds., 2000) (discussing skewed sex ratio and possible causes); White, *supra*, at 112-14 (same).

205. See *supra* notes 188-91 and accompanying text.

206. See MCGOVERN & KURTZ, *supra* note 42, at 165-67 (discussing conditions relating to marriage and divorce in U.S. wills and trusts). Note that a provision “so long as she remains unmarried” may be valid if “the dominant motive of the transferor is to provide support until marriage” rather than to induce the transferee to remain unmarried.” *Id.* at 165 (citing RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 6.1 (1981)). For an extended discussion of conditions on trust beneficial interests, see RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. d-h & rptr. notes (Tentative Draft No. 2, 1999).

207. See UNDERSTANDING APPLICATIONS, *supra* note 187, at 75, 86 (discussing will provisions stating that a “wife cannot inherit if she remarries” and leaving the testator's estate to whichever son or sons “produce male children”). The authors concluded that both will conditions would be void. *Id.*

property acquired during a marriage of continuous duration.”<sup>208</sup> In practice, courts have interpreted this language expansively to give the survivor rights to a wide range of assets spouses acquired either individually or jointly during marriage.<sup>209</sup> Indeed, in marked contrast to U.S. community property schemes,<sup>210</sup> Chinese courts have treated property a spouse received during marriage by gift or inheritance as marital property rather than separate property.<sup>211</sup> One court even extended the definition of jointly-owned marital property to a premarital asset to give an elderly widow rights to the two-room house she had shared with her husband for twenty years.<sup>212</sup>

Trusts present new fact patterns that challenge existing marital property schemes. Consider, for example, the situation where a husband unilaterally creates a trust for someone other than his spouse out of income he earned during marriage. Under marital property rules, that income is jointly owned by both spouses, not individually owned by the settlor. Thus, the initial question is whether the trust is valid. The settlor has effectively

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208. Inheritance Law, *supra* note 32, art. 26. This provision applies unless the parties have made another arrangement for disposition of marital property. *Id.*

209. *See, e.g.*, Case No. 430, in NEW TYPES OF CIVIL AND COMMERCIAL LAW CASES, *supra* note 85, at 1216, 1218 (awarding a surviving spouse marital property rights in a store, house, telephone installed in the decedent’s brother’s house paid for by the decedent, motorcycle, cash account “under contract,” television, washing machine and other electrical appliances).

210. *See* DUKEMINIER & JOHANSON, *supra* note 41, at 473 (“Property acquired before marriage and property acquired during marriage by gift, devise, or descent is the acquiring spouse’s separate property.”).

211. Case No. 430, *supra* note 209, at 1219 (case analysis stating that joint marital property includes “property acquired after marriage by one or both spouses in the form of a gift, legacy, or inheritance”). *See also* Zuigao Renmin Fayuan “Guanyu Renmin Shenli Lihun Anjian Chuli Caichan Fenge Wenti de Ruogan Juti Yijian” [Opinion of the Supreme People’s Court “On Certain Concrete Issues that Confront People’s Courts in Division of Property in Divorce Cases”] art. 2(2) (Nov. 3, 1993) [hereinafter 1993 Opinion], in ANNOTATED INHERITANCE LAW, *supra* note 78, at 166 (defining joint marital property for divorce purposes to include property received by inheritance or gift by one or both spouses). Future courts may not adopt this approach for distribution of marital property, however. *See infra* notes 232-34 and accompanying text (discussing new definitions of marital property under the Chinese Marriage Law Amendments and the Supreme People’s Court interpretation).

212. DETAILED EXPLANATION OF INHERITANCE CASES, *supra* note 23, at 121, 121-22 (reproducing the case). Although the decedent had purchased the house before marriage, it became joint marital property. The court explained that “any property acquired by a spouse before marriage is considered joint marital property if both parties did not agree otherwise after marriage and if they were married for a relatively long time (generally over 15 years).” *Id.* Another court used the same approach to give an eighty-year-old man rights to the house he had shared with his wife for over twenty years. *Li Zhi v. Qian Mao*, *supra* note 23, at 148-49. A few months prior to her death the wife had written a holographic will leaving her house and all other property from before her marriage to her former husband’s nephew. *Id.* at 149. The court characterized the house as marital property, citing “the Supreme People’s Court’s ‘Opinion on Certain Matters Concerning Implementation of the Principles of the Civil Law’ provision that whenever there has been a lengthy marriage, property that has been used, managed, and administered by both parties together for a long time can be regarded as joint marital property.” *Id.*



disposed of property that belongs to another person as well as himself. The Trust Law provides no clear answers. It simply states that the settlor must “lawfully own” trust property or have “lawful rights in property.”<sup>213</sup> The Trust Law is equally unclear as to the impact on the trust. It provides that a trust that fails to meet trust property requirements is “void.”<sup>214</sup> It does not specify whether a trust that contains marital property is entirely void or partially void.

In the case of a testamentary trust, Article 13 and annotated commentary suggest application of conventional rules for wills that dispose of marital property.<sup>215</sup> That is, the court will first allot to the surviving spouse one-half of the marital assets transferred into the trust and then distribute the remainder to the trust.<sup>216</sup> This extension of wills rules to testamentary trusts appears reasonable where the settlor transferred the bulk of his marital property into the trust. What if, instead, the trust assets represent only a small portion of the joint marital property in the decedent’s estate? If there exist sufficient other assets to satisfy the survivor’s marital property rights, must the court still allocate one-half of the trust assets to the survivor?<sup>217</sup> Or can the court leave the trust untouched and award the surviving spouse one-half of the aggregate value of *all* marital property in the decedent’s estate? Neither the Chinese Trust Law nor previous inheritance cases provides a definitive answer.<sup>218</sup>

Spousal rights to marital property in an inter vivos trust are even less secure. The surviving spouse will confront the initial hurdle of locating assets transferred into an inter vivos trust.<sup>219</sup> Even if she succeeds in doing so, her status and remedies under the Trust Law are uncertain. Is she a “creditor”<sup>220</sup> for Trust Law purposes? If so, is she entitled to void the trust entirely or does she have a claim only to her one-half marital property interest? Does the timing of her action make a difference? In some U.S.

213. Trust Law, *supra* note 1, art. 7.

214. *Id.* art. 11(3).

215. *See supra* Part I.A (discussing Article 13 and the uncertain application of will requirements to testamentary trusts). Annotated commentary to Article 13 states that the Inheritance Law’s marital property rights provision applies to testamentary trusts. WANG & GUO, *supra* note 6, at 31.

216. *See* Inheritance Law, *supra* note 32, art. 26 (providing that one-half of the joint marital property is first allotted to the surviving spouse and the remainder constitutes the decedent’s estate).

217. Under the so-called “item theory,” applied in most U.S. community property states, “husband and wife own equal shares in each item of community property. They do not own equal undivided shares in the aggregate of community property.” DUKEMINIER & JOHANSON, *supra* note 41, at 523.

218. *Compare* Case No. 430, *supra* note 209, at 1218 (using an aggregate value approach) *with* SELECTED LAW CASES, *supra* note 102, at 66 (allotting one-half of the decedent’s bank savings and other property to the decedent’s surviving spouse).

219. *See supra* Part I.B.

220. Trust Law, *supra* note 1, arts. 12, 17(1).

jurisdictions, if the spouse brings action during the settlor's lifetime she can set aside the entire trust (or other gift to a third party) and "reclaim the property for the community."<sup>221</sup> If she brings action after the settlor's death, however, she is only "entitled to set aside the gift to the extent of one-half."<sup>222</sup>

Transfer of marital property into trust is just one issue the Trust Law fails to address. Another is the status of the new property interests it creates.<sup>223</sup> For example, the Trust Law does not consider possible marital property claims to property one spouse manages as trustee for a third party.<sup>224</sup> It should be noted, however, that although the Trust Law does not specifically deal with the marital property context, it does state generally that trust property is not "part of the trustee's own property . . . or the trustee's estate"<sup>225</sup> and is not subject to claims of the trustee's individual creditors.<sup>226</sup> Thus, a trustee's spouse likely also has no rights to trust property.<sup>227</sup>

Even more challenging classification questions arise in the case of a married beneficiary of a trust.<sup>228</sup> The Trust Law does not indicate whether the beneficiary's equitable interest in the trust constitutes marital or

221. DUKEMINIER & JOHANSON, *supra* note 41, at 523 (referring to California's approach to gifts of community property to a third party).

222. *Id.*

223. Several commentators have emphasized that trusts introduce a system of property rights that conflicts with Chinese definitions. *See, e.g.*, Richard Qiang Guo, *A Look at China's New Trust Law*, CHINA ONLINE, (Aug. 17, 2001) (contrasting the "Anglo-American . . . notion of 'fiduciary ownership,' a peculiar judicial institution in which the trustee becomes legal owner, and the settlor/beneficiary remains as an owner or equity . . . [with] the Chinese legal system, rooted in civil law tradition, [which] inherits Roman law rule dictating 'one thing, one owner'"), at <http://www.chinaonline.com/refer/legal/NewsArchive/cs-protected/2001/August/c01081658.asp>; Ho, *supra* note 87, at 634 (stating that "because the trust system is essentially a system of dual property rights and our system follows [the principle of] 'one thing, one owner' and because there is no system for ownership of property for another person, this produces numerous technical questions"). For an extended discussion of trust property issues, see Li Qunxing, *Lun Xintuo Caichan [On Trust Property]*, FAXUE PINGLUN [LEGAL STUDIES COMMENTARY], no. 1, 77 (2000).

224. *See* Ho, *supra* note 87, at 634 (raising the issue of whether the Marriage Law's provision on jointly-owned marital property "include[s] property that one spouse owns as trustee"). Professor Ho points out that under the Marriage Law, "[u]nless both parties have agreed otherwise, spouses have equal rights to manage jointly-owned property." *Id.* It is unclear whether the Chinese trustee even has "ownership" rights to the trust property. *See* Guo, *supra* note 223 ("As a matter of legislative history, according to Professor Jiang Ping, senior member of the drafting committee of the Trust Law, the legislators deliberately avoided stipulating that the ownership or property rights of the trust property belong to trustee.").

225. Trust Law, *supra* note 1, art. 16.

226. *Id.* art. 18. *See also id.* art. 37 (providing that the trustee is personally liable for any debts incurred as the result of "breaching his management duties or improperly handling trust affairs").

227. This is the "general rule" in the United States. ROUNDS, *supra* note 45, at 396.

228. *See* Ho, *supra* note 87, at 634 (asking whether a trust beneficiary/"spouses's rights and interests [are] categorized as jointly-owned marital property").

separate property. Equally uncertain is the classification of income or other property actually distributed to the married beneficiary. Chinese inheritance precedent suggests that marital property schemes may encompass these new property interests.<sup>229</sup> Moreover, a 1993 Supreme People's Court opinion<sup>230</sup> provides further support for inclusion of trust interests. The Court stated in the divorce context that "jointly owned marital property" comprehends property one spouse received by inheritance, gift, as well as "other legally acquired" property.<sup>231</sup> Recent amendments to China's Marriage Law, however, complicate matters considerably.<sup>232</sup> New Article 18 of the Marriage Law explicitly redefines the scope of marital property to exclude "property identified in a will or gift as belonging to the husband or wife alone" and "[o]ther property that should be considered the property of one party alone."<sup>233</sup> In December 2001, China's Supreme People's Court confirmed this narrower definition of marital property for Marriage Law purposes.<sup>234</sup> The impact on China's trust system remains an open question. If U.S. experience is any precedent,<sup>235</sup> China faces major challenges in integrating its trust and marital property systems. Yet, the outcome may be crucial to the success of China's larger objective of promoting gender equality through inheritance.

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229. See *supra* notes 208-12 and accompanying text.

230. 1993 Opinion, *supra* note 211.

231. *Id.* at art. 2(2), (6).

232. See Quanguo Renmin Daibiao Dahui Changweihui Guanyu Xiugai "Zhonghua Renmin Gongheguo Hunyin Fa" de Jueding [The Decision of the National People's Congress Standing Committee on Amending the "Marriage Law of the People's Republic of China"] (Apr. 28, 2001), in *Guowuyuan Gongbao*, no. 21, 8 (2001). For a superb summary and analysis of the debates that led to revision of the Chinese Marriage Law, see William P. Alford & Shen Yuanyuan, *Have You Eaten? Have You Divorced? Debating the Meaning of Freedom in China*, in *REALMS OF FREEDOM IN THE MODERN CHINESE WORLD* (William C. Kirby ed., forthcoming 2002).

233. Zhonghua Renmin Gongheguo Hunyin Fa [Marriage Law of the People's Republic of China] art. 18 (as amended Apr. 28, 2001), in *Guowuyuan Gongbao*, no. 21, 11 (2001).

234. Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Hunyin Fa" Ruogan Wenti de Jieshi [Interpretation of the Supreme People's Court of Certain Matters Concerning Application of the "Marriage Law of the People's Republic of China"] art. 19 (Dec. 27, 2001), in *Zuigao Renmin Fayuan Gongbao*, no. 1, 16, 17 (2002) (stating that property owned individually by one spouse only will not become joint marital property because of the existence and continuation of the marriage unless otherwise agreed upon by the parties).

235. See GEORGE C. BOGERT ET AL., *CASES AND TEXT ON THE LAW OF TRUSTS* 110 n.5 (7th ed. 2001) ("The various jurisdictions still lack uniformity with respect to marital laws which determine the relative interests of the trust beneficiary and his spouse."); David William Gruning, Comment, *Reception of the Trust in Louisiana: The Case of Reynolds v. Reynolds*, 57 TUL. L. REV. 89, 89, 121 (1982) (discussing a "problem created by the trust in [Louisiana]: the characterization of the interest of a trust beneficiary who is also a spouse living under the legal matrimonial property regime of the community of acquets and gains" and concluding that the trust can create "uncertainty" and "untoward results in cases involving traditional civilian concepts such as donation and community property").

## IV. CONCLUSION

In her 1998 analysis of the draft Trust Law, Professor Lusina Ho identified significant conflicts with existing Chinese legal concepts and rules.<sup>236</sup> She cautioned legislators not to move with “undue haste”<sup>237</sup> in adopting China’s first Trust Law. Unfortunately, as this Article has shown, Chinese legislators did not heed her warning. They enacted a Trust Law so riddled with gaps and ambiguities that it threatens to undermine China’s innovative inheritance system.

This Article has demonstrated that trusts challenge all three distinctive features of Chinese inheritance law: China’s behavior-based distribution of estates,<sup>238</sup> recognition of support needs and contributions,<sup>239</sup> and efforts to promote gender equality through inheritance.<sup>240</sup> As Parts II and III have shown,<sup>241</sup> the current Trust Law effectively turns inheritance law on its head.<sup>242</sup> The Trust Law allows decedents to reward the bad,<sup>243</sup> punish the good,<sup>244</sup> leave the needy unprotected,<sup>245</sup> and exclude the survivor based on gender alone.<sup>246</sup>

The Trust Law’s impact on the inheritance system will not be felt immediately. In today’s China, private trusts are “almost nonexistent.”<sup>247</sup>

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236. Ho, *supra* note 87, at 630-35.

237. *Id.* at 618.

238. *See supra* Part II.

239. *See supra* Part III.A.

240. *See supra* Part III.B.

241. *See supra* Parts II, III.

242. Trust Law drafters did not deliberately set out to change the face of Chinese inheritance law. They did so by accident more than design. Until the very end, drafters focused on the needs of China’s commercial trust industry and thus failed to anticipate the full implications of their law for private gratuitous transmission of wealth. *See supra* note 3 (discussing the original emphasis of the drafters). As Professor Walter Hutchens has noted, “[a]s late as June 2000, drafts of the Trust Law included provisions on trust companies. However, in its final form, the Trust Law is not about trust companies.” Hutchens, *supra* note 1, at 18. Immanuel Gebhardt and Holger Hanisch have argued that the use of trusts for private management and inheritance of wealth emerged as “important” only late in the drafting process when supporters of the draft law needed a new rationale for adopting the law. *See Gebhardt & Hanisch, supra* note 3, at 5. The draft Trust Law had been effectively shelved since the 1998 collapse of China’s second largest trust company, Guangdong International Trust and Investment Corporation, and the ensuing “rectification and liquidation” of Chinese trust and investment companies. *See Wang Lianzhou, Xintuo Fa Chu Tai, Buyi Zai Tuo [The Trust Law Should Not Be Delayed Any Longer]*, in MATERIALS ON THE DRAFTING PROCESS, *supra* note 2, at 14, 17-18 (discussing the drafting process).

243. *See supra* Part II.B.

244. *See supra* Part II.C.

245. *See supra* Part III.A.

246. *See supra* Part III.B.

247. Luo Ying, *Xintuo Ye de Jichu [The Basis of the Trust Industry]*, ZIBEN SHICHANG ZAZHI [CAPITAL MARKETS MAGAZINE], no. 1, 22, 23 (2002).

Reports suggest, however, that this situation may not continue for long. Indeed, a recent Chinese commentator described the “potentially enormous market” for such trusts and advocated “major efforts to exploit it.”<sup>248</sup> Thus, China may soon discover for itself the full panoply of services trusts provide—both “for good or for bad.”<sup>249</sup>

If China’s citizens do in fact embrace trusts,<sup>250</sup> the future of its distinctive inheritance system is precarious. Without significant improvements in existing trust legislation<sup>251</sup> and appropriate enforcement,<sup>252</sup> China’s unique schemes for addressing survivors’ individual needs and circumstances are unlikely to withstand the challenges trusts present. In the end, an inheritance law for the living could give way to a trust law for the dead.<sup>253</sup>

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248. *Id.*

249. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d (Tentative Draft No. 1, Apr. 5, 1996) (“The history of the trust reveals the role it has played, for good or for bad, in avoiding some of the undesired consequences of legal ownership.”).

250. See Gebhardt & Hanisch, *supra* note 3, at 8 (stating that it is “very difficult to predict whether the Chinese people will use trusts for managing private property or for making wills that are not currently permitted under Chinese law”).

251. For example, Chinese lawmakers need to clarify the impact on trusts of the Inheritance Law’s provisions on forfeiture, mandatory share, and marital rights. See *supra* Parts II.B, III.A, III.B. They also should consider possible schemes for identifying and recapturing inter vivos trust assets for inheritance purposes. See *supra* Parts I.B, II.C.1, III.A, III.B.1. In addition, they should revisit the decision to permit perpetual trusts. See *supra* text accompanying notes 38 and 201. Chinese authorities will also need to address taxation of trusts. See Hutchens, *supra* note 1, at 21 (observing that because the “Trust Law is almost silent concerning the taxation of trusts, and the PRC has no special regulations to date on the taxation of trusts . . . [c]larification of tax issues is needed”).

252. As Jamie Horsley has recently underscored, “even the best laws are of little use if they are not enforced consistently and fairly.” Jamie P. Horsley, Book Review, *Bird in a Cage: Legal Reform in China After Mao*, 29 CHINA BUS. REV. 51, 51 (May-June 2002).

253. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 340 (referring to succession law as “[t]he [l]aw of the [l]iving, the [l]aw of the [d]ead”).