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GIVING OR LEAVING—WHAT IS A WILL?

*Olin L. Browder**

The question raised by the title of this essay should be essentially as simple as that: Do you want to give property, so that, having given it, it is no longer yours, or do you want to leave it behind at your death, directing who will receive it at that time? The statement of that issue suggests obvious differences in the consequences of inter vivos and testamentary dispositions. Most people also understand that a testamentary disposition invokes the elaborate machinery involved in the administration of a testator's estate, which confers special rights in the creditors and the spouse of the decedent.

In most cases the resolution of the issue is simple and obvious. Most deeds or gifts take effect without question, and large numbers of wills are perfunctorily probated. Trouble comes not because an instrument is not properly labelled or because most transactions are not clearly wills, deeds, or contracts. Nor is it often a problem that an instrument that appears to be a will really indicates an intention to make a gift inter vivos. The trouble comes with insistent efforts to use inter vivos transactions to produce results that may seem to be the purposes of a will. These have come to be called "will substitutes." Fortunately most of these recur in one of a number of easily identifiable forms. Others appear as a miscellany of devices that vary in certain particulars and are not wholly predictable. The reasons for the use of will substitutes constitute a fascinating story itself, which, however, is beyond the purposes of this essay. To most persons, some of the reasons seem obvious. In any event, the result has cast the original issue into a special form: When should a transaction that purports to be an inter vivos disposition of property be treated as really a will; that is, as justifying the epithet that it is "testamentary"? For more than a century this issue has created a great fault line across the body of the American law of conveyancing, with continual disturbances along the line, which have produced cries from outraged commentators, not to speak of the unpublished cries of disappointed donees.

The trouble has been evident from the beginning, but has swelled as court after court, in one kind of case or another, has been

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moved to strike down as testamentary, transactions that could only have taken effect if they were inter vivos. In other words, a transaction executed as an inter vivos transfer will fail altogether if it is held to be really a will, for want of attestation, if not for the failure to meet some other formal requirement for the execution of wills. The question remains: Why does a court hold that a transaction that purports to be inter vivos is really a will? Will courts actually deem testamentary a transaction that would otherwise be valid under the law applicable to inter vivos transactions solely because the court senses that the donor resorted to the transaction to avoid leaving the property by will? There are a few cases that have expressly so held, but there are many more in which one senses such an idea as a moving force behind ostensible misapplications of the rules relating to inter vivos transactions.

One can only speculate upon the reasons for an overly zealous or jealous defense by some courts of the policy of the statutes of wills. Is it really a genuine fear of letting loose a variety of informal dispositions in disregard for those safeguards prescribed by the statutes against imposition upon donors? Or have courts really been afraid that devices to avoid probate would let too much business slip out of the hands of the profession? In any case, a number of the old rigors invoked by some courts in defense of the statutes of wills have been designated as erroneous by other courts. Other old errors have been remedied by legislation. It is arguable that the forces driving people to avoid probate and the resistance of courts to those efforts have not yet been brought into a proper equilibrium. No overall rationale for drawing the inter vivos-testamentary distinction has been generally accepted. I am moved to tell the old story about the conflict primarily because of the continued progression of reported cases in which inter vivos transactions have been attacked as testamentary, in many of which the attacks have failed. It almost seems that such attacks are always worth a try, and that there is too much of this sort of litigation. This will continue to be the case until some generally applicable rationale can gain general acceptance for applying the distinction properly.

The idea that expresses the essence of a will is very elusive, if in fact there is any single notion about it. This becomes apparent when one surveys the kinds of cases in which transactions have been held testamentary. It is also discovered whenever one, in criticism of many of such cases, seeks to identify a proper basis for distinction. Inquiries of both sorts will be briefly undertaken here.

Most of the cases in which the problem arises are those in which

a donor sought to do one of two things: either he expressed an intention, often ambiguously, that his donee should not have complete, perfected, or vested ownership, or the right of enjoyment, until the donor's death; or, having given an otherwise valid vested remainder or other recognized future interest, he retained many if not most of the incidents of ownership. In respect to the first situation, nothing but chaos will result from a failure to see that it is quite possible and proper to convey interests *inter vivos* that are in some sense not perfected until the death of the donor. Some sophistication in handling the intricacies and refinements of *inter vivos* conveyancing and the doctrine of estates is indispensable. In the second situation, the donor's retention of substantial interests may be viewed as irrelevant to the characterization of a transaction as *inter vivos*, for reasons that will be presented later in this essay.

In the course of this survey it is important, I believe, to draw the distinction between testamentary and *inter vivos* transactions with an eye to the ultimate purposes of those who seek to characterize transactions as testamentary. Most attention here is given to cases in which the challenge, if successful, leaves the transaction without any legal effect, in vindication of the policy of the statutes of wills. I will urge, however, that a disposition that survives such an attack still might properly be subject to attack by the creditors of a donor or by a surviving spouse. In other words, there should be room to claim that a disposition is testamentary for some but not all purposes. The failure to perceive this distinction has contributed to the failure to reach a successful resolution of the basic problem.

I. THE NATURE AND SOURCE OF THE PROBLEM

How do we respond to the efforts by courts to thread their way through a great variety of devices that raise doubt about their proper classification? Is there some simple standard that can be applied to all or most of these devices, and, if not, is there some fundamental rationale against which varying circumstances or ingredients can be tested? In approaching this problem on principle, I will first and for the most part be concerned with whether a transaction can be sustained as *inter vivos* for any purpose—that is, whether it fails altogether for want of proper execution as a will.

The ultimate source of most of the trouble is the fact that more formal requirements apply to wills than to *inter vivos* transactions. Deeds of land and gifts of personal property must be delivered. Some contracts require a writing, and others require no formalities.

But wills must be in writing, signed, and attested in a prescribed manner. Much grief might be avoided if uniform requirements were imposed. It would require no great wrench, for example, if deeds had to be attested, for in some states there is such a requirement at least as a condition of recording.¹ Such a requirement, however, can hardly be proposed for gifts of personal property, bank accounts, or other contracts. A case could indeed be made for going the other way and eliminating attestation and the other special formalities for executing wills. If such a position were adopted, most of what follows here would become irrelevant, and most of the litigation over the inter vivos-testamentary distinction would disappear. I do not think, however, that there is a fair prospect for such a change in the law in the foreseeable future. Some comment may be in order on why that is, and perhaps should be, so.

Analyses have been offered of the policy behind the statutes of wills, the several functions that the traditional formal requirements are believed to serve, and whether those requirements are too exacting or not exacting enough.² Commentators have said that the requirements serve evidentiary, cautionary, protective, and channeling functions. There is a recent proposal to retreat from a literal and exact compliance with the detailed formalities in favor of a doctrine of "substantial compliance,"³ but this is not a proposal to eliminate these requirements or even those that are more exacting than the Statute of Frauds. All the identified purposes of the formal requirements assume that special dangers exist in the execution of wills. The dangers of fraud, forgery, undue influence, donative incapacity, and loose and irresolute expressions of donative intent are present in all donative transactions. Experience also shows that the more rigorous requirements for wills are not guarantees against such dangers.⁴ Are these dangers, however, more to be feared when wills are made? We may indeed feel the need for more assurance of genuineness when some person, who may be anyone, comes forward with an instrument that was found among a decedent's possessions. Such assurance is sought not only in the special requirements for executing wills but also in the requirements for proving wills when they are offered to begin the process of estate administration. Implicit in all this is the assumption that generally

1. See 3 AMERICAN LAW OF PROPERTY § 12.59 (A.J. Casner ed. 1952) [hereinafter cited as ALP].

2. See Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

3. See Langbein, *supra* note 2.

there are more risks of imposition in the circumstances in which wills are made than in those surrounding inter vivos transfers, although the point is arguable because of the wide range of circumstances that may attend either type of transaction. In fact, there may be greater danger in *some* inter vivos transactions than in the making of most wills. The prescribed formalities for wills, however, are framed to deal with the probability of risks in the generality of wills, in most of which there is no doubt about their essence as testamentary dispositions.

It should not be assumed, moreover, that differences in formal requirements are the only reason why we must decide whether a disposition of property is testamentary or inter vivos. A will must be probated and the estate of the testator administered. Policy matters are involved in this machinery, particularly in the claims of creditors or a surviving spouse. A convenient process is desirable even if only to establish that there are no such claims. There may be no public policy involved in the rules relating to the abatement or ademption of legacies and devises, but the obvious usefulness of such rules presupposes the existence of decedents' estates to which they are applicable. We surely are not yet ready to dispense with estate administration and attach the same consequences to a disposition by will as to a conveyance inter vivos, leaving as the sole difference the fact that a disposition by will takes effect at the testator's death. So even if a dispositive instrument is duly attested and valid either as a deed or a will, it must still be decided whether the property involved is or is not to be administered as part of the donor's estate. It still must be decided whether the instrument is a deed or a will.

We must come finally to deal with that question. Wills have much in common with other donative transactions. Classification is not aided by looking behind the transaction itself to discover the donor's ultimate objectives. It can readily be assumed that in many cases a testator wishes to be assured that certain persons will be adequately provided for after his death. Every property owner thinks about the disposition of his property after his death, and directs what is to be done, unless he is content with the law of intestate succession or does not really care. He can attain most of the same objectives, however, by a variety of inter vivos transactions. The search for a testamentary intent can lead to nothing more than the intent to do those things, and in those ways, which, if prescribed by him, identify his efforts as a will. So what is a will?

It is natural to put the question in a manner that identifies the way in which a will differs from all inter vivos dispositions, for the

way in which inter vivos transactions differ from one another is relevant here only to that question. It is commonly said that a will is "ambulatory." That is not a very helpful term, and courts do not agree upon its meaning. In a brief essay written many years ago, Percy Bordwell applied his acute perception to the essence of a will,⁴ though, unfortunately, he did not extend his analysis beyond a few illustrative examples. He identified two essential ingredients: first, a will is not effective until death, and, second, it is revocable. These two elements seem either to be two ways of saying the same thing or to be inconsistent. How can you revoke a transfer of property before it has taken effect? Of course it can be done with a will, but this is an idea that sometimes bothers students in their study of wills. Again there is no need to digress here to explain the problem except to suggest that it is a sign of the subtleties involved in understanding the essence of wills. Professor Bordwell said that the first of these ingredients relates to the property involved and the second relates to the person who makes and revokes a will. Although essential to the definition of a will, revocability may be dismissed as a feature that distinguishes a will from an inter vivos transaction, so long as we recognize revocable inter vivos trusts or gifts causa mortis, as well as some authority that permits ordinary deeds to be revocable. We should not, however, too quickly assume that the inherent revocability of a will is the same as the expressly reserved revocability of a deed or trust instrument. It has been pointed out in a discussion of the revocability of simple deeds⁵ that a will can be revoked merely by destroying it. Where a power of revocation is reserved in an inter vivos instrument, the power must be exercised as prescribed in the instrument or by law—that is, by executing another instrument or by giving proper notice.

Does the other ingredient—the ineffectiveness of the transfer until death of the testator—fare any better? The distinction is obvious: an inter vivos transfer of property is effective upon execution or delivery; a will transfers property only upon the testator's death. It may seem that this simple distinction is all we need to know, but unfortunately the subtleties resorted to in some will substitutes are designed to cast, or have the effect of casting, a cloud over that issue. The main problem comes in deciding what we mean by a will's taking effect; and the main source of the problem lies in the subtleties of the doctrine of estates, which permit the creation or re-

4. Bordwell, *Testamentary Dispositions*, 19 Ky. L.J. 283 (1931).

5. See Garvey, *Revocable Gifts of Legal Interests in Land*, 54 Ky. L.J. 19 (1965).

tention of a variety of present and future interests, either vested, contingent, or defeasible, and which may make the vesting or time of enjoyment depend upon the death of the donor. In an attempted inter vivos transaction of such complexity, what is it that must take effect upon execution or delivery? An interest need not vest or become possessory at that time. For example, a conveyance to *A* for life, remainder to *B* takes effect upon delivery, for *B* has been given a remainder. So also if *B* is given the property only if he survives *A* or the grantor, since the deed gives him a contingent remainder.

By the same token, if a settlor creates a revocable trust, the conveyance is effective though the settlor, by revoking, can undo it altogether. This is also true if the settlor additionally retains a life interest, or even retains a general power of appointment. It is clear that a settlor can, by an inter vivos conveyance, retain until his death all but a small immeasurable part of the economic value of the property conveyed. This leaves us with the proposition that a conveyance is effective inter vivos and is not testamentary if only the merest fragment of a property interest passes to someone else. This is the position upon which a number of courts appear to have come to rest.

If a donor can, by ingeniously framed inter vivos transactions, do almost all that he can do by will, what reason is there for imposing stricter formal requirements for wills than for inter vivos transactions? The main reason is the practical fact that most people who want to make wills do make them, for most people who resort to will substitutes have reasons other than the avoidance of the formal requirements for executing wills. If the belief that wills present special dangers is justified, there is little reason to remove the special wills requirements for that large majority of persons who find no reason to resort to will substitutes. For those who do wish to use will substitutes, the circumstances in which they do so may still be found not to subvert the policy behind the formal will requirements. It seems reasonable to argue that such an inter vivos transfer does not subvert the policies of the statutes of wills if at least one of two facts is established: (1) either the transaction creates no greater risk to its integrity than that which attends any typical inter vivos transaction; or (2) if such a risk is created, the transaction is attended by circumstances that provide a comparable substitute for the formal requirements for wills. For example, if property is conveyed in trust, the presence of a trustee who has legal title, possession of a trust instrument and the trust estate, and rights and duties under the trust, may constitute a sufficient safeguard for the integrity of the

transaction, no matter how many strings upon the transfer the settlor may reserve in the trust instrument. It has been argued that a trustee can be relied on for this purpose only if he really is a disinterested party, such as a professional trustee, with no incentive to fabricate the existence or terms of the trust.⁶ The trouble with this argument is that it applies as well to any conveyance in trust, even those that no one has ever alleged to be testamentary. This is not to speak of the difficulty of deciding on an ad hoc basis what degree or kind of interest is disqualifying. It must be remembered that we are striving for a reasonably workable way through a maze of variabilities, and predictability and administrative simplicity must therefore be taken into account. No perfectly workable guarantees are available.

This approach might be taken one step further. It could be argued that, so long as the existence of one of the two facts identified above is established, any otherwise effective attempt to transfer property should be sustained as an inter vivos transfer, regardless of whether some sort of property interest passed prior to the donor's death. Such an extension, however, bears little prospect of acceptance. Not only the validity but the consequences of dispositive transactions would be rendered unnecessarily unpredictable. In respect to the consequences, when would an instrument be probated as a will and when would it be held to have passed property without administration? Assuming that the estate of a decedent was otherwise solvent, and that his spouse raised no objection to the conveyance, would this issue turn on whether the donor merely indicated that he wished the property to be administered at his death, by designating the instrument as a will or otherwise? Or would it be left to the donees to decide?

This problem might be partially solved by separating the question of the validity of the transaction from the other consequences of deciding whether a conveyance is testamentary or inter vivos. This would mean that a disposition could be upheld if it satisfied the requirements for inter vivos transfers—that is, by a writing duly delivered—provided that one of the two elements stated above was also present. That would leave the passing-of-an-interest test to operate for the purpose of deciding whether the property involved was to be administered as part of the donor's estate. In other words, if the test were not passed, the disposition would be treated as a valid

6. See Comment, *Trusts Which Substitute for Wills: A Problem of Faulty Analysis*, 51 NW. U.L. REV. 113 (1956).

will. The test of validity, however, would still remain essentially undefined. For courts imbued with respect for the precise requirements of the statutes of wills, such a solution hardly seems promising without legislation.

All this brings me to a tentative hypothesis concerning a proper standard for drawing the distinction between *inter vivos* and testamentary transactions. If the hypothesis is vindicated by an examination of the problems that have appeared in the cases, it would in its consequences not be far from the standard discussed in the preceding paragraph. It would, however, leave the courts to operate much as they have tried to do in the past, but, I hope, with better effect. I propose that the passing-of-an-interest test be tentatively accepted, subject to an assumption not yet proven—that in all or most of the types of cases that pass the test, adequate safeguards exist against the dangers that the statutes of wills were designed to prevent. If that assumption proves correct, the passing-of-an-interest test would become the basic standard. It should, however, be subjected to a further qualification. A court should leave open the door to litigants to prove in a particular case, perhaps not now foreseen, that adequate safeguards were not present. Such a scheme really comes down to proceeding in much the same fashion as many courts have tried to proceed, but with a somewhat more enlightened application of the test. In retaining such a formal technical standard at least as a starting point, substance is not really subordinated to form. The standard rather would serve as a reasonably simple device for saving transactions that ought to be saved.

To say that a transfer of property is *inter vivos* if some recognized interest passes when the instrument is properly executed does not mean, of course, that if such an interest passes, all transfers of other property or of the same property to other persons contained in the same instrument are thereby saved as *inter vivos*. Each transfer of any interest, present or future, to any person, must pass the same test.

Acceptance of the passing-of-an-interest standard places a court in the position that reverses the approach to the problem initially suggested above. Instead of beginning by asking what is a will, a court will inquire first whether a deed, a trust agreement, a gift, or a contract satisfies the law governing such transactions. This of course is what courts have always purported to do. Very often the term “testamentary” is merely an epithet applied to a transaction that fails to take effect as intended. Such an approach, however, has not prevented courts from following the circuitous analysis that a transaction

is not effective inter vivos because, for some vague reason, it is testamentary.

It should now be emphasized again that the standard proposed herein rests on the important assumption that most if not all of the usual will substitutes that meet the passing-of-an-interest test also provide adequate safeguards of the policy of the statutes of wills. It is now time to examine the recurrent types of transactions, and some miscellaneous variants, that have been held testamentary, as well as a few that have survived such a challenge, and to comment on the propriety of applying our qualified test in such cases.

II. THE INTER VIVOS-TESTAMENTARY DISTINCTION IN THE COURTS

A. *The Validity of Inter Vivos Transactions*

1. *Contracts*

I will begin this section by treating contractual transactions as a special category, since they can be disposed of more simply and summarily. It will no doubt shock some people that any contract could ever have been successfully attacked as a testamentary transfer of property. A promise to pay money or to give other valuable things can be said to create at least a chose in action in the promisee, which for many purposes is a property interest. That is no reason to treat the making of such a promise as a transfer of property that is subject to the formal rules of conveyancing. The denial of a contractual right to a promisee, often a third-party beneficiary, on the ground that the promise is testamentary, is the most flagrant example of the obsession of courts with sniffing out efforts by donors to confer by other means what the courts perceive to be the benefits of a will. In a sense, a life insurance contract is one of the most "testamentary" of all will substitutes. With the optional settlements that are often available, it can perform all the functions of a will and still free the proceeds from an estate administration. It may be asked why it has escaped unscathed when similar contracts have been challenged. In any case, I do not believe that contractual transactions need to meet any passing-of-an-interest test, since the crucial question in such transactions concerns the validity and enforceability of a promise, and not whether the effect of the promise is to create a property interest. The only legitimate concern about the substitution of contracts for wills might be whether the transaction produces the same dangers as an oral will.

a. *Bank accounts.* The dismal story of the courts' treatment of joint and other types of bank accounts is the most offensive and damaging example of the misuse of the statutes of wills. This treatment has received ample commentary and been sorely criticized⁷ and will therefore be dismissed summarily here. The so-called pay-on-death (POD) account has been universally condemned by the courts as a means of creating rights in anyone other than the depositor.⁸ Such an account bears both the name of the depositor and that of another person to whom the balance of the account is made payable on the death of the depositor. Such an arrangement is presumably different from a life insurance contract because the depositor remains as free to withdraw funds as if the account were in his sole name. But this should be of no concern if the bank's obligation to pay is enforceable under contract law. Moreover, even if the policy governing wills were applicable to contracts, no more of the risks affecting the execution of wills appear here than in any bank account. A few statutes authorize POD accounts.⁹

The greatest confusion in analysis is found in the treatment of the joint bank account in which a person deposits all the money in favor of himself and another, with the right of survivorship. Some courts speak of these as true joint tenancies, which they are not. Most courts have used either the "gift theory" or the "contract theory," with the former predominating, although, oddly, the choice of theory leads to little difference in result. There is no testamentary problem if it is intended that both depositors are to have the same right to draw upon the account. But if extrinsic proof establishes that the person whose money is deposited intends to reserve the sole right to withdraw it during the depositors' joint lives and to give the codepositor only the right of survivorship, then the transaction is testamentary and the codepositor has no rights.¹⁰ Such a result is subject to the same objections as those made in respect

7. See BROWN ON PERSONAL PROPERTY § 8.8 (3d ed. W. Raushenbush 1975) [hereinafter cited as BROWN]; Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

8. See, e.g., *Northwestern Natl. Bank v. Daniel*, 80 S.D. 528, 127 N.W.2d 714 (1964).

9. E.g., N.J. STAT. ANN. § 17:9A-218 (West Supp. 1975).

10. BROWN, *supra* note 7, at 184 n.12; cf. *Farmers Bank v. Howard*, 276 A.2d 744 (Del. Ch. 1971). But see *Blanchette v. Blanchette*, 362 Mass. 518, 287 N.E.2d 459 (1972).

to the courts' treatment of POD accounts. The result has been changed in the Uniform Probate Code.¹¹

A New Jersey court denied the claims of the beneficiary of a decedent's account in a credit union¹² on the ground that the transaction was testamentary. A statute authorizing payment as directed in such an account was treated like a "bank-protection" statute, and therefore held not to govern the claims of competing claimants. Another statute that authorized POD bank accounts was also held not applicable. The court said that the account was not a life insurance contract because it was a debt due the decedent on demand, and concluded with the remarkable statement that there was no binding promise by the credit union. And so the preposterous old saws about bank accounts not only die hard, but are actually extended.

b. *Totten trusts*. This is a form of bank account recognized in some states where *A* deposits money in his own name "in trust for *B*." It is construed to be a kind of self-declared trust, in which a power to revoke is implied in *A*'s favor and can be exercised merely by withdrawals from the account, leaving *B* to claim as beneficiary any balance left at *A*'s death. In substance, the Totten trust is no more than a disguised POD account and should be sustained on a contract basis. But to call it that would condemn it in the eyes of most courts. For this reason, a property-trust analysis is typically made to sustain it on the theory that a tenuous interest has passed to the beneficiary, subject to revocation and perhaps also conditioned on the requirement that the beneficiary survive the depositor-settlor. Such an analysis provides the most strained construction to be found in favor of saving a transaction as inter vivos. Unlike most trusts, the power to revoke is implied, and the power is exercisable merely by withdrawals from the account by the settlor. Moreover, it is also implied that the beneficiary has no benefits from the so-called trust during the settlor's lifetime. All of these features of the Totten trust present the conceptual difficulty that the settlor remains as free to deal with the account as he would be if it were in his sole name. Nevertheless, the device is really innocuous, for the formalities involved in creating and using such an account seem peculiarly free of any danger of fabrication. Its acceptance in a number of jurisdictions¹³ is a striking exception to the attitudes of most courts toward will substitutes.

11. UNIFORM PROBATE CODE §§ 6-103, 6-104.

12. *In re Estate of Posey*, 89 N.J. Super. 293, 214 A.2d 713 (Union County Ct., P. Div. 1965).

13. 1 SCOTT ON TRUSTS § 58.5 (3d ed. Supp. 1976) [hereinafter cited as SCOTT].

c. *Other contracts.* A variety of other contractual provisions, which are usually only incidental or subordinate to other terms of valid contracts, have met the same fate as the POD and joint bank accounts. A contract, for example, may provide that upon the death of the principal obligee a payment is to be made to his widow or others; it may sometimes add the requirement that the alternate payees be then living. Or the contract may provide that an obligation to pay in installments is discharged if the promisor survives the promisee. There is no good reason to hold either type of provision testamentary and void,¹⁴ although occasionally they have been so held.¹⁵ In contrast, a provision in a contract of employment stipulating that commissions earned by the employee would be paid to him if he were living, or, if not, to his wife, if she were living, or, if not, then to a daughter, was held invalid to create any interests in the wife or daughter.¹⁶ The court simply stated that the contract provision was clearly testamentary. It has been held that a provision in a written contract of employment stipulating that upon the death of the promisor-employer the person employed would be entitled to the promisor's business is valid and binding.¹⁷ The result should be the same whether the transaction is analyzed in purely contractual terms or as a present conveyance of a future interest in the business.¹⁸

Suppose two persons mutually agree that the one who survives shall have the property of the decedent. In *Spinks v. Rice*,¹⁹ such a written agreement, signed by both parties and notarized, provided that "all property he may have is to be her sole and separate property," should she survive him. The instrument was ambiguous about the extent of the promise of the other party. The decedent had made a prior will disposing of all of her property. Assuming that the two promises were identical, mutual promises, the court held that the instrument was "fundamentally testamentary," and so in substance a joint and mutual will that failed for want of attestation.

It seems clear from the language of the instrument that it would be difficult to sustain the transaction as an inter vivos conveyance, since it purported to deal only with property that a contracting party owned at death. It would require even greater conceptual straining

14. *Valenzuela v. Anchonda*, 22 Ariz. App. 332, 527 P.2d 109 (1974).

15. See ATKINSON ON WILLS 195 (2d ed. 1953) [hereinafter cited as ATKINSON].

16. See *Combined Ins. Co. of America v. Salisbury*, 101 R.I. 448, 224 A.2d 383 (1966).

17. See *Hunt v. Dallmeyer*, 517 S.W.2d 720 (Mo. App. 1974).

18. But see *Hruby v. Romanick*, 128 N.W.2d 106 (N.D. 1964).

19. 187 Va. 730, 47 S.E.2d 424 (1948).

here than was resorted to in a similar case²⁰ to declare the instrument an effective conveyance of all the grantee's property subject to a reserved life estate and a power of appointment in the grantor. But to call it a joint and mutual will does not reach the substance of the parties' declared intention, even if it had been properly executed as a will. The parties purported to make an agreement, and by construction each purported to bind himself as to the disposition of his property. A joint and mutual will may be found to imply a contract not to revoke it, but usually such a contract is not found to be binding during the joint lives of the parties. If these parties intended to leave themselves free to dispose of their respective property during their joint lives, in what way did they intend to be bound? Cannot a person explicitly agree that he shall be free to dispose of his property inter vivos, but be bound to do everything necessary to assure that whatever remains at his death shall go to the other party and to no one else? So conceived, the arrangement was an exchange of promises to make a will, which implicitly means to die leaving such a will and to revoke any prior inconsistent will.

Contracts to make wills, even when not limited to such contracts as are implied in joint and mutual wills, are not new. The circumstances under which such contracts are valid, the proper interpretation of their meaning and dimensions, and the proper remedies for their enforcement, are questions that cannot be explored here.²¹ There may be no exact precedents for the *Spinks* case, but the only problem is to see whether one such promise is sufficient consideration for the other or whether they are both illusory. I think it is at least arguable that they are not illusory. Each promise is subject to two qualifications: it applies only to property owned at death and only if the other party is then living. The latter provision is beyond the control of the promisor; the former deprives him of his freedom to give his property by will to whomever he pleases. Such a contract of course could not itself dispose of property, even as a will, or serve to revoke any prior will. But if breached, the remedies would be those normally available for breach of contract, or at least those for contracts to make wills.

If the agreement in *Spinks* is properly construed as intended to have such effect, and if such promises are binding under contract law, it still remains to be seen whether the policy of the wills acts

20. *Ricker v. Brown*, 183 Mass. 424, 67 N.E. 353 (1903).

21. For a discussion of these issues, see B. SPARKS, *CONTRACTS TO MAKE WILLS* (1956).

is thereby subverted. The promises in *Spinks* embraced real estate, and so were subject to the Statute of Frauds, if indeed they would not have been so subject had they embraced only personal property. Surely an oral agreement of this sort would present all the risks and dangers of oral wills. Is an instrument in writing sufficient? Most of the problems discussed above about contracts that have not been, or should not have been, vitiated as testamentary transfers of property are third-party beneficiary contracts, in which the testimony of the promisor, as a "third-party" interposed between a donor and his beneficiary, may provide an adequate safeguard to the integrity of the transaction. That element is lacking in the *Spinks* case. But the special risks that the wills acts are designed to meet also were not present, at least to no greater degree than in any contract to make a will. No such risks are created merely by the fact that the property bound by the contract cannot be identified until the death of the promisee, for the fact of dispositions by the promisor in his lifetime is a fact not readily fabricated by false testimony.

In *McCarthy v. Pieret*,²² an agreement to extend a bond and mortgage provided that if the mortgagee died before the new due date, interest and principal were to be paid to designated persons. The court held that those persons had no rights under the agreement because it was testamentary. The court explained that no valid gift was perfected, an irrelevant statement because no transfer of property was attempted. In recognizing that valid third-party beneficiary contracts can be made, the court dismissed this one by remarking that in enforceable third-party beneficiary contracts the promisee is unable to control the promisor in the fulfillment of the promise. Presumably the court meant that here the beneficiaries had no presently enforceable rights and that the mortgagee could have received payment of the mortgage debt and discharged the mortgage without accountability to anyone. This, however, involves no greater control than exists where an insured reserves the right to change the beneficiary of an insurance contract, not to speak of the power of a settlor to revoke a trust. The decision has been much criticized and is indefensible.²³ It may have prompted a statutory change in the New York law,²⁴ which, however, failed to reach the particular kind of transaction involved in this case.

Much unnecessary fall-out from some courts' attacks upon con-

22. 281 N.Y. 407, 24 N.E.2d 102 (1939).

23. See 1 SCOTT, *supra* note 13, § 56.5A.

24. N.Y. EST., POWERS & TRUSTS LAW § 13-3.2 (McKinney 1967).

tractual provisions as testamentary would be prevented by an unusual section of the Uniform Probate Code.²⁵ It is provided that in any written instrument effective as a contract, gift, conveyance, or trust, certain provisions shall not be deemed testamentary, nor render the instrument testamentary. Two such provisions are: (1) that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently; and (2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

2. Deeds

a. *Provisions concerning the passing of title.* Deeds sometimes provide that they are not to take effect until the death of the grantor, or that no title is to pass or vest until his death. It is sometimes held that such deeds are not effective inter vivos.²⁶ Enlightened construction, however, permits the conclusion that the grantor intends merely to postpone enjoyment and so to convey a future interest, retaining a life estate.²⁷ Under this construction, the result is the same as the case in which a grantor, by will or deed, conveys to *A* for life, and says that upon *A*'s death "I give to *B*," or that the property shall then vest in *B*. *B* takes a vested remainder.²⁸

Even if such a provision is construed as directing that no interest shall pass until the grantor's death, the conveyance must be regarded as effective at once. If the grantor has made it clear that full ownership is to reach the grantee upon the grantor's death, there is nothing he can do thereafter to prevent it. Such a certainty of future full enjoyment cannot be treated as anything other than a property interest, whatever the grantor calls it, and despite any expression by him that nothing is to pass until a future event occurs. The problem is not essentially different if the deed provides that the grantee is to take upon the grantor's death only if he survives the grantor.²⁹ The

25. UNIFORM PROBATE CODE § 6-201.

26. See, e.g., *Gardner v. Thames*, 223 Ga. 378, 154 S.E.2d 926 (1967); *Wheeler v. Rines*, 375 S.W.2d 48 (Mo. 1964); *Coulter v. Carter*, 200 Miss. 135, 26 So. 2d 344 (1946); ATKINSON, *supra* note 15, at 187.

27. ATKINSON, *supra* note 15, at 187.

28. See *Dowd v. Scally*, 174 N.W. 938 (Iowa 1919), *affd. on rehearing*, 184 N.W. 340 (Iowa 1921).

29. See *Abbott v. Holway*, 72 Me. 298 (1881).

condition of survivorship is beyond the control of the grantor, and the grantee simply takes a contingent future interest.

A duly executed and delivered deed that expressly or by proper construction reserves a life estate in the grantor poses no greater threat to the policy of the statutes of wills than a deed that conveys a fee simple outright.

b. *Delivery.* By far the most common type of case in which a transaction is challenged or defeated as testamentary involves the delivery of deeds. The full dimensions of the subtle requirement of delivery cannot be explored here. At the very least, it can be said that delivery does not require the physical transfer of the instrument, although such transfer is the best way to accomplish it. "Delivery" essentially means an objective manifestation of the grantor's intention that the conveyancing transaction has been concluded. Delivery properly has nothing to do with the nature or extent of the property interest conveyed, although a significant exception to this proposition will be noted below.

If a grantor fails to deliver his deed during his lifetime, the deed is ineffective, and it may be proper to describe the transaction as testamentary.³⁰ A few variations of this problem can be considered here. Substantial, though not uncontroverted, authority allows a grantor to reserve the power to revoke his conveyance without rendering the conveyance testamentary.³¹ The universal recognition of revocable trusts renders incongruous any other rule for conveyances not in trust.

Grantors have delivered deeds in escrow with the direction that the deed be delivered to the grantee upon the grantor's death. In cases where the grantor has clearly reserved no right to recall the deed, it is generally held that the conveyance is effective upon delivery in escrow, but in effect subject to a life estate in the grantor.³² Exception could have been taken to this device as an initial proposition on the ground that such a manipulation of the delivery process, as a substitute for an express reservation of a life estate in the deed, is not consistent with the requirements of the Statute of Frauds, or perhaps the parol evidence rule. Conceding the general acceptance of this device, one might further argue that the informal reservation by the grantor of the right to recall the deed is also sustainable, on the same basis, as a power to revoke. Respect for the nature and

30. See *Palmer v. Riggs*, 197 Miss. 256, 19 So. 2d 807 (1944).

31. See *Garvey*, *supra* note 5.

32. 3 ALP, *supra* note 1, § 12.67. *Contra*, *Costello v. Costello*, 136 Conn. 611, 73 A.2d 333 (1950).

importance of the formal requirement of delivery, however, may fully justify regarding such further qualification of it as essentially subversive. On the other hand, there is no reason why a direction by a grantor to deliver a deed held in escrow upon his death if the grantee is then living should not also be valid. Again, it should not matter that the deed conveyed a contingent rather than a vested remainder. There is, however, considerable authority to the contrary.³³ The argument by some courts that in such a case the grantor has not parted with all control over the deed, because in one event he will be entitled to have it back, reveals a misconception concerning the delivery requirement, since the event upon which the grantor can regain it is not subject to his control.³⁴

There is an old rule of conveyancing that a deed cannot be delivered in escrow to the grantee.³⁵ This means that an effort to make a conditional delivery by delivering to the grantee rather than to a third person in escrow results in an absolute conveyance free of any conditions. A number of courts have given this rule modern acceptance, and presumably it also applies if the delivery is not subject to a true condition but rather to a direction that the deed is to be recorded after the grantor's death or is otherwise to pass the right of enjoyment at that time. At least one court, however, has permitted a grantor to prove that delivery to the grantee, his wife, was on condition that she not record the deed unless he were killed on a military mission.³⁶ A number of recent cases have taken a third position—that the conveyance is testamentary and void.³⁷ It is at least arguable that proof of oral conditions should not be admissible for the purpose of giving effect to them, where no third person is involved who can testify to the transaction. It is also arguable that neither a grantor nor anyone claiming his property should be permitted to offer proof of such a condition even for the purpose of demonstrating that the deed was not delivered at all. All proof of delivery is extrinsic, but where a deed is normally given to the grantee, a court may well resist proof denying delivery that consists solely of

33. 3 ALP, *supra* note 1, § 12.67.

34. See Ballentine, *When Are Deeds Testamentary*, 18 MICH. L. REV. 470, 478 (1920).

35. 3 ALP, *supra* note 1, § 12.66 n.7.

36. See *Chillemi v. Chillemi*, 197 Md. 257, 78 A.2d 750 (1951).

37. *E.g.*, *Kelly v. Bank of America*, 112 Cal. App. 2d 388, 242 P.2d 923 (1952); *Peebles v. Rodgers*, 211 Miss. 8, 50 So. 2d 632 (1951); *First Sec. Bank v. Burgi*, 122 Utah 445, 251 P.2d 297 (1952); *cf.* *Knibbe v. Wade*, 161 Ohio St. 294, 118 N.E.2d 833 (Sup. Ct. 1954).

oral assertions of conditions by the grantor. It still can be argued that the old rule is the best.

A strange twist to this problem appeared in *Johnson v. Weldy*,³⁸ a case in which a settlor conveyed land to her daughter by a deed absolute on its face. Through an accompanying trust instrument, the settlor directed her daughter, in the event of the settlor's death, to administer the property in trust for designated beneficiaries, and in the meantime to hold the deed in escrow and record it after the settlor's death. The court held that the trust was testamentary and invalid, leaving the original deed absolute, and that a reconveyance by the grantee to the grantor revested absolute title in her. Instead of conveying in trust with the reservation of an equitable interest for life in the settlor, cannot a settlor convey in trust, reserving a full legal life estate? The court recognized that such a conclusion had been reached in a prior case containing ambiguous trust language. The court's effort to distinguish these cases was unconvincing. It was hardly sufficient to say that this "whole transaction looks to the future." The language about holding the deed in escrow, since it was expressed in the trust instrument itself, does not raise the problem about delivering a deed in escrow to the grantee. Perhaps the court was moved by the particular circumstances following the original transaction; but in the absence of proof that the settlor reserved any power to recall the deed, should the settlor's initial purpose, which seems obvious from the trust instrument, be subverted by the ineptitude of the draftsman?

*Noble v. Fickes*³⁹ is a famous case in which a warranty deed was defeated for want of delivery because the grantor, in delivering the deed in escrow, had reserved the right to recall it. The court said that the grantor's intent in such circumstances was essentially testamentary. Since the deed was attested, the grantee then offered it for probate, which was denied because the grantor's testamentary intent did not appear from the language of the deed and could not be proved extrinsically. The result is logical if a court insists upon such a rule respecting proof of testamentary intent when an instrument is offered as a will. Proof of delivery of a deed is necessarily extrinsic, but proof of testamentary intent is not. It also is not necessary to label as testamentary every deed that fails for want of delivery. On the other hand, where a deed fails because the grantor has reserved the right to recall it, it is not inaccurate to say that the keeping of such a string

38. 79 N.D. 80, 54 N.W.2d 829 (1952).

39. 230 Ill. 594, 82 N.E. 950 (1907).

on the transaction reveals a testamentary purpose. In any event, as argued by dissenting justices, there may be some need to bring the rules relating to these two types of transactions into better conformity, at least to the extent of avoiding the consequences of defeating a deed because it is testamentary and defeating it also as a will because it is not.⁴⁰

When grantors attempt to keep strings on their conveyances by manipulating the delivery requirement, serious risks such as those that properly offend the statutes of wills can arise, since the delivery of a deed is entirely dependent on extrinsic proof, and such proof can establish delivery even where the deed remains in the grantor's possession. It would appear, however, that by a proper definition and application of the delivery requirement, these risks can be reduced to manageable levels, especially where a deed is delivered in escrow, so that the testimony of the escrowee is available. In fact, the same delivery problems would exist even if it were required that deeds be attested.

3. *Gifts of Personal Property*

Some of the problems here are much the same as those encountered above involving deeds of land. Others arise out of transactions that are contractual but which contain provisions that cannot be enforced as contracts. As for formal requirements, gifts need not be in writing although they must meet the delivery requirement, which is analogous to but not the same as the requirement of the delivery of deeds. Delivery of gifts builds on the base of a physical transfer of a chattel. The obvious need for qualifications and substitutes is accommodated by notions of "constructive" and "symbolical" delivery, as illustrated by a signed paper or instrument of gift. Such a delivery is accepted in many but not all circumstances. The acceptance may depend upon the formality of the instrument—that is, on whether the writing is something more than an expression in a personal letter.⁴¹ Where accepted as a substitute for delivery of a chattel or a document representing intangible property, such as a certificate of stock or a bond, it obviously follows that the paper itself must be delivered. This is the situation that presents

40. See 230 Ill. at 607-08, 82 N.E. at 954 (Cartwright & Carter, JJ., dissenting); cf. *In re Wnuk's Will*, 256 Wis. 360, 41 N.W.2d 294 (1950) (warranty deed admitted to probate where testamentary intent was evidenced by the deed itself).

41. See BROWN, *supra* note 7, § 7.10.

problems most closely analogous to those identified above involving deeds.

a. *Gifts causa mortis*. Gifts induced by the fear of death from an existing physical condition of the donor are held to be revoked by the donor's recovery from that condition and are otherwise revocable upon a proper expression of the donor's intention.⁴² Conceptually, although called *causa mortis*, the gift is *inter vivos* in the sense that the property is treated as passing at the time of delivery, though it is subject to revocation. In a few cases, courts have insisted upon the distinction between a gift that will take effect at death and one that is revocable, and have held invalid a gift where the donor, in fear of death, delivers a chattel to the donee or to a third person with the statement that the gift is not to take effect or that the chattel is not to be given to the donee before the donor's death.⁴³ The distinction between a conveyance on a condition precedent (the donor's death) and one subject to a condition subsequent (revocation) is difficult enough to apply or to justify in formal property transactions. Gifts *causa mortis* are usually made informally and without benefit of counsel. Trapping a donor by such a refinement, so that his gift fails if he uses the wrong words, cannot be justified. Most courts do not even inquire into such a question, and of those that do most reject the distinction. Recognition is given to the fact that in substance such a gift is inherently imperfect until the donor's death. Commonly, courts simply declare that a gift *causa mortis* is one kind of "testamentary" transfer that, by long tradition, escapes the statutes of wills.⁴⁴ In fact, such a characterization is misleading. Gifts *causa mortis* are not like the giving by a person of whatever personal property he may have at his death. It is really only the revocable feature that reduces the *inter vivos* quality of a gift *causa mortis*. So long as such gifts must be delivered, and especially where the delivery requirement is more strictly applied than it is with gifts *inter vivos*, they raise no greater conveyancing risks than gifts *inter vivos*.

b. *Gifts inter vivos*. Sometimes such gifts are made, as in the case of deeds of land, by delivering a chattel to a third person to be delivered to the donee or held for him. Courts have tried to distinguish between a direction to hold for the donee, where title is said

42. See *id.* §§ 7.15-.20.

43. See *Slager v. Allen*, 220 S.W.2d 752 (Mo. App. 1949); *BROWN*, *supra* note 7, § 7.17.

44. See *In re Nols' Estate*, 251 Wis. 90, 28 N.W.2d 360 (1947).

to pass immediately "in trust" for the donee, and a direction by which the third party is made the donor's agent for delivery.⁴⁵ Even in the former case the gift will fail if the donor has reserved the right to recall the chattel. Although it has seldom been attempted, the analogy to a deed in escrow has been used to sustain a gift of corporate stock where the third party was directed to deliver the stock certificates on the donor's death, upon proof that no right of recall was reserved.⁴⁶ The donor was, in effect, held to have reserved a life interest.

Suppose a donor delivers stock certificates to a donee with a written statement that "these are mine as long as I live and then yours." Such a gift has been held invalid.⁴⁷ If these directions were oral, the result would be obvious, unless one were to apply the analogous rule of deeds of land, under which the gift would be treated as effective immediately free of the reservation. Does it make any difference that the reservation was in writing? Perhaps not, in view of the informality of the writing. The question remains: Can a donor deliver a deed or gift of personal property to the donee and reserve an interest for life expressly in the deed? If it can be done in a deed of land, it should be possible in a deed of personal property. But one should be prepared to find a court, unfamiliar with deeds of personal property, treating the writing merely as a constructive or symbolical delivery, which is vitiated by the old saw that a donor must part with all dominion and control over the chattel itself.

Such a problem is involved where a partnership agreement provides that upon the death of any partner his interest in partnership property shall be paid to the decedent's wife or to others. In several cases such a provision has been held void as testamentary.⁴⁸ This simple and sensible arrangement seems so free of any of the dangers that the wills acts are designed to prevent that an effort should be made to find some reasonable rationale for sustaining it. A contractual analysis will not help, for there is no promise by a surviving partner to pay a third-party beneficiary, since each partner is

45. See Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 568, 586 (1927).

46. See *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604 (1915).

47. See *Zimmerman v. Fawkes*, 70 Idaho 389, 219 P.2d 951 (1950).

48. See, e.g., *In re Hillowitz's Will*, 24 App. Div. 2d 891, 264 N.Y.S.2d 868 (1965); cf. *In re Dash's Will*, 120 N.Y.S.2d 621 (Surr. Ct. 1953) (agreement admitted to probate where there was testamentary intent and compliance with the statute of wills).

attempting to dispose of his own property. The difficulty with calling the provision in question an inter vivos transfer is that each partner presumably can bring about a dissolution of the partnership in his lifetime and so get all his interest for himself. But this does not necessarily mean that he has conveyed nothing. It could be argued that a partner either has conveyed a future interest in his share of the partnership property or has conveyed his interest to the surviving partners in trust for his donee. The implicit power of a partner to defeat the conveyance by dissolution of the partnership could be treated simply as a reserved power to revoke. Surely the procedure for dissolution supplies more formalities than those normally prescribed by an express power of revocation. The fact that partnership property may be disposed of implies that such disposition also must comply with partnership law or the agreement, and does not rest in the unfettered discretion of any partner.⁴⁹

Finally, a deed of land, delivered to the grantee, which also provided that the conveyance shall include all personal property owned by the grantor at his death, was held not to convey any personal property inter vivos.⁵⁰ The troublesome nature of this problem is discussed more fully below.⁵¹

4. Trusts

Obviously, the rules respecting conveyances of land and gifts of personal property apply when such transactions are in trust, unless the trust is self-declared; the problems discussed above in relation to such transfers may also exist where the dispositions are in trust. Some of the contractual problems already examined also recur here, and several of them are considered below. They are followed by problems peculiar to trusts.

a. *Conveyancing and contract problems.* In *Alexander v. Zion's Savings Bank and Trust Co.*,⁵² property was transferred in trust to pay the income to the settlor and his wife during his life, reserving to the settlor the power to revoke and to change beneficiaries. The settlor's wife died, he remarried, and he amended the

49. Cf. *Crowell v. Himes*, 117 Ind. App. 56, 69 N.E.2d 135 (1946) (provision in a sharecropping lease, through which the lessee would receive all personal property on the premises should the lessor die during the term, denied effect because, due to the year-to-year basis of the lease, the lessor remained in complete control of the personal property).

50. See *Brennenstuhl v. Scharfenberger*, 259 S.W.2d 41 (Ky. 1953).

51. See text at note 57 *infra*.

52. 2 Utah 2d 317, 273 P.2d 173 (1954).

trust to provide that his second wife would have the use and occupancy of trust land for life, with remainders for the benefit of the plaintiffs. The trust instrument also contained a typical spendthrift clause that provided that no interest should vest in the beneficiaries until they became entitled to receive income or principal absolutely. After the second wife had enjoyed her interest for many years, and after the settlor's death, the plaintiffs sued to terminate the trust and to receive the corpus. The wife claimed her statutory intestate share of the trust estate, and the court held that she was entitled to it, on the ground that the trust was testamentary and void. Presumably, the plaintiffs were not entitled to the balance after payment of the widow's share.

It may have been proper to hold that such a trust could not be used to defeat the wife's statutory share, although there might have been some question about her right to challenge it after having enjoyed its benefits. But the trust should otherwise have been held valid. The fact that the beneficiaries' interests were not to "vest" in the settlor's lifetime does not mean that no interest passed to them. It seems improper to construe typical spendthrift language as having any purpose other than to make the beneficiaries' interests inalienable. Such language cannot properly be construed as preventing the transfer of any interest so long as it is certain, by the terms of the instrument, and apart from the power to revoke, that the beneficiaries would have the right to it at a future time. In other words, if the settlor has given them a future interest, his statement that he has given them nothing must be disregarded unless he means that they are never to receive anything under any circumstances.⁵³

In *Rodriguez v. Rodriguez*,⁵⁴ the owner of a business contracted in writing to sell it, the buyer agreeing in part to pay \$15,000 to the seller's son, who was informally told by his father to use the money to pay hospital and doctors' bills incurred by the father and to keep the balance for himself. After the father's death, part of the money was expended, upon the son's direction, to pay the expenses of the father's last illness, and the balance was paid to the son. The court held that he was not entitled to keep it because there had been no gift inter vivos to the son, but rather an attempted testamentary disposition. On the contrary, it could have been held that

53. *But cf.* *Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 249 S.W. 629 (1923) (spendthrift clause held to convey only a contingent interest; since a question of remoteness was involved, the instrument was in violation of the rule against perpetuities and therefore void).

54. 310 F.2d 62 (9th Cir. 1962).

the son was entitled to the money as a third-party beneficiary of the contract of sale, but in trust with the duty to enforce the contract, to use the proceeds collected for the benefit of the designated creditors, and to hold the balance for himself. Trusts of personal property can be oral where they arise out of a contract or upon proper delivery of personal property to a trustee, which I believe is unfortunate. But even if it were otherwise and oral trusts were regarded as objectionable, that is hardly a reason to deprive a son of his rights under the contract. It has been held, moreover, that even when land is conveyed upon an oral trust, the grantee can perform the trust against objections by other interested parties.

In *Urbancich v. Jersin*,⁵⁵ a decedent in his lifetime opened a joint bank account, and the evidence showed that the defendant codepositor was directed to pay the funds after the decedent's death to the latter's nieces and nephews. The court held that the defendant took no interest in the account, since it was an attempted testamentary transfer. The same criticism discussed above of the courts' treatment of joint bank accounts applies here. The court said that the nephews and nieces were not parties to the account and could take nothing, and that it had not been intended for the defendant to take anything. This should mean merely that it was intended that he take in trust for them. As in *Rodriguez*, oral proof of such an intention, whether or not it should be enforced against the defendant, is not a good reason to deny him his rights as a depositor. Another obstacle to effectuating the donor's intention might have been mentioned. It is declared to be the law that a manifestation of an intention to create an inter vivos trust in the future does not create a trust, either presently or in the future.⁵⁶ Such a rule is sensible if its meaning is properly limited. It does not seem helpful or sensible to say that a person cannot be presently given a future interest, which, when it comes into possession, will be administered as a trust. Even if the rule applies to such a case, the transaction can be construed to create a present trust if one is willing to accept the fact that for the time being the trustee has no active duties.

Clearly no trust can be created without a *res*. Nor can an inter vivos trust be created other than by a self-declared trust unless an interest in properly designated property is given to the trustee inter vivos. It has thus had been held that a trust instrument that purports to transfer in trust all property owned by the settlor at his death does

55. 123 Colo. 88, 226 P.2d 316 (1950).

56. RESTATEMENT (SECOND) OF TRUSTS § 26 (1959).

not create a trust inter vivos.⁵⁷ The reason is not merely that the expressed intention is to create a trust in the future, but also that no property is transferred in trust inter vivos. It might seem that such a result is necessary under any conceivable standard for drawing the testamentary-inter vivos distinction. This is one of the few kinds of recurrent will substitutes, if not the only one, that is not saved by a proper application of the passing-of-an-interest test. Should it nevertheless be saved where, as in the instant case, a safeguard against the usual dangers involved in executing wills might be found in the formality of an instrument delivered to a trustee? In fact, I would not find it offensive if a court were to uphold such a transaction as a will to be administered as such. Such a result might conceivably be justified under a principle of "substantial compliance" with the usual formal requirements for the execution of wills.⁵⁸ I would not expect, however, that a court could be induced to fashion such a result without some sort of legislation that liberalizes the application of those requirements. Nor am I prepared to assert that any attempt to give inter vivos all the property that one owns at death should be sustained.

In a similar case, a father expressed in writing to his children that he had received \$25,000 from their mother, "and if I have it at the time of my death I want it paid" to them. In the absence of any other acts by the donor, it is difficult to escape the court's conclusion that his statement could have no inter vivos effect.⁵⁹

b. *Power to revoke and other reserved powers.* It has long been held that the reservation of a power to revoke a trust does not rob the trust of its inter vivos effect. It is easy to understand why such a reservation is desired by settlors, and to justify the approval the courts have given it. When nothing else is reserved, the concept of a defeasible property interest here has real substance. The trust is a going concern, and the beneficiaries have interests that are presently enjoyable. It is also obvious that if a settlor reserves only an interest to himself as beneficiary, a substantial change has occurred in his prior absolute ownership. When these two reserved interests are combined, however, and a settlor reserves both a life interest and a power to revoke or amend, it may seem that he has altered his dominion over the trust estate so slightly that the change

57. *Niccolls v. Niccolls*, 168 Cal. 444, 143 P. 712 (1914); cf. *Brennenstuhl v. Scharfenberger*, 259 S.W.2d 41 (Ky. 1953) (same result for deed attempting to convey all personal property grantor might have at his death).

58. See Langbein, *supra* note 2.

59. *Dawson v. Dawson's Admx.*, 272 S.W.2d 666 (Ky. 1954).

is purely formal. He has bound himself only to the extent of removing himself one step from absolute ownership; that is, he must take the time and make the effort to exercise the power to revoke in the manner prescribed. It has been recognized, however, that the permissibility of this combination of reserved interests was implicit in the recognition of the power to revoke; for everything else that a settlor may want to retain can be gained merely by an amendment that exercises the power. And so it has turned out: everything settlors have reserved in addition to a power to revoke has been justified by substantial authority. For example, a settlor's reservation of a power of appointment, in addition to a life interest and a power to revoke, has been sustained.⁶⁰ Serious conflict arose only when settlors, in addition to such interests, also reserved substantial power to control the trustee in the administration of the trust. Although this too has been approved, there is still substantial authority that draws a line at this point.⁶¹ The argument is that this accumulation of reserved interests has in effect converted the trustee into a mere agent of the settlor, whose powers end at the settlor's death.

Sufficient reasons appear in much of what has been said herein for not drawing such a line. On a technical basis, the trustee in such a case has been given legal title, which normally is not given to an agent, with attending legal relations that keep his title from being barren or his role wholly passive; the passing-of-an-interest test is thereby satisfied. Should that fact be ignored and emphasis placed instead upon the essential substance of the transaction? The argument herein made for the passing-of-an-interest test assumes that it is essentially formal in the sense that it is limited only by the variety of property interests that can be conveyed *inter vivos* and the formal distinctions among them. It is also properly limited by a search to discover whether the transaction in question is reasonably free of those dangers of fabrication that usually inhere in the making of ordinary wills. Here the formalities of the transaction and the interposition of a trustee between the donor and donees seem sufficient assurance of the integrity of the transaction.

c. *Life insurance trusts.* Much the same can be said of transactions of this sort.⁶² If an insured designates as beneficiary of the insurance policy a person whose contractual rights are to be held in trust, it can be argued that this is no different from any life insurance

60. See 1 SCOTT, *supra* note 13, § 57.1.

61. See *id.* § 57.2.

62. See *id.* § 57.3.

contract. But of course it is different in the sense that the requirements of trust law must also be satisfied. For example, the trustee must be given a property interest. The contract gives him such an interest, which is a chose in action, a right to enforce the insurance contract. The duties of the trustee during the lifetime of the insured-settlor are minimal, but they are real. The retention of substantial control by the insured, such as the right to change the beneficiary, and the cash-surrender or other values of the insurance, raises a problem that is not different from that already considered in the context of an ordinary trust in which the settlor reserves the power to revoke and other interests as well.

d. *Formal requirements for trusts of personal property.* A large gap in the law of conveyancing relates to trusts of personal property. In most states, the Statute of Frauds reaches trusts of land, but trusts of personal property can be created without any formal requirements, which means that it can be done orally.⁶³ This is the case both with declarations of trust (that is, self-declared trusts), and also with transfers in trust, where the transfer itself must be formally effective but the trust can be proven orally. Is an oral trust any less dangerous than an oral will? It is to the extent that the oral trust does not present the peculiar dangers of allowing proof after a person dies that something he did in his lifetime constituted his will. The lesser requirements for inter vivos transfers have been defended on the ground that there is some safeguard against imposition in the fact that two people who deal with one another at arm's length are both available to speak about what they have done. But here we are speaking of a kind of transfer of property interests that requires no formalities whatever. There may be historical and practical reasons for such a condition, but I do not believe it can be justified. No one is arguing for repeal of the Statute of Frauds or the abolition of the need for the delivery of gifts; hence, in the absence of a special reason for the gap in the creation of trusts, the gap should be closed. In fact, that has already been accomplished in at least one state.⁶⁴ A writing signed by the settlor or trustee should be the minimum. It would not seem sufficient, however, to proceed merely as though the Statute of Frauds were applicable. It would be better to require in addition that the writing be delivered in the same sense as delivery is required for deeds of land. A beneficiary would be a proper person to whom such a writing could be delivered. It may be

63. See *id.* §§ 32.5, 39, 52.

64. See GA. CODE § 108-105 (1975).

too late to expect courts to raise such a formality. Curative statutes are in order.

In *Farkas v. Williams*,⁶⁵ a settlor purchased on several occasions corporate stock in his name as trustee for one Williams. For each purchase he signed and delivered to the corporation a written declaration by which he declared himself trustee of the stock, reserved the beneficial interest to himself for life, reserved the power to sell or to redeem the stock and to retain the proceeds of trust, and declared that the stock should vest absolutely in Williams at the settlor's death, subject to the condition that he survive the settlor and also to the settlor's power to change the beneficiary or otherwise to revoke the trust. The court upheld the trust on the basis of the usual analysis concerning the effect of the reservation of extensive interests by a settlor, noting that the settlor was still bound to an extent greater than if he had merely made a will. Such an analysis seems to reach its uttermost limits when, as here, the settlor not only reserves the usual powers and interests but is the sole trustee as well. In further defense of its decision, the court noted the formality of the transaction, which consisted not only of the issuance of stock in the settlor's name as trustee but also of separate written declarations of trust for each purchase. It may also be emphasized that these declarations were delivered to the corporation whose stock was held in trust.

Where an employee's pension or profit-sharing plan provides that interests are to be paid upon his death to such persons as he shall designate in a written instrument filed with the trustee-employer, the exercise of such a right by the employee has been upheld against a claim that it was testamentary.⁶⁶ The result seems proper, for it is not essentially different from a right to change the beneficiary of an insurance contract. It has been expressly authorized by statute in some states.

There is a peculiar dearth of authority respecting the formalities required for the transfer by a beneficiary of his interest in personal property held in trust. It has been said that no writing is required.⁶⁷ If the transfer is gratuitous, is it a gift that must be delivered? What is there to deliver other than a writing? If in fact there are no formal

65. 5 Ill. 2d 417, 125 N.E.2d 600 (1955). Cf. *In re Estate of Brenner*, 547 P.2d 938 (Colo. 1976), where a self-declared trust of land reserving similar powers was created by an instrument that referred to property not then owned by the settlor, but which was later conveyed to the settlor as "Trustee for R. Forrest Brenner" (settlor-trustee).

66. See 1 SCOTT, *supra* note 13, § 57.4.

67. See 2 *id.* § 138.

requirements, this is another gap in the law of conveyancing that should be filled, presumably in the same way as suggested for declarations of trust.

Conveyances in trust have an unusual double-barreled effect. They are generally effective to convey legal title to the trustee and equitable interests to the beneficiaries. The two transfers, however, need not occur at once or by the same instrument. A settlor can convey to a trustee *inter vivos* and designate the beneficiaries by his will. In such a case, it appears that a trust is created immediately and can be enforced by the settlor by way of resulting trust unless and until he designates the beneficiaries. When he does so by his will, the will can be said to transfer the equitable interests. Suppose he directs that the trustee shall hold for such persons as he may name thereafter and, in fact, he does name them orally or by an informal writing. Clearly if he does not mean to do it by will, he must do it *inter vivos* by a writing if the trust property is land. Suppose the subject matter is personal property or the trustee is named beneficiary of life insurance that is to be held in trust. It makes no substantial difference whether the transaction is treated as a transfer of the settlor's retained equitable interest or as the completion of the initial conveyance in trust. Several courts have differed over the formalities that must be observed. In one case, a memorandum found at the settlor's death was held to be sufficient,⁶⁸ while in another, such a device was deemed testamentary.⁶⁹ Apart from the question whether the settlor intended his informal writing to operate as a will, is it permissible for him to make an *inter vivos* transfer without delivery of the writing or some substitute therefor? If no formalities are required, can he do it orally? Whatever view one has generally about informally created trusts of personal property, surely all the dangers of oral wills are present here. This need not necessarily mean that the transaction must in all cases be deemed testamentary, so that an attested instrument is required. Rather it should mean that, if the settlor intends to complete the transfer *inter vivos*, the formalities suggested above for all trusts of personal property should at least be required here.

Reference is made again to the section of the Uniform Probate

68. See *Jackman v. Equitable Life Assur. Socy.*, 145 F.2d 945 (3d Cir. 1944).

69. See *Payton v. Almy*, 17 R.I. 605, 24 A. 101 (1892); cf. *Van Cott v. Prentice*, 104 N.Y. 45, 10 N.E. 257 (1887) (trust valid in which beneficiaries were named in a writing in a sealed envelope delivered to the trustee at the time of transfer with directions that it should not be opened until the settlor's death).

Code⁷⁰ which provides that, in any written instrument effective as a contract, gift, conveyance, or trust, certain provisions shall neither be deemed testamentary nor shall render the instrument testamentary. For example, it is provided: "(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently." The rights of creditors are not to be affected.

I hope that the language referring to a separate, subsequently "executed," instrument will not be construed to permit its execution without any formal requirements other than a writing. Otherwise a new method will have been created for conveying land without satisfying either the requirements for wills or for inter vivos conveyances. If the reservation of a testamentary power of appointment is an apt analogy, it has been held and is generally assumed that the power must be exercised by a duly executed will. If the authors of the Uniform Probate Code really intend to tie inter vivos and testamentary transactions together into one inter vivos transfer, and, so long as creditors' rights are not affected, to permit its completion by any informal writing, I must dissent. An attempt to regard otherwise testamentary dispositions as inter vivos when they are tied to inter vivos transactions in this manner is one thing. Even that requires some policy concessions. But if in becoming inter vivos a subsequent disposition need not even meet the formal requirements for inter vivos conveyances, I think such a result can be approved only after a thorough reexamination of all formal dispositive requirements and the policy they are thought to serve.

5. *Conclusions from the Cases*

Any inclination a court may have toward condemning contracts as testamentary dispositions of property should be summarily suppressed. The only issue that really exists when enforcement of a promise is sought is governed by the law of contract—that is, whether under that law the promise is valid and binding. There should be no reason to question any contract on the ground that it is a substitute for a will, for, if it is, there is no law against it. A statute of wills and its underlying policy have nothing to do with contracts. Those who need more comfort than that derived from such

70. UNIFORM PROBATE CODE § 6-201; *cf. id.* § 2-513 (a reference in a will to a separate writing identifying the subject matter of a bequest is valid if it is in the testator's handwriting or signed by him. The writing may be prepared after execution of the will, and may be altered after preparation.).

a dogmatic assertion should observe that none of the types of contract cases considered above present the kind of dangers encountered with informal or oral wills.

In dealing with inter vivos transfers of real or personal property, the question should be, as with a contract, whether the transaction in question satisfies the law governing such conveyancing. As one encounters the subtleties of the law of estates, and as the line between testamentary and inter vivos transactions seems to blur, the "passing-of-an-interest" standard has evolved to sustain as inter vivos any disposition that transfers any property interest, present or future, vested or contingent, however slight. I believe that in the cases considered above, such a standard, when properly applied, can be a reasonably simple and straightforward device for saving those transactions that ought to be saved. The question was raised at the beginning of this essay whether there are kinds of dispositions involving interests that pass the test, but that ought nevertheless to be held testamentary because compliance with inter vivos formalities would not be enough to avoid the dangers that the statutes of wills were designed to preclude. It now seems that, with one serious exception, such dispositions have not been encountered. Suspected transactions are seen either to be essentially no different from ordinary conveyances by deed, gift, or trust, or they are attended by the sort of circumstances that constitute a sufficient substitute for attestation. The exception is a class of transactions that involves or depends upon the anomalous and perilous gap in the law of conveyancing that permits trusts of personal property to be created without any formalities. Courts should also realize that the passing-of-an-interest test alone may not be an invulnerable safeguard of the policy advanced by the statutes of wills. A case may yet come along that passes the test but does not provide any assurance that the transaction involved is really genuine.

The most striking fact that emerges from a review of the cases is that in almost all of those involving purported inter vivos transfers, a proper application of the passing-of-an-interest test would save them as effective inter vivos. The same can be said for a proper application of contract law to challenged contractual provisions.

There has been a strange reticence among both courts and commentators toward declaring the passing-of-an-interest test valid and useful. We have noted that a number of courts have acted as if their decisions were justified by that test. One may at times sense, however, either a reluctance to espouse it or the attitude that there is no single, reliable standard for drawing the distinction between

inter vivos and testamentary dispositions. It is one of my two main conclusions herein that the test can, without embarrassment, be openly acknowledged and given respectability. Reticence in acknowledging the standard can be replaced by caution in applying and by qualifying it in the manner herein explained.

Reticence or caution in recognizing the passing-of-an-interest test, however, does not justify the cases that have misunderstood it, have applied it improperly, or have resorted to other vague notions about what is testamentary. This is the second main conclusion that I have reached from the cases considered.

There has been a noticeable diminution in litigation over this matter in the past ten years, as compared with the ten years immediately after World War II. Yet I fear that there remains a greater risk, not in a court's allowing something testamentary to slip through its fingers, but in lingering old ghosts and the unwarranted fear of will substitutes.

B. *Spouses' Rights*

The whole picture changes drastically when the problem presented involves the administration of the law respecting a spouse's right to renounce any interest given by the will of a deceased spouse and to take instead a portion of the latter's estate as an intestacy, which is generally limited to a one-third share of the estate. A fundamental defect in such a limited marital property regime is the application of the right of election only to property that a deceased spouse leaves by will. An opportunity was left for property owners to vitiate such a right by inter vivos dispositions; and thus arose the problem of "fraud" upon a spouse's share. The full dimensions of this problem and the efforts by courts to close or to reduce the gap cannot be explored here.⁷¹ Some courts have dealt with attacks upon inter vivos dispositions by a surviving spouse in terms of the decedent's intent—that is, whether he intended to defeat or circumvent his spouse's claims upon his property. The difficulties in applying such a test have in some places virtually transformed it into one that assesses the fairness of an inter vivos disposition in the light of a variety of attending circumstances.

A different approach to the problem, in which attention is concentrated upon the nature or effect of the inter vivos transfer, is more relevant to the distinctions explored herein between inter vivos and testamentary transactions. It should now be obvious that a variety

71. See W.D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

of property devices are available whereby a grantor of property may, in a gratuitous transfer, retain many of the elements of ownership. Some of these are sufficient to leave a grantor's control or enjoyment of the property substantially undiminished. I have argued that such facts are irrelevant in deciding whether the conveyance is testamentary for the purpose of protecting the policy of the statutes of wills. Obviously, however, such facts may assume controlling importance where the only issue is whether the transaction is vulnerable to challenge by the grantor's spouse, who asserts that the property conveyed should be reached as a part of the grantor's estate for the purpose of the right of election. If such a transaction is indeed a subversion of the policy of the statutes enacted for the protection of surviving spouses, it is easy enough to say so and to declare the transaction vulnerable to the spouse's claim. It may also seem proper to describe such a transaction as testamentary with respect to a spouse's right of election. It is, however, neither necessary nor defensible to say that the transaction is testamentary for all purposes. There is nothing new in the notion that labels or classifications are to be applied with reference to and to be limited by the purposes or policies to be served. There is also no doubt that the policy of the statutes of wills and the policy of spouses' election statutes are altogether different.

The idea behind the particular distinction just asserted also is not new. It appears most strikingly in the Internal Revenue Code, in the basic notion that a variety of transactions that are not testamentary for other purposes are so regarded in determining what property is includable in a decedent's gross estate for estate tax purposes. Tax experts are fond of saying, and for good reason, that the policies that sustain inter vivos transactions for property or trust purposes must yield to the fundamental objectives of the tax laws. Thus, the two kinds of problems are carefully kept separate, and courts that pass on tax questions are rarely misled into assuming that a property classification for tax purposes has any necessary relevance for other purposes.

In respect to spouses' rights, the most famous case is the New York decision in *Newman v. Dore*,⁷² in which a settlor, three days before his death, conveyed all his property in trust, most of the provisions of which are not shown, but reserved a life interest in the income, the power to revoke, and substantial control over the powers given to the trustees. The trial court sustained the widow's attack upon the "valid-

72. 275 N.Y. 371, 9 N.E.2d 966 (1937).

ity" of the trust, and this decision was affirmed. The appeals court rejected the "intention" test and called the trust "illusory." The meaning of that term was not made clear, other than that it had something to do with the extent of the dominion reserved by the settlor. In fact, the court refused to say whether such a trust is valid for any purpose, and the reported proceedings do not indicate the exact nature or consequence of the judgment below.

The same court subsequently sustained an attack by a widow upon a Totten trust created by her husband for the benefit of a third person, on the ground that it was illusory under *Newman v. Dore*.⁷³ But ten years later, the court sustained a Totten trust against such a challenge.⁷⁴ The prior case was distinguished on the ground that the Totten trust there was never intended to have any real effect. The court made the remarkable statement that "[t]here is nothing illusory about a Totten trust as such."⁷⁵ Such a statement means that the later court thought illusory meant an absence of any real legal effect for any purpose. Equally remarkable is the court's statement that there is no power in the courts to divide such a trust and to hold part of it good and part illusory.

Until changed by legislation, no further clarification of the New York law came from the courts. Much remained in doubt: not only the question of the extent of reserved control that would render a transfer in trust illusory but also the very meaning of "illusory." Did the term mean "unreal" or "testamentary"? Or do these terms have the same meaning? After rejecting the intention test, did the court bring it back in disguise? It is at least obvious that the major source of confusion was the inability or unwillingness of the court to see that an inter vivos transaction can be vulnerable to a spouse's claim without being invalid altogether.

A statute in Ohio provides that a settlor may reserve a power to amend or revoke a trust, and that such a trust is valid as to all persons, except that any beneficial interest reserved to the settlor may be reached by his creditors.⁷⁶ It was held, however, that a trust of corporate securities in which the settlor reserved a life interest and the power to revoke was illusory and void as to his widow, but was otherwise valid.⁷⁷ The court said that the law places a widow in a higher position than a mere creditor in respect to personal prop-

73. *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941).

74. *In re Halpern's Estate*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

75. 303 N.Y. at 38, 100 N.E.2d at 122.

76. OHIO REV. CODE ANN. § 1335.01 (Page Supp. 1976).

77. *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (Sup. Ct. 1944).

erty in an unrevoked revocable trust. The same result was reached in a similar case three years later.⁷⁸ More recently, however, in *Smyth v. Cleveland Trust Co.*,⁷⁹ the court overruled both prior cases, and relied at least in part on the statute to deny a widow's claim.

The state of the authorities generally must be described as chaotic. Understandably, where *Newman v. Dore* has been relied on, the situation is not improved. Spouses have won in cases in which transactions were found testamentary,⁸⁰ apparently in the sense that the transactions were not valid for any purpose. Other courts have defeated the claims of spouses on the ground that the transactions were not testamentary,⁸¹ presumably meaning that they were valid for all purposes. The retention of control has been held to render trusts illusory as to spouses,⁸² but without any clear indication in the decision that the trusts were valid for other purposes. Often not made clear is the degree of reserved control that will render a transaction illusory, or the extent to which the intent of a settlor to defeat his wife's claim may play a part in the decision. Apparently, only in jurisdictions accepting the intention test as the basic standard is it clear that a judgment in favor of a spouse does not otherwise affect the validity of the transaction.⁸³ One court has defined the intention test as requiring an intent to defraud a widow of her rights, but it also said that proof of actual fraud is required, which is not established merely by proof of intent to defraud but rather by proof that a donor did not intend to divest himself of ownership.⁸⁴ Such a line of reasoning causes concepts and distinctions to dissolve before one's eyes. In view of its origin, the word "illusory" properly should designate a transaction that is vulnerable only to the special claims of spouses and not otherwise "testamentary," but the word illusory, even more than the word testamentary, implies the basic unreality of the transaction. Sometimes a transaction is called merely

78. *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (Sup. Ct. 1947).

79. 172 Ohio St. 489, 179 N.E.2d 60 (Sup. Ct. 1961).

80. *E.g.*, *In re Pengelley's Estate*, 374 Pa. 358, 97 A.2d 844 (1953); *Bickers v. Shenandoah Valley Natl. Bank*, 197 Va. 145, 88 S.E.2d 889 (1953); *cf. In re Montague's Estate*, 403 Pa. 558, 170 A.2d 103 (1961) (fraudulent inter vivos transfer).

81. *E.g.*, *United Bldg. & Loan Assn. v. Garrett*, 64 F. Supp. 460 (W.D. Ark. 1946); *Horn v. First Sec. Bank*, — Utah 2d —, 548 P.2d 1265 (1976); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945).

82. *See Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); W.D. MACDONALD, *supra* note 71, at 88 n.74.

83. W.D. MACDONALD, *supra* note 71, at 132.

84. *In re Montague's Estate*, 403 Pa. 558, 560-61, 170 A.2d 103, 105 (1961).

"colorable,"⁸⁵ without making clear whether this means that it is testamentary or illusory, or exactly why it is only colorable, or whether it is colorable for all purposes. An Illinois court has recently described as "quasi-testamentary" an otherwise valid inter vivos transfer by which a donor retains sufficient control of the property to justify a claim upon it by his surviving spouse.⁸⁶

In *Montgomery v. Michaels*,⁸⁷ the Illinois court took a refreshing approach to this problem. The court held that a Totten trust bank account was illusory as to the donor's creditors and surviving husband but otherwise was valid to create an interest in the trust beneficiaries. The opinion is the clearest statement I have seen that such a trust "violates the policy of the statute which gives a distributive share of the decedent's estate to the surviving spouse," as well as the rules protecting creditors, but does not violate any other policy.⁸⁸ In relying on *Newman v. Dore*, the court implied, but did not declare, that the same result would be reached in cases other than those involving Totten trusts in which a settlor reserves substantial control over the property given in trust. If the court does intend to extend the *Montgomery* rule to such trusts, it will have to define the extent of the reserved control that will result in such an extension, particularly the question whether a power to revoke alone is enough.

Such a clarification of the issues as the court provided in *Montgomery* does not alone, of course, solve the problem concerning the legitimate expectations of surviving spouses. Legislation may reconstitute the whole regime of marital property rights, as is accomplished by community property regimes. Other legislation has been more modest and may merely seek to clarify or reduce the problem in the manner suggested by *Montgomery*. For example, a statute in Pennsylvania provides that a conveyance by which a person retains a power of appointment by will, a power of revocation, or a power of consumption shall at the election of a surviving spouse be treated as a testamentary disposition so far as the surviving spouse is concerned.⁸⁹

There may be a substantial difference between a disposition that deprives a spouse of substantially all of the donor's property and one

85. See W.D. MACDONALD, *supra* note 71, at 132-37.

86. *Toman v. Svoboda*, 39 Ill. App. 3d 394, 403, 349 N.E.2d 668, 676 (1976).

87. 54 Ill. 2d 532, 301 N.E.2d 465 (1973).

88. According to the *Restatement*, the deposit can be included in the computation of the share to which the surviving spouse is entitled. RESTATEMENT (SECOND) OF TRUSTS § 58, comment *e* (1959).

89. PA. CONS. STAT. ANN. tit. 20, § 6111 (Purdon 1975).

by which the donor includes substantial benefits for his spouse. New York has enacted elaborate legislation that is discriminating in this respect and declares certain kinds of dispositions immune from attack by a surviving spouse.⁹⁰

The Uniform Probate Code (UPC) is similar in purpose to the New York statute but different in structure and detail.⁹¹ Its framers have borrowed the idea expressed in the Internal Revenue Code that certain types of transactions are to be treated as testamentary in the sense that the property involved remains in the donor's estate for estate tax purposes. The concept introduced is that of the "augmented estate" of a decedent. For the purposes of a spouse's right of election, a decedent's estate is treated as augmented by certain inter vivos transfers not made for full consideration, including transfers by which the decedent retained at his death the possession or enjoyment of, or the right to, income from the property, or the power to revoke, consume, invade, or dispose of the principal. These benefits to a spouse are balanced in effect by deducting from the augmented estate the value of property received by the spouse from the decedent during the marriage. When the balance is struck, and the augmented estate is determined, the surviving spouse may elect to take one-third of it. The spouse need not renounce the interest given by the decedent's will, but if the will gives less than the elective share, the spouse will receive the difference between that share and the amount received by the will.

Under any of the statutes mentioned above, it seems clear that any disposition that is testamentary in the sense that it is invalid inter vivos for all purposes will become a part of the decedent's estate and be subject to a spouse's right of election. The same is true for property not effectively conveyed inter vivos for any reason. Otherwise, under the New York statute and the UPC, a surviving spouse presumably has no basis for a claim against a decedent's estate except as provided in the statute.

Some persons may argue that this sort of protection is not enough or is incomplete; others may argue that it goes too far, or is impracticable or unmanageable. Those who hold either opinion may find more solace in an entirely different sort of statutory scheme—one that may appear to be the simplest and most equitable of all. I refer to the so-called family maintenance legislation, which has been adopted in England, New Zealand, and in several Canadian and

90. N.Y. EST., POWERS & TRUSTS LAW § 501.1 (McKinney 1967).

91. UNIFORM PROBATE CODE §§ 2-201 to -207.

Australian jurisdictions.⁹² Under such legislation, a surviving spouse or certain other designated dependents may challenge a decedent's will on the ground that the decedent did not make "reasonable provision" for the claimant. In practice, these matters are handled by referring them to a master who hears all relevant evidence, and then often are resolved through an agreement between the parties in interest that is submitted for court approval. My own limited examination of the workings of this scheme some years ago showed no flood of claimants or congested dockets in its administration.

The main burden of the inquiry herein, however, does not proceed so far. In the absence of substantial legislative changes, courts are left to straighten out the mess they are in. Their first indispensable step must be to separate the policy of the statutes of wills from the policy of the spouses' election laws, and to recognize that the term "testamentary" can have more than one meaning, one of which can be limited to dispositions that offend the policy of the spouses' election laws. Having done so, courts will be left to identify the elements of a transaction that make it testamentary in the limited sense—that is, whether the reservation of only a life interest or a power to revoke is enough. It should also be recognized that courts remain free to use the test of the intention of a donor to defraud his spouse, or a test that balances all relevant equities, without struggling over what makes a transaction testamentary as to a surviving spouse.

C. *Creditors' Rights*

Gratuitous transfers of property are subject to attack by creditors of the donor under the usual rules relating to fraudulent conveyances. Of greater value to creditors, however, is the usual regime of decedents' estate administration, one of the main purposes of which is the marshalling of assets to give creditors of a decedent priority over the interests of legatees or heirs. Under such a system, our old problem arises again: What inter vivos dispositions by a decedent are subject to challenge on the ground that they are essentially testamentary, so that the property transferred remains the property of the donor and therefore a part of his estate? It is obvious that, whenever an inter vivos disposition fails as testamentary for all purposes, the property is available to creditors of the donor's estate. This fact, however, does not entirely resolve the problem respecting the legitimate expectations of creditors of a donor. We have seen that under

92. See Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, c. 45; W.D. MACDONALD, *supra* note 71, ch. 21.

the passing-of-an-interest test, many kinds of transactions have escaped or should escape the testamentary challenge, for reasons that relate to the proper limits of the policy of the statutes of wills. At this point, it becomes evident that a problem arises analogous to that in the cases involving the rights of the spouses of decedent donors. Should a person be allowed to escape the claims of his creditors by an inter vivos transaction that leaves him in a position where he does, or can, enjoy the property despite his conveyance? If he has reserved a beneficial interest, such as a life estate or a life interest in trust, such interest of course can be reached by his creditors. If he has gratuitously exercised a general power of appointment that he has reserved in a conveyance, the rules relating to fraudulent conveyances apply to his exercise of the power.⁹³ If he transfers property in trust, reserving a life interest and a general power to appoint the remainder and creates no other beneficial interests that he cannot destroy by exercising the power, the property is subject to the claims of his creditors, even though the power is not exercised, provided other property of the donor is insufficient for that purpose.⁹⁴

One may wonder why the same rule does not apply where a donor of property inter vivos reserves a power to amend or revoke. In fact, apart from statutes, the only kind of transaction that has been held vulnerable to creditors is the Totten trust bank account.⁹⁵ As in *Montgomery v. Michaels*,⁹⁶ the result in the Totten trust cases does not indicate that such a trust is invalid for all purposes. It also does not mean that creditors are limited to treating such a trust as a fraudulent conveyance.

Under the Bankruptcy Act,⁹⁷ a trustee in bankruptcy presumably can reach the bankrupt's power to revoke a trust created by him. Statutes in at least ten states provide that if a grantor in a conveyance reserves to himself an absolute power of revocation, he is thereafter deemed the absolute owner of the estate conveyed so far as the rights of his creditors are concerned.⁹⁸ A similar statute in Ohio respecting transfers in trust⁹⁹ has been construed to limit the rights of creditors to the lifetime of the settlor.¹⁰⁰

If courts can without legislation limit the validity of Totten trusts

93. RESTATEMENT OF PROPERTY § 330 (1940).

94. *Id.* § 328.

95. See 1 SCOTT, *supra* note 13, § 58.5; 4 *id.* § 330.12.

96. 54 Ill. 2d 532, 301 N.E.2d 465 (1973), discussed in text at note 87 *supra*.

97. Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1970).

98. See statutes cited in 4 SCOTT, *supra* note 13, § 330.12 nn.7 & 8.

99. OHIO REV. CODE ANN. § 1335.01 (Page Supp. 1976).

100. Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939).

so as to make them vulnerable to the claims of the donor's creditors, the same result should be reached in other kinds of revocable transfers. I am not prepared to argue whether the policy of the law that protects creditors' rights has the same force as the policy protecting spouses' rights. It may be argued that modern creditors do not really need the kind of protection suggested here. If there is such a policy, courts can assert it without distorting the law respecting the testamentary effect of transfers that purport to be *inter vivos*. Again, a conveyance can be testamentary with respect to creditors without being testamentary for all purposes.

For estate planning purposes, it is as important to consider the possible relation between *inter vivos* and testamentary transactions as it is to distinguish between them. It would be convenient for many worthy purposes if we could simply ignore the distinction. Surely a property owner who is thinking about providing for the future cannot confine his thoughts to what will happen at his death. We may even be moving toward a system in which the benefits of correlating all dispositive devices are thought to outweigh the importance of the formal distinctions, so that the latter conceivably might finally disappear. Whether such a development would require adaptation to protect creditors, or whether some new system for defining creditors' rights could be worked out, is only one of the many imponderables involved, all of which are far too complex to be considered here.

The most striking development in the relation between testamentary and *inter vivos* transactions affects so-called pour-over wills. The efforts of courts to avoid the obstacles to pouring property by will into an *inter vivos* trust have generally been superseded by explicit statutory authority for overriding the obstacles.¹⁰¹

Another more limited device has been referred to as a "reverse pour-over" device. Attempts have been made, by language in a life insurance trust, to make the proceeds payable to the trustee named in one's will, in trust according to the terms of one's will, or to a named trustee according to the terms of one's will. The reference is assumed to be to the settlor's last will, and not to an existing will, if there is one. When a settlor properly supplies the missing elements by will, there is no problem about the validity of the trust. The question at that point is whether the insurance proceeds are to be administered as part of the settlor's estate or whether they are to be regarded as part

101. See, e.g., UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1; UNIFORM PROBATE CODE § 2-511. The uniform acts are identical. These provisions or similar legislation now exist in over forty states. 1 SCOTT, *supra* note 13, § 54.3 nn. 39 & 40.

of an inter vivos trust estate. It is obvious that only by means of some fictional notion of relation back can the trust be found to have been created inter vivos. But there are obvious reasons why a settlor desires such a result. In a case involving a possible abatement of a legacy given by the settlor's will, it was held that the trust of the insurance proceeds was inter vivos.¹⁰² There may not be any compelling policy obstacle to such a result. A Pennsylvania court, however, held that such proceeds were subject to the state's inheritance tax.¹⁰³ The same court held that the proceeds were available to creditors of the settlor's estate.¹⁰⁴

Anyone who believes that an inter vivos transaction can be deemed testamentary as to creditors of the donor on the basis of control reserved by him will find this kind of transaction testamentary in the same sense. One may have reason to so hold even where creditors have no access to property transferred in a manner not otherwise regarded as testamentary for all purposes. To the extent that it is applied, section 6-201¹⁰⁵ of the UPC expressly preserves the rights of creditors.

Variants of this scheme are conceivable. The situation should be no different if land or personal property is transferred in trust to be held according to the terms of the settlor's will. Questions other than creditors' rights may, of course, become involved, which is the problem discussed above in connection with section 6-201 of the UPC.

102. *Tootle-Lacy Natl. Bank v. Rollier*, 341 Mo. 1029, 111 S.W.2d 12 (1937).

103. *In re Myer's Estate*, 309 Pa. 581, 164 A. 611 (1933).

104. *In re Kenin's Trust Estate*, 343 Pa. 549, 23 A.2d 837 (1942).

105. See text at note 70 *supra*.