Florida Law Review

Volume 16 | Issue 1 Article 2

June 1963

Estate Planning in Florida: The Revocable Intervivos Trust

James S. Roth

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

 Part of the Law Commons

Recommended Citation

James S. Roth, *Estate Planning in Florida: The Revocable Intervivos Trust*, 16 Fla. L. Rev. 34 (1963).
Available at: https://scholarship.law.ufl.edu/flr/vol16/iss1/2

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

ESTATE PLANNING IN FLORIDA: THE REVOCABLE INTER VIVOS TRUST

JAMES S. ROTH*

INTRODUCTION

Judicious planning of an estate of any appreciable size requires consideration of the use of a revocable inter vivos trust. These trusts have been the source of extensive litigation, and each jurisdiction has developed its own peculiarities in the area. Before recommending and drafting a revocable inter vivos trust, the attorney must be thoroughly familiar with the interpretation given to such trusts in the jurisdiction whose laws are to govern the particular trust arrangement. This article will explore a number of peculiarities in the Florida law pertaining to revocable inter vivos trusts.

The alternatives to the use of a revocable inter vivos trust are: a testamentary trust or non-trust gift, an inter vivos non-trust gift,[1] and an irrevocable inter vivos trust.[2] Only the revocable inter vivos trust and the testamentary gift remain ambulatory in nature and allow the donor to retain some degree of control over the property during his lifetime.

Without attempting to examine all of the factors relevant to the choice of the form a gift should take, the advantages of the use of a revocable inter vivos trust may be summarized as follows:

(1) the settlor can test the competency and discretion of the trustee who will manage the property after the settlor's death;

(2) management of the property will not be interrupted by the death of the settlor;

(3) if the settlor becomes incompetent to manage his own property, management has been established under the trust, and no guardian or conservator need be appointed;

(4) court supervision of the trust may be avoided;

(5) the assets in such a trust will not be part of the settlor's probate estate and thus possibly may be available to the ultimate beneficiaries at an earlier date;[3]

---

* B.S. 1959, Wharton School of Finance and Commerce of the University of Pennsylvania; LL.B. 1962, Harvard University; Member of Miami, Florida, Bar.

1. Such gifts may take various forms including: a gift of personal property inter vivos, as opposed to a gift causa mortis; a gift of a present interest; a gift of a future interest; or a gift of a concurrent interest. See generally CASNER, ESTATE PLANNING 267-79 (3d ed. 1961).

2. See generally CASNER, ESTATE PLANNING 148-266 (3d ed. 1961).

3. The word "possibly" is used because the extent of the trustee's potential personal liability for federal estate taxes arising from premature distributions to

Published by UF Law Scholarship Repository, 1963

(6) publicity attendant to probate will be avoided;

(7) ancillary administration for assets physically located in another jurisdiction may be avoided;

(8) the total expenses of administration of the estate and trust will usually be less if the probate estate is reduced;

(9) during and after the settlor's lifetime, his creditors will have more difficulty reaching trust property than non-trust property;

(10) from and after the settlor's death, it will be more difficult for the wife of the settlor to assert her marital rights against trust property than non-trust property;

(11) contesting heirs will find it more difficult to upset a long established trust than a will;

(12) there may be favorable federal[4] or state tax considerations; and

---

beneficiaries depends upon whether 48 Stat. 760 (1934), 31 U.S.C. §192 (1958) applies to trustees as well as executors. See Alexander, *Personal Liability of Executors and Trustees for Federal Income, Gift and Estate Taxes,* 9 TAX L. REV. 1 (1953).

4. The general rules of federal taxation that will apply to the majority of revocable inter vivos trust arrangements may be summarized as follows:

During the life of the settlor, the income from the trust will be included in the settlor's gross income. INT. REV. CODE OF 1954, §§676, 677. After the death of the settlor, the trust will constitute a separate tax entity.

The trustee's basis in the property during the life of the settlor will be the settlor's basis. INT. REV. CODE OF 1954, §1014. After the death of the settlor, the trustee's basis will be the fair market value of the property at the date of the settlor's death or on the alternate valuation date. INT. REV. CODE OF 1954, §1014.

During the life of the settlor, the trustee's holding period for capital gains purposes will begin on the date the settlor acquired the property. INT. REV. CODE OF 1954, §1223(2). Although there is no statutory, judicial or administrative authority under the Internal Revenue Code of 1954, Professor Casner indicates that the trustee's holding period is unaffected by the death of the settlor. CASNER, ESTATE PLANNING 126 (3d ed. 1961). Compare G.C.M. 19347, 1938-1 CUM. BULL. 218 and Fifth Ave. Bank v. United States, 41 F. Supp. 428 (Ct. Cl. 1941), *cert. denied,* 315 U.S. 820 (1942) for a discussion of the holding period of capital assets under §117 of the Revenue Act of 1934.

The value of the trust property on the date of death of the settlor, or on the alternate valuation date, will be included in his gross estate for federal estate tax purposes. INT. REV. CODE OF 1954, §2038. Some items subject to disposition by the testator may be includible in his gross estate only if they pass through his probate estate. See INT. REV. CODE OF 1954, §§2039, 2042. It is not settled whether payment of these items to the trustee of a revocable inter vivos trust will avoid their inclusion in the testator's gross estate. See CASNER, ESTATE PLANNING 128-30 (3d ed. 1961).

No gift will be made by the settlor for federal gift tax purposes except to the extent that the income or corpus of the trust is paid to one other than the settlor. See Treas. Reg. §25.2511-2(c) (1961).

Such a trust may be used to avoid the attribution rules of INT. REV. CODE OF 1954, §318(a)(2)(A), that apply between the estate and beneficiaries. Thus, if an intended beneficiary and the testator own stock in the same close corporation, attribution of the beneficiary's stock to the estate—should the estate desire to redeem the

(13) generally, the settlor can select more freely the jurisdiction in which he desires to have his trust administered as well as the jurisdiction whose laws he wishes to govern his dispositive arrangement. This feature may be of particular importance to Florida residents because of the uncertainty of the Florida law concerning many aspects of the inter vivos trust.

The disadvantages of an inter vivos trust arrangement may be summarized as follows:

(1) a federal stamp tax is payable with respect to the securities transferred to the trust;[5]

(2) additional expense of a trustee's fee may be incurred during the settlor's lifetime;

(3) a significant distribution fee will be incurred if and when a corporate trustee distributes assets in the trust;

(4) additional records and tax returns must be kept and filed;

(5) there may be adverse federal[6] and state tax considerations.

Before proceeding, it should be noted that the position of the Florida courts is not definitive in many areas considered in the following pages. Because this article is directed to the problems of estate planning, rather than litigation, assumptions and conclusions as to the state of the law and its probable course of development in Florida will necessarily be propounded from a conservative point of view.

---

stock—would be avoided if the particular stockholder beneficiary were eliminated as a devisee or legatee and instead made a beneficiary of such a trust.

See generally CASNER, ESTATE PLANNING 120-34 (3d ed. 1961).

5. INT. REV. CODE OF 1954, §4321.

6. If substantially all the settlor's property is placed in a revocable inter vivos trust, the advantages of using his estate as a separate tax entity will be lost. Such advantages include: (1) The $600 exemption available to estates. INT. REV. CODE OF 1954, §642(b); (2) The use of certain administrative expenses as deductions against estate income rather than the estate tax. See INT. REV. CODE OF 1954, §642(g); See also CASNER, ESTATE PLANNING 122 n.33 (3d ed. 1961); (3) The avoidance of the "throwback rule" which applies to trusts but not estates. INT. REV. CODE OF 1954, §§665-68; and (4) The ability of an executor, but not a trustee, to be discharged from personal liability under INTERNAL REVENUE CODE OF 1954, §2204. *But see* note 3 *supra*.

If stock in a closely held corporation is transferred to a trust, the corporation will no longer be able to avail itself of the provisions of Subchapter S of the Internal Revenue Code of 1954. See INT. REV. CODE OF 1954, §1371; Treas. Reg. §1.1371-1(e) (1959).

See generally CASNER, ESTATE PLANNING 120-36 (3d ed. 1961).

POUR-OVER OF PROPERTY FROM THE SETTLOR'S WILL TO THE REVOCABLE INTER VIVOS TRUST

Pour-overs in General

Rejection of an attempted pour-over[7] from a will to an inter vivos trust is often based upon the conclusion that the pour-over is a testamentary disposition, and it does not meet the requirements of the Statute of Wills[8] because the trust instrument has not been executed with the requisite formalities. In the absence of statute, some courts have sanctioned such pour-overs on the basis of the doctrine of incorporation (of the trust instrument) by reference or the doctrine of independent significance (of the trust itself).[9]

The issue arises in the context of various trust arrangements. If the trust is irrevocable and not subject to amendment, the pour-over can be supported by either doctrine.[10] If the inter vivos trust is revocable but has not been revoked or amended, the rationale that would support a pour-over to an irrevocable inter vivos trust would seem to be equally applicable.[11] The concepts give the courts the most difficulty when a revocable, amendable inter vivos trust has been amended or partially revoked after the execution of the settlor's will. The ability to make a testamentary disposition to an entity that existed at the time of the execution of the will may still be supported on the rationale of incorporation by reference.[12] But what of a disposition pursuant to the terms of the trust instrument as amended, when the amendment is executed after the execution of the testator's final will and does not comply with the requirements of the Statute of Wills?[13] Clearly, the requirements of incorporation by reference—that the unattested instrument be in existence at the time the will is executed and be referred to in the will as an existing instrument—cannot be met. In the absence of statute, only two courts have taken the view that the pour-over may operate under the

---

7. By will, one may make specific bequests, or leave the residue of his estate to the trustee of a living trust to be distributed in accordance with the terms of the trust instrument. Thus, testamentary assets may "pour-over" to an inter vivos trust. See BOGERT, TRUSTS §22 (3d ed. 1956).

8. The Florida counterpart of the Statute of Wills is FLA. STAT. §731.07 (1961).

9. See RESTATEMENT (SECOND), TRUSTS §54 (1959); 1 SCOTT, TRUSTS §§54.1, 54.2 (2d ed. 1956).

10. See RESTATEMENT (SECOND), TRUSTS §54 comment *g* (1959); 1 SCOTT, TRUSTS §54.3 (2d ed. 1956).

11. See RESTATEMENT (SECOND), TRUSTS §54 comment *h* (1959); 1 SCOTT, TRUSTS §54.3 (2d ed. 1956).

12. See, *e.g.*, Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935).

13. In 1 SCOTT, TRUSTS §54.3 (2d ed. 1956), it is stated, "Where the inter vivos trust is amended by instruments which comply with the formalities required for the

trust as amended.[14] These two decisions are based on the sound rationale that the trust, as amended, is a fact of significance independent of its effect on the will. In recent years there has been a move by various state legislatures to give a definitive answer to the pour-over problem.[15]

In Florida, before 1959, the validity of pour-overs to amended revocable inter vivos trusts had not been decided by the courts.[16] In 1959, the Florida legislature adopted a liberal approach to the matter when it enacted Florida Statutes section 736.17 which permits a pour-over from a will to an inter vivos trust even though the trust is amended after the execution of the will. If there is a subsequent amendment, the pour-over property is permitted to pass under the amended trust. The statute, as amended in 1961, is set out in full in the Appendix.

In some states the question arises whether and to what extent an inter vivos trust that receives a pour-over from a will, shall be supervised by a court. After the pour-over has operated, three variant approaches are possible: a single non-court trust exists; a single court trust has been established; or although the inter vivos trust, as it existed prior to the death of the testator, is a non-court trust, the property poured-over from the will creates a new and separate court trust.[17] Florida Statutes section 736.17 unequivocally provides that the trust shall be treated as a single non-court trust unless the will manifests a contrary intention.[18]

---

execution of wills, it would seem clear enough that the policy underlying the Statute of Wills is complied with, and that the property disposed of by the will should pass in accordance with the terms of the inter vivos trust as amended, even though the amendments were made after the execution of the will. In such a case it is not necessary to resort either to the doctrine of incorporation by reference or to the doctrine as to facts of independent significance." (Footnotes omitted.)

Professor Casner points out that, "If the revocable inter vivos trust is executed with the formalities of a will . . . it may be a will for all purposes and may have to be probated like any other will. Thus many of the advantages of creating a revocable inter vivos trust will be lost." CASNER, ESTATE PLANNING 1580 (answer to problem 5.2) (1961).

14. Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919 (1961); Second Bank-State St. Trust Co. v. Pinion, 341 Mass. 368, 170 N.E.2d 350 (1960); *cf.* Matter of Ivie, 4 N.Y.2d 178, 149 N.E.2d 725 (1958).

15. At this time, thirty states have enacted such "pour-over" statutes. These statutes are set out in 1 P-H WILLS, ESTATES AND TRUSTS ¶1003. Most of the statutes provide that the property may pass under the trust as amended.

16. In Forsythe v. Spielberger, 86 So. 2d 427 (Fla. 1956) the beneficiaries of the original trust attempted to question the will's incorporation of an amendment to the trust executed on the same date as the settlor's will. The question was left unanswered because the complaint failed to allege that the trust was amended after the execution of the will and that the amendment was not executed in accordance with the Statute of Wills. This case is noted in 10 U. FLA. L. REV. 108 (1957).

17. See CASNER, ESTATE PLANNING 147 (3d ed. 1961).

18. FLA. STAT. §736.17(5) (1961), see APPENDIX; *cf.* FLA. STAT. §37.24 (1961).

Pour-over to an Unfunded Trust

Unfortunately, section 736.17 leaves unanswered the question: Will an unfunded or nominally funded revocable inter vivos trust qualify as the subject of a pour-over from the testator's will? The settlor may create a separate "unfunded" trust, that is, he may convey no property to the trustee; or he may create a "nominally funded" trust, for example ten dollars in cash could be placed in the trust. The settlor may execute such an instrument with the idea that he will, at some future time during his life, convey additional property to the trustee; or the settlor might create an unfunded trust merely to avoid the necessity of setting forth the terms of the trust in his will. Another reason for creating an unfunded trust might be that the settlor contemplates the probability that he might wish to change the dispositive provisions of the trust at a later date. He may conclude that the use of a separate trust, as opposed to setting forth the trust provisions in his will, will facilitate future amendments because such amendments need not be executed with the formalities required by the Statute of Wills, whereas a change in the provisions of his will would require a formal codicil. The question presented is whether this conclusion will be upheld by the Florida courts: Must a subsequent amendment to an unfunded or nominally funded trust that is to be the recipient of the settlor's devise or bequest be executed with the same formalities as a will or does such an amendment come within the provisions of section 736.17?

Subsection (2)(d) expressly permits a pour-over to a trust, the *res* of which consists of "the possible expectancy of receiving benefits as named beneficiary of a life insurance policy deposited, or to be deposited with the trustee."[19] The statute is silent on the matter of an unfunded or nominally funded trust that is not the beneficiary of a life insurance policy. Initially, it would seem that the mention of this specific type of trust, commonly referred to as an unfunded insurance trust, would indicate that the Florida legislature did not intend to sanction pour-overs to unfunded trusts generally.

The statute provides that a bequest or devise may be made to the trustees of a trust that is evidenced "by a written instrument subscribed concurrently with the making of the will. . . ." Since a period of time after the execution of a trust instrument is usually required for the final conveyance of various properties to the trust, the wording of the statute would seem to recognize the validity of a trust not funded at the time of the execution of the will. Nevertheless, it should be recognized that the statute could be interpreted as contemplating the existence of such a trust *res* at the date of the settlor's death.[20]

19. FLA. STAT. §736.17(2)(d) (1961), see APPENDIX.

20. *Cf.* Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (1955) wherein the trust instrument was in existence when the will was executed but was

A pour-over to an unfunded trust can be supported in sound legal theory. Because no trust exists there is no fact of independent significance; but a trust instrument does exist, and this instrument may be incorporated into the testator's will by reference.[21] If the unfunded trust has been amended after the execution of the settlor's will, a disposition pursuant to the terms of the trust as amended cannot be supported solely by the doctrine of incorporation by reference or by the doctrine of independent significance.

Since there are neither cases nor any other statutes in Florida pertaining to such trusts, an examination of their treatment in other jurisdictions may aid in predicting the efficacy of their use in Florida. There seems to be no reported case in this country involving a pour-over to an unfunded trust that was not the beneficiary of a life insurance policy.[22] There is, however, abundant judicial authority supporting trusts, the only assets of which are life insurance policies.[23] Generally, the courts have little difficulty in upholding these insurance trusts. The expectancy of receiving life insurance proceeds is a "peculiar" type of property arising out of the contract.[24] Maturation of the life insurance policy is no more a testamentary disposition because the proceeds are paid to the beneficiary as trustee than if payable to him absolutely.[25]

Thirty states have recently enacted statutes sanctioning pour-overs.[26] The Uniform Testamentary Additions to Trusts Act,[27] not only sanctions pour-overs to unfunded life insurance trusts, but permits a pour-over to a trust, "regardless of the existence, size, or character of the corpus of the trust." Although the enactment of section 736.17[28] antedates the promulgation of the Uniform Act, their general import and actual wording are similar in many respects, yet the Florida statute makes no mention of unfunded trusts in general.

It would be desirable for the Florida legislature to amend section 736.17 by inserting a provision similar to that found in the Uniform Act, or indeed by enacting the Uniform Act itself, which would permit the use of any unfunded trust as a receptacle for a pour-over from the settlor's will. Such trusts would enable the settlor to retain absolute

---

not funded until after the execution of the will, though before the death of the testator. The court held that the attempted pour-over failed.

21. 1 SCOTT, TRUSTS §54.3 (2d ed. 1961).

22. *But cf.* Sapp v. Protheroe, 77 S.D. 72, 85 N.W.2d 505 (1957).

23. See 1 SCOTT, TRUSTS §57.3 (2d ed. 1956).

24. See Milam v. Davis, 98 Fla. 202, 123 So. 668 (1929).

25. See 1 SCOTT, TRUSTS §57.3 (2d ed. 1956).

26. See note 14 *supra.*

27. Uniform State Laws Ann. 87-88 (Supp. 1961). The Uniform Act has been enacted in the following states at this time: Arizona, Connecticut, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, Vermont, and West Virginia.

28. See APPENDIX.

ownership of property during his life, and at the same time allow additional flexibility in his dispositive arrangement. However, until the Florida legislature or judiciary has definitively established the validity of a pour-over to an unfunded or nominally funded trust, it would seem manifestly imprudent to invoke such an arrangement in Florida.

The Revocable Inter Vivos Trust as a Nontestamentary Disposition

The *sine qua non* of an operative pour-over pursuant to section 736.17[29] is the existence of a trust. However, the statute leaves unanswered the paramount question: What constitutes a valid trust in Florida? Thus, if a will directs a pour-over to an ostensibly inter vivos trust that is, in fact, nonexistent, or that is a testamentary trust lacking the requisite formalities, the pour-over provision will be nugatory and the property in the purported inter vivos trust will fall back into the residue of the testator's estate.

Prerequisite to the use of an inter vivos trust, and a fortiori, a pour-over thereto, is a critical analysis of the factors that will prompt the courts to invalidate an allegedly inter vivos trust. Confutation can be based on one or more of the following theories:

(1) no trust was created;
(2) no trust arose until the death of the settlor;[30] or
(3) the conveyance, though effective during the lifetime of the settlor, is a testamentary disposition of the remainder and thus void if there is a failure to comply with the wills statutes.[31]

An examination of these three theories follows.

No Trust Was Created

Objection on this theory can usually be averted by careful drafting of the trust instrument. If Florida realty is to be conveyed in trust a written instrument is required.[32] A trust of personalty can, however, be established by parol.[33] No formal words are necessary to create a trust,[34] but

29. *Ibid.*
30. Restatement (Second), Trusts §56 (1959); 1 Scott, Trusts §§56-56.7 (2d ed. 1956).
31. Restatement (Second), Trusts §57 (1959); 1 Scott, Trusts §§57-57.6 (2d ed. 1956).
32. Fla. Stat. §689.05 (1961).
33. McCrory Stores Corp. v. Tunnicliffe, 104 Fla. 683, 140 So. 806 (1932); Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860 (1917). Note however, that a will cannot pour-over to a trust not evidenced by a written instrument. See APPENDIX.
34. Walker v. Close, 98 Fla. 1103, 125 So. 521 (1929).

a clear intention must be expressed.[35] The Florida Supreme Court has repeatedly announced that the concurrence of three circumstances is imperative to the creation of a trust:[36] sufficient words to manifest the grantor's intention to raise a trust; a definite subject matter;[37] and a certain and identifiable object or beneficiary.

A trust will not fail for want of a trustee named in the instrument.[38] Conversely, a trust will not arise merely because the words "trustee" or "as trustee" are added to the name of the grantee.[39] A trust will not arise if a person is at the same time the trustee and beneficiary of the identical interest.[40] A trust in realty will be executed by the Statute of Uses if it is a mere dry or passive trust.[41]

If No Trust Arises Until the Settlor's Death or the Remainder Over on the Settlor's Death Is Testamentary

It may be difficult, if not impossible, to draft an instrument that will foreclose an attack on these grounds, and at the same time, substantially comply with the settlor's desires. The settlor's retention of excessive dominion and control over the trust property is usually the provocation for both of these objections. Presumably because of this common genesis, many courts, including the Florida Supreme Court, often do not precisely articulate the theory of their analysis.

A trust will not arise during the settlor's lifetime, if he fails to make an effective inter vivos conveyance to the trustee or if no interest passes to any beneficiary.[42] An inter vivos conveyance may effectively divest the grantor of legal title during his life and nevertheless be deemed a

35. Webster v. St. Petersburg Fed. Sav. & Loan Ass'n, 155 Fla. 412, 20 So. 2d 400 (1945).

36. *E.g.*, Axtell v. Coons, 82 Fla. 158, 89 So. 419 (1921); Byrne Realty Co. v. South Florida Farms Co., 81 Fla. 805, 89 So. 318 (1921); Bay Biscayne v. Baile, 73 Fla. 1120, 75 So. 860 (1917); Floyd v. Smith, 59 Fla. 485, 51 So. 537 (1910).

37. In Lines v. Darden, 5 Fla. 51, 73 (1853), the court stated, "where the intended subject matter or disposition consists of an indefinite part or quantity, the bequest fails for uncertainty— . . . gifts of a 'handsome gratuity,' 'some of my best linen,' 'a part of my land,' and numerous other gifts of similar import, have been held void."

38. Van Roy v. Hoover, 96 Fla. 194, 117 So. 887 (1928).

39. FLA. STAT. §689.07 (1961), Willey v. W. J. Hogson Corp., 90 Fla. 343, 106 So. 408 (1925).

40. See, *e.g.*, Huggins v. Whitaker, 100 Fla. 600, 129 So. 857 (1930); Montgomery v. Carlton, 99 Fla. 152, 126 So. 135 (1930); Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927).

41. See, *e.g.*, McGiff v. McGill, 62 So. 2d 28 (Fla. 1952); Deauville Corp. v. Blount, 157 Fla. 322, 25 So. 2d 812 (1946); Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940). See also FLA. STAT. §689.09 (1961).

42. RESTATEMENT (SECOND), TRUSTS §56 comment *a* (1959); 1 SCOTT, TRUSTS §56 (2d ed. 1956).

testamentary disposition because of his inordinate retention of dominion and control over the property during his lifetime, indicating that a mere agency arrangement was intended.[43]

It is well settled that possession by the settler of a power to revoke or modify the trust will not make the trust testamentary.[44] Nor will the reservation of the income for life nullify the remainder.[45] The result should be the same if the settlor has custody of both of these powers.[46] Only when the settlor reserves additional dominion over the trust is the testamentary character of the disposition called into question.[47]

In most cases in which such trusts are nullified because of the settlor's reservation of undue control, the results are based on the cumulative effect of the retention of numerous powers rather than the possession of any single power. This makes the analysis especially difficult and the retention of multifarious powers particularly hazardous in jurisdictions, such as Florida, where the cases in point are rather exiguous.

Only five reported Florida cases touch on the issue in question. The first case, *Smith v. Hines*,[48] involved not a trust, but an inter vivos transfer of several slaves just before the testator's death. The Florida Supreme Court, in upholding the testator's widow's claim of dower[49] in these slaves, stated,[50]

> we are forced to infer, from these facts, that said [testator] never parted with the absolute dominion over said slaves during his life; and that said conveyance was but a mere device or contrivance, to be used at his death, to keep his widow from her dower. We, therefore, declare it ineffectual against her.

43. RESTATEMENT (SECOND), TRUSTS §57 text following comment *b*, illus. 8 (1959); 1 SCOTT, TRUSTS §57.2 (2d ed. 1956).

44. RESTATEMENT (SECOND), TRUSTS §57 comment *a* (1959); 1 SCOTT, TRUSTS §57.1 (2d ed. 1956).

45. *Ibid.*

46. *Ibid.*

47. See 1 SCOTT, TRUSTS §57.2 (2d ed. 1956). If only possession and not title is transferred, with instructions to hold and deal with the property as the transferor directs and on death to deliver to a third person, the transferee is not a trustee, but merely an agent for the owner. The agency terminates with the death of the owner and the disposition is testamentary and invalid because of failure to comply with the Statute of Wills. The result would not be changed merely because legal title vests in the agent. The agent is a trustee, but the difference between an independent trustee and one who is also an agent is recognized in the decisions.

In the original RESTATEMENT, TRUSTS §57 (1935), the amount of control reserved by the settlor was the sole consideration. However, if the trust is evidenced by a formal instrument the policy of the Statute of Wills has been complied with.

48. 10 Fla. 258 (1863).

49. In 1863, as today, a widow was entitled to dower in personalty owned by her husband at the time of his death, as well as in realty. See FLA. STAT. §731.34 (1961).

50. 10 Fla. at 298.

The court noted that the testator and his estate received the proceeds from the resale of two of the slaves after the testator's alleged sale of the slaves to his father. The court stated that fraud could be inferred from the retention of possession of the "goods" and the failure of the testator to part with the absolute dominion over the "property" during his lifetime.

The holding of the court was based partially on the failure to record the contract of sale and failure to show consideration. However, the case would seem more appropriately classified as one that repudiated an allegedly inter vivos transfer because of the conclusion that a mere agency agreement was intended. The full implications of the case are obscured by the predominant fact that the transfer involved a fraud on the wife's dower rights. In a later case[51] the Florida Supreme Court, although upholding the validity of an inter vivos trust against the settlor's widow's claim of dower, distinguished *Smith v. Hines* on the grounds that,[52]

> it appears that the husband designed by subterfuge to deprive his wife of her dower rights when she was not properly provided for from his property. In this case the wife is amply provided for, and the husband created a trust in good faith for a laudable purpose, by a written instrument sufficient to impose a trust upon personal property delivered to the trustee.

Thus the implication to be drawn from this latter case is that, absent the issue of fraud on the widow's rights, *Smith v. Hines* is not dispositive of the question of the effect of excessive reservation of control.

Not until 1914 did the Florida Supreme Court again have an opportunity to speak on the issue. In *Johns v. Bowden*[53] the testator had conveyed his homestead in trust reserving a life interest with the right to occupy the land and appropriate the rents, certain administrative powers including the right to collect rents, and a lifetime power to appoint by deed. In holding the inter vivos conveyance to be in reality a testamentary disposition of homestead, the court stated,[54]

> In effect the entire beneficial interest and right in the specific property remained in the grantor, and could not pass at all, without his consent, till after his death, thus making the trust deed not an absolute conveyance of a vested right *in praesenti*, of the property alleged to be homestead. [Citations omitted.] Because of the

51. Williams v. Collier, 120 Fla. 248, 158 So. 815, *rehearing denied* 120 Fla. 258, 162 So. 808 (1935).
52. *Id.* at 258, 158 So. at 818.
53. 68 Fla. 32, 66 So. 155 (1914).
54. *Id.* at 47, 66 So. at 159.

> retention of the entire beneficial estate in the grantor during his life, the instrument in practical effect, is in the nature of a testamentary disposition of property alleged to be homestead . . . .

The court analyzed this conveyance as ineffective to pass any interest until the death of the settlor. The trust instrument in fact specified the devolution of the property in default of an inter vivos appointment by the settlor. Thus the beneficiaries in default of appointment immediately acquired a vested future interest, albeit subject to divestment by exercise of the power. The only rationale that could support the decision is that the overabundant retention of powers by the settlor indicated a mere agency agreement was intended. It is doubtful that the court would have reached such a conclusion had the homestead rights[55] of the settlor's surviving children not been in issue.

In *Williams v. Collier*[56] the Florida Supreme Court denied the settlor's widow dower in bonds that the settlor had transferred to an irrevocable[57] inter vivos trust. The instrument provided that the bonds were to remain the property of the settlor subject to the consummation of the trust. After that time the only interest retained by the settlor was a life interest in the income. The court also interpreted the instrument as reserving to the settlor during his life the right to name another trustee on the death of the designated trustee.[58]

---

55. FLA. CONST. art. X, §6; See also FLA. STAT. §731.27 (1961).

56. 120 Fla. 248, 158 So. 815, *rehearing denied* 120 Fla. 258, 162 So. 868 (1935).

57. The trust instrument provided, ". . . it being expressly understood that said bonds shall remain the property of the said [settlor] in accordance with the terms of this instrument and subject only to the consummation of the trust herein created. . . . In the event of the death of the Trustee before the execution of this trust, or at any time prior thereto during the pleasure of said [settlor] and at his option, this instrument shall become inoperative and concurrent therewith the said bonds shall be forthwith returned to said [settlor]." 120 Fla. at 251-52, 158 So. at 816.

In answer to the assertion that the settlor had retained the power to revoke the trust, the court stated, "The reserved power to require redelivery of the bonds to the trustor in either of the events stated, has reference to the administration of the trust, and not to a revocation of the trust. . . ." 120 Fla. at 260, 162 So. at 869.

The Florida Supreme Court, in *Hanson v. Denckla*, apparently misinterpreted the facts of *Williams v. Collier*, when it stated, "[*In Williams v. Collier*] we upheld a *revocable* trust reserving a life interest to the settlor, with remainder payable to named grandchildren. . . ." 100 So. 2d 378, 383 (Fla. 1956). (Emphasis added.)

In 11 U. FLA. L. REV. 266, 267 (1958), the author misinterpreted the facts when he cited *Williams v. Collier* for the proposition that, "The settlor may, in the absence of statutory prohibition, reserve the power to amend or revoke in whole or in part at any time without making the trust illusory."

In 1 SCOTT, TRUSTS §57.5 n.3 (2d ed. 1956), the *Williams v. Collier* trust is recognized as being irrevocable.

58. 120 Fla. at 257, 158 So. at 818.

Again the court apparently viewed the issue as one involving the passing of an interest before the death of the settlor when it stated,[59] "the reservation of the interest on the bonds during his life, did not affect the passing of title to the principal of the bonds from the maker of the trust to the trustee for the beneficiaries of the trust . . . ." The court distinguished *Smith v. Hines* on the ground of the good faith of the settlor.[60]

In 1956, in *Hanson v. Denckla,*[61] the Florida Supreme Court was presented with the question of the validity of a purported inter vivos trust without the intervention of any issues involving dower or homestead rights. In fact, the court, although citing *Williams v. Collier,* stated, "the validity of an attempted inter vivos trust such as this is a matter of first impression in this state."[62]

The trust instrument reserved to the settlor the following rights and powers: (1) life estate in the income, (2) power to amend or revoke the trust in whole or in part, (3) power to change the trustee, (4) power to designate and change the "advisor" (certain powers of the trustee could be exercised by him only with the consent or at the direction of the "advisor"),[63] and (5) power of appointment by deed or will.

In her will the testatrix-settlor provided,[64]

> all the . . . residue and remainder of my estate, . . . including any and all property, rights and interests over which I may have power of appointment which prior to my death has not been effectively exercised by me . . . , I direct my Executrix to deal with as follows . . . . [Partially italicized in court's opinion.]

The issue before the court involved the determination of the testamentary or nontestamentary character of the trust and consequently whether the power of appointment had been effectively exercised or whether the corpus of the trust passed under the residuary clause of the will. The court quoted extensively from the original *Restatement of Trusts.* Insight into the court's reasoning can be gleaned from an examination of its analysis of the illustrations in the *Restatement.*[65]

---

59. *Id.* at 256, 158 So. at 817.

60. See text at note 52 *supra.*

61. 100 So. 2d 378 (Fla. 1956), *rev'd on other grounds,* 357 U.S. 235 (1958), *conformed to,* 106 So. 2d 549 (Fla. 1958). The same case was tried in the Delaware courts which upheld the trust. Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), *affirming* Hanson v. Wilmington Trust Co., 35 Del. Ch. 411, 119 A.2d 901 (1955), *aff'd* Hanson v. Denckla, 357 U.S. 235 (1958).

62. 100 So. 2d at 383.

63. The advisor, who was the settlor's husband, had to give his written consent before the trustee could exercise certain enumerated powers. *Ibid.*

64. 100 So. 2d at 380, 381.

65. 100 So. 2d at 384.

Appellants contend that Illustration 8 under Subsection g. of [Section 56 of the original *Restatement of Trusts*] is "exactly our case." This illustration reads as follows:

> 8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A.

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills and codicils in their operation.

The court emphasized that the settlor exercised the power of appointment several times. The power was initially exercised one month after the creation of the trust in 1935. Subsequent amendments to the power of appointment were executed in 1939, in 1949—on the same day the settlor executed her will—and again in 1950. The court, in its analysis of the illustration from the *Restatement of Trusts,* implies that the question whether a present interest passes to a beneficiary is not to be determined as of the time that the beneficiary is appointed, but rather depends upon whether the appointment is amended or partially revoked. This line of reasoning would lead to the conclusion that any amendment or revocation of a power of appointment after the initial exercise will place the remainder in jeopardy. The Florida Supreme Court indicated the remainder was invalid under both possible approaches: no interest passed to a beneficiary during the life of the settlor, and a mere agency agreement was intended. When the same case was presented to the Delaware Supreme Court, that court found no invalidity on either of these grounds.[66]

66. The Delaware court held that the exercise of the power of appointment created immediate interests, and the right to revoke or change the appointment merely subjected the interests to possible defeasance. Rejecting the Florida court's reasoning, the court further held that the right to revoke or modify did not create a mere agency agreement even though joint action of the settlor and the trustee was required in some instances. Lewis v. Hanson, 36 Del. Ch. 235, 253, 128 A.2d 819, 830 (1957).

The Florida court noted that the illustration quoted above did not deal with the element of control. The court went on to quote section 57, comment g, of the original *Restatement of Trusts.* It is noteworthy to compare the position taken in section 57 of the original *Restatement* with that taken in the same section of the second *Restatement.*[67] The language used in the former was based primarily on *McEvoy v. Boston Five Cents Savings Bank,*[68] whereas the language of the latter reflects the holding of *National Shawmut Bank v. Joy,*[69] which expressly overruled *McEvoy.* Notwithstanding the wording of the original *Restatement,* Professor Scott states "even under the rule as there stated most courts would probably have held that a trust and not a mere agency was created in [*Hanson v. Denckla*], as, indeed, the Delaware court did, citing the original *Restatement.*"[70]

Hanson v. Denckla, as decided by the Florida Supreme Court not only represents the minority view in the United States, but is difficult to support. The formal requirements of the wills statutes are intended to prevent fraudulent claims against the estate of a decedent. It is well established that an inter vivos trust instrument need not be executed with the formalities required for a will even though the settlor reserves a life interest and a power to revoke or amend the trust.[71] Fraudulent

---

67. RESTATEMENT, TRUSTS §57(2) (1935), reads as follows: "Where the settlor transfers property in trust and reserves not only a beneficial life estate and a power to revoke and modify the trust but also such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, the disposition so far as it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

RESTATEMENT (SECOND), TRUSTS §57 (1959) reads as follows: "Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."

68. 201 Mass. 50, 87 N.E. 465 (1909).

69. 315 Mass. 457, 53 N.E.2d 113 (1944).

70. Scott, *Hanson v. Denckla,* 72 HARV. L. REV. 695 n.5 at 697-98 (1959). Professor Scott continues: "Such a power of appointment is very commonly reserved by the settlor of an inter vivos trust. It seems clear that the reservation of such a power does not make the trust invalid as a testamentary disposition, and that the exercise of the power inter vivos is valid although not fulfilling the requirements for a will. It is true that in the instant case any such appointment was revocable under the terms of the trust. But that does not make the disposition testamentary, just as the fact that a trust is revocable does not make it testamentary. By the exercise of the power an interest is created in the appointees, and the disposition is not testamentary merely because that interest might have been later taken away."

71. See text at note 46 *supra.*

claims do not present any greater danger merely because the settlor also reserves powers of control over the trustee as to the administration of the trust and a power of appointment exercisable only by an instrument executed and signed by the settlor and delivered to the trustee. This is especially true when, as in the instant case, there is a formal trust instrument and a corporate trustee.

The most recent Florida case in this area is *Watson v. St. Petersburg Bank & Trust Co.*[72] The settlor conveyed certain property to the purported trustee under an instrument containing, among others, the following provisions:

> (1) power to revoke the trust in whole or in part was retained by the settlor *and the settlor's successors in interest;*
>
> (2) power to require the trustee at any time to convey the trust property to such persons as the settlor or his *successors in interest* might appoint was reserved;
>
> (3) the beneficiary was given a possessory interest in the trust property; and
>
> (4) the only duty of the trustee was to hold title to the trust property until it was conveyed free of the trust.

The Second District Court of Appeal held that the terms of the purported trust agreement failed to show an intent on the part of the settlor to create a trust and therefore the conveyances were a nullity because no valid trust was created. The court stated:[73]

> While neither the reservation of a power to revoke the trust and take back the res nor the retention of a power to modify the trust and change the beneficiaries in themselves make the trust nugatory, they are elements to be considered. The power of the trustor to direct conveyances of the property to any person is an element contrary to a trust intent. Normally, the trustor does not provide that the beneficiary shall have a possessory interest; however, it is possible for him to permit the beneficiary to enjoy the trust property directly, although under the supervision of the trustee.

Indicating that the arrangement created was more characteristic of an agency or bailment,[74] the court stated: "As was the case in *Hansen [sic] v. Denckla* . . . , the *cumulative* effect of the reservations made the trust illusory."[75]

The *Watson* case provides little if any additional insight into the anticipated position of the Florida courts on the extent of permissible

72. 146 So. 2d 383 (2d D.C.A. 1962).
73. *Id.* at 385.
74. See notes 43 and 47 *supra.*
75. 146 So. 2d at 386. (Emphasis added.)

reservation of dominion and control by a settlor of a revocable inter vivos trust. This is particularly true because of the rather extensive and unusual reservations present in the *Watson* case; especially the reservation of the powers of revocation and appointment to the settlor's successors in interest.

What then are the implications of these cases; to what extent can a settlor of an inter vivos trust in Florida retain control over the trust property without fear of nullifying his post-death intentions? The courts, in *Hanson v. Denckla* and *Watson v. St. Petersburg Bank & Trust Co.*, correctly recognized that it is the *cumulative* effect of the reservation of various powers that may cause the intended disposition to fail.[76] Herein lies the difficulty of trying to analyze the position of the Florida courts.

Initially, an examination should be made of the minimum controls that the settlor can reserve with almost absolute assurance that the transfer will be sustained as a non-testamentary trust. Certainly the settlor can retain an interest in the income for life.[77] The "pour-over" statute[78] implies that a revocable or amendable trust will be operative, and this is true whether or not the trust has been amended or revoked in part. Presumably the same result will obtain if the settlor reserves a life interest coupled with the power to amend or revoke.[79]

The court's analysis, in *Hanson v. Denckla,* of the illustration in the *Restatement of Trusts,*[80] indicates that a single exercise of a power of appointment will not be fatal. If the settlor wishes to retain a power of appointment over a revocable inter vivos trust, and after the first exercise thereof wishes to amend or revoke the appointment, prudence would suggest that the settlor revoke the entire trust. A new trust should then be created designating the new appointee as the taker in default of appointment.

The power to designate a new trustee on the death, resignation, or removal of the existing trustee, otherwise than at the discretion of the settlor, should not be a fatal addition to the above powers. But what of the power to change the trustee at will, or the power to directly or indirectly control the trustee's administration of the trust? The suggestion

---

76. In *Hanson v. Denckla,* the court stated, "We re-emphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor *standing alone,* would suffice to invalidate the remainder interests sought to be created under this trust." 100 So. 2d at 385. (Emphasis added.)

77. Williams v. Collier, 120 Fla. 248, 158 So. 815 (1935).

78. FLA. STAT. §736.17(2)(a), (b) (1961). See APPENDIX.

79. In *Hanson v. Denckla,* the court assumed that a life interest coupled with a power to revoke would not invalidate the remainder. This assumption was, however, based on an incorrect interpretation of the facts in *Williams v. Collier.* See note 57 *supra.* See also text at note 46 *supra.*

80. See text at note 65 *supra.*

in the preceding paragraph connotes the incongruity of the position of the Florida court at least so far as a power of appointment is concerned. If the settlor can accomplish an intended result by revocation and reconstitution of a trust, why should he be prohibited from accomplishing the same result by a written instrument directing the trustee to change the appointees? Although the same reasoning—that a power to amend or revoke should encompass the lesser powers—might be applied to the retention of the power to change the trustee at will or to direct the trustee in certain administrative functions, it is doubtful that such a contention would be sustained by the courts of Florida.

Until the exact position of the law in Florida is clearly delineated by the courts or preferably by statute, prudence would dictate that a settlor of a revocable inter vivos trust in Florida retain no more than the total of the following rights and powers:

(1) life estate in the income;
(2) power to amend or revoke the trust in whole or in part;
(3) power to designate a new trustee on the death, resignation, incapacity, or removal of the existing trustee otherwise than at the discretion of the settlor; and
(4) power of appointment by deed or will. (But such a power should be exercised no more than once if at all.)

A Proposed Statutory Solution

The question, under what circumstances will a purported inter vivos trust be invalid because of its testamentary character, can most advantageously be answered by the legislature.[81] As indicated above, when such trusts are held testamentary, it is because of the cumulative effect of the reservation of various powers over the trust property or the trustee. For this reason, the desired degree of certainty in this area can be achieved through judicial pronouncement only after the Florida courts have passed on the myriad of possible combinations of retained powers, and even then, the extent of the permissible powers probably will be quite limited. *Hanson v. Denckla* and the other cases discussed above leave much of the area in the realm of speculation at this time.

The time is propitious for the Florida legislature to enact a statute that would provide the estate planner and the draftsman of trust instruments with a greater amount of certainty, and accordingly, this author submits for consideration the proposed statute set out below. It is not contended that such a statute is a panacea for all possible factual situations that might arise. Beyond a certain point, judicial flexibility is

81. As yet only one state has enacted a statute in this area. WIS. STAT. §231.205 (1961).

desirable. This proposed statute specifies certain powers that may be reserved by the settlor or granted to another person without fear that the trust may, upon the death of the settlor, be held invalid as a testamentary disposition.[82]

If the settlor wishes to retain or to grant powers beyond those specified in the proposed statute, he should be apprised of the fact that if the trust is attacked it might be held invalid. If powers other than those specified in the proposed statute are retained, it is contemplated that the courts will follow the common-law approach and view the cumulative effect of all such powers, including any specified in the statute.

Admittedly, the proposed statute would enable the settlor to retain or to grant extensive powers. However, this would not extend the permissible powers of the settlor beyond what they now are under the common law in many jurisdictions.[83] The proposed statute would introduce desired flexibility into the planning of estates in Florida. As has been noted, such a statute would not seriously undermine the policy of the wills statutes. The proposed statute would require a formal written instrument and a trust that would take effect during the life of the settlor.

Consideration might also be given to the advisability of amending the "pour-over" statute[84] to permit a pour-over from a will to any trust that would not be testamentary under the proposed statute. It is arguable, however, that a trust capable of receiving a pour-over from the settlor's will should not be subject to the extensive reservations of control that may be acceptable in the case of other inter vivos trusts.

The proposed statute reads as follows:

> (1) An otherwise valid trust, created by a written instrument, shall not be held invalid as a testamentary disposition for any or all of the following reasons:
>
> (a) because the settlor or another person or both possess the power to revoke or amend, alter, or modify the trust in whole or in part;
>
> (b) because the settlor or another person or both possess the power to appoint by deed or by will or by either, the persons and organizations to whom the income shall be paid or the principal distributed;

---

82. It is contemplated that the court, in *Hanson v. Denckla,* would have held the trust a nontestamentary disposition had the proposed statute been in force.

83. See RESTATEMENT (SECOND), TRUSTS §§56, 57 (1959); 1 SCOTT, TRUSTS §§56, 57 (2d ed. 1956).

84. See APPENDIX. The Wisconsin statute, note 81 *supra,* incorporates a pour-over provision into the statute providing for the nontestamentary character of certain trusts.

(c) because the settlor or another person or both possess the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;

(d) because the settlor or another person or both possess the power to remove trustees and appoint successor trustees;

(e) because the settlor or another person or both possess the power to control the trustee in the administration of the trust;

(f) because the settlor has retained the right to receive all or part of the income of the trust during his life or for any part thereof.

(2) The fact that the powers specified in subsection (1) are exercised more than once shall not affect the validity of the trust or its nontestamentary character.

(3) This act shall take effect immediately upon the date the same becomes law and shall be applicable to trusts executed before or after said date by persons who are living on or after said date.

MARITAL RIGHTS OF THE SETTLOR'S SURVIVING SPOUSE

Upon the death of the settlor of an inter vivos trust, his surviving spouse may attempt to assert her marital rights against the trust property.[85] It is generally held that the surviving spouse has no rights in property conveyed by her husband to an irrevocable inter vivos trust.[86] If the trust is revocable, three divergent views are possible:

(1) the trust may be declared wholly nugatory as a testamentary disposition;

(2) the trust may be wholly effective and beyond the claims of the surviving spouse; or

(3) the trust may be otherwise valid but treated, at the election of the surviving spouse, as a testamentary disposition so far as is necessary to satisfy the spouse's marital rights.

The first possibility has been discussed in the preceding section. A court may consider the effect of the conveyance on the marital rights of the spouse merely as additional evidence bearing on the testamentary character of the disposition. A trust may be held testamentary solely on the grounds that the conveyance was a fraud on the spouse's rights.

85. For a collection of cases dealing with such rights of the surviving spouse, see CASNER, ESTATE PLANNING 114 n.18 (3d ed. 1961).

86. See 1 SCOTT, TRUSTS §57.5 n.3 (2d ed. 1956).

Where the second of the above results is reached, it is usually based on a literal reading of the governing law which states that the surviving spouse's rights attach only to property owned by the deceased spouse at death, and property conveyed inter vivos without the surviving spouse's relinquishment of her marital rights if such relinquishment is required. Courts which fall into the third category attempt to strike a balance between two conflicting policies:

> (1) each spouse has a right to freely dispose of his property inter vivos since the surviving spouse's rights attach only on death of the first spouse; and
>
> (2) one should not be permitted to circumvent the public policy protecting the surviving spouse and at the same time retain substantial ownership of the property until death.

In Florida, a widow's statutory dower rights consist of a fee simple in one-third of all realty, except homestead, owned by her husband at the time of his death, or which he had previously conveyed without relinquishment of her dower rights. In addition, the widow is entitled to one-third of all personalty owned by her husband at the time of his death.[87]

If a married man dies intestate, his widow may elect either dower or the statutory share. Because the latter entitled the widow to take equally with the lineal descendants as if she were a child, it may be more or less advantageous than dower, depending on the number of lineal descendants and/or the amount of claims against her husband's estate.[88] In cases wherein a surviving spouse has sought to assert her marital rights against property transferred inter vivos by her deceased spouse, the courts of many jurisdictions analyze the disposition in terms of what might be called the "illusory" test, while other courts, or the same courts in other cases, use the "fraud" test. When a court speaks in terms of an illusory transfer, the test applied is whether the transferor has divested himself of the ownership of the property transferred.[89] The so-called "fraud" test directs itself to the intent and purpose of the transferor to deprive his surviving spouse of property she would otherwise acquire at his death.[90]

The Florida Supreme Court, as will be seen in the discussion that follows, has applied both the "fraud" and the "illusory" tests, depending

87. FLA. STAT. §731.34 (1961).

88. FLA. STAT. §731.23(1) (1961). The statutory share is available to either the surviving husband or wife, whereas there is no provision for curtesy for the surviving husband.

89. The leading case following this line of analysis is Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). See Annot., 112 A.L.R. 643 (1956).

90. See, *e.g.*, Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947). See also Nat'l Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950), wherein both the "illusory" and the "fraud" tests are discussed. See Annot. 49 A.L.R.2d 521 (1956).

upon the particular facts in the case before it. Often the court does not phrase its opinion in terms of "fraud" or "illusory," but the theories remain the same.[91] Therefore, the estate planner in Florida must be mindful of the fundamental objections underlying both of these theories.

The Florida courts have had little opportunity to examine a widow's rights in property conveyed by her deceased husband to an inter vivos trust. Three of the relevant cases have already been explored in another context in the preceding section of this article.[92]

Smith v. Hines[93] first established, by way of dictum, the proposition that a man may sell or give his personal property away even for the avowed purpose of defeating his wife's dower interest therein, "but such sale or gift must be a bona fide one—not a sham or pretence of a sale or gift...."[94] The court held that the inter vivos conveyance was not bona fide because the deceased never parted with absolute dominion and control over the property.[95] "Bona fide," as used in this context, directs itself to the settlor's good faith in divesting himself of substantial control and dominion over the property during his lifetime, rather than the lack of intent to deprive his wife of her marital rights in his property.

Smith v. Hines raises the crucial question: What constitutes a bona fide conveyance sufficient to defeat a widow's claim of dower in Florida? The relevant considerations were set out in *Williams v. Collier*,[96] wherein the court distinguished *Smith v. Hines* on the grounds that in *Smith*, "the husband designed by subterfuge to deprive his wife of her dower rights when she was not properly provided for from his property."[97] The court pointed out that in *Williams* ample provision had been made for the widow; the trust was created in good faith for a laudable purpose;[98] and the testator had effectively divested himself of title to and control over the property transferred to the trust.[99]

In *Bee Branch Cattle Co. v. Koon*,[100] the court denied an attempt by

91. Smith v. Hines, discussed at note 93 *infra*, wherein the court spoke in terms of the "bona fides" of the transfer; and Johns v. Bowden, discussed at note 101 *infra*, would most appropriately be classified as cases involving illusory transfers, although in Smith the court also speaks in terms of fraud. Williams v. Collier, discussed at note 96 *infra*; and Bee Branch Cattle Co. v. Koon, discussed at note 100 *infra*, are based on a finding of the lack of a fraudulent intent on the part of the transferor.

92. Smith v. Hines, *supra* note 48, Johns v. Bowden, *supra* note 53, and Williams v. Collier, *supra* note 56.

93. 10 Fla. 258 (1863).

94. *Id.* at 285.

95. See text at note 50 *supra*.

96. 120 Fla. 248, 158 So. 815 (1935).

97. *Id.* at 258, 158 So. 818.

98. The trust was created for the benefit of the settlor's grandchildren.

99. Note that in this case the trust was irrevocable. See note 57 *supra*.

100. 44 So. 2d 684 (Fla. 1949).

the settlor's wife to void her husband's transfer of certain stock to an irrevocable inter vivos trust that had been established for the benefit of his niece and nephews. The settlor, although sane at the time of the transfer, was insane when the suit was commenced. The court relied heavily on *Williams v. Collier,* and distinguished *Smith v. Hines* on the grounds that there, the husband did not properly provide for his wife. The court pointed out that in the instant case the plaintiff's husband, after the transfer in trust, remained in possession of property valued at approximately $100,000. It should be pointed out that although in both *Bee Branch Cattle Co. v. Koon,* and *Williams v. Collier,* the trusts were irrevocable, the court in neither case indicated that this fact was determinative.

In *Johns v. Bowden*[101] the testator's orphan children successfully attacked their father's conveyance of his homestead to an inter vivos trust. The court did not approach the issue from the point of view of the bona fides of the conveyance as did the *Smith v. Hines* line of cases. The court purportedly held that the revocable inter vivos trust was testamentary in character regardless of the homestead issue. However, the court then noted that a testamentary disposition of homestead is prohibited by law and hence nugatory.

As indicated above,[102] the court erroneously viewed *Johns* as a case in which no interest passed to any beneficiary during the life of the settlor. Notwithstanding this fact, it is submitted that the decision is altogether sound. The extensive retention of control over the property[103] leads inescapably to the conclusion that the testator intended to circumvent the statutory and constitutional restrictions on testamentary disposition of homestead, and at the same time, treated the property as his own during his lifetime. The testator's dominion over the property was virtually unchanged after the alleged conveyance in trust. At most, a mere agency arrangement was created for the purpose of benefiting some of his children at the expense of the others.

To what extent then may a man deprive his wife or children of their statutory rights by a conveyance of property to a revocable inter vivos trust? Clearly the cases discussed give no definitive answer. They do however, establish broad guidelines. The Florida court has obviously attempted to strike a balance between two extreme positions. At one extreme is a rule that denies the surviving spouse's rights under all circumstances in which a literal reading of the statute does not afford her protection, thus seriously undermining the policy of these statutes. At the other extreme is a rule that so severely limits the husband's disposi-

101. 68 Fla. 32, 66 So. 155 (1914).

102. See text at note 54 *supra.*

103. See text at note 53 *supra.*

tive powers that it casts doubt upon the validity of most inter vivos gifts of personalty or homestead not joined in by his wife. As is the case with most broad legal standards, especially when they are articulated in rather vague terms, it is difficult to predict the results of a given course of action.

The Florida legislature should consider the advisability of a statute which would bring greater certitude to this area.[104] Such a statute might provide that the surviving spouse or children may assert their statutory rights against any property over which the testator had, during his lifetime, a power to vest in himself the beneficial enjoyment of the property. Such a statute might be considered in conjunction with the proposed statute in the preceding section.[105]

---

104. For an example of a statute which delineates the rights of a surviving spouse in property conveyed by her husband to an inter vivos trust, see PA. STAT. ANN. tit. 20, §301.11 (Supp. 1961).

105. A statute might also be considered which would delineate the rights of the settlor's creditors in the revocable inter vivos trust property. See, *e.g.*, N.Y. REAL PROP. LAW, §145, which reads, "Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned."

The only Florida statute which deals with creditors' rights in this context is FLA. STAT. §726.01 (1961), which allows creditors to avoid fraudulent conveyances by their debtor. In 3 SCOTT, TRUSTS §330.12 n.8 (2d ed. 1956), and in the annotations to RESTATEMENT (SECOND), TRUSTS §330 comment *o* (1959), it is implied that FLA. STAT. §726.08 (1961), protects the rights of creditors of a settlor of a revocable trust. It would seem however, that this statute applies not to general creditors, but rather to subsequent purchasers.

Because there are no reported Florida cases that deal with the general rights of creditors in property conveyed by their debtor to an inter vivos trust, a separate section of this paper will not be devoted to this problem.

The creditors of the settlor of a revocable inter vivos trust generally cannot reach the trust property merely because the trust is revocable. RESTATEMENT (SECOND), TRUSTS §330 comment *o* (1959); 3 SCOTT, TRUSTS §330.12 (2d ed. 1956).

It is generally held that if the settlor reserves to himself the income for life, his creditors can at least reach his beneficial interest in the income. 2 SCOTT, TRUSTS §156 (2d ed. 1956). If the settlor retains a general power to appoint the principal of the trust, his creditors generally will be able to reach the entire trust property whether or not the settlor exercises the power. RESTATEMENT (SECOND), TRUSTS §156 (1959); 2 SCOTT, TRUSTS §156 (1956). In one Florida case the settlor conveyed property in trust, reserving to himself the income for life and a power of appointment. There was no provision for a gift over in default of appointment. The court held that the settlor was the sole beneficiary and his creditors could reach the entire trust property. First Wisconsin Nat'l Bank of Milwaukee v. Schwab, 141 Fla. 748, 194 So. 307 (1940). See also Adams v. Adams, 147 Fla. 267, 2 So. 2d 885 (1941).

See generally RESTATEMENT (SECOND), TRUSTS §§156, 330 (1959); 2 SCOTT, TRUSTS §156 (2d ed. 1956); 3 SCOTT, TRUSTS §330 (2d ed. 1956). See also Bankruptcy Act, §70(a)(3), 30 Stat. 565 (1939), 11 USC §110 (1958).

Until such a statute is enacted, or until the Florida courts delineate more definitive rules, the following vague standards will control:

(1) the conveyance must be bona fide—the grantor must divest himself of legal title and substantial dominion and control over the property conveyed;

(2) the grantor's wife or children must be "amply" provided for from his other assets; and

(3) the conveyance must be for a "proper" and "laudable" purpose.[106]

Conclusion

In order to effectuate the desires of his client, the estate planner who advises the use of a revocable inter vivos trust must be thoroughly familiar with the limitations placed on such a device in the jurisdiction whose laws are to govern the disposition. This is especially true if a revocable inter vivos trust is to be created in Florida. If the trust is to be the subject of a pour-over from the settlor's will, the statutory requirements must be met, and the trust should be adequately funded. Care must be taken to assure that the settlor has not retained such dominion and control over the trust property or the operation of the trust as to subject the arrangement to attack on the grounds that it is in reality a testamentary disposition. The estate planner must be mindful of the fact that inadequate provision for the settlor's spouse and children, either from the trust itself or from the settlor's other assets, will render ineffective the dispositive scheme.

A skillfully planned and properly created revocable inter vivos trust can be a useful and desirable instrument in the planning of many estates. As has been noted, the advantages of such trusts are numerous. Of paramount importance is the realization that such trusts may add greater flexibility to a dispositive plan and thus enable the estate planner to more effectively accomplish the desires of his client, which, after all, should be the ultimate goal of the estate planner.

106. For cases involving confutation of prenuptial conveyances alleged to be in fraud of the wife's marital rights, see Davis v. Davis, 98 So. 2d 777 (Fla. 1957); McIntyre v. McIntyre, 92 So. 2d 835 (Fla. 1956) (discussed in Davis v. Davis, *supra*, at 778); Lange v. Lange, 133 Fla. 447, 182 So. 807 (1938). See also note, 11 U. Fla. L. Rev. 321 (1958).

APPENDIX

FLA. STAT. §736.17 (1961): "Bequests and devises to trustee.

(1) An otherwise valid bequest or devise may be made to the trustee of a trust which is evidenced by a written instrument subscribed concurrently with the making of the will, provided that such written instrument is identified in the will.

(2) Such devise or bequest shall not be invalid for any or all of the following reasons:

(a) Because the trust is amendable or revocable or both by any person whomsoever; or

(b) Because the trust has been amended or revoked in part after execution of the will or codicil thereto; or

(c) Because the trust instrument or any amendment thereto was not executed in the manner required for wills; or

(d) Because the possible expectancy of receiving benefits as named beneficiary of a life insurance policy deposited, or to be deposited with the trustee is the only trust res, and even though the testator or other person has reserved any or all rights of ownership in such insurance contracts, including the right to change the beneficiary.

(3) Such devise or bequest shall operate to dispose of property under the terms of the instrument which created the trust as theretofore or thereafter amended.

(4) An entire revocation of the trust by an instrument in writing prior to the testator's death shall invalidate the devise or bequest.

(5) Unless the will provides otherwise, the property so devised or bequeathed shall not be deemed held under a testamentary trust of the testator and thus shall not be subject to the terms of Chapter 737, Florida trust accounting law, but shall become a part of the principal of the trust to which it is devised or bequeathed.

(6) This section shall not be construed as repealing or amendatory of, but as cumulative to, all laws touching upon the subject matter hereof and now in force and effect.

(7) This act shall take effect immediately upon the date the same becomes law and shall be applicable to wills executed before and after said date by persons who are living on or after said date."

The original FLA. STAT. §736.17 as enacted in 1959 was less comprehensive than the present statute set out above. The original statute read as follows:

"An otherwise valid bequest or devise may be made to the trustee of a trust in existence at the date of the execution of the will. Such devise or bequest shall not be invalid: (1) Because the trust is amendable or revocable or both by any person whomsoever; or (2) Because the trust has been amended or revoked in part after execution of the will or codicil; or (3) Because the trust instrument or any amendment thereto was not executed in the manner required for wills.

"Such devise or bequest shall operate to dispose of property under the terms of the instrument which created the trust as theretofore or thereafter amended."