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Compressing Testamentary Intent into Inter Vivos Delivery: What Makes a Conveyance Effective?—In re Estate of O'Brien, 109 Wash. 2d 913, 749 P.2d 154 (1988)

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COMPRESSING TESTAMENTARY INTENT INTO INTER VIVOS DELIVERY: WHAT MAKES A CONVEYANCE EFFECTIVE?—*In re Estate of O'Brien,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

Abstract: In *In re Estate of O'Brien,* the Supreme Court of Washington held that intent to pass a deed title at death fulfills the inter vivos delivery requirement and that the will substitute statute removes ineffective conveyances from the will statute requirement. This Note concludes that the *O'Brien* interpretations of delivery and the will substitute statute are misguided, and recommends judicial reversal of the delivery ruling and a legislative rewording of the statute.

Ms. Ross dies without a will. The only papers she leaves behind are two undelivered deeds purporting to pass title at her death. Does her estate fall into intestacy?—possibly not, as a result of the Supreme Court of Washington's holding in *In re Estate of O'Brien.*[1] The *O'Brien* court considered a case in which two deeds apparently passed all interest at the grantor's death. It held that intent to pass title at death, absent compliance with the legal delivery requirement,[2] effectively transfered property. With that decision, the majority diverged from traditional property law, which states that both present intent and delivery are necessary for an effective inter vivos conveyance. Further, despite contrary interpretations from commentators and other jurisdictions, the court held that the Washington "will substitute statute"[3] validated such undelivered, ineffective transfers, in spite of their noncompliance with the Washington "will statute."[4] This may have rendered the Washington will statute obsolete and thrown Washington property law into confusion.

I. REQUIRED ELEMENTS OF PROPERTY TRANSFERS

A. *The* O'Brien *Dispute*

The *In re Estate of O'Brien*[5] issues were whether two deeds effectively conveyed property, even though titles did not pass until the grantor's death, and whether Washington's will substitute statute[6] exempted those deeds from the statutory requirements relating to the execution of wills. In 1979, Mary O'Brien executed two deeds to her

1. 109 Wash. 2d 913, 749 P.2d 154 (1988).
2. *Id.* at 919, 749 P.2d at 158.
3. WASH. REV. CODE § 11.02.090 (1987).
4. WASH. REV. CODE § 11.12.020 (1987).
5. 109 Wash. 2d 913, 749 P.2d 154 (1988).
6. WASH. REV. CODE § 11.02.090 (1987).

daughter, Peaches Robinson.[7] The unrecorded deeds were kept in a joint safe deposit box until 1982, when the women closed the box and Robinson took physical possession of the deeds.[8] O'Brien, however, continued to pay for utilities, insurance, repairs, and all maintenance on both properties. She also paid all property taxes and swore to the City of Seattle that she was the fee owner of one of the properties.[9] O'Brien lived on one property and her daughter moved onto the other and paid rent to her mother. Following O'Brien's stroke in 1983, Robinson recorded the deeds.[10] Her mother died intestate, without regaining consciousness. The court appointed one of O'Brien's granddaughters as personal representative, and she filed an action to quiet title to the properties. Robinson counterclaimed that her mother had transfered the properties to her.[11]

Affirming the trial court, the court of appeals found the evidence clear, cogent, and convincing[12] that the deeds failed as inter vivos conveyances because O'Brien had not legally delivered them to Robinson.[13] The court also rejected Robinson's claim that the will substitute statute[14] validated the transfers, finding that the statute only pertained to effective conveyances, not to undelivered deeds.[15]

The Supreme Court of Washington reversed, holding that the will substitute statute did apply,[16] despite the deeds' apparent testamentary nature. Although Robinson did not appeal the delivery issue,[17] the court held that the legal delivery requirement is satisfied when a grantor intends to pass title at death.[18]

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7. *In re* Estate of O'Brien, 46 Wash. App. 860, 861, 733 P.2d 235, 236 (1987), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

8. At trial, some witnesses testified that Robinson did not physically possess the deeds until much later. *O'Brien,* 46 Wash. App. at 862, 733 P.2d at 236.

9. *Id.* This enabled her to qualify for a senior citizen tax discount on the property.

10. *Id.* at 862, 733 P.2d at 236.

11. *Id.* At trial, witnesses presented sharply conflicting testimony as to O'Brien's intent concerning the disposition of her property. Some witnesses indicated she wanted to give the property to her grandchildren, others testified she wanted to sell the holdings, and still others claimed O'Brien wanted Robinson to get the land. *Id.* at 863, 733 P.2d at 237.

12. *Id.* at 865, 733 P.2d at 238.

13. *Id.* at 864–65, 733 P.2d at 237–38.

14. WASH. REV. CODE § 11.02.090 (1987).

15. *In re* Estate of O'Brien, 46 Wash. App. 860, 866–67, 733 P.2d 235, 238–39 (1987), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

16. *In re* Estate of O'Brien, 109 Wash. 2d 913, 919, 749 P.2d 154, 158 (1988).

17. *Id.* at 916, 749 P.2d at 156.

18. *Id.* at 919, 749 P.2d at 158.

B. Property Transfer Requirements

Analysis of *O'Brien* requires examining the traditional requirements of property transfers, and distinguishing between testamentary and inter vivos transactions.[19] In a testamentary transfer, all interest in the property passes at the grantor's death.[20] Such transfers must conform to the requirements of the will statute[21] to be effective.[22] Generally, more formal requirements apply to wills than to inter vivos transfers.[23] A critical distinction between testamentary and inter vivos gifts is that the testamentary transferee receives no property rights until the transferor's death.[24]

In inter vivos transfers, grantors relinquish absolute ownership of the property during their lifetime and deliver some property interest to the grantee.[25] Under long-established principles of property law, valid inter vivos gifts require both present intent and delivery.[26] A variety of factors determine intent,[27] and delivery can be explicit or implied.[28]

Will substitutes are methods of inter vivos conveyances which nonetheless produce results similar to testamentary transfers.[29] The grantor makes a present delivery of a future interest to the grantee.[30] Will

19. For further explanation of the differences between forms of property transfers, see 5A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2603, at 287–88 (1978 & Supp. 1981); 6 *id.* §§ 2935–36 (1962); 4 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 1033–34 (3d ed. 1975).

20. 5A G. THOMPSON, *supra* note 19, § 2603, at 287; *see also In re* Estate of Verbeek, 2 Wash. App. 144, 150–51, 467 P.2d 178, 183 (1970).

21. All wills must be written, signed by the testator, and witnessed by at least two competent witnesses. WASH. REV. CODE § 11.12.020 (1987).

22. 5A G. THOMPSON, *supra* note 19, § 2603. A will statute serves three purposes. First, compliance with the ritualistic aspects of a will helps the testator evidence deliberate intent. Second, the evidentiary characteristics of a will increase the reliability of proof in a probate dispute. Third, the formality required by the will statute serves the prophylactic purpose of protecting the testator from undue influence. Gulliver & Tilson, *Classification of Gratuitous Transfers,* 51 YALE L.J. 1, 2–5 (1941).

23. Browder, *Giving or Leaving—What Is a Will?,* 75 MICH. L. REV. 845, 847 (1977).

24. 5A G. THOMPSON, *supra* note 19, § 2603, at 290; *cf. Verbeek,* 2 Wash. App. at 150, 467 P.2d at 183.

25. *In re* Estate of Verbeek, 2 Wash. App. 144, 150, 467 P.2d 178, 183 (1970).

26. 4 H. TIFFANY, *supra* note 19, § 1033, at 359.

27. *Verbeek,* 2 Wash. App. at 149–50, 467 P.2d at 182–83; *see also* Annotation, *Sufficiency of Delivery of Deed Where Grantor Retains or Recovers Physical Possession,* 87 A.L.R.2d 787, 796 (1963).

28. 4 H. TIFFANY, *supra* note 19, § 1034. With implied delivery, no physical transfer of the deed and property from grantor to grantee is needed.

29. Browder, *supra* note 23, at 845.

30. Will substitutes may include life insurance policies, joint tenancies, pension benefits, contracts with payable-on-death provisions, and deeds. WASH. REV. CODE § 11.02.090 (1987), U.P.C. § 6-201 (1987); Browder, *supra* note 23. For examples of successful will substitute conveyances, see *In re* Cunningham's Estate, 19 Wash. 2d 589, 143 P.2d 852 (1943) (valid gift

substitutes can be nontestamentary[31] and effective as inter vivos transfers when the "merest fragment of property interest passes to someone else."[32] For instance, a grantor may reserve the right to retain a life estate in property conveyed to a grantee.[33] The theory behind will substitutes is that the grantor has legally delivered the property and has only delayed the grantee's enjoyment of it.[34]

When a deed contains a dispositive provision that takes effect at death, the key question becomes whether it is an inter vivos will substitute or a testamentary transfer.[35] If the transfer is inter vivos, the grantor must have the requisite intent and relinquish some interest in the property to the grantee.[36] If these two requirements are met, the transfer is an inter vivos will substitute.[37] If a deed transfers no interest until the grantor's death, however, it is a testamentary transfer and must be included in a valid will to be effective.[38]

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where donor, who retained use, management, and control of property, irrevocably parted with deed by giving deed to third party for delivery to donee at donor's death); Riley v. Riley, 266 S.W.2d 109 (Ky. 1954) (effective deed stating fee simple was to vest in grantees at grantor's death); St. Louis County Nat'l Bank v. Fielder, 364 Mo. 207, 260 S.W.2d 483 (1953) (valid deed conveying property to grantee but reserving life estate for grantor); Kerns v. Kerns, 157 Neb. 786, 61 N.W.2d 405 (1953) (valid delivery although grantee's use of property postponed until grantor's death). *See also* 8 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF PROPERTY § 4226, at 13–16 (1963).

31. *See* 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 6.1 (1960).

32. Browder, *supra* note 23, at 851; *see also* Comment, *Contracts To Devise Real Property,* 14 WASH. L. REV. 30, 35 (1939).

33. 5A G. THOMPSON, *supra* note 19, § 2603, at 304–05; *see, e.g., In re* Estate of Verbeek, 2 Wash. App. 144, 150, 467 P.2d 178, 183 (1970).

34. Browder, *supra* note 23, at 860.

35. *See* 8 G. THOMPSON, *supra* note 30, § 4226, at 13; Browder, *supra* note 23, at 849. Conventional property law distinguishes between the present conveyance of a future interest and an invalid testamentary disposition. 8 G. THOMPSON, *supra* note 30, § 4226, at 17. For example, a deed giving ownership of the family home to a son, but reserving a father's right to live in the house until death, conveys a future interest to the son and is an effective inter vivos conveyance by will substitute. *In re* Estate of Pappuleas, 5 Wash. App. 826, 490 P.2d 1340 (1971). Alternatively, a deed from uncle to nephew, transfering title at the uncle's death, is an invalid inter vivos conveyance, even if the nephew farms and pays taxes on the land. First Nat'l Bank v. Bloom, 264 N.W.2d 208 (N.D. 1978); *see* 5A G. THOMPSON, *supra* note 19, § 2603, at 295–96; *cf. Verbeek,* 2 Wash. App. at 150–51, 467 P.2d at 183.

36. 8 G. THOMPSON, *supra* note 30, § 4226, at 13; Browder, *supra* note 23, at 845–54.

37. *Verbeek,* 2 Wash. App. at 153, 467 P.2d at 184–85 (if a future interest is passed, it is not a testamentary instrument); Browder, *supra* note 23, at 854–77.

38. Juel v. Doll, 51 Wash. 2d 435, 319 P.2d 543 (1957) (where grantor does not intend to pass present interest at time deed is executed, there is no valid delivery); Holohan v. Melville, 41 Wash. 2d 380, 249 P.2d 777 (1952); *In re* Murphy's Estate, 193 Wash. 400, 75 P.2d 916 (1938); *In re* Estate of Verbeek, 2 Wash. App. 144, 467 P.2d 178 (1970); 1 W. BOWE & D. PARKER, *supra* note 31, § 6.1, at 218.

C. *Manifestations of Intent and Delivery*

Case by case judicial determinations of whether a conveyance is inter vivos or testamentary produce widely varying results.[39] The fact specific nature of each case with regard to questions of intent and delivery produces results peculiar to the conveyance in question.[40] Although the two elements are related,[41] they are distinguishable.[42] While intent plays a role in delivery,[43] without delivery of an interest, an effective inter vivos conveyance cannot exist.[44]

A grantor can manifest intent to convey an interest through a will substitute in many ways.[45] In finding intent, courts consider the deed's nature, form, and physical location; the parties' conduct and relationship; the grantor's power of revocation or sale; the grantee's access to the deed; and recordation.[46] A physical transfer of some tangible item is unnecessary to show intent, but it may be persuasive.[47] The grantor's language, both written and spoken, also indicates intent.[48] Relinquishing control of the property to a third party

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39. Some commentators liken the classification quandary to a shell game. "Now you see the 'interest'; now you don't; sometimes it seems to be here, sometimes there." Gulliver & Tilson, *supra* note 22, at 37.

40. Anderson v. Ruberg, 20 Wash. 2d 103, 107–08, 145 P.2d 890, 893 (1944) (each case must be decided on its own facts and provides negligible assistance in deciding another case); *see also* Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of Grantor,* 31 A.L.R.2d 532 (1953).

41. *E.g.,* Juel v. Doll, 51 Wash. 2d 435, 319 P.2d 543 (1957) (valid delivery may depend on whether grantor intended deed should presently pass title); Bull v. Fenich, 34 Wash. App. 435, 440, 661 P.2d 1012, 1015 (1983) ("Delivery, one of the basic requirements for an effective conveyance, requires an intent to make a deed presently operable.").

42. *See* 6 G. THOMPSON, *supra* note 19, § 2936.

43. *E.g.,* Raborn v. Hayton, 34 Wash. 2d 105, 109, 208 P.2d 133, 136 (1949) (delivery requires grantor's intent that the conveyance should presently take effect (citing Anderson v. Ruberg, 20 Wash. 2d 103, 145 P.2d 890 (1944))); *see also* Malek v. Patten, 208 Mont. 237, 678 P.2d 201 (1984) (intestate decedent showed present intent to establish and convey a valid joint tenancy with her husband by purchasing certificates of deposit and opening a checking account, payable to decedent or husband, even though husband was unaware a joint tenancy existed until after wife's death); 4 H. TIFFANY *supra* note 19, § 1034, at 361.

44. *E.g.,* Bull v. Fenich, 34 Wash. App. 435, 661 P.2d 1012 (1983) (ineffective present delivery because deed was conditional upon the grantee's mother predeceasing the grantor); First Nat'l Bank v. Bloom, 264 N.W.2d 208 (N.D. 1978) (ineffective delivery where grantor kept deed in his safety deposit box, paid all taxes on the land, and made statements indicating that at death he wanted the property to go to the grantee).

45. 5A G. THOMPSON, *supra* note 19, § 2603, at 294–95.

46. *In re* Estate of Verbeek, 2 Wash. App. 144, 149–50, 467 P.2d 178, 182–83 (1970); Annotation, *supra* note 27, at 792.

47. Browder, *supra* note 23, at 861; *see also* Johnson v. Brown, 65 Idaho 359, 144 P.2d 198 (1943) (physical transfer is unnecessary as long as intent and delivery are shown).

48. *See, e.g., In re* Kirkpatrick's Estate, 140 Wash. 452, 249 P. 980 (1926). In *Kirkpatrick,* the court found present intent to deliver a future interest when the grantor sent a letter to his

provides a rebuttable presumption of the grantor's intent to deliver a present interest.[49]

In addition to requiring a manifestation of the grantor's intent, an effective transfer requires delivery of a present[50] or future[51] interest during the grantor's lifetime.[52] While physical possession of the deed by the grantee raises a strong presumption of delivery,[53] that presumption is rebuttable by clear, cogent, and convincing evidence that the grantor retained absolute ownership[54] or actual possession of the property.[55] Recordation will not validate a deed,[56] but it does create another rebuttable presumption of delivery.[57] This presumption is much stronger when it is the grantor who records the deed.[58]

Conventional property law requires present intent and delivery of some interest to the grantee in all inter vivos transactions. In addition to deciding whether the *O'Brien* deeds met these requirements, the

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sister stating that he had placed all of his property, which she was to receive upon his death, in escrow. The court also found intent in the man's remarks reminding his attorney of the escrow agreement and reiterating that he wanted his sister to have his property. *See also* Raborn v. Hayton, 34 Wash. 2d 105, 208 P.2d 133 (1949) (no intent to deliver when a woman executing a deed in her attorney's office commented that she would deliver the deed only upon receipt of a property settlement from her estranged husband).

49. Maxwell v. Harper, 51 Wash. 351, 98 P. 756 (1909) (grantor deposited deed in bank, relinquishing all control over property, but reserving the right to keep the profits from the land during his lifetime).

50. *See generally, supra* text accompanying notes 25–28 (detailing standard inter vivos transfers).

51. 8 G. THOMPSON, *supra* note 30, § 4226, at 16; *see also In re* Murphy's Estate, 193 Wash. 400, 407–08, 75 P.2d 916, 919 (1938). In *Murphy's Estate,* a lease provided that by meeting certain conditions, the YMCA could lease property for the duration of the lessor's life. If these conditions were not met, the lessor reserved the right to reenter and retake the property. If the lease was still in effect at the lessor's death, the YMCA would become outright owner of the property. At the lessor's death, the court held that the lease was an invalid testamentary disposition. Because the lessor had retained all control over the property until his death, there was no valid inter vivos transfer of any interest.

52. 4 H. TIFFANY, *supra* note 19, § 1033, at 359. If the deed is not delivered during the grantor's lifetime, the deed is ineffective and the transaction is testamentary. *Murphy's Estate,* 193 Wash. at 407–08, 75 P.2d at 919; *In re* Estate of Verbeek, 2 Wash. App. 144, 150, 467 P.2d 178, 183 (1970); Browder, *supra* note 23, at 861.

53. *In re* Estate of Pappuleas, 5 Wash. App. 826, 828, 490 P.2d 1340, 1341 (1971) (citing Raborn v. Hayton, 34 Wash. 2d 105, 208 P.2d 133 (1949)).

54. 8 G. THOMPSON, *supra* note 30, § 4238, at 93–94; 4 H. TIFFANY, *supra* note 19, § 1034, at 361–62.

55. *In re* Estate of O'Brien, 46 Wash. App. 860, 864, 733 P.2d 235, 237 (1987) (citing Raborn v. Hayton, 34 Wash. 2d 105, 208 P.2d 133 (1949); *Pappuleas,* 5 Wash. App. at 828, 490 P.2d at 1341), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

56. 6 G. THOMPSON, *supra* note 19, § 2935, at 4.

57. 8 G. THOMPSON, *supra* note 30, § 4240, at 107–08.

58. *See* Johnson v. Wheeler, 41 Wash. 2d 246, 247, 248 P.2d 558, 560 (1952).

court also examined whether Washington's will substitute statute[59] applied to them.

D. Washington's Will Substitute Statute

The will substitute statute, section 11.02.090 of the Washington Revised Code, recognizes the nontestamentary nature of will substitutes. It prevents invalidation of will substitutes when they have not complied with will statute formalities.[60] The subsection of the statute pertinent to *O'Brien* reads:

> (1) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, joint tenancy, community property agreement, trust agreement, conveyance, or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this title does not invalidate the instrument or any provision:
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> . . . .
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> (c) 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.[61]

This statute is based on Uniform Probate Code ("U.P.C.") section 6-201.[62] Fourteen other states currently have provisions based on the U.P.C. section.[63] Unlike the U.P.C., Washington's statute adds joint tenancies and community property agreements to the list of acceptable conveyance forms.[64] Otherwise, the wording in the two provisions is identical.

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59. *In re* Estate of O'Brien, 109 Wash. 2d 913, 916, 749 P.2d 154, 156 (1988).

60. Wills must be written, signed by the testator, and witnessed by at least two competent witnesses. WASH. REV. CODE § 11.12.020 (1987).

61. WASH. REV. CODE § 11.02.090 (1987). The two omitted subsections concern money or other benefits owed the decedent and money due under the instrument. Two additional sections in the will substitute statute also are not pertinent—one concerns creditors' rights, the other involves safety deposit repositories.

62. U.P.C. § 6-201 was published in 1969; Washington Revised Code § 11.02.090 was enacted in 1974.

63. ALASKA STAT. § 13.31.070 (1985); ARIZ. REV. STAT. ANN. § 14-6201 (1975); COLO. REV. STAT. § 15-15-201 (1973); IDAHO CODE § 15-6-201 (1979); IND. CODE § 32-4-1.5-14 (1980); KY. REV. STAT. ANN. § 391.360 (Baldwin 1969); MO. REV. STAT. § 456.231 (1988); MONT. CODE ANN. § 72-1-110 (1987); NEB. REV. STAT. § 30-2714 (1985); N.M. STAT. ANN. § 45-6-201 (1978); N.D. CENT. CODE § 30.1-31-14 (1976); S.C. CODE ANN. § 62-6-201 (Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 450 (Vernon 1980); UTAH CODE ANN. § 75-6-201 (1978).

64. Washington's statute also adds a provision concerning safety deposit boxes. *See supra* note 61.

Although the legislative history of the Washington statute is limited,[65] the comment following U.P.C. section 6-201[66] can shed light on the legislative reasoning behind the state statute. The comment indicates that the section's purpose is to give effect to those transfers, usually of future interests, that would be valid except for the will statute.[67] Several commentators have indicated that the U.P.C. and Washington's similar statute are not designed to validate otherwise ineffective transfers.[68] However, the majority in *O'Brien* found otherwise.[69]

E. The O'Brien *Decision and Reasoning*

Writing for the seven-member majority in *O'Brien,* Justice Brachtenbach held that the will substitute statute removed O'Brien's conveyances from the will statute requirements[70] and validated the deeds as nontestamentary transfers.[71] The court reasoned that every word or portion in the statute must be given meaning.[72] It rejected the lower courts' holding that the phrase "effective as" applied to each of the preceding categories of will substitutes,[73] so that a property transfer must be already "effective as a conveyance" before the statute applies.[74] The Supreme Court of Washington called this interpretation "meaningless,"[75] and held that the statute "cannot operate upon a conveyance which is effective as a conveyance because its operation as a conveyance would in and of itself make it nontestamentary."[76]

The supreme court determined that there are twelve separate categories of conveyances to which the statute applies;[77] the first eleven are

65. Note, *Property—Probate Law & Procedure—No More Probate?,* 51 WASH. L. REV. 451, 453 (1976).

66. U.P.C. § 6-201 comment (1987).

67. *Id.* (the sole purpose of the section is to eliminate testamentary characterization of transfers included in the terms of the section); M. REUTLINGER & W. OLTMAN, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION 350–52 (1985).

68. M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351 (the statute does not itself validate an otherwise ineffective agreement); *cf.* U.P.C. § 6-201 comment (1987).

69. *In re* Estate of O'Brien, 109 Wash. 2d 913, 917–18, 749 P.2d 154, 157 (1988).

70. WASH. REV. CODE § 11.12.020 (1987).

71. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 158.

72. *Id.* at 918, 749 P.2d at 157.

73. "Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, joint tenancy, community property agreement, trust agreement, conveyance or any other written instrument *effective as* a contract, gift, conveyance, or trust is deemed to be nontestamentary . . . ." WASH. REV. CODE § 11.02.090(1) (1987) (emphasis added).

74. *O'Brien,* 109 Wash. 2d at 917, 749 P.2d at 157.

75. *Id.*

76. *Id.* at 918, 749 P.2d at 157.

77. *Id.* at 917, 749 P.2d at 157.

specifically named.[78] Category twelve includes any *other* written instruments "effective as a contract, gift, conveyance or trust," *not* covered by the first eleven categories.[79] This twelfth category, the court stated, includes ineffective conveyances and makes them nontestamentary.[80] Applying this interpretation, the court held that the will substitute statute validated the O'Brien deeds.[81]

The parties did not appeal the lower courts' holding that O'Brien did not intend to pass title until her death. Nevertheless, the supreme court held that when the proven intent of a grantor is to pass title at death, the legal delivery requirement of inter vivos transfers is satisfied.[82] The "technical, legal"[83] delivery requirement should ensure that the grantor's intent is realized; in O'Brien's case, requiring strict compliance with the delivery requirement would "thwart the unchallenged intent of the grantor."[84] The court held that O'Brien intended to pass title at her death,[85] and that her intent would suffice for delivery.[86]

Justice Dore dissented, relying on conventional property law which requires both intent and delivery[87] to effectuate a valid inter vivos conveyance. He found the O'Brien deeds ineffective as inter vivos conveyances and therefore ineffective as statutorily defined will substitute conveyances.[88]

78. *Supra* note 61 and accompanying text quoting the relevant statutory language.

79. *O'Brien,* 109 Wash. 2d at 918, 749 P.2d at 157.

80. *Id.* at 917, 749 P.2d at 157.

81. *Id.* at 918, 749 P.2d at 157.

82. *Id.*

83. *Id.*

84. *Id.* at 918–19, 749 P.2d at 157.

85. *Id.* at 918–19, 749 P.2d at 157–58.

86. *Id.* at 919, 749 P.2d at 158.

87. *See supra* notes 50–58 and accompanying text (explaining the requirement and indications of delivery).

88. Justice Dore based the lack of delivery portion of his dissent on the holding in Juel v. Doll, 51 Wash. 2d 435, 436–37, 319 P.2d 543, 544 (1957) (to constitute delivery it must be clear that the grantor intended the deed to presently pass title), and on 2 WASHINGTON STATE BAR ASS'N, REAL PROPERTY DESKBOOK §§ 30.11–30.21 (2d ed. 1986) (a valid deed must be delivered by the grantor to the grantee). Justice Dore combined these sources with the *O'Brien* trial court's finding that O'Brien made no present delivery, intending a testamentary transfer. Justice Dore then cited the comment following U.P.C. section 6-201 and M. REUTLINGER & W. OLTMAN, *supra* note 67, to support the proposition that the will substitute statute cannot validate an otherwise invalid deed. *O'Brien,* 109 Wash. 2d at 919–23, 749 P.2d at 158–60 (Dore, J., dissenting).

II. FLAWS IN *O'BRIEN*'S ANALYSIS AND LIMITS UPON ITS IMPACT

"Mere intention to give is not sufficient to effectuate a gift." Justice Blake, Supreme Court of Washington, 1943.[89]

"[W]hen it is determined that the proved intent of the grantor was to pass title upon his or her death, the legal requirement of 'delivery' is satisfied . . . ." Justice Brachtenbach, Supreme Court of Washington, 1988.[90]

If O'Brien wanted Robinson to have the property, the supreme court may have reached an equitable solution in *O'Brien.*[91] Yet in the process, the court reformulated property law and policy in this state. The court apparently eliminated the legal delivery requirement of will substitutes[92] upon a finding that the grantor intended the property to pass at death.[93] Then, diverging from the conventional interpretation of the will substitute statute,[94] the court held that the statute can validate ineffective conveyances.[95] Analysis shows that the orthodox interpretation of the delivery requirement should be reinstated and that the conventional scope of the statute is not only valid but also the one most likely intended by the Washington State Legislature.[96]

A. The Court's Failure To Distinguish Between Valid Inter Vivos Delivery and O'Brien's Testamentary Intent

Although neither party appealed the lower courts' determination that O'Brien intended the titles to pass only at her death, the Supreme Court of Washington addressed the issue and held that intent to pass title at death satisfied the legal delivery requirement of an effective inter vivos conveyance.[97] This holding contradicts the established inter vivos delivery requirement that some property interest pass to the grantee during the grantor's life.[98]

89. *In re* Cunningham's Estate, 19 Wash. 2d 589, 595, 143 P.2d 852, 855 (1943) (Blake, J., dissenting in part).

90. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 158.

91. See *supra* note 11 and accompanying text regarding factual disputes at the trial court level. Some commentators indicate "delivery" may only be a label for results reached on other grounds. If a court finds donative intent exists, it finds delivery. Conversely, a finding of no delivery reflects the court's opinion that no delivery was intended. W. MCGOVERN, S. KURTZ & J. REIN, WILLS, TRUSTS AND ESTATES 184 (1988) (citing Gulliver & Tilson, *supra* note 22).

92. *Supra* notes 50–58 and accompanying text (legal delivery requirements).

93. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 157.

94. *Infra* notes 113–43 and accompanying text.

95. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 157.

96. M. REUTLINGER & W. OLTMAN, *supra* note 67, at 352.

97. *O'Brien,* 109 Wash. 2d at 918–19, 749 P.2d at 157–58.

98. 8 G. THOMPSON, *supra* note 30, § 4226, at 13–14.

The court missed the critical distinction between the intent in conveying a will substitute to deliver an inter vivos future interest, and the intent to deliver an interest only at death.[99] Passing title at death is the testamentary function of a will, not of an inter vivos transfer.[100] Once the court found that O'Brien intended to convey only at her death,[101] it also should have found that there was no effective conveyance. Even if O'Brien intended to give an inter vivos interest in the deeds, she failed to deliver anything. Conventional indications of delivery,[102] such as the grantor's parting with absolute ownership and recording the deed, suggest that the O'Brien deeds were not validly delivered inter vivos and were ineffective conveyances.

The supreme court found that Robinson had physical possession of the deeds when her mother died,[103] yet it was O'Brien who paid all of the property expenses, swore she was fee owner of one of the properties, and received rent payments from her daughter.[104] Under traditional property concepts,[105] all of these actions work to rebut the delivery presumption based on Robinson's physical possession of the deeds,[106] by suggesting that O'Brien retained absolute ownership of the property until her death.[107] Such absolute ownership indicates an attempted testamentary transfer, not an effective inter vivos delivery.[108]

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99. *Supra* notes 20–28 and accompanying text (describing differences between testamentary and inter vivos transfers).

100. *Id.*

101. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 157.

102. Courts can find valid delivery based on a variety of actions taken by the grantor. *See, e.g.,* Johnson v. Wheeler, 41 Wash. 2d 246, 248 P.2d 558 (1952) (recording of deed by grantor constitutes rebuttable presumption of delivery); *In re* Cunningham's Estate, 19 Wash. 2d 589, 143 P.2d 852 (1943) (donor's giving up possession of deed constitutes rebuttable presumption of delivery); Bloor v. Bloor, 105 Wash. 110, 177 P. 722 (1919) (delivery can be made to third party, but validity not established if property still in grantor's control and there is no present intent to pass title); *In re* Estate of Pappuleas, 5 Wash. App. 826, 490 P.2d 1340 (1971) (grantee's possession of deed creates a rebuttable presumption of delivery).

103. *O'Brien,* 109 Wash. 2d at 915–16, 749 P.2d at 156.

104. *Supra* notes 8–9 and accompanying text.

105. *Supra* notes 50–58 and accompanying text.

106. *In re* Estate of O'Brien, 46 Wash. App. 860, 865, 733 P.2d 235, 238 (1987), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

107. *See, e.g.,* First Nat'l Bank v. Bloom, 264 N.W. 208 (N.D. 1978) (when grantor pays taxes on property, there is no delivery to grantee). *But see* Severson v. First Baptist Church, 34 Wash. 2d 297, 208 P.2d 616 (1949) (delivery found although donor retained use, management, control, and taxpaying responsibilities during his life). *Severson* may be distinguished from *O'Brien* because the *Severson* donor gave up control of the property by telling others his intent to presently relinquish control and by depositing the deed with a third party.

108. 8 G. THOMPSON, *supra* note 30, § 4240, at 107–08.

Mary O'Brien did not record the deeds.[109] Instead, the grantee recorded them after her mother lapsed into a coma.[110] Any presumption of delivery based upon recordation is severely weakened, if not eliminated, by a finding that the grantor died unaware that the grantee recorded the deeds.[111]

Under conventional property analysis, no effective inter vivos delivery occurred in *O'Brien.* Although the grantee had possession of the deeds and recorded them during the grantor's lifetime, these two delivery presumptions can be rebutted by O'Brien's retention of absolute ownership and failure to record the deeds herself. Although the lower courts so held in unappealed portions of their opinions,[112] the Supreme Court of Washington reversed and held that intent to pass title at death satisfied the inter vivos legal delivery requirement. Perhaps the court took this position to bolster its finding that the will substitute statute, which pertains to nontestamentary conveyances, applied to the O'Brien deeds.

B. Inapplicability of the Will Substitute Statute to Otherwise Ineffective Deeds

In holding the will substitute statute applicable to ineffective conveyances, the supreme court described the court of appeals' conventional interpretation of the statute as "meaningless."[113] It is not a meaningless statute, but neither is it designed to give effect to an ineffective conveyance.[114] Washington's will substitute statute is inapplicable to the O'Brien deeds. Support for this proposition is found in evidence of the U.P.C. drafters' intent and expert commentary on both the U.P.C. and Washington's statute. Further evidence for this statutory interpretation is found in the outcome of cases decided before states enacted will substitutes, other states' statutory interpretations, and desirable probate policy.

The drafters' comment to section 6-201 of the U.P.C.[115] notes that the U.P.C. will substitute provision operates only on valid inter vivos transfers. Commentators agree that because of the testamentary

109. *In re* Estate of O'Brien, 46 Wash. App. 860, 862, 733 P.2d 235, 236 (1987), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

110. *Id.*

111. *See* Johnson v. Wheeler, 41 Wash. 2d 246, 247, 248 P.2d 558, 560 (1952).

112. *In re* Estate of O'Brien, 109 Wash. 2d 913, 916, 749 P.2d 154, 156 (1988).

113. *Id.* at 917, 749 P.2d at 157.

114. M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351.

115. The comment following U.P.C. section 6-201 states "The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section."

features of will substitutes,[116] the section's sole purpose is to prevent testamentary characterization of such effective transfers containing provisions effective at death.[117]

Legislative history of the Washington will substitute statute is limited.[118] It is unlikely, however, that the legislature would adopt U.P.C. section 6-201 nearly verbatim[119] without intending an application similar to that expressed in the official U.P.C. comments. Washington commentators agree, noting that the legislature intended to clarify laws validating and invalidating various inter vivos transactions that "because of certain arguably testamentary features, constitute an unnecessary source of uncertainty and litigation."[120]

Inequitable outcomes in cases prior to various states' enacting will substitute statutes further clarify the statutory purpose. Courts used to consider present transfers of future interests testamentary in nature and required them to meet will formalities.[121] In one early Washington case, *Young v. O'Donnell,*[122] the supreme court considered a deed given by a father to his son in exchange for the son's promise to care for his father until death. The court held that the deed was an invalid testamentary disposition because the father retained a life estate, with the ability to use and control the property until death.[123] Arguments failed to persuade the court that the father had delivered a future interest to his son.[124] Had a will substitute statute been in effect when *Young* was decided, the deed presumably would have been valid. Such inequitable results probably led to the enactment of will substitute statutes in Washington and other states.

Examining how other states interpret their U.P.C.-patterned statutes also indicates that will substitute statutes apply only to those

116. *Supra* notes 29–38 and accompanying text (describing testamentary features of will substitutes).

117. *O'Brien,* 109 Wash. 2d at 922–23, 749 P.2d at 159–60 (Dore, J., dissenting); U.P.C. § 6-201 comment (1987); M. REUTLINGER & W. OLTMAN, *supra* note 67, at 352.

118. Note, *supra* note 65, at 453.

119. *See supra* text accompanying notes 62 & 64 (similarity of Washington Revised Code § 11.02.090 and U.P.C. § 6-201).

120. M. REUTLINGER & W. OLTMAN, *supra* note 67, at 352.

121. *See* Wilhoit v. People's Life Ins. Co., 218 F.2d 887 (7th Cir. 1955) (decedent's irrevocable contract with insurance company to hold funds for her and upon her death to pay those funds to her brother was an invalid testamentary disposition); McCarthy v. Pieret, 281 N.Y. 407, 24 N.E. 2d 102 (1939) (invalid testamentary disposition where mortgage provided that at holder's death, future installments were to be paid to a third party); *In re* McCoy's Estate, 189 Wash. 103, 63 P.2d 522 (1937) (no valid gift of stock to grantor's children because children never had possession of the stock certificates).

122. 129 Wash. 219, 224 P. 682 (1924).

123. *Id.* at 224, 224 P. at 684.

124. *Id.*

conveyances which would be valid except for the will statute.[125] In *First National Bank v. Bloom,*[126] the Supreme Court of North Dakota held there was no constructive delivery of a deed by an uncle to his nephew where the uncle kept the deed, paid taxes on the land until he died, and kept a life estate in the property.[127] Because the deed was found ineffective as a conveyance, the court held the will substitute statute[128] inapplicable.[129] Six of the fourteen other jurisdictions with U.P.C.-patterned statutes have reported decisions involving will substitute cases; all suggest the prevalent view that these statutes only apply to already effective transfers.[130] The *O'Brien* court is the only one to depart from this theory and hold that the statute applies to ineffective deeds.

The Supreme Court of Washington claimed to interpret the statutory language through a strict reading;[131] however, an equally strict and more credible reading of the statute[132] indicates that it should operate only upon otherwise effective inter vivos transfers. The court reasoned that the phrase "effective as"[133] indicated that "other written instruments" are the only ones which already must be effective.[134] The consensus of commentators and other jurisdictions, however, is that the phrase does not modify a separate category.[135] Instead, the phrase indicates that if a form of effective written contract, gift, conveyance, or trust does not fall under one of the eleven specific transfers

125. *See, e.g.,* Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142 (Utah 1978) (based on Utah's will substitute statute, life insurance proceeds were nontestamentary in nature, but delivery requirements were not met by note found in decedent's wallet, indicating he wanted to change his life insurance policy beneficiary because all policy changes must be mailed to the insurer or given to third party).

126. 264 N.W.2d 208 (N.D. 1978).

127. *Id.* at 210–12.

128. N.D. CENT. CODE § 30.1-31-14 (1976).

129. *First Nat'l Bank,* 264 N.W.2d at 212.

130. *See, e.g.,* Valenzuela v. Anchonda, 22 Ariz. App. 332, 527 P.2d 109 (1974). In *Valenzuela,* the Arizona Court of Appeals upheld as a valid nontestamentary gift a contract stipulating that any remaining debt on a land purchase contract be terminated at the seller's death, although the gift would take practical effect only at the seller's death. The Arizona will substitute statute removed the conveyance from the will statute requirements because a future interest in the contract rights was delivered.

131. *In re* Estate of O'Brien, 109 Wash. 2d 913, 918, 749 P.2d 154, 157 (1988) ("We are to construe a statute in such a manner as to avoid rendering meaningless a word or portion thereof.").

132. *See supra* text accompanying note 61 (quoting language of statute).

133. WASH. REV. CODE § 11.02.090 (1987); *see also supra* text accompanying note 61 for text of statute.

134. *O'Brien,* 109 Wash. 2d. at 917–18, 749 P.2d at 157.

135. *Supra* notes 120 & 126–32 and accompanying text (interpretation of will substitute statutes).

listed, it is still covered by the statute.[136] Under this reading, the statute should not itself validate invalid deeds[137] such as those in *O'Brien.*[138]

The Washington will substitute statute and its U.P.C. counterpart are complex and confusing,[139] but both the prevalent case law and commentators agree that will substitute statutes operate only on already effective conveyances.[140] Due to broad language in both provisions,[141] statutory application may be virtually limitless[142] if the Supreme Court of Washington continues to interpret the statute as it did in *O'Brien.* By extending the statute's scope to transfers effective only at the grantor's death, the *O'Brien* interpretation may open a floodgate of testamentary controversies.[143]

C. *Implications of* O'Brien

The *O'Brien* court's reformation of probate law emphasizes reducing the need for formalities in order to distribute property according to the decedent's intent.[144] The court accomplishes this at the expense of the predictability inherent in the formalization of wills.[145] While an attempt to effect a decedent's testamentary intent can provide just results,[146] eliminating the requirement of delivery of some interest during the grantor's life defeats the very essence of inter vivos transfers. The court unwisely sacrifices a key element of inter vivos property

136. *See In re* Estate of O'Brien, 46 Wash. App. 860, 733 P.2d 235 (1987), *rev'd,* 109 Wash. 2d 913, 749 P.2d 154 (1988).

137. M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351.

138. *In re* Estate of O'Brien, 109 Wash. 2d 913, 919, 749 P.2d 154, 158 (1988).

139. *See* M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351; *see also* R. WRIGHT, UNIFORM PROBATE CODE PRACTICE MANUAL § 15.12 (1972) (describing U.P.C. section 6-201 as "broadly worded").

140. *Supra* notes 115–39 and accompanying text (inapplicability of the will substitute statute to ineffective deeds).

141. Washington's will substitute statute covers several different provisions, all falling under the broad categories of contracts, gifts, conveyances, and trusts. WASH. REV. CODE § 11.02.090(1) (1987); *see also* R. WRIGHT, *supra* note 139, § 15.12.

142. *See* M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351.

143. The very concept of an effective will substitute is confusing and "has created a great fault line across the body of the American law of conveyancing, with continual disturbances across the line, which have produced cries from outraged commentators, not to speak of the unpublished cries of disappointed donees." Browder, *supra* note 23, at 845.

144. *In re* Estate of O'Brien, 109 Wash. 2d 913, 919, 749 P.2d 154, 158 (1988).

145. 1 W. BOWE & D. PARKER, *supra* note 31, §§ 1.6–1.7.

146. *Compare O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 157–58 *with* Cook v. Equitable Life Assurance Soc'y, 428 N.E.2d 110 (Ind. Ct. App. 1981). In *Cook,* the decedent's former wife was named beneficiary on his life insurance policy, yet he later bequeathed the policy proceeds to his widow and child in a holographic will. The court held the decedent's attempt to change beneficiaries was insufficient.

transfer to accommodate testamentary intent concerns. Continued judicial insistence that intent suffices for delivery[147] could extend to validate holographic wills.[148] A further extension could permit any instrument with expressed testamentary intent, such as a signed, typewritten document, to be admitted into probate.[149]

After *O'Brien,* litigants will be unable to predict outcomes in situations where a testator's valid will devises property to one individual, and yet other instruments, similar to the *O'Brien* deeds and not in compliance with the will statute, purport to convey the same property to a different individual when the testator dies. Conventional probate law would allow the will to prevail as an effective testamentary disposition; the second instrument would fail as an invalid inter vivos transfer attempt. Yet, under *O'Brien,* both parties have a colorable claim. The predictability provided by conventional law serves valuable purposes, including making both estate planning and probate easier.[150] Conflicts based on *O'Brien* will further confuse, not clarify, probate expectations and disputes. Absent clarification of the will substitute statute and the court's compression of testamentary intent into the legal delivery requirement, uncertainties and litigation[151] will develop.[152] The court and the legislature should clarify these interpretations.

147. *O'Brien,* 109 Wash. 2d at 919, 749 P.2d at 157–58.

148. Holographic wills are unwitnessed, handwritten, and signed by the testator. They are not given legal effect in Washington. WASH. REV. CODE § 11.12.020 (1987).

149. *See* M. REUTLINGER & W. OLTMAN, *supra* note 67, at 351; *see also* Zartman, *An Illinois Critique of the Uniform Probate Code,* 1970 U. ILL. L.F. 413, 463 (referring to U.P.C. section 6-201). A similar result could be found involving life insurance policies, if the insured intended to change beneficiaries but did not comply with all the contract formalities. Although life insurance policies differ from deeds in that the former are contractual in nature, both ultimately operate to create a gratuitous transfer to a beneficiary. A court could extend the *O'Brien* reasoning to this conveyance of policy proceeds. Washington is one of several states which give limited effect to an insured's proven intent that the proceeds pass to someone other than the policy-named beneficiary, but only when the insured substantially complies with the policy provisions. Although this test is difficult, *see e.g.,* Allen v. Abrahamson, 12 Wash. App. 103, 529 P.2d 469 (1974), after *O'Brien,* the substantial compliance requirement could be eliminated and the contractual relationship seriously weakened.

150. 1 W. BOWE & D. PARKER, *supra* note 31, §§ 1.6–1.7.

151. The legislature enacted the statute to eliminate the uncertainty and litigation that arose concerning inter vivos agreements which contained provisions intended to take effect at death. *O'Brien,* 109 Wash. 2d at 923, 749 P.2d at 159 (Dore, J., dissenting).

152. *See* Note, *supra* note 65, at 469.

D. Remedying O'Brien

If the *O'Brien* court only sought a result-oriented decision[153] to give Peaches Robinson the deeds, it was unnecessary for the court to address whether intent by itself satisfied the delivery requirement. The court simply could have applied its expansive interpretation of the will substitute statute to the deeds. But by finding that intent to pass title at death qualifies as inter vivos delivery, the court established precedent in opposition to orthodox property theory. Interest in requiring delivery in inter vivos conveyances, as well as in the predictability afforded by the will statute, mandates judicial and legislative clarification of *O'Brien.* Clarification may avoid confusion in other states as well.[154]

1. Judicial Remedies

A judicial solution will most effectively deal with *O'Brien*'s holding that intent to pass title at death satisfies the delivery requirement. Any solution must preserve the distinction between inter vivos and testamentary dispositions of property.[155]

The court could remedy the statute applicability issue either by overruling *O'Brien,* or limiting the holding to its facts. Realistically, the court is unlikely to admit that its "statutory construction analysis misses the mark"[156] and that the statute only applies to already effective inter vivos transfers. Limiting *O'Brien* to its facts may not be a practical solution because Washington courts and other states consistently indicate that cases concerning attempted will substitutes involve unique fact patterns critical to the disposition of each case.[157] While limiting the case to its facts leaves open the judicial door for a return to conventional property law, *O'Brien* could still provide precedent in similar will substitute cases where litigants dispute delivery.[158] A judicial limitation of *O'Brien* can only be a short-term bandage for what could become a long-term probate problem.

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153. W. MCGOVERN, S. KURTZ & J. REIN, *supra* note 91, at 184; *see also* Bowder, *supra* note 23, at 846.

154. *See supra* note 63 (listing states with statutes similar to U.P.C. section 6-201); *see also supra* notes 126–31 and accompanying text (how courts in these states have considered cases involving their respective statutes).

155. *O'Brien,* 109 Wash. 2d at 921, 749 P.2d at 158 (Dore, J., dissenting).

156. *Id.*, 749 P.2d at 159.

157. *Supra* note 40; *see also* Annotation, *supra* note 27.

158. The majority acknowledged the importance of the fact pattern to the case. *O'Brien,* 109 Wash. 2d at 918, 749 P.2d at 157. However, it is likely that future courts could apply *O'Brien* by analogy.

2. Legislative Solution

The best resolution of the will substitute statute problem would come from the state legislature. The legislature could clarify the statute by amending it to read:

> (1) Any of the following provisions in an *otherwise effective* contract, gift, conveyance, or trust is deemed to be nontestamentary, and this title does not invalidate the instrument or any provision:[159]

The eleven specifically named contracts, gifts, conveyances, or trusts currently enumerated in this section could be listed in a new subsection:

> (4) This section is applicable, but not limited, to otherwise effective insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, joint tenancies, community property agreements, trust agreements, and conveyances.

This amendment would clarify the intended meaning of the statute by indicating that the nontestamentary provision exists only for those transfers which would be effective absent the will statute.[160] As to the conveyance of deeds, the amendment would indicate clearly that the statute operates only on those deeds effective because they had already met the mandatory delivery and intent requirements. This is what Washington's will substitute statute, modeled on U.P.C. section 6-201, is designed to accomplish.[161] By adding additional wording to the statute, the legislature could make this meaning more apparent.

III. CONCLUSION

Whether or not Mary O'Brien's true intent was realized (and we can assume protracted litigation was not part of her plan), the *O'Brien* holding goes far beyond what was needed to resolve the dispute. The scope of Washington's will substitute statute now extends beyond the inter vivos instruments intended by the legislature and has the potential to eradicate the requirement for testamentary formalities. The immediate casualties are the predictability of wills and the elimination of guesswork over the will substitute statute. Moreover, the *O'Brien* holding apparently eliminates the requirement for present delivery, which is the fundamental difference between inter vivos and testamentary transfers. Without preservation and promotion of this difference, the validity of many contracts, gifts, conveyances, trusts, and wills

159. Emphasis added for purposes of this Note only.
160. U.P.C. § 6-201 comment (1987); M. REUTLINGER & W. OLTMAN, *supra* note 67.
161. U.P.C. § 6-201 comment (1987); M. REUTLINGER & W. OLTMAN, *supra* note 67.

may be in doubt. The Supreme Court of Washington and the legislature must clarify the status of the will substitute statute and the delivery requirement. This is important not just for probate practitioners and scholars, but also for those who have property and those who could receive it. Unless the court and the legislature act, *O'Brien* and the will substitute statute will continue to spark controversy and confusion.

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