Notre Dame Law Review

Volume 37 | Issue 2 Article 4

12-1-1961

History of Estate Planning

William D. Rollison

THE HISTORY OF ESTATE PLANNING

*William D. Rollison**

There is no part of the law of greater interest to the people of America and England, from the standpoint of numbers, than estate planning. This interest is not something that is new; it goes back to the days of a feudal society in England shortly after the Norman Conquest. It is my purpose to give a survey of the historical development of the subject.

I.

Estate planning is a process that is not subject to precise delimitation, owing to the innumerable factors which must be considered. As a process it involves the use and arrangement of property for and among the members of the owner's family group according to a design that will afford the greatest benefit to the objects of the owner's bounty commensurate with estate conservation.[1] But this is only a part of the process. While the basic steps are fairly well defined, the ramifications and combinations are only limited by the ability of the deft planner, acting consistently with the law and the wishes of the property owner. Accordingly, estate planning is not, in modern law, a job for the amateur or the general practicioner — it is a task for the expert. It involves a wide range of knowledge and the ability to use it. Even the expert may have difficulty in preparing the instruments for a complicated estate plan. No one can deny that an adequate understanding of the historical development gives a better understanding of modern law in estate planning.

While a will is not the only form of an estate plan, it is the type most generally used, either singly or in conjunction with other types of plans. The will is the only written form whose main function is the posthumous disposition of property. However, as a testamentary instrument it has other functions besides the posthumous disposition of property, such as the naming of a fiduciary to administer the testator's estate, suggesting a guardian, republishing prior testamentary instruments, or revoking prior testamentary instruments.

The will appears to be the earliest of all estate plans. Professor Page says that there is evidence of its use in Egypt some thirty centuries before the time of Christ.[2] The nearest thing to the modern will had its genesis in the Roman Law. The will in Roman Law was revocable, and the legislation of Justinian provided formal requisites.[3] Wills appear to have been in use in England, especially among notables, prior to the Norman Conquest. But wills received their greatest legal development in modern law in England after the Norman Conquest; and this is the real genesis of the will as used today. The history of the modern will is closely related to the history and development of the use (the forerunner of the trust) and to the history of the Rule Against Perpetuities. No scholar can doubt the interrelation of these three subjects both from the

* A.B., LL.B., LL.M.; Professor of Law, Notre Dame Law School; member of Indiana and Alabama Bars.

1 See SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK 3 (2d ed. 1953).

2 1 PAGE, WILLS § 2.4 (3rd ed. Bowe & Parker 1960).

3 See PAGE, *op. cit. supra* note 2, § 2.5.

practical standpoint, and from that of historical development. Nowhere else in the law do any three subjects have such unity of development or unity of purpose. And this is the way in which these subjects should be handled in our law schools.[4]

One resorts to estate planning for some purpose or purposes to be found in the legal and social order of the time. The Norman Conquest occasioned great changes in the legal and social order in England. Regardless of whether feudalism was introduced into England after the Conquest, or whether an existing feudal system was expanded after the Conquest, it is apparent that feudalism received its greatest development in England after the Conquest, with great impact upon the history of estate planning in Anglo-American law. The will (devise) and the testament were forced into separate legal channels and the law was developed by separate courts. The ecclesiastical courts developed the law pertaining to testaments, and our probate law owes its origin to these courts. The law pertaining to devises was developed by the temporal courts. It was not until 1837 that unification of the formal requisites for devises and testaments took place in England. On the procedural side, unification took place in 1857, under the Court of Probate Act in England.[5] This separate development of devises and testaments left its impact on American law in some areas until well into the twentieth century.

The law of wills has had a rather checkered existence. The legal and social order produced by feudalism occasioned general abolition of the devise in England by the end of the twelfth century.[6] Thus, for a while, testamentary power over land ceased to exist in most areas. Various reasons have been assigned for this development: (1) The superior lord's valuable rights of relief, wardship, and marriage in the feudal system — a kind of taxation, called by some an extortion of benefits from tenants. A power to devise land could have defeated these benefits. (2) The incidents of land tenure. The doctrine of seisin was paramount at the time. Land could be transferred only by livery of seisin or by proceedings in a court of record. The devise could not be classified under either method, and so it could not be recognized.[7] Also, a dead man (the testator, in this respect) could not make livery of seisin; and the devisee, when the time came to enter, was confronted by the heir, from whom he had to obtain livery of seisin, the result probably being a refusal.[8] (3) The fear of undue influence by religious men in the last hours of the testator's life. It is difficult to find any evidence of the truth of this view. It assumes that devises were made by persons *in extremis*. One can only wonder about this suggestion because of the ancient superstition that a person who makes a will may die soon thereafter.

4 Rollison, *The Course in Estate Planning at Notre Dame*, 36 NOTRE DAME LAWYER 315 (1961).

5 20 & 21 Vict. c. 77 (1857).

6 See PAGE, *op. cit. supra* note 2, § 2.9; ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 89-91 (1959).

7 See PAGE, *op. cit. supra* note 2, § 2.9.

8 ROLLISON, WILLS 85 (1939); UNDERHILL, WILLS 6 (2d ed. 1906).

II.

Notwithstanding the difficulties listed above and the demise of the devise, the people in England were not to be denied estate planning. We have ample evidence of the desire of property owners to plan their estates, from the words of the great English judges, who have told us that most of the land in England was held in *use,* and land was the chief item of wealth. Personal property was of relatively little value. This was the situation about the time of the demise of the devise.

Why was the use so important? The Preamble to the Statute of Uses indicates the answers. As far as estate planning is concerned they are: (1) the desire of landowners to dispose of their estates other than in accordance with the law of descent; (2) a desire to evade the feudal exactions; and (3) a desire to exclude dower and curtesy.

With the vanishing of testamentary power over land in most areas, the use gave an opportunity to effectuate the desires of the property owner in estate planning. If the use was properly created, the equitable owner (*cestui*) could dispose of it by will, enforceable by the chancellors. The use was an equitable interest, not subject to the incidents of seisin. This sort of an estate plan was quite common by the early part of the fifteenth century.[9] In it we have the origin of the power of appointment.

When land was held in use the cestui que use was enabled to evade or avoid many of the exactions of the feudal overlord.[10] The Preamble to the Statute of Uses states that by reason of holding land to use "lords have lost their wards, marriages, reliefs, harriots, escheats, . . ." — valuable feudal exactions.

The Preamble also states that by means of the use "men married have lost their tenancies by curtesy, women their dower." There is little evidence beyond this statement to support this conclusion, if it refers to a use being created to exclude dower or curtesy. On the other hand, at the time of enactment of the Statute of Uses there was no dower or curtesy in a use (an equitable interest). So from this standpoint the statement is correct. Even if the use was created to exclude dower or curtesy, it seems to be reasonably clear that such a purpose in estate planning was not nearly as significant as other purposes.

Thus, testamentary power over land staged a comeback; but not for long. The Statute of Uses checked for a time the creation of uses; and it destroyed testamentary power over uses by executing existing uses, as well as future uses. The provisions of this Statute were of deep concern to the people. The demand for testamentary power was too strong for Parliament to resist, and this power was restored to a great extent by the Statute of Wills in 1540, and more completely, indirectly, by the enactment of the Statute of Military Tenures in 1660. The latter statute abolished all feudal tenures, except in certain localities, and thus made all lands devisable where applicable.[11]

---

9 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 420 *et seq.* (3rd ed. 1945).
10 NORTHRUP, REAL PROPERTY 289 (1919).
11 REPPY & TOMPKINS, HISTORY OF WILLS 27 (1928).

III.

Other developments were taking place. With the passing of feudalism from the legal scene, exceptions to the Statute of Uses were recognized. As construed, three exceptions were recognized: (1) A use on a use. The second use was considered valid, though dry or passive. (2) Where a leasehold, or personal property, was limited to a use. (The Statute did not apply to personal property). (3) The active use.[12] The modern trust emerged from these exceptions. This does not mean that the term "use" passed from the legal scene. It has a place of considerable importance in the drafting of modern trusts.

The Statute of Uses has either been re-enacted or is recognized as part of the common law in most jurisdictions in the United States.[13] Thus, the distinction between active and passive trusts is a significant part of estate planning. There is a conflict of judicial opinion as to whether the Statute, where applicable, applies to trusts of personal property.[14] The doctrine that a use on a use is not executed by the Statute has received some recognition in early American cases.[15]

Modern legislation as to wills has its roots in the Statute of Wills (1540) in England. This statute merely restored testamentary power over land, with certain restrictions as to scope of operation over tenure, without requiring any formalities in the execution of a will other than a "writing." Its scope of operation was enlarged by the Statute of Military Tenures.

The next important legislation concerning wills was the Statute of Frauds (1676), requiring "all devises and bequests of any lands or tenements" to be in writing and signed by the testator, or some other person in the testator's presence and by his express direction, and be attested and subscribed by three or four credible witnesses. This statute contained the first legislative restrictions on the revocation of wills. It regulated the execution of the oral will of personal property where the amount involved exceeded thirty pounds. It accorded the first legislative favoritism to wills of servicemen by exempting them from the provisions as to execution. Section 7 of this statute required trusts of land to be "manifested and proved" by some writing signed by the party who was entitled by law to declare the trust, or by his will in writing. Similar statutes exist in most jurisdictions in the United States, though American statutes differ in some detail from the English statute. Section 8 of the English statute exempts from the operation of Section 7 trusts which "arise or result by implication or construction of law." This exemption has been adopted generally in the United States.

The Statute of 25 George II (1752), qualified beneficiaries and creditors of the testator as witnesses to his will. The beneficiary-witness was qualified by losing his benefits from the will. The creditor was rendered competent, but his credit was left to be considered under all of the circumstances by the court and jury before whom the will should be contested.

The next important legislation in England was the Wills Act (1837),

12 See ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 67-68 (1959).
13 BOGERT, TRUSTS 202 (3rd ed. 1952).
14 ROLLISON, *op. cit. supra* note 12 at 69.
15 *Id.* at 70.

regulating the execution and revocation of wills and testaments. It made the substantive law uniform for both wills and testaments for the first time. It reduced the number of witnesses necessary to the execution of a will from "three or four" to two, and required a will to be signed at "the foot or end thereof." It also exempted wills of servicemen from its formal requirements. It repealed the Statute of 25 George II, although it re-enacted some of its provisions. An important provision permitted a will to pass after-acquired realty. A constructional provision, often overlooked, states that a limitation over, upon death without issue, means a definite failure of issue, in the absence of any indication in the instrument in question to the contrary.

The beginning of American legislation dealing with the substantive law of wills is to be found in these English statutes; and these statutes have had their impact on the very latest legislation, including the Model Probate Code.

Two other types of estate plans, used only to dispose of property after death of the owner, are the gift causa mortis and the contract to devise or bequeath property. These appear to have reached their first extensive recognition in eighteenth-century cases.[16]

There seems to have been little, if any, doubt about validity and enforcement of a contract to devise or bequeath property. Conflict has existed and does exists as to the methods of enforcement.

Some two or three centuries before the Norman Conquest, and for about a century thereafter, instruments were used in England to make a posthumous disposition of property, and they were so drafted that they have been considered by some to be gifts causa mortis rather than wills or testaments.[17] But the gift causa mortis, as it was developed at the common law, derived from the Roman or civil law.[18] Sanction was not without some misgivings as to the use of such transfers to evade the stringent requirements of the Statute of Frauds governing nuncupative testaments.[19] The requirement of delivery appears to have been sufficient to distinguish the gift causa mortis from a legacy,[20] and to sustain validity of the gift notwithstanding the requirements of the Statute of Frauds as to nuncupative testaments. The Roman or civil law recognized a limitation as to the amount of the donor's property which might be given causa mortis.[21] Some early American cases held that the donor could not make a gift causa

16 BOGERT, TRUSTS 82 (2d ed. 1942).

17 Gift causa mortis: Tate v. Gilbert, 2 Ves. Jun. 111, 30 Eng. Rep. 548 (1793); Blount v. Burrow, 1 Ves. Jun. 564, 30 Eng. Rep. 481 (1792); Hill v. Chapman, 2 Bro. C. C. 612, 29 Eng. Rep. 337 (1789); Ward v. Turner, 2 Ves. Sen. 431, 28 Eng. Rep. 275 (1752); Snellgrove v. Baily, 3 Atk. 214, 26 Eng. Rep. 924 (1744); Miller v. Miller, 3 Pm. Wms. 356, 24 Eng. Rep. 1099 (1735); Lawson v. Lawson, 1 Pm. Wms. 441, 24 Eng. Rep. 463 (1718); Drury v. Smith, 1 Pm. Wms. 404, 24 Eng. Rep. 446 (1717); Jones v. Selby, Prec. Ch. 300, 24 Eng. Rep. 143 (1710).

Contract to devise or bequeath: Walpole v. Oxford, 3 Ves. Jun. 402, 30 Eng. Rep. 1076 (1797); Jones v. Martin, 3 Anst. 882, 145 Eng. Rep. 1070 (1798). As early as 1682 a contract to devise land was enforced in chancery without any question: Goilmere v. Battison, 1 Vern. 49, 23 Eng. Rep. 300 (1682).

18 PAGE, *op. cit. supra* note 2, § 1658.

19 Ward v. Turner, 2 Ves. Sen. 431, 28 Eng. Rep. 275 (1752).

20 Ward v. Turner, *supra* note 19, Walter v. Hodge, 2 Swans. 92, 36 Eng. Rep. 549 (1818).

21 Ward v. Turner, *supra* note 19.

mortis of all his personal property; but these have either been overruled or not followed.[22] An ordinance of Justinian provided that if a gift causa mortis was made, regardless of whether it was in writing, in the presence of five witnesses (the number necessary for a codicil), registration and the usual notarial formalities were unnecessary.[23] The common law authorities do not require a plurality of witnesses to establish a gift causa mortis, but only that the proof be satisfactory.[24]

IV.

The various types of estates in property have played an important role in estate planning, from the standpoint of purposes and historical development. The incidents of estates are important factors in estate planning, although in altogether too many instances this has not been emphasized by draftsmen. It was the operational incidents of certain estates that led to the development of the Rule Against Perpetuities.

Man's desire to project himself posthumously into the future and to control the ultimate destination of his property and the destinies of his family or donees often manifests itself. This attempt at posthumous control took, and takes, two forms: (1) an attempt to restrain alienation; and (2) the creation of limitations to take effect in the future.

An early method of tying up estates in families was use of the estate tail. This involved an attempt to confine the inheritance to a particular class of heirs. The purpose here seems to have been to create an estate that would be inheritable by the particular heirs and which could not be transferred so as to deprive subsequent heirs of their inheritance. The courts favored freedom of alienation, as a matter of public policy. For instance, a conveyance to "A and the heirs of his body" was regarded as passing a fee on condition of A having heirs of his body, and when A had heirs he performed the condition and this enabled him to transfer an estate in fee; such a transfer cut off the claims of A's heirs of his body. This displeased the landowners, and they procured the enactment of the Statute De Donis Conditionalibus (1285), making estates tail inalienable, depriving A, in the instance given above, of the power to bar his descendants.

The Statute De Donis Conditionalibus was said to have established a "general perpetuity" and to be the "occasion and cause of . . . mischiefs. And the same was attempted and endeavoured to be remedied at divers Parliaments and divers bills were exhibited accordingly . . . but they were always on one pretence or other rejected."[25] About two hundred years after enactment of this statute, it was held in *Taltarum's Case*[26] that an estate tail might be docked and barred by a common recovery. This sort of procedure was discussed in *Mildmay's Case* in 1605,[27] wherein it is said that "mischiefs" arose after the change of the common law by the Statute De Donis Conditionalibus, which were not foreseen by those who made the change, and that the common recovery

22 Annot., 90 A.L.R. 366 (1934); LEE, ELEMENTS OF ROMAN LAW 149 (4th ed. 1956).
23 PAGE, *op. cit. supra* note 2, § 1675; Annot., 90 A.L.R. 366 (1934).
24 LEE, *op. cit. supra* note 21.
25 Walter v. Hodge, *Supra* note 20.
26 Mildmay's Case, 6 Co. Rep. 40a, 40b, 77 Eng. Rep. 311, 313 (1605).
27 Y. B. 12 Edw. IV, pl. 25, F. 19 (1473).

was not within the restraint of the perpetuity made by the Statute. Regardless of such "mischiefs," the policy of the courts favoring freedom of alienation was manifested again; and again landowners were displeased and made efforts to avoid the effect of the decision in *Taltarum's Case*. One method was to attach a condition against alienation on the creation of an estate tail; but the condition was held to be repugnant to the estate tail and against the law.[28] A later method of docking or barring an estate tail was the fine.[29] The condition against alienation probably was aimed at both the common recovery and the fine. The attempt to create an unbarrable estate tail appears to be the first transaction to which the term "perpetuity" was attached. Even in the *Duke of Norfolk's Case*[30] it is said that:

> A perpetuity is the settlement of an estate or interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate....

Other attempts were made by landowners to create lasting settlements of their estates, notwithstanding the judicial policy against restraints on alienation. One was to create a perpetual freehold by limiting successive estates for life to the heirs or unborn issue of a person ad infinitum; this failed.[31] Another device was creation of a species of estate tail by means of an executory bequest of a term of years to a person and his heirs one after another ad infinitum, either directly or in trust; this also failed. It would have created a "perpetuity" if the limitation had been held to be legal, because it could not be barred by the common recovery or fine as these did not apply to estates for years.[32]

The Rule in Shelley's Case had to be reckoned with, and it still has to be, even under legislation purporting to abolish it. The actual origin of this Rule is veiled in some obscurity.[33] As applied, it facilitates the alienation of property, by uniting the remainder and the life estate in the life tenant. Where operative, an attempt to create a remainder in the heirs of the life tenant is fruitless.

Future estates are either vested or contingent. Remainders are not only either vested or contingent, but they may be cross or alternative. Contingent remainders appear to have been adjudged valid as early as 1430, but they were seldom employed until the latter half of the following century.[34] This, of course, was some time after enactment of the Statute of Wills and the Statute of Uses. Failure to use the contingent remainder to any extent may have been due to the destructibility rule. It seems to be clear that the destructibility rule would have eliminated reliance upon the judicial policy favoring freedom of alienation. And in modern law, where the destructibility rule is applicable, there would seem to be no occasion to rely upon the Rule Against Perpetuities to preserve freedom of alienation, or as a rule against remoteness of vesting. However, this is not so in jurisdictions where the destructibility rule is abolished.

28 Mildmay's Case, *supra* note 26.
29 NORTHRUP, REAL PROPERTY 43 (1919).
30 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1602).
31 1 JARMAN, WILLS 290 (8th ed. 1951).
32 JARMAN, *op. cit. supra* note 31, at 291.
33 See Van Grutten v. Foxwell, [1897] A. C. 658.
34 SPITZ, CONDITIONAL AND FUTURE INTERESTS IN PROPERTY 194 (1912).

At the early common law a fee could not be limited on a fee.[35] Future estates could create by remainder and by way of reversion. Other types of future interests came to be recognized and some were, in effect, the result of the Statute of Uses. A use could be created, unlike reversions and remainders, without dependence upon any prior estate; or a use could be created as a remainder after a particular estate.[36] A use could be made to spring up at a designated future time, or made to shift on a future event happening. Uses were not dependent upon the common law notion as to seisin. If a use was limited in fee, then an equitable fee could be made to shift or to spring up in the future. After enactment of the Statute of Uses, springing or shifting uses were executed when they arose or the contingency occurred, and thus new estates were recognized at law. After enactment of the Statute of Wills such future interests could be created by a will in land, and when so created they were known as executory devises or limitations. Accordingly, contingent future interests other than remainders became possible and claimed the attention of the courts.

At about the time these developments were taking place another was becoming important. A term for years was not uncommon; but terms appear to have been short and to be regarded as chattels.[37] There appear to be few, if any attempts to limit a future interest of a term prior to the enactment of the Statute of Wills. We have already noticed the judicial policy against restraints on alienation and the effect of the feudalistic system on the devise. The Statute of Wills offered an opportunity to landowners, with the aid of the construction placed upon the Statute of Uses as applying only to land (realty), to carry out their desires to create lasting settlements by use of the term. Thus, executory limitations of terms became more common; terms became longer; and the courts sustained validity of the executory limitation of a term.[38] An executory limitation of a term was declared to be indestructible by the act of the prior taker.[39] A little later it was held that an executory limitation of a shifting fee, created by will on a prior fee that was devised, was not destructible by a common recovery suffered by the first taker in fee.[40] This emancipation of the executory devise from the destructibility doctrine presented a challenge to the judicial policy favoring freedom of alienation. It was an important factor leading to the rule confining executory limitations within reasonable time limits, which rule began to take form in the *Duke of Norfolk's Case*,[41] and later became known as the Rule Against Perpetuities.

Whether the Rule Against Perpetuities, as finally developed, is aimed at restraints on alienation or at remoteness of vesting of limitations over, is a battleground of jurisprudence. Be that as it may, the Rule is important in estate planning. It has a close connection with wills, trusts, and the creation of

35 NORTHRUP, REAL PROPERTY 288 (1919).
36 NORTHRUP, *op. cit. supra* note 35, at 288.
37 ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 599 (1959).
38 Manning's Case, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (1609) (term of 50 years); Lampet's Case (1612) 19 Co. Rep. 46a, 77 Eng. Rep. 994 (1612) (term of 5,000 years).
39 Manning's Case, *supra* note 38.
40 Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620).
41 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

future interests in property. It tends to emphasize the importance of estates in estate planning. The practical aspects or incidents of various estates or interests in property, such as creation, transferability, and in modern jargon, liquidity, cannot be overemphasized. Altogether too often this is overlooked.

V.

Thus, estate planning, due to its very nature and functions, cannot be said to be a modern process. By examination of the origins of this process, it can be seen that in the early English law, the same reasons existed for resorting to this process as presently exist in modern law. The name is new; it may have come into general usage after enactment of the 1948 Internal Revenue Code — a Code that has given a new turn to estate planning. It gives us new devices in estate planning, such as the split gift and the marital deduction gift. It gives greater significance to the life estate with the power of appointment. New terms, either from provisions of this Code or in construction of it, have received common usage, such as the short-term trust, the pour-over trust, the sprinkling trust, and the terminable interest. Gifts have been given a new status and classification. Modern inheritance tax statutes do not go so far, but they are a factor to be considered in many cases.

There is no doubt but that the Internal Revenue Code has given a great impetus to estate planning. While developments in taxation have stimulated interest in estate planning, it is erroneous to identify estate planning only with tax savings or tax reduction. Much estate planning takes place without regard to estate or inheritance tax incidents as factors.

Estate and inheritance taxation has created new interest in life insurance. Life insurance should be considered from the standpoints of the gift tax, the estate tax, and inheritance taxes. It may be used to provide liquid funds, as in key-man insurance, and in connection with the disposition of a business interest. There are other incidents in estate planning connected with life insurance. Newer phases are social security and pension plans. The question as to whether life insurance options qualify for the marital deduction is one of great moment.

In addition to taxation, there are many more recent developments in estate planning. The law of corporations and the law of partnerships have taken on new significance. The modern importance of the family, or close, corporation is unparalleled by anything in history in this field. This sort of enterprise raises problems concerning the impact of taxation, reorganization, and future control over the busines involved, as well as key-man insurance. Other problems in general corporation law are of specific concern to the estate planner, such as voting rights, subscription rights, disposal of stock dividends, and the modern stock-split.

In the law of partnerships we deal more and more with key-man insurance, and we find the partnership contract taking on the character of an estate plan as shown by agreements admitting new members on the death of a partner and the disposal of the interest of a deceased partner.

Deeds and contracts have taken on new significance. The revocable deed is attaining legal sanction on its own, apart from the law of wills, and notwith-

standing the doctrine of inconsistency.[42] We find many modern estate plans in the form of a deed and simultaneous declaration of trust by the grantee. Antenuptial and postnuptial contracts, as estate plans, are fairly common. Also, there are contracts to make or not to revoke wills and the contract-will combination. The latter is useful in controlling the ultimate destination of jointly owned property. Indiana and Missouri lead the way in sanctioning and giving operative effect to this sort of an estate plan. In this connection, it is hard to find any good reason for having to rely upon the doctrine of estoppel, or giving overemphasis to the ambulatory character of wills. Contractual waiver of one spouse to take against the will of the other is not uncommon. Sometimes adoption proceedings fail to comply with the controlling statute. In such cases, if a contract to adopt can be established, it may assure the child concerned his or her share in the estate of the would-be foster parent.

The common law in England did not recognize adoption,[43] and the first legislation on this subject in England was passed in 1926.[44] An illegitimate child who had been begotten before his parent's marriage was proclaimed legitimate if his parents married before his birth. Legislative provision for adoption exists in every state. Legislation providing for legitimation exists in most states. The first legislation in England designed to prevent lapse of testamentary gifts was contained in the Wills Act (1837). In most states there is legislation similar to this provision of the Wills Act. Most of the state legislation is a product of the nineteenth and twentieth centuries, though in a few areas statutes appeared in the latter part of the eighteenth century in the United States.

Legislation dealing with pretermission of heirs has been enacted in most of the United States. This is a manifestation of disapproval of the English view of freedom of testation as to issue. Heirs have received some statutory protection against disinheritance in a few states by statutes limiting the amount that can be given by will to charity in case the testator is survived by certain relatives.

VI.

General overhauling of probate law took place in Indiana in 1953, and in Missouri and Texas in 1955. The Model Probate Code received greater recognition in the new Indiana Code than in the new codes in Texas and Missouri. Several states within the last fifty years have made extensive changes in segments of probate law. Twice within the last three years New York has amended its law pertaining to restraints on alienation, bringing its present rule practically into line with the common law Rule Against Perpetuities. The Uniform Simultaneous Death Act, approved by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1940, is of considerable significance in estate planning, especially since the pace of modern living with its multiple forms of transportation, including the jet airplane, has caused simultaneous deaths in families to occur with greater frequency than in the past. The Act has been adopted in forty-six states.

42 See St. Louis Nat. Bank v. Fielder, 364 Mo 207, 260 S.W.2d 483 (1953); ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 783 (1959).
43 See Humphrys v. Polak (1901) L.R. 2 K.B. 385.
44 ATKINSON, WILLS 39 (1937).

Several other Uniform Acts and some Model Acts, all in the area of estate planning, have been approved within recent years by the National Conference of Commissioners on Uniform Laws and the American Bar Association. The Model Execution of Wills Act, approved in 1940, has been adopted in Tennessee. This Act supersedes the Uniform Wills Act, Foreign Executed, of 1910, which had been adopted in thirteen jurisdictions. This Act, as far as the execution of wills is concerned, is superseded by the Model Probate Code. The Model Spendthrift Trust Act, prepared by Dean Erwin Griswold of the Harvard Law School, has been adopted in Louisiana and Oklahoma. The Model Rule Against Perpetuities Act, approved in 1944, has been adopted in California, Montana and Wyoming. The purpose of this Act is to effectuate the common law rule. The Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, approved in 1944, has been adopted in Alabama, Maryland and Vermont. The substantive part of this Act is in one paragraph, consisting of a statement of the application of the cy pres doctrine.

The Uniform Adoption Act, approved in 1953, has been adopted in Montana and Oklahoma. This act deals solely with adoption procedure, which, of course, is only a part of the significance of adoption. If the procedure fails, the child involved may still have the right to share in the property of the person seeking to adopt him, provided a contract to adopt can be established. There are many ramifications of adoption in the law of descent and distribution[45] and in the construction of the term "child," or the term "children," in wills. The Uniform Ancillary Administration of Estates Act, approved in 1949, has been adopted in Wisconsin. The utility of this Act far exceeds the unfavorable implication which is raised by reason of its limited adoption. The Uniform Common Trust Fund Act, approved in 1938, has been adopted in twenty-eight states. This Act does not cover in detail all of the restrictions on the operation of common trust funds; detailed restrictions are covered by the regulations issued by the Federal Reserve Board which became effective in 1937.[46] The Uniform Fiduciaries Act, approved in 1922, has been adopted in twenty-one states and the District of Columbia. It deals with situations which arise when one person deals with another whom he knows to be a fiduciary, and it also established uniform and definite rules as to constructive notice of breaches of fiduciary obligations. The Uniform Gifts to Minors Act, approved in 1956, has been adopted in forty-one states. It sets forth a form for the making of such gifts. By its terms the transfer is made to a custodian whose duties and powers are prescribed. The Act enlarges the significance of this new type of official in estate planning. Compliance with the provisions of this Act is of special significance in connection with the Internal Revenue Code.[47] The Uniform Principal and Income Act, approved in 1931, has been adopted in twenty-three states. Its purpose is to deal with the difficult problems of adjustment of principal and income between tenants and remaindermen in trust and other estates in property.[48]

45 See Note, 31 NOTRE DAME LAWYER 451 (1956); Model Probate Code §§ 5, 27, 28 (Simes 1946).
46 See 9 Uniform Laws Annotated 224.
47 See Commissioners' Prefatory note to the Act.
48 See Commissioners' Prefatory note to the Act.

The Uniform Probate of Foreign Wills Act, approved in 1950, has been adopted in Texas and Wisconsin. Probably the existence of legislation in most states dealing with one or more of the principal problems concerning foreign wills accounts for the extent of adoption. The Uniform Property Act, approved in 1938, has been adopted in Nebraska. It deals with a variety of matters, many of which are of interest to estate planners, such as the Rule in Shelley's Case, the Rule in Wild's Case, the doctrine of the Worthier Title, an inter vivos transfer to the heirs of the grantor, indestructibility of contingent interests, creation of cross-remainders, estates tail, and it also contains a constructional provision governing failure of issue, when these terms are used in a limitation.

Besides the Uniform and Model Acts, in estate planning one must also reckon with the *Restatement of the Law of Trusts,* now in the second edition, and the *Restatement of the Law of Property.*

In England a part of the law of trusts has been codified in the Trustee Act and the Charitable Trusts Act. In the United States several states have enacted trust codes of considerable detail. Notwithstanding such codes, and the many Uniform and Model Acts, a great part of trust law is still case law. This plethora of legislative activity does serve, however, to bear witness to the significance of estate planning and its many ramifications in modern law.

All of these matters lead to one conclusion: Estate planning, in our time, is one of the most complex as well as one of the most interesting tasks of the practicing lawyer. It requires a wide range of knowledge, probably more so that any other part of the practice of law. From the historical standpoint estate planning has had its most intense and greatest development in our time. The significance of this subject is being emphasized by the large number of damage suits brought against attorneys for improperly drafted estate plans and for the careless handling of matters of estate administration. The estate planner must not only have a wide range of knowledge; he must also be able to apply this knowledge when he plans an estate. Due to the increasing legislative activity and number of cases, the estate planner must keep his knowledge current. In the well drafted estate plan there is no place for brevity, the use of elastic terms, lack of clarity, or lack of knowledge. The client is entitled to expect the utmost competence on the part of the attorney in preparing his estate plan.