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AN ASPECT OF ESTATE PLANNING IN COLORADO: THE REVOCABLE INTER VIVOS TRUST

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Professor Huff discusses the nature, creation, and validity of the revocable inter vivos trust, together with the problems that may arise upon creation and its use as an estate planning device.

INTRODUCTION

THE trust is exclusively the creature of equity.[1] Because of its separation of legal and equitable title,[2] it provides an unique[3] method of property disposition[4] which is both broad and flexible.[5] Its use in modern times in diverse contexts[6] is living proof of its utility. This Article will treat a particular type of trust, the revocable inter vivos trust, used as an estate planning device.

If the owner of property does not dispose of it during his lifetime by gift or otherwise, he may by will, provide for its disposition at his death or, he may allow the law to dispose of it for him by operation of the statute of intestate succession.[7]

The obvious drawback of the owner's making outright gifts during his lifetime is that he parts with possession, control and enjoyment of his property. The man of modest means cannot seriously

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[1] Melville v. Weybrew, 106 Colo. 121, 124, 103 P.2d 7, 9 (1940) (jurisdiction over trusts is always within the domain of a court of equity); Bowes v. Cannon, 50 Colo. 262, 266, 116 Pac. 336, 338 (1911) (a true trust is enforceable solely in equity).

[2] Botkin v. Pyle, 91 Colo. 221, 14 P.2d 187 (1932); Bowes v. Cannon, 50 Colo. 262, 116 Pac. 336 (1911); Cree v. Lewis, 49 Colo. 186, 112 Pac. 326 (1910); 1 SCOTT, TRUSTS § 2.3 (2d ed. 1956).

[3] The trust is known only to the common law system, though there are analogous arrangements in other legal systems. 1 BOGERT, TRUSTS AND TRUSTEES § 2 (1965); 1 SCOTT, TRUSTS § 1.9 (2d ed. 1956).

[4] Because the law of contracts is as broad and flexible, Professor Scott points out that the trust would not be unique were it not for the fact that the trust is a means of disposing of property. 1 SCOTT, TRUSTS § 1 (2d ed. 1956).

[5] MAITLAND, EQUITY 23 (1936); 1 SCOTT, TRUSTS § 1 (2d ed. 1956).

[6] The historical and most common use of the trust is making family settlements. However, in modern times the trust is used in many business contexts, such as holding title to real estate in situations in which it would be difficult to divide the legal title, 1 SCOTT, TRUSTS § 1 (2d ed. 1956), and pooling of voting rights to stock, COLO. REV. STAT. § 31-4-17 (1963). For a comprehensive discussion of trusts used in business contexts, see Isaacs, *Trusteeship in Modern Business*, 42 HARV. L. REV. 1048 (1929).

[7] COLO. REV. STAT. § 153-2-1 (1963).

consider inter vivos giving and the man of greater wealth will not consider it as his principal estate planning device.[8]

The use of a will, though historically the most commonly used device for estate planning,[9] has inherent drawbacks. By statute in every state, a will must comply with certain formalities.[10] If these absolute requirements are not met in the carefully prescribed manner,[11] ample opportunity is provided for attack upon the will by disgruntled heirs of the testator.[12] If the will is successfully attacked, it fails as a dispositive instrument. The property attempted to be passed under the will devolves according to the laws of intestacy,[13] thereby frustrating the testator's intent and substituting therefor a rather stereotyped, and often inadequate,[14] estate plan created by operation of law.[15] In addition to the invitation to attack latent in the strict requirements of the statute of wills, there is another rather important drawback to the use of a will. The property devised or bequeathed must go through the process of probate,[16] with its attendant costs.[17]

Caught between the extreme choice of outright gifts and the rather undesirable attributes of testamentary disposition (or intestacy), an arrangement is needed which would allow the owner to retain control and enjoyment of his property during his lifetime while at the same time allowing him to make provision for its passing to his selected recipients after his death. If a disposition is deemed testamentary, the statute of wills must be followed.[18] "A testamentary

[8] This is not to say that under certain circumstances, with specific property and for appropriate reasons, some inter vivos gifts will not be a useful and appropriate *part* of an estate plan, but only that such gifts could not serve as *the* estate plan. For a discussion of non-trust gifts, see CASNER, ESTATE PLANNING, Ch. VI (3d ed. 1961).

[9] SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK § 13 (2d ed. 1953).

[10] ATKINSON, WILLS § 62 (2d ed. 1953). In Colorado a will must be: (1) in writing; (2) signed by the testator; (3) signed in the presence of two or more credible witnesses; (4) declared by the testator to be his last will and testament; and (5) attested by the witnesses by subscribing their names to the document at the testator's request and in the testator's presence and in the presence of each other. COLO. REV. STAT. § 153-5-2 (1963).

[11] *In re* McGary's Estate, 127 Colo. 495, 258 P.2d 770 (1953); Ireland v. Jacobs, 114 Colo. 168, 163 P.2d 203 (1945); International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781 (1909); ATKINSON, WILLS § 62 (2d ed. 1953) ("[N]o will is valid unless there is compliance with all of the statutory requirements."); see Deering, *Some Problems Relating to Testamentary Witnesses*, 23 ROCKY MT. L. REV. 458 (1951).

[12] Meyer, *Non-Tax Advantages of the Revocable Trust*, 37 DICTA 333, 335 (1960).

[13] *In re* McGary's Estate, 127 Colo. 495, 506, 258 P.2d 770, 775 (1953); *cf.* Colorado v. Rogers, 140 Colo. 205, 344 P.2d 1073 (1959) (lapsed legacy); Gibson v. Hills, 84 Colo. 596, 272 Pac. 660 (1928) (lapsed legacy).

[14] CASNER, ESTATE PLANNING 10 (3d ed. 1961).

[15] COLO. REV. STAT. § 153-2-1 (1963) (intestate succession).

[16] ATKINSON, WILLS § 96 (2d ed. 1953).

[17] Meyer, *Non-Tax Advantages of the Revocable Trust*, 37 DICTA 333, 336 (1960).

[18] Urbancich v. Jersin, 123 Colo. 88, 92, 226 P.2d 316, 319 (1950); Johnson v. Hilliard, 113 Colo. 548, 554, 160 P.2d 386, 389 (1945); Smith v. Simmons, 99 Colo. 227, 230, 61 P.2d 589, 590 (1936).

disposition is one which is to take effect upon the death of the person making it and as to which he has substantially entire control until his death, that is, a disposition which is ambulatory."[19] Therefore, the solution must be an arrangement in which the transfer does not take effect upon death in a technical sense, but which does, nevertheless, take effect on his death in a very practical sense. If this can be accomplished, a will may be dispensed with, while retaining the advantages of a testamentary-like disposition.

There are a number of arrangements, varied in scope and design, which are deemed to have a present effect, and thus not testamentary, but which suffice to send the property to another only upon the owner's death. The owner of property might, for example, transfer presently a future interest therein to another, reserving a life estate.[20] One might acquire property, holding it in joint tenancy with another, or transfer presently owned property into joint tenancy, so that upon death the property automatically becomes the sole property of the surviving joint tenant.[21] One might create a tentative trust, or so-called Totten trust, of funds in a savings account by denominating himself trustee of the funds for another. By this means the depositor reserves the right to use or consume the money in the account during his lifetime, but at his death the remaining funds become the property of the designated beneficiary.[22] A life insurance contract has certain testamentary characteristics in that the owner may retain control, possession and the beneficial interest in the policy during his lifetime. Yet it creates a valid transfer of property upon his death without compliance with the statute of wills. The courts have had little difficulty with life insurance, consistently holding it nontestamentary in nature, either on a contract[23] or trust [24] theory. A gift

[19] 1 SCOTT, TRUSTS § 53, at 361 (2d ed. 1956).

[20] Million v. Botefur, 90 Colo. 343, 9 P.2d 284 (1932); ATKINSON, WILLS § 43, at 186 (2d ed. 1953) ("It is agreed that a deed in usual form except for the fact that it reserves a life estate to the grantor is a valid conveyance and not testamentary."); see Trautman v. Kranz, 63 Colo. 297, 165 Pac. 764 (1917) (transfer of a life estate, with a contingent remainder also in the transferee did not convert deed into attempted will).

[21] COLO. REV. STAT. § 118-2-1 (1963) (joint tenancy valid, but the common law presumption that a joint tenancy is created unless otherwise indicated, is reversed).

[22] Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904); 1 SCOTT, TRUSTS §§ 58-58.6 (2d ed. 1956). No cases in Colorado dealing with the tentative trust were found.

[23] Olinger Mutual Benefit Ass'n v. Christy, 139 Colo. 425, 342 P.2d 1000 (1959); *In re* Hamilton's Estate, 113 Colo. 141, 154 P.2d 1008 (1945); Martin v. Modern Woodmen, 253 Ill. 400, 97 N.E. 693 (1912); Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 S.W.2d 624 (1944); Johnston v. Scott, 76 Misc. 641, 137 N.Y.S. 243 (1912); Hooker v. Sugg, 102 N.C. 115, 8 S.E. 919 (1889); Toulouse v. New York Life Ins. Co., 40 Wash. 2d 538, 245 P.2d 205 (1952); ATKINSON, WILLS § 39 (2d ed. 1953).

[24] VANCE, INSURANCE § 107 (3d ed. 1951).

causa mortis is a variant of a transfer effective at death which is not deemed testamentary.[25]

All the above, however, are limited either in scope of planning available or in the nature of the property with which they deal.[26] None affords a comprehensive arrangement by which the owner might establish an effective plan for the disposition of his property. Even the use of several of the devices would not provide an overall estate plan. Herein lies the great utility of the revocable inter vivos trust. Any type of transferable interest that might be dealt with in a will may be treated in a revocable inter vivos trust.[27] The limitations on planning are only the skill, imagination and ingenuity of the drafter of the trust.

The nature of the trust with which this Article will be concerned is one created during the lifetime of the settlor and made for the purpose of avoiding the necessity of a will to the extent of the property involved; wherein the settlor retains a beneficial life interest, with power to revoke, modify or amend the trust and with control over the trustees in the administration of the trust, with disposition to others upon the settlor's death. The object of analysis will be to determine if such an arrangement is valid, and if so, whether it can provide a satisfactory substitute for a will, without the disadvantages of a will.

In modern times revocable living trusts have not been free from attack and scrutiny in all of their aspects. In fact, there has been almost ceaseless litigation concerning their validity. However, in all courts, no trust has been held invalid because of the reserved power to revoke,[28] and in a majority of courts such trusts have been declared valid even where more extensive powers are reserved to the settlor.[29]

I. VALIDITY OF THE REVOCABLE INTER VIVOS TRUST

A. *Generally*

Without doubt the revocable inter vivos trust which is designed to continue after the settlor's death has some testamentary aspects.[30]

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[25] Brind v. International Trust Co., 66 Colo. 60, 179 Pac. 148 (1919) recognizes gifts causa mortis but demands strict compliance with common law requisites of having made the gift in contemplation of death; death from the peril feared; and delivery with intent that title vest only in the event of death.

[26] See 24 ROCKY MT. L. REV. 365 (1952) for a discussion of these and other dispositions, nontestamentary, but effective at death.

[27] 1 SCOTT, TRUSTS § 74.1 (2d ed. 1956) (whatever can be given away or passed by will can be placed in trust).

[28] *Id.* § 57.1.

[29] *Id.* § 57.2.

[30] It is interesting to note that one of the principal purposes for the development of uses, from which our modern doctrine of trusts grew, was to evade the rule of law, before the enactment of the Statute of Wills in 1540, that land could not be devised. So, an owner would make a feoffment to another to the owner's use. He could then devise the use. SCOTT, CASES ON TRUSTS 220, 321 (4th ed. 1951).

Such trusts often *appear* to pass interests to the beneficiaries only at the settlor's death. The settlor's retention of many incidents of ownership, through a retained beneficial life estate, the power to revoke and amend, and control over the administration of the trust, makes the disposition seem of a testamentary genre. These aspects have caused some courts to look with suspicion upon them.[31]

There would be no question of validity if the trust were drafted and executed in accordance with the statute of wills. It would be valid as a will.[32] But since it would be a will it will not provide a solution because it would have all of the previously discussed disadvantages, including sending the property held in trust through probate.[33]

The courts have had no difficulty with the validity of the irrevocable inter vivos trust. The irrevocable trust at its creation indefeasibly vests in the beneficiary an interest. Thus, the irrevocable trust is effective upon creation and not upon the death of the settlor.[34] This is true even if the settlor reserves a beneficial life interest, because the beneficiaries still have indefeasibly vested present interests with only possession and enjoyment postponed.[35]

The problem then is to determine whether the beneficiary under the trust receives a present interest at the time of the creation of the trust. If so, the transfer is not testamentary. If the beneficiary receives no interest until the settlor's death, the disposition is testamentary and invalid unless there is compliance with the statute of wills.[36]

The beneficiaries may fail to acquire any interest in the trust property during the settlor's lifetime, either because the conveyance is ineffective to transfer title to the trustee,[37] in which case neither the trustee nor the beneficiary acquire an interest; or, because, though the conveyance is effective to vest title in the trustee, the settlor made no disposition of the beneficial interest before his death.[38]

In determining whether the trustee acquires legal title during the settlor's lifetime, the rules applicable to effective conveyances generally are controlling. Whether a transfer to the trustee is effec-

[31] Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N.E. 389 (1929); Worthington v. Redkey, 86 Ohio St. 128, 99 N.E. 211 (1912).

[32] 1 SCOTT, TRUSTS § 56.7 (2d ed. 1956).

[33] ATKINSON, WILLS § 42 (2d ed. 1953). For this reason, it is wise to avoid an attestation clause, since the court might seize on this to construe the trust as a will.

[34] Fonda v. Miller, 411 Ill. 74, 103 N.E.2d 98 (1952); RESTATEMENT (SECOND), TRUSTS § 56 (1957); 1 SCOTT, TRUSTS § 56.5 (2d ed. 1956).

[35] Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895); Hines v. Louisville Trust Co., 254 S.W.2d 73 (Ky. 1953); *In re* Curry, 390 Pa. 105, 134 A.2d 497 (1957).

[36] 1 SCOTT, TRUSTS § 56 (2d ed. 1956).

[37] Smith v. Simmons, 99 Colo. 227, 230, 61 P.2d 589, 590 (1936) (to create a valid express trust it is necessary to do all things essential to pass legal title to the trustee).

[38] 1 SCOTT, TRUSTS § 56.1 (2d ed. 1956).

tive to convey a present interest depends upon the intention of the grantor,[39] as manifested by the instrument of conveyance or the circumstances attending its execution and delivery.[40]

If the owner of land executes a deed which purports to convey the land to another, but manifests an intention that no interest vest in the grantee prior to the grantor's death, the conveyance is incomplete.[41] Thus, the conveyance of land is ineffective where there is no delivery of the deed.[42] If the grantee is a trustee for a third person, no trust arises.[43] If the deed provides that it shall have no effect until the grantor's death, it is testamentary, even though it was executed and delivered during the grantor's lifetime.[44] The result is the same where the deed is absolute on its face but is delivered pursuant to an agreement with the grantee that it shall not be effective until the death of the grantor.[45]

The same principle is applicable to personal property. If the conveyance to the grantee is incomplete for lack of delivery, or because the grantor does not intend it to be effective until his death,[46] the grantee takes nothing. If the conveyance were upon trust, no trust arises.[47]

On the other hand, the disposition is not testamentary if the donor surrenders all control, even though the legal title to the property does not pass until his death.[48] Thus, a valid conveyance may be made by the irrevocable delivery of the property or deed to a third person in escrow, the property or deed to be delivered to the grantee on the death of the grantor.[49]

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[39] Johnson v. Hilliard, 113 Colo. 548, 554, 160 P.2d 386, 389 (1945); Dunham v. Armitage, 97 Colo. 216, 219, 48 P.2d 797, 798 (1935); Barnes v. Spangler, 93 Colo. 254, 257-58, 25 P.2d 732, 733 (1933); Larison v. Taylor, 83 Colo. 430, 443, 266 Pac. 217, 222 (1928); Taylor v. Taylor, 79 Colo. 487, 489, 247 Pac. 174, 175 (1926); Phelps v. Phelps, 71 Colo. 343, 345, 206 Pac. 787, 788 (1922); Taylor v. Wilder, 63 Colo. 282, 284, 165 Pac. 766, 767 (1917).

[40] However, it has been stated that the court will attempt to construe the instrument valid if possible. Million v. Botefur, 90 Colo. 343, 345, 9 P.2d 284 (1932); Clark v. Bouler's Estate, 62 Colo. 465, 468, 163 Pac. 965, 966 (1917).

[41] 1 SCOTT, TRUSTS § 56.1 (2d ed. 1956).

[42] Griffith v. Sands, 84 Colo. 456, 271 Pac. 191 (1928); Larison v. Taylor, 83 Colo. 430, 266 Pac. 217 (1928); Childers v. Baird, 59 Colo. 382, 148 Pac. 854 (1915).

[43] 1 SCOTT, TRUSTS § 56.1 (2d ed. 1956).

[44] Dunham v. Armitage, 97 Colo. 216, 48 P.2d 797 (1935); Taylor v. Wilder, 63 Colo. 282, 165 Pac. 766 (1917).

[45] Barnes v. Spangler, 93 Colo. 254, 25 P.2d 732 (1933).

[46] Smith v. Simmons, 99 Colo. 227, 61 P.2d 589 (1936); Clarke v. Commerce State & Savings Bank, 68 Colo. 401, 189 Pac. 842 (1920). For a discussion of valid inter vivos gifts in trust of funds in a joint bank account, see Comment, 33 ROCKY MT. L. REV. 246 (1961); Comment, 24 ROCKY MT. L. REV. 133 (1952).

[47] 1 SCOTT, TRUSTS § 56.1 (2d ed. 1956).

[48] *Id.* at 424-25.

[49] Kauffman v. Kauffman, 130 Colo. 583, 589, 278 P.2d 179, 182 (1954) (where deed delivered in escrow was without qualifications, exceptions or reservations, it constituted an absolute conveyance *in praesenti*); Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953). *But see,* Barnes v. Spangler, 93 Colo. 254, 25 P.2d 732 (1933).

Assuming a valid present transfer is made to a trustee during the settlor's lifetime, the trust is invalid if the trust deed indicated that the beneficiaries were to receive no interest until the death of the settlor.[50] However, it would not affect the validity of the trust if the beneficiaries' rights to possession and enjoyment were postponed until the grantor's death as long as they received a presently vested future interest upon the creation of the trust.[51]

Assuming effective conveyance of the property to the trustee and present vesting of future interests in the beneficiaries, various aspects of such a trust must be considered which might lead to the conclusion that it is testamentary in nature.

It is well settled today that the power to revoke an inter vivos trust does not render the trust testamentary.[52] This view is supported by the theory that the beneficiary receives a vested interest upon creation of the trust. The death of the settlor is not a condition precedent to the vesting of the interest, though the interest received is subject to being divested by subsequent revocation of the trust by the settlor during his lifetime.

Some cases have suggested that the intent of the settlor to *evade* compliance with the statute of wills by the use of a revocable trust might affect its validity.[53] It is difficult to see how such an intent, even if expressed in the trust instrument, could affect its validity. Any inter vivos transfer necessarily has the effect of obviating the need for a will with respect to the property transferred. A person is presumed to intend the obvious consequences of his acts;[54] thus, literally applying this concept, any inter vivos transfer would be invalid because it must of necessity be intended to *evade* the statute of wills. Rather, the statute applies, in the interest of preventing frauds, only to regulate the formalities of those dispositions which are in fact

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[50] 1 SCOTT, TRUSTS § 56 (2d ed. 1956).

[51] Hignett v. Sherman, 75 Colo. 64, 75, 224 Pac. 411, 415 (1924) (an estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment, quoting from 4 KENT, COMMENTARIES (14th ed.)); Taylor v. Wilder, 63 Colo. 282, 286, 165 Pac. 766, 768 (1917) (it is unnecessary that the deed pass an immediate interest in possession, but it must be effective to pass the interest or estate at execution); cases cited note 38 *supra*.

[52] Miles v. Miles, 78 Kan. 382, 96 Pac. 481 (1908); National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956). Only one case expressed the view that the mere power of revocation would have made the trust invalid (had it not been for a local statute), Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N.E. 389 (1929), and this language was later repudiated in Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

[53] Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N.E. 716 (1925); McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50, 87 N.E. 465 (1909); National Newark & Essex Bank Co. v. Rosahl, 97 N.J. Eq. 74, 128 Atl. 586 (1925). The first and last cases upheld the trusts, finding no intent to evade the statute of wills; the trust fell in *McEvoy*, but this case was severely criticized and overruled in National Shawmut Bank v. Joy, 315 Mass. 457, 478, 53 N.E.2d 113, 126 (1944).

[54] Ellis v. Jones, 73 Colo. 516, 517, 216 Pac. 257, 258 (1923).

testamentary. Either the disposition is testamentary in nature, in which event compliance with the statute of wills is mandatory; or, it is not and the statute of wills need not be followed. It is immaterial that the settlor's motive in creating the trust was to avoid the necessity of complying with the statute of wills. As Mr. Justice Holmes said:

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy, if not by the mere letter of the law.[55]

Professor Scott suggests what is really meant when a court speaks of the importance of the settlor's intent is that the transaction creating the trust must be real and not merely colorable.[56] Generally courts have proceeded on the more logical basis that the intent of the settlor to use the trust as a substitute for a will, *i.e.*, to evade the statute of wills, is immaterial to the validity of the trust.[57]

Thus, a power of revocation, a reserved life estate in the settlor, or the intent to avoid the use of a will, will not render an inter vivos trust testamentary. The remaining area of contention and the prime problem today is the amount of control which the settlor retains over the administration of the trust. The question presented by reserved control is whether it, in fact and law, renders the trustee nothing more than the mere agent of the settlor. The Restatement of Trusts, section 57, adopted in 1935, provided:

> Where the settlor transfers property in trust and reserves not only a beneficial life estate and a power to revoke and modify the trust but also such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, the disposition so far as it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with.[58]

This, of course, made the validity of the trust depend on the extent of control reserved by the settlor.[59] The theory behind this provision is that the very essence of the principal and agent relationship is that the agent acts in behalf of and subject to the control of the princi-

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[55] Bullen v. Wisconsin, 240 U.S. 625, 630-31 (1916). In Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930), Mr. Justice Holmes said: "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."

[56] 1 SCOTT, TRUSTS § 57.1 (2d ed. 1956).

[57] National Shawmut Bank v. Joy, 315 Mass. 457, 471, 53 N.E.2d 113, 122 (1944); Newman v. Dore, 275 N.Y. 371, 376, 9 N.E.2d 966, 967 (1937); Windolph v. Girard Trust Co., 245 Pa. 349, 366, 91 Atl. 634, 639 (1914).

[58] RESTATEMENT, TRUSTS § 57(2) (1935).

[59] 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956).

pal.[60] If the trustee is also the agent of the settlor, the rules of agency prevail,[61] and thus the relationship would terminate on the death of the settlor (as principal)[62] and would be ineffective insofar as designed to continue after his death.[63]

If the owner simply gave possession of his property to another, instructing him to deliver it to a third person upon the owner's death, certainly the holder of the property would be a mere agent of the owner. No interest would have passed to the third person during the owner's lifetime. The attempted disposition to the third person upon the owner's death would be testamentary in nature and invalid for failure to comply with the statute of wills.[64] Professor Scott feels that if a transaction is essentially of this nature, with the only change being the vesting of legal title in the agent (so that he also becomes a trustee), the result should be the same.[65]

A number of trusts have been held invalid on the ground of reserved control by the settlor.[66] A greater number of cases, however, have held that reservation of control by the settlor does not render the trust testamentary.[67] The Restatement of Trusts adopted in 1957 took a stronger stand than that of 1935, in favor of the validity of trusts over which the settlor has reserved control, providing:

> Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.[68]

Professor Scott favors upholding such trusts, even where extensive powers of control are reserved to the settlor, stressing the fact that where the trust is represented by a formal trust instrument the pur-

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[60] RESTATEMENT (SECOND), AGENCY § 2 (1958).

[61] *Id.* § 14B.

[62] *Id.* § 120.

[63] 1 SCOTT, TRUSTS § 8 (2d ed. 1956).

[64] ATKINSON, WILLS § 42 (2d ed. 1953); 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956).

[65] 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956).

[66] Betker v. Nalley, 140 F.2d 171 (D.C. Cir. 1944); Atlantic Bank v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948); Burns v. Turnbull, 294 N.Y. 889, 62 N.E.2d 785 (1945); *In re* Shapley's Trust, 353 Pa. 499, 46 A.2d 227 (1946).

[67] Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); Bear v. Millikin Trust Co., 336 Ill. 366, 168 N.E. 349 (1929); Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1889); Leahy v. Old Colony Trust Co., 326 Mass. 49, 93 N.E.2d 238 (1950); National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942); Goodrich v. City Nat'l Bank & Trust Co., 270 Mich. 222, 258 N.W. 253 (1935); *In re* Mason's Estate, 395 Pa. 485, 150 A.2d 542 (1959); Alexander v. Zion's Savings Bank & Trust Co., 4 Utah 2d 90, 287 P.2d 665 (1955); *In re* Estate of Steck, 275 Wis. 290, 81 N.W.2d 729 (1957).

[68] RESTATEMENT (SECOND), TRUSTS § 57 (1957).

pose behind the statute of wills, to prevent frauds, is not violated.[69] Also, the formal instrument would seem to evidence something more than a mere casual handing over of property to another for disposition on the owner's death to a third person.

B. *Colorado's Position*

The revocable inter vivos trust had an inauspicious beginning in Colorado. Apparently the first case in which the Colorado court had occasion to deal with such a trust was *Dunham v. Armitage.*[70] In that case property was purportedly conveyed to another as trustee, with the grantor reserving possession and the right to the rents and profits from the property for life. The trust was subject to an express power of revocation. The trust provided that "upon the death" of the settlor, revocation not having occurred, the property was to become that of the beneficiary. The court held that the reservation of the power to revoke and the reservation postponing vesting of title until the death of the grantor were fatal to the trust because they demonstrated an intent of the grantor that the trust was not to be effective for any purpose prior to his death.[71]

Since 1954 there has been a trilogy of unrelated cases[72] dealing with the revocable trust, culminating in a landmark decision in favor of the validity of the revocable trust.[73]

In the first case of the series, *Brown v. International Trust Co.,*[74] the court dealt with a revocable life insurance trust. The trust company as beneficiary of the policy was to collect the proceeds of the insurance on the settlor's life and hold them as trustee for designated beneficiaries of a trust agreement. By the trust instrument, the settlor retained for his life all of the incidents of ownership, including the right to pledge the policy, the right to borrow on the policy, the right to receive the dividends and refunds of the policy, and the right to change the beneficiary of the policy. The settlor also reserved the right to revoke or amend the trust instrument during his lifetime. With regard to the power of revocation reserved in the trust instrument, the court quoted from *Farmer's Loan & Trust Co. v. Bowers* which said there was a well established rule of law as follows:

> The power of revocation is perfectly consistent with the creation of

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[69] 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956); United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460, 465 (D. Ark. 1946). *Contra,* 1 BOGERT, TRUSTS AND TRUSTEES §§ 103-04 (1935).

[70] 97 Colo. 216, 48 P.2d 797 (1935).

[71] *Id.* at 219, 48 P.2d at 798.

[72] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958); Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956); Brown v. International Trust Co., 150 Colo. 543, 278 P.2d 581 (1954).

[73] Denver Nat'l Bank v. Von Brecht, *supra* note 72.

[74] 130 Colo. 543, 278 P.2d 581 (1954).

> a valid trust. Title passes to the donee, and remains vested for the purpose of the trust, even though there be a right to revoke it. The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence, or effect of that which may perhaps be thereafter brought to an end, for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised, an estate exists by virtue of the transfer.[75]

While definitely a step in the direction of upholding revocable inter vivos trusts, this case was somewhat limited in its value as a precedent because it involved an insurance trust upon which the courts have always looked favorably while holding them nontestamentary in nature,[76] and because not all of the factors which had been raised concerning the validity of such trusts were present, particularly, control over the administration of the trust.

The next case involving the revocable trust was *Richard v. James.*[77] The power to revoke in this case was not express, but was argued from a construction of the trust instrument. The trust on its face purported to be irrevocable . The settlor, dying of cancer, created a trust for the purpose of research into its cause and cure. The only factor which raised a question as to its not being the normal irrevocable trust which it purported to be was a provision in the trust instrument making the trust property subject to the debts of the settlor at his death. It was contended by the plaintiff in attacking the trust that this provision amounted to a power to revoke, since the settlor might by incurring debts, in effect, revoke or defeat the trust. The court did not cite *Brown v. International Trust Co.* which apparently would have been dispositive of that objection. Rather, the court contented itself with examining the evidence and stating there was no indication the settlor had intended to use the debt clause to defeat the trust.[78] It would seem the court was influenced in this approach by the fact that the plaintiff was the wife of the settlor and was attempting to assert her marital rights against the trust property. The court wanted to make it clear that the transfer was not merely "colorable" as against her. Because of the court's approach this case added little, if anything, to Colorado's position on the testamentary aspects of the revocable inter vivos trust.

The final case of the trilogy, and the one providing a landmark in Colorado in favor of the validity of such trusts, is *Denver Nat'l Bank v. Von Brecht.*[79] In this case the settlor transferred stock to a

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[75] Farmer's Loan & Trust Co. v. Bowers, 29 F.2d 14, 17 (2d Cir. 1928).

[76] Sigal v. Hartford Nat'l Bank & Trust Co., 119 Conn. 570, 177 Atl. 742 (1935); *In re* Albert Anderson Life Ins. Trust, 67 S.D. 393, 293 N.W. 527 (1940); see 46 HARV. L. REV. 818 (1933).

[77] 133 Colo. 180, 292 P.2d 977 (1956).

[78] *Id.* at 185, 292 P.2d at 979.

[79] 137 Colo. 88, 322 P.2d 667 (1958). This case was noted in 35 DICTA 146 (1958) and 30 ROCKY MT. L. REV. 517 (1958).

bank as trustee. The trust provided that the income should be paid to the settlor for life and that the settlor might have all or part of the corpus upon written request. Provision was made for the care of the settlor from the trust property in the event of his illness, and the trust property was subject to the expenses of the settlor's last illness. A provision was made for distribution to others after the settlor's death. The settlor retained the power during his life to add property to the trust, to revoke, modify or amend the trust agreement, and the power to pass on any sale or disposition of trust property by the trustees when the value of the property involved exceeded $1,000.

Despite these extensive powers reserved by the settlor, there were many powers granted to the truste concerning the management of the trust property. The lower court, relying on the case of *Dunham v. Armitage*,[80] concluded the trust was testamentary in nature and void because not executed in compliance with the statute of wills. The lower court felt the trust was intrinsically an agency, since the settlor retained virtual control and dominion over the trust property.[81] The Colorado Supreme Court distinguished *Dunham* on the ground that there, possession had been retained by the settlor, while in the present case the bank had possession of the stock. While it seems the cases are distinguishable, possession does not seem the point, but rather the fact that in *Dunham* the trust deed provided that the beneficiaries were to have no interest until the death of the settlor, whereas here the trust instrument had no such language.[82] In upholding the trust the Colorado Supreme Court said:

> Where as here, the property involved in a trust is assigned, transferred and set over to the trustee and remains in the name of the trustee, the interest of the settlor therein passes to the trustee in presenti and while the settlor remains alive the transfer is inter vivos and not testamentary. Hence, if an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial.[83]

The case was ideal because all of the aspects about which questions of validity had been raised were presented at one time; it settled many questions theretofore unanswered for Colorado attorneys and

[80] 97 Colo. 216, 48 P.2d 797 (1935).

[81] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 93, 322 P.2d 667, 669 (1958).

[82] It has also been suggested that the *Dunham* case can be distinguished not only on the basis of the reservation postponing the vesting of interests in the beneficiaries until the death of the settlor in that case, but also on the basis that in the *Dunham* case the grantor had no fiduciary duties to perform, whereas in the *Von Brecht* case the trustee bank had a great many duties despite the veto power over investments in the settlor. See 30 ROCKY MT. L. REV. 517, 518 (1958).

[83] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 99, 322 P.2d 667, 672 (1958).

their clients. The summary at the close of the court's opinion provides a concise outline of Colorado's present position:

> To recapitulate: The settlor specifically reserved to himself three matters, viz. (1) The income from the trust estate; (2) the right to change or entirely revoke the trusts, and (3) the right to disapprove investments of more than $1,000 suggested by the trustees. It is agreed by counsel on both sides that a settlor may reserve a life income for himself, together with the right to revoke the trust, and he may reserve additional powers *if he does not go too far.* We are satisfied that settlor did not go too far in reserving the so-called veto power concerning investments proposed by the trustee. Restatement of Trusts, § 57 states: 'The intended trust is not testamentary merely because the Settlor reserves power to direct the trustee as to making of investments or the exercise of other particular powers, or power to appoint a substitute trustee.'[84] (Emphasis added.)

Of course, the case is limited by its facts as to how far the settlor may go in controlling the trustee, but certainly the breadth of control over the trustee in the facts of this case would satisfy most settlors. The court's opinion contains a warning about control in the language "if he does not go too far."[85] It is difficult to theorize where the line will, or should, be drawn in the permissible amount of control which the settlor may retain. Surely a distinction cannot be drawn on the amount or value of property involved. A veto power over every investment is no more harmful to the nature of the arrangement than one only on those investments over $1,000, for the trustee would still, in the first instance, perform his duties of management.

The court's stress of the fact that possession of the trust property had passed to the trustee[86] could not be carried out logically as a test of validity. For example, assume that real estate, used as a home, were placed in trust; the only manner in which the settlor might retain a beneficial life interest would be by retaining possession of the property.[87] The Restatement of Trusts, adopted in 1957, would seem to deem such a trust with retained possession valid.[88]

Employing a conceptualistic approach, once legal title has passed from the settlor to the trustee, and the beneficiaries have acquired vested future interests, the transfer would seem to be inter vivos and not testamentary. Retention of control by the settlor scarcely increases the testamentary nature of the transaction beyond what the retained life estate and the power to revoke accomplish.

Perhaps the most stringent test would arise if the trust agree-

[84] *Id.* at 101-02, 322 P.2d at 674.

[85] *Id.* at 102, 322 P.2d at 675.

[86] *Id.* at 93, 322 P.2d at 669.

[87] Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895) (trust valid though property in possession of settlor).

[88] RESTATEMENT (SECOND), TRUSTS § 57, comment b, illustration 2 (1957).

ment provided that the trustee should have legal title, but that the possession and power to manage the trust property would remain in the settlor until his death; that upon his death the trustee would take possession of the property and manage it for the benefit of the ultimate beneficiaries. This situation is no more objectionable than that created by the powers which are presently permitted to the settlor. If land were involved,[89] the statute of uses[90] might operate to leave a legal life estate in the settlor because of the passive nature of the trust during his lifetime.[91] But he would have made a nontestamentary disposition in trust of the remainder interest.

In attempting to find the real import of the transaction, one may approach the question of validity from a less conceptualistic direction. A consideration of the dichotomy between agent and trustee covers this approach. While the difference between the two is one of degree,[92] it would seem that the theory of the beneficiaries' having received vested future interests, and Professor Scott's pragmatic approach of stressing a formal trust instrument[93] should be sufficient to overcome any possible objection to extensive control reserved by the settlor.

II. Purposes for Which a Revocable Trust May Be Created

As a general proposition a trust, like a contract, may be created for any lawful purpose.[94] The same proposition is, of course, true of the revocable trust. However, experience has shown there will be difficulty when the purposes of the trust run contrary to established public policy. Two areas of persistent difficulty have involved the rights of creditors and the rights of the settlor's spouse to claim against the trust property.

A. *Creditor's Rights*

The settlor may desire to protect the beneficiaries of the trust from their own indiscretion. To accomplish this purpose he may make their interest in the trust property subject to a spendthrift provision — providing that a beneficiary may not voluntarily anticipate his interest under the trust, and that creditors of the beneficiary shall not have a right to reach the trust property. The majority of juris-

[89] *Id.* § 70.

[90] See O'Reilly v. Balkwill, 133 Colo. 474, 297 P.2d 263 (1956); Ohio and Colorado Smelting & Refining Co. v. Barr, 58 Colo. 116, 144 Pac. 552 (1914).

[91] Restatement (Second), Trusts § 69, comment c (1957) (where the duties of the trustee may not begin until after the expiration of a limited period, the statute of uses may execute the trust for the limited period).

[92] 1 Scott, Trusts § 57.2 (2d ed. 1956).

[93] *Ibid.*

[94] *Id.* § 1.

dictions,[95] including Colorado,[96] recognize the validity of spendthrift provisions. The theory supporting their validity is that the owner might not have made the transfer to the beneficiary, and had he not done so, the creditors would have had no complaint. Thus the owner may limit his gift in this manner.[97] No particular form of words is required to create a spendthrift provision,[98] but it is necessary that the provision be set forth in the instrument in clear and unequivocal language or that the intention to create the provision appear clearly from a reading of the entire instrument.[99]

There is a split of authority, even in states which recognize valid restraints on the right to income for life, concerning restraints on alienation of the equitable fee.[100] This could be of importance in the typical trust where the settlor retains the income for life, with the equitable remainder in fee in the beneficiaries. However, in Colorado if the settlor retained the income after his death payable to the beneficiaries for life or for a term of years, the restraint on the beneficiaries' right to receive income after the settlor's death would be valid under the authority of *Snyder v. O'Conner*.[101]

If the interest of the beneficiary is limited to the amount needed for his support, he may not assign his interest nor may his creditors reach it, even in the absence of an express restraint on alienation.[102] It is held otherwise if the interest is not measured by a standard for support, but is a fixed amount or the entire income, with an indication in the trust that the funds are for "support."[103] If the trust is a discretionary trust — one in which the beneficiary has no absolute

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[95] GRISWOLD, SPENDTHRIFT TRUSTS § 58 (2d ed. 1947); 2 SCOTT, TRUSTS § 152 (2d ed. 1956).

[96] Newell v. Tubbs, 103 Colo. 224, 84 P.2d 820 (1938); Snyder v. O'Conner, 102 Colo. 567, 81 P.2d 773 (1938); see Estate of Nicholson, 104 Colo. 561, 569, 93 P.2d 880, 883 (1939).

[97] Snyder v. O'Conner, 102 Colo. 567, 570, 81 P.2d 773, 774 (1938) ("The testator could lawfully have willed his property away from his children entirely, and he had a right to limit his gift in the way he did."); *cf.* Johnson v. Shriver, 121 Colo. 397, 409, 216 P.2d 653, 659 (1950) (with regard to a power of appointment; "We recognize the right of a donor of a power of appointment to condition his bounty as he sees fit, and creditors of the donee of the power have no reason to complain that the donor did not give his bounty to them.").

[98] GRISWOLD, SPENDTHRIFT TRUSTS § 264 (2d ed. 1947); 2 SCOTT, TRUSTS § 152.4 (2d ed. 1956). See Newell v. Tubbs, 103 Colo. 224, 227, 84 P.2d 820, 821 (1938), where the court said: "Without setting out any formal definition, we may state that it is only by the use of language similar in meaning and legal import to that contained in the recent case of Snyder v. O'Conner, 102 Colo. 567 [569], 81 P.2d 773 [774 (1938)] that such a trust may be established . . . ."

[99] Newell v. Tubbs, 103 Colo. 224, 84 P.2d 820 (1938); GRISWOLD, SPENDTHRIFT TRUSTS § 264 (2d ed. 1947); 2 SCOTT, TRUSTS § 152.4 (2d ed. 1956).

[100] GRISWOLD, SPENDTHRIFT TRUSTS §§ 84-91 (2d ed. 1947).

[101] 102 Colo. 567, 81 P.2d 773 (1938).

[102] GRISWOLD, SPENDTHRIFT TRUSTS § 430 (2d ed. 1947); 2 SCOTT, TRUSTS § 154 (2d ed. 1956).

[103] GRISWOLD, *Id.* § 433; SCOTT, *Ibid.*

right to income but is entitled only to so much as the trustee in his discretion determines to pay — the beneficiary may not assign, nor may his creditors reach, his interest.[104] If the trust does not contain a spendthrift provision, is not a trust for support, or a discretionary trust, then the beneficiary may transfer his interest and his creditors may reach it.[105]

A different question is presented when dealing with the settlor's creditors. If the settlor has creditors existing at the time of the transfer creating the trust, the creditors may avoid the transfer as a fraudulent conveyance.[106] This would be true whether or not the settlor had reserved a beneficial interest or a power to revoke.[107] The remaining questions assume that there is no fraudulent conveyance, since if there were a fraudulent conveyance, it would be dispositive of the issue. If the settlor retains no life interest, but merely the power to revoke the trust, his creditors may not force him to exercise the power in order to reach the property which would then return to him.[108] When the settlor does reserve an interest under the trust, the existing creditors of the settlor are protected by a Colorado statute, beyond the protection provided by the statute pertaining to fraudulent conveyances, which provides:

> All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels, or things in action, or real property, made in trust for the use of the person making the same, shall be void, as against the creditors existing of such person.[109]

This statute does not cover the position of creditors who became such subsequent to the transfer creating the trust. However, it is uniformly held, without benefit of statute, that the creditors of the settlor may reach his reserved interest, although an attempt is made to protect his interest by a spendthrift provision.[110]

Where the settlor reserves a beneficial life interest and a power to revoke the trust, the question arises whether his creditors may reach his remainder interest as well as his life estate. It might be argued that since the settlor retains most of the incidents of ownership, he should not be allowed to retain these incidents and at the

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[104] GRISWOLD, *Id.* § 425; SCOTT, *Id.* § 155.

[105] GRISWOLD, *Id.* § 10; SCOTT, *Id.* § 132; see Newell v. Tubbs, 103 Colo. 224, 84 P.2d 820 (1938) (beneficiary made an assignment of his interest; court found no spendthrift provision and allowed the assignment to stand).

[106] COLO. REV. STAT. § 59-1-17 (1963) (made with the intent to hinder, delay, or defraud creditors); GRISWOLD, SPENDTHRIFT TRUSTS § 472 (2d ed. 1947).

[107] 3 SCOTT, TRUSTS § 330.12 (2d ed. 1956).

[108] *Ibid.*

[109] COLO. REV. STAT. § 59-1-11 (1963).

[110] GRISWOLD, SPENDTHRIFT TRUSTS § 474 (2d ed. 1947); 2 SCOTT, TRUSTS § 156 (2d ed. 1956).

same time keep "his" property from his creditors.[111] However, on the theory that the remaindermen have a vested future interest, it is held that the creditors of the settlor may reach only the settlor's life estate, unless there was a fraudulent conveyance.[112]

B. *Spouse's Rights*

The common law rights of dower and curtesy have been abolished by statute in Colorado.[113] The husband's[114] property is free of any vested interest of his wife, and he may dispose of it during his lifetime without his wife's knowledge[115] or consent.[116]

Like most states,[117] Colorado has an election statute. It provides that a wife may renounce her husband's will and elect to take the statutorily prescribed fraction of her husband's "property or estate."[118] If the husband has made an outright and absolute disposition during his lifetime, then, of course, his wife cannot successfully assert her rights against the property transferred. What constitutes an effective conveyance, in the sense that the wife's rights would be foreclosed, is governed by the same rules of conveyances, whether or not the transfer was in trust. If the transfer by the husband were ineffective for want of delivery of the deed or property,[119] or for an intention that title was not to pass until his death,[120] then such property would still be a part of his probate estate. As such, it would be subject to the wife's claim.[121]

Colorado has a number of cases dealing with the wife's rights in property transferred or purportedly transferred by the husband during his lifetime.[122] The cases have not always been consistent. The

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[111] 3 SCOTT, TRUSTS § 330.12 (2d ed. 1956).

[112] GRISWOLD, SPENDTHRIFT TRUSTS § 475 (2d ed. 1947); 2 SCOTT, TRUSTS § 156 (2d ed. 1956).

[113] COLO. REV. STAT. § 153-2-1(2) (1963).

[114] Reference shall be had to the husband's disposing of his property and the rights of the wife, since this is the normal context of the cases, though the rules announced would be the same if the positions of the husband and wife were reversed.

[115] Wilson v. Lowrie, 77 Colo. 427, 236 Pac. 1004 (1925).

[116] Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953); Wright v. Nelson, 125 Colo. 217, 242 P.2d 243 (1952); Norris v. Bradshaw, 96 Colo. 594, 45 P.2d 638 (1935).

[117] 2 SCOTT, TRUSTS § 146A n.1 (2d ed. 1956); Phipps, *Marital Property Interests,* 27 ROCKY MT. L. REV. 180, 191 (1955) (for a listing of provisions in each state).

[118] COLO. REV. STAT. § 153-5-4 (1963) (the prescribed share is one-half).

[119] Griffith v. Sands, 84 Colo. 456, 271 Pac. 191 (1928); Larison v. Taylor, 83 Colo. 430, 266 Pac. 217 (1928); Childers v. Baird, 59 Colo. 382, 148 Pac. 854 (1915).

[120] Smith v. Simmons, 99 Colo. 227, 61 P.2d 589 (1936); Dunham v. Armitage, 97 Colo. 216, 48 P.2d 797 (1935); Taylor v. Taylor, 79 Colo. 487, 247 Pac. 174 (1926).

[121] Rea, *Election to Take the Statutory Share,* 29 ROCKY MT. L. REV. 506, 523 n.96 (1957).

[122] Moedy v. Moedy, 130 Colo. 464, 470-71, 276 P.2d 563, 566 (1954); Bostron v. Bostron, 128 Colo. 535, 539, 265 P.2d 230, 232 (1953); Thuet v. Thuet, 128 Colo. 54, 60-61, 260 P.2d 604, 607 (1953); Phillips v. Phillips, 30 Colo. 516, 519-20, 71 Pac. 363, 364-65 (1903); Smith v. Smith, 22 Colo. 480, 486-87, 46 Pac. 128, 131 (1896).

following statement has often been quoted with approval by the Colorado court:

> There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be *bona fide,* and no right is reserved to him, though made to defeat the right of the wife, it will be good against her.[123]

In *Ellis v. Jones* the court laid down the proposition that intent to deprive the wife of her rights was irrelevant, saying:

> One cannot give away land without depriving his heirs of it. He is presumed to intend the consequences of his own acts. He must therefore be regarded as intending to deprive his heirs of what he gives away; but all agree that he may give. Is it not, then, evident that the intent is irrelevant, that if the deed is genuine, it is valid, but that if it is a mere pretense it is invalid? In other words, if colorable, it is invalid, otherwise valid.[124]

Other courts took this same position.[125] A colorable deed was defined as one which is "counterfeit, feigned, having the appearance of truth . . . not really intended as a deed."[126] This would mean that "fraud" and "colorable" apply only to those transactions which are not really what they purport to be, a sham or trick. If so, the only time the wife would have any claim against the property transferred would be when the property was still a part of the husband's probate estate. Her rights would be no greater than the executor or any other party interested in the estate. The only possible additional protection she might have would be a subjective one — the tendency of the court to look more closely at a transaction in which the wife's rights were involved.

The often quoted statement from Kerr[127] to the effect that the husband must reserve no interest to himself is also in doubt. In *Thuet v. Thuet*[128] the transfer was upheld against the claim of the surviving husband though the grantor retained a lifetime use, possession and control of the property, transferring the remainder by irrevocably delivering a deed to a third party, with instructions to deliver the deed to the grantee only upon the grantor's death.[129]

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[123] KERR, FRAUD AND MISTAKE 220 (1872).

[124] Ellis v. Jones, 73 Colo. 516, 517, 216 Pac. 257, 258 (1923).

[125] Moedy v. Moedy, 130 Colo. 464, 471, 276 P.2d 563, 566-67 (1954); Norris v. Bradshaw, 96 Colo. 594, 597, 45 P.2d 638, 639 (1935).

[126] Ellis v. Jones, 73 Colo. 516, 517, 216 Pac. 257, 258 (1923).

[127] KERR, FRAUD AND MISTAKE 220 (1872).

[128] 128 Colo. 54, 260 P.2d 604 (1953).

[129] See Moedy v. Moedy, 130 Colo. 464, 276 P.2d 563 (1954); Million v. Botefur, 90 Colo. 343, 9 P.2d 284 (1932).

Thus, it would appear today that the wife is not in a position to assert her statutory rights against a completed transfer, despite the fact it was made with the intention of defeating her rights, and despite the fact the husband retains possession and control during his lifetime.

The next question, logically, is what are the wife's rights if the husband reserves a right to revoke the inter vivos disposition which he has made. The *Thuet* case contained a warning, saying it would have decided otherwise had the grantor retained a power of revocation. But, the transfer involved was not one in trust. A transfer not in trust, if revocable, would not be a completed transfer. The property would remain in the husband's probate estate, against which his wife could assert her statutory claim.[130] This does not reach the problem of her rights when the husband has a power of revocation over a transfer in trust.

While the concept that a revocable deed does not convey any present interest is true with regard to a transfer of a legal interest by deed,[131] this concept has been deemed inapplicable to transfers in trust.[132] The beneficiary of a trust receives immediately a vested equitable interest, even though subject to being divested by revocation.[133]

Though the validity of the revocable trust as nontestamentary is established in Colorado,[134] the question of the rights of the wife in the trust property remains open. In *Richard v. James,*[135] the trust was attacked by the wife claiming her statutory share. The court upheld the transfer against her claims, though it was in effect subject to a power of revocation through a clause making the res subject to the debts of the settlor upon his death. However, the court did not treat the question of revocability, confining its comments to the fact there was no indication the husband had intended to use the debt clause to defeat the trust. The court dealt with the trust as irrevocable (which it purported to be), and therefore, did not reach the problem of the wife's rights in property held under revocable transfers in trust.

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[130] See Shores v. Shores, 134 Colo. 319, 303 P.2d 689 (1956); Falbo v. United States Nat'l Bank, 116 Colo. 508, 181 P.2d 1020 (1947); Johnson v. Hilliard, 113 Colo. 548, 160 P.2d 386 (1945); Barnes v. Spangler, 93 Colo. 254, 25 P.2d 732 (1933); Hardy v. Carrington, 87 Colo. 461, 288 Pac. 620 (1930); Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921).

[131] *Ibid.*

[132] 1 SCOTT, TRUSTS § 571 (2d ed. 1956); King, *A Reappraisal of the Revocable Trust,* 19 ROCKY MT. L. REV. 1, 3 nn.20 & 21 (1946). For a discussion of differences between gifts inter vivos and transfers in trust, see Schenkein, *Widow's Right in Colorado to Set Aside Husband's Inter Vivos Transfer,* 26 ROCKY MT. L. REV. 180, 187 (1954).

[133] 1 SCOTT, TRUSTS § 57.1 (2d ed. 1956).

[134] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

[135] 133 Colo. 180, 292 P.2d 977 (1956).

In *Denver Nat'l Bank v. Von Brecht*[136] the trust was attacked by the settlor's wife, but the attack was on the ground that the trust was testamentary in nature. The court held otherwise. There was no alternative assertion by the wife that she was entitled to exercise her statutory claim against the trust property even if it were deemed nontestamentary.[137] So, the question in Colorado remains open. However, the cases provide little reason to believe that the wife's rights in the trust property will be recognized. On the contrary, they seem to indicate that if the trust is deemed nontestamentary, it will be deemed a valid, completed inter vivos transfer against the wife.[138]

There is some authority and respected opinion that the wife should not be precluded from asserting her rights simply because for other purposes the trust would be valid as nontestamentary.[139] While no one would feel that the wife should be deprived of some right to share in trust property over which the husband had a power of revocation, with control and enjoyment during his lifetime, it can be argued that the solution lies in legislation. That is to say, in order to preserve the conception of a revocable living trust as a valid, nontestamentary device, the decisions with regard to the wife's rights should be consistent with those holding such trusts nontestamentary in their creation and operation. When the wife's rights depend, as they do in Colorado, on the property's being deemed a part of the husband's probate estate, she should be precluded from reaching trust property not in his probate estate.[140]

It would seem a statute relating to the wife's rights in the trust property would be appropriate. In 1947 Pennsylvania enacted the following statute for the wife's protection:

> A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of

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136 137 Colo. 88, 322 P.2d 667 (1958).

137 See 30 ROCKY MT. L. REV. 517, 520 (1958).

138 For a thorough and analytical examination of all aspects of the wife's statutory share, see Rea, *Election to Take the Statutory Share,* 29 ROCKY MT. L. REV. 506 (1957).

139 Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); 1 SCOTT, TRUSTS § 57.5 (2d ed. 1956) (arguable that though the creation of a revocable trust is not so far testamentary as to be invalid under the statute of wills, it is so far testamentary as to allow the wife to recover a distributive share); Rea, *Election to Take the Statutory Share,* 29 ROCKY MT. L. REV. 506, 543 (1957).

140 And certainly after Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958), there is no doubt but that the trust property is not a part of the probate estate.

> any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor.[141]

Such a statute would protect the wife without unnecessarily confusing the clear conception of the validity of the revocable trust which now prevails in Colorado.

III. UNFUNDED OR NOMINALLY FUNDED TRUSTS

A. *Facts of Independent Significance and Incorporation by Reference*

For a number of reasons the owner may not desire to place a substantial amount of his property in the trust while living, yet does desire to have such a trust as a receptacle to take property from his will. He will not have the advantages which ordinarily inure to the benefit of the settlor from the operation of the trust during his lifetime, but will have the advantages of the trust as it operates in a post-death manner. There are two doctrines of the law of wills, incorporation by reference,[142] and facts of independent significance,[143] which are applicable to pouring over property from a will into a previously created inter vivos trust.

Without doubt, if the testator spelled out in his will the terms of the inter vivos trust, he would have created a valid trust — a testamentary trust.[144] The testator would not have given property to the inter vivos trust, but simply would have created a testamentary trust, identical in terms to the previously created living trust. The continuing supervision of the trust would be in the court having probate jurisdiction.[145]

However, if the testator attempts to devise or bequeath property to a previously created trust, a different problem arises. The objection to such a disposition is that the trust, which is not an instrument executed in accordance with the statute of wills, is going to control the ultimate disposition of the property which it receives. It appears to be a disposition of property owned at death not made in accordance with the requirements of the statute of wills. It is at this point that the theories of incorporation by reference and facts of independent significance come into play.

If the testator, in lieu of repeating the terms of the living trust

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[141] PA. STAT. ANN. tit. 20, § 301.11 (Purdon 1950). The conveyance is to be treated "as" testamentary for this one purpose; it is not made testamentary. It also protects persons who start to receive income before the settlor's death. This seems entirely proper, since the wife should share only in that property which her husband enjoyed throughout his life, and not in that property others were enjoying. See *Joint State Law Commission Comment*, PA. STAT. ANN. tit. 20, § 301.11 (Purdon 1950).

[142] ATKINSON, WILLS § 80 (2d ed. 1953).

[143] *Id.* § 81.

[144] 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956).

[145] COLO. REV. STAT. § 152-14-11(3) (1953).

in the will, simply refers to the trust previously created as an existing instrument, adequately identifying it by reference, for example to its title or date of creation, the trust instrument[146] will be deemed to have been incorporated into the will. However, since this is tantamount to having repeated the terms of the trust in the will, the trust is testamentary in nature, subject to court control and supervision.[147]

Serious problems arise when an attempt is made to use this theory to validate a trust which was, in accordance with its terms, amended after the execution of the will. If the trust instrument were amended after the execution of the will, when the will became operative upon the settlor's death, the trust instrument which it purported to incorporate would no longer exist. If the will were deemed to incorporate the trust as amended, the testator would have, in effect, amended his will other than by codicil in statutory form,[148] which amendment is invalid.[149] This conceptual problem has caused some courts to hold the amended trust was not incorporated into the will.[150] Of course, if the settlor amended the trust after the execution of his will, but then executed a codicil to his will, which referred to the trust as amended, as an existing instrument, the incorporation of the amended trust would be valid.[151]

The theory of facts of independent significance has not been circumscribed by the rigid conceptualistic tenets of the theory of incorporation by reference. "Even though a disposition cannot be fully ascertained from the terms of the will, it is not invalid if it can be ascertained from facts which have significance apart from their effect upon the disposition in the will."[152] This doctrine of wills was designed to make valid gifts to classes of persons, or to persons by description, where extrinsic evidence was necessary to determine the members of the class or the person described. Since it requires facts which have significance apart from their effect on this determination, there is not the danger ordinarily present when reference is made to documents outside the will which are not executed in compliance with the statute of wills.

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[146] 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956) (trust instrument and not the trust which is incorporated by reference).

[147] *Id.* § 54.1 (doctrine of incorporation by reference not recognized in many states). No cases were found in Colorado which dealt with the theory.

[148] COLO. REV. STAT. § 153-5-2 (1963) (requisites for a will). COLO. REV. STAT. § 153-1-1(15) (1963), provides that when the word "will" is used in Chapter 153 of the Colorado Revised Statutes, it shall include a codicil.

[149] Freeman v. Hart, 61 Colo. 455, 158 Pac. 305 (1916).

[150] Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

[151] The same would be true if the trust were amended by a writing executed in accordance with the statute of wills. See Stouse v. First Nat'l Bank, 312 Ky. 405, 245 S.W.2d 914 (1951); 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956).

[152] 1 SCOTT, TRUSTS § 54.2 (2d ed. 1956).

Perhaps two examples will serve to illustrate the doctrine and the distinction it makes. If the testator left property "to those persons whose names appear in a letter which will be found with my effects at my death," it is clear that the letter, and the names of the persons therein, have no significance except as they determine who shall take property under the will.[153] Thus, this disposition would be invalid for failure to comply with the statute of wills. However, if the testator left property "to those persons in my employ at my death," then this description, and the persons who bear such relationship to the testator at his death, will have significance apart from the effect upon the disposition because they would still be the persons in his employ at his death whether or not the will had been made.[154] While each disposition would, in effect, allow the testator to change his will (in the former, by changes in the letter after execution of the will, and in the latter by selective hiring and retention of employees), the possibility of fraud, which the statute of wills is designed to avoid,[155] is not as likely in the latter case.

When the theory of independent significance is applied to the problem of pouring over property to a revocable living trust, it is more helpful in avoiding the conceptualistic difficulties of incorporation by reference when the trust is amended after the execution of the will. The trust, even as amended, can be said to have independent significance as it exists at the time of the testator's death, apart from its effect on the ultimate disposition of the property passing under the will.[156]

A problem arises when employing this theory if the trust is only nominally funded during the settlor's lifetime. Can it be said the trust has independent significance if its nominal funding was only to create a receptacle for property to be poured over from the will? Professor Scott thinks it cannot.[157] When this theory is employed, how many trusts are created, one or two? Will the inter vivos trust be treated as testamentary or inter vivos after the pour-over? Professor Scott feels that only one trust is created, and that it remains inter vivos in nature.[158] There is some authority to this effect.[159]

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[153] *Id.* § 54.

[154] *Id.* § 54.2.

[155] *Id.* § 57.2.

[156] *Id.* § 54.3.

[157] *Ibid.*

[158] *Ibid.*

[159] Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal. 2d 1, 193 P.2d 721 (1948), noted in 22 So. CAL. L. REV. 205 (1949); In State *ex rel.* Citizens Bank v. Superior Court, 236 Ind. 135, 138 N.E.2d 900 (1956); *In re* Estate of York, 95 N.H. 435, 65 A.2d 282 (1949).

Colorado has solved the problems raised by these two theories with regard to pour-overs, by statute providing:

> (1) By a will, a testator may devise or bequeath property to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation or termination, and irrespective of the value of the corpus of the trust. Unless the will provides otherwise, the property so bequeathed or devised shall be treated as an addition to the trust and shall be governed by the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator, and upon proper delivery of the property so devised and bequeathed to the trustee as such, the property so devised or bequeathed shall be no longer subject to the jurisdiction of the county court. No reference to any such trust in any will shall cause the assets held under the provisions of such trust instrument at the time of the death of the testator to be included in the property administered as part of the testator's estate.[160]

This statute solves the problem under the theory of incorporation by reference concerning the subsequent amendment of the trust after the execution of the will. It eliminates the question raised under the theory of facts of independent significance about the value of the trust assets which must be present to make the trust of more than nominal significance. It eliminates any doubt about the jurisdiction of the court after the property passing under the will is paid over to the trustee; it solves the problem of whether the living trust becomes testamentary when a pour-over is made; and it expressly keeps assets already in the trust at the testator's death from having to go through the process of probate.[161]

B. *Insurance Trusts*

Another increasingly common type of unfunded inter vivos trust is the life insurance trust.[162] It is like the ordinary inter vivos trust except that the trustee has no duties to perform and there is no property to be managed until the death of the insured.[163] As noted earlier, life insurance has been held to be nontestamentary in nature as have life insurance trusts.[164] The theory of validity is that the trustee, as

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[160] COLO. REV. STAT. § 153-5-44 (1963). COLO. REV. STAT. § 153-16-3 (1963) contains similar provisions for property bequeathed or devised to a charitable trust.

[161] See generally Kemp, *Recent Colorado Legislation Greatly Enhances the Utility of Testamentary and Inter Vivos Life Insurance Trusts,* 32 ROCKY MT. L. REV. 382, 386, for a discussion of possible problems of construction which might be raised in future litigation.

[162] VANCE, INSURANCE § 119 (3d ed. 1951); 50 HARV. L. REV. 511 (1937).

[163] Hawley, *The Use of Life Insurance in Planning Small Estates,* 25 ROCKY MT. L. REV. 149, 160 (1953).

[164] Sigal v. Hartford Nat'l Bank & Trust Co., 119 Conn. 570, 177 Atl. 742 (1935); *In re* Albert Anderson Life Ins. Trust, 67 S.D. 393, 293 N.W. 527 (1940); 46 HARV. L. REV. 818 (1933).

beneficiary of the policy, immediately becomes the trustee of his interest as beneficiary. He may be designated in the beneficiary provisions of the policy as trustee, or he may be a beneficiary who agrees with the insured to hold his interests in trust.[165]

If the insured has no right to change the beneficiary, there is no question but that the trust is not testamentary, since the trustee has indefeasibly vested rights as beneficiary of the policy.[166] Where the insured does have a right to change the beneficiary of the policy, the minority view follows the theory which supports revocable trusts; that is, the beneficiary has a vested right, even though subject to being divested, which he holds in trust.[167] While a majority of jurisdictions adopt the view that the beneficiary of the policy has a mere expectancy interest which will ripen into a property right only upon the insured's death without his having changed the beneficiary, this expectancy interest is consistently, nevertheless, found to be a sufficient right to constitute the res of a valid inter vivos trust.[168]

Insurance trusts are valid in Colorado,[169] even if there is a right to change the beneficiary of the policy or to revoke the trust.[170] Colorado has passed legislation designed to enhance and facilitate the creation of insurance trusts (and trusts of proceeds payable under other contractual arrangements), providing that the owner of the policy may designate as beneficiary of the policy a trustee named in any inter vivos or testamentary trust existing at the time of such designation.[171] The statute provides that it is not necessary to the validity of such a trust that there be any trust corpus other than the right to receive the designated benefits. Provision is also made for the designation as beneficiary of a trustee who is named or who is to be named in, or ascertainable under, the will of the person making the designation.[172] It also provides that the terms of the trust agreement shall control the extent to which the proceeds of the insurance shall be subject to the debts of the insured if paid to such a trustee.[173]

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[165] 1 SCOTT, TRUSTS § 57.3 (2d ed. 1956).

[166] VANCE, INSURANCE § 106 (3d ed. 1951); Vance, *The Beneficiary's Interest in a Life Insurance Policy,* 31 YALE L.J. 343, 344 (1922).

[167] Metropolitan Life Ins. Co. v. Woolf, 138 N.J. Eq. 450, 47 A.2d 340 (1946); Fidelity Title and Trust Co. v. Graham, 262 Pa. 273, 105 Atl. 295 (1918); VANCE, INSURANCE § 108 (3d ed. 1951).

[168] Grimm v. Grimm, 26 Cal. 2d 173, 157 P.2d 841 (1945); Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P.2d 653 (1954); VANCE, INSURANCE § 108 (3d ed. 1951).

[169] Bosma v. Evans, 96 Colo. 504, 44 P.2d 511 (1935); Fee v. Wells, 65 Colo. 348, 176 Pac. 829 (1918).

[170] Brown v. International Trust Co., 130 Colo. 543, 278 P.2d 581 (1954).

[171] COLO. REV. STAT. § 153-19-1 (1963), as amended, Colo. Sess. Laws 1964, ch. 39, § 437, at 378.

[172] *Ibid.*

[173] COLO. REV. STAT. § 153-19-1(7) (1963).

Thus, even the man of modest means may arrange a trust during his lifetime for what may be the largest asset he leaves without its being testamentary in nature and unfettered by the claims of his creditors.

IV. Other Considerations

A. *The Rule Against Perpetuities*

The rule against perpetuities is in effect in all states as the common law rule except as modified by statute.[174] The rule was made applicable in Colorado by a statute adopting the common law of England.[175] Professor Gray states the rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[176] The Colorado court, in some earlier cases, seemed to graft onto the common law rule the provision that the gestation period is allowed as an automatic extension of the gross period of the rule.[177] However, it would seem that this unwarranted modification was unintentional, and that Colorado follows the rule as stated by Professor Gray.[178]

The rule is applicable to equitable interests as well as legal interests.[179] Therefore, the drafter of the inter vivos trust must always keep it in mind when drafting the dispositive provisions of the trust. Colorado applies what has been called "Gray's remorseless construction"[180] by ascertaining first whether the interest under consideration is vested or contingent; and, if contingent, the rule is then applied "remorselessly."[181]

There is a special question with regard to revocable trusts; namely, when does the rule begin to run? Does it commence to measure the period from the date of the creation of the trust, or, on the other hand, from the date of the death of the settlor, when his power to revoke ceases? The policy underlying the rule is to prohibit

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[174] GRAY, THE RULE AGAINST PERPETUITIES § 200 (4th ed. 1942).

[175] COLO. REV. STAT. § 135-1-1 (1963).

[176] GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[177] *In re* Tritch's Will, 1 Colo. (Nisi Prius) Dec. 42, 44 (1900); Chilcott v. Hart, 23 Colo. 40, 59, 45 Pac. 391, 398 (1896).

[178] Gray's definition was noted with approval in Miller v. Weston, 67 Colo. 534, 539, 189 Pac. 610, 612 (1920). Though after *Miller* there was again mention of the fraction period in Gregory v. Colorado Nat'l Bank, 91 Colo. 172, 175, 13 P.2d 273, 274 (1932), it was only "in cases of posthumous birth" and not as an automatic extension. Dean King felt the courts always meant only to state the common law rule which permits the inclusion of *actual* periods of gestation. KING, FUTURE INTERESTS IN COLORADO 109 (1950).

[179] 1 SCOTT, TRUSTS § 62.10 (2d ed. 1956).

[180] GRAY, THE RULE AGAINST PERPETUITIES § 629 (4th ed. 1942) ("[E]very provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.").

[181] Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 29, 353 P.2d 385, 389 (1960), noted in 33 ROCKY MT. L. REV. 252 (1961).

the creation of contingent future interests with remote vesting which would fetter the marketability of property for too long a period.[182] Professor Scott is of the opinion that the policy of the rule is not violated if the rule begins to run only at the settlor's death;[183] other authorities,[184] and what is apparently the sole case on the point take the same position.[185]

Since the revocable inter vivos trust serves as a dispositive instrument, the drafter must keep the rule in mind. Once the problem of when the rule begins to run has been determined from the nature of the instrument, the rule's application under the revocable trust will be the same as under any other dispositive instrument.[186]

B. *Manner of Revocation*

A trust is not revocable unless the power to revoke is expressly reserved in the trust instrument.[187] While it is clear that the trust is valid if such a power is reserved, the question of the effective method of revocation remains. It would seem to be insufficient simply to manifest an intention to revoke. Rather, the trust may be revoked *only* in the manner specified in the trust instrument.[188]

C. *The Statute of Frauds*

By statute in Colorado any trust "concerning lands, *or in any manner relating thereto*" must be created by an instrument in writing in order to be valid.[189] Of course, a trust prepared by an attorney would invariably be evidenced by a formal trust instrument whether or not any interest relating to land were involved. Partial performance will take an oral trust from the operation of the statute.[190]

With regard to assignments of interests in trusts, Colorado provides by statute that any assignment or grant of any existing trusts "in lands, goods or things in action" shall be void unless in writing.[191]

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[182] Barry v. Newton, 130 Colo. 106, 114-15, 273 P.2d 735, 740 (1954); GRAY, THE RULE AGAINST PERPETUITIES § 2 (4th ed. 1942).

[183] 1 SCOTT, TRUSTS § 62.10(1) (2d ed. 1956).

[184] GRAY, THE RULE AGAINST PERPETUITIES § 524.1 (4th ed. 1942); Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638, 662 (1938).

[185] Manufacturers Life Ins. Co. v. Von Hamm-Young Co., 34 Hawaii 288 (1937), noted in 51 HARV. L. REV. 172 (1938).

[186] For a discussion of Colorado cases, see KING, FUTURE INTERESTS IN COLORADO, Ch. 7 (1950).

[187] Smith v. Simons, 99 Colo. 227, 230, 61 P.2d 589, 590 (1936).

[188] Brown v. International Trust Co., 130 Colo. 543, 546, 278 P.2d 581, 583 (1954) (where trust instrument provided for revocation by writing delivered to trustees in the settlor's lifetime, revocation could not be by will).

[189] COLO. REV. STAT. § 59-1-6 (1963); Kennedy v. Bates, 142 Fed. 5 (1905); Griffith v. Sands, 84 Colo. 456, 271 Pac. 191 (1928); Agnew v. Agnew, 57 Colo. 81, 185 Pac. 259 (1919); Farrand v. Beoshoar, 9 Colo. 291, 12 Pac. 196 (1886).

[190] Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957); Vandewiele v. Vandewiele, 110 Colo. 556, 136 P.2d 523 (1943).

[191] COLO. REV. STAT. § 59-1-18 (1963).

D. *Tax Aspects of the Revocable Living Trust*

There are no tax advantages to be gained from the use of the revocable trust.[192] However, neither are there any tax disadvantages, for all of the tax saving benefits given under the federal and state revenue codes can be utilized through the use of a revocable trust, as well as through the use of a will.[193] No gift tax will be paid on the inter vivos transfer of property to the trustee, since the gift, because of the power of revocation, is incomplete.[194] The transfer will not suffice to take the property placed in trust from the settlor's gross estate for federal estate tax purposes because of the aspect of revocability.[195] If the settlor reserves the income from the trust for life, he will of course be taxed on the income received.[196] With regard to the Colorado Inheritance Tax, it is provided that where there is a power in a deed of trust to revoke the trust the property in the trust at the settlor's death is taxable to the settlor's estate to the extent of the unexercised power to revoke.[197]

V. Advantages of the Revocable Inter Vivos Trust

There are a number of advantages of the revocable inter vivos trust. A settlor may retain control and enjoyment of his property for life, with the advantages of professional management, knowing he has created a dispositive scheme which will continue to operate without interruption upon his death.[198] The settlor may "keep his hand in" by the retained powers, even serving as a trustee.[199] The settlor has the opportunity to see the trust, and the trustees, in operation; hence it allows him to see how his post-death arrangement for the administration of his estate will operate.[200] A will can never afford this chance. Because of the lack of formalities in the creation of a trust,[201] it is less likely to invite attack by heirs of the settlor.[202] The revocable trust is a good arrangement to provide in advance for

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[192] Casner, *Avoidance of Probate,* 60 Colum. L. Rev. 108, 112-13 (1960) ("Thus the use . . . of an arrangement to avoid probate when . . . [the owner] retains control until his death must find its attractions in reasons other than avoidance during . . . [the owner's] lifetime of federal income taxes and avoidance on his death of federal estate taxes.").

[193] Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 Dicta 333, 341 (1960).

[194] Treas. Reg. § 25.2511-2(c) (1958).

[195] Int. Rev. Code of 1954, §§ 2036, 2038.

[196] Int. Rev. Code of 1954, §§ 676-77.

[197] Colo. Rev. Stat. § 138-3-10 (1963).

[198] Shattuck & Farr, An Estate Planner's Handbook 85 (2d ed. 1953); Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 Dicta 333 (1960).

[199] 1 Scott, Trusts § 57.6 (2d ed. 1956); Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 Dicta 333, 342 (1960).

[200] King, *Trusts as Substitutes for Wills,* 14 Rocky Mt. L. Rev. 1, 5 (1941).

[201] *Id.* at 4-5.

[202] Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 Dicta 333, 334-35 (1960).

the possible incapacity of the settlor, avoiding the concommitant necessity for a conservatorship.[203] It provides a means, as any trust, of protecting the beneficiaries from their own indiscretion, and in the case of minors may eliminate the necessity for the appointment of a guardian.[204]

Perhaps the most notable advantage of the revocable trust is the avoidance of probate for the property constituting the res of the trust. By avoiding probate the estate is saved executor's fees, the executor's attorney's fees and court costs,[205] all of which run between five and ten per cent of the value of the probate estate in Colorado.[206] The publicity incident to probate is also avoided since the trust is not a matter of public record as is the will and its attendant probate papers.[207] The delay of probate is also absent.[208]

If the trust encompasses business enterprises of the settlor, they may continue to operate under the guidance of the trustees without interruption upon the settlor's death. This result cannot be obtained by the use of a will, since an executor's duty is to act as a short-term fiduciary, winding up the operation of businesses and closing the estate.[209]

It has been asserted that advantage also stems from the subjective practice of attorneys to make wills stereotyped in practice and to use greater imagination and ingenuity in the drafting of trusts.[210]

An important advantage is that inter vivos trusts are not subject to court accounting and control procedures.[211] This is true even if the

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[203] SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK 86, 87 (2d ed. 1953).

[204] *Id.* at 189.

[205] While there may be transfer taxes on stock placed in trust (Internal Revenue Code Section 4321), they would not be substantial enough to offset the gain achieved by avoiding probate. Casner, *Estate Planning — Avoidance of Probate,* 60 COLUM. L. REV. 108, 114 (1960).

[206] Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 DICTA 333, 336 (1960); Rea, *Election to Take the Statutory Share,* 29 ROCKY MT. L. REV. 506, 541 n.201 (1957).

[207] Though a copy of the trust must be filed in tax offices, they are not open to public scrutiny as are probate files. Meyer, *Non-Tax Advantages of the Revocable Trust,* 37 DICTA 333, 336 (1960). Of course, there may be those to whom publicity concerning their financial affairs following death is unimportant, but who are extremely reluctant to divulge information to attorneys or trustees while alive.

[208] King, *Trusts as Substitutes for Wills,* 14 ROCKY MT. L. REV. 1, 4 (1941).

[209] 1 SCOTT, TRUSTS § 6 (2d ed. 1956): Although an executor might continue a business for a short while, he could not do so for the length of time or with the facility of a trustee. In Calkins, *Administration of Testate Estates,* 29 ROCKY MT. L. REV. 557, 564-65 (1957), it was stated that "if the decedent was engaged in a business . . . a court order authorizing its continuance should be obtained. The right to continue the business, however, is limited to a 'reasonable time,' in order to provide for efficient liquidation [Colorado Revised Statute section 153-10-34 (1963)]. This would seem to require the disposal of the business by the executor, unless the will gives him power to continue and distribute it on closing the estate."

[210] SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK 89 (2d ed. 1953).

[211] *Id.* at 195.

trust receives a pour-over increment from the will of the settlor.[212] Testamentary trusts are subject, however, to court control with annual accounting requirements, unless it appears to the court that it was not the intention of the testator that the court should not continue the administration of the estate.[213]

At least with regard to personal property, the law of inter vivos trusts can be the law of the most liberal jurisdiction with regard to such trusts, if desired by the settlor, for it has been held that the law of the situs of the trust property controls the validity and operation of the trust, and not the law of the settlor's domicile.[214] While at present Colorado seems among the most liberal of jurisdictions with regard to the validity of revocable trusts, this factor could be of importance if the position were reversed.

CONCLUSION

The *Von Brecht*[215] case unreservedly carries the Colorado court's imprimatur of validity for a trust created by a formal trust instrument which reserves a life estate to the settlor and a power to revoke or amend the trust. The opinion acknowledges that the trust may retain its inter vivos nature if the settlor also reserves "additional powers if he does not go too far." It specifically held that the reservation by the settlor of the "additional power" to veto investments proposed by the trustee when the amount involved was in excess of $1,000 "did not go too far."

It is impossible to say what "additional powers" the court had in mind when it appended its warning. Indeed the cautionary phrase may indicate simply a feeling that somehow a settlor might retain so much control the trust would be testamentary in nature.

Concerning "additional powers" which relate to the settlor's control over investments, clearly no meaningful distinction can be made between the control by the settlor over investments involving in excess of $1,000 which existed in *Von Brecht,* and control over all investments regardless of value. Similarly, no meaningful distinction can be made to depend upon whether the settlor merely has a veto power over investment decisions proposed by the trustees as in *Von Brecht,* or whether, on the other hand, investment initiatives must come from the settlor, and then be executed by the trustee. Thus, projecting from the *Von Brecht* case, in Colorado a settlor should be able to retain complete control over all investment decisions, in addi-

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[212] COLO. REV. STAT. § 153-5-44 (1963).

[213] COLO. REV. STAT. § 153-14-11(3) (1963), as amended, Colo. Sess. Laws 1964, ch. 39, § 432 at 378.

[214] Hanson v. Denckla, 357 U.S. 235 (1958), noted in 72 HARV. L. REV. 695 (1959).

[215] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

tion to his life estate and the power to revoke and amend, without destroying the nontestamentary nature of the trust.

One can imagine a trust which would allow the settlor to retain possession of the trust assets, although legal title has been transferred to another as trustee. The beneficiaries other than the settlor would, of course, have received at the creation of the trust presently vested interests despite the retained power to revoke. Possession by the settlor is not in derogation of their equitable title. Indeed, possession may represent nothing more than the only effective way the settlor may enjoy a retained life estate, for example, if the trust contains a home, paintings, furniture or similar types of property. Surely then, retained possession is not the reservation by which the settlor might "go too far."

In order to describe the outer limits of the degree of control that may be retained, assume the revocable instrument provides that the trustee shall hold title to the trust property for the settlor for life with provisions for disposition after his death to others, and also provides that the settlor shall retain possession of the trust assets, keep the trust records, and make all decisions, both discretionary and ministerial, concerning the operation of the trust. The trust, however, is "active" in the sense it will not be executed by the statute of uses, because the trustee will be required to participate by signing deeds and other title documents, insurance applications, and similar papers requiring the assent of the holder of the legal title to the trust assets. The settlor has presently conveyed defeasible equitable interests to the beneficiaries of the trust. There has been an inter vivos transaction. The reserved control over the trust assets is not in derogation of that present legal title.

Clearly a settlor may create a revocable trust by self-declaration of trust, as well as by transfer of property to a third person as trustee. The settlor would, as trustee, have complete dominion over the trust assets. He could also retain a life estate. One may be both the trustee and a beneficiary of a trust. So long as beneficial interests exist in others no merger of legal and equitable title takes place.[216] True, the settlor holds dominion in a fiduciary capacity in such a situation. He must exercise his powers as trustee in compliance with his fiduciary duties. However it would seem that the settlor who creates a trust by transfer to a third person, but who retains virtually complete control over and possession of the trust assets, might be held to a fiduciary standard also. One who knowingly participates in a breach of trust, even though not himself a trustee, is liable to the beneficiaries of the trust.[217]

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[216] 1 SCOTT, TRUSTS § 99.1 (2d ed. 1956).
[217] 3 *id.* § 326.5.

The requirements of the statute of wills are designed to guarantee that the proferred document is in truth the will of the decedent. The fraud which the statute is designed to prevent is the offering of a document which is, either in whole or in part, not the will of the testator.

In any situation involving an inter vivos trust, there is the chance the document signed by the settlor will be changed after his death, and an altered or totally new document substituted. The extensive safeguards of the statute of wills would not be available to deter or assist in the discovery of such a fraud. The point is, however, that the likelihood of such a fraud is no greater where the settlor has reserved extensive control over the administration of the trust than where he has not. Indeed, it is no greater than that which exists where the trust is irrevocable and the settlor has no control over the administration of the trust or over the trust assets.

If the owner of property simply gives possession of it to another, with directions as to its disposition at his death if the latter still holds it at that time, the relationship of principal and agent exists. The agency terminates automatically at the death of either the principal (owner) or the agent (possessor).[218] No property interests were intended to pass to those covered by the post-death dispositive scheme until after the owner's death. The attempted post-mortem disposition is clearly testamentary in nature and invalid for failure to comply with the statute of wills. Professor Scott says that "[i]t would seem that the legal title is in his agent."[219] This may be true if the owner transfers legal title to an agent simply in order that the agent might carry out the purposes of the agency, for example, a sale. In such a situation the owner is not conveying equitable title to others. Indeed, he may be retaining it himself. However, if the owner conveys legal title to another whom he designates as his "agent," but it is made clear that the "agent" is only to have naked legal title to the property and is to hold such title for other designated persons, a trust has been created. Present equitable property interests have been created in the "other designated persons." If such is the intent, of course, it makes no difference that the transferee has been denominated an "agent" rather than a "trustee." The intention of the transferor is to convey presently an equitable interest in the transferred property to the designated beneficiaries and he has taken the accepted steps to accomplish his purpose. A distinction exists, which should be recognized, between a true agency with mere possession, and an "agency"

[218] 1 *id.* § 57.2; RESTATEMENT (SECOND), AGENCY §§ 120-21 (1958).

[219] 1 SCOTT, TRUSTS § 57.2, at 450 (2d ed. 1956).

with legal title in the "agent" and equitable title in other designated persons. The latter are beneficiaries of a valid inter vivos trust.

Thus, it can be argued that the conceptual basis for supporting revocable inter vivos trusts should be sufficient to support any inter vivos disposition of legal title, or any self-declaration of trust, where it appears the settlor intended to create thereby, present interests in those beneficiaries designated to take following his death. Retained possession of or control over the trust property, whether or not in a fiduciary capacity, is not inconsistent with the concept that there are present interests in the beneficiaries other than the settlor.

It is unlikely this analysis of the theoretical support for the validity of revocable inter vivos trusts will cause attorneys to be so bold as to advise their clients they may create a trust by conveying legal title to a trustee, keeping the trustee available only to sign deeds, insurance and other papers. Nevertheless, it seems that logic and presently existing legal doctrines could support the valid inter vivos nature of such a trust.

Clearly Colorado attorneys may offer their clients the prospect of a revocable trust, with a reserved life estate and virtual control over investments, as a will substitute. It will provide a flexible estate planning device, achieving living and post-death objectives desired by the settlor. Currently, problems would persist concerning marital rights of a surviving spouse and the rights of decedent's creditors. If the legislature continues to favor the protection of a spouse's and a creditor's claim to a decedent's "property," legislation should be enacted for the protection of both. Technical distinctions concerning what assets constitute decedent's "property" available for the surviving spouse and creditors, which are sufficient to obviate the necessity of complying with the statute of wills, are not potent enough to warrant thwarting these social policies.