Florida Law Review

Volume 21 | Issue 1 Article 2

June 1968

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THE REVOCABLE TRUST: A MEANS OF AVOIDING PROBATE IN THE SMALL ESTATE?

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One of the apparent casualties in the modern quest for speed and efficiency is the usage of the probate court to transmit wealth at death. The inter vivos revocable trust has been suggested as a possible alternative to conventional probate court procedures. It is not feasible to consider here all potential applications of such a trust to every type of estate. Estates are too varied in quantity and quality to permit such generalizations in an article of limited scope. There is, then, no satisfactory answer to whether the trust is always a desirable alternative to conventional probate court procedures, but proper consideration can be given to the more manageable question of whether the trust, alone or in combination with other devices, is an appropriate substitute for probate court proceedings in an estate of specified size and quality.

This article undertakes to suggest some major shortcomings of contemporary probate procedures with particular concern for their impact on the small estate[1] and to examine the effectiveness of the revocable trust with the settlor as trustee in circumventing these shortcomings.[2]

Any evaluation of a scheme designed to avoid the probate court involves an analysis of why one desires to avoid that court as it is now constituted. "Probate" in the usual sense "is the judicial establishment of an instrument as the last will of a competent testator, executed in the manner required by the statute."[3] The term can have a broader meaning and as used here refers to all probate court activity from production of the will to discharge of the executor whereby a judicially supervised scheme seeks to give effect to the wishes of the testator. Despite all the dissatisfaction with it and all the attacks mounted against it, probate contains very substantial advantages not lightly cast out in a weighing of the relative value of the revocable trust and other methods. Most important of these advantages, especially when the selection

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1. The small estate is defined for purposes of this article as a gross estate of less than $60,000, in accordance with the provisions of INT. REV. CODE of 1954, §2052.

2. This consideration is grounded on certain premises about the state of probate administration today, the nature of the trust device itself, and the nature of limitations on the utilization of the device as a will substitute. These premises are: (1) existing probate administration has become sufficiently burdensome on the small estate to justify serious attempts at will substitutes; (2) the revocable inter vivos trust device itself is unremarkable, except that if utilized as considered here the settlor will always himself be the trustee of the trust; (3) there is no taxation advantage in the use of the revocable trust as a will substitute; (4) the revocable trust is impractical as a will substitute in the small estate if the settlor intends the trust to continue in being beyond his own lifetime, other than for a short period immediately following his death for certain winding up purposes; (5) the use of the trust as a will substitute is impractical if there is any circumstance present requiring the appointment of a personal representative for the estate. INT. REV. CODE of 1954, §2038, provides that reservation by the donor of the right to revoke the trust requires inclusion of the trust property in the gross estate.

3. T. ATKINSON, WILLS 480 (2d ed. 1953).

is between probate and the revocable trust, is the advantage of the probate proceeding as a judicial determination with all this implies in factfinding, thoroughness, fairness, and most importantly, finality.[4] The revocable trust, if successfully used as a will substitute, ought never to be the subject of a court proceeding and thus cannot achieve the certainty of judicial approval. Probate, when finally completed, carries with it the assurance that title to land is again secure and available to commerce, creditors are paid or barred,[5] and provision has been made for unknown or infant heirs.[6] In short, all the blessings of res judicata settle over the matter and in so doing dispel the doubts about property arising from the death of its owner.[7] Contributing to this security is a highly developed case law in all jurisdictions. This is reasonable and desirable, and an effective argument can be made that probate best solves the problem of transfer of wealth from the dead to the living for this reason alone. While such an argument is sound in the case of many estates, the fact is that the disadvantages attendant on probate are often so substantial as to erode or even frustrate the beneficial purpose sought to be obtained, especially if the estate is small, uncomplicated, and relatively unable to bear the inherent burdens of probate. It is this condition that justifies the serious consideration of will substitutes.

The revocable trust is by no means the sole possibility for avoidance of the probate court.[8] But of various means suggested to achieve that end, thereby evading the court's twin specters of delay and expense, none has achieved more popular attention in recent times than this trust. Ironically, much of this prominence must be attributed to the efforts of a layman who, in 1965, achieved what must be one of the surprises of the decade in book publishing.[9] While Dacey's book may have questionable ramifications for many, largely because of its "do it yourself" forms and directions (eliminating not only probate, which may be harmless, but eliminating the professional draftsman as well, which may be disastrous to the estate),[10] an indisputable merit of the book has been its function in exposing dissatisfaction with probate administration extending beyond the legal profession itself. The most immediate significance of this reaction is that it lends support to today's efforts at probate reform[11] and suggests the need for a closer look at the

4. Bosnak v. Murphy, 28 Ill. App. 2d 110 (1960).

5. FLA. STAT. §§733.16-.211, .42, 736.03 (1967).

6. FLA. STAT. §744.03 (1967).

7. T. ATKINSON, *supra* note 3, at 798.

8. One way often used is the joint ownership of property. A significant disadvantage of this in a mobile society is the widely varying positions of state law on the effect of such ownership. For an interesting and negative appraisal of joint ownership as a will substitute see Wehringer, *Joint Ownerships—No Substitute for a Will*, 39 N.Y. ST. B.J. 301 (1967).

9. N. DACEY, HOW TO AVOID PROBATE (1967).

10. The Dacey book includes a number of trust "forms," which presumably one would be able to execute properly after having read the accompanying text. *See* Manwell, Book Review, 54 CALIF. L. REV. 2189 (1966) assessing this and other aspects of the book in a decidedly critical manner.

11. There is presently in preparation a revision of the 1946 Model Probate Code. In excerpts from remarks before the Committee of the Whole, Nat. Conf. of Comm. on

revocable trust as an effective device in competent hands for providing a possible solution to the probate problem. The basic question is whether this device is a reasonable will substitute in even the small, relatively uncomplicated, estate.

CONTEMPORARY PROBATE DIFFICULTIES

Implicit in this evaluation is the suggestion that something is wrong with the methods usually employed in the transmission of wealth from a decedent to his successors. Even a cursory consideration of all the traditional means used is beyond the scope of this article, which examines only a few of the problems of probate administration alone, but generally, it may be stated that all the deficiencies of testate administration are found in acute form in intestate administration.[12] Statutory provisions for widows and minor children often involve only a fraction of the estate and are subject to hazards and limitations of after-the-fact solutions. Family settlements attempted without judicial intervention are questionable at best and require a consensus not always available among interested persons, though such settlements are favored when possible.[13] Statutes dispensing with administration, even if the prerequisites are met, are usually so restrictive in terms of estate size and quality as to be virtually worthless when utilized alone.[14] However, they can be significant if used in conjunction with the trust as is suggested later in this article. So, of all the most frequently used methods, the execution of a will, its probate, and the carrying out of its terms under court direction may be the most preferable. However, some have resorted to the revocable trust as a potentially better method. That this instrument is sometimes valuable as a supplement to the will is not questioned. A more difficult question is whether it can be used successfully as a will alternative to circumvent the probate court.

Today's most worrisome and potentially lethal shortcoming of probate is its increasing irrelevance to modern modes of wealth. An abundant concern with real estate title and its protection is reflected in much of modern probate laws; indeed, innumerable meaningless distinctions between realty and personalty permeate probate law.[15] Originally, real estate was not subject to probate[16] and consequently wills devising realty were not probated. But statutes

Uniform State Laws, the motivation for this effort is explained by project director Richard V. Wellman in 12 LAW QUADRANGLE NOTES 4 [U. Mich.] (1967).

12. The reason is, of course, that permissible waivers, includible in a will, are not present so there is no question of avoiding bond premiums, advertisements, inventories, public sales with notices and orders, and notices to all possibly interested parties — all of which are expensive.

13. Ortman v. Kraemer, 190 Kan. 716, 378 P.2d 26 (1963); *In re* Frances' Estate, 153 Fla. 360, 14 So. 2d 803 (1943); Engle v. Engle, 209 Mich. 275, 176 N.W. 547 (1920).

14. *See* FLA. STAT. §735.01 (1967); MINN. STAT. ANN. §525.51 (1959); FLORIDA PROBATE PRACTICE ch. 16 (Fla. Bar Continuing Legal Educ. Practice Manual No. 11, 1968). *See also* Wrigley, *The Small Estates Act of New York*, 30 BROOKLYN L. REV. 19 (1963).

15. MODEL PROBATE CODE §§123, 143, 183, 152, 161, 167 (Simes 1946).

16. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 110 (1943).

have increasingly subjected real estate to payment of debts of decedents[17] and have, in some instances, placed a right of possession of real estate in the personal representative.[18] In so doing, probate codes have elaborated their provisions for handling realty. Yet this approach reflects a relative insensibility to the rapid shift from land to other forms of property as the principal source of wealth. Certainly the stock certificate is a more realistic representative of a contemporary estate's wealth than is the deed, and an even more accurate representation of that wealth is the insurance policy. Life insurance has, since the inception of substantial income taxation, become the most likely source of the small estate's assets.[19] This trend has contributed heavily to one of the most critical developments in the field of estates and trusts in this century — the emergence of nonprobate means of gratuitous transfer of wealth at death. Development has not been entirely due to conscious design, but rather it has evolved through a fundamental transformation of the source and type of wealth occasioned by sophisticated economic and political developments of recent decades. Irrespective of motive or stimulus, a tangential aspect of today's dominant wealth forms has been the rise of the possibility of a feasible avoidance of probate. Pension plans, insurance proceeds, and joint ownership all lend themselves to the hope of escaping the toils of probate. Such a prospect may prove illusory since none of these approaches has sufficient individual breadth to accomplish this purpose. Insurance policies and pension plans are obviously limited by the includable assets in the plan or policy, since one cannot transform his entire wealth to insurance.[20] Joint ownership is limited by the irrevocability of the conveyance by the owner, once made, and by its susceptibility to widely varying constructions among jurisdictions.[21] Nonetheless, one evaluating a small estate that consists largely of these assets is impressed with the possibility of avoiding probate entirely since the bulk of the estate, by its very nature, is not subject to probate. But the problem remains of what to do with the other estate assets, especially if they exceed the "no administration necessary" criteria. Here is an area where the trust may be used to good effect.

A second serious deficiency of probate is that it suffers from the ailments of old age — a sort of arteriosclerosis of method that renders it both philosophically and functionally unable to cope with the insistent demand of modern society. Probate abhors speed. In fact, it finds merit in controlled delay.[22] With its retention of the pattern of a more leisurely era when wealth was cemented in solid, stable items of slowly changing value, probate had no need for quick solutions. It certainly provided few solutions and indeed

17. GA. CODE ANN. 113-1509 (1959); MODEL PROBATE CODE §§62, 81, 84 (Simes 1946). Statutes in all states except Virginia permit land to be sold for payment of debts. 3 AMERICAN LAW OF PROPERTY §14.27, at 676-77 (1952).

18. *E.g.*, FLA. STAT. §733.01 (1967).

19. A. CASNER, ESTATE PLANNING 7 (3d ed. 1961).

20. T. ATKINSON, *supra* note 3, at 161.

21. Wehringer, *supra* note 8.

22. Professor Atkinson estimates that 13 to 14 months are required as the minimum time for settlement of an estate. T. ATKINSON, *supra* note 3, at 575. This period is likely to be substantially longer when a federal estate tax return is involved.

indulged in such incredible sloth as to offend even the temperaments of that time.[23] To the extent that probate retains these characteristics, it is in expanding conflict with that value considered more important by each succeeding generation of the Twentieth Century — speed. The generous time limitations granted by probate codes to accomplish progressive steps in the procedure are undoubtedly designed to insure thoroughness. However, they frequently facilitate unwarranted delay in settlement of the most uncomplicated estates. This deliberate policy of measured delay, relatively unimportant in past time, may prove such a frustrating experience in thwarting the high speed efficiency values of modern life that it will ultimately cause the collapse of the whole probate system as presently constituted.

Almost as damaging as delay are those probate procedures originally designed to assure fair and honest estate settlement, but which today must be regarded as cautious to the point of absurdity. Typical of these procedures is the rule requiring personal service of certain kinds of notice on infant heirs of an estate.[24] In this situation, the serving office or attorney under a strict construction may find himself in the position of actually placing a copy of the legal document in the crib of a small child out of fear that the service may otherwise be inadequate to satisfy the statute.[25] Commendable as the statute may be in its protective function, the application of its literal commands may lead to a ludicrous situation in such occasions. Equally absurd is the statute requiring the attorney or some other representative of the estate to read the contents of a legal advertisement giving notice of intention to sell estate assets from the courthouse steps — often to nonexistent listeners.[26] Yet the penalty for failure to conform may be a void sale.[27]

Woven into this fabric of activity, and especially into its slowness and irrelevancy, is the element of expense. There is, for example, the not infrequent situation when the personal representative must operate a business for a short time in the small estate in order to make the most beneficial disposition of it.[28] In such a situation, when the statute calls for a substantial charge to the probate court for each "voucher" written by the personal representative, including those of the business operation, the total of such fees alone can make determined inroads into the assets of the small estate.[29] Of course, this

23. Charles Dickens effectively, if tediously, castigated the whole probate system in the England of his day with his mythical case of *Jarndyce v. Jarndyce* in which virtually the whole estate is devoured by court costs and lawyers fees in years of pointless litigation. C. DICKENS, BLEAK HOUSE (1853).

24. GA. CODE ANN. §81-212 (1959).

25. In Boardman v. Taylor, 66 Ga. 638, 648 (1881) the court said: "We say formality because personal service upon real infants like these — children but a few years old and wholly incapable of defending a suit — is a mere formality . . . . Still, while the act is on the statute book, it is the duty of the courts to regard and enforce it." Nevertheless, the court, while making this ominous statement, could not bring itself to enforce the statute in this case probably because of the obvious injustice such technical enforcement would have caused.

26. GA. CODE ANN. §113-1702 (1959).

27. Whitehurst v. Mason, 140 Ga. 148, 78 S.E. 938 (1913).

28. MASS. ANN. LAWS ch. 195, §7 (1955).

29. GA. CODE ANN. §§113-1410, 24-1716 (1959). The latter section provides a fee of

charge is insignificant when compared with the attorney and personal representative fees incurred in probate; even when these are fixed by statute.[30]

A fourth objection to probate administration is that legislatures, in their efforts to protect the property of the deceased and his intentions toward it, have often adopted the most restrictive and stringent measures for governing he acts of estate fiduciaries.[31] In general, this represents a curtailment of common law bounds of fiduciary discretion.[32] Such is the statute found in most jurisdictions requiring the posting of bond by the personal representative (when not relieved by the will) of double value of the estate.[33] The practical effect is to saddle an estate with a large bond premium without regard to the reliability of a particular personal representative or of his ability to respond in damages for improper conduct. In the same tradition, some statutes require court orders for a personal representative to sell estate personal property in the absence of specific powers in the will permitting this.[34] Again, here is a statutory modification of an inherent power in a personal representative at common law.[35] Careful draftsmen of wills have sought to avoid or at least to mitigate some of these harsh aspects of fiduciary law as to personalty by granting wide powers to the personal representative in the will itself. Often the will waives statutory requirements of public sales, filing of annual returns, posting of bonds, and making of inventories. But aside from the basic issue of the wisdom of stripping the estate of these statutory safeguards when the testator is no longer present to compare performance with expectation, there is the increasingly troublesome question of how far legislatures and probate courts should proceed in permitting a testator to fix the control that may be exercised over a personal representative by a court charged with the responsibility of overseeing the carrying out of the testator's wishes.[36] Hopefully, rising popularity of corporate fiduciaries, with their advantages in breadth of talent, financial responsibility, and wide access to information on economic matters, will permit a moderation of the more stringent limits of fiduciary activity and spare the testator the hard choice

20 cents per "voucher" filed in the Ordinary's office with an annual or final return; assuming the operation of a small business in the estate requiring the writing of 5,000 checks over a period of time for payroll et cetera, the voucher fees alone could total $1,000.

30. *See* FLA. STAT. §734.01 (1967); N.Y. SUR. CT. PROC. ACT §285 (1965).

31. W. WOERNER, AMERICAN LAW OF ADMINISTRATION §§498, 500 (3 ed. 1923).

32. *Id.* at §501. *See also* T. ATKINSON, *supra* note 3, at 28.

33. *See* MODEL PROBATE CODE 310-14 (app. A) (Simes 1946) on statutory requirements for bonds.

34. W. WOERNER, *supra* note 31, at 1093-96 & n.3. This is also the position of the *Model Probate Code*, which requires a petition for authorization before selling, mortgaging, or leasing personalty (§158) unless there is a power of sale in the will or unless there are enumerated special circumstances such as the presence of perishable property.

35. T. ATKINSON, *supra* note 3, at 664.

36. *See In re* Estate of Smith, 200 So. 2d 547 (2d D.C.A. Fla. 1967) in which the court refused to permit title to real estate to pass that had been sold under a general power of sale in a will but without a showing to the court of necessity to sell and without a court order to sell. *See* Comment, 20 U. FLA. L. REV. 422 (1968). *See also* McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941) where the court upheld a suit in equity for an accounting by an executor who allegedly committed acts of waste and mismanagement, despite a will provision relieving the executor from accounting for his acts and doings to any court.

between a too-liberal powers clause in his will and an overly rigid statutory scheme of fiduciary powers.

Finally, there is an inadequacy of the probate court, which undoubtedly contributes to the ineffectiveness of the entire system. The concept that any honest, well-intentioned citizen can perform effectively in the office of probate judge irrespective of his general or legal educational qualifications prevails in many jurisdictions.[37] This license to the nonlawyer, coupled with inadequate remuneration, has resulted in a mediocrity of ability in the office of probate judge. A system of lay judges in this and other courts may have met the needs of frontier America, but is inadequate for the needs of contemporary life. While there are notable exceptions in this regrettable pattern,[38] the excellence of performance in this post by the professional lawyer and the rare layman of exceptional ability only illustrates the inadequacy of the usual lay judge in undertaking to do that which he is literally unqualified by training to do.

Despite its inadequacies, the transmission of wealth at death can still be achieved through probate administration. But the very inadequacies mentioned – delay and fixed expense – fall heaviest upon the small estates because they are less able to bear waste and because it is more difficult to plan a suitable interim program for the probate administration period beneficial to those who will ultimately take when the estate is completed. In the small estate situation, the takers often need the bulk of estate immediately for support. This result is impossible through probate administration. For the small estate, then, the remedy must be found outside conventional probate administration.

THE REVOCABLE TRUST

Any consideration of a revocable trust calls for an attempt at a stated definition of the device. One of the most striking and immediately evident characteristics of the trust is the flexibility of the arrangements possible within its bounds. Here is its greatest strength, but here also is the difficulty of precise definition that is occasionally troublesome. Professor Scott has suggested that a precise definition of a term in the field of trusts, even if possible, is of little practical value and suggests that one simply describe the relationship in such terms as to make it comprehensible to others.[39] In that sense, the arrangement suggested here is that of a private express trust, inter vivos in nature and amendable and revocable at any time by the settlor alone. All the usual trust standards of separation of legal and equitable title, an identifiable res, and existence of fiduciary duties in respect to the res are present.[40] The only distinguishing characteristic of the trust as a suggested will substitute in the small estate is that the settlor would always act as trustee.

Though perhaps not as familiar as the tax-useful irrevocable short-term

37. *E.g.*, 22 county court judges in Florida's 67 counties are not lawyers. Editorial, 50 JUDICATURE 114 (1966).

38. 1 A. SCOTT, TRUSTS §2.3 (3d ed. 1967).

39. A. SCOTT, TRUSTS §2.3 (2d ed. 1956).

40. *Id.* at §§2.4, .5, .6, .7, .8.

trust,[41] the revocable trust has long been used to achieve a variety of purposes including the supplement of will provisions. It has, for instance, been often used by those who wish to receive the income from property without having to maintain personally that degree of skill and diligence necessary for the proper protection and investment of property.[42] This use has been an especially attractive utilization of the device for those older persons who are willing to bear the cost of a competent trustee in return for a release from the cares of management. Another purpose has been to set up a trial period in which trustee competence can be evaluated during the settlor's lifetime. Yet another benefit afforded through the trust is the opportunity to effect a firm settlement of the settlor's intent as to the ultimate disposition of the trust property, thereby discouraging potential litigants who may be more likely to challenge a recent testamentary disposition than a long-standing settlor-sanctioned living trust. Though sometimes employed to achieve this goal it is becoming increasingly doubtful that the widow's election of her share can be defeated through the use of an inter vivos revocable trust.[43]

Potential Limitations of the Trust as an Effective Will-Substitute

There are several impressive areas of potential concern in the use of the trust as a will substitute. Notably, there have been fewer attempts to avoid probate through use of the trust as a will substitute than as an instrument to supplement the will. This situation may be due in part to attorney unfamiliarity with the device. But a major additional reason is the diminishing yet real risk of knowing how far one may safely proceed in reserving settlor control without having the entire transaction declared invalid as an attempted testamentary transaction not in accordance with the Statute of Wills.[44] With such a construction, the effort could be defeated as nothing more than an agency or bailment arrangement.[45] The limitations on such relationships are obvious. The ultimate result, therefore, may be not only a failure to avoid the probate court, but a requirement of going there as an intestate estate, which is a more disastrous procedure than testate probate court administration. Thus, this problem deserves close scrutiny and may be so formidable a risk in some jurisdictions as to eliminate the trust as a viable will-alternative.[46] If the potential settlor cannot retain, during his

41. INT. REV. CODE OF 1954, §§671-77, sets out the circumstances under which the settlor might be taxed on trust income on the ground of dominion and control. Unless justification for taxing to the settlor can be grounded in these sections, the trust income cannot be taxed to the settlor on the basis of control and dominion.

42. N.Y. DECEDENT ESTATE LAW §§18-a, (1)3 (1909); PA. STAT. ANN. tit. 20, §301.11 (a) (1947). *But see* National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950).

43. Eipper v. Benner, 113 Mich. 75, 71 N.W. 511 (1897); A. CASNER, ESTATE PLANNING 145 (3d ed. 1961); W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

44. *See generally* A. SCOTT, *supra* note 39, §57.6, at 519.

45. Watson v. St. Petersburg Bank & Trust Co., 146 So. 2d 383 (Fla. 1962).

46. Some jurisdictions sanction the revocable inter vivos trust as a will substitute by statute to avoid the uncertainty arising from decisions following the Massachusetts case of McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 N.E. 465 (1909). That case, holding a revocable living trust testamentary and therefore void, was finally overruled by

lifetime, the significant prerogatives of property ownership in the trust res, then the trust is little better for purposes of avoiding probate than any inter vivos gift with reservation of life estate in the donor. Unfortunately, that arrangement is too limited in scope to afford any reasonable alternative to probate.

Courts dealing with the issue of retained controls in the settlor have not treated it uniformly, a fact that suggests the same type dangers inherent in the use of joint ownership to avoid probate.[47] There are essentially two approaches currently taken by the courts in this regard. One is a rather liberal view of how much control of the trust res can be retained in the settlor. This view, as applied in a fact situation of exceedingly broad control retentions, is illustrated by the Illinois case of *Farkas v. Williams*.[48] The issue was whether the settlor's retained control made this arrangement an attempted testamentary disposition in violation of the Statute of Wills. It is difficult to imagine what more could have been retained by the settlor in this case. Among other things, the settlor had the right to receive during his lifetime all cash dividends from the trust property; the right to change the beneficiary at any time; the right to revoke the trust at any time; the right, upon sale or redemption of any portion of the trust property, to retain the proceeds for his own use; and in addition, the right to act as sole trustee and, as such, the right to vote, sell, redeem, exchange, or otherwise deal in the stock that constituted the trust res. The court emphasized that these additional powers were reserved to Farkas in his capacity as *trustee*, and not in his capacity as owner. In upholding the validity of the trust and refusing to find an attempted testamentary disposition, the court's theory, typical of the more liberal courts on this question,[49] is that the formality of the trust instrument itself indicates a total familiarity of the settlor with the entire disposition and a total compliance with his wishes for his property. Thus, the purpose of the Statute of Wills is satisfied because the possibility of forgery or fraud is excluded. Consequently, the need for witnesses and formalities of execution is not present. The court finds that some present interest in the property has passed to the successor beneficiary at the time of execution of the trust agreement. Although this interest may be immediately divested by action of

National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944). But by then, the case had been followed elsewhere and had created substantial doubt as to the validity of a revocable trust when significant indicia of ownership of the trust res had been retained in the settlor. Wisconsin followed *McEvoy*. See Warsco v. Oshkosh Sav. & Trust Co., 183 Wis. 156, 196 N.W. 829 (1924) holding that the trustee is the mere agent of the settlor and the trust is invalid because there is no sufficient present interest transferred. Subsequently, this case was superseded by statute, which greatly liberalized the degree of permissible retained powers in the settlor. Laws of Wis. 1955, ch. 85, §231.205 (1). *See also* KY. REV. STAT. §394.010 (1928); IND. ANN. STAT. §6-509 (1953).

47. *E.g.*, the problem in a mobile society of varying positions from jurisdiction to jurisdiction on the question of how much control can be retained in the settlor.

48. 5 ILL. 2d 417, 125 N.E.2d 600 (1955).

49. In a similar vein, though not quite so extensive in retained powers as the trust in *Farkas, id.*, was the trust in Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956). The North Carolina court upheld the trust as valid against a contention that retained powers made it a testamentary attempt.

the settlor, it does exist until there is such amendment or revocation by the settlor. The fact, as in *Farkas,* that property will go to the remainderman at death of the settlor—life tenant if there is no revocation or amendment, is deemed by the court to be evidence that there has been a present creation of an equitable interest. Theoretically, the rights of the remainderman may be legally enforced against the settlor even if it is not feasible to enforce them inasmuch as the settlor could then revoke the trust and destroy the remainder interests.

Thus, those courts taking the more permissive view of the problem, as in *Farkas,* tend to ignore the issue of retained controls in the settlor. Rather, they look to the issue of whether the policy of the Statute of Wills to prevent fraud has been satisfied.[50] If the court is satisfied that this has been done by reason of the existence of a formal trust instrument or through other evidence, then the trust will probably be upheld against criticism premised on a theory of violation of the Statute of Wills.

The older and more conservative position has reflected a concern with the degree of control retained by the settlor of the trust in himself either as settlor or as trustee.[51] These courts have often found that a life estate in a settlor, coupled with unrestrained right to consume the trust res, to control trustee actions, to designate beneficiaries at death, and to amend or revoke the trust in limitless fashion is nothing more than a subterfuge—the effect of which is to avoid the Statute of Wills. The basic assumption of this view has been that an arrangement wherein the settlor has full control of the trust property and of the trustee in his fiduciary duties, is nothing more than an agency arrangement because there has been no significant divestment of ownership by the settlor and consequently, no transfer of a present interest, equitable or otherwise. This was the position of the original *Restatement of Trusts,*[52] since amended drastically in this respect.[53] The much criticized Florida case of *Hanson v. Denckla,*[54] which apparently represents the law in Florida on this subject,* adopts the conservative approach to the question of retained controls. While not concluding that a life estate in income coupled with power of appointment by deed or will, plus power to revoke or amend

50. Apparently the theory is that if an *instrument* passes title to a trustee for a purpose purportedly beneficial to persons other than the settlor, then even if that interest is revocable, the settlor's control over the trustee in no way nullifies interests defined by the instrument. *See* discussion in Comment, *Trusts—Broad Powers of Control Right of Revocation, and the Retention of Income by the Settlor Held Not To Invalidate Inter Vivos Trust,* 5 DEPAUL L. REV. 153 (1955).

51. *E.g.,* Ferry v. Bryant, 19 Tenn. App. 612, 93 S.W.2d 344 (1935); McGillivray v. First Nat'l Bank, 56 N.D. 152, 217 N.W. 150 (1927).

52. RESTATEMENT, TRUSTS §57 (2) (1935).

53. RESTATEMENT (SECOND), TRUSTS §57 (1959).

54. 100 So. 2d 378 (Fla. 1956), *rev'd on other grounds,* 357 U.S. 235 (1958).

**Editor's Note*: Since this article was completed for publication, the Second District Court of Appeal has upheld a trust where the settlor had retained the income for life, a power to invade the corpus completely (and thus revoke the trust), and the power to give written directions to the trustee, without which the trustee could not act. There was no reserved power of appointment as in *Hanson.* Lane v. Palmer First Nat'l Bank & Trust Co., 213 So. 2d 301 (2d D.C.A. Fla. 1968).

is necessarily a testamentary disposition and therefore void, the court did decide that when these reservations are combined with an actual amendment or revocation of a power of appointment after the initial exercise, the trust becomes illusory since no present interest passes to the beneficiary. The court determined that a mere agency agreement was therefore intended. The heavy emphasis is on the issue of retained controls, a principal consideration of the conservative courts in determination of the effect of the trust effort. The serious question confronting the draftsman in a jurisdiction adopting this view is how far he may proceed beyond retention of life interest and amendable-revocable appointment rights in the settlor before the courts will find that the cumulative effect of the reservations make the trust illusory.

Clearly, as Professor Casner suggests,[55] the majority position on this issue is the more liberal one, and deservedly so. Nevertheless, the risk of overstepping the bounds remains in some jurisdictions and can substantially impair the use of the trust as a feasible will substitute. When the underlying policies of the Statute of Wills have been satisfied, this seems a heavy penalty to pay to preserve intact its technical requirements. If the obvious purpose of the trust is simply to avoid probate, rather than a more questionable one such as avoidance of creditors' claims or a denial to the widow of her share of the estate, then the reasoning of those courts permitting broad retentions of control is all the more sound. In appropriate circumstances the revocable trust should be sanctioned in a broad form as a legitimate alternative to probate.

A second major concern of any scheme to use the revocable trust to avoid probate is the problem of keeping the trust current by a continuing infusion of all the estate assets into the trust as they become property of the settlor. Practically, this may be unfeasible or even impossible in the small estate. Despite every effort to keep the trust current, the likelihood is that at least some of the settlor's assets will fail to be included within the trust arrangement. Then, there are some assets that are not suited for inclusion, such as often traded and sometimes valuable items such as personal automobiles, clothing, and jewelry. On the death of the owner of these items there must be some way of conveying this property to intended recipients. The danger is that despite the existence of a revocable trust containing the vast bulk of the estate, there still may be assets outside its terms of such significance as to require a proceeding in probate for those assets only. There can be no residual clause in the trust as in a will, to save the situation. Since much of the initial expense of probate is fixed and the cost of newspaper advertising, the filing of petitions, inventories, and the assorted paraphernalia of probate can be unrelated to size of the estate,[56] a necessity of probate administration could substantially damage the entire program that the trust is relied upon to effect. Cer-

55. Casner, *Estate Planning — Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960); *see* 1 A. SCOTT, TRUSTS §57.2, at 485 (3d ed. 1967); Roth, *Estate Planning in Florida: The Revocable Intervivos Trust*, 16 U. FLA. L. REV. 34, 57-58 (1962).

56. *E.g.*, GA. CODE ANN. §24-1716 (1959). Only a few items of expense are geared to estate size.

tainly this problem can be mitigated by a continuing review of the estate after the trust becomes operative. There should, for example, be a frequent review of the status of life insurance policies owned by the settlor to avoid the activation of the provision of many policies that on death of all named beneficiaries, the proceeds of the policy will be paid to the estate of the owner.[57] On the other hand, there are situations where reasonable vigilance cannot prevent the accumulation of a sizeable estate outside the trust, as where the settlor becomes incapacitated by incompetence and unable to transfer into the trust those assets he acquires after the onset of the incompetency. There is almost certainly going to be something of significance belonging to the settlor outside the trust at his death, either by design or lack of diligence in keeping his affairs current.

This probability perhaps is the greatest hurdle in any attempt to use a revocable trust as a *total* will substitute. There seems to be no realistic way to bring and keep all of the settlor's assets under the trust arrangement. But a satisfactory solution may be a plan combining the trust, containing within it the vast bulk of the estate assets, with the least onerous of probate court proceedings in terms of expense and delay, the dispensing with administration proceedings.[58] This proceeding, in its typical form, is reasonably flexible in that it involves the least contact with a court proceeding while at the same time gaining for the estate a measure of that certainty, which is probate administration's most valuable quality.[59] The difficulty is that these statutes frequently limit the use of the procedure to estates of 5,000 dollars or less.[60] This effectively removes this statutory provision as an alternative to a will in estates exceeding that amount. But, if the bulk of the estate passes through the device of the trust, the maximum amount of the dispensing with administration statute may well provide adequate leeway for passing those items of the estate that are outside the trust for some reason. Depending on the statute, this may involve putting the property into the hands of heirs at law only.[61] But if they are the desired recipients of the presumably small amount outside the trust, this could be a solution.

57. If the proceeds of life insurance are payable to a named beneficiary, then they are not a part of the decedent's estate for probate purposes, White v. White, 212 S.C. 440, 48 S.E.2d 189 (1948) (though they will be for federal estate tax purposes if decedent retains control of the policy during his lifetime, INT. REV. CODE OF 1954, §§2042, 2036, 2038; Treas. Reg. §20.2042-3 (b) (1) (1958). If, however, the proceeds are made payable to an estate representative, then the proceeds become estate assets. *In re* Walker's Estate Tax, 273 App. Div. 1025, 79 N.Y.S.2d 377 (1948); Treas. Reg. §20.2042-3 (c) (1) (1958).

58. *See* Manwell, *supra* note 10. This is by no means a universal solution since these statutes are entirely lacking in some jurisdictions and limited only to personalty in others. Often, the statute is not strictly one designed to dispense with administration entirely, but rather one to exempt certain types of assets from administration. For a classification of the legislation, see Basye, *Dispensing with Administration*, 44 MICH. L. REV. 329 (1945).

59. The assets of the estate, if the estate qualifies for this procedure, are made available to the heirs much more quickly than in other probate administration procedures and at dramatically less cost than otherwise.

60. *E.g.*, FLA. STAT. §735.04 (1967) puts the maximum at $5,000. In terms of other statutes, this is reasonably liberal.

61. The Florida statute is available to both the testate and intestate estate, FLA. STAT. §735.01 (1967).

There is yet another problem for the trust in the small estate. This relates to the intentions of the settlor as to continuation of the trust beyond his death. The assumption of the entire probate avoidance scheme is that the settlor will also serve as trustee. But if the settlor has in mind, in addition to probate avoidance, a continuing trust designed to provide long-term support benefits to minors or others, then the revocable trust is a disappointing vehicle. In the small estate a trust does not work well for this purpose because there are insufficient funds to yield income for long-term support and, if probate avoidance is the principal purpose of its creation, a good part of the corpus may be in the form of the settlor's residence or other nonincome type assets. Therefore, the settlor should not seek to extend the life of the trust long beyond his death. There should be provision in the trust for some short extension beyond the settlor's death. This involves designation of a successor trustee.[62] The successor's function should be to windup the affairs of the settlor. Since, hopefully, there will be no personal representative, the successor trustee should pay expenses of last illness and any other pending indebtedness under authority provided in the trust instrument, file an income tax return if one is required, and make all necessary arrangements and conveyances terminating the trust and turning over the corpus to the intended takers.

Advantages of the Revocable Trust

Assuming a satisfactory resolution of the problems inherent in the use of the trust, it is possible to move to a consideration of some of the obvious benefits of a revocable trust as compared with classic probate administration in disposition of wealth at death.

As probate is complex with its petitions, inventories, and bonds so is the revocable trust simple in concept and execution. Rules governing the creation of trusts, even as to real estate, are exceedingly simple by comparison, usually involving no more than the three essential elements of existence of the trust intent, existence of the trust res, and sufficient identification of the beneficiaries capable of enforcing the trust.[63] If real estate is involved, there should be a writing to satisfy the Statute of Frauds[64] and, of course, a writing is desirable, if not required in every instance. Expense, the inevitable companion of probate administration, is virtually negligible in the revocable trust since as envisioned here the settlor always will act as his own trustee. It is likely that the only expense involved in the average situation would be that of drafting a written trust instrument and of transferring the property of the settlor into the trust by deeds and bills of sale. However, if securities are present a securities transfer tax has to be paid.[65] The formalities of the

62. The fact of a successor trustee should be taken into account by the draftsman of the trust instrument so that sufficient powers are provided for him to effect the necessary winding up of the settlor's affairs.

63. *See* A. BOGERT, LAW OF TRUSTS §§10, 112, 12, at 15-18 (4th ed. 1963).

64. *See id.* at 34-38.

65. INT. REV. CODE OF 1954, §4321.

instrument and of the various transfers should be prepared with care to strengthen the arrangement in terms of the *Farkas* policy.

A second advantage of the trust is that in operation it is not circumscribed by the same increasingly rigid standards applied to testamentary trusts.[66] Since the settlor himself has by definition the right to revoke the trust, or since he can usually remove the trustee, or as suggested here he is trustee himself there is not the same need for watchdog arrangements on the fiduciary activity as might be the case with testamentary trusts. The result is that the trustee can safely be granted a wide range of powers. Where the settlor is also the trustee, it is important that the instrument specify whether the powers he exercises are exercised by him as trustee or as an owner, for in the former capacity he would be governed in the exercise by law governing fiduciaries, a point the *Farkas* court apparently thought important in its consideration of the retained controls problems.

A third and especially valuable advantage of the trust as proposed is that it can be instantly amended or terminated by the settlor during his lifetime should he become disenchanted or dissatisfied with its operation. In this respect, the settlor has almost the same position as the testator who revokes or adds a codicil to his will,[67] although, of course, revocation of the trust should involve as well a reconveyance of the trust assets.

There is another advantage to the use of this statute as compared with probate administration of a will. That is the advantage of time. The non-claim statutes of probate proceedings make hazardous any distribution of a small estate within a fixed time period, usually a year. This is especially burdensome on the benficiaries of the small estate who need the assets to live during that year. Statutes dispensing with administration shorten that period to acceptable limits. Expense in the proceeding is the least onerous of all the probate administration proceedings. So, while under this combination proposal there must be contact with the probate court, that contact is the least painful possible.

CONCLUSION

This article has undertaken to suggest some of the reasons for the current interest in use of will substitutes and to point out some of the strengths and weaknesses of the revocable trust as such a substitute device. How effective is this idea? Does it really avoid probate? The answer must be that there is no totally effective substitute for a will. If by will substitute there is an implication of total avoidance of probate court administration, then the possible factual situations in which this could happen are so narrow as to

66. While most authorities seem not to question seriously the validity of a provision in an inter vivos trust instrument for an accounting between the trustee and the beneficiary without the intervention of a court (*see* Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40, 60 (1957)), there is a substantial issue as to the effectiveness of an effort by a testator to waive court accountings for a testamentary trustee in the absence of statutory license for such waiver. A. CASNER, ESTATE PLANNING 1148 (3d ed. 1961).

67. Casner, *supra* note 55.

be illusory. But of the possible will substitutes available, the revocable trust is likely the most effective instrument for guaranteeing minimum contact with the court. This may be especially true in the small estate if certain factors are present. If the settlor is willing and able to serve as his own trustee and (1) he does not contemplate substantial duration of the trust beyond his own lifetime, (2) his ultimate beneficiaries are to be the same persons as would take his estate in intestacy, and (3) there is no predictable contingency requiring the appointment of a personal representative, then despite the fact that the small estate's assets may not be of the sort generally thought suitable for a trust there may be a satisfactory formula devised to avoid the worst failings of probate. This result would have to be achieved through a combined use of the trust and the statute permitting dispensing with administration, for without such utilization of the statute, there seems to be no realistic way to provide for those items of property that will ineviably be in the estate but outside the trust at the time of settlor's death.

There is no intention to suggest that the revocable trust does not have far-reaching uses in an estate larger than 60,000 dollars. But in that case, a personal representative is a virtual necessity because of the estate tax consideration and the likelihood of greater complexity because of the size of the estate. There is, for instance, greater probability of employment of testamentary trusts in a will in the larger estate. While inter vivos revocable trusts may be well used to supplement testamentary plans, this procedure is not identical to their use as a will substitute to avoid probate.

Without doubt, neither the revocable trust nor any other presently-used will substitute is the answer to the dilemma presented by contemporary probate administration. The solution lies in widespread reform of probate systems themselves. The surging mobility of the American population demands that this reform be relatively uniform for the same reasons as uniformity in commercial law. Until that time, there will presumably be continued efforts at mitigating probate's harshness through the use of will substitutes.