**BLAW 409**

**WILLS, TRUST, AND ESTATES**

**SUPPLEMENTAL CASES**

Contents

[WHITE v. BROWN 2](#_Toc48121783)

[BARNETT v. ESTATE OF ANDERSON 3](#_Toc48121784)

[HIGBEE CORP. v. KENNEDY 4](#_Toc48121785)

[DeFORGE v. PATRICK 5](#_Toc48121786)

[JAMES v. TAYLOR 6](#_Toc48121787)

[ESTATE OF MICHAEL 7](#_Toc48121788)

[WALTON v. CITY OF RED BLUFF 9](#_Toc48121789)

[KOST v. FOSTER 10](#_Toc48121790)

[WEBB v. UNDERHILL 11](#_Toc48121791)

[NEWMAN v. BOST 14](#_Toc48121792)

[FOSTER v. REISS 15](#_Toc48121793)

[ESTATE OF SMITH 18](#_Toc48121794)

[GRUEN v. GRUEN 19](#_Toc48121795)

[ALBINGER v. HARRIS 22](#_Toc48121796)

[ESTATE OF KIRKPATRICK 24](#_Toc48121797)

[BRADLEY v. FOX 25](#_Toc48121798)

[ESTATE OF KOONTZ 26](#_Toc48121799)

[ESTATE OF SHELLY 28](#_Toc48121800)

[ESTATE OF KAMESAR 29](#_Toc48121801)

[CUNNINGHAM v. CUNNIGHAM 33](#_Toc48121802)

[MATTER OF JOHNSON’S ESTATE 35](#_Toc48121803)

[MAGINN’S ESTATE 36](#_Toc48121804)

[CLARK v. GREENHALGE 37](#_Toc48121805)

[ALDRICH v. BASILE 38](#_Toc48121806)

[ESTATE OF GUSHWA 40](#_Toc48121807)

[ESTATE OF KAUFMAN 41](#_Toc48121808)

[WOLF v. BOLLINGER 43](#_Toc48121809)

[CHURCH v. MORGAN 44](#_Toc48121810)

[WEST v. COOGLER 45](#_Toc48121811)

[GIANOLI v. GABACCIA 46](#_Toc48121812)

[MATTER OF REYNOLDS 47](#_Toc48121813)

[ESTATE OF SHANNON 48](#_Toc48121814)

[AZCUNCE V. ESTATE OF AZCUNCE 49](#_Toc48121815)

[SELF V. SLAUGHTER 50](#_Toc48121816)

[FRANZEN V. NORWEST BANK COLORADO 52](#_Toc48121817)

[GURNETT V. MUTUAL LIFE INSURANCE CO. 53](#_Toc48121818)

[CANAL NATIONAL BANK V. CHAPMAN 54](#_Toc48121819)

[VENTURA COUNTY DEPT. OF CHILD SERVICES V. BROWN 55](#_Toc48121820)

[ESTATE OF BROWN 56](#_Toc48121821)

[IN RE ROTHKO 58](#_Toc48121822)

[TRACY V. CENTRAL TRUST CO. 60](#_Toc48121823)

[ALLARD V. PACIFIC NATIONAL BANK 60](#_Toc48121824)

[CARTER V. CARTER 62](#_Toc48121825)

# WHITE v. BROWN

559 S.W.2d 938 (Tenn. 1977)

BROCK, Justice. Mrs. Jessie Lide died on February 15, 1973, leaving a holographic will which, in its entirety, reads as follows:

April 19, 1972

 I, Jessie Lide, being in sound mind declare this to be my last will and testament. I appoint my niece Sandra White Perry to be the executrix of my estate. I wish Evelyn White to have my home to live in and not to be sold. I also leave my personal property to Sandra White Perry. My house is not to be sold.

Jessie Lide

Mrs. Lide was a widow and had no children. … [O]nly two sisters residing in Ohio survived her. These two sisters quitclaimed any interest they might have in the residence to Mrs. White. The nieces and nephews of the testatrix, her heirs at law, are defendants in this action. Mrs. White … live[d] with Mrs. Lide until Mrs. Lide’s death in 1973 at age 88.

Mrs. White, joined by her daughter as executrix, filed this action to obtain construction of the will, alleging that she is vested with a fee simple title to the home. The defendants contend that the will conveyed only a life estate to Mrs. White, leaving the remainder to go to them under our laws of intestate succession. The [lower court] held that the will unambiguously conveyed only a life interest in the home to Mrs. White … .

[T]he practical difficulty in this case, as in so many other cases involving wills drafted by lay persons, is that the words chosen by the testatrix are not specific enough to clearly state her intent. [I]t is not clear whether Mrs. Lide intended to convey a life estate in the home to Mrs. White, leaving the remainder interest to descend by operation of law, or a fee [simple] interest with a restraint on alienation [transfer]. …

Thus, if the sole question for our determination were whether the will’s conveyance of the home to Mrs. White “to live in” gave her a life interest or a fee in the home, a conclusion favoring the absolute estate would be clearly required. The question, however, is complicated somewhat by the caveat contained in the will that the home is “not to be sold” a restriction conflicting with the free alienation of property, one of the most significant incidents of fee ownership. We must determine, therefore, whether Mrs. Lide’s will, when taken as a whole, clearly evidences her intent to convey only a life estate in her home to Mrs. White.

Under ordinary circumstances a person makes a will to dispose of his or her entire estate. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate and by the other of which he disposes of only a part of his estate, dying intestate as to the remainder, this Court has always preferred that construction which disposes of the whole of the testator’s estate if that construction is reasonable and consistent with the general scope and provisions of the will. … In our opinion, testatrix’s apparent testamentary restraint on the alienation of the home devised to Mrs. White does not evidence such a clear intent to pass only a life estate as is sufficient to overcome the law’s strong presumption that a fee simple interest was conveyed. Accordingly, we conclude that Mrs. Lide’s will passed a fee simple absolute in the home to Mrs. White. [Reversed and remanded.]

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# BARNETT v. ESTATE OF ANDERSON

966 So.2d 915 (Ala. 2007)

LYONS, Justice. Barbara C. Anderson (“the testatrix”) died in 1970. Her will, executed on April 5, 1965, was admitted to probate in August 1970. The testatrix’s two daughters, Kathryn A. Reed and Gertrude A. Holmes Penton (“the daughters”) were issued letters testamentary as co-executors for the estate. In July 2005 the daughters filed a petition for a declaratory judgment, seeking an interpretation and a declaration of the legal effect of item four of the testatrix’s will, which reads as follows:

ITEM FOUR: All the rest, residue and remainder of my property of every kind or nature, I GIVE, DEVISE AND BEQUEATH unto my two daughters, Gertrude Holmes and Kathryn Reed, to have and to hold share and share alike provided however that ‘The Farm’ adjacent to the extension of the Blackwell Nursery Road consisting of approximately three hundred acres *shall not be sold during the terms of their natural lives and twenty-one years thereafter. Upon their deaths, title to ‘The Farm’ shall vest in the heirs of their bodies per stirpes,* but not to be sold or otherwise disposed of for a period of twenty-one years succeeding the death of the survivor of my two daughters. (emphasis added)

Specifically, the daughters sought a judgment declaring ... that they owned the farm outright in fee simple. ... Following a hearing, the trial court entered a judgment declaring that the daughters owned the farm in fee simple ... The heirs appeal, contending that trial court erred in concluding that the testatrix's will did not evidence an intent to convey a lesser title to the farm than fee simple. ...

[Alabama law] provides: “Every estate in lands is to be taken as a fee simple, although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended.” ... [O]ur only inquiry is whether the testatrix’s intent can be ascertained from the four corners of the will ... .

The first provision in item four regarding the farm states that the farm *“shall not be sold during the terms of [the daughters’] natural lives and twenty-one years thereafter.”* The daughters claim that this language is legally insufficient to create a life estate. The daughters, however, ignore the well-settled principle that a court has an obligation to consider the language of the entire will in order to ascertain the testatrix’s intent as to a particular provision. ... Standing alone, the language in the first provision may seem lacking in complete meaning, being silent as to the creation of a remainder interest in favor of others. However, when the first provision is read in conjunction with the second provision, which states that *“[u]pon [the daughters’] deaths, title to ‘The Farm’ shall vest in the heirs of [the daughters’] bodies per stirpes,”* the testatrix’s intent is clear. The second provision shows that the testatrix did not intend for the daughters to have a fee-simple estate, and a reading of the first provision, in light of the second provision, imports that the testatrix intended the daughters to have only a life estate in the farm with a remainder interest to vest in the daughters’ heirs per stirpes. The language in both provisions, when read together, should be given its plain and ordinary meaning. ...

We find no language in item four of the testatrix’s will to suggest that the testatrix intended to convey the farm to the daughters outright in fee simple. Instead, the language imports that the testatrix intended to convey a lesser estate ... . Accordingly, the daughters have only a life estate in the farm and their heirs have a remainder interest therein. [Reversed and remanded.]

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# HIGBEE CORP. v. KENNEDY

428 A.2d 592 (Pa. Super. Ct. 1981)

PRICE, Judge. Appellant, James J. Kennedy, contends that the trial court erred in determining that his interest in the disputed tract of land was a fee simple determinable. … Appellee, the Higbee Corporation, owns approximately nine acres of property in Bethel Park, Allegheny County, Pennsylvania. Kennedy and Higbee both claim … a narrow strip of land that passes through Higbee’s property. Seeking to acquire clear title to the entire tract Higbee filed an action to quiet title and a complaint in equity against Kennedy. … The trial court relied upon the following provision contained in the original grant to Kennedy’s property in reaching its determination.

To have and to hold the said piece of land above-described … unto the said party of the second part his heirs and assigns … provided the party of the second part his heirs and assigns wishes to make use of it for the purpose of a road. The party of the second part agrees to keep a good fence around the above-mentioned lot, failing to do so forfeits his claim, … [and] the land is to revert to the party of the first part.

The court held that the above language created a fee simple determinable, the breach of which would cause title to revert to the grantor or his successors. Based upon Kennedy's admission that he has not maintained a fence around the lot, the court found that title had reverted and is, therefore, now vested in Higbee. …

The sole issue for our consideration is whether the estate created by the deed was a fee simple determinable or a fee simple subject to a condition subsequent. A fee simple determinable is an estate in fee that automatically reverts to the grantor upon the occurrence of a specified event. The interest held by the grantor is termed a possibility of reverter. Words of [definite] limitation, such as “so long as,” “during,” “while” and “until,” are generally used to create the fee simple determinable.

“If, on the other hand, the deed conveyed a fee simple subject to a condition subsequent, then upon the noncompliance with the stated condition the grantor or his successor in interest would have the power to terminate the preceding estate. Thus, the grantors would have a right of re-entry.” … “The principal distinction between the two estates is that a right of re-entry requires some action to perfect title by the grantor or his successor, while a reverter vests automatically.” …

We first examine the effect of the following clause: “forever provided the (grantee) his heirs and assigns wishes to make use of it for the purpose of a road.” We … cannot agree with appellee’s contention that this conditional language limits the estate to a fee simple determinable. Words such as “provided,” “if,” or “upon the condition that” express condition and, therefore, indicate the existence of a fee simple subject to a condition subsequent. … [W]hen conditional language is followed by a reverter clause, absent a showing of contrary intent, we will find a fee simple subject to a condition subsequent. … Accordingly, in absence of contrary intent, we view the conflicting terminology herein as creating a fee simple subject to a condition subsequent. [Reversed and remanded.]

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# DeFORGE v. PATRICK

76 N.W.2d 733 (Neb. 1956)

WENKE, J. This is an appeal … [by] Frances L. DeForge as administratrix of the estate of Adelaide Raymond, deceased[.]. … Adelaide Raymond and Nellie F. Chaplin were elderly sisters. At all times herein material they lived together in a home located at 2401 Avenue D. in Scottsbluff, Nebraska … . This residence property [and another business building] … were, prior to January 24, 1949, owned by Adelaide Raymond. On January 24, 1949, Adelaide Raymond … conveyed these two properties to herself and Nellie Chaplin … as joint tenants and not as tenants in common. The deed goes on to recite: “It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee.” … On July 24, 1944, a joint survivorship checking account was opened in the Scottsbluff National Bank of Scottsbluff, Nebraska, in the name of the two sisters. It continued in this status up until Adelaide Raymond’s death.

Adelaide Raymond died on April 15, 1953. … Several claims have been filed in this estate. They include a claim for personal taxes for the year 1953 in the sum of $7.97; a claim by Dr. Ted E. Riddell in the sum of $882.50 for professional services rendered to the deceased …; a claim by Dr. Paul Q. Baker in the sum of $78.50 for professional services …; and a claim by the Sisters of St. Francis … doing business … as the St. Mary’s Hospital in the sum of $465.90 for services, medicines, etc., rendered to the deceased while she was in the hospital … .

[A]t the time of her death Adelaide Raymond left no other property out of which these claims, if allowed, can be paid other than that held in joint tenancy. At the time of her death the joint account in the Scottsbluff National Bank had a balance of $1,931.85.

Nellie F. Chaplin died on May 15, 1953. … [Her executor, Patrick,] has taken possession of the property hereinbefore referred to as being held in joint tenancy and has sold the two pieces of real estate. He now has in his possession the proceeds thereof.

The question is, can appellant [DeForge], … hold any of this property for the purpose of paying the creditors and expenses of administration of the estate of Adelaide Raymond, deceased? … [I]n order to create a joint tenancy the purpose must be clearly expressed, otherwise the tenancy will be held to be in common. However, … if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to control and a joint tenancy with right of survivorship will be created.

There can be no doubt from the language used, which has been [quoted above], that it was the intention of the parties to the deed under consideration to create a joint tenancy with right of survivorship; that is, upon the death of one the survivor should take the whole title. It would vest the whole title in the survivor free from the debts of the deceased joint tenant. [U]pon the death of one of two co-tenants holding such an estate, the survivor takes the entire fee free from the debts of the deceased cotenant … .

Was the conveyance made with intent to hinder, delay, or defraud expected creditors? … The debts for which claims have been filed against the estate of Adelaide Raymond, deceased, were not incurred until 4 years or more after the deed was executed and recorded and not until more than 8 years after the joint survivorship checking account was opened. … While it is true that Adelaide Raymond was not in very good health at the time she executed the deed to herself and her sister and had the same recorded, we do not think it can be said that debts incurred in connection with her last illness some 4 years later were then in contemplation and that she executed the deed with an intent to avoid the payment thereof. Affirmed.

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# JAMES v. TAYLOR

969 S.W.2d 672 (Ark. Ct. App. 1998)

PITTMAN, Judge. The issue in this case is whether a deed from the late Eura Mae Redmon to her three children, W.C. Sewell, Billy Sewell, and appellee Melba Taylor, was a conveyance to them as tenants in common or as joint tenants with the right of survivorship. …

The deed in question was executed by Mrs. Redmon on January 14, 1993. The conveyance was made to the three grantees “jointly and severally, and unto their heirs, assigns and successors forever,” with the grantor retaining a life estate. W.C. Sewell and Billy Sewell died on November 18, 1993, and May 11, 1995, respectively. Mrs. Redmon died on February 17, 1997. Shortly thereafter, appellee filed a complaint … seeking a declaration that her mother had intended to convey the property to the grantees as joint tenants, thereby making appellee, by virtue of her brothers’ deaths, sole owner of the property. Appellants, who are descendants of W.C. and Billy Sewell, opposed the complaint on the ground that the deed created a tenancy in common among the grantees. …

Appellants and appellee agree that the term “jointly and severally” as used to describe an estate in property is ambiguous. However, they disagree over the rule of construction to be applied in the face of such ambiguity. Appellants contend that, under Arkansas law, a deed to two or more persons presumptively creates a tenancy in common unless the deed expressly creates a joint tenancy. … Appellee, on the other hand, points to the well-established rule that, when faced with an ambiguity in a deed, the trial court may determine the intent of the grantor by looking to extraneous circumstances to decide what was really intended by the language in the deed. …

However, … in Arkansas, and in many other states, statutes have been adopted which presumptively construe an instrument to create a tenancy in common rather than a joint tenancy. These statutes do not prohibit joint tenancies but merely provide for a construction against a joint tenancy if the intention to create it is not clear. … Survivorship is the distinctive characteristic of a joint tenancy. Where, from the four corners of an instrument, a court can interpret the intention of the grantor or testator as creating a survivorship estate, the court will deem the estate to be a joint tenancy with the right of survivorship.

Nothing appears from the four corners of the deed in this case to indicate Mrs. Redmon’s intent to convey a survivorship interest, unless that intention is to be found in the term “jointly and severally.” … In the context of an ownership interest, such a term is a legal anomaly; several ownership is, by definition, a denial of joint ownership. … [A] conveyance to grantees “jointly” does not create a joint tenancy.

If use of the word “jointly” is not sufficient to create a joint tenancy, the term “jointly and severally,” with its elusive connotation, cannot do so either. … Based upon the foregoing, we hold that the deed in this case did not create a joint tenancy in the grantees. [Reversed and remanded.]

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# ESTATE OF MICHAEL

218 A.2d 338 (Pa. 1966)

JONES, J. On February 24, 1947, Joyce E. King deeded certain real estate in Lycoming County, known as “King Farm”, to Harry L. Michael and Bertha M. Michael, his wife, and Ford W. Michael (son of Bertha and Harry L. Michael) and Helen M. Michael, his wife. The pertinent provisions of the lawyer-drawn deed are as follows:

This Indenture Made the 24th day of February in the year of our Lord one thousand nine hundred forty-seven (1947).

Between Joyce E. King, widow, of Milton, Northumberland County, State of Pennsylvania, party of the first part, Harry L. Michael and Bertha M. Michael, his wife, tenants by the entireties and Ford W. Michael and Helen M. Michael, his wife, as tenants by the entireties, *with right of survivorship*, of Hughesville, Lycoming County, Pennsylvania, parties of the second part. (emphasis added.)

… [H]ave granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien, enfeoff, release convey and confirm unto the said parties of the second part, their heirs and assigns. …

Harry L. Michael died prior to February 20, 1962 leaving to survive him his wife, Bertha W. Michael and two sons, Ford W. Michael, one of the grantees, the Robert C. Michael, the appellant. Bertha W. Michael died testate, November 26, 1963, leaving to survive her two sons, Ford W. and Robert C. Michael. By her will dated February 20, 1962, she provided … as follows: … “That my interest in the ‘King Farm’ situate partly in Wolf and partly in Moreland Townships go to Robert C. Michael and the sum of $1,000.00, be paid to Ford W. Michael to balance this gift.”

The two sons were appointed executors of their mother’s estate. Soon thereafter a dispute arose as to what, If any, interest Bertha W. Michael had in the real estate known as “King Farm.” The answer to this question turns on the construction of the language, above-quoted, contained in the deed of 1947. The court below held that the deed created a joint tenancy with right of survivorship between the two sets of husbands and wives.

The appellant urges that the deed created a tenancy in common as between the two married couples, each couple holding its undivided one-half interest as tenants by the entireties. … [A] conveyance or devise to two or more persons (not husband and wife or trustees) … carries with it no right of survivorship unless clearly expressed, and in effect it creates, not a joint tenancy, but a tenancy in common. … [T]he question of survivorship … [is] a matter of intent and, in order to engraft the right of survivorship on a co-tenancy which might otherwise be a tenancy in common, the intent to do so must be expressed with sufficient clarity to overcome the statutory presumption that survivorship is not intended. Whether or not survivorship was intended is to be gathered from the instrument and its language, but no particular form of words is required to manifest such intention. The incident of survivorship may be expressly provided for in a deed or a will or it may arise by necessary implication.

 Applying the above-stated principles to the instant facts, we fail to find a sufficiently clear expression of intent to create a right of survivorship … to overcome the presumption against such a right … . Nowhere in the deed is the term “joint tenants” employed. To create a right of survivorship the normal procedure is to employ the phrase “joint tenants, with a right of survivorship, and not as tenants in common” in describing the manner in which the grantees are to take or hold the property being conveyed or transferred. The deed herein involved also uses the term “their heirs and assigns forever.” The use of the plural would tend to indicate a tenancy in common. If “his or her” heirs and assigns had been used a strong argument could be made that the grantor intended a right of survivorship and that the survivor of the four named grantees would have an absolute undivided fee in the property. …

We cannot find within the four corners of this deed a clearly expressed intention to create a joint tenancy with the right of survivorship. Having failed to find a clear intention to overcome the statutory presumption against such estates, … [we] find that the deed of 1947 created a tenancy in common as between the two sets of married couples, each couple holding its undivided one-half interest as tenants by the entireties. [Reversed.]

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# WALTON v. CITY OF RED BLUFF

3 Cal.Rptr.2d 275 (Cal. Ct. App. 1991)

CARR, A.J. Elizabeth and Edward Kraft, the wife and son of Herbert Kraft, wished to provide for a public library in Red Bluff. … Each gave land for the library by inter vivos transfer and each left money for library purposes by bequests in their wills. The Krafts transferred the land by separate but similar documents … . [Red Bluff used the land to construct a library, but] in September 1986, the books were removed from the library.

On February 18, 1988, Walton filed a complaint …to quiet title as against Red Bluff. The complaint alleged Walton was the sole surviving heir of Elizabeth and Edward …, who died in 1916 and 1920, respectively. … Red Bluff answered, admitting the allegations of the complaint except for denying it held the property in violation of Walton's rights and denying Walton was entitled to possession or title. ... Red Bluff alleged the books were moved to a new building because of a lack of space, the lack of access for handicapped and elderly persons and the lack of parking. …

Judgment was entered that Red Bluff had not breached the “condition of conveyances,” but … “that [Red Bluff] must use the Kraft Building for library purposes, but is not restricted to that use alone, and may use said building consistent with the terms of the grant ... .” Both parties appeal. …

Elizabeth Kraft’s indenture provides the grantor

does hereby give, grant and convey the property To have and to hold the said premises in trust for the uses and purposes of a public library. No portion of said property shall be used for any other purpose[.] If the property herein conveyed shall at any time, be abandoned by the said Town of Red Bluff, or if the said property shall cease to be used, for library purposes, by said Town, or shall be put to [any] use other [than] the uses and purposes, herein specifically referred to ... then the grant and conveyance herein made shall cease and terminate, and the title to the said property and all the improvements thereon shall at once revert to the party of the first part or to her heirs or assigns.

Edward Kraft's indenture refers to

further carrying out the ideas of his Mother in making the gift above mentioned ... the said party of the first part does hereby give, grant and convey additional property TO HAVE AND TO HOLD the said premises in trust for the uses and purposes of the [Herbert Kraft Free Public Library] on the same terms and conditions and for the same purposes and uses that the rest of said Library property is held, the same being ... [incorporating the restrictions contained in his mother's indenture]. …

Either a fee simple determinable or a fee simple on condition subsequent was created by the indentures herein. The former ends upon the happening of a stated condition, resulting in a reverter, while the latter gives the grantor or successor the power of termination over the fee, often called a right of reentry.

The language of the grant suggests a fee simple determinable was created. … Based on the undisputed facts before the trial court Red Bluff violated the express condition of the grant that unless the property be used for “uses and purposes of a public library,” the property should be returned to the Kraft family. … Red Bluff admits all the books were removed from the library as of September 1986. … But the grantors specified that “if the said property shall cease to be used, for library purposes” the grants terminate. There is no question but that the property is no longer used for library purposes.

Whether Red Bluff intended to “abandon” the use purpose of the property or not, it removed the books and stopped using the premises for library purposes. The grants defined library purposes broadly to include various educational endeavors, but there is no evidence any of these other activities took place. Indeed, the evidence is to the contrary, as Red Bluff urged it was unable to use the library building due to the pending litigation. It stopped using the grant for library purposes and the property must go back to the Kraft heir. [Reversed.]

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# KOST v. FOSTER

94 N.E.2d 302 (Ill. 1950)

 DAILY, J. [O]n December 11, 1897, John Kost and his wife, Catherine, executed a warranty deed as follows: "The Grantors, John Kost and his wife Catherine Kost … [convey] to their son Ross Kost to have and to hold, use, and control for and during his natural life only, at his death to his lawful children, the lawful child or children of any deceased lawful child of Ross Kost, to have and receive its or their deceased parent's share” … the real estate in question. The deed was filed for record on September 18, 1909, in the recorder's office of Fulton County.

 Ross Kost took possession of the real estate and occupied it until his death on March 8, 1949. The only lawful children ever born to him were Lether Page, Adah Charleroy, Fern Kost Rhodes, Harry L. Kost, Gladys Wilson, Gilbert Kost, [and] Oscar Durant Kost … . Five of the children, including appellant, Oscar Durant Kost, were born prior to the execution of the deed of John and Catherine Kost. The others were born subsequently thereto. All of the children … are living … .

 On December 29, 1936, a trustee in bankruptcy of the estate of Oscar Durant Kost, bankrupt, executed a deed of conveyance of [Oscar’s] interest … to Marshall C. Foster … The principal question involved is whether or not the interest of Oscar Durant Kost was a vested remainder at the time of the purported sale by the trustee in bankruptcy. It is contended that Oscar Durant Kost had but a contingent remainder in the real estate, and that a contingent remainder does not pass to a trustee in bankruptcy of the remainderman.

 We have frequently been called upon to define vested remainders and contingent remainders and to distinguish between them. The chief characteristic which distinguishes a vested from a contingent remainder is the present capacity to take effect in possession should the possession become vacant, with the certainty that the event upon which the vacancy depends will happen sometime, and not upon the certainty that it will happen or the possession becomes vacant during the lifetime of the remainderman. In the case of a vested remainder, there is a person in being ascertained and ready to take, who has a present right of future enjoyment which is not dependent upon any uncertain event or contingency, while in the case of a contingent remainder the right itself is uncertain. The uncertainty which distinguishes a contingent remainder is the uncertainty of the right and not of the actual enjoyment, for in this regard any remainder may be said to be uncertain, as the remainderman may die without heirs before the termination of the particular estate.

 Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or into the gift to the remainderman then the remainder is contingent, but if, after words giving a vested interest, a clause is added making it subject to being divested, the remainder is vested. Thus, on a devise to A for life, the remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death, but on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent. When a conveyance of a particular estate is made to support a remainder over, the tenant for the particular estate takes it, and if the remainderman is in being he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainderman on the delivery of the deed. The title thus vested becomes an estate of inheritance.

 The language used by the grantors in the instant case is not conditional in nature. At the time of the execution of the deed there were five lawful children of Ross Kost in being, including the appellant, Oscar Durant Kost, and designated as remaindermen and capable of taking immediate possession upon the termination of the life estate. It is true that each of the estates in remainder was subject to being opened up and diminished in quantity by the birth of other children to the respective life tenants. The remainders, while vested in the children already born to the life tenant, are contingent in quantity until the death of the life tenant because of the possibility of the birth of other children, who will have a right to share in the estate. ... The estate in remainder vested in the five lawful children of Ross Kost upon the execution and delivery of the deed, and it vested in each of the other lawful children as each of them was born. Decree affirmed.

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# WEBB v. UNDERHILL

882 P.2d 127 (Or. Ct. App. 1994)

ROSSMAN, P.J. Ernest Webb, owner of the Buck Hollow Ranch, died in 1972. His will devises all of his property to his wife Agnes for life, or until she remarries, with the remainder of the property to be divided equally among four of Ernest's six children upon Agnes’ death or remarriage. If any one of the four named children is deceased at that time, that one-quarter share will go to his or her lineal descendants, if any. Specifically, the will provides:

For her use, benefit and enjoyment, for such period of her natural life as she shall remain unmarried, I give to my beloved wife, Agnes Webb, all of my property of every kind and nature, with the provision, however, that if my said wife shall remarry, that said property shall *at the date of the marriage* revert as follows: One Dollar ($1.00) each to Irene Barton and to Vivian Morse [two of Ernest’s six children]. The remainder shall be divided equally between [the other four children]:

Delbert Webb

Delores Rhodig

La Velle Underhill

Wayne L. Webb

But if one or more of these shall be dead, their share shall go to their lineal descendants, if any. If one or more of the four who live in Oregon and are last mentioned, shall be dead leaving no lineal descendants, the share of the deceased one, dead without lineal descendants, shall go to the survivors of the four who live in Oregon (last mentioned) or to their lineal descendants. The said four being Delbert Webb, Delores Rhodig, La Velle Underhill, and Wayne L. Webb.

*At the death of my said wife,* if she shall yet be in the use and enjoyment of said property, such as remains shall be divided as follows: One Dollar ($1.00) each to Irene Barton and to Vivian Morse. The remainder shall be divided equally between:

Delbert Webb

Delores Rhodig

La Velle Underhill

Wayne L. Webb

But if one or more of these shall be dead, their share shall go to their lineal descendants, if any. If one or more of the four who live in Oregon and are last mentioned, shall be dead leaving no lineal descendants, the share of the deceased one, dead without lineal descendants, shall go to the survivors of the four who live in Oregon (last mentioned) or to their lineal descendants. The said four being Delbert Webb, Delores Rhodig, La Velle Underhill, and Wayne L. Webb. (emphasis added.)

After Ernest’s death, his son Delbert died. Delbert is survived by his wife Carol, who subleases a portion of the ranch, and their three adult children (the grandchildren). Plaintiffs, who seek to sell the ranch as a single parcel and distribute the proceeds according to their respective interests, are Ernest’s wife Agnes, two of Ernest’s children (Wayne and Delores), Delbert’s wife Carol and the grandchildren. Defendant is Ernest’s daughter La Velle. …

The trial court ruled that both the children’s and grandchildren’s interests are contingent and conditioned upon surviving to the date of Agnes’ death or remarriage. Having concluded that none of the plaintiffs holds a vested remainder, the court held that they could not maintain this partition action. … The issues on appeal are whether the children’s and grandchildren’s interests in the property are vested, and whether resolution of that question involves a factual determination that precludes summary judgment. ...

We turn to … an analysis of the future interests of Ernest’s four named children. Plaintiffs acknowledge that the will contains a survivorship requirement that the children must meet, in order for them to personally take, but contend that the children’s interests are most aptly described as “vested remainders subject to divestment” should they fail to survive the life tenant. That is incorrect. The devise in this case created *alternative* remainder interests in both the children and the grandchildren. When a life estate is followed by two alternative remainder interests, and “the vesting of the second depends upon the failure of the first, and the same contingency decides which one of the two alternative remainders shall take effect in possession,” both interests are alternative *contingent* remainders. Here, surviving the death or remarriage of the life tenant is the contingency that decides whether and which of the alternative remainder interests will vest indefeasibly. If one of the children dies before the triggering event, his or her estate – and, accordingly, his or her spouse, if any – will take nothing under the will. Until the triggering event takes place, it cannot be known who will be entitled to take under Ernest’s will.

Plaintiffs contend that the only contingency that conditioned the present three grandchildren’s interests was to survive their *father’s* death. They argue that, once Delbert died, his interest in the property indefeasibly vested in his children. … However, the future interests of Delbert’s children, if any, flow directly from their grandfather Ernest’s will, not Delbert’s. Their interests stem only from their membership in a class described as “lineal descendants.” When a will includes a gift to a class of persons, the devise takes effect in favor of those who constitute the class at the death of the testator, unless the will shows a contrary intent. As noted above, Ernest’s will unambiguously expresses a contrary intent. It states that upon *Agnes’* remarriage or death, Ernest’s property is to be divided among his four named children or their lineal descendants. That language fixed Agnes’ death or remarriage as the date on which a determination of the members of the “lineal descendants” class is to be made. There may or may not be any lineal descendants of Delbert living at the date of Agnes’ death or remarriage. If none are living, Delbert’s share will be divided among his named siblings who live in Oregon or their lineal descendants.

Furthermore, before the life tenancy ends and the class closes, it will be impossible to determine the entire membership of the class of lineal descendants. Plaintiffs argue that once Delbert died, he could have no more lineal descendants and that, as a consequence, his portion of the class closed with Delbert's three children as its only members. That is incorrect. The term “lineal descendants” encompasses more than just children. The term includes all those who proceed from the body of the person named to the remotest degree, including grandchildren and great-grandchildren.

In sum, until Agnes’ death or remarriage, all of the future interests in this case will remain contingent. There is presently no party who may maintain a partition action. Affirmed.

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# NEWMAN v. BOST

29 S.E. 848 (N.C. 1898)

FURCHES, J. The plaintiff, in her complaint, demands $3,000, collected by defendant, as the administrator of J. F. Van Pelt, on a life insurance policy …; $300, the value of a piano upon which said Van Pelt collected that amount of insurance money; $200.94, the value of household property sold by defendant as belonging to the estate of his intestate; and $45, the value of property in the plaintiff’s bedroom, and sold by the defendant as a part of the property belonging to the intestate’s estate. The $3,000, money collected on the life insurance policy, and the $200.94, the price for which the household property sold, plaintiff claims belonged to her by reason of a [gift] causa mortis from said Van Pelt. The $45, the price for which her bedroom property sold, and the $300, insurance money on the piano, belonged to her also, by reason of gifts inter vivos. …

To constitute a [gift] causa mortis, two things are indispensably necessary – an intention to make the gift, and a delivery of the thing given. Without both of these requisites, there can be no gift causa mortis; and both these are matters of fact to be determined by the jury, where there is evidence tending to prove them. The intention to make the gift need not be announced by the donor in express terms, but may be inferred from the facts attending the delivery; that is, what the donor said and did. But it must always clearly appear that he knew what he was doing, and that he intended a gift. …

The case of *Thomas v. Lewis*, … is distinguishable from the case under consideration. [In the *Thomas* case,] articles present were taken out of the bureau drawer, handed to the donor, and then delivered by him to the donee. According to [the court in that case], this was a good gift causa mortis. The box and safe, the key to which the donor delivered to the donee, were not presents, but were deposited in the vault of the bank[.] … This box and safe would have been of little value to the donee for any other purpose. But, more than this, the donor expressly stated that “all you find in this box and this safe is yours.” There is no mistake that it was the intention of the donor to give what was contained in the box and in the safe. …

[There are clear differences] between [the *Thomas*] case and the case at bar. … [T]he life insurance policy … was neither taken out of the drawer, nor mentioned by the donor … . The bureau in which was found the life insurance policy, after the death of Van Pelt, was present in the room where the keys were handed to Julia; and the life insurance policy could easily have been taken out and handed to Van Pelt, and by him delivered to Julia, as was done in the case of *Thomas v. Lewis*. But this was not done. The safe and box, in *Thomas v. Lewis*, were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may often be used for that purpose, while a safe and a box deposited in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes … while the safe and box, in *Thomas v. Lewis*, are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff. …

[W]e feel bound to give effect to constructive delivery, where it plainly appears that it was the intention of the donor to make the gift, and where the things intended to be given are not present, or, where present, are incapable of manual delivery from their size or weight; but where the articles are present, and are capable of manual delivery, this must be had. … It being claimed and admitted that the life insurance policy was present in the bureau drawers in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title to the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant. But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass, and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight, they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery. … [W]e are of the opinion that the other articles of household furniture (except those in the plaintiff’s private bedchamber) did not pass to the plaintiff, but remained the property of the defendant’s intestate.

We do not think the articles in the plaintiff’s bedchamber passed by [gift] causa mortis, for the same reason that the other articles of household furniture did not pass – want of delivery, either constructive or manual. But, as to the furniture in the plaintiff’s bedroom ($45), it seems to us that there was sufficient evidence of both gift and delivery to support the finding of the jury, as a gift inter vivos. The intention to give this property is shown by a number of witnesses, and contradicted by none. The only debatable ground is as to the sufficiency of the delivery. But, when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her, and had given it to her; that it was placed in her private chamber, her bedroom, where we must suppose that she had the entire use and control of the same – it would seem that this was sufficient to constitute a delivery. …

As to the piano there was much evidence tending to show the intention of Van Pelt to give it to the plaintiff, and that he had given it to her, and we remember no evidence to the contrary. And as to this, like the bedroom furniture, the debatable ground, if there is any debatable ground, is the question of delivery. It was placed in the intestate’s parlor, where it remained until it was burned. The intestate insured it as his property, collected and used the insurance money as his own, often saying that he intended to buy the plaintiff another piano, which he never did. It must be presumed that the parlor was under the dominion of the intestate, and not of his cook, housekeeper, and hired servant. And unless there is something more shown than the fact that the piano was bought by the intestate, placed in his parlor, and called by him “Miss Julia’s piano,” we cannot think this constituted a delivery. But [since] the case goes back for a new trial, if the plaintiff thinks she can show a delivery, she will have an opportunity of doing so; but she will understand that she must do so according to the rules laid down in this opinion – that she must show actual or constructive delivery, equivalent to actual manual delivery. We see no ground upon which the plaintiff can recover the insurance money if the piano was not hers. … There is error. New trial.

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# FOSTER v. REISS

112 A.2d 553 (N.J. 1955)

VANDERBILT, C.J. On April 30, 1951 the decedent, Ethel Reiss, entered a hospital in New Brunswick where she was to undergo major surgery. Just prior to going to the operating room on May 4, 1951, she wrote the following note in her native Hungarian language to her husband, the defendant herein:

My Dearest Papa:

In the kitchen, in the bottom of the cabinet, where the blue frying pan is, under the wine bottle, there is one hundred dollars. Alongside the bed in my bedroom, in the rear drawer of the small table in the corner of the drawer, where my stockings are, you will fund about seventy-five dollars. In my purse there is six dollars, where the coats are. Where the coats are, in a round tin box, on the floor, where the shoes are, there is two hundred dollars. This is Dianna’s. Please put it in the bank for her. This is for her schooling.

The Building Loan book is yours, and the Bank book, and also the money that is here. In the red book is my son’s and sister’s and my brothers address. In the letter box is also my bank book. Give Margaret my sewing machine and anything else she may want; she deserves it as she was good to me.

God be with you. God shall watch your steps. Please look out for yourself that you do not go on a bad road. I cannot stay with you. My will is in the office of the former Lawyer Anekstein, and his successor has it. There you will find out everything.

Your Kissing, loving wife,

Ethel Reiss 1951/5/4

She placed the note in the drawer of a table beside her bed, at the same time asking Mrs. Agnes Tekowitz, an old friend who was also confined in the hospital, to tell her husband or daughter about it – “In case my daughter come in or my husband come in, tell them they got a note over there and take the note.” That afternoon, while the wife was in the operating room unconscious under the effects of ether, the defendant came to the hospital and was told about the note by the friend. He took the note from the drawer, went home, found the cash, the savings account passbook, and the building and loan book mentioned in the note, and has retained possession of them since that time.

The wife was admittedly in a coma for three days after the operation and the testimony is in dispute as to whether or not she recovered consciousness at all before her death on the ninth day. Her daughter, her son-in-law, Mrs. Waldner, an old friend and one of her executrices who visited her every day, and Mrs. Tekowitz, who was in the ward with her, said that they could not understand her and she could not understand them. The defendant, on the other hand, testified that while she was “awful poor from ether” after the operation, “the fourth, fifth and sixth days I thought she was going to get healthy again and come home. She talked just as good as I with you.” The trial judge who saw the witnesses and heard the testimony found that

After the operation and until the date of her death on May 13, 1951 she was in a coma most of the time; was unable to recognize members of her family; and unable to carry on intelligent conversation. … Mrs. Reiss was never able to talk or converse after coming out of the operation until her death.

The decedent’s will gave $1 to the defendant and the residue of her estate to her children and grandchildren. The decedent’s personal representatives and her trustees under a separation agreement with the defendant, brought this action to recover the cash, the passbook, and the building and loan book from the defendant, who in turn claimed ownership of them based on an alleged gift causa mortis from his wife. The trial court granted judgment for the plaintiffs, concluding that there had been no such gift. The Appellate Division of the Superior Court reversed. …

A [gift] causa mortis is a gift of personal property made by a party in expectation of death, then imminent, and upon the essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise. … To constitute a valid gift causa mortis, it must be made in view of the donor's impending death; the donor must die of the disorder or peril; and there must be a delivery of the thing given. The donor must be competent to make the gift; there must be an intent upon his part to do so; and an acceptance by the donee. … The delivery must be such as is actual, unequivocal and complete during the lifetime of the donor, wholly divesting him of the possession, dominion, and control thereof. …

The first question confronting us is whether there has been “actual, unequivocal, and complete delivery during the lifetime of the donor, wholly divesting him (her) of the possession, dominion, and control” of the property. … [U]nder New Jersey law actual delivery of the property is still required except where “there can be no actual delivery” or where “the situation is incompatible with the performance of such ceremony.” In the case of a savings account, where obviously there can be no actual delivery, delivery of the passbook or other indicia of title is required.

Here there was no delivery of any kind whatsoever. … This requirement is satisfied only by delivery by the Donor, which calls for an affirmative act on her part, not by the mere taking of possession of the property by the donee. … Thus, an informal writing such as we have here does not satisfy the separate and distinct requirement of delivery, but rather there must be such delivery of the property that the donor stands absolutely deprived of his control over it. … We must not forget that since a gift causa mortis is made in contemplation of death and is subject to revocation by the donor up to the time of his death it differs from a legacy only in the requirement of delivery. …

Here we are concerned with three separate items of property – cash, a savings account represented by a bank passbook, and shares in a building and loan association represented by a book. There was no actual delivery of the cash and no delivery of the indicia of title to the savings account or the building and loan association shares. Rather, the donor set forth in an informal writing her desire to give these items to the defendant. Although the writing establishes her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement for a gift causa mortis. The cash, passbook, and stock book remained at the decedent's home and she made no effort to obtain them so as to effectuate a delivery to the defendant.

We disagree with the conclusion of the Appellate Division that the donee already had possession of the property, and therefore delivery was unnecessary. Assuming, but not deciding, the validity of this doctrine, we note that the house was the property of the deceased and, although defendant resided there with her, he had no knowledge of the presence of this property in the house, let alone its precise location therein; therefore it cannot be said that he had possession of the property. [Reversed.]

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# ESTATE OF SMITH

694 A.2d 1099 (Pa. 1996)

DEL SOLE, Judge. On May 7, 1994, Appellant’s husband, Alfred E. Smith (Decedent), committed suicide in the basement of the couple’s home. Prior to his suicide, Decedent took the following steps in an effort to attend to several of his personal affairs. On May 5, 1994, Decedent drafted four checks in various amounts to four individuals: Joy Youpa (Decedent’s girlfriend), Carol Sandt (Ms. Youpa’s sister), Barbara Kressley (Decedent's sister), and Diana Kressley (Decedent’s niece). On May 6, 1994, … Decedent mailed the checks to his sister and niece accompanied with a suicide note.

 I know this is a hell of a mess and I am truly sorry for the embarrassment, but I can’t go on. I know there will be legal questions about the will, but they are my intentions. I know the estate taxes for the state could have been avoided, but I don't have time. I’m sorry. I’m sorry. I’m sorry.

Good-bye

Alfred

Barbara,

 The checks are [to] use at your discretion.

Alfred

On May 7, 1994, before committing suicide, Decedent delivered the checks to his girlfriend and her sister by leaving the checks under a pizza box on their kitchen table. The two mailed checks and the note were received on May 9, 1994, two days after the suicide. Each of the recipients knew of Decedent’s death at the time she cashed her check.

After Appellant, as administratrix of Decedent’s estate, discovered that Decedent had written the four checks, she requested that the funds be returned by the recipients to the estate. The four recipients refused and Appellant commenced a civil action alleging conversion and seeking restitution. … The court entered a decree holding that the four checks to the donees were valid gifts causa mortis … . These appeals followed. …

The issue presented by Appellant for our review is whether Decedent’s death revoked gifts of checks which Decedent had written, but which were not negotiated until after his death. The lower court held that the gifts were not revoked because they were valid gifts causa mortis.

To establish a gift causa mortis, it must be shown that at the time of the alleged gift, the decedent intended to make a gift, the decedent apprehended death, the res of the intended gift was either actually or constructively delivered, and death actually occurred. It is not necessary that the donor expressly say he knows or believes he is dying, that may be inferred from the attendant circumstances. It will suffice if at the time the gift was made, the donor believed he was going to die, that he was likely to die soon; and death did actually ensue within a reasonable time thereafter.

The facts of the instant case support a finding of a gift causa mortis. On May 5, 1994, Decedent wrote and executed the four checks to four separate individuals in various specific amounts. On May 6, 1994, Decedent mailed two of the checks, accompanied by a note of suicide. On May 7, 1994, Decedent physically delivered the other two checks, and then, sadly, took his own life. All of the requisite elements of a gift causa mortis have been established. Therefore, the lower court was correct in refusing to revoke the checks. [Affirmed.]

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# GRUEN v. GRUEN

496 N.E.2d 869 (N.Y. 1986)

SIMONS, Judge. Plaintiff commenced this action seeking a declaration that he is the rightful owner of a painting which he alleges his father, now deceased, gave to him. He concedes that he has never had possession of the painting but asserts that his father made a valid gift of the title in 1963 reserving a life estate for himself. His father retained possession of the painting until he died in 1980. Defendant, plaintiff's stepmother, has the painting now and has refused plaintiff’s requests that she turn it over to him. She contends that the purported gift was testamentary in nature and invalid insofar as the formalities of a will were not met or, alternatively, that a donor may not make a valid inter vivos gift of a chattel and retain a life estate with a complete right of possession. …

The subject of the dispute is a work entitled “Schloss Kammer am Attersee II” painted by a noted Austrian modernist, Gustav Klimt. It was purchased by plaintiff’s father, Victor Gruen, in 1959 for $8,000. On April 1, 1963 the elder Gruen, a successful architect with offices and residences in both New York City and Los Angeles during most of the time involved in this action, wrote a letter to plaintiff, then an undergraduate student at Harvard, stating that he was giving him the Klimt painting for his birthday but that he wished to retain the possession of it for his lifetime. This letter is not in evidence, apparently because plaintiff destroyed it on instructions from his father. Two other letters were received; however, one dated May 22, 1963 and the other April 1, 1963. Both had been dictated by Victor Gruen and sent together to plaintiff on or about May 22, 1963. The letter dated May 22, 1963 reads as follows:

Dear Michael:

I wrote you at the time of your birthday about the gift of the painting by Klimt. Now my lawyer tells me that because of the existing tax laws, it was wrong to mention in that letter that I want to use the painting as long as I live. Though I still want to use it, this should not appear in the letter. I am enclosing, therefore, a new letter and I ask you to send the old one back to me so that it can be destroyed.

I know this is all very silly, but the lawyer and our accountant insist that they must have in their possession copies of a letter which will serve the purpose of making it possible for you, once I die, to get this picture without having to pay inheritance taxes on it.

Love,

s/Victor

Enclosed with this letter was a substitute gift letter, dated April 1, 1963, which stated:

Dear Michael:

The 21st birthday, being an important event in life, should be celebrated accordingly. I therefore wish to give you as a present the oil painting by Gustav Klimt of Schloss Kammer which now hangs in the New York living room. You know that Lazette and I bought it some 5 or 6 years ago, and you always told us how much you liked it.

Happy birthday again.

Love,

s/Victor

 Plaintiff never took possession of the painting nor did he seek to do so. Except for a brief period between 1964 and 1965 when it was on loan to art exhibits and when restoration work was performed on it, the painting remained in his father’s possession, moving with him from New York City to Beverly Hills and finally to Vienna, Austria, where Victor Gruen died on February 14, 1980. Following Victor’s death plaintiff requested possession of the Klimt painting and when defendant refused, he commenced this action.

The [main issue on appeal is] whether a valid inter vivos gift of a chattel may be made where the donor has reserved a life estate in the chattel and the donee never has had physical possession of it before the donor’s death … . [This] issue requires application of two general rules. First, to make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee. Second, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.

*Donative Intent*

There is an important distinction between the intent with which an inter vivos gift is made and the intent to make a gift by will. An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will.

Defendant contends that the trial court was correct in finding that Victor did not intend to transfer any present interest in the painting to plaintiff in 1963 but only expressed an intention that plaintiff was to get the painting upon his death. The evidence is all but conclusive, however, that Victor intended to transfer ownership of the painting to plaintiff in 1963 but to retain a life estate in it and that he did, therefore, effectively transfer a remainder interest in the painting to plaintiff at that time. Although the original letter was not in evidence, testimony of its contents was received along with the substitute gift letter and its covering letter dated May 22, 1963. The three letters should be considered together as a single instrument and when they are they unambiguously establish that Victor Gruen intended to make a present gift of title to the painting at that time. But there was other evidence for after 1963 Victor made several statements orally and in writing indicating that he had previously given plaintiff the painting and that plaintiff owned it. Victor Gruen retained possession of the property, insured it, allowed others to exhibit it and made necessary repairs to it but those acts are not inconsistent with his retention of a life estate. …

Defendant contends that even if a present gift was intended, Victor’s reservation of a lifetime interest in the painting defeated it. … The correct test is “whether the maker intended the [gift] to have *no effect* until after the maker’s death, or whether he intended it to transfer *some present interest.”*  As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately. …

*Delivery*

In order to have a valid inter vivos gift, there must be a delivery of the gift, either by a physical delivery of the subject of the gift or a constructive or symbolic delivery such as by an instrument of gift, sufficient to divest the donor of dominion and control over the property. As the statement of the rule suggests, the requirement of delivery is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees. Accordingly, what is sufficient to constitute delivery "must be tailored to suit the circumstances of the case". The rule requires that “[t]he delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit.”

Defendant contends that when a tangible piece of personal property such as a painting is the subject of a gift, physical delivery of the painting itself is the best form of delivery and should be required. Here, of course, we have only delivery of Victor Gruen’s letters which serve as instruments of gift. Defendant’s statement of the rule as applied may be generally true, but it ignores the fact that what Victor Gruen gave plaintiff was not all rights to the Klimt painting, but only title to it with no right of possession until his death. Under these circumstances, it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain.

Nor is there any reason to require a donor making a gift of a remainder interest in a chattel to physically deliver the chattel into the donee’s hands only to have the donee redeliver it to the donor. As the facts of this case demonstrate, such a requirement could impose practical burdens on the parties to the gift while serving the delivery requirement poorly. Thus, in order to accomplish this type of delivery the parties would have been required to travel to New York for the symbolic transfer and redelivery of the Klimt painting which was hanging on the wall of Victor Gruen’s Manhattan apartment. Defendant suggests that such a requirement would be stronger evidence of a completed gift, but in the absence of witnesses to the event or any written confirmation of the gift it would provide less protection against fraudulent claims than have the written instruments of gift delivered in this case.

*Acceptance*

Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part*.* Plaintiff did not rely on this presumption alone but also presented clear and convincing proof of his acceptance of a remainder interest in the Klimt painting by evidence that he had made several contemporaneous statements acknowledging the gift to his friends and associates, even showing some of them his father’s gift letter, and that he had retained both letters for over 17 years to verify the gift after his father died. [Affirmed.]

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# ALBINGER v. HARRIS

48 P.3d 711 (Mont. 2002)

NELSON, J. Who owns a ring given in anticipation of marriage after the engagement is broken? … [Michelle L.] Harris and [Michael A.] Albinger met in June 1995, and began a troubled relationship that endured for the next three years, spiked by alcohol abuse, emotional turmoil and violence. Albinger presented Harris with a diamond ring and diamond earrings on December 14, 1995. The ring was purchased for $29,000. Days after accepting the ring, Harris returned it to Albinger and traveled to Kentucky for the holidays. Albinger immediately sent the ring back to Harris by mail. The couple set a tentative wedding date of June 27, 1997, but plans to marry were put on hold as Harris and Albinger separated and reconciled several times. The ring was returned to or reclaimed by Albinger upon each separation, and was re-presented to Harris after each reconciliation.

Albinger and Harris lived together in Albinger’s home from August 1995 until April 1998. During this time, Albinger conferred upon Harris a new Ford Mustang convertible, a horse and a dog, in addition to the earrings and ring. Harris gave Albinger a Winchester hunting rifle, a necklace and a number of other small gifts. Albinger received a substantial jury award for injuries sustained in a 1991 railroad accident. He paid all household expenses and neither party was gainfully employed during their cohabitation.

On the night of February 23, 1997, during one of the couple’s many separations, Albinger broke into the house where Harris was staying. He stood over Harris’ bed, threatened her with a knife and shouted, “I’m going to chop your finger off, you better get that ring off.” After severely beating Harris with a railroad lantern, Albinger forcibly removed the ring and departed. Harris sued for personal injuries and the county attorney charged Albinger by information with aggravated burglary, felony assault, and partner and family member assault. The next month, after another reconciliation, Harris requested the county attorney drop all criminal charges in exchange for Albinger's promise to seek anger management counseling and to pay restitution in the form of Harris’ medical expenses and repair costs for damage to her friend’s back door. Harris also directed her attorney to request the court dismiss the civil complaint without prejudice.

The parties separated again in late April 1998. Albinger told Harris to “take the car, the horse, the dog, and the ring and get the hell out.” … Harris moved from Great Falls, Montana to Kentucky, where she now resides. The parties dispute who was responsible for the end of the relationship. No reconciliation followed, marriage plans evaporated and Harris refused to return the ring.

Albinger filed a complaint on August 31, 1998, seeking recovery of the ring or its monetary value … . The District Court found the ring to be a gift in contemplation of marriage, and … implied the existence of a condition attached to the gift of the engagement ring. Disregarding allegations of fault for “breaking” the engagement, the court concluded that the giver is entitled to the return of the ring upon failure of the condition of marriage. On September 2, 1999, the District Court awarded the engagement ring or its reasonable value and court costs to Albinger, and … [f]rom this judgment, Harris appeals the disposition of the ring … .

In the instant case, the parties agree that the ring was a gift. The crux of the dispute today is whether a condition of marriage attached to the gift as a matter of law at the time Albinger presented the ring to Harris. Harris contends the ring lost any association with a promise to marry after the first incidence of domestic violence. The couple canceled their June 1997 nuptials and never revived explicit wedding plans. In response to a question about the ring’s symbolic relationship to a promise to marry after the couple’s numerous break-ups, reconciliations, and incidents of domestic violence, Harris testified, “[A]fter a while you don't think about that stuff. You just resume life.” Albinger argues that the ring was presented as a gift only upon the unspoken condition that the wedding take place.

The District Court found the ring at issue in this action to be an engagement ring given in contemplation of marriage, and not a gift in commemoration of another occasion or as consideration for any other anticipated acts on the part of Harris. … The District Court employed the “conditional gift” theory advanced by Albinger to determine present ownership of the disputed engagement ring. The theory holds that an implied condition of marriage attaches to the gift of a ring upon initial delivery due to the ring’s symbolic association with the promise to marry and, when the condition of marriage fails, the incomplete gift may be revoked by the giver. Albinger urges this Court to affirm the District Court's conclusion that the ownership of an engagement ring remains with the one who gave the ring when plans to marry are called off. …

According to Montana law, “a gift is a transfer of personal property made voluntarily and without consideration.” The essential elements of an *inter vivos* gift are donative intent, voluntary delivery and acceptance by the recipient. Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient. Such a gift, made without condition, becomes irrevocable upon acceptance. When clear and convincing evidence demonstrates the presence of the essential elements of donative intent, voluntary delivery and acceptance, the gift is complete and this Court will not void the transfer when the giver experiences a change of heart.

Another essential element of a gift is that it is given without consideration. A purported “gift” that is part of the inducement for “an agreement to do or not to do a certain thing,” becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one. When an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of the breach of promise actions.

The only revocable gift recognized by Montana law is a gift in view of death. Also known as a gift *causa mortis,* such a gift is subject to the following conditions: 1) it must be made in contemplation, fear or peril of death; 2) the giver must die of the illness or peril that he or she fears or contemplates; and 3) the delivery must be made with the intent that the gift will only take effect if the giver actually dies. Statutory law provides that a gift in view of death may be revoked by the giver at any time and is revoked by the giver’s recovery from the illness or escape from the peril under which the gift was made.

Albinger maintains he held a reversionary interest in the gift of the engagement ring grounded in an implied condition subsequent [and] … urges the Court to adopt a conditional gift theory patterned on the law relevant to a gift in view of death. …Conditional gift theory applied exclusively to engagement ring cases, carves an exception in the state’s gift law for the benefit of predominately male plaintiffs. … While antenuptial traditions vary by class, ethnicity, age and inclination, women often still assume the bulk of pre-wedding costs, such as non-returnable wedding gowns, moving costs, or non-refundable deposits for caterers, entertainment or reception halls. …

To preserve the integrity of our gift law and to avoid additional gender bias, we decline to adopt the theory that an engagement ring is a gift subject to an implied condition of marriage. … [T]he engagement ring was voluntarily offered by Albinger on December 14, 1995, without consideration and with the present intent to voluntarily transfer dominion and control to Harris. Harris accepted the ring. Although the court implied a condition of marriage attaching to the gift as a matter of law, we do not. In our judgment, the gift was complete upon delivery, and a completed gift is not revocable. The fact that possession of the ring passed back and forth between Albinger and Harris during the course of their relationship bears no relevance to the issue of ring ownership. All of the elements of gifting must be present to transfer ownership, and the facts do not indicate re-gifting occurred. In fact, Albinger acknowledged Harris’ ownership himself when he told Harris “to take the car, the horse, the dog and the ring” when she left the relationship. We hold that the engagement ring was an unconditional, completed gift upon acceptance and remains in Harris’ ownership and control. [Reversed.]

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# ESTATE OF KIRKPATRICK

77 P.3d 404 (Wyo. 2003)

KITE, J. The question presented for appeal is whether biological siblings (and their descendants) of an adopted decedent may claim rights as heirs in intestacy. … John Henry Kirkpatrick was born Gion Rosetti to Joseph and Beatrice Rosetti in 1914. He had ten siblings. On January 25, 1927, Edgar and Margaret Kirkpatrick adopted Gion and his brother, Leo Rosetti. The Kirkpatricks changed Gion’s name to John Henry Kirkpatrick (John Kirkpatrick) and Leo’s name to Edward Watson Kirkpatrick (Edward Kirkpatrick). The other nine birth siblings were either adopted away or remained with their birth parents. John Kirkpatrick was married briefly, divorced, and had no children. Edward Kirkpatrick married and, with his wife, raised a daughter, Karen Shippey. John and Edward Kirkpatrick’s nine biological siblings produced eight children (the cousins).

John Kirkpatrick died intestate on August 4, 2000, leaving a substantial estate consisting of stocks, bonds, real estate, and personal property. [The cousins contend that John Kirkpatrick's adoption had no effect on the biological siblings’ right to inherit from him and claimed their share of the portion of the estate which would have been distributed to their parents. The district court found Kirkpatrick's heirs included the descendants of both his adoptive and his biological siblings. Kirkpatrick’s executors argue that an adopted child's biological siblings are no longer his “brother” and “sister” and, thus, they are not entitled to inherit from the adopted child’s intestate estate.]

[The Wyoming intestacy statute] explicitly establishes the adopted person inherits the same as any other member of the adoptive parent’s family and provides mutuality by requiring the “relatives” of the adoptive parent shall inherit from the adopted person as well. … The adoption statutes, on the other hand, act to terminate the legal relationship between the biological parents and the adopted child. … The adoption decree severs the relationship between the child and his biological parents and creates a new and exclusive parent-child relationship between the child and the adoptive parents. … In the instant case, the children are from two different families. The Rosettis relinquished their rights as parents to the two boys and gave those rights to the Kirkpatricks. The adoption terminated the Rosettis’ parent/child relationship with John and Edward Kirkpatrick. … If that parent/child relationship is terminated by adoption and established in new, adoptive parents, the right to inherit is derived from the adoptive parents and flows down the family tree to the siblings who share the same parents in the eyes of the law. …

Without complete separation of the biological family and the adoptive family, probating an adopted child’s estate would become rife with problems. Moreover, already probated estates could be subject to challenge by previously unidentified biological relatives laying claim to the intestate estate. Ultimately, a probate involving an adopted person could never be fully closed without full identification of the biological relatives. The only way a probate court could ethically fulfill its duties would be to first determine whether an intestate decedent was adopted and, if so, obtain a review of the adoption records. However, adoption records are traditionally sealed to insure the confidential and final nature of an adoption. … Allowing adoptees to inherit from birth parents and kindred would breach confidentialities created to protect the adoptive parents. … Even if confidentiality were not a problem, locating an adoptee at the time of a birth parent’s death would prove very difficult. If heirs cannot be located, then estates remain open for a long time, which undermines the goal of settling estates quickly. …

An adopted child’s biological family members have no right to inherit from the adopted child under Wyoming’s intestacy statutes. Therefore, we reverse the district court’s decision and hold John Kirkpatrick’s sole legal heir is Karen Shippey.

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# BRADLEY v. FOX

129 N.E.2d 699 (Ill. 1955)

DAVIS, J. [Lawrence Fox and Matilda Fox were married on May 6, 1949, and resided near Rockford, in Winnebago County. On April 18, 1950, they purchased real property, which they held in joint tenancy with right of survivorship. On September 14, 1954, Lawrence murdered his wife Matilda. He then conveyed to his attorney the real property, valued at $20,000, which he and Matilda had owned as joint tenants. Matilda’s daughter from a previous marriage sued to challenge Fox’s ownership interest in the property. The issue presented is whether a murderer becomes sole owner of property owned with the decedent as joint tenants with right of survivorship.]

The issue of whether a murderer may acquire or increase his property rights by the fruits of his crime is not a novel question. … [Illinois law] provides in substance that a person who is convicted of the murder of another shall not inherit from the murdered person or acquire as surviving spouse any interest in the estate of the decedent by reason of the death. … Contracts and other instruments creating rights should properly be construed in light of prevailing public policy … prohibiting the devolution of property to a convicted murderer from his victim … . That policy would be thwarted by a blind adherence to the legal fiction that a joint tenant holds the entire property at the date of the original conveyance, and acquires no additional interest by virtue of the felonious death of his co-tenant, since that rationale sanctions in effect the enhancement of property rights through murder. …

In joint tenancy the contract that the survivors will take the whole [property interest] presupposes that the death of either will be in the natural course of events and that it will not be generated by either tenant murdering the other … . It is our conclusion that Fox by his felonious act destroyed all rights of survivorship … . [Reversed and remanded.]

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# ESTATE OF KOONTZ

2016 WL 6775593 (Tex. Ct. App. 2016)

BARNHARD, Justice. In 2005, Stephen Everett Koontz and Joyce Koontz executed wills leaving all of their property to each other and naming Stuart as the contingent beneficiary to receive the property after the death of the second spouse. Stuart was Stephen and Joyce’s great-nephew and was involved in taking care of the couple since the early 2000’s. In 2010, Stephen executed a new will revoking the 2005 will and leaving all of his property to Hale, his sister. Joyce passed away on February 6, 2013, and Stephen passed away on July 25, 2013.

On October 17, 2013, Hale applied to admit the 2010 will to probate and was appointed independent executrix of Stephen’s estate. ... Four months later, Stuart filed a contest to the 2010 will asserting Stephen lacked testamentary capacity when the 2010 will was executed and was under Hale’s undue influence. Hale filed a no-evidence motion for summary judgment on Stuart’s claims of lack of testamentary capacity and undue influence. The trial court granted Hale’s motion and … Stuart appeals. …

A testator has testamentary capacity when he has sufficient mental ability to understand he is making a will, the effect of making a will, and the general nature and extent of his property. The testator also must know his next of kin and the natural objects of his bounty … . The pivotal issue is whether the testator had testamentary capacity on the day the will was executed. In this case, Stuart attached his affidavit to his response to Hale’s no-evidence motion for summary judgment, stating:

My uncle, Stephen Everett Koontz suffered from severe bi-polar depression for decades.

During the summer of 2010 when the Will at issue was executed, my uncle’s behavior throughout the summer was becoming more and more erratic and unpredictable.

My uncle had several prolonged episodes of paranoid and delusional behavior that lasted for weeks rather than only days during the summer of 2010.

Part of this behavior was because he was refusing to take his prescribed medications or taking them incorrectly.

The following events are just some of the strange behaviors that took place to the best of my recollection during the summer of 2010:

My uncle would hide his medications in his chair;

He began hiding money in the walls because he thought the Government was going to come take it from him;

He started keeping a 9mm and shotgun next to his chair;

He began to say that people were in the hills watching him;

He began to accuse his devoted wife of over 50 years of having an affair;

He tried to lease property that he used to own to a hunter and became irate when I told him that he couldn’t because he no longer owned that property, he said that it was, “his land”;

I found him trying to build a gazebo in the middle of the road.

He could not drive and could only walk with a walker. He would not have been able to get to a lawyer to execute a Will on his own.

I was concerned for my uncle and my aunt and their safety because of my uncle’s erratic and unpredictable behavior. My aunt and I decided to remove all of the guns from their house that summer so that a horrible accident would not happen.

We decided that summer that my uncle needed more care than we as a family could provide and that a nursing home facility would be best for his safety and care. We chose Bandera Rehabilitation and Healthcare.

Shortly after being admitted there, my uncle tried to commit suicide by placing a plastic bag over his head.

We hold Stuart’s affidavit contains more than a scintilla of evidence to raise a genuine issue of material fact with regard to Stephen’s testamentary capacity. Stephen’s attempt to lease property he longer owned raises a fact issue as to whether he understood the nature and extent of his property. Furthermore, his delusion that his wife of fifty years was having an affair raises a fact issue as to whether this delusion led him to change his 2005 will which had left all of his property to his wife. Finally, because the will was executed on August 12, 2010 and the events described in Stuart’s affidavit occurred during the summer of 2010, the evidence is probative of Stephen’s lack of testamentary capacity on the day the will was executed. …

The trial court’s judgment is reversed, and the cause is remanded to the trial court for further proceedings.

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# ESTATE OF SHELLY

950 A.2d 1021 (Pa. Super. Ct. 2008)

POPOVICH, Judge. [Norman F. Shelly (Decedent) died on July 27, 1999. After Decedent’s death, a cardboard panel of a cigarette carton was submitted for probate. The cigarette carton read:

FIRST AND LAST ONLY WILL

OF “DRAFT?”

NORMAN F. SHELLY

MONEY. DEVIDE

MICHAEL COOKS SONS

The carton was signed and dated by Shelly, but was not witnessed or notarized. None of the people named as beneficiaries of the estate (Appellants) would have been intestate heirs of Shelly. After the cigarette carton was admitted to probate, several individuals who would inherit from Shelly if he died intestate challenged the probate of the cigarette carton as Shelly’s will. The lower court agreed and the Appellants filed this appeal.]

[I]n order to determine whether a particular writing constitutes a will, no formal words are necessary, the form of the instrument is immaterial if its substance is testamentary. A gift or bequest after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Therefore, our first inquiry is whether the cigarette carton provides for a positive disposition of assets.

 Appellants’ argue that a positive disposition of assets is evidenced by the writing labeled “FIRST AND LAST ONLY WILL” and signed and dated by the decedent. Specifically, Appellants argue that the orphans’ court erred in finding the cigarette carton did not evidence testamentary intent due to the absence of a positive disposition of assets. Appellants’ contend that the term “will” is a dispositive term and the fact that the decedent signed and dated the cigarette carton resulted in a determination that it was a will written with testamentary intent.

No rule regarding wills is more settled than the general rule that the testator’s intent, if it is not unlawful, must prevail. Moreover, the testator’s intention must be ascertained from the language and scheme of his will; it is not what the Court thinks he might or would have said in the existing circumstances, or even what the Court thinks he meant to say, but is *what is the meaning of his words.*

 [T]his document did not make a disposition of property. … The only term that could have been construed to dispose of property is “DEVIDE,” which the [lower] court presumed to be “divide.” Appellants contend that “DEVIDE” written in this context indicated that Michael Cook, Sr., was the father of the two sons and that the decedent intended the money to be divided equally between the two sons. We disagree.

There is no indication of what money was to be divided, into what shares it was to be divided, or if it was to be divisible by three including Michael Cook, Sr., or divisible by two including only his two sons. There was no specificity as to the proposed beneficiaries or to the subject matter to be distributed. Therefore, this was not a positive disposition of property nor can a positive disposition of property be inferred from the cigarette carton. Accordingly, because the cigarette carton does not include the one essential element for the creation of a will, a disposition of property, it cannot be considered as such. …

 Appellants’ next argument is that the writing on the cigarette carton evidenced the testamentary intent of the decedent. Specifically, Appellants’ contend that the orphans’ court erred in determining the decedent lacked testamentary intent due to the insertion of the term “DRAFT?” at the top of the cigarette carton. … With regard to … testamentary intent, … [i]f a testator intends to make a testamentary gift, it can be done in many ways and in many forms, and the intent, as we have often said, is the polestar. Papers – holographic and otherwise – have been sustained as wills where a testamentary disposition of property was clearly contained in a letter or a deed or a certificate of deposit or a power of attorney or an agreement or a check or a note or an assignment, and even in a letter of instructions to an attorney where it was later proved that the writer intended such letter to be a will[.] Moreover, if a further or additional act or writing is contemplated by an alleged testator in order to make a written document his will or codicil, the writing is *nontestamentary* in nature.

*Black’s Law Dictionary* defines the term “draft” as “[a]n initial or preliminary version.” The obvious connotation of the term “draft” is that it is a contemplation of a further or additional act or writing. Appellants’ arguments to the contrary are unavailing. The fact that the decedent did not strike out the word “Will” but included it on the cigarette carton in addition to “DRAFT?” was not an indication of testamentary intent but rather an indication that the decedent contemplated a final document to be created at a later time. Appellants’ contention that labeling a document a “Will” is determinative of the character of the writing itself is illogical, in that, if this were the case, then any writing labeled “Will” would be a valid will despite the lack of a positive disposition of assets or testamentary intent. Simply labeling a document “Will” does not end our inquiry into the validity of the document itself.

[Lastly.] Appellants’ argue that the signing and dating of the cigarette carton was conclusive as to the decedent’s testamentary intent. [T]here is no special form of words necessary to constitute a will, however, it must include one essential element, that is, the document must dispose of property. As noted above, the decedent’s words do not constitute a plain and clear meaning by which this Court can decipher his intention. The fact that the cigarette carton itself is labeled a “Will” and that it was signed and dated by the decedent is of no consequence when the contents of the writing do not amount to a disposition of property. [Affirmed.]

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# ESTATE OF KAMESAR

259 N.W.2d 733 (Wis. 1977)

DAY, Judge. [Samuel Kamesar died on January 16, 1974, at the age of 84, and was survived by two daughters, Jeanette Feldman and Bernice Lee, a son, Armon Kamesar, and his second wife, Doris Kamesar, to whom he had been married three years. Kamesar had executed his latest will in June of 1971 incorporating a prenuptial agreement with his wife, devising $5,000 to a grandchild, and leaving the residue to his Bernice. His prior wills had left the residue to all three of his children, but the 1971 will explained that Armon and Jeannette had been omitted since Kamesar had made provisions for them during his life. Beginning n 1971 and until Kamesar’s death, Bernice managed his personal affairs and held a power of attorney. Kamesar’s friend and attorney, George Laikin, drafted the 1971 will and recommended that Kamesar incorporate the prenuptial agreement. Kamesar also told him that “other changes” should be made in the will also and that he would advise him of those changes later. Kamesar did not personally contact Laikin later, but communicated the changes to be made in the will by telephone through Bernice.

When the June will was ready to sign, Bernice made an appointment with Mr. Laikin and drove Samuel and Doris Kamesar to his office. Doris and Bernice were present when the will was executed. Before Kamesar signed it, the will was read aloud and Laikin reviewed the specific terms of the will. Several months after the will was signed, Doris reminded Samuel Kamesar that he had cut his two children out of the will, but he could not remember doing so. When Bernice offered the June 1971 will for probate, Armon and Jeanette (objectors) Feldman objected, claiming the will was the result of undue influence by Bernice upon her father. The trial court conducted a hearing on the issue and found in favor of Bernice and ordered the June 1971 will admitted to probate.]

There are two avenues by which an objector to a will on the theory of undue influence may challenge its admission. One is by proving the elements that this court has said show undue influence. Those are: (1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result. … The second method of challenge is to prove the existence of (1) a confidential relationship between the testator and the favored beneficiary and (2) suspicious circumstances surrounding the making of the will. …

I. *Four Elements Test*.

A. Susceptibility To Undue Influence

The objectors must establish by clear, satisfactory and convincing evidence that the testator in this case was susceptible to the influence of Bernice Lee. Factors to be considered are age, personality, physical and mental health and ability to handle business affairs. [T]he infirmities of old age, such as forgetfulness do not incapacitate one from making a valid will … [but] evidence of impaired mental powers on the part of a testator is itself a circumstance which gives rise to a reasonable inference that the testator is susceptible to undue influence. …

The objectors argue that the fact that Samuel Kamesar entrusted the management of his business affairs to Bernice, coupled with his impaired mental powers, made him susceptible to her influence. But the evidence is conflicting. The testator did suffer from arteriosclerosis, and there was testimony that in June of 1971 he was forgetful and confused. But several witnesses testified he was of sound mind three months before when he was married, and his wife testified he never forgot what he owned or who his children were. Mr. Laikin, the attorney, who was present when all the wills were executed and had known the testator for most of his own life, testified that the deceased was of sound mind and not under any undue influence when the will in question was executed. At that conference the testator made one request for a change with regard to his wife's occupancy of the apartment in the event of his death. This request shows his awareness of the will's provisions. The trial court's conclusion that the objectors did not establish susceptibility is not against the great weight and clear preponderance of the evidence.

B. Opportunity To Influence

The trial court found and the proponents agree that Bernice Lee had ample opportunity to exert undue influence on the decedent. This conclusion is not against the great weight of the evidence.

C. Disposition To Influence

Disposition to unduly influence means more than a desire to obtain a share of the estate. It implies a willingness to do something wrong or unfair. The evidence in this case shows that Bernice Lee had taken over the decedent’s business affairs completely, but as the trial court pointed out, she had merely taken up where her brother had left off when he moved from Milwaukee. Bernice Lee testified that in December 1973, she did consult another attorney other than Mr. Laikin and procured a declaration of intent signed by her father to give her and her children $9,000 in tax free gifts every year. This document was executed twenty-one days before Samuel Kamesar died, at a time when his attending physician testified that he was incapable of making any kind of decision. But this was remote in time from the date of execution of the will in question here. …

The evidence here is quite clear that Armon Kamesar and Jeanette Feldman received substantial gifts from their parents during the parents’ lives and that Bernice Lee had not. Even if she had tried to influence her father to make his will more favorable to her than to her brother and sister who had already benefitted from Samuel Kamesar’s generosity, such influence would not necessarily be undue. …

D. Coveted Result

This element goes to the naturalness or expectedness of the bequest. The fact that the testator has excluded a natural object of his bounty is a “red flag of warning.” But that fact alone does not render the disposition unnatural where a record shows reasons as to why a testator would leave out those who may be the natural beneficiaries of his bounty.

In the case at bar, the will expressly states that Armon Kamesar and Jeanette Feldman are excluded because the testator believed he had adequately provided for them during his lifetime. Mr. Laikin testified that it was he who suggested that this language be used in drafting the will … .

While conflicting inferences may be drawn from the evidence presented and even though the June 1971 will manifests a drastic change in attitude from that manifested just three months before when Armon Kamesar had been the close confidant of his father, the trial court’s finding in favor of the proponent on this issue is not against the great weight and clear preponderance of the evidence. We conclude, therefore, that on the basis of the four classic elements the trial court must be sustained.

II. *Presumption of Undue Influence*

Undue influence may also be proved by the existence of (1) a confidential relationship between the testator and the favored beneficiary, and (2) suspicious circumstances surrounding the making of the will. When the objector proves the existence of both elements by the required quantum of evidence, a presumption of undue influence is raised, which must be rebutted by the proponent. The trial court held that the record did not substantiate a finding of either element.

(1) Confidential Relationship

“The basis for the undue influence presumption lies in the ease in which a confidant can dictate the contents and control or influence the drafting of such a will either as the draftsman or in procuring the drafting ... . If one is not the actual draftsman or the procurer of the drafting, the relationship must be such that the testator depends upon the advice of the confidant in relation to the subject matter of the will.” ...

The objectors argue that Bernice Lee’s role in the execution of the June 1971 will made her the procurer of the drafting and execution of the will. To “procure” is “to initiate,” “to instigate,” or “to cause a thing to be done.” However, the record shows that it was Mr. Laikin who recommended that Samuel Kamesar change his will to reflect the provisions of the pre-nuptial agreement. Samuel Kamesar himself stated that he intended to make “other changes” as well. Bernice Lee’s role in communicating these changes to Mr. Laikin and in arranging for the execution of the will was a role customarily played by one of Samuel Kamesar’s children.

The record is clear, however, that Bernice Lee did manage all of her father’s business and personal affairs, and this court has held that where a child has also served as a testator’s financial advisor that a confidential relationship can be found to exist. … Bernice Lee testified that she took over the role that had previously been played by her brother and it appears to us that the reasonable inference to be drawn from the evidence is that Samuel Kamesar did rely on Bernice Lee in relation to the subject matter of the will. We conclude, therefore, the finding of the trial court, that there was no confidential relationship between Bernice Lee and her father is against the great weight and clear preponderance of the evidence.

(2) Suspicious Circumstances

The suspect circumstances requirement is satisfied by proof of facts “such as the activity of the beneficiary in procuring the drafting and execution of the will, or a sudden and unexplained change in the attitude of the testator, or some other persuasive circumstance.” “The basic question to be determined from the evidence is always whether ‘the free agency of the testator has been destroyed.’” …

[A]lthough Bernice Lee called the attorney, Mr. Laikin, made the appointment to see him to have the will signed, drove Samuel Kamesar to the lawyer’s office and communicated to the attorney the terms of the will which made her the sole beneficiary, these were all routine practices for this particular testator. The evidence showed that at the time of execution, Samuel Kamesar was aware of the terms of his will. The will was also drafted by his long-time personal friend and attorney who testified there was nothing irregular in the drafting or in the execution. The will itself contained the explanation that Samuel Kamesar believed that he had adequately provided for his son and his other daughter during their lifetime, and the fact was that they had received substantial gifts and that Bernice Lee had not received such gifts. The will was not made in haste but over a period of three months. There was no reluctance shown in signing the will and while the testator was forgetful, he was functioning on his own, outside of a nursing home when the will was executed. It was also established that Armon Kamesar had been informed by Doris Kamesar of the new will before his father died and all parties were aware of the testator’s failing health. The … court's conclusion that no suspicious circumstances were proven. That conclusion is not against the great weight and clear preponderance of the evidence. [Affirmed.]

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# CUNNINGHAM v. CUNNIGHAM

83 N.W. 58 (Minn. 1900)

COLLINS, J. [T]he only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses. The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both of the physicians went away. They were again summoned November 12, 1899, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory, and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which was lying upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting room, which stood about 10 feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about three feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said, in effect, that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two or three feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham.

The appellants (contestants) insist that the attestation and subscription by the witnesses was insufficient, because Mr. Cunningham did not and could not see the witnesses subscribe their names from where he sat ... In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the ‘presence’ of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. … And yet … no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his ‘conscious' presence … Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested 10 feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room?

Take the case at bar. The testator sat on the edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically he was capable of stepping two or three feet forward, and from this point the witnesses would have been within his range of vision. ... [T]he witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator while Dr. Adams returned doorway, not over five feet distant, whereupon the former ‘showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said in effect that it was all right.’ To say that this was not a sufficient attestation within a statute which requires such attestation to be in the ‘presence’ of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute … should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property. ... Judgment affirmed.

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# MATTER OF JOHNSON’S ESTATE

630 P.2d 1039 (Ariz. 1981)

WREN, Chief Judge. Arnold H. Johnson, the decedent, died on January 28, 1978 at the age of 79. One of his sons, John Mark Johnson, was appointed personal representative of the estate. In addition to John, the decedent was survived by five other children. Approximately three weeks following appointment of the personal representative, appellants, Barton Lee McLain and Marie Ganssle, petitioned for formal probate of an instrument dated March 22, 1977. The personal representative objected to the petition and filed a motion for summary judgment on the grounds that the instrument was invalid as a will, in that it … did not qualify as a holographic will … since the material provisions thereof were not in the handwriting of the testator. [The trial court held that the form did not qualify as a holographic will.]

The document claimed by appellants to be decedent’s last will and testament was a printed will form available in various office supply and stationery stores. It bore certain printed provisions followed by blanks where the testator could insert any provisions he might desire. The entire contents of the instrument in question are set forth below, with the portions underscored which are in the decedent’s handwriting.

|  |
| --- |
| THE LAST WILL AND TESTAMENT I Arnold H. Johnson a resident of Mesa Arizona of Maricopa County, State of Arizona, being of sound and disposing mind and memory, do make, publish and declare this my last WILL AND TESTAMENT, hereby revoking and making null and void any and all other last Wills and Testments heretofore by me made.  FIRST--My will is that all my just debts and funeral expenses and any Estate or Inheritance taxes shall be paid out of my Estate, as soon after my decease as shall be found convenient.  SECOND--I give devise and bequeath to My six living children as follows:To John M. Johnson 1/8 of my Estate Helen Marchese 1/8 Sharon Clements 1/8 Mirriam Jennings 1/8Mary D. Korman 1/8 A. David Johnson 1/8To W. V. Grant, Souls Harbor Church 3200 W. Davis Dallas Texas 1/8To Barton Lee McLain ) and Marie Gansels ) Address 901 E. Broadway ) 1/8Az Mesa )  I nominate and appoint Mirriam Jennings my Daughter of Nashville Tenn. as executress of this my Last Will and Testament Address 1247 Saxon Drive Nashville Tenn. IN TESTIMONY WHEREOF, I have set my hand to this. My Last Will and Testament, at \_\_\_\_\_\_\_\_\_\_\_\_\_ this 22 day of March, in the year of our Lord, One Thousand Nine Hundred 77  The foregoing instrument was signed by said Arnold H. Johnson in our presence, and by \_\_\_\_\_\_\_\_\_\_ published and declared as and for \_\_\_\_\_\_\_\_\_\_\_ Last Will and Testament, and at \_\_\_\_\_\_\_\_\_ request, and in \_\_\_\_\_\_\_\_\_\_\_ presence, and in presence of each other, we hereunto subscribe our Names as Attesting Witnesses, at \_\_\_\_\_\_\_\_\_ This 22 day of March, 1977  |

A will which does not comply with [the Uniform Probate Code] is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. The statutory requirement that the material provisions be drawn in the testator's own handwriting requires that the handwritten portion clearly express a testamentary intent. Appellants argue that the purported will here should thus be admitted to probate, since all the key dispositive provisions essential to its validity as a will are in the decedent’s own handwriting; and further, when all the printed provisions are excised, the requisite intent to make a will is still evidenced. We do not agree. In our opinion, the only words which establish this requisite testamentary intent on the part of the decedent are found in the printed portion of the form.

By requiring only the “material provisions” to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate.

It is thus clear that, under the terminology of the statute and the comment thereto, an instrument may not be probated as a holographic will where it contains words not in the handwriting of the testator if such words are essential to the testamentary disposition. However, the mere fact that the testator used a blank form, whether of a will or some other document, does not invalidate what would otherwise be a valid will if the printed words may be entirely rejected as surplusage. [In this case, however, the handwritten portions of the will without the printed words did not express testamentary intent because the handwritten words alone did not require that a disposition be made at death.] … Judgment affirmed.

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# MAGINN’S ESTATE

127 A. 79 (Pa. 1924)

WALLING, J. [The appealed from the lower court’s refusal to admit to probate seven loose pages that were found clipped together and offered as the Daniel Maginn’s will. The top page was signed by Maginn and subscribing witnesses. The other pages followed no apparent order, and nothing in the pages indicated that they were to be read together. None of the pages, except the last page, contained testamentary language.]

To entitle separate loose sheets of paper to be probated as a will they must be identified by their internal sense. "A will may be made on separate pieces of paper, but when so made they must be connected by their internal sense, by coherence or adaptation of parts, to constitute a will. The order of connection must appear upon the face of the will, it cannot be established by extrinsic evidence; and it must be a will executed as directed by the act of assembly."

Here appellants' case fails, for there is no internal sense connecting the first sheet with the second, or the second with the third, or the first with the third. There is no reference or recital to indicate they are connected the one with the other. The sheets are not numbered, and it is reasonably certain the second of the three sheets did not originally join the third, for, as found after Maginn's death, four sheets came between them. How then can the three, having no internal connection, be probated as a will? At best they express but a fragment of the testamentary intent, while one omitted page entirely modifies a $5,000 bequest contained in those probated. The three pages do not disclose the testator's completed testamentary purpose. ... The will on its face would be just as complete with the second page omitted and that page would fit just as well in any other will. [Affirmed.]

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# CLARK v. GREENHALGE

582 N.E.2d 949 (Mass. 1991)

NOLAN, J. [Helen Nesmith’s 1977 will named F.T. Greenhalge as executor and as recipient of all her tangible personal property, except that in Article Fifth of the will he was instructed to “distribute such of the tangible property to and among such persons as I may designate by a memorandum left by me and known to him, or in accordance with my known wishes.” Nesmith had in 1972 drafted and dated a document entitled “MEMORANDUM”, listing 49 specific bequests of her tangible personal property. In 1976, she modified that list and made a later series of entries in a notebook under the title, “List to be given, Helen Nesmith 1979.” In 1980, she executed two codicils to her 1977 will, amending and deleting certain bequests, and ratifying the 1977 will in all other respects. Following her death in 1986, Greenhalge, as executor, distributed Nesmith’s property in accordance with the will and codicils, and the 1972 memorandum, as amended in 1976. However, he refused to comply with the 1979 notebook, which bequeathed a valuable painting to Virginia Clark, who filed suit seeking a court order compelling him to do so.]

The probate judge found that ... [the] notebook qualified as a “memorandum” ... within the meaning of Article Fifth of Helen Nesmith's will [and that it] ... was in existence at the time of the execution of the 1980 codicils, which ratified the language of Article Fifth in its entirety. Based on these findings, the judge ruled that the notebook was incorporated by reference into the terms of the will ... [and] awarded the painting to Ms. Clark.

A properly executed will may incorporate by reference into its provisions any “document or paper not so executed and witnessed, whether the paper referred to be in the form of ... a mere list or memorandum, ... if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein.” ... The parties agree that the document entitled “memorandum,” dated 1972 and amended in 1976, was in existence as of the date of the execution of Helen Nesmith's will. The parties further agree that this document is a memorandum regarding the distribution of certain items of Helen Nesmith's tangible personal property upon her death, as identified in Article Fifth of her will. There is no dispute, therefore, that the 1972 memorandum was incorporated by reference into the terms of the will.

The parties do not agree, however, as to whether the documentation contained in the notebook, dated 1979, similarly was incorporated into the will through the language of Article Fifth. ... “The ‘cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided it is consistent with the rules of law.’” The intent of the testator is ascertained through consideration of “the language [of the will] ... as well as the circumstances existing at the time of the execution of the will. The circumstances existing at the time of the execution of a codicil to a will are equally relevant, because the codicil serves to ratify the language in the will which has not been altered or affected by the terms of the codicil.

The text of Article Fifth provides a mechanism by which Helen Nesmith could accomplish the result she desired; i.e., by expressing her wishes “in a memorandum.” ... The language of Article Fifth does not preclude the existence of more than one memorandum which serves the intended purpose of that article. ... [T]he phrase “a memorandum” in Article Fifth appears as an expression of the manner in which Helen Nesmith could exercise her right to alter her will after its execution, but it does not denote a requirement that she do so within a particular format. To construe narrowly Article Fifth and to exclude the possibility that Helen Nesmith drafted the notebook contents as “a memorandum” under that Article, would undermine our longstanding policy of interpreting wills in a manner which best carries out the known wishes of the testatrix. The evidence supports the conclusion that Helen Nesmith intended that the bequests in her notebook be accorded the same power and effect as those contained in the 1972 memorandum under Article Fifth. [Affirmed.]

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# ALDRICH v. BASILE

136 So.3d 530 (Fla. 2014)

On April 5, 2004, Ms. [Ann] Aldrich wrote her will on an “E–Z Legal Form.” In Article III, entitled “Bequests,” just after the form's pre-printed language “direct[ing] that after payment of all my just debts, my property be bequeathed in the manner following,” she hand wrote instructions directing that all of the following “possessions listed” go to her sister, Mary Jane Eaton:

—House, contents, lot at 150 SW Garden Street, Keystone Heights FL 32656

—Fidelity Rollover IRA 162–583405 (800–544–6565)

—United Defense Life Insurance (800–247–2196)

—Automobile Chevy Tracker, 2CNBE 13c916952909

—All bank accounts at M & S Bank 2226448, 264679, 0900020314 (352–473–7275).

Ann also wrote: “If Mary Jane Eaton dies before I do, I leave all listed to James Michael Aldrich, 2250 S. Palmetto 114 S Daytona FL 32119.” Containing no other distributive provisions, the will was duly signed and witnessed.

Three years later, Ms. Eaton did die before Ann, becoming her benefactor instead of her beneficiary. Ms. Eaton left cash and land in Putnam County to Ms. Aldrich, who deposited the cash she inherited from Ms. Eaton in an account she opened for the purpose with Fidelity Investments. On October 9, 2009, Ann Dunn Aldrich herself passed away, never having revised her will to dispose of the inheritance she had received from her sister.

After being appointed as personal representative of Ms. Aldrich’s estate, Mr. Aldrich sought to have a court determine who would inherit the property that Ms. Aldrich acquired after the execution of her will. Laurie Basile and Leanne Krajewski, Ms. Aldrich’s nieces from a predeceased brother, asserted an interest in the probate action. … The nieces argued that … Mrs. Aldrich’s will contained no mechanism to dispose of the after-acquired property or any other property not mentioned in the will, so that she died [partially] intestate as to the Putnam County property and the cash in the … Fidelity Investments account. … Mr. Aldrich essentially argues that the testator’s intent to dispose of her entire estate should lead this Court to construe her will as devising all of her property to the sole heir in the will, including the property not mentioned in the will. …

[Florida law] provides: “The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. ... Subject to the foregoing, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.” ... Also important in this analysis is how Florida's intestacy statute relates to [these rules]. When the Florida Legislature adopted the Uniform Probate Code, it ... provided: “Any part of a decedent’s estate not effectively disposed of by will passes to the decedent's heirs ... .”

It has been well established that “in construing a will the intention of the testator is the controlling factor and it should be gleaned from the four corners of the will unless the language employed by the testator is ambiguous, in which case the testimony of competent witnesses may be received and considered as an aid to the court in its quest for the testator’s intent.” The testator’s intention as expressed in the will controls, not that which she may have had in her mind.

It is clear from the language of Ms. Aldrich’s will that she intended to leave all of the property listed to her brother, Mr. Aldrich, in the event her sister, Ms. Eaton, predeceased her. Ms. Aldrich expressed no intent as to any property that she may have acquired after the execution of her will, as the document did not include a residuary clause, nor did it include any general bequests that could encompass the inherited property. Mr. Aldrich is asking this Court to infer from the four corners of the will that the testator intended to devise all of her property to the sole person mentioned in the will, including the inherited property which was not mentioned in the will, based on the assertion that the testator did not intend to die intestate as to any of her property. This conclusion is simply not supported by the four corners of the document.

Ms. Aldrich’s will states that she intended for all of the property that she listed to pass to her brother. Although it was not disputed that the property listed in the will was substantially all, if not completely all, of the property owned by the decedent at the time she executed the will, Ms. Aldrich did not explicitly state that her identified beneficiaries were to receive all of the property that she owned at her death, only the property that she listed in her will. If Ms. Aldrich did in fact intend to devise all of the property she owned at death to her named devisee, her intent would have been better served through the use of a residuary clause or general devises of personal and real property in the will.

The testator had nearly two years to decide how the after-acquired property would be distributed. She inherited approximately $122,000 in cash, which she deposited into an account she opened with Fidelity Investments days after she received it. At the time of her death, the investment account containing the after-acquired money had an approximate balance of $87,000. The decedent did not “effectively dispose of” the Fidelity Investments account as she had done with the accounts listed in the will. It is possible that in the years that passed between executing the first will and receiving the inheritance from Ms. Eaton, that Ms. Aldrich’s testamentary intent may have changed and that she became less eager to disinherit any additional heirs. Or, perhaps, Ms. Aldrich intended to sell the land and spend or gift all the inherited money during her lifetime, leaving none of this money to be disposed of by will. If Ms. Aldrich intended for the inherited money to pass to her named beneficiaries through the will, she could have simply deposited said money into one of the already-existing accounts that were expressly disposed of in her will. Instead, she chose to deposit the after-acquired money into a new investment account, which would seem to indicate that she intended for that property to be separate from the money that she had already mentioned in her will. ...

Ms. Aldrich’s will is not ambiguous. There are no provisions in the will that are “difficult to reconcile.” The will is not ambiguous as to the question of whether Ms. Aldrich intended to dispose of after-acquired property. The will did not have a residuary clause or any general devises which could be interpreted as disposing of any of the inherited property. This court cannot infer from the four corners of the will, without adding words to the document, that in making provision for the property she owned on that day that she also intended to make provision for any property that she stood to gain in the future. ...

The testator’s will specifically devised all possessions “listed,” to Mr. Aldrich. Therefore, it is clear that the testator did not intend for any property not listed to be distributed by the will. Any other interpretation of the testator’s actions would require this Court to rewrite the will to include provisions regarding property for which the testator made none. In the present case, this Court would be forced to speculate that the testator intended for her sole devisee to have more than she specifically listed in her will, despite language in the will indicating the opposite. [Affirmed.]

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# ESTATE OF GUSHWA

197 P.3d 1 (N.M. 2009)

BOSSON, J. In June 2000, George Gushwa (Decedent) executed his Last Will and Testament (the Will) while his wife, Zane Gushwa**,** (Wife) was in the hospital. Decedent was assisted in preparing the Will by his niece, Betty Dale, and her husband, Ted Dale (Ted). The Will provided that Decedent's separate property be held in trust for the support of Wife, during her life, and upon her death it was to be distributed to Decedent’s nieces and nephews. … Shortly thereafter, it appears that Decedent decided he wanted to revoke the Will. According to Wife, Decedent called Ted to regain possession of the original Will, but Ted refused to send it. … Ted then notified Decedent’s attorney [who instructed him not to return the original will].

In January 2001, Decedent contacted another lawyer to help him revoke the Will. In February 2001, his new lawyer assisted him in drafting a document entitled “Revocation of Missing Will(s),” in which Decedent repeatedly stated that he wanted to revoke his previous Will. … In April 2001, Decedent received a photocopy of the entire Will from his previous attorney and wrote “Revoked” on each page of that copy of the Will. Decedent died in 2005. After his death, … Wife asserted that her husband died intestate … .

This appeal raises two questions … . First, we consider whether Decedent’s execution of the Revocation of Missing Will(s) document satisfies the requirements … dealing with revocation by writing. Second, we determine whether Decedent’s act of writing “Revoked” on a photocopy is a revocatory act … .

Wife argues that the Revocation of Missing Will(s) document should be given the effect of a subsequent will because of its language expressly revoking Decedent’s prior will. … Wife’s position, however, is at odds with the Code’s specific language describing the only legally effective methods of revocation. If a will could be revoked by any writing that simply revoked another will, without the necessary testamentary language – or that it be in fact a “subsequent will” – then a will could be revoked by “any other writing,” contrary to the Code’s specific language and the legislative intent to limit the available means of revocation. Because our Probate Code requires revocation by a subsequent will, we are guided by this more specific statement rather than a generic definition. Accordingly, we reject Wife’s argument that the Revocation of Missing Will(s) document satisfies the requirements of [the Probate Code]. It clearly does not, regardless of Decedent's intent. …

In addition to revoking a will by executing a subsequent will, the Probate Code provides that a will may be revoked by performing a revocatory act on the will. … Wife is attempting to give the photocopy the same legal significance as an executed original, which our Probate Code does not permit. … Instead, our Probate Code mandates that a revocatory act be performed “on the will.” While the Code does not explicitly require that the act be performed on the original or on an executed original, such a requirement is implicit in the statutory term “will.” … Requiring that the revocatory act be performed on an original, or on a fully executed copy, simply comports with the statutory requirements for executing a will. … [T]he requirement of an original can protect against fraudulent reproduction of unauthorized wills. Photocopies can be readily produced and the existence of multiple copies of a will can engender confusion, especially when the issue is whether the will has been validly revoked. … Accordingly, we hold that Decedent’s revocatory acts performed on a mere photocopy of his original Will do not comport with the statutory requirments … . [Affirmed in part; reversed in part.]

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# ESTATE OF KAUFMAN

155 P.2d 831 (Cal. 1945)

TRAYNOR, J. On March 18, 1940, Samuel B. Kaufman executed a will in New York. He subsequently moved to California where he executed a new will on April 30, 1941, containing a clause “I, Samuel B. Kaufman, do hereby make and declare this to be my Last Will and Testament, revoking all former wills.” Both wills named identical persons for identical cash bequests and the Second Church of Christ, Scientist, of New York City, as residuary legatee. The 1941 will named a new executor. It also directed that the testator’s body be cremated; the 1940 will only stated a wish to that effect. It expressly provided, as the 1940 will did not, that the specific legacies were given free of deduction for inheritance or estate taxes. It made no express provision, as the 1940 will did, that “In the event there is not sufficient amount in my estate to pay the above requests, I direct my executor to divide the proceeds in the proportion as stated above.” The testator died on May 2, 1941. On petition of one of the executors, the 1941 will was admitted to probate. [However, the charitable bequest of the residue to the Church violated a state law requirement that the decedent survive for at least 30 days after making the bequest.] Appellant thereafter filed a petition to have the 1940 will admitted to probate [instead], to which respondent filed a contest. The present appeal is taken from the judgment denying the 1940 will admission to probate.

The respondent contends that there is substantial evidence to support the finding of the trial court that it was the intention of the testator in executing the 1941 will to revoke the 1940 will unconditionally. The appellant contends that the 1940 will should be admitted to probate under the doctrine of dependent relative revocation, on the ground that the testator did not intend to destroy the testamentary effect of the 1940 will unless the 1941 will would become wholly effective. …

Under the doctrine of dependent relative revocation, an earlier will, revoked only to give effect to a later one on the supposition that the later one will become effective, remains in effect to the extent that the latter proves ineffective. The doctrine is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative. …

The doctrine is clearly applicable to the facts of the present case. … Since the second will was virtually identical with the first in the disposition of the testator’s estate, it is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy as to a substantial part of his estate. … [A] testator who repeats his purpose intends to confirm and not revoke it, and does not intend to have the new will operate as a revocation independently of its operation as a will. …

All the testimony … shows that the testator wanted no change in his will except for the naming of a [new] executor. … The testator was not advised that he might provide in his 1941 will that the revocation of the charitable bequest by the revocation clause in the 1941 will was dependent upon the legal effectiveness of the 1941 will to carry out his bequest, nor was he advised that the same result would follow under the doctrine of dependent relative revocation. … . It does not follow from the fact that he was advised that the new will would not be effective unless he lived for thirty days that he intended that the charitable bequest should fail if he died within that period. To so hold would be to read into the charitable bequest an intentional condition precedent that the testator should live for more than thirty days. There is no evidence that the testator had any such intention. [Reversed.]

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# WOLF v. BOLLINGER

62 Ill. 368 (1872)

SHELDON, J. On the 2d day of February, 1868, Jacob Bizer duly executed his last will and testament, wherein Catharine Bollinger, the appellee, was made the devisee of a certain forty acres of land. A few weeks afterward, the testator sent for Frederick T. Krafft, the executor named in the will, and informed him that he wished to alter the will so that Christina Wolf, the appellant, should take the forty acres instead of Catharine Bollinger; and at his instance, Krafft cancelled the name of Catharine Bollinger in the will, by drawing lines through it with a pen, leaving the name still legible, and interlined over it the name of Christina Wolf, so as to make the will read as a devise of the forty acres to her. … After the death of Jacob Bizer, the will, in its altered condition, was admitted to probate. …

We come now to the main question in this case – the effect of this alteration of the will. … Before the alteration, the will contained a valid devise to her of this forty acres of land. It is the rule that a valid will, once existing, must continue in force, unless revoked … “by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, by his direction and consent, or by some other will, testament, or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament, or codicil in writing, executed as aforesaid in due form of law.”

The only mode of revocation of this devise to Catharine Bollinger, that can be claimed in this case, is by cancellation or obliteration. Lines were drawn with a pen through her name as devisee, leaving it still legible, and the name of Christina Wolf was interlined above it. It has been often determined, in the construction of similar statutes, that the mere acts named, of cancellation or obliteration, will not constitute a valid revocation, unless done with the intent to revoke. ...

The intent of the testator, as expressed by himself, when he directed the cancellation to be made, was, “that Christina Wolf should inherit the forty acres instead of Catharine Bollinger.” The cancellation was not made with intent to revoke the devise to the complainant simply, but with intent to substitute in her stead the defendant, Christina Wolf, as a devisee. The cancellation of the name of Catharine Bollinger, was but as a means toward the effecting of the end of such substitution; and the ultimate object of substitution having failed of accomplishment, the cancelling, which was done only in the view of, and in order to effect, that object, should be esteemed for nothing, and be considered, not as having been made absolutely, but only conditionally, upon the attempted substitution being made effectual. To give it effect under the circumstances, would seem to be to thwart the intention of the testator, and make him intestate as to this piece of land, when he manifested the contrary intent by his will. It can by no means be said to have been the intent of the testator, that in case Christina Wolf was not substituted as devisee, Catharine Bollinger should not take the devise, or that as between the latter and his heirs-at-law, he preferred that they should have the land. The original intention of the will certainly was to make her a devisee; it appears to have been changed no further than in order to effect the substitution of another devisee in her place; that purpose having failed to become perfected, the original intention to devise to Catharine Bollinger must be considered as remaining unchanged.

[Under] the doctrine [of dependent relative revocation] … where the testator makes an alteration in his will, by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute; and such alteration not being so made as to take effect, the will, therefore, stands in legal force, the same as it did before, so far as it is legible after the attempted alteration. [Reversed.]

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# CHURCH v. MORGAN

685 N.E.2d 809 (Ohio Ct. App. 1996)

HARSHA, J. [The testator, Minnie Lacy, devised the money in a specific savings account to Spring Fleming and the residue to Ellene Cobbs. At the moment Ms. Lacy executed her will on February 27, 1995, there was $94,108.25 in savings account number 72424 at the Belpre Savings Bank. Lacy had been taken to her attorney’s office that day to sign her will by her long-time friend, accountant Samuel Church, who held a power of attorney. Although this will also named Church as the eventual executor of Ms. Lacy’s estate, he had no knowledge of the specific dispositions in Lacy’s will until after her death approximately two and one-half months later. During the return drive home after she signed the will, Church mentioned to Ms. Lacy that she should consider transferring money from her lower yielding savings accounts to higher yielding certificates of deposit. Lacy agreed and they drove to the bank, and she withdrew the money from savings account number 72424, and purchased certificate of deposit number 53029825 with the money. After he read the will following Lacy’s death, Church asked the court to construe the will and determine if the devise to Fleming had been adeemed.]

Only when the express language of the will creates doubt as to its meaning may the court consider extrinsic evidence to determine the testator's intent. Unfortunately for Ms. Fleming, the words of Ms. Lacy’s will clearly and unambiguously express her testamentary intent about the disposition of her estate. The second provision of her will enumerates several specific bequests to Ms. Fleming, testator’s niece, one of which states “I give, devise and bequeath to SPRING FLEMING, … all funds located in the following account … Savings Account #72424, in my name at Belpre Savings Bank, of Belpre, Ohio.” Since the express language contained within the four corners of this will creates no doubt as to its meaning, neither the lower court nor this court, may consider any extrinsic evidence to determine Ms. Lacy’s intent. At the time of testator’s death, savings account number 72424, in Ms. Lacy’s name at Belpre Savings Bank in Belpre, Ohio, contained $4,108.25 plus interest. Pursuant to the express terms of the specific bequest cited above, appellee is thereby entitled to receive $4,108.25 plus interest from savings account number 72424. …

[T]he executor has submitted extrinsic evidence that $90,000 was withdrawn from that account, literally within hours of the execution of the will, to fund a certificate of deposit at a higher rate of interest. Even though such extrinsic evidence might indicate that Ms. Lacy intended the $90,000 to remain part of Ms. Fleming’s specific bequest, we are nevertheless bound to ignore such evidence and construe the terms of the will as written by the testator. To do otherwise would result in this court rewriting the testator’s will … .

 The express terms of the will are unambiguous. It is only by introducing the extrinsic evidence of the substantial transfer of funds on the day the will was executed that testator’s intent may appear unclear. However, our independent examination of the will discloses no basis upon which to justify a consideration of the extrinsic evidence admitted by the lower court. This is especially true in light of the continued existence of account number 72424 at the time of death.

 Therefore, we hold that the will of Minnie Frances Lacy, on its face, clearly and unambiguously expresses her testamentary intentions. Any reference to the extrinsic evidence submitted by the executor in this case is unnecessary and cannot be permitted. As a result, the lower court erred in its admission and consideration of the extrinsic evidence in order to determine testator's intentions. Accordingly, certificate of deposit number 53029825, which was not explicitly disposed of by the will, becomes part of the rest, residue and remainder of testator’s estate and must, by law, pass to the residuary beneficiary, Ms. Cobbs. [Reversed and remanded.]

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# WEST v. COOGLER

427 So.2d 813 (Fla. App. Ct. 1983)

COWART, Judge. This case involves an “advancement” to one beneficiary of a trust.

On July 30, 1962, Margaret F. Coogler, as settlor, conveyed 160 acres to her daughter, appellant Jane West, in trust for the use and benefit of the settlor during her lifetime with remainder in trust for the use and benefit of her four children: appellant Jane West, appellee Vivian V. Coogler, Jr., appellant William F. Coogler, and Theodore Jack Coogler. The deed of trust provided that the trust expired 20 years from its date and that if any of the four children died prior to the expiration of the trust that child’s interest would pass in equal shares to the surviving beneficiaries. Upon termination the corpus was to be distributed equally to the surviving beneficiaries. This was a spendthrift trust precluding any alienation of any interest therein by any beneficiary. This deed of trust was not recorded until March 3, 1964, and between the date of its execution and its recording … Margaret F. Coogler deeded her son Vivian V. Coogler, Jr., and his wife Clara, a quarter (40 acres) of the property included in the trust deed. On January 4, 1967, Vivian V. Coogler, Jr., deeded the forty acre tract he obtained from his mother to a third party. … In 1968 one of the four children, Theodore Jack Coogler, died and in 1969 the mother died. … In 1979 Vivian V. Coogler, Jr., brought this action for declaratory decree and accounting, claiming a one-third interest in the corpus of the trust, being the 120 acres remaining of the 160 acres … .

In a strict technical sense, the legal definition of an “advancement” is an inter vivos gift made by a parent to a child with intent that such gift represents a part or the whole of the donor’s estate that the donee would inherit on the death of the donor. … Whether a particular transfer is an advancement or not is one of intent and the relevant intent is that of the person making the gift and not that of the donee. Therefore, whether or not Vivian V. Coogler, Jr., knew of the trust at the time he received the 40 acres from his mother is irrelevant and immaterial. Vivian V. Coogler, Jr., knew of the trust at the time he received the 40 acres from his mother is irrelevant and immaterial. Vivian V. Coogler admitted that he paid his mother nothing for the 40 acres. In addition to a presumption the testimony of Jane West as to her mother’s intent was made without objection and is uncontradicted. As to why the mother gave the 1964 deed of 40 acres to Vivian V. Coogler, Jr., in her deposition Jane West testified, “she said he just was pressuring her and she felt he needed it at that time instead of later.” At trial Jane West, referring to her mother’s 1964 conveyance of the 40 acres to Vivian V. Coogler, Jr., said, “she really just considered it an early inheritance. She said he needed it now was the way she explained it to me.” Since advancements to a child can be made by a transfer to the spouse of the child it is immaterial that the 1964 deed from the mother was to Vivian V. Coogler, Jr., and his wife Clara.

Therefore we hold that the conveyance of 40 acres by the settler to Vivian V. Coogler, Jr., constituted an advancement [and satisfaction,] and that for the purposes of distribution the 40 acres should be grouped, hotchpot, with the remaining trust corpus and treated as an advancement and, in this case, charged, not by valuation but in kind as 40 acres against the interest of Vivian V. Coogler, Jr., in the trust corpus. The effect of this is that Vivian V. Coogler will share with Jane West and William F. Coogler the share that their brother Theodore Jack Coogler would have received had he survived … . [Affirmed in part; reversed in part; remanded.]

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# GIANOLI v. GABACCIA

412 P.2d 439 (Nev. 1966)

ZONOFF, D.J. [John Data will devised $5,000 “to each of my brothers and sisters” and left the residue of his estate “to my nephews and nieces, share and share alike.” At the time the will was executed, one brother and one sister were already dead. Before Data died, two other brothers and another sister died. Only one sister survived Data. The Nevada anti-lapse statute provided: “When any estate shall be devised or bequeathed to any child or other relation of the testator and the devisee or legatee shall die before the testator, leaving lineal descendants, such descendants, in the absence of a provision in the will to the contrary, shall take the estate so given by the will in the same manner as the devisee or legatee would have done is he had survived the testator.”]

 We first consider the two brothers and sister of Data who were alive at the time of the will’s execution but predeceased Data. … Data’s brothers and sisters come within th[e] protection [of the anti-lapse statute] “in the absence of a provision in the will to the contrary.”

 It is argued … that Data intended for the anti-lapse statute not to apply. Such intent, of course, would control, “but to render the statute inoperative a contrary intent on the part of the testator must be plainly indicated.” Nowhere is such a “plain intent” expressed within Data’s will; nor did he even state “I give … to each of my surviving brothers and sisters.” …

 Finally, we consider the status of the brother and sister who predeceased the execution of Data’s will. ... Our anti-lapse statute only speaks of a testamentary beneficiary who “shall die before the testator;” there is no specification as to how long “before,” nor is there any express reference within the statute to “lapse” or “void” bequests or their distinction. However “[i]t seems obvious that the [anti-lapse statute] was motivated by a purpose to protect the kindred of the testator and by a belief that a more fair and equitable result would be assured if a defeated legacy were disposed of by law to the lineal descendants of the legatees or devisees selected by the testator.” Accepting this rationale, as have the majority of courts, we see little reason to not equally apply it to void as well as lapsed bequests or devises. [Reversed.]

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# MATTER OF REYNOLDS

664 N.E.2d 1209 (N.Y. Ct. App. 1996)

BELLACOSA, J. This appeal raises for this Court’s review the question whether an inter vivos trust, in which a deceased spouse retained a limited power of appointment, constitutes a testamentary substitute in violation of the surviving spouse’s right of election. …

Appellant William Reynolds and decedent Dorothy Reynolds were married in 1963 and remained wed until her death in 1989. The decedent had four children from a previous marriage. On May 11, 1989, Dorothy Reynolds, suffering from adverse health, created a trust for the purpose of qualifying for Medicaid benefits in the event that nursing home care was needed. She named two of her children from a previous marriage as trustees and, pursuant to the terms of the trust, transferred the majority of her assets to the trust while designating her children as remainder beneficiaries. As the settlor of the trust, she relinquished all right, title and interest in the property thus transferred, except for retaining the right to appoint remainder beneficiaries at any time prior to the termination of the trust. The limitation on the exercise of the retained power was that the settlor could not appoint herself, her spouse, her creditors, or her estate and its creditors. The trust agreement fixed a termination date of one day prior to the death of the settlor.

Dorothy Reynolds died on August 29, 1989, leaving her entire estate to her children from a previous marriage. … Appellant, her surviving spouse, filed a notice of election … . Subsequently, however, appellant filed objections to the proposed accounting for the estate. He particularly objected to the exclusion of inter vivos trust assets from the estate accounting for purposes of computing his elective share. The [lower court] sustained the objection and decreed that the assets of the trust were part of decedent’s estate. The Appellate Division disagreed and … held that the trust was not a testamentary substitute under [the elective share statute] because the transfer was irrevocable and the decedent had relinquished the right to appoint herself or her estate as beneficiary. …

[W]e conclude that Dorothy Reynolds’ retained power of appointment, though limited, left her with meaningful control over the trust during her lifetime, in contravention of the statute’s explicit and intended protection. Because the settlor, despite her general relinquishment of title and ownership of the property, was free to designate any person, charity or entity as a beneficiary of the trust except for herself, her spouse or her estate and creditors, she possessed personal power to execute what were essentially testamentary transfers to any number of other specific beneficiaries of her choosing. This was a functional substitute allowing disposal of the entire trust corpus by way of one or a series of specific bequests … . The power here to designate many beneficiaries or classes is essentially indistinguishable from the power to dispose of the principal of the trust as contemplated by the statute. … . This power of appointment is no less testamentary here because it purports to expire the day before the settlor’s death … . Since the termination date of the power cannot be ascertained with any certainty until after the death of the settler [Reynolds], it … effects no … realistic limitation on the exercise of the meaningful power retained by the settlor during virtually her entire lifetime. [Affirmed as modified.]

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# Estate of Shannon

274 Cal. Rptr. 338 (Cal. Ct. App. 1990)

HUFFMAN, ACTING P. J. Gilbert A. Brown, executor of the will of Lila Demos Shannon, appeals on behalf of Lila’s estate from an order of the probate court denying her petition for determination of heirship as an omitted spouse … .

On January 25, 1974, Russell, an unmarried widower, executed his last will and testament, naming his daughter, Beatrice Marie Saleski, executrix and sole beneficiary. The will also provided his grandson, Donald Saleski, would inherit his estate in the event Beatrice did not survive him for “thirty (30) days” and contained a disinheritance clause which provided as follows: “Seventh: I have intentionally omitted all other living persons and relatives. If any devises, legatee, beneficiary under this Will, or any legal heir of mine, person or persons claiming under any of them, or other person or persons shall contest this Will or attack or seek to impair or invalidate any of its provisions or conspire with or voluntarily assist anyone attempting to do any of those things mentioned, in that event, I specifically disinherit such person or persons. If any Court finds that such person or persons are lawful heirs and entitled to participate in my estate, then in that event I bequeath each of them the sum of one ($1.00) dollar and no more.”

On April 27, 1986, Russell married Lila. On February 22, 1988, Russell died. He did not make any changes in his will after his marriage to Lila and before his death. His 1974 will was admitted to probate May 9, 1988, and Beatrice was named executrix of his estate. On September 27, 1988, Lila filed a petition for … determination of entitlement to estate distribution as an omitted surviving spouse. The court denied … Lila’s petition to determine heirship. She timely appealed only from this latter order. … On appeal, Lila contends she was a pretermitted spouse … and does not fall under any of the exceptions … which would preclude her from sharing in Russell's estate as an omitted spouse. We agree and reverse.

Section 6560, [of] the [California] Probate Code … states: “Except as provided in Section 6561, if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive a share in the estate … .” Section 6561 states: “The spouse does not receive a share of the estate under Section 6560 if any of the following is established: (a) The testator’s failure to provide for the spouse in the will was intentional and that intention appears from the will.” …

Here, Russell failed to provide for Lila in his will. … [S]he is thus an omitted spouse and the crucial inquiry becomes whether Beatrice met the burden of rebutting this presumption. …

The will on its face does not evidence an intent on Russell’s part to disinherit Lila. … [T]he presumption [that she is an omitted spouse] is only rebutted by a clear manifestation of such intent on the face of the will … .

[E]xclusionary clauses in wills which fail to indicate the testator contemplated the possibility of a future marriage are insufficient to avoid the statutory presumption. … As there is no mention of Lila or the fact of a future marriage in the disinheritance clause of the will, it does not manifest Russell's intent to specifically disinherit Lila as his surviving spouse. Beatrice has simply not met her burden of proving Russell’s intent to disinherit Lila … .

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# AZCUNCE v. ESTATE OF AZCUNCE

586 So.2d 1216 (Fla. Ct. App. 1991)

HUBBART, Judge. The central issue presented by this appeal is whether a child who is born after the execution of her father’s will but before the execution of a codicil to the said will is entitled to take a statutory share of her father's estate under Florida's pretermitted child statute-when the will and codicils fail to provide for such child and all the other statutory requirements for pretermitted-child status are otherwise satisfied.

On May 4, 1983, the testator Rene R. Azcunce executed a will which established a trust for the benefit of his surviving spouse and his then-born children: Lisette, Natalie, and Gabriel; the will contained no provision for after-born children. On August 8, 1983, and June 25, 1986, the testator executed two codicils which did not alter in any way this testamentary disposition and also made no provision for after-born children.

On March 14, 1984, the testator’s daughter Patricia Azcunce was born-after the first codicil was executed, but before the second codicil was executed. The first codicil expressly republished all the terms of the original will; the second codicil expressly republished all the terms of the original will and first codicil.

On December 30, 1986, the testator, who was thirty-eight (38) years old, unexpectedly died of a heart attack-four months after executing the second codicil. After the will and codicils were admitted to probate, Patricia filed a petition seeking a statutory share of her father's estate as a pretermitted child; the trial court denied this petition. Patricia appeals. The statute on which Patricia relies for a share of her father’s estate provides:

When a testator omits to provide in his will for any of his children *born or adopted after making the will* and the child has not received a part of the testator’s property equivalent to a child’s part by way of advancement, the child shall receive a share of the estate equal in value to that he would have received if the testator had died intestate, unless:

(1) It appears from the will that the omission was intentional; or

(2) The testator had one or more children when the will was executed and devised substantially all his estate to the other parent of the pretermitted child.

Without dispute, Patricia was a pretermitted child both at the time the testator’s will and the first codicil thereto were executed, as, in each instance, the testator “omit[ted] to provide in his will [or codicil] for [Patricia who was] born ... after ... the will [or codicil was executed]”; moreover, Patricia at no time received a part of the testator’s property by way of advancement, the will and first codicil do not expressly disinherit Patricia, and the testator did not substantially devise all of his estate to Patricia's mother. The question in this case is whether the testator’s execution of the *second* codicil to the will *after* Patricia had been born destroyed her prior statutory status as a pretermitted child.

[A]s a general rule, the execution of a codicil to a will has the effect of republishing the prior will as of the date of the codicil. Although this is not an inflexible rule and must at times give way to a contrary intent of the testator, it always applies where, as here, the codicil expressly adopts the terms of the prior will; this is so for the obvious reason that such a result comports with the express intent of the testator.

Turning to the instant case, it is clear that the testator’s second codicil republished the original will and first codicil because the second codicil expressly so states. This being so, Patricia’s prior status as a pretermitted child was destroyed inasmuch as Patricia was alive when the second codicil was executed and was not, as required by Florida’s pretermitted child statute, born after such codicil was made. Presumably, if the testator had wished to provide for Patricia, he would have done so in the second codicil as she had been born by that time; because he did not, Patricia was, in effect, disinherited which the testator clearly had the power to do. Affirmed.

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# SELF v. SLAUGHTER

16 So.3d 781 (Ala. 2008)

 BOLIN, J. Wright Slaughter and Georgia B. Slaughter were married for 32 years. There were no children born of their marriage but each had children born of prior marriages. … In 1998, the Slaughters had assets totaling approximately $1.2 million. The assets were apportioned as follows: Wright had assets totaling $664,464, Georgia had assets totaling $238,194, and they had joint assets totaling $347,229. Additionally, Georgia owned a policy of life insurance that insured Wright's life for $415,986 and that named Georgia as the beneficiary. … On June 1, 1998, Wright and Georgia executed identical wills that provided for a family-support trust upon the death of the first to die, with the surviving spouse being the lifetime beneficiary of the trust. Upon the death of the surviving spouse, the remaining assets of the family-support trust would be distributed to the Slaughters' children … .

 At the time the Slaughters executed their wills, [they each] also executed agreements [not to revoke or change their wills]. … [T]he Slaughters wanted to execute the agreements to ensure that the surviving spouse could not change his or her will after the other died. … Wright died in November 2005. Wright's will was admitted to probate, and his estate passed consistent with the terms of the will to fund the family-support trust for Georgia. Shortly after Wright's death, Georgia discussed with [her attorney] the possibility of changing her will because she felt that the way the assets were to be distributed under the will was unfair to her two children … .

 Georgia executed the Georgia B. Slaughter Revocable Trust on March 3, 2006. Pursuant to the terms of the revocable trust, Georgia's children Mike and Don were to receive her residence, household effects, furniture, furnishings, silverware, chinaware, art, jewelry, automobiles, and other personal property in equal shares. The balance of the trust was to be distributed to [her children]. All Georgia's assets were transferred into the trust during March and April 2006. The effect of establishing the revocable trust and transferring Georgia's assets into it was that there would be no assets to be distributed to the two of Wright's children who were beneficiaries of Georgia's 1998 will … . Georgia died on April 13, 2006, shortly after executing the revocable trust. Her will was admitted to probate in July 2006.

Contracts not to revoke a will or devise are enforceable … . In this case, it is clear from the record that the creation of the revocable trust and the transfer of Georgia's assets into the trust were for the clear purpose of defeating the contract Wright and Georgia had entered into whereby each agreed not to change his or her 1998 will upon the other's death. Georgia informed [her attorney] in November 2005 that the disposition of her estate under her will was not fair to her children … and that she wanted to change it. … [The attorney] testified that he informed Georgia … that agreements not to revoke or change a will were valid and enforceable agreements and that a challenge to the creation of the revocable trust and the transfer of Georgia's assets into the trust was likely. …

Here, Georgia and Wright executed a valid and enforceable agreement by which the surviving spouse would not change or revoke his or her will following the other's death. That agreement cannot be circumvented by the creation of the revocable trust and the transfer of Georgia's assets into the trust when it is clear that the sole purpose for creating the revocable trust was to defeat the agreement not to change or revoke the 1998 wills executed by Wright and Georgia. …Wright supplied consideration for Georgia's promise not to change her will when he transferred to Georgia a significant amount of assets titled solely in his name in order to create two separate and equal estates. Before the transfer of assets to Georgia, Wright had titled solely in his name $664,464 of the couple's approximately $1.2 million in total assets (including jointly held assets and Georgia's solely owned assets of $238,194). Thus, a transfer of assets by Wright to Georgia in order to create two separate and equal estates resulted in a significant reduction in the value of Wright's individual estate. Additionally, Wright supplied consideration to Georgia in exchange for her promise not to change or revoke her will when upon his death the balance of his estate passed into the family-support trust for Georgia's benefit.

[As to the argument] that Georgia agreed only not to *change* her will and that the inter vivos transfer of her assets into the revocable trust does not constitute a breach of the agreement not to *change* her will. Here, the parties did indeed use the word *change* in reaching the agreement at issue, and by creating the revocable trust and transferring the balance of her estate into the revocable trust Georgia did not technically work a *change* to her will. However, transferring the balance of her estate into the revocable trust had the effect of revoking her will, because upon her death there was nothing left in her estate to be distributed in accordance with the terms of her will. … Accordingly, we conclude that the transfer of the assets of Georgia's estate into the revocable trust, which was created for the purpose of circumventing the terms of her will, constitutes a breach of the agreement not to change or revoke her will. Affirmed.

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# FRANZEN v. NORWEST BANK COLORADO

955 P.2d 1018 (Colo. 1998)

 SCOTT, J. This case arises out of a disagreement over disposition of assets in trust created for the benefit of Frances Franzen by her late husband, James Franzen. … On February 4, 1992, James Franzen, the settlor, executed an instrument creating a trust designed to provide for himself and his wife, Frances Franzen. … Norwest Bank … was named as the sole trustee in the trust agreement.

 James was terminally ill when he created the trust, and he died four months later. Upon Mr. Franzen’s death, a trust officer at the bank sent a letter to Frances Franzen, who was living in a nursing home, notifying her that she had “certain rights regarding the trust.” [The trust agreement stated that at James’ death, if Frances survives him], “she may direct … [the] trustee in writing to deliver the residuary trust estate to her within three months of [James’] death. If she does not so direct, this trust shall continue to be administered as provided [in the trust agreement]. If she so directs, the trust shall terminate on the date the trust estate is distributed to her.” …

 The bank ... contacted Mrs. Franzen’s nephews, who were named as remaindermen of the trust. The two nephews were reluctant to assume responsibility for Mrs. Franzen’s affairs, though, and Mrs. Franzen’s brother, James O’Brien, intervened. O’Brien moved Mrs. Franzen to a nursing home in Kentucky, where he lived, and asked the bank to turn over Mrs. Franzen's assets to him. ... [T]he nephews expressed concerns about O’Brien’s motives. The bank declined to comply with O'Brien’s request, and it filed a Petition for Instruction and Advice in the Denver Probate Court (probate court). Before the hearing, O’Brien sent the bank a copy of a power of attorney purporting to authorize him to act in Mrs. Franzen’s behalf and a letter attempting to revoke the trust and to remove the bank as trustee. ...

 Article 6.2 of the trust provides that after the death of James Franzen, Frances Franzen “may remove any trustee,” and that “[a]ny removal under this ... [paragraph] may be made without cause and without notice of any reason and shall become effective immediately upon delivery of ... [written notice] to the trustee” unless Frances Franzen and the trustee agree otherwise. Article 8 of the trust agreement gives James Franzen “the right to amend or revoke this trust in whole or in part ... by a writing delivered to ... [the] trustee ... . After my death, Frances may exercise these powers with respect to the entire trust estate.” ...

 The probate court ordered the bank to use the assets to make payments for Mrs. Franzen’s benefit. ... On appeal, the court of appeals reversed, holding that the power of attorney authorized O'Brien to remove the bank as trustee and to revoke the trust. ...

 A power of attorney is an instrument by which a principal confers express authority on an agent to perform certain acts or kinds of acts on the principal's behalf. ... Norwest notes that the power of attorney executed by Mrs. Franzen did not refer specifically to the Franzen trust. Thus, Norwest argues, O'Brien was not authorized to remove the trustee or revoke the trust. …

 [W]e are not persuaded that under the common law, an agency instrument must expressly refer to a particular trust by name in order to confer authority on the agent to revoke it. Under the reasoning of the cases previously cited, the terms of the power of attorney need only evince an intention to authorize the agent to make decisions concerning the principal's interests in trusts generally, not necessarily a particular trust.

 Section 1(c) of the power of attorney executed by Mrs. Franzen expressly authorizes O'Brien to “manage ... and in any manner deal with any real or personal property, tangible or intangible, or any interest therein ... in my name and for my benefit, upon such terms as ... [O’Brien] shall deem proper, including the funding, creation, and/or revocation of trusts or other investments.”

 We have little trouble concluding that the quoted language expressly authorizes O'Brien to revoke the Franzen trust, even though it does not mention the trust specifically by name. ... In conclusion, we hold that under the common law, a power of attorney that appears to give the agent sweeping powers to dispose of the principal’s property is to be narrowly construed in light of the circumstances surrounding the execution of the agency instrument. However, the principal may confer authority to amend or revoke trusts on an agent without referring to the trusts by name in the power of attorney. [Judgment affirmed.]

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# GURNETT v. MUTUAL LIFE INSURANCE CO.

191 N.E. 250 (Ill. 1934)

 DeYOUNG, J. [Knowlton Ames deposited several insurance policies worth $1 million with the Central Trust Company. Under the trust agreement, the trust company was named beneficiary of those policies, while Ames continued to pay the premiums and retained all rights under the policies. The only duty of Central Trust as trustee was to surrender the policies to Ames upon demand and to administer the proceeds under the provisions of the trust agreement upon the death of Ames. Creditors and heirs of Ames sued to declare the revocable trust void so that the insurance proceeds could be used to satisfy his outstanding debts.]

 A life insurance policy is property and may constitute the subject matter of a trust. The designated beneficiary of the policy may, by the provisions of a collateral trust agreement, be named as the trustee. When the beneficiary promises the insured to pay either the whole or a portion of the proceeds of the policy to a third person, the proceeds will be impressed with a trust to the extent of the promise made. …

 The date of the death of the insured merely fixed the time when the obligation of the insurers to pay and the right of the beneficiary to receive the proceeds of the policies became enforceable. … The trust agreement and the change of beneficiaries, however, became effective during the lifetime of the settlor. The continuing right to receive the proceeds of an insurance policy is not impaired by the unexercised right or privilege of the insured to designate another beneficiary. The designation of a beneficiary in a policy of life insurance creates an inchoate gift of the proceeds of the policy, which, if not revoked by the insured in his lifetime, vests in the beneficiary at the time of the former's death. A policy of life insurance is not deemed an asset of the estate of the insured unless it is made payable to him, his executors or administrators. The mere fact that the insured may change the beneficiary does not make the policy or its proceeds a part of his estate. Neither the policies nor their proceeds constituted a part of the estate of Knowlton L. Ames, deceased. Since his death the trust agreement is merely evidence of the trustee's contract under which it must collect the policies and hold the proceeds for the purposes of the trust. …

 The reservation of the power to revoke an entire trust does not invalidate the agreement presently creating it or render it testamentary. The plaintiffs in error concede the validity of the provision reserving power to the settlor to terminate the trust agreement in whole or in part. Naming new beneficiaries in one or more of the policies would have produced precisely the same effect as the termination of the trust with respect to such policies. The power to designate another beneficiary in an insurance policy is a privilege personal to the insured. The powers and privileges reserved do not affect the obligations of the insurers to pay the proceeds of the policies to the trustee upon the death of the insured. [Affirmed.]

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# CANAL NATIONAL BANK v. CHAPMAN

171 A.2d 919 (Me. 1961)

 WILLIAMSON, C. J. This is an action by the Canal National Bank of Portland, executor under the will of Marion P. Harmon, for construction of a “pour over” provision in the will. The issue is whether the property under paragraph Sixth of the will passes into an inter vivos trust as amended subsequent to the execution of the will, or passes into an inter vivos trust as it existed when the will was executed, or passes by intestacy. … The testatrix, who is also the settlor of the trust, executed her will on September 24, 1948, and died on January 31, 1960. Paragraph Sixth of the will reads:

SIXTH: I hereby give, bequeath and devise all and any other rights and credits, cash on hand, monies in banks or on deposit, any notes, obligations and securities of any and all kinds to THE CANAL NATIONAL BANK OF PORTLAND as well as any shares in any loan and building associations, the same to be added to and made a part of the Trust Fund created by me under a Trust Agreement with said Bank dated August 24, 1934, as well as any Supplemental Agreement or amendments thereof, in which Agreement provisions are made for additions to said fund.

 The trust agreement of August 24, 1934 between the settlor and the plaintiff bank as trustee was a revocable and amendable inter vivos or living trust. At the time of the execution of the will the trust had been amended in 1942 and again on the day of the execution of the will in 1948. On September 23, 1955, the trust was again amended with changes in the ultimate disposition of the trust property after the death of the settlor. …

It is unquestioned that the property held in the trust has been of substantial value since its inception in 1934, and likewise that property of substantial value passes under paragraph Sixth of the will. Indeed, in argument, without objection, it was indicated that at the death of the testatrix the trust amounted roughly to $120,000 and the estate to $93,000. “The cardinal rule to be applied in the construction of a will is that the intention of the testator when clearly expressed in the will must be given effect, provided it be consistent with legal rules.” … “The intention of the testator is that which existed at the time of the execution of the will.”

The testatrix beyond doubt intended under paragraph Sixth to add property to the trust as it existed at her death. We can think of no sound reason why the testatrix would have intended in 1948 that property should be added to the trust as it then existed, and not to the trust as it might later be amended. … [T]he testatrix intended to create not a testamentary trust, but to add property to an existing continuing non-testamentary trust, revocable and amendable in her lifetime. …

We find no solid ground for refusing to give effect to the intention of the testatrix. The trust is adequately identified in the will. The provisions of the trust for amendment were duly carried out. The amendments and indeed the trust as amended are facts of independent significance. The “pour over” under paragraph Sixth from estate to trust as it existed at the death of the testatrix is valid and the executor should make distribution to itself as trustee thereunder.

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# VENTURA COUNTY DEPT. OF CHILD SERVICES v. BROWN

11 Cal. Rptr.3d 489 (Cal. Ct. App. 2004)

 COFFEE, J. [Kenneth Marinos was a beneficiary of a trust created by his mother. The trust contained a spendthrift provision and granted the trustee discretion to distribute income or principal to Marinos for his “proper support, care, maintenance, and education.” Marinos, who had fathered six children from relationships with three different mothers, had failed to pay court-ordered child support for approximately 15 years. One of the mothers and the county department of child support services, on behalf of all the minor children, also sought to enforce all the child support judgments against Marinos. The trustee refused to satisfy the child support judgments from Marinos’ interest in the trust.]

 The issue before us is whether a court may order a trustee to exercise its discretion to satisfy a support judgment (from trust income or principal) when the trustee has chosen not to make a payment to the beneficiary. … California Probate Code section 15305(c) contains language referring to a trustee's exercise of discretion: "Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, *pursuant to the exercise of the trustee's discretion*, determines to make to or for the benefit of the beneficiary." Appellant claims that under subdivision (c), the trial court must defer to the trustee's exercise of discretion when fashioning a support order. …

 “Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.” … When a trust instrument confers “absolute,” “sole” or “uncontrolled” discretion, “he trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.” …

 According to the language of the Trust, Helen Marinos wished to provide for the “support, care, maintenance and education” of her sons. Upon the death of either son, the trust estate was to be administered for the benefit of his “children and/or to the spouse of a deceased child of the Grantor.” Although neither son is deceased, the Trust instrument reflects Helen Marinos’ intent to provide support to her grandchildren. …

 Under section 15305, even if the trust instrument contains a spendthrift clause applicable to claims for child support, “it is against public policy to give effect to the provision.” “As a general rule, the beneficiary should not be permitted to have the enjoyment of the interest under the trust while neglecting to support his or her dependents.” … The policy behind the payment of support “outweigh[s] the public policy that an owner of property, such as the settlor of a trust, may dispose of it as he pleases and may impose spendthrift restraints on the disposition of income.” …

 Marinos has acted with patent disregard towards the support of his six children. He owes over $140,000 in past-due support and has an ongoing monthly obligation of $1,218. Appellant has refused to make any trust distributions to satisfy Marinos’ child support obligation. In light of the statutory and public policy objectives in favor of the payment of support, we conclude appellant’s exercise of his discretion was misdirected. To deny the trial court authority to compel the exercise of a trustee's discretion in this instance creates the very problem that the statute was enacted to remedy – avoiding the payment of child support. The statute cannot have been intended to allow a beneficiary to defraud support creditors by hiding behind the trustee’s discretion. This is directly contrary to the legislative purpose behind section 15305. [Affirmed.]

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# ESTATE OF BROWN

528 A.2d 752 (Vt. 1987)

GIBSON, J. Andrew J. Brown died in 1977, settling his entire estate in a trust, all of which is held by the trustee under terms and conditions that are the subject of this appeal. The relevant portion of the trust instrument provides:

(3) The . . . trust . . . shall be used to provide an education, particularly a college education, for the children of my nephew, Woolson S. Brown. My Trustee is hereby directed to use the income from said trust and such part of the principal as may be necessary to accomplish this purpose. Said trust to continue for said purpose until the last child has received his or her education and the Trustee, in its discretion, has determined that the purpose hereof has been accomplished.

At such time as this purpose has been accomplished and the Trustee has so determined, *the income from said trust and such part of the principal as may be necessary shall be used by said Trustee for the care, maintenance and welfare of my nephew, Woolson S. Brown and his wife, Rosemary Brown, so that they may live in the style and manner to which they are accustomed, for and during the remainder of their natural lives*. Upon their demise, any remainder of said trust, together with any accumulation thereon, shall be paid to their then living children in equal shares, share and share alike. (Emphasis added.)

The trustee complied with the terms of the trust by using the proceeds to pay for the education of the children of Woolson and Rosemary Brown. After he determined that the education of these children was completed, the trustee began distribution of trust income to the lifetime beneficiaries, Woolson and Rosemary.

On June 17, 1983, the lifetime beneficiaries petitioned the probate court for termination of the trust, arguing that the sole remaining purpose of the trust was to maintain their lifestyle and that distribution of the remaining assets was necessary to accomplish this purpose. The remaindermen, the children of the lifetime beneficiaries, filed consents to the proposed termination. The probate court denied the petition to terminate, and the petitioners appealed to the Washington Superior Court. The superior court reversed, concluding that continuation of the trust was no longer necessary because the only material purpose, the education of the children, had been accomplished. This appeal by the trustee followed. …

An active trust may not be terminated, even with the consent of all the beneficiaries, if a material purpose of the settlor remains to be accomplished. … Although the issue as to whether a material purpose of the trust remains cannot be answered through resort to the foregoing formal categories traditionally imposed upon trust instruments, we hold that termination cannot be compelled here because a material purpose of the settlor remains unaccomplished. In the interpretation of trusts, the intent of the settlor, as revealed by the language of the instrument, is determinative.

We find that the trust instrument at hand has two purposes. First, the trust provides for the education of the children of Woolson and Rosemary Brown. …The settlor also intended a second purpose, however: the assurance of a life-long income for the beneficiaries through the management and discretion of the trustee. We recognize that, had the trust merely provided for successive beneficiaries, no inference could be drawn that the settlor intended to deprive the beneficiaries of the right to manage the trust property during the period of the trust. Here, however, the language of the instrument does more than create successive gifts. The settlor provided that the trustee must provide for the “care, maintenance and welfare” of the lifetime beneficiaries “so that they may live in the style and manner to which they are accustomed, *for and during the remainder of their natural lives*.” (Emphasis added.) The trustee must use all of the income and such part of the principal as is necessary for this purpose. We believe that the settlor’s intention to assure a life-long income to Woolson and Rosemary Brown would be defeated if termination of the trust were allowed.

Because of our holding regarding the second and continuing material purpose of the trust, we do not [decide] the question of whether the trial court erred in holding that the educational purpose of the trust has been accomplished. Reversed*.*

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# In re Rothko

372 N.E.2d 291 (N.Y. Ct. App. 1977)

COOKE, Judge. Mark Rothko, an abstract expressionist painter whose works through the years gained for him an international reputation of greatness, died testate on February 25, 1970. The principal asset of his estate consisted of 798 paintings of tremendous value, and the dispute underlying this appeal involves the conduct of his three executors in their disposition of these works of art. ... Rothko’s will was admitted to probate on April 27, 1970 and letters testamentary were issued to Bernard J. Reis, Theodoros Stamos, and Morton Levine. Hastily and within a period of only about three weeks and by virtue of two contracts each dated May 21, 1970, the executors dealt with all 798 paintings.

By a contract of sale, the estate executors agreed to sell to Marlborough A.G., a Liechtenstein corporation (MAG), 100 Rothko paintings as listed for $1,800,000, $200,000 to be paid on execution of the agreement and the balance of $1,600,000 in 12 equal interest-free installments over a 12-year period. Under the second agreement, the executors consigned to Marlborough Gallery, Inc. (MNY), “approximately 700 paintings listed on a Schedule to be prepared”, the consignee to be responsible for costs covering items such as insurance, storage restoration and promotion. By its provisos, MNY could sell up to 35 paintings a year from each of two groups, pre-1947 and post-1947, for 12 years at the best price obtainable but not less than the appraised estate value, and it would receive a 50% Commission on each painting sold, except for a commission of 40% On those sold to or through other dealers. [Kate Rothko, Rothko’s daughter, and another heir, sued to remove the executors, to enjoin MNY and MAG from disposing of the paintings, to rescind the agreements between the executors and corporations, for a return of the paintings still in possession of those corporations, and for damages. She argued that the co-executors breached their fiduciary duties and had conflicts of interest.]

Following a nonjury trial covering 89 days and in a thorough opinion, the Surrogate found: that Reis was a director, secretary and treasurer of MNY, the consignee art gallery, in addition to being a co-executor of the estate; that the testator had a 1969 inter vivos contract with MNY to sell Rothko's work at a commission of only 10% And whether that agreement survived testator's death was a problem that a fiduciary in a dual position could not have impartially faced; that Reis was in a position of serious conflict of interest with respect to the contracts of May 21, 1970 and that his dual role and planned purpose benefited the Marlborough interests to the detriment of the estate; that it was to the advantage of co-executor Stamos as a “not-too-successful artist, financially”, to curry favor with Marlborough and that the contract made by him with MNY within months after signing the estate contracts placed him in a position where his personal interests conflicted with those of the estate, especially leading to lax contract enforcement efforts by Stamos; that Stamos acted negligently and improvidently in view of his own knowledge of the conflict of interest of Reis; that the third co-executor, Levine, while not acting in self-interest or with bad faith, nonetheless failed to exercise ordinary prudence in the performance of his assumed fiduciary obligations since he was aware of Reis' divided loyalty, believed that Stamos was also seeking personal advantage, possessed personal opinions as to the value of the paintings and yet followed the leadership of his co-executors without investigation of essential facts or consultation with competent and disinterested appraisers … .

To be sure, the assertions that there were no conflicts of interest on the part of Reis or Stamos indulge in sheer fantasy. Besides being a director and officer of MNY, for which there was financial remuneration, however slight, Reis, as noted by the Surrogate, had different inducements to favor the Marlborough interests, including his own aggrandizement of status and financial advantage through sales of almost one million dollars for items from his own and his family's extensive private art collection by the Marlborough interests. Similarly, Stamos benefited as an artist under contract with Marlborough and, interestingly, Marlborough purchased a Stamos painting from a third party for $4,000 during the week in May, 1970 when the estate contract negotiations were pending. The conflicts are manifest. “The duty of loyalty imposed on the fiduciary prevents him from accepting employment from a third party who is entering into a business transaction with the trust”. “While he (a trustee) is administering the trust he must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries”. Here, Reis was employed and Stamos benefited in [this] manner … .

Levine contends that, having acted prudently and upon the advice of counsel, a complete defense was established. Suffice it to say, an executor who knows that his co-executor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable even though he was acting on the advice of counsel. When confronted with the question of whether to enter into the Marlborough contracts, Levine was acting in a business capacity, not a legal one, in which he was required as an executor primarily to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence. Alleged good faith on the part of a fiduciary forgetful of his duty is not enough. He could not close his eyes, remain passive or move with unconcern in the face of the obvious loss to be visited upon the estate by participation in those business arrangements and then shelter himself behind the claimed counsel of an attorney. [Affirmed.]

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# TRACY v. CENTRAL TRUST CO.

192 A. 869 (Pa. 1937)

 SCHAFFER, J. [The will of David E. Tracy created a trust, naming Central Trust Co. and two others as co-trustees. The income was payable to Tracy’s wife for life, with the remainder to be paid to several charities. Central Trust owned several mortgages. The amount of the mortgages was $240,380. Central Trust sold the mortgages to the Tracy trust. The co-trustees participated in the purchase of the mortgages and knew that Central Trust owned them. After those mortgages declined in value, the co-trustees sued to rescind the sale and recover the purchase price from Central Trust. The lower court refused to grant relief and the co-trustees appealed.]

 Appellants state the controlling question to be: Whether it is a breach of trust for a corporate trustee to sell to a trust estate, of which it is a co-trustee, mortgages originally taken and held by it for its own corporate purposes. ... It has long been an outstanding principle of the law of trusts that a trustee violates his duty to the trust estate if he sells to himself as trustee property which he individually owns. “The trustee violates his duty to the beneficiary if he sells to himself as trustee his individual property.” That the trustee acted in good faith makes no difference. The doctrine applies, though the purchaser be one of several trustees. … “A corporate trustee violates its duty to the beneficiary if it purchases property for the trust from one of its departments, as where it purchases for the trust securities owned by it in its securities or banking department.” ...

 The remedy for such a breach of trust is clear. “If the trustee in breach of trust sells his individual property to himself as trustee and the price paid by him as trustee was more than the value of the property at the time of sale, the beneficiary can compel him to repay the difference; or, at his option, the beneficiary can set aside the purchase and compel the trustee to repay the amount of the purchase price with interest thereon, in which case the trustee will be entitled to receive from the trust estate the property and any income thereon actually received by the trust estate”. [Reversed.]

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# ALLARD v. PACIFIC NATIONAL BANK

663 P.2d 104 (Wash. 1983)

 DOLLIVER, J. [Freeman Allard and Evelyn Orkney are beneficiaries of trusts established by their parents, J.T. and Georgiana Stone. Pacific National Bank (Pacific Bank) is the trustee of the Stone trusts. The sole asset of the trusts was the “Third and Columbia property” in downtown Seattle. The property was subject to a 99 year lease the settlors had entered into with Seafirst Bank at a fixed rental for the entire term, with the lessee holding the right of first refusal if the lessor wanted to sell the property. Subsequently, Seafirst Bank assigned its leasehold interest to Credit Union, which later offered to purchase the property for $200,000, which Pacific Bank accepted, deeding the property to Credit Union. About six weeks later, Pacific Bank informed the beneficiaries of the sale. The beneficiaries of the Stone trusts sued for breach of fiduciary duties, alleging that Pacific Bank improperly depleted the trust assets by selling the Third and Columbia property for less than its fair market value.]

 The Stone trusts gave Pacific Bank "full power to ... manage, improve, sell, lease, mortgage, pledge, encumber, and exchange the whole or any part of the assets of [the] trust estate". Under such an agreement, the trustee is not required to secure the consent of trust beneficiaries before selling trust assets. The trustee owes to the beneficiaries, however, the highest degree of good faith, care, loyalty, and integrity.

 Pacific Bank claims it was obligated to sell the property to Credit Union since Credit Union, as assignee of the lease agreement with Seafirst Bank, had a right of first refusal to purchase the property. Since it did not need to obtain the consent of the beneficiaries before selling trust assets, Pacific Bank argues it also was not required to inform the beneficiaries of the sale. We disagree. The beneficiaries could have offered to purchase the property at a higher price than the offer by Credit Union, thereby forcing Credit Union to pay a higher price to exercise its right of first refusal as assignee of the lease agreement. Furthermore, letters from the beneficiaries to Pacific Bank indicated their desire to retain the Third and Columbia property. While the beneficiaries could not have prevented Pacific Bank from selling the property, they presumably could have outbid Credit Union for the property. This opportunity should have been afforded to them.

 [T]he trustee’s fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests. … The duty to provide information is often performed by corporate trustees by rendering periodic statements to the beneficiaries, usually in the form of copies of the ledger sheets concerning the trust. For example, such condensed explanations of recent transactions may be mailed to the beneficiaries annually, semiannually, or quarterly. Ordinarily, periodic statements are sufficient to satisfy a trustee’s duty to beneficiaries of transactions affecting the trust property. …

 The trustee must inform beneficiaries, however, of all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries prior to the transaction taking place. The duty to inform is particularly required in this case where the only asset of the trusts was the property on the corner of Third and Columbia. Under the circumstances found in this case failure to inform was an egregious breach of fiduciary duty and defies the course of conduct any reasonable person would take, much less a prudent investor.

 We also conclude Pacific Bank breached its fiduciary duties regarding management of the Stone trusts by failing to obtain the best possible price for the Third and Columbia property. Pacific Bank made no attempt to obtain a more favorable price for the property from Credit Union by, for example, negotiating to cancel the restrictive provisions in the lease originally negotiated with Seafirst Bank. The bank neither offered the property for sale on the open market, nor did it obtain an independent, outside appraisal of the Third and Columbia property to determine its fair market value. …

 [A] trustee may determine the best possible price for trust property either by obtaining an independent appraisal of the property or by “testing the market” to determine what a willing buyer would pay. The record discloses none of these actions were taken by the defendant. By its failure to obtain the best possible price for the Third and Columbia property, defendant breached its fiduciary duty as the prudent manager of the trusts. … The case is remanded for a determination of the damages caused to plaintiffs by defendant's breach of its fiduciary duties as trustee of the Stone trusts and a determination of the amount of attorney fees to be awarded plaintiffs from the trustee individually. [Reversed and remanded.]

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# Carter v. Carter

965 N.E.2d 1146 (Ill. Ct. App. 2012)

Luther Reynolds Carter, Jr. (Luther), created the Luther Reynolds Carter, Jr., Living Trust (the Living Trust) in 1993 … . The Living Trust appointed his wife Audrey as trustee … . Under the provisions of the Living Trust, Audrey is entitled to “all the income” from the Trust during her lifetime, but is not entitled to any of the principal. Upon Audrey’s death, Tiffany will receive the principal of the Trust. Tiffany was Luther’s daughter. Section 11.5 of the Living Trust, describing the Trustee’s power to invest, provides as follows:

“In addition to all powers granted by law, the trustee shall have the following powers, to be exercised in a fiduciary capacity: … To invest in bonds, common or preferred stocks, notes, options, common trust funds, mutual funds, shares of any investment company or trust, or other securities, life insurance, partnership interests, general or limited, limited liability company interests, joint ventures, real estate, or other property of any kind, regardless of diversification and regardless of whether the property would be considered a proper trust investment … .”

Audrey [became trustee] upon Luther’s death on August 28, 2003. In October 2003, the Marital Trust was funded with $2 million. Since assuming trusteeship of the Marital Trust, Audrey has invested 100% of the trust funds in tax-free municipal bonds, which pay interest over time but do not increase the value of the principal. Tiffany [filed suit and] contends that this investment strategy has maximized Audrey’s net income at the expense of Tiffany’s remainder interest in the Marital Trust, in contravention of the terms of the Living Trust, which is silent as to any priority of beneficial interests, and in violation of Audrey’s fiduciary duties as trustee. … [F]ollowing a hearing, the trial court granted summary judgment in favor of Audrey … .

“‘[A] trustee owes a fiduciary duty to a trust’s beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degree of fidelity and utmost good faith.’” A trustee has a duty to deal impartially with all beneficiaries and to protect their interests. …

Tiffany asserts that Audrey had a duty to treat all beneficiaries under the trust impartially, without any favor toward her own interest. We disagree. The trial court … inferred from the language of the Living Trust that Luther intended for Audrey to generate income during her lifetime in any way she deemed appropriate, regardless of diversification. The court acknowledged that as a result of Audrey’s current strategy of investing solely in municipal bonds, inflation may take a toll on the principal, but it found that the investment strategy Audrey adopted was consistent with Luther’s intent in creating the Marital Trust. Therefore, we reject Tiffany’s argument that Audrey breached her duty of impartiality.

Next, Tiffany asserts that [a trustee who is granted authority in a trust document to make investment decisions regardless of diversification is still required under the prudent investor rule to diversify her investments.] The prudent investor rule provides in relevant part that a trustee “has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee’s duty of impartiality and the purposes of the trust. Whether investments are underproductive or over-productive of income shall be judged by the portfolio as a whole and not as to any particular asset.” The rule states that “[n]o specific investment or course of action is, taken alone, prudent or imprudent” but, rather, “[t]he trustee’s investment decisions and actions are to be judged in terms of the trustee’s reasonable business judgment regarding the anticipated effect on the trust portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. The prudent investor rule is a test of conduct and not of resulting performance.”

A trustee is expected to exercise the same degree of care in managing a trust as persons of prudence and intelligence would exercise in their own affairs. “‘The trustee must be mindful of the beneficiaries’ interests, and the trustee cannot act inconsistently with the beneficiaries’ interests, irrespective of the trustee’s good or bad faith.’” That said, a court will not interfere with a trustee’s exercise of discretion given to him by the trust instrument so long as the trustee does not act in a wholly unreasonable and arbitrary manner. …

Here, the trust agreement expressly permitted Audrey to make investment elections “regardless of diversification”… . The prudent investor rule provides that the provisions of the rule “may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument.” … In her role as trustee, Audrey was required to be mindful of Tiffany’s interests as the remainder beneficiary and was prohibited from acting inconsistently with those interests, regardless of whether she was acting in good faith or bad faith. However, a trustee’s exercise of discretion will not be interfered with by a court so long as he or she does not act in a wholly unreasonable and arbitrary manner. Here, we find that the trial court did not err in finding that Tiffany failed to establish a cause of action under the prudent investor rule where there is no evidence that Audrey’s decision to invest in municipal bonds was arbitrary or unreasonable. [Judgment affirmed.]

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