



3-1-1957

Estate Planning -- Use of Deeds To Effectuate Transfer At Death of Grantor

John C. Rogers

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

John C. Rogers, *Estate Planning -- Use of Deeds To Effectuate Transfer At Death of Grantor*, 32 Notre Dame L. Rev. 300 (1957).
Available at: <http://scholarship.law.nd.edu/ndlr/vol32/iss2/4>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

Estate Planning

USE OF DEEDS TO EFFECTUATE TRANSFER AT DEATH OF GRANTOR

Introduction

For centuries the problem of determining the disposition of a decedent's estate has been a constant source of litigation. By far the majority of the cases are concerned with property rights to that estate. Basically the question in such cases has been to determine what the deceased intended to be done with the property after death, for if his intent can be established, the estate ordinarily will be disposed of accordingly.

Since the problem of establishing intent is so basic to the estate planner in trying to carry out the desires of his client, it is necessary that this intent be made as manifest as possible. In situations where the grantor wishes to convey specific properties at his death to designated individuals, the transfer may be effected either by deed or by will. The question to be examined in this Note will be the use of the deed as an instrument to express effectively the decedent's intent. The scope of this Note necessarily will be confined to transfers taking effect at the death of the grantor.

Basic legal documents in the field of estate planning are the will and the deed. Since the field is primarily concerned with the transfer of property, it is suggested that in certain circumstances where the transfer is to take place at the death of the grantor, transfer by deed is a surer method of accomplishing the intention of the grantor than transfer by will. Problems accompanying the construction of the will are not present where the deed is used. Under transfer by deed there should be no difficulty in determining the intent of the grantor as to the final disposition of the property and the grantee to whom the property is intended to be transferred. Certain other undesirable features are present in a transfer by will that are avoided by transfer by deed, such as costs of probate proceedings, delay before the property can be used by the grantee, costs of the executor, and administrative problems.

Distinguishing Between Deed and Will

Deeds and wills are similar in that both are instruments re-

lated to the ultimate disposition of property by the owner.¹ The major substantive difference in disposition between these two instruments is that in the will no interest is passed until the death of the testator,² whereas in a deed an interest is immediately vested in the grantee.³ This difference may be referred to in terms of revocability. It is stated that a will is ambulatory, that is, it may be changed at any time before the death of the testator because no interest has been conveyed,⁴ while the deed is irrevocable because some interest has passed.⁵ This difference is fundamental to the problem under discussion. Where the conveyance is made contingent upon the death of the grantor, it is understandable that the courts have been uncertain as to whether the instrument was a deed or, in effect, a will.⁶ Faced with this problem the courts have looked to the intent of the grantor to determine which form of disposition was used.⁷

Early cases in which this problem arose were concerned primarily with the time at which the grantor intended to pass an interest to the grantee. If it could be ascertained that the interest was to pass before the grantor's death, then the instrument was treated as a deed. However if it was ascertained that the interest did not pass until the death of the grantor, then the instrument was a will.⁸

¹ ROLLISON, WILLS § 40 (1939), "The term 'will,' as it is popularly understood, is a disposition of an interest in property, made by the owner thereof in the form and manner prescribed by law, which disposition is to take effect at the death of the owner." 3 AMERICAN LAW OF PROPERTY § 12.35 (Casner ed. 1952). "[A deed] . . . is an instrument in writing by delivery and acceptance of which the title to some interest or estate in real property then and there passes."

² 5 THOMPSON, REAL PROPERTY § 2676 (1940 ed.), ". . . the instrument does not pass a present interest or right in property, and . . . such right or interest does not take effect until after the death of the testator."

³ AMERICAN LAW OF PROPERTY, *op. cit. supra*.

⁴ 1 JARMAN, WILLS 19 (6th ed. 1893), "It is this ambulatory quality which forms the characteristic of wills . . ."

⁵ 16 AM. JUR., Deeds § 7 (1938), "In other words wills and deeds are distinguished by the power of revocation residing in the maker in the case of a will, whereas a deed once executed and delivered is irrevocable . . ."

⁶ See *Bromley v. Mitchell*, 155 Mass. 509, 30 N.E. 83 (1892) wherein deeds executed two days before the death of the grantor were held valid. Justice Holmes referred to such an instrument as having a "very testamentary look."

⁷ ROLLISON, WILLS § 196 (1939).

⁸ *Burlington University v. Barrett*, 22 Iowa 60,72 (1867), "If the instrument passes a *present interest*, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not *pass an interest* or right till the *death of the maker*, it is a will, or testamentary paper." See also Comment, 5 Mo. L. REV. 350 (1940); Comment, 16 U. DET. L. J. 87 (1952).

In these early cases clauses like the following were found to convey a present interest and not to be testamentary in character: ". . . this deed is not to take effect until the death of the said [grantor]";⁹ ". . . to be of none effect until after the death of [grantor], then to be in full force.";¹⁰ ". . . this deed shall take and be in full force and effect immediately after the said [grantor] shall depart this life, and not sooner.";¹¹ "This deed not to take effect until after my decease—not to be recorded until after my decease.";¹² ". . . not to take effect during my life time, and to take effect and be in force . . . after my decease . . .";¹³ "This deed to take effect at my death.";¹⁴ ". . . and the deed shall go into full force and effect at my death, . . .";¹⁵ However, the following clauses were held to be testamentary: "This deed is to take effect and be in full force from and after my death.";¹⁶ ". . . but in no event is this deed to go into effect until after my death.";¹⁷ "To have and hold . . . from and after the death of [grantor].";¹⁸ "Said deed of gift to be of full effect at my death . . .";¹⁹ ". . . to have the [property] after my death."²⁰ Clearly the diverse interpretation of these clauses is not based on any significant distinction in their wording. The intent of the grantor certainly is to retain full control over the property until his death, at which time the property is to be transferred to the grantee. If the time of conveyance is the sole criterion, the view that such deeds are testamentary dispositions is correct. It is difficult to find a logical basis for construing the grantor's intent to retain control of the property as being anything other than an intent that the property should pass at his death.²¹ In effect then, what has caused some courts to state that such clauses are not testamentary is the fact that they have been insistent that the

⁹ *Hunt v. Hunt*, 119 Ky. 39, 82 S.W. 998, 998 (1904).

¹⁰ *Wilson v. Carrico*, 140 Ind. 533, 40 N.E. 50, 50 (1895).

¹¹ *Lauck v. Logan*, 45 W. Va. 251, 31 S.E. 986, 987 (1898).

¹² *Shackelton v. Sebree*, 86 Ill. 616, 617 (1877).

¹³ *Wyman v. Brown*, 50 Me. 139, 141 (1863).

¹⁴ *West v. Wright*, 115 Ga. 277, 41 S.E. 602, 603 (1902).

¹⁵ *Bunch v. Nicks*, 50 Ark. 367, 7 S.W. 563, 563 (1888).

¹⁶ *Pinkham v. Pinkham*, 55 Neb. 729, 76 N.W. 411, 411 (1898).

¹⁷ *Donald v. Nesbitt*, 89 Ga. 290, 15 S.E. 367, 368 (1892).

¹⁸ *Goodale v. Evans*, 263 Mo. 219, 172 S.W. 370, 370 (1914).

¹⁹ *Sperber v. Balster*, 66 Ga. 317, 318 (1881).

²⁰ *Robinson v. Brewster*, 140 Ill. 649, 30 N.E. 683, 684 (1892).

²¹ In *Goodale v. Evans*, 263 Mo. 219, 172 S.W. 370, 372 (1914), the court stated that "This language cannot be tortured into meaning that any right, title, or interest in or to the real estate . . . was conveyed to or was vested in the grantees prior to the death of the grantor."

grantor's intent be carried out.²²

The Interest Conveyed

An early problem in the use of a deed to take effect at the death of the grantor was the determination of the type of interest to be conveyed to the grantee. At early common law, interests to take effect in the future were not recognized.²³ However, with the advent of the Statute of Uses and the Statute of Wills this type of interest was recognized as valid.²⁴ Today it is generally recognized that executory interests can be conveyed by a deed.²⁵ However, it is normal to construe the language of the grantor as conveying some type of *present* interest²⁶ in the property.

Where a deed is non-operative until the grantor's death, there are two possible views: (1) no interest or estate is conveyed and therefore the instrument is testamentary, and (2) there is a present conveyance of a future interest which makes the deed valid. If the deed acts only by operation of the death of the grantor, that is, if it is ambulatory till his death, then only upon his death is an interest or estate conveyed.²⁷ Under such a construction, the grantee has nothing more than a mere expectancy of an estate. The second view is more sound however.

²² *Crowley v. Engelke* 394 Ill. 264, 68 N.E.2d, 241, 251 (1946), wherein the court stated, "The test to be applied in determining this question is whether the grantor intended the document, by which the conveyance is made, to be presently operative or merely to be ambulatory in character, and revocable until the death of the grantor." See also, *Noffsinger v. Noffsinger*, 303 Ky. 344, 197 S.W.2d 785 (1946); *White v. Wester*, 170 Okla. 250, 39 P.2d 22 (1934); *Blair v. Blair*, 111 Vt. 53, 10 A.2d 188 (1940).

²³ Confusion may arise, and has arisen, over the use of the words "interest" and "estate." Courts have used these words more or less interchangeably and it is important to determine in just what sense they are using the terms. "The term 'interest' in land may be distinguished from and should not be confused with the term 'estate' therein, and therefore, if so intended by the makers, a deed may pass a 'present interest' in property while the 'estate therein' is a future one." *White v. Wester*, 170 Okla. 250, 39 P.2d 22, 25 (1934).

²⁴ SIMES AND SMITH, *THE LAW OF FUTURE INTERESTS* § 221 (1956).

²⁵ *Id.* § 30.

²⁶ *Id.* § 232, "Or it may be said that, after all, the Statute of Uses has little to do with conveyancing in these modern days even in those jurisdictions where it can be said to be a part of the law, and that the modern doctrine is, not merely that one may create an estate of freehold to begin in the future by a conveyance operating under the Statute of Uses, but simply that the rule prohibiting the creation by deed of an estate of freehold to begin in the future is no longer law."

²⁷ "The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time, it is ambulatory. By its execution, the maker has

The essence of a future interest is potential possession in the future; that future interest is part of the total present ownership.²⁸ The holder of the executory interest does not become vested with the estate until the death of the grantor but he does have a presently vested future interest. Presumably this is what the grantor intends. He at least wants to create some new right in the grantee. However, there must be some indication of a corresponding surrender of an interest by the grantor. It must be shown that some interest has been presently conveyed; otherwise the instrument is ambulatory and invalid as a deed.²⁹

The Reservation of a Life Estate

Where the grantor creates an executory interest to take effect at his death, the situation is analogous to the reservation of a life estate by the grantor and conveyance of the remainder to the grantee. In this latter situation, the courts have held that the grantor did intend that an interest should pass immediately³⁰ to the grantee. If intent is to be the controlling factor then this interpretation is reasonable. For what other reason would a specific reservation of a life estate be made by a grantor?³¹ Yet notwithstanding the reservation, some courts have held that such

parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title." *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 1091 (1895).

²⁸ *SIMES AND SMITH*, *op. cit. supra* § 1.

²⁹ *Nobell v. Town of Beaver*, 133 Okla. 247, 271 Pac. 420 (1928).

³⁰ *Fonda v. Miller*, 411 Ill. 74, 103 N.E.2d 98 (1952); *Hall v. Hall*, 206 Iowa 1, 218 N.W. 35 (1928); *Meairs v. Kruckenberg*, 171 Kan. 450, 233 P.2d 472 (1951); *Noffsinger v. Noffsinger*, 303 Ky. 344, 197 S.W.2d 785 (1946); *Stoutenburg v. Stoutenburg*, 176 Misc. 430, 27 N.Y.S.2d 734, (Sup. Ct. 1941), *aff'd*, 265 App. Div. 570, 40 N.Y.S.2d 146 (3d Dep't 1943).

In Michigan, where the view is that a conveyance taking effect at the death of the grantor is void because of the testamentary character of the instrument, a specific reservation of a life estate in the deed is valid. Comment, 16 U. DER. L. J. 87 (1952).

³¹ In *Thorpe v. Daniel*, 339 Mo. 763, 99 S.W.2d 42, 44 (1936), the court stated, obiter, that a provision for a life estate to the grantor in an instrument purporting to convey a fee title, was strong evidence of an intention to pass title.

"Of great importance in our thinking on this subject is the long uninterrupted line of cases in this state holding that where there is a deed reserving a life estate in the grantor, there is a strong presumption that it is intended that the title should vest immediately in the remainderman, for the reason that if such intention had not existed there would be no reason for the reservation." *Fonda v. Miller*, 411 Ill. 74, 103 N.E.2d 98, 102 (1951).

instruments are testamentary.³² In reaching such a decision, these courts seemingly have been troubled by the fact that an estate was to be conveyed only by the occurrence of the grantor's death, *i.e.*, interpreting this to mean no present conveyance of an interest.³³ Such a position is unrealistic. The court assumes that the instrument is operative only by reason of the grantor's death. It does not take into account the fact that a genuine interest in property passes presently, and that enjoyment alone is postponed until the happening of a certain future event. This interpretation mistakenly equates the operative effect of a deed, *i.e.*, a present conveyance of an estate or interest in property, with the time at which such effect will take place. The time when an estate becomes vested should not determine whether the deed is operative, but rather the intent of the grantor should govern. It is difficult to reconcile the fact that the grantor intends to make a present conveyance with the construction given by the courts, that the conveyance is operative only upon his death. This construction nullifies any intention the grantor might have of making an inter-vivos transfer.

The Revocable Deed

Courts are in agreement that where a deed clearly passes, or is construed to pass, a present interest to the grantee, merely postponing enjoyment, the instrument is valid as a deed. Frequently, a situation may arise where the grantor reserves both a life estate and a power to revoke the instrument. In this case it may be contended that no present interest has passed or been given up by the grantor. The instrument being revocable, it is said to be ambulatory, and therefore must be treated as a testamentary disposition.³⁴ A closer analysis of this situation

³² *Steinke v. Sztanka*, 364 Ill. 334, 4 N.E.2d 472 (1936).

³³ Ballentine states that in situations where the deed is not to take effect until death there is a confusion of two intents: (1) an intent to give the estate to commence in futuro but reserving the possession and the use of the property during the grantor's life, and (2) an intent not to make a present conveyance, but to keep the deed ambulatory until the grantor's death. He is of the opinion that the probable intention in such cases is effected by holding the instrument operative in praesenti as a grant of a future estate. Ballentine, *When Are Deeds Testamentary*, 18 MICH. L. REV. 470 (1920).

But see *Edwards v. Butler*, 244 N.C. 205, 92 S.E.2d 922 (1956), where the court held that when a fee was conveyed in the granting clause and a specific reservation of a life estate was made in a paragraph inserted between the granting and habendum clause, such reservation was repugnant to the granting clause.

³⁴ *Dunham v. Armitage*, 97 Colo. 216, 48 P.2d 797 (1935); *Goins v. Melton*, 343 Mo. 413, 121 S.W.2d 821 (1938).

should yield a different result. There are two possible views as to the intent of the grantor who reserves the power to revoke: (1) that an interest is passed and a specific reservation of a power to revoke is necessary to retain in the grantor some control over the rights which were conveyed; (2) that the instrument merely restates the rights of the grantor in the property. This second view seems incongruous with the apparent intent of the grantor. As owner of the property, the grantor is entitled to all the privileges of ownership before conveyance. In an instrument purporting to be a conveyance, there would seem to be no necessity for the grantor to restate his privileges, unless it be that some other privileges were conveyed.³⁵ Reason dictates that by a conveyance the grantor did intend to part with something. It should be all the more manifest that the grantor did convey some interest because he resorted to a reservation of the power to revoke; otherwise, this privilege, too, would have been lost by the transfer.³⁶

Actually the grantor is still in virtually complete control of the property. The question then arises as to the nature of the interest of which the grantor divested himself. The courts have given effect to the grantor's intent by finding a present conveyance of a future interest,³⁷ or a defeasible fee subject to the grantor's life estate.³⁸ This reasoning is sound and effect is given to the grantor's intention to make a present transfer.

The Deed in Escrow

It is a general rule that delivery is essential before a deed can become operative as a conveyance of property.³⁹ No actual

³⁵ *St. Louis City County National Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953).

³⁶ *St. Louis County Nat'l Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953); see case comment, 22 U. KAN. CITY L. REV. 171 (1954).

³⁷ *Lowe v. Ruhlman*, 67 Cal. App.2d 828, 155 P.2d 671, 674 (1945) (dictum), where the court stated that if grantor intended to make a present conveyance of a future interest, even though the grantor reserved the power to revoke the deed, such instrument would be valid as a deed. In *St. Louis County Nat'l Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953), the court held an instrument reserving the power to revoke was valid as a deed, as there was a present grant of a future interest with enjoyment of possession postponed.

³⁸ "It merely afforded the means whereby such vested future estate could be defeated and divested before it ripened into an estate in possession." *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242, 246 (1914). See also *St. Louis County Nat'l Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953).

³⁹ AMERICAN LAW OF PROPERTY § 12.64 (Casner ed. 1952); 4 TIFFANY, PROPERTY § 1033 (1939).

physical delivery is required. If it can be shown that the grantor intended to make a delivery, then a "constructive" delivery is presumed and the deed is operative.⁴⁰ The problem is analagous to those already discussed concerning the intent of the grantor in the use of a deed taking effect at his death.

In the original escrow situation, a deed was delivered to a third party (the escrowee) to be delivered to the grantee upon the performance of some future condition.⁴¹ Such deliveries are held to be valid.⁴² In circumstances where the deed is delivered to an escrowee to be delivered to the grantee, not upon some condition to be performed by the grantee, but upon the occurrence of some future event, such as the death of the grantor, a valid escrow delivery also is made.⁴³ It has been said that the function of delivery is to determine whether or not the instrument shall be operative, that is, whether a present conveyance is made; it is not concerned with vesting an estate in the grantee, for that is expressed by the terms of the instrument, but with actual determination of whether the deed should have any effect or not.⁴⁴ Nor will delivery determine what kind of estate or estates the deed will create when it does become operative.⁴⁵

It would be hard to determine any significant advantage in the use of the escrow deed. It would seem that in both the escrow and the revocable deed situation the intent of the grantor is the same. He wishes to maintain the control of the property during his life and at his death to convey the property to the grantee. In

⁴⁰ "The general rule is that words or conduct of the grantor which evidence his intention to make his deed presently operative and effectual so as to vest title in the grantee and to surrender his own control over the title amount to delivery." *AMERICAN LAW OF PROPERTY*, *op. cit. supra*.

⁴¹ "Where a deed is placed in the hands of a depository for conditional future delivery to the grantee, a distinction has by some courts been recognized between cases where the future delivery depends upon the performance of some condition, and those where it depends upon the death of the grantor. In the former case the deed does not become operative until rightfully delivered by the depository [escrowee] to the grantee, while in the latter, upon delivery to the depository, it is deemed to be the grantor's deed presently, taking effect for many, if not for most purposes, from the time of its delivery to the depository." *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 338 (1905).

⁴² *Bigelow, Conditional Delivery*, 26 HARV. L. REV. 576 (1913).

⁴³ "The deed in either of these cases is usually called an 'escrow,' but perhaps more frequently and more properly that word is used to designate the deed in the former, rather than in the latter case." *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 338 (1905).

⁴⁴ *Ballantine, When Are Deeds Testamentary*, 18 MICH. L. REV. 479 (1918).

⁴⁵ *Id.* at 470.

the escrow situation the grantor's intent is manifested by the physical act of delivery to the escrowee. In the revocable deed situation it is the express statements in the deed which manifest the grantor's intent. From this observation, the written intent of the grantor would seem to be the better method. However, the law of the state should be checked to determine any particular advantage that may be gained by the use of one method over the other.

The Deed in Trust

A trust arrangement also may be useful in enabling the grantor to retain control of the property for life, and then at death have the property transferred to the grantee. Again the problem is the effective disposal of property at the grantor's death. In the trust plan the settlor conveys property by a deed to the trustee reserving a life estate in the property and reserving power to revoke the instrument.⁴⁶ An alternate method would be to convey by deed to the beneficiaries who are to hold the property in trust for the settlor until his death.⁴⁷ Both these arrangements have been held valid as inter vivos trusts.⁴⁸ It is generally agreed that the power to revoke a trust, coupled with the reservation of a life estate, does not necessarily make the trust testamentary.⁴⁹ But if the settlor reserves power and control over the trustee to such an extent that the trustee is in effect the agent of the settlor, the trust will be testamentary.⁵⁰ Problems frequently arise where the settlor and the trustee are the same person. In this instance it is difficult to say that the settlor does not have control over the trustee. In spite of this inconsistency some courts have recognized this arrangement as valid.⁵¹ It is reasoned that even though the trustee and the settlor are in fact one and the same person, the settlor-trustee must follow the terms of the trust agreement, and to that extent the settlor is limited in his control over the property.⁵² If the trustee-settlor sets forth the extent of his control in the trust agreement, it is hard to see how he is limited in any substantial

⁴⁶ *United Bldg. & Loan A'ssn v. Garrett*, 64 F. Supp. 460 (W.D. Ark. 1946); *Farkas v. Williams*, 5 Ill.2d 417, 125 N.E.2d 600 (1955) (settlor declared himself trustee); *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956).

⁴⁷ *In re Sheasley's Trust*, 366 Pa. 316, 77 A.2d 448 (1951).

⁴⁸ *Id.*

⁴⁹ 1 SCOTT, TRUSTS § 57.1 (2d ed. 1956); RESTATEMENT, TRUSTS, § 57 (1935).

⁵⁰ 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956).

⁵¹ *Farkas v. Williams*, 5 Ill.2d 417, 125 N.E.2d 600 (1955); *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956).

⁵² *Farkas v. Williams*, *supra* note 51.

sense, since the trust instrument is merely an expression of his own intent.

By the use of the deed a certain formality is given to the transaction which indicates the settlor's intent to convey a legal interest to the trustee, and not merely to make the trustee his agent.⁵³ In practical effect the requirements of the Statute of Wills have not been violated by giving effect to a revocable deed in trust since both the deed and the will are concerned primarily with giving effect to the intent of the grantor.⁵⁴

Tax Consequences

To determine what the tax liability would be in the use of the deed as discussed above, it should be first ascertained whether or not a sale or exchange was made, or whether the deed was a gift. If a sale or exchange is made, the income would be taxed according to the ordinary provisions for such income. But if the deed is a gift, a different result ensues. At first glance it would seem that this deed granting an interest would be taxable to the grantor solely under the gift tax as an inter-vivos gift, even though the enjoyment of the property is suspended by the grantor. However gifts wherein a life estate is reserved,⁵⁵ or where the

⁵³ RESTATEMENT, TRUSTS § 57 (2), comment *g* (1935).

⁵⁴ In *Farkas v. Williams*, 5 Ill.2d 417, 125 N.E.2d 600 (1955), it is stated at 608,

"Historically, the purpose behind the enactment of the statute on wills was the prevention of fraud. The requirement as to witnesses was deemed necessary because a will is ordinarily an expression of the secret wish of the testator, signed out of the presence of all concerned. The possibility of forgery and fraud are ever present in such situations. . . . [By such issuance of stock certificates and declarations in trust] He thus manifested his intention in a solemn and formal manner."

⁵⁵ INT. REV. CODE OF 1954, § 2036, *Transfers With A Retained Life Interest*:

(a) GENERAL RULE — "The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

interest is not to take effect until death,⁵⁶ also are held taxable to the decedent's estate, subject of course to a credit for the gift tax paid on the inter-vivos transfer.⁵⁷ Hence, where the grantor makes certain transfers of property but reserves to himself a life estate or makes such transfer effective on his death, tax liability may effect the degree of control he wishes to maintain over the property. In some situations it may be preferable, tax-wise, to make an outright gift of the property.

Conclusion

If the estate planner intends to carry out the wishes of his client, it is rudimentary that he must make as manifest as possible the client's intent as to the disposition of the property. The difficulty arises from the conflict between (1) what the instrument purports to do, and (2) what the grantor intended it to do. A strict construction of the deed or will must, in many cases, deny the grantor's wishes. Yet the court cannot be expected to have the facility to examine the subjective intent and desires of the grantor. It can only look to the extrinsic evidence produced, and from this evidence determine the grantor's intent. Therefore it is incumbent upon the estate planner to use the instruments which best express this intent. Increasing use of transfer by deed, to take effect at the grantor's death, is a step in the right direction. It should not be considered as a substitute for a will. Indeed it was never intended to be such. But in situations where transfers of property are desired to be made to specified individuals, the use of a deed is appropriate. If convenience and practicality are essential, if efficient administration of the grantor's estate and prompt disposition at his death are desired, no better method can be found.

John C. Rogers

⁵⁶ INT. REV. CODE OF 1954, § 2037:

(a) GENERAL RULE — "The value of the gross estate shall include the value of all property . . . to the extent of any interest therein which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if —

- (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and
- (2) the decedent has retained a reversionary interest in the property (but in the case of transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property."

⁵⁷ INT. REV. CODE OF 1954, § 2012.