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Bequests of ORTS

William F. Fratcher

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BEQUESTS OF ORTS*†

WILLIAM F. FRATCHER**

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I. PROLOGUE

When you came into your law office a week ago this morning, your secretary reminded you of Howard Staunton's appointment for 2:00 p.m. to discuss a new will. You began reviewing your previous work for Colonel Staunton, a valued client whom it has always been a pleasure to serve. First came the 1940 will, prepared when Howard received orders to extended active duty as a National Guard captain. His son John was three years old then, his net worth was inconsiderable, and the will gave everything to his wife Mary. Twenty years later came the 1960 will, made after Howard had become a millionaire, with A and B trusts to take advantage of the maximum marital deduction. In 1970, after Mary's death, Howard asked you to do two things. First, to organize a charitable corporation to which he could convey the old Philidor mansion at 2 Carlisle Crescent and give part of his world-famous collection of chess sets, thus establishing the Staunton Museum of Chess. This was easy. His second request was not. He wanted to establish a perpetual fund to promote chess tournaments. You worried a lot about that request and you still wonder how long the device you used will

* Note for readers who do not have the *Oxford English Dictionary* handy: "Orts" are left-overs; what a person with powers of disposition and consumption does not dispose of or consume.

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work.¹ In 1973, Howard told you of his impending marriage to Helen Hancock and of their agreement, made in view of the fact that she is beneficiary of a large marital deduction trust set up by her second husband, George Hancock, that neither should have marital rights in the other's property. You then drew up the antenuptial settlement and prepared a will for Howard leaving only a nominal amount to Helen.

II. CONUNDRUM

Howard Staunton bustled in at 2:00 p.m. on the minute, looking remarkably fit for a man in his seventies. He said, "Helen has been a wonderful companion and we have been very happy together. She shares my enthusiasm for chess and collecting chess sets. I suspect that she knows more about both than I do. She and her children by Henry West and George Hancock don't need or seek any of my money, but I want to be sure that she can enjoy, as fully as I do, the house where we live next to the museum and the furnishings and chess sets in it. I want you to prepare a will which will make Helen the absolute owner of the house and everything in it, with power to sell anything she likes and spend the proceeds as she pleases and to give away whatever she likes. But what she doesn't sell or give away is to go to the museum corporation. With the two adjacent houses on Carlisle Crescent and the chess sets I have collected since my 1970 gift to the museum, the Staunton Museum of Chess would be unbeatable."

You then told Howard Staunton that, although his wishes are much like those of many testators and are not illegal, immoral, or contrary to public policy, the courts will thwart them if they are expressed frankly and clearly in his will. The best that can be done, you said, is to approximate his wishes by indirect or devious means. You suggested that he return in a week and discuss with you a list of possible methods of carrying out his wishes to the extent that the courts permit. Since then you have been making up a tentative list and checking the authorities bearing on each method.

III. METHODS THE COURTS WILL THWART

A. *Shifting Executory Devise on Failure to Alienate Inter Vivos*

This is what Howard Staunton asked you to do, expressed in legal terms. The clause of the will would run something like this: "I devise my home at 4 Carlisle Crescent to my beloved wife, Helen Anderson Staunton, and her heirs, and I bequeath the contents thereof, including my collection of chess sets, to my said wife, absolutely and forever, but if my said wife does not convey the house to another during her lifetime or does not sell or give away any of the contents, the property retained by her shall pass at her

1. See *Daley v. Lloyds Bank, Ltd.*, 61 T.L.R. 50, 51 (Ch. 1944); Fratcher, *Bequests for Purposes*, 56 IOWA L. REV. 773, 776 (1971).

death to the Staunton Museum of Chess, a charitable corporation, its successors and assigns."

This clause would give Helen an estate in fee simple in the home, subject to a shifting executory devise to the museum to take effect if she does not convey the home by deed. Such a shifting executory devise would not violate the Rule Against Perpetuities and would be valid in England if Howard Staunton held the home by copyhold tenure.² But copyhold tenure was abolished in England in 1926³ and has never existed in your state, so Howard is not a copyholder; he is necessarily a freeholder. The Statute of Wills,⁴ which did not apply to copyhold,⁵ empowered every freehold tenant in fee simple to devise his estate by will. There are, of course, statutes to the same effect in every state. With such legislation in force, it is understandable that the courts have taken the position that a tenant in fee simple cannot be deprived of power to devise her land by will; that is, if Helen left a will devising the house, her devisee would take.⁶ It does not necessarily follow logically that, if Helen did not attempt to devise the home by will, the shifting executory devise to the museum would fail. Nevertheless, most courts have held that the shifting executory devise to the museum is void whether or not Helen makes a will devising the home, and they reach the same result as to the chattels in the house.⁷ It will not do to run afoul of the rule against restraints on testamentary alienation, so this formula should

2. See *Doe ex dem. Stevenson v. Glover*, 1 C.B. 448, 135 Eng. Rep. 615 (C.P. 1843). Copyhold, the later name of the medieval villein tenure, could be conveyed inter vivos only by surrender to the lord of the manor and regrant by him and could be devised by will only if the copyholder surrendered to the lord of the manor to such uses as he should by will appoint. 1 C. WATKINS, TREATISE ON COPYHOLDS 42-43, 50-51, 102, 121 (1797). As the Statute of Uses, 1535, 27 Hen. 8, ch. 10, did not apply to copyhold, it was doubtful whether a shifting use could be created, but a shifting executory devise was possible. 1 C. WATKINS, *supra*, at 198-202. As *Stevenson* held, there was no objection to a devise of copyhold in fee simple subject to a shifting executory devise on failure to alienate inter vivos. The taker of the shifting executory interest was successful in ejecting a daughter of the original devisee, to whom the latter had tried to devise the land by will.

3. Copyhold was converted into free and common socage, a freehold tenure, by the Law of Property Act, 1922, 12 & 13 Geo. 5, ch. 16, effective January 1, 1926.

4. 32 Hen. 8, ch. 1, § 2 (1540).

5. 1 C. WATKINS, *supra* note 2, at 122.

6. *Good v. Fichthorn*, 144 Pa. 287, 291 (1891). See *Holmes v. Godson*, 8 De G., M. & G. 152, 166, 44 Eng. Rep. 347, 353 (Lords Justices of Appeal 1856); W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 67-68 (1954); J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY §§ 56, 56b, 56c (2d ed. 1895); Schnebly, *Restraints Upon the Alienation of Property*, in 6 AMERICAN LAW OF PROPERTY § 26.41, at 473-474 (A. Casner ed. 1952).

7. *Newland v. Newland*, 46 N.C. (1 Jones) 463, 467 (1854); J. GRAY, *supra* note 6, §§ 55, 56, 56a, 56b, 56c; L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1486 (2d ed. 1956).

not be used even though it is the only one which expresses Howard Staunton's wishes fully and accurately.

B. *Shifting Executory Devise on Failure to Alienate Inter Vivos or by Will*

This is not exactly what Howard Staunton asked you to do, but it is close. The clause of the will would read, "I devise my home at 4 Carlisle Crescent to my beloved wife, Helen Anderson Staunton, and her heirs, and I bequeath the contents thereof, including my collection of chess sets, to my said wife, absolutely and forever, but if my said wife does not convey or devise the home or does not sell, give away, or bequeath any of the contents, the property retained by her shall pass at her death to the Staunton Museum of Chess, a charitable corporation, its successors and assigns."

Before 1225 it seems to have been thought that a transfer of land to a person "and his heirs" conveyed some sort of future interest to the heirs and that, therefore, the tenant could not convey the full fee simple without the joinder or consent of his prospective heir.⁸ Then the courts held that the heir could be cut off by an inter vivos conveyance to which he did not consent.⁹ This meant that, if the heir ever took, he took by descent and not by purchase. The 1540 Statute of Wills¹⁰ permitted a freehold tenant in fee simple to cut off his heir by will. But if a tenant in fee simple did not cut off his heir by inter vivos conveyance or by will, the heir was entitled to inherit the fee simple on the tenant's death.¹¹ This right of inheritance of estates in fee simple on the death of the owner intestate is established by statute in every state. If the formula suggested in the preceding paragraph is effective, it would create an estate in fee simple which, while alienable inter vivos and by will, would be non-heritable. The English courts held that a non-heritable freehold estate in fee simple cannot be created; the shifting executory devise to the museum corporation is therefore void as an unlawful restraint on intestate descent.¹² As Mr. Justice Burnett put it in 1746, "[A] devise in fee, upon the condition that his heirs shall not take by de-

8. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* at 307-09 (2d ed. 1923); 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 73-75 (5th ed. 1942).

9. *Fitz Roger v. Arundel*, Bract. N.B. pl. 1054 (1225).

10. 32 Hen. 8, ch. 1, § 2.

11. Coronation Charter of Henry I § 2 (1100), reprinted in G. ADAMS & H. STEPHENS, *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 5 (1921); 1 J. BAGLEY & P. ROWLY, *A DOCUMENTARY HISTORY OF ENGLAND* 43 (1966); R. GLANVILL, *TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND XIII* at 150 (G. Hall ed. 1965) (1st ed. 1189); 1 W. HOLDSWORTH, *supra* note 8, at 275, 652 (7th ed. 1956); 3 *id.* at 171-85 (5th ed. 1942); 1 F. POLLOCK & F. MAITLAND, *supra* note 8, at 126-27.

12. See *Gulliver ex dem. Dell v. Vaux*, 8 De G., M. & G. 167, 172. 44 Eng. Rep. 353, 356 (Nisi Prius 1746). *But see* *Beachcroft v. Broome*, 4 T.R. 441, 442 '00 Eng. Rep. 1108, 1109 (K.B. 1791) (dictum of Lord Kenyon, C.J.).

scent, unless he specially appoint them, is a void condition."¹³

An earlier case involved a will that devised and bequeathed all my real and personal estate unto my son Francis Hall, and to the heirs of his body . . . and if my said son Francis Hall shall die, leaving no heirs of his body living, then I give and bequeath so much of my said real and personal estate, as my said son shall be possessed of at his death, to the Goldsmiths Company [upon trust for charity].¹⁴

Francis Hall suffered a common recovery of the land, executed a will appointing his wife executrix, and died without issue. It was held that, as to the land, Francis took an estate tail with a remainder to the Goldsmiths Company and that the common recovery converted the estate tail into an estate in fee simple and destroyed the remainder. As to the personal property, the court

was unanimous, that the limitation over was void, as the absolute ownership had been given to F. H. for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent; and therefore he had a power to dispose of the whole; which power was not expressly given to him, but it resulted from his interest.¹⁵

Later English decisions reach the same result. If a will is construed to devise a freehold estate in fee simple in land or the general ownership of chattels, an executory devise to another of what the original devisee does not dispose of inter vivos or by will is void.¹⁶

Most of the American decisions follow those in England. As Professor Simes put it, "If a fee simple in land or a like interest in personalty is given, coupled with an absolute power of disposal by deed or will, the great weight

13. *Gulliver ex dem. Dell v. Vaux*, 8 De G., M. & G. 167, 172, 44 Eng. Rep. 353, 356 (Nisi Prius 1746).

14. *Attorney General ex rel. Goldsmiths Company v. Hall*, Fitz-G. 314, 314, 94 Eng. Rep. 772, 772 (Ch. 1731).

15. *Id.* at 321, 94 Eng. Rep. at 775 (decision of Lord King, C.; Sir Joseph Jekyll, M.R.; Reynolds, C.B.). Professors Gray and Simes thought that this case should not be deemed authoritative in the United States because the decision was based on an unsound and outmoded theory as to the nature of future interests in chattels personal. See J. GRAY, *supra* note 6, § 68; L. SIMES & A. SMITH, *supra* note 7, § 1484. See also Simes, *Future Interests in Chattels Personal*, 39 YALE L.J. 771 (1930).

16. *Lightburne v. Gill*, 3 Brown 250, 1 Eng. Rep. 1300 (H.L. 1764) (investment securities); *Holmes v. Godson*, 8 De G., M. & G. 152, 44 Eng. Rep. 347 (Lords Justices of Appeal 1856) (devise of land in fee simple with shifting executory devise on death intestate); *Cuthbert v. Purrier*, Jacob 415, 37 Eng. Rep. 907 (M.R. 1822) (gift over of personalty on death of bastard son intestate void); *Ross v. Ross*, 1 Jac. & W. 154, 37 Eng. Rep. 334 (M.R. 1819) (bequest to bastard son with shifting executory interest to testator's daughter if son died without will; executory interest held void, so money passed to the Crown as *bona vacantia*). Other English cases are collected and discussed in J. GRAY, *supra* note 6, §§ 57-64; L. SIMES & A. SMITH, *supra* note 7, § 1483; Ottway, *Absolute Gift or Life Interest?*, 109 L.J. 51 (1959).

of authority is to the effect that a gift over in the same instrument of what remains undisposed of is void."¹⁷ Some of the American cases proceed on the theory that, because executory interests are not destructible by the tenant in possession,¹⁸ the gift over cannot be an executory devise. A future interest which cuts off an estate in fee simple cannot be a remainder because remainders must follow estates tail or for life. The law knows no future interests created in persons other than the transferor except remainders and executory interests. Therefore, goes the argument, the gift over is void because it is neither a remainder nor an executory interest.¹⁹

The majority rule, sometimes known as the Rule Against Restraints on Intestate Succession, has been severely criticized,²⁰ and it was rejected in a 1980 draft revision of the Restatement of Property.²¹ The rule has been rejected or abrogated by statute in Alabama,²² Mississippi,²³ Nebraska,²⁴

17. L. SIMES & A. SMITH, *supra* note 7, § 1482, at 355. Numerous American cases are collected in this section and in J. GRAY, *supra* note 6, §§ 65-74g. See also RESTATEMENT OF PROPERTY § 406 comment g, illustrations 8-10 (1944); A. KALES, *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* §§ 717-725 (1920); 5 H. TIFFANY, *LAW OF REAL PROPERTY* § 1344 (3d ed. 1939); Eckhardt, *Property—Future Interests Following Powers of Disposal in First Taker*, 16 MO. L. REV. 388 (1951); Hudson, *Executory Limitations of Property in Missouri*, 11 U. MO. BULL. L. SER. 3, 37-51 (1916); Nelson, *Restraints on Alienation in Missouri*, 39 U. MO. BULL. L. SER. 23, 33-34 (1928); Schnebly, *supra* note 6, §§ 26.36-46; Swenson, *The Iowa Repugnancy Rule in Testamentary Dispositions*, 41 IOWA L. REV. 601 (1956); White, *Life Estate or Fee?*, 1 U. CIN. L. REV. 405 (1927); Youngs, *A Compendium of Cases on Future Interests in Kentucky*, 6 N. KY. L. REV. 51, 73-83 (1979); Comment, *The Effect of the Extent of a Power in the Owner of a Prior Estate Upon the Validity of a Future Interest*, 35 ILL. L. REV. 957 (1941); Note, *Estate Including an Absolute Power of Disposition*, 6 NOTRE DAME LAW. 503 (1931); Note, *Enlargement of Life Estates to Fees Simple by the Annexation of a Power*, 18 ST. LOUIS L. REV. 243 (1933); Annot., 17 A.L.R.2d 7 (1951).

18. See *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620); N. PIGOTT, *TREATISE OF COMMON RECOVERIES, THEIR NATURE AND USE* 127, 134 (2d ed. 1770).

19. *Jackson ex dem. Livingston v. Robins*, 16 Johns. 537, 589 (N.Y. Sup. Ct. 1819); *Jackson ex dem. Brewster v. Bull*, 10 Johns. 19, 21 (N.Y. Sup. Ct. 1813); 4 J. KENT, *COMMENTARIES ON AMERICAN LAW* *270.

20. See W. LEACH, *PROPERTY LAW INDICTED* 24-31 (1967). Professor Leach discusses *Fox v. Snow*, 6 N.J. 12, 76 A.2d 877 (1950), which involved a bequest of a bank account to the husband of the testatrix with a gift over of any money in the account at the husband's death to a niece. The majority of the court held the gift over void. *Id.* at 13, 76 A.2d at 877. Professor Leach praised the dissenting opinion of Chief Justice Vanderbilt, who sought to overrule the cases adopting the Rule Against Restraints on Intestate Succession. W. LEACH, *supra*, at 27. See also Schnebly, *supra* note 6, §§ 26.43, .44.

21. RESTATEMENT (SECOND) OF PROPERTY § 4.2 comment O, illustration 22 & Reporter's Note 12c (Tent. Draft No. 3, 1980).

22. ALA. CODE § 35-4-292 (1975); *Nevin v. Nevin*, 366 So. 2d 266 (Ala. 1979);

New Jersey,²⁵ New York,²⁶ Ohio,²⁷ Texas,²⁸ West Virginia,²⁹ and Wisconsin.³⁰ If Carlisle Crescent is in one of these nine states, the shifting executory devise to the museum may be valid. But even in these nine states there may be reluctance to enforce the gift over.³¹ Method B had best be rejected.

C. *Semi-Secret Trust*

If you are unwise enough to use this unsatisfactory device to try to achieve your client's ends, the clause of the will would provide, "I devise my home at 4 Carlisle Crescent to my beloved wife, Helen Anderson Staunton, and her heirs, and I bequeath the contents thereof, including my collection of chess sets, to my said wife, her executors, administrators, and assigns, upon trust, however, as to both the real and personal property, for purposes which she understands." When the will is executed, Helen will hand the testator a letter reading something like this:

April 4, 1983

To Colonel Howard Staunton
My dearest husband:

I acknowledge that the home in which we reside and its contents, including your collection of chess sets, which you have devised and bequeathed to me by your will executed today, are to be

Bradley v. Eskridge, 361 So. 2d 100 (Ala. 1978); Brashier v. Burkett, 350 So. 2d 309 (Ala. 1977); Bailey v. Brannon, 293 Ala. 83, 300 So. 2d 344 (1974). *Cf.* Hendrix v. Hester, 385 So. 2d 990 (Ala. 1980).

23. Rose v. Bennett, 193 Miss. 878, 11 So. 2d 307 (1943) (money); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916) (land and chattels).

24. *In re Darr's Estate*, 114 Neb. 116, 206 N.W. 2 (1925) (land and chattels). *But see* Sterner v. Nelson, 210 Neb. 358, 314 N.W.2d 263 (1982) (indicating a return to the majority rule).

25. N.J. STAT. ANN. § 3A:3-16 (West 1953) (will of testator dying after January 1, 1952). *See* Greene v. Schmurak, 39 N.J. Super. 392, 121 A.2d 35 (1956).

26. N.Y. EST. POWERS & TRUSTS LAW § 6-5.10 (McKinney 1967); *In re Bennett's Will*, 275 N.Y. 593, 11 N.E.2d 770 (1937) (land and chattels); Tillman v. Ogren, 227 N.Y. 495, 125 N.E. 821 (1920) (land and money). *But see In re Estate of Long*, 60 Misc. 2d 591, 303 N.Y.S.2d 176 (Sur. Ct. 1969). *See also* Glasser, *Practice Commentary*, N.Y. EST. POWERS & TRUSTS LAW § 6-5.10 (McKinney Supp. 1981).

27. OHIO REV. CODE ANN. § 2131.07 (Page 1976); *In re Knickel's Will*, 185 N.E.2d 93 (Ohio Prob. Ct. 1961).

28. Jones v. Walter, 436 S.W.2d 130 (Tex. 1968); McMurray v. Stanley, 69 Tex. 227, 6 S.W. 412 (1887) (land and chattels); Johnson v. Stark, 585 S.W.2d 900 (Tex. Civ. App. 1979); First National Bank of Corsicana v. De Foe, 384 S.W.2d 926 (Tex. Civ. App. 1964).

29. W. VA. CODE § 36-1-16 (1966); *In re Estate of Evans*, 156 W. Va. 425, 194 S.E.2d 379 (1973); Simonton, *Estates—Effect of Power in Life Tenant to Make Absolute Disposition of Property—Governing Statute*, 37 W. VA. L.Q. 422 (1931).

30. *In re Zweifel's Will*, 194 Wis. 428, 216 N.W. 840 (1927) (land and chattels).

31. *See, e.g.*, Tillman v. Ogren, 227 N.Y. 495, 504, 125 N.E. 821, 823-24 (1920).

held by me on trust, to the extent that I own any of the property at the time of my death, for the Staunton Museum of Chess, a charitable corporation, its successors and assigns.

Your loving wife,
Helen A. Staunton

There is authority in England and six American states for the validity of the beneficial interest of the museum,³² but even in one of these jurisdictions Helen will not have the freedom to sell or give away the property which Howard wants her to have because the fact that she holds on trust will be of record and her powers as trustee will not be. In the other American states, the beneficial interests of both Helen and the museum will fail and she will hold the house and its contents on resulting trust for the residuary devisees and legatees or the heirs and next of kin of the testator.³³ Under Methods A and B, Helen's title would be good even if the shifting executory devise to the museum was bad. Under Method C, neither Helen nor the museum would get anything. Method C should be rejected out of hand.

IV. METHODS WHICH MAY SUCCEED

D. *Secret Trust*

If this device is used, the clause of the will would provide, "I devise my home at 4 Carlisle Crescent to my beloved wife, Helen Anderson Staunton, and her heirs, and I bequeath the contents thereof, including my collection of chess sets, to my said wife, her executors, administrators, and assigns." When the will is executed, Helen will hand the testator a letter like this:

April 4, 1983

To Colonel Howard Staunton
My dearest husband:

You have executed a will today devising and bequeathing to me the home in which we reside and its contents, including your collection of chess sets. It is our understanding that I am free to convey the house in fee simple absolute and sell or give away any of the contents and that I may use any proceeds of sale of either as I wish. It is also understood between us that whatever part of this property I own at the time of my death shall be held on trust for

32. See, e.g., *Curdy v. Berton*, 79 Cal. 420, 21 P. 858 (1889); *Cagney v. O'Brien*, 83 Ill. 72 (1876); *Hughes v. Bent*, 118 Ky. 609, 81 S.W. 931 (1904); *Linney v. Cleveland Trust Co.*, 30 Ohio App. 345, 165 N.E. 101 (1928); *Hartman's Estate* (No. 2), 320 Pa. 331, 182 A. 232 (1936); *Blackwell v. Blackwell*, 1929 A.C. 318. There are New York decisions for and against the validity of the museum's interest. See, e.g., *Jay v. Lee*, 41 Misc. 13, 83 N.Y.S. 579 (1903) (for); *Trunkey v. Van Sant*, 176 N.Y. 535, 68 N.E. 946 (1903) (against). Other cases are collected in 1 A. SCOTT, *THE LAW OF TRUSTS* § 55.8 (3d ed. 1967). See *Matthews, The True Basis of the Half-Secret Trust?*, 1979 CONV. 360; *Annot.*, 67 A.L.R. 349 (1930).

33. *Olliffe v. Wells*, 130 Mass. 221, 226 (1881). Other cases are collected in 1 A. SCOTT, *supra* note 32, § 55.8.

the Staunton Museum of Chess, a charitable corporation, its successors and assigns.

Your loving wife,
Helen A. Staunton

Helen's letter cannot create a trust when it is signed because there is no trust property owned by her at that time.³⁴ There is a question as to whether a trust will arise on Howard's death, because it will still be unknown what Helen will own at the time of her death.³⁵ In any event, the will and Helen's letter cannot create an express testamentary trust, because to create such a trust, the intent to create a trust must be expressed in the will and it must be possible to ascertain from the language of the will the identity of the beneficiary, the trust property, and the purposes of the trust.³⁶ However, when a testator makes a will or refrains from changing it in reliance upon the promise of a devisee or legatee to hold the property devised or bequeathed upon trust for another, the English courts and most American courts will impose a constructive trust upon the devisee or legatee without proof of fraud, duress, undue influence, mistake, or confidential relationship.³⁷ There are, however, cases in eight states suggesting that a constructive trust will not be imposed without proof of fraud or a confidential relationship.³⁸

It would be well to check the decisions in your state before adopting this method of carrying out Howard Staunton's wishes. If it does work, it will achieve almost exactly what he wants. Helen will be, for all practical purposes, the absolute owner of the house and its contents as long as she lives. Yet the museum, if it has her letter, will be protected against her executor, devisees, legatees, heirs, and next of kin.

34. *In re Ellenborough*, [1903] 1 Ch. 697, 701; 1 A. SCOTT, *supra* note 32, § 86.1.

35. *Edwards v. Edwards*, 1 Wash. App. 67, 459 P.2d 422 (1969); 1 A. SCOTT, *supra* note 32, § 76.

36. 1 A. SCOTT, *supra* note 32, §§ 54, 55.

37. *De Laurencel v. De Boom*, 48 Cal. 581, 585 (1874) (devise of land); *Drakeford v. Wilks*, 3 Atk. 539, 541, 26 Eng. Rep. 1111, 1112 (Ch. 1747) (bequest of bond; promise by legatee to give it to plaintiff upon legatee's death); *Oldham v. Litchfield*, 2 Vern. 506, 506, 23 Eng. Rep. 923, 924 (Ch. 1705) (devise of land). *See also* *Glass v. Hulbert*, 102 Mass. 24, 39 (1869); *Jones v. McKee*, 3 Pa. 496, 500 (1846). Other cases, including those requiring proof of fraud or a confidential relationship, are collected in 1 A. SCOTT, *supra* note 32, § 55.1; Annot., 11 A.L.R.2d 808 (1950); Annot., 155 A.L.R. 106 (1945); Annot., 66 A.L.R. 156 (1930).

38. *See, e.g.*, *Moore v. Campbell*, 102 Ala. 445, 453, 14 So. 780, 782-83 (1893); *Henrichs v. Sundmaker*, 405 Ill. 62, 65, 89 N.E.2d 732, 734 (1950); *Vance v. Grow*, 206 Ind. 614, 625, 190 N.E. 747, 751 (1934); *Hermann v. Hermann*, 193 Iowa 1201, 1204, 188 N.W. 806, 808 (1922); *Yeager v. Yeager*, 155 Kan. 734, 735, 129 P.2d 242, 243 (1942); *Haack v. Burmeister*, 289 Mich. 418, 425, 286 N.W. 666, 669 (1939); *In re Weir's Estate*, 134 Wash. 560, 567, 236 P. 285, 287 (1925).

E. *Contract to Make a Will*

If this method is chosen, the will would contain the same clause as used in Method D (secret trust), but Helen's letter will be slightly different. It will read something like this:

April 4, 1983

To Colonel Howard Staunton
My dearest husband:

You have executed a will today devising and bequeathing to me the home in which we reside and its contents, including your collection of chess sets. As our antenuptial agreement deprives me of marital rights in your property, you have no obligation to devise and bequeath this property to me. It is our understanding that I am free to convey the house in fee simple absolute and sell or give away any of the contents and that I may use any proceeds of sale of either as I wish.³⁹ In consideration of your making this will and keeping it in force until your death, I agree that I will devise and bequeath by will whatever part of this property I own at the time of my death to the Staunton Museum of Chess, a charitable corporation, its successors and assigns.

Your loving wife,
Helen A. Staunton

A written and signed contract to dispose of property by will, supported by substantial consideration, is valid in England and all American states.⁴⁰ If the promisor fails to execute the agreed will or fails to keep it in force, the person or corporation to whom the promisor agreed to devise the property can, at least when the property is specific land or unique chattels, by a suit in equity in the nature of a suit for specific performance of contract, compel the persons who take title on the death of the promisor by will or intestate succession to convey the property to him or it.⁴¹

39. It is important that this sentence be in the letter because courts sometimes treat inter vivos transfers made by the promisor under a contract to make a will as breaches of the contract. *See, e.g.*, *Skinner v. Rasche*, 165 Ky. 108, 112, 176 S.W. 942, 944 (1915); *Quinn v. Quinn*, 5 S.D. 328, 334, 58 N.W. 808, 810 (1894); *Swingley v. Daniels*, 123 Wash. 409, 416, 212 P. 729, 730 (1923). Cases on this point are collected in Sparks, *Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor*, 53 MICH. L. REV. 1 (1954).

40. *Gould v. Mansfield*, 103 Mass. 408 (1869); *Anding v. Davis*, 38 Miss. 574 (1860); *Bynum v. Bynum*, 33 N.C. 632 (1850); *Rivers v. Rivers*, 3 S.C. Eq. (1 Des.) 190 (1811); *Fenton v. Emblers*, 3 Burr. 1278, 97 Eng. Rep. 831 (1762); *Goilmer v. Battison*, 1 Vern. 48, 23 Eng. Rep. 301 (1682); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 48 (1953); B. SPARKS, CONTRACTS TO MAKE WILLS 1-21 (1956); Sparks, *Historical Development of the Law of Contracts to Devise or Bequeath*, 42 KY. L.J. 573, 583 (1954); Annot., 32 A.L.R.2d 370 (1953); Annot., 106 A.L.R. 742 (1937); Annot., 69 A.L.R. 14 (1930).

41. *Crail v. Blakely*, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973); *Redke v. Silvertrust*, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971); *Matthews v. Turner*, 581 S.W.2d 466 (Mo. App., S.D. 1979); *Owens v. Savage*, 518 S.W.2d

You may decide, after checking local decisions, that this is the best method of carrying out Howard Staunton's wishes. It will make Helen, so far as anyone but the museum is concerned, the absolute owner of the property and relieve her of the suggestion of fiduciary duty to the museum inherent in the trust device. If the museum has her letter, it will be able to get all of the property passing to her under Howard's will which she owns at the time of her death, whether or not she complies with the contract. In England, this method would operate in a fashion which is virtually identical with the secret trust.⁴² If Helen does comply with the contract, there will be no need to use her letter unless her will is contested.

F. *Life Estate Plus Power of Appointment and Gift in Default*

Like Methods A and B, which probably will not work, and unlike Methods C, D, and E, Method F requires only one instrument, Howard Staunton's will. The clause of the will would provide "I devise my home at 4 Carlisle Crescent and bequeath the contents thereof, including my collection of chess sets, to my beloved wife, Helen Anderson Staunton, for and during the term of her natural life only, without impeachment of waste, remainder to such persons as she may by deed, bill of sale, or inter vivos gift appoint, remainder in default of appointment to the Staunton Museum of Chess, a charitable corporation, its successors and assigns." If this method works, it will give the museum a vested remainder, subject to total or partial defeasance by the exercise of Helen's power of inter vivos alienation.⁴³

192 (Mo. App., K.C. 1974); T. ATKINSON, *supra* note 40, at 213. This is clearly true if the person to whom the devise or bequest is to be made is a party to the contract. See numerous cases collected in Sparks, *Enforcement of Contracts to Devise or Bequeath After the Death of the Promisor*, 39 MINN. L. REV. 1 (1954); Sparks, *supra* note 40, at 146-61. When, as in the case of the Staunton Museum of Chess, the intended devisee of the property is a third party donee beneficiary, the availability of such relief may be questionable in a jurisdiction in which a third party beneficiary is not entitled to maintain an action at law for breach of contract. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 119B, 348, 357-360, 368, 370, 1420 (3d ed. 1968). However, although a third party donee beneficiary may not maintain an action at law for breach of contract in England, Tweddle v. Atkinson, 1 B. & S. 393, 397-98, 121 Eng. Rep. 762, 764 (Q.B. 1861), a third party donee beneficiary of a contract to devise or bequeath property by will may maintain a suit in equity to get the property on a trust theory. *In re Hagger*, [1930] 2 Ch. 190, 195; *In re Green*, 1951 Ch. 148, 154-55. See *Stone v. Hoskins*, 1905 P. 194; Annot., 73 A.L.R. 1395 (1931); Annot., 66 A.L.R. 1439 (1930); Annot., 33 A.L.R. 739 (1924); Annot., 2 A.L.R. 1193 (1919).

42. See English cases cited note 41 *supra*.

43. J. GRAY, THE RULE AGAINST PERPETUITIES §§ 86a, 112, 112a (3d ed. 1915); L. SIMES & A. SMITH, *supra* note 7, §§ 150, 360. If the courts of your state have indicated a leaning toward the Doctrine of Double Thwart, discussed *infra*, it might be safer to have the clause of the will provide: "I devise my home at 4 Carlisle Crescent and bequeath the contents thereof, including my collection of chess

The chief danger in the use of this method is the Doctrine of Double Thwart, which might also be called the Doctrine of Maximum Frustration of Purpose. Courts are wont to say that the intention of the testator is the pole star of testamentary construction.⁴⁴ This is as it should be, but too often such a statement is followed by one like this: "Now with respect to what Isaac intended by limiting Mary's interest in his estate to an estate for life. . . . Isaac's will must be interpreted from the language used by him and not according to what others might think he meant or what he might have thought the words . . . meant"⁴⁵ We do not know what the learned chief justice thought that *his* words meant or what others might think he meant, but they suggest to us that the court which adopted them was not much interested in carrying out Isaac's real intention, even though it could ascertain it without difficulty. It is, perhaps, this kind of judicial approach to will construction which leads to such results as the Doctrine of Double Thwart.

The Doctrine of Double Thwart works like this. Thwart 1: If a life tenant is given an unlimited power of disposition, this will be construed to give him an estate in fee simple in land or the absolute ownership of chattels, even though it is perfectly clear that the testator intended him to have only an estate or interest for life. Thwart 2: Although the testator clearly intended to have the life estate or interest followed immediately by a vested remainder in a named person or corporation, it cannot be a remainder because there cannot be a remainder on the estate in fee simple which we have foisted upon the life tenant in defiance of the testator's wishes.⁴⁶ Therefore, the intended remainder must be treated as an executory devise. As the authorities cited in connection with Methods A and B proclaim, a shifting executory devise or bequest to take effect upon the death of a freehold tenant in fee simple or an absolute owner of chattels if he fails to dispose of the property is void as a restraint on testate or intestate succession. Therefore, the remainder fails and the property passes under the life tenant's will or to her intestate successors. Even though the testator's intent is clear and, as has been illustrated by the rule that an identical shifting executory interest on a copyhold estate in fee simple is valid,⁴⁷ there is no violation of public policy, the testator's intent will be double-thwarted because

sets, to my beloved wife, Helen Anderson Staunton, for a term of forty years if she shall so long live, without impeachment of waste, remainder to such persons as she may by deed, bill of sale, or inter vivos gift appoint, and subject to the said term and power, to the Staunton Museum of Chess, a charitable corporation, its successors and assigns." By devising a present estate to the museum, subject to Helen's term and power, you may reduce the danger of a court's holding that Helen takes a fee simple.

44. See, e.g., *In re Keefer's Estate*, 353 Pa. 281, 283, 45 A.2d 31, 32 (1946).

45. *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 859-60 (1965).

46. See notes 17-19 and accompanying text *supra*.

47. See note 2 *supra*.

devises and bequests of orts are not enforced with respect to land held in free and common socage or with respect to chattels personal.

The Supreme Court of Michigan was notorious for its adherence to the Doctrine of Double Thwart⁴⁸ until a 1930 decision manifested reduced enthusiasm for that doctrine.⁴⁹ Tennessee was another stronghold of the doctrine⁵⁰ until 1929, when the court criticized it,⁵¹ after which the legislature abolished it.⁵² Virginia and West Virginia also applied the Doctrine of Double Thwart with zeal⁵³ until it was abolished by statute.⁵⁴ The Virginia courts have shown some tendency to forget or ignore the statute abolishing the Doctrine of Double Thwart,⁵⁵ and they will not apply it unless the holder of the power is expressly limited to a life estate.⁵⁶

In the other American states and in England, it is possible to have a

48. See, e.g., *Gibson v. Gibson*, 213 Mich. 31, 181 N.W. 41 (1921); *White v. Grand Rapids & Ind. Ry.*, 190 Mich. 1, 155 N.W. 719 (1915); *Killefer v. Bassett*, 146 Mich. 1, 109 N.W. 21 (1906); *Moran v. Moran*, 143 Mich. 322, 106 N.W. 206 (1906); *Dills v. La Tour*, 136 Mich. 243, 98 N.W. 1004 (1904); *Jones v. Jones*, 25 Mich. 401 (1872); *W. FRATCHER*, *supra* note 6, at 69-72.

49. *Quarton v. Barton*, 249 Mich. 474, 483, 229 N.W. 465, 467-68 (1930), *noted in* 29 MICH. L. REV. 761 (1931).

50. See, e.g., *Van Deventer v. McMullen*, 157 Tenn. 571, 11 S.W.2d 867 (1928); *Davis v. Richardson*, 18 Tenn. (10 Yer.) 290 (1837).

51. *Waller v. Sproles*, 160 Tenn. 11, 19, 22 S.W.2d 4, 6 (1929).

52. TENN. CODE ANN. § 66-1-106 (1982). See also *Leach v. Dick*, 205 Tenn. 221, 326 S.W.2d 438 (1959). But in *Webb v. Webb*, 53 Tenn. App. 609, 385 S.W.2d 295 (1964), a devise to the testator's widow "for the full period of her natural life," with unrestricted powers of disposition and consumption, was construed to give the widow an estate in fee simple absolute in the absence of a remainder. *Id.* at 613-14, 385 S.W.2d at 297.

53. See, e.g., *Hunter v. Hicks*, 109 Va. 615, 64 S.E. 988 (1909); *May v. Joynes*, 62 Va. (20 Gratt.) 692 (1871); *Morgan v. Morgan*, 60 W. Va. 327, 55 S.E. 389 (1906); *Cocke*, *The Rule of Construction in May v. Joynes*, 14 VA. L. REG. 161 (1908); *Simonton*, *Gift of a Life Estate with Absolute Power of Disposal by Deed*, 36 W. VA. L.Q. 288 (1930).

54. VA. CODE § 55-7 (1981) (enacted in 1908, amended in 1919 and 1978); W. VA. CODE 36-1-16 (1966). See also *Potter v. United States*, 269 F. Supp. 545 (N.D. W. Va. 1967), *noted in* 70 W. VA. L. REV. 271 (1968); *Simonton*, *Effect of Power in Life Tenant to Make Absolute Disposition of Property—Governing Statute*, 37 W. VA. L.Q. 422 (1931).

55. See, e.g., *Wornom v. Hampton Normal & Agricultural Inst.*, 144 Va. 533, 132 S.E. 344 (1926); *Davis v. Kendall*, 130 Va. 175, 107 S.E. 751 (1921) (1885 will); *Taylor v. Johnson*, 114 Va. 329, 76 S.E. 325 (1912); *Randall v. Harrison's Ex'r*, 109 Va. 686, 64 S.E. 992 (1909). Cf. *Barnett v. Blain*, 126 Va. 179, 101 S.E. 239 (1919) (statute mentioned but not applied because testator died before its enactment); *Steffey v. King*, 126 Va. 120, 101 S.E. 62 (1919) (same).

56. *Gardner v. Worrell*, 201 Va. 355, 357, 111 S.E.2d 285, 286 (1960). The latest Virginia decision, *Pigg v. Haley*, 294 S.E.2d 851 (Va. 1982), may indicate some relaxation of this requirement for application of the statute.

valid remainder on an estate or interest for life even though the life tenant has an unrestricted power of disposition of the fee simple in land or the absolute ownership of chattels.⁵⁷ Yet even in these jurisdictions, if there is the slightest ambiguity or doubt as to whether the holder of the unrestricted power of disposition took a fee simple (or an equivalent interest in chattels) or a life estate or interest, there is a tendency to favor the fee simple construction and hold the gift over void.⁵⁸

Method F will probably accomplish Howard Staunton's purpose. Helen will get only a life estate with an unrestricted power of disposition inter vivos and the museum will have a valid vested remainder. As Helen's restricted interest will be of record, however, she will find it less easy to make a sale, particularly of the land. A careful prospective purchaser may refuse to accept a conveyance from her without a decree binding upon the museum establishing her power to convey.

G. *Express Testamentary Trust With Third Party Trustee*

The express trust is perhaps the most flexible and useful device available to lawyers. It may be used to accomplish a variety of purposes so wide that its uses are almost unlimited.⁵⁹ Howard Staunton's wishes can be approximated in some states by means of an express testamentary trust created by a clause of his will providing, "I devise my home at 4 Carlisle Crescent and bequeath the contents thereof, including my collection of chess sets, to the Staunton National Bank, its successors and assigns, upon trust for the following purposes: (1) to keep the trust property insured, make necessary repairs, and pay special assessments and property and income taxes; (2) to permit my beloved wife, Helen Anderson Staunton, to occupy the home and keep possession of its contents so long as she lives; (3) to sell and convey the real property and transfer the personal property to such persons as my said wife shall direct; (4) to pay over the proceeds of any property sold pursuant to my said wife's direction to her for her own

57. *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 P. 247 (1912) (real and personal property); *Kent v. Morrison*, 153 Mass. 137, 26 N.E. 427 (1891) (land); *Rubey v. Barnett*, 12 Mo. 3 (1848) (land, slaves, money, and evidences of debt); *Anon.*, 3 Leonard 71, 74 Eng. Rep. 548, 4 Leonard 41, 74 Eng. Rep. 716 (C.P. 1578) (freehold land); *Reith v. Seymour*, 4 Russ. 262, 38 Eng. Rep. 804 (M.R. 1828) (investment securities). Numerous other cases to this effect are collected in L. SIMES & A. SMITH, *supra* note 7, § 1488; Annot., 76 A.L.R. 1153 (1932); Annot., 36 A.L.R. 1177 (1925). See also RESTATEMENT OF PROPERTY § 111 (1936); A. KALES, *supra* note 17, § 726.

58. See, e.g., *Jackson ex dem. Livingston v. Robins*, 16 Johns. 537, 588 (N.Y. 1819); *Sterner v. Nelson*, 210 Neb. 358, 314 N.W.2d 263 (1982); L. SIMES & A. SMITH, *supra* note 7, § 1489. Numerous cases are collected in Annot., 17 A.L.R.2d 7 (1951); Annot., 75 A.L.R. 71 (1931). See also J. GRAY, *supra* note 6, § 74c; Schnebly, *supra* note 6, § 26.47, at 482.

59. See Fratcher, *Fascicle on Trust* in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 1 (1974).

use absolutely; (5) to convey any trust property remaining at my said wife's death to the Staunton Museum of Chess, a charitable corporation, its successors and assigns. I bequeath the sum of \$100,000 to the said trustee to be invested and held upon trust to use the income and any principal needed to meet the costs of administration of the foregoing trust and any expenses arising from the carrying out of Purpose (1) thereof. Any surplus income shall be paid to or at the direction of my said wife."

The Rule Against Restraints on Testate and Intestate Succession, discussed in connection with Methods A and B, and the Doctrine of Double Thwart, discussed in connection with Method F, cannot be avoided by use of an express testamentary trust. If the court finds that Helen took an equitable fee simple under the trust, the gift over to the museum is void in most jurisdictions.⁶⁰ For example, in *Hawley v. Watkins*,⁶¹ a testator devised and bequeathed a third of his estate upon trust for his mentally incompetent sister, "the said money to be advanced to her as she may need it. Should any of the said sum of money be in the hands of the said trustee at the death of my said sister, . . . my desire is that the same be equally divided between" two named persons.⁶² It was held that the sister took an equitable fee simple and that the gift over to the two persons was void for repugnancy.⁶³

Howard Staunton wishes Helen to have possession and control of the house at 4 Carlisle Crescent and its contents. In some states, when the beneficiary is entitled to possession of the trust property the trust is destroyed and the beneficiary takes legal title.⁶⁴ If Carlisle Crescent is located in a state with legislation to this effect, there is no point to using language of trust because the result will be the same as that in Method F. If your state does permit trusts under which the beneficiary is entitled to possession of the trust property, Helen will have the bank looking over her shoulder to see that she does not damage or destroy the trust property. Howard may not want Helen to be subject to such scrutiny. In any event, use of an

60. See, e.g., *Storkan v. Ziska*, 406 Ill. 259, 94 N.E.2d 185 (1950); *Van Deventer v. McMullen*, 157 Tenn. 571, 11 S.W.2d 867 (1928); *Culpeper Nat'l Bank v. Wrenn*, 115 Va. 55, 78 S.E. 620 (1913); *Hunter v. Hicks*, 109 Va. 615, 64 S.E. 988 (1909) (beneficiary of trust had power of sale; remainder held void); *Davis v. Heppert*, 96 Va. 775, 32 S.E. 467 (1899) (trust for A for life, trustee to convey as requested by A, remainder to A's children); *Meyer v. Barnett*, 60 W. Va. 467, 56 S.E. 206 (1906) (beneficiary had power of sale); *Morgan v. Morgan*, 60 W. Va. 327, 55 S.E. 389 (1906) (trustee to convey as directed by beneficiary).

61. 109 Va. 122, 63 S.E. 560 (1909).

62. *Id.* at 123, 63 S.E. at 560.

63. *Id.* at 124, 63 S.E. at 560.

64. See MICH. STAT. ANN. § 26.53 (West 1974) (land only); MINN. STAT. ANN. § 501.03 (West 1947) (land only; *id.* § 501.04 makes § 501.03 inapplicable if trustee has active duties); N.Y. EST. POWERS & TRUSTS LAW § 7-1.1 (McKinney 1967); N.D. CENT. CODE § 59-03-05 (1960); OKLA. STAT. ANN. tit. 60, § 175.4 (West 1971) (land only); S.D. COMP. LAWS ANN. § 43-10-2 (1967).

express trust with a third party trustee will be costly. The Staunton National Bank cannot afford to serve without compensation and it must be provided with funds to cover expenses. If the existence of the trust is a matter of public record, as every express testamentary trust is, anyone with actual or constructive notice of the existence of the trust is bound to inquire into the trustee's powers before accepting a conveyance or other transfer from it and is charged with knowledge of whatever such inquiry would have produced.⁶⁵ This being so, Helen will not be able to get the trust property transferred as expeditiously or economically as she could if she appeared to be the absolute owner, as she would under Methods D (secret trust) and E (contract to make a will).

The chief advantage of using an express testamentary trust with a bank as trustee is that the chances of the trust property being mingled or confused with Helen's individual property at the time of her death are minimized. The bank will have an inventory of the trust property and will transfer it promptly to the museum. From the standpoint of the Staunton Museum of Chess, Method G may be the most satisfactory. Although the requirement that Helen ask the bank to make any sale or gift that she wishes may restrict her to some extent, it will protect against false claims made after Helen's death that she made gifts of rare chess sets to the claimants. You have decided tentatively that you will discuss Method G with Howard Staunton and see whether he prefers it to Method E (contract to make a will). As you will put the question, he must decide whether he thinks the extra expense of Method G and the restrictions on Helen's freedom of action which it entails are worth accepting in order to get slightly greater protection of the museum's right to get all of the property that Helen does not sell or give away. You may tell him that Method G runs a slightly greater risk of running afoul of the Rule Against Restraints on Testate and Intestate Succession or the Doctrine of Double Thwart, because his real plan of disposition will be disclosed. If the contract to make a will scheme is used and Helen does her part by executing a will devising what she has left of the property passing to her under her husband's will to the museum, there will be no disclosure unless her heirs and next of kin contest the will. Even if they succeed in a will contest, they cannot reach the home or its contents if the contract is valid.

65. 4 A. SCOTT, *supra* note 32, § 297; Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. REV. 627, 645-649 (1962). See also Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 307-10, 326-27 (1960). The duty of inquiry is abolished by UNIF. TRUSTEES' POWERS ACT § 7 (1964), which has been enacted in ten states. See FLA. STAT. ANN. § 737.405 (Supp. 1982); IDAHO CODE § 68-107 (1980); KAN. STAT. ANN. § 58-1207 (1976); KY. REV. STAT. ANN. § 386.830 (Bobbs-Merrill Supp. 1980); ME. REV. STAT. ANN. tit. 18A, § 7-406 (1981); MISS. CODE ANN. § 91-9-115 (1972); N.H. REV. STAT. ANN. § 564-A:7 (Supp. 1981); OR. REV. STAT. § 128.031 (1981); UTAH CODE ANN. § 75-7-406 (1978); WYO. STAT. § 4-8-107 (1977).

H. *Express Testamentary Trust With Life Beneficiary as Trustee*

If this method is chosen, Howard Staunton's will would provide, "I devise my home at 4 Carlisle Crescent and bequeath the contents thereof, including my collection of chess sets, to my beloved wife, Helen Anderson Staunton, her heirs, executors, administrators, and assigns, upon trust for the following purposes: (1) to keep the trust property insured, make necessary repairs, and pay special assessments and property and income taxes; (2) to permit my said wife to occupy the home and keep possession of its contents so long as she lives; (3) to sell and convey the real property and transfer the personal property to such persons as my said wife shall direct; (4) to pay over the proceeds of any property sold pursuant to my said wife's direction to her for her own use absolutely, free of trust; (5) to convey any trust property remaining at my said wife's death to the Staunton Museum of Chess, a charitable corporation, its successors and assigns."

The decisions are not in complete accord, but the prevailing and better view seems to be that one can be trustee for himself for life and thereafter for another without having the trust destroyed, wholly or partially, by merger.⁶⁶ In any event, the interest of the remainderman beneficiary is not destroyed by merger.⁶⁷ This plan, if it works, would probably involve less cost for trustee's compensation than Method G (bank as trustee) and it would relieve Helen of the irritation of having the bank looking over her shoulder to see that she does not damage or destroy the trust property.

As in the case of Method G, the Rule Against Restraints on Testate and Intestate Succession, discussed in connection with Methods A and B, and the Doctrine of Double Thwart, discussed in connection with Method F, cannot be avoided by use of an express testamentary trust. If Helen is held to take an estate in fee simple in the house and an equivalent interest in the chattels, the gift over to the museum is likely to fail. As in the case of Method G, Helen's right to possession of the trust property will convert her interest into a legal estate in some states.⁶⁸ The existence of the trust will be a matter of public record, which may impede Helen's exercise of her powers to convey the land and sell or give away the chattels. Unlike Method G, if

66. See *Williams v. Nylund*, 268 F.2d 91 (10th Cir. 1959); *Woodbery v. Atlas Realty Co.*, 148 Ga. 712, 98 S.E. 472 (1919); *Morgan v. Murton*, 131 N.J. Eq. 481, 26 A.2d 45 (1942); 2 A. SCOTT, *supra* note 32, § 99.3.

67. *In re Estate of Duskis*, 76 Misc. 2d 411, 351 N.Y.S.2d 97 (Sur. Ct. 1973), involved a will devising and bequeathing the entire estate to the husband of the testatrix upon trust to pay the income to himself for life, with the right to invade and to use any part or parts of the principal for his sole use and benefit and in his sole discretion, without being accountable to anyone. The will provided that the trust was to end on the husband's death and bequeathed the residue to two sisters or their issue. It was held that the husband took a legal estate for life, with power to invade principal, and what remained in his possession at his death would pass to the remaindermen. *Id.* at 413-14, 351 N.Y.S.2d at 100-01.

68. See statutes cited note 64 *supra*.

Helen is the trustee, there will be no bank trustee with an inventory of the trust property, ready to step in when she dies to see that the trust property is not confused with Helen's estate and that it is transferred promptly to the museum. Neither will there be the protection against false claims of gifts provided by Method G's requirement that the bank make transfers of the trust property at Helen's direction during her lifetime. You conclude that, on balance, if an express testamentary trust is to be used, it would be best to have the bank act as trustee.

V. EPILOGUE

A week has passed since your conference with Howard Staunton about his proposed new will. You suggested then that he return to your office at 2:00 p.m. today to discuss possible methods of carrying out his wishes. While you were shaving this morning, you decided to recommend to Howard the use of either Method E (contract to make a will) or Method G (express testamentary trust with the bank as trustee). He would be able to help you to decide which of these two methods would come closest to carrying out his wishes. Then you went to breakfast and opened the morning newspaper beside your plate. In the middle of the front page you found a news item which wrecked your plans. It read:

PROMINENT LOCAL BANKER DIES

Colonel Howard Staunton, 73, Chairman of the Board of Directors of the Staunton National Bank, was found dead in his study by his wife, Helen, last evening. Dr. Warren Maddox, County Medical Examiner, stated that death occurred at about 8:00 p.m. and was caused by a massive heart attack. Funeral arrangements are incomplete. Colonel Staunton is survived by his wife, the former Helen Anderson, and a son, John Staunton, President of the Staunton National Bank. Colonel Staunton was the founder of the Staunton Museum of Chess and an internationally known collector of chess sets. He was decorated with the Distinguished Service Cross for exceptional heroism in combat while leading his battalion at Anzio, Italy, in 1944.

When you reached your office this morning you found Mrs. Howard Staunton seated in the waiting room outside your door. After your condolences, Helen said, "I am on my way to the funeral parlor but I decided to stop here to ask you to get the legal processes rolling. There are three things to be done. First, here is Howard's 1973 will, which names me as executrix. Please get it admitted to probate. I want you to handle the estate. Second, here is a warranty deed that Howard wrote out himself, signed, had witnessed, acknowledged, and handed to me after he had a slight heart attack two days after his appointment with you last week. It conveys the house at 4 Carlisle Crescent and all its contents to me absolutely and forever. Please get it recorded. Third, please prepare a will for me. It should exercise my power of appointment under the will of my first husband, Henry West, in favor of my children by him, Henry West, Jr. and Rebecca West Farnham.

It should exercise my power of appointment under the will of my second husband, George Hancock, in favor of my children by him, Moffat Hancock and Jean Hancock Harbison. The house at 4 Carlisle Crescent and its contents, including Howard's collection of chess sets, are to go to the Staunton Museum of Chess. I want to give the residue of my estate to my four children in equal shares. Call me if you need further information or instructions."

As Helen Anderson Staunton left your office you mused, "Well, Howard, you seem to have solved your own problem without my help. I think that yours is the best possible solution."

