Missouri Law Review

Volume 32
Issue 2 *Spring 1967*

Article 3

Spring 1967

# Some Remarks Concerning the Revocable Self-Declaration of Trust

Henry T. Lowe

# SOME REMARKS CONCERNING THE REVOCABLE SELF-DECLARATION OF TRUST

HENRY T. LOWE*

> A man may desire to make disposition of his property in his lifetime to avoid administration after his death. Indeed . . . such a desire is not unnatural. And when it is given legal expression . . . by gifts in trust during life . . . there is manifest not only an absence of testamentary intent, but an absolute hostility to such an intent.[1]

In these terms the Supreme Court of Missouri many years ago approved the revocable trust as a legitimate means of avoiding probate. Since then the revocable trust has become widely used as a substitute for a will, and today the reasons one might choose to use a revocable inter vivos trust in place of a will go far beyond the suggestion found in the quoted extract: the desire of an individual to avoid litigation over his estate. Reasons prompting such a choice are varied and may reflect among others such important desires as those to be relieved of the management of property during one's lifetime, to avoid publicity about the composition of one's estate upon death, to achieve continuity in the administration of one's property before and after death, to insure the preservation and retention of certain property in the estate for a substantial period after death,[2] and, importantly, to save expense. Fees of the personal representative and his lawyer and other expenses of probate administration may take a substantial portion of the total estate, and the view that these fees in some instances are excessive and even unconscionable is probably shared by many people. The author of a best seller reinforces this belief by characterizing the expenses of probate administration as "a private tax,

*Professor of Law, University of Missouri.

1. This quotation from Nichols v. Emery, 109 Cal. 323, 331-32, 41 Pac. 1089, 1092 (1895) was quoted with approval by the Missouri Supreme Court in Sims v. Brown, 252 Mo. 58, 69, 158 S.W. 624, 628 (1913) and later in Davis v. Rossi, 326 Mo. 911, 941-42, 34 S.W.2d 8, 20 (1930).

2. In the absence of a binding waiver the surviving spouse may elect to take her forced share from property passing by will. § 474.160, RSMo 1949. A revocable inter vivos trust in which the surviving spouse is given substantial equitable interests may be immune to an attack as a transfer in fraud of marital rights. Potter v. Winter, 380 S.W.2d 27 (Mo. 1955). Hence in some circumstances the use of the revocable trust may insure the retention of certain assets where the use of a will would not.

imposed by one group of citizens upon another, a form of tribute privately levied by the legal profession."[3]

The revocable inter vivos trust may be both a safe and inexpensive way to avoid this alleged tribute, but its use does not insure economy. Ordinarily if one chooses the revocable inter vivos trust as the primary vehicle for passing his property from one generation to the next, he must consult a lawyer for the proper execution and implementation of his wishes, and the expense involved in this may be, and often is, substantial. Further, he must choose a trustee or trustees, and typically this will involve the selection of a corporate fiduciary whose fees for the creation and administration of the trust during the settlor's lifetime may be substantial. The expenses incurred in creating and administering a revocable inter vivos trust may be comparable to the expenses incurred in a testamentary plan involving the usual costs of probate administration. What can be said in favor of a revocable inter vivos trust of this type, a plan prepared by a lawyer which names an independent third party as a trustee or co-trustee, is that, regardless of economy, it is safe. The channels in which these streams flow are well defined and sufficiently deep to support all but the most cumbersome vessels.

Currently the emphasis is on economy,[4] and here the suggestions are twofold: first, to avoid the expense of creating a revocable trust by the use of forms,[5] and second, to avoid the expenses of administration during the settlor's lifetime by designating the settlor the sole trustee of the trust during his lifetime. From the lay standpoint these suggestions have great appeal, and as a consequence there will probably be a good deal of lay experimentation with the revocable self-declaration of trust, this newly found means of avoiding probate. Predictably in the years to come the courts will have occasion to pass with greater frequency on the validity of arrangements cast in this form. The comments to follow concern this question.

## I. Views on Validity

Decisions on the validity of the revocable self-declaration of trust are few in number. A survey of the reported cases indicates that the courts have not been uniform in their disposition of the cases, although a clear majority do sustain the trust.

Some courts have refused to uphold the revocable self-declaration of

3. Dacey, How To Avoid Probate 14 (1965).
4. *Ibid.*
5. *Ibid.*

trust, and even within a particular state the decisions have not been uniform. In an early case the Supreme Court of Pennsylvania upheld a revocable self-declaration of trust against a forced share claim of the surviving spouse where the settlor reserved the right to the income during his life.[6] But in a later case, decided shortly after the publication of the first edition of the *Restatement of Trusts*, the same court set aside a purported revocable self-declaration of trust where the settlor reserved the right to the income and the "full power . . . to sell, transfer and assign" the trust property at any time.[7] In a decision significant for its reasoning the Court of Appeals for the Second Circuit refused to uphold a purported revocable self-declaration of trust; the court found that the decedent, a layman, who had listed certain property on a sheet of property as "held by me in trust" for a daughter, did not intend to create a trust but rather intended to pass to her only such of the property as he had in his possession at the time of his death.[8] Contemporaneous decisions of the same New York court present an interesting contrast. In one, where decedent executed a revocable trust naming himself co-trustee with a bank, the court upheld the trust;[9] in the other the court found an alleged self-declaration of trust to be testamentary in nature where the decedent during his lifetime retained the income, discretion as to the sale of the property, and in the event of a sale the power to apply the proceeds for his own benefit.[10] Recently a provincial court in Canada refused to sustain an alleged revocable self-declaration of trust reserving similar powers in the purported settlor.[11]

Notwithstanding the decisions mentioned above which deny validity to the trust, the dominant view[12] and the one expressed in the *Restatement of Trusts* is to sustain the trust,[13] even where the settlor, in addition to the right to receive the income, reserves the power to sell or dispose of the trust corpus at any time and to appropriate the proceeds for his own benefit free of trust.[14]

---

6. Dickerson's Appeal, 115 Pa. 198, 2 Am. St. Rep. 547 (1886).
7. Tunnell's Estate, 325 Pa. 554, 190 Atl. 906 (1937).
8. Ambrosius v. Ambrosius, 239 Fed. 473 (2d Cir. 1917).
9. In Re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1951).
10. Application of Cerchia, 279 App. Div. 734, 108 N.Y.S.2d 753 (1951).
11. *Re* Shirley, 49 D.L.R.2d 474 (1965).
12. Roberts v. Roberts, 286 F.2d 647 (9th Cir. 1961); United Bldg. & Loan Ass'n. v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); *In Re* Morrison's Estate, 189 Kan. 704, 371 P.2d 171 (1962); De Leuil's Ex'rs v. De Leuil, 255 Ky. 406, 74 S.W.2d 474 (1934); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956); Smith v. Deshaw, 116 Vt. 441, 78 A.2d 479 (1951).
13. RESTATEMENT (SECOND), TRUSTS § 57 (1959).

Several of the recent decisions[15] involve the construction of instruments similar to the forms found in the currently popular literature for estate planning by laymen. In each of these cases a purchaser of mutual fund shares registered the shares in his name as trustee of a revocable trust which reserved to him income for life and the power to sell the shares and appropriate the proceeds free of trust; on the death of the purchaser the shares became the sole property of a designated beneficiary. These courts reason that, since a revocable trust and a self-declaration of trust are both recognized legal forms, a combination of the two is likewise permissible, a power to sell and appropriate the proceeds being one attribute of a power of revocation.[16] While recognizing that the interest of the designated beneficiary before the death of the settlor is a thin one, these courts nonetheless find an existing property interest in the beneficiary until the trust is revoked.[17] In one of the decisions involving the mutual fund trust, the court in upholding the trust suggested that the question was so close that the personal representative of the settlor's estate might have been remiss in her duty had she failed to contest the trust.[18]

The *Restatement of Trusts* has been an important influence in the recent decisions, and the successive versions of the *Restatement* reflect the difficulties inherent in the device. The first edition of the *Restatement*, published in 1935, took the position in section 57 that the revocable self-declaration of trust is not a testamentary disposition.[19] With regard to the settlor's power of control the first edition stated that the power is not unlimited since it can only be exercised in accordance with the terms of the trust.[20] This version, however, stated that an instrument is testamentary where the settlor has such power to control the trustee as to the details of administration of the trust that the trustee is agent of the settlor.[21] An example of such a disposition was a revocable self-

14. This provision is found in most of the mutual fund trusts listed in note 15. It is also present in the forms included in DACEY, *op. cit. supra* note 3.

15. Roberts v. Roberts, *supra* note 12; United Bldg. & Loan Ass'n. v. Garrett, *supra* note 12; Farkas v. Williams; In Re Morrison's Estate, *supra* note 12; Ridge v. Bright, *supra* note 12.

16. Roberts v. Roberts, *supra* note 12; United Bldg. & Loan Ass'n. v. Garrett, *supra* note 12; Farkas v. Williams, *supra* note 12; Ridge v. Bright, *supra* note 12.

17. Cases cited note 12 *supra*. This writer found the best discussions of the legal questions in Farkas v. Williams, *supra* note 12; United Building & Loan Ass'n. v. Garrett, *supra* note 12; and Investor's Stock Fund, Inc. v. Roberts, 179 F. Supp. 185 (D. Mont. 1959), *aff'd sub nom.* Roberts v. Roberts, *supra* note 12.

18. United Bldg. & Loan Ass'n. v. Garrett, *supra* note 12.

19. RESTATEMENT, TRUSTS § 57 (1935).

20. *Id.* comment on subsection (1)(b).

21. *Id.* § 57(2).

declaration of trust with a reserved life estate where the settlor had power to deal with the trust property as "he likes" or as "he pleases" during his lifetime.[22]

It was this language from the *Restatement* on which the Supreme Court of Pennsylvania relied in 1937 in invalidating a purported revocable self-declaration of trust.[23] A standard phrased in terms of what the settlor "likes" and "pleases" is at least imprecise. Perhaps it says no more than the familiar propositions: a settlor must intend to create a trust; in close cases there is no presumption of such an intention; and the court must resolve the question factually by weighing all the possible inferences.

One important point made in the first edition of the *Restatement* is the impact of form on the question of intention; form is relevant to the distinction of agency from trust.[24] This might indicate that an instrument prepared with the advice and assistance of counsel would succeed where an arrangement embracing similar economic consequences to the settlor undertaken by himself would fail.

A revision to section 57 of the *Restatement* was adopted in 1947.[25] By contrast to the first formulation this revision contains no reference to the degree of control as a distinguishing factor between trust and agency. By the revision the trust is valid "unless the terms are so informally stated and the power of control reserved is so great that it would violate the policy of the Statute of Wills to enforce it." Again there is emphasis on form, and the reference of the control question is to "the policy of the Statute of Wills." But this reference is subject to the same comment as a standard expressed in terms of what the settlor "likes" or what he "pleases" to do. Such a formulation leaves the matter open for a case by case determination.

The most recent version of section 57 of the *Restatement* came in 1959.[26] It omits the reference to the standards expressed in the 1935 and 1947 versions. Now the section states that a revocable trust is not invalid merely because the settlor reserves in conjunction a beneficial interest, powers to revoke and modify, and a power to control the trustee as to the administration of the trust.[27] The rule is expressly made applicable to

22. *Id.* § 57(3).
23. Tunnell's Estate, *supra* note 7.
24. RESTATEMENT, TRUSTS § 57(3) (1935).
25. This version is not found in either the 1948 or 1954 Supplements to the *Restatement of Trusts*. However Professor Austin Scott, Reporter for the *Restatement of Trusts* states in his treatise that this revision to section 57 was adopted in 1947. 1 A SCOTT, TRUSTS § 57.2, at 451 (2d ed. 1957).
26. RESTATEMENT (SECOND), TRUSTS § 57 (1959).
27. *Ibid.*

a self-declaration of the trust.[28] That the settlor as trustee controls the administration of the trust is not deemed important.[29]

It is evident that the successive versions of section 57 are no restatement of the law in any ordinary sense, at least in their application to the revocable self-declaration of trust. These versions do point out the fact that the law is not yet clearly settled.

## II. Aspects of Local Law

### A. *Settlor Not Sole Trustee*

In Missouri a revocable inter vivos trust is subject to attack primarily on two grounds, as a testamentary disposition ineffective for failure to comply with the requirements for execution of wills[30] or as a fraud on the marital rights of a surviving spouse.[31] The highest court has consistently upheld the trust, where the settlor is not the sole trustee, against attacks based on the first of these grounds in decisions which clearly indicate that the settlor may reserve one or more of the following rights or powers: to revoke, alter, or amend the trust;[32] to receive the income from the trust property during his lifetime;[33] to encroach upon the trust corpus;[34] to serve as co-trustee during his lifetime;[35] and to make important decisions with respect to the administration of the trust property exercisable in a non-fiduciary capacity.[36]

An important Missouri decision[37] held a purported revocable trust to be an ineffective testamentary disposition where the property had in fact been administered by a purported trustee for 44 years after the settlor's death. There the settlor during his lifetime had the power to

28. *Id.* comment (h).
29. *Id.* comment (h).
30. Atlantic Nat'l Bank of Jacksonville v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948).
31. Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947).
32. Sims v. Brown, *supra* note 1; Davis v. Rossi, *supra* note 1; Odom v. Langston, 355 Mo. 109, 195 S.W.2d 463 (1946); Potter v. Winter, *supra* note 2.
33. In Re Soulard's Estate, 141 Mo. 642, 43 S.W. 617 (1897); Davis v. Rossi, *supra* note 1; Odom v. Langston, *supra* note 32; Potter v. Winter, *supra* note 2; Masterson v. Plummer, 343 S.W.2d 352 (Spr. Mo. App. 1961).
34. Odom v. Langston, *supra* note 32; Potter v. Winter, *supra* note 2.
35. Potter v. Winter, *supra* note 2.
36. Power to direct the investment and reinvestment of trust property, *In re* Soulard's Estate, *supra* note 33; Davis v. Rossi, *supra* note 1; Potter v. Winter, *supra* note 2; Masterson v. Plummer, *supra* note 33. Power to vote shares of a closely held company, Davis v. Rossi, *supra* note 1.
37. Atlantic Nat'l Bank of Jacksonville v. St. Louis Union Trust Co., *supra* note 30.

revoke and to "use, occupy and enjoy" the trust property and did in fact retain possession and control during his lifetime. The trust instrument provided that the named trustees "from and after" the settlor's death should assume possession and control of the trust property. These factors rendered the arrangement testamentary. But the result in this case is exceptional, and in view of the unusual control retained by the settlor does not jeopardize the safety of the revocable inter vivos trust as a dispositive device, particularly where the settlor is not the sole trustee.

A surviving spouse may challenge a revocable inter vivos trust on the ground that such a disposition is a fraud on her marital rights. Attacks of this type have been successful in some instances.[38] But the decisions which sustain the attack do not invalidate the transfer because the trust is revocable; the test is one of timing and whether there was an intent on the part of the settlor to deprive his spouse of substantial rights she would otherwise have.[39] Where there is no such intent present the revocable trust stands.[40]

Typically the cases involve the interpretation of instruments prepared by lawyers where there is little question concerning the intention of the settlor to create a trust; here the formality of the transaction is one of the best guarantees of intention to create a trust. To be distinguished are those informal arrangements, usually undertaken without the benefit of legal advice, where the court has to decide from the factual context whether the purported settlor had a bona fide intention to create a trust.[41] In these cases the revocable trust theory is one way to reach the result which in the particular circumstances seems best. In these informal arrangements the results often turn on a choice by the courts between competing factual inferences and have little, if any, influence on the subject of estate planning.

Form, however, does not always speak in behalf of those who seek to sustain the trust. In the decision mentioned above,[42] where the court struck down a purported trust as testamentary, the very formality of the transaction spoke against a result sustaining a trust. The proponents wanted to show that the settlor, who was not named as a trustee in the trust instrument and who retained possession and control of the property

38. Cases cited note 31 *supra.*
39. *Ibid.*
40. Potter v. Winter, *supra* note 2.
41. Eschen v. Steers, 10 F.2d 739 (8th Cir. 1926), Harris Banking Co. v. Miller, 190 Mo. 640, 89 S.W. 629 (1905), Masterson v. Plummer, *supra* note 33, Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).
42. *Supra* note 37.

during his lifetime, nevertheless held the property as trustee. In rejecting this contention, the court indicated that the indenture, facts, and circumstances must *unequivocally* indicate he intended such a change in position; and they did not.

### B. *Settlor Sole Trustee*

The law in Missouri concerning the revocable self-declaration of trust is not yet clearly settled. While there was some indication to the contrary, particularly in cases involving bank accounts, the earlier decisions had a conservative cast and at least threw some doubt on the validity of the device. Recent decisions which approve of the device in theory do not remove that doubt altogether.

The Court of Appeals for the Eighth Circuit in a case[43] involving Missouri residents and a Missouri bank refused to sustain an alleged trust in favor of the depositor's daughter which the depositor sought to establish three days before his death. The court apparently rejected as incompatible with the trust relationship an arrangement where the donor during his lifetime had absolute dominion over the property—the legal title and beneficial enjoyment of the property and an unrestricted power of disposition.

But the Missouri courts have upheld the revocable self-declaration in bank deposit cases,[44] a result reached elsewhere[45] and adopted in the *Restatement of Trusts*.[46] The courts are inclined to uphold the disposition where the settlor has done all he could to manifest his intention to create a trust. This may involve notice to the bank[47] and the intended beneficiary[48] of the creation of the trust; and where the settlor does not take these steps the court may find absence of intention to create a trust.[49] In some instances it is not possible to determine whether the settlor intended to reserve a power of revocation.[50]

The lower appellate courts of the state have had occasion to pass on the question in instances involving property other than bank accounts. The Kansas City court refused to sustain an alleged oral trust of certain

43. Eschen v. Steers, *supra* note 41.
44. Harris Banking Co. v. Miller, *supra* note 41; Masterson v. Plummer, *supra* note 41.
45. Smith v. Deshaw, *supra* note 12.
46. RESTATEMENT (SECOND), TRUSTS § 58 (1959).
47. Harris Banking Co. v. Miller, *supra* note 41; Masterson v. Plummer, *supra* note 41.
48. Harris Banking Co. v. Miller, *supra* note 41.
49. RESTATEMENT (SECOND), TRUSTS § 58 (1959).
50. Masterson v. Plummer, *supra* note 33.

notes and securities, emphasizing the wording of the endorsements placed on the property by the decedent and the use of the property by the decedent during his lifetime.[51] The St. Louis court had occasion to comment upon an arrangement where the settlor and co-trustee of a life insurance trust had the power as co-trustee to have "possession, custody and control of the trust estate and sole access thereto and the sole right of disposition" thereof during his lifetime. The court refused to construe this clause as conferring a power on the settlor, qua settlor, to dispose of the property in any manner he might see fit, for to do so "would render the instrument testamentary in character and inefficacious as a declaration of trust."[52]

Some indication of the attitude of the Missouri Supreme Court toward the revocable self-declaration of trust is found in *Lipic v. Wheeler*,[53] decided in 1951, a case involving the construction of an instrument the validity of which none of the parties challenged. The instrument was a revocable self-declaration of trust under which the settlor retained the right to income during his lifetime. In this instance the settlor had not disclosed the existence of the trust and had kept the instrument and trust property entirely within his control during his lifetime. The court assumed the instrument created a valid trust. From the opinion it appears that the instrument was prepared with the advice and assistance of counsel.

More important is the opinion in *Edgar v. Fitzpatrick*,[54] decided in 1963. This case involved an attempt by a surviving spouse to reach the assets, mutual fund shares, of a purported revocable self-declaration of trust as a transfer in fraud of her marital rights. The trial court found in favor of the plaintiff, but the Springfield Court of Appeals with some reluctance reversed,[55] upholding the trust. The Missouri Supreme Court sustained the spouse's position, not on the ground relied on by the trial judge, that the transfer was in fraud of her marital rights, but rather on the basis that the settlor created no trust. In reaching this conclusion the court found that the subject matter of the trust was not ascertainable at the time the trust was created. The written declaration of trust purported to include certificates or shares which the decedent "then owned" or "thereafter acquired." The evidence showed that on the date he signed the purported trust instrument he owned shares of the mutual fund registered in his name individually, and at the time of his death he owned

51. Coon v. Stanley, 230 Mo. App. 524, 94 S.W.2d 96 (K.C. Ct. App. 1936).
52. St. Louis Union Trust Co. v. Dudley, 162 S.W.2d 290, 293 (St. L. Mo. App. 1942).
53. 242 S.W.2d 43 (Mo. 1951).
54. 377 S.W.2d 314 (Mo. En Banc 1964).
55. Edgar v. Fitzpatrick, 369 S.W.2d 592 (Spr. Mo. App. 1963).

shares of the mutual fund registered in his name as trustee and also registered in his name individually. On this record the court reasoned that on the date of the purported trust the subject matter was not ascertainable; the trust could not be sustained on the basis of property owned (the trust property was not identifiable as such) nor on the basis of after-acquired property since one cannot create a trust of property he expects to acquire thereafter.

The latest case on the subject is *Gardner v. Bernard*,[56] decided in 1966, in which the court sustained the claims of five persons against the executor of decedent's estate on the theory they were beneficiaries of oral revocable self-declarations of trust established by the decedent in their favor many years before his death. By contrast to the situation in *Edgar v. Fitzpatrick* the claimants were natural objects of decedent's bounty and decedent's only blood relatives. Here the court had no difficulty whatsoever with the theory, reciting as established principles of trust law that one may create an oral trust in personal property and constitute himself trustee and that *any* trust may be revocable or irrevocable. It is significant that, while claimants prevailed before the trial court on the theory of irrevocable trusts in their favor, the court on appeal sustained their contentions on the theory that the trusts were revocable.

The controlling distinction in these last two cases to come before the supreme court is probably the factual one of the interests of the parties who seek to sustain the trusts. In the earlier case the surviving spouse asserts the invalidity of an alleged written revocable self-declaration of trust and wins; in the later case the blood relatives and natural objects of decedent's bounty prevail on the basis of an oral revocable self-declaration of trust in their favor. These decisions illustrate very well the maxim attributed to Holmes that general propositions do not decide concrete cases.[57] For in the earlier case the court was unwilling to make a permissible factual inference that decedent intended to create a trust of shares which he owned at the time he signed the purported trust instrument and which were later registered in his name as trustee. In the later case the court resolved factual ambiguities in favor of the claimants who urged the trust, a result which effectuated the donor's apparent intention and sustained the legitimate and considerable expectations of the claimants.

What does one conclude about the decision in *Edgar v. Fitzpatrick?* Is it limited to its peculiar facts? One may argue that it is. Had the trust

56. 401 S.W.2d 415 (Mo. 1966).
57. FRANK, LAW AND THE MODERN MIND, 134 (Anchor Books ed. 1963).

instrument specified particular shares, owned by decedent when he signed the declaration, then the court's objection would be met and no problem would exist with respect to after-acquired property.[58] On this reading the company might instruct its mutual fund salesman to make certain that the piece of paper designated "trust" specifies a particular certificate or certificates by number and that on registration the certificates refer specifically to that piece of paper.

But this is not the only reading of the opinion. If, as the opinion indicates, decedent on the date of the purported trust owned some shares registered in his name individually and thereafter had these shares registered in his name as trustee, a permissible factual inference is that he intended to establish a trust of these shares. That the court refused to make this inference suggests, if not an attitude of hostility, at least an absence of hospitality to a transaction of this type. The decision may be read as a warning that arrangements of this character, when attacked by persons who make a strong claim on the court by virtue of their relationship to the deceased, are subject to a close judicial scrutiny. It may be read as a warning that the court is not yet prepared to put its stamp of "safety approved" on the do-it-yourself estate plan.

## III. Some Concluding Comments

Once formed, legal rules are often invested with great logical vigor; they tend to acquire an all or nothing quality. A rule such as the revocable self-declaration principle that says a man may declare himself trustee of property for another and that *any* trust may be revocable indicates sweeping possibilities and prompts extravagant claims. But those who would view legal rules in an instrumental manner,[59] would look at the matter from a different perspective. From this perspective the rule itself is not the important consideration; rather its uses and its limitations are the important questions.

One important use of the revocable self-declaration principle is its salvage function: to preserve dispositive arrangements which because of the particular circumstances present ought to be preserved and cannot be preserved on some other basis. These would include situations where the decedent's intention is reasonably clear and to uphold the arrangement

58. Property may be added to an existing trust, and many revocable inter vivos trust instruments contemplate that this shall occur and provide that the trustee may accept additional property transferred by the settlor inter vivos or by will.

59. *Supra* note 57.

would be to recognize legitimate expectations without the sacrifice of more important interests. In these cases litigation or the threat of litigation is the background for the resolution of disputes between rival claimants. Courts with broad fact-finding powers will use the revocable self-declaration of trust as a means to reach a just result on the theory that dispositive intentions and normal expectations should be given legal recognition whenever possible. The decision in *Gardner v. Bernard* is a good example of this salvage function; there are many others.[60]

Another use of the revocable self-declaration principle is its planning or legislative function. In the hands of a competent adviser a revocable self-declaration should yield the same results as a revocable trust in which the settlor is co-trustee or does not serve in a fiduciary capacity. In such an instance, typically, there will be no substantial question about intention and, hence, of the predictability of consequences entailed in the dispositive scheme. The form of the transaction is the best indicium of intention and the best insurance against fraud, mistake, and the like. Litigation or the threat of litigation should pose no significant danger to such an arrangement; in this context the revocable self-declaration should be a safe, legitimate means of avoiding probate.

The individual who undertakes his own legislative scheme by using a form designed to give him full economic control over his property during his lifetime would like to take comfort from the protection accorded the planning function of the revocable self-declaration device. But he may or may not have the kind of intention the law respects. The likelihood is that in many instances he will, but there will be instances where he will not. Form in these instances does not insure against fraud, mistake, and the like. Circumstances surrounding the creation of the purported trust become important; and litigation or the threat of litigation again becomes the backdrop for the resolution of disputes between rival claimants.

If, as some believe, the claims made in behalf of the revocable self-declaration will induce the public into a spate of planning activity, then in the years ahead we may expect more decisions like that in *Edgar v. Fitzpatrick*[61] and the further refinement by the courts of the uses and limitations of the self-declaration principle. Bland assurances about the safety of the device[62] are inaccurate and premature.

60. Harris Banking Co. v. Miller, *supra* note 41; Masterson v. Plummer, *supra* note 41; Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (1908) (no trust found); Murray v. O'Hara, 291 Mass. 75, 195 N.E. 909 (1935); Osius v. Dingell, 375 Mich. 605, 134 N.W.2d 657 (1965); Irving Bank-Columbia Trust Co. v. Rowe, 213 App. Div. 281, 210 N.Y. Supp. 497 (1925); Smith v. Deshaw, *supra* note 12.

61. *Supra* note 55.

62. DACEY, HOW TO AVOID PROBATE 14 (1965).