A TRUST AS AN ALTERNATIVE TO A WILL?

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ABSTRACT

The purpose of this thesis is to study the feasibility of using a trust as an alternative to the will in the jurisdiction of British Columbia. The genesis of the study lies in the liberal interpretation and application of the Wills Variation Act by the courts in this province. Assuming that the free alienation of property upon death is a sound principle, it is incumbent upon the legal community to find methods of avoiding the interference of the judiciary in testamentary matters.

To properly assess the trust as an alternative to the will, a brief overview of both is provided. The historical context of the trust is examined, followed by a review of its use in the United States as a wills substitute. The particular trust popular in the United States is one containing a power to revoke by the settlor, a life interest with power to encroach upon capital in favor of the settlor, and powers of modification and control retained by the settlor. It is hereinafter referred to as the revocable trust.

Whether the revocable trust would be acceptable to the commonlaw of British Columbia is examined, and the
conclusion reached is that there is nothing in theory to prevent its use as an alternative to the will. However, careful drafting must be used at all times to prevent attacks upon the validity of the trust itself.

Certain practical considerations in using the revocable trust as an alternative to the will are reviewed, including income tax laws, provincial tax laws, and possible claims by beneficiaries. The more philosophical issue of whether the use of a trust should be permitted to avoid claims by surviving spouses and children is also examined. Conflicting doctrines in the United States are reviewed in light of existing caselaw in British Columbia. The tentative conclusion is that our own courts will permit a settlor to avoid succession claims by employing the trust. Again, however, careful drafting is crucial, and the facts in each case must be reviewed.

The study establishes that the revocable trust can be used as an alternative to the will in British Columbia. The popularity of such use may, however, be limited by Canada's income tax laws as well as provincial tax laws. The resistance of the legal community to new ideas may also reduce the possible use of the revocable trust as an alternative to the will.
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CHAPTER 1
INTRODUCTION

1. THE PROBLEM

The subject of this study is the inter vivos trust containing a power to revoke, and in particular, its suitability as a vehicle to dispose of property upon death. There is little doubt that, in British Columbia today, the vast majority of people who wish to control the disposition of both real and personal property upon death do so within the framework of a will. There are, of course, many individuals who never execute a will, either because of neglect, omission, or avoidance. Upon death, their property will be distributed pursuant to intestate succession laws. A few use the more sophisticated framework of "estate planning" --the combination of inter vivos gifts, insurance policies, pension plans, wills, and trusts, both revocable and irrevocable. However, it is the good old-fashioned will to which most people turn when contemplating testamentary intentions.

What need, then, is there to examine the inter vivos trust with a power of revocation as an alternative to the will? Insofar as such a trust can bypass the need for probate proceedings, it may be very attractive to those wishing to
avoid the substantial probate fees recently imposed by the government of British Columbia. However, a more fundamental concern is the freedom to dispose of assets upon death. Since the early twentieth century, this freedom has been under increasing attack in British Columbia by claims commenced pursuant to the Wills Variation Act. The provisions of this Act (parallels of which are found in one form or another in every common law province of Canada) authorize the Court to, as the title of the Act suggests, vary a will. Of course, neither the legislation nor the courts in the exercise of their discretion under the legislation refer to the power as a power to "vary" the provisions of a will. Rather, in typical legal fashion, the power is given, and exercised, to make "provision" out of the estate for the spouse and children of the testator. Earlier versions of the legislation (which has not substantially changed since first enacted in 1920) were actually entitled "An Act to Secure Adequate Provision for the Maintenance of the Wife and Children of the Testator" and the "Testator's Family Maintenance Act". Such titles were no doubt chosen to emphasis the legislators' concern with the issue of maintenance rather than variation. The sanctity of a properly drawn and executed will has, afterall, been established since the seventeenth century, and earlier.

However, by whatever name the legislation goes, there is little doubt that the sanctity of the will is a hollow prin-
ciple in British Columbia today. One has only to review any number of cases decided under the legislation to realize that wills are being varied, and not merely to "maintain" the family. The empowering section reads as follows:

Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.6

The wording "adequate provision for the proper maintenance and support" suggests an objective test for relief, based on some level of need. However, as early as 1931, the Supreme Court of Canada in Walker v. McDermott7 stated that "proper maintenance and support" was not limited to "bare necessities of existence". Rather, the court should

proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty...(and if)...the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also...8

This theme of "just and equitable" provision has been developed in a number of cases in British Columbia,9 with the result that the test is a highly subjective one, based on moral
obligations of the testator as perceived by the particular judge or judges hearing the case. Such a test invites anomolities, for no two judges will have the same view of moral obligations in any one instance. Moreover, the test opens the door to abuse, as

(E)ven unworthy claims which have a small chance of success are given enhanced "nuisance" value with the result that executors may be under pressure to settle them.10

Finally, the actual results in individual cases can appear ironically inequitable, as the recent case of Morris v. Morris11 demonstrates. In that case, the British Columbia Court of Appeal granted relief to the applicants, two adult children, aged thirty nine and forty respectively. The younger was a lawyer employed with the Ministry of the Attorney General, earning about $39,000.00 per annum; the older was a freelance interior designer living in London, England in a "comfortable lifestyle", although with a more limited income than her sibling. An award of $75,000.00 was granted to the latter and $50,000.00 to the former out of an estate worth approximately $250,000.00. Two other children who had not joined in the application received nothing, although they had received inter vivos gifts from the testator.

Lest it be thought that this case stands on its own at the extreme end of the range of "just and equitable", it
must be said that other decisions have produced similar results. Naturally, there has been some criticism of these decisions from the legal community. Gordon Bale voices a common concern in the following passage:

In British Columbia, testamentary freedom has been eroded to a considerably greater extent than in other provinces because its Courts have too freely exercised a wide discretion which, it is submitted, is not to be found within the Statute. The B.C. Courts have not simply limited testamentary freedom in order to provide maintenance which is clearly mandated by the statute but also to provide a fair distribution of the estate which is not mandated by the statute.

Notwithstanding this criticism, the Law Reform Commission of British Columbia has suggested that the class of persons entitled to apply under the Wills Variation Act be extended to include common law spouses, grandparents, grandchildren, parents, brothers, sisters, half brothers and half sisters, and ex-spouses who are receiving maintenance from the deceased. It has also recommended that the right to apply extend to intestacies. In fairness, it must be said that the Commission recommends that some of these persons only be entitled to apply if they have been dependent upon the testator or deceased at the time of his or her death. However, the "degree of dependency need not necessarily be substantial", as the Commission's "concern is to ensure that persons who may require financial provision which ought to have been provided by the deceased are permitted to apply to
If the courts apply their very liberal interpretation of the Wills Variation Act to this new class of applicants, it is readily apparent that there will be very little purpose in devising property by will.

The radical limitation of testamentary freedom as recommended by the Law Reform Commission is not without merit. The Commission points out that there has always been some limits on testamentary freedom so as to benefit the surviving spouse and children—for example, the rights of dower and of curtesy. Today, these limits take the form of legislation such as the Wills Variation Act. As the Commission points out:

A deceased's moral obligations to provide adequately for his family differ from inter vivos obligations he may have owed them. Principles which determine inter vivos obligations are primarily founded upon concepts of maintenance and support. In some cases members of the deceased's family have a moral claim to share in the assets of his estate which is not necessarily limited to support. The basis of this conclusion is that a deceased's death significantly alters his obligations to his family and dependents, in part because the deceased no longer requires his estate.

With the mounting costs of our modern welfare state, a strong argument can be that the family, not the state, should bear the expense of caring for its needy and dependent. This argument has particular appeal in light of the justification mentioned by the Law Reform Commission mentioned above, that the testator cannot "take it with him". Testamentary gifts are
winfalls of a kind, and it does not seem unreasonable to more equally share those winfalls amongst family members.

Another argument which can be made in favour of the Wills Variation Act is that the right to make a will being statutory, it should be within the legislator's power to alter or restructure that right at any time. Unfortunately, the sanctity of the will is a strong tradition. The majority of the public believe that they can continue to control their affairs from the grave. They are surprised and sometimes dismayed to learn that the government has intervened to prevent the free disposition of assets (which they have acquired throughout their lifetimes with varying degrees of effort) to the beneficiaries of their choice. It must be pointed out that it is not the vindicative or aggrieved testator wishing to punish a family member which is described here. The average testator has little or no desire to "cut out" a family member from sharing the testator's wealth. Nevertheless, there may be other considerations which would result in more needy relatives or friends or even charities receiving the testator's estate. It is these dispositions which can be thwarted by the Wills Variation Act.

Whatever the philosophical underpinnings of the Act, the current reality is that a will is no longer a guaranteed vehicle for testamentary dispositions. And yet, the freedom of
testation has been a part of our legal system for so long that it has a reputation of being almost a fundamental right. People expect their wills to be enforced as drafted. If this is no longer possible, it is time for the legal profession to be more innovative, and provide the testator with alternate methods for testamentary dispositions. The law, ironically, often develops only because attempts to circumvent the laws are successful. There already exists in our law a number of alternatives to the will which can result in the satisfactory disposition of assets in accordance with the testator's wishes. While the focus of this thesis is upon the inter vivos trust which contains a power to revoke, a brief examination of the other alternates is in order.

2. ALTERNATIVES TO THE WILL

The popularity of the will as a testamentary instrument indicates that it has traditionally satisfied the needs of the majority of testators. To determine what options other than a will are open to an individual in the disposition of property upon death, it is necessary to understand exactly what the will offers. First, there is the personal control inherent in a will, which includes not only the choice of beneficiaries but also the appointment of executors, trustees, and guardians. The nature and timing of gifts is also within the testator's
power. Second, the will is a private matter, one might even say secret. Third, its contents can be changed from time to time by the testator as his or her circumstances change.\textsuperscript{21} Fourth, the will has no effect until the death of the testator.\textsuperscript{22} Fifth, the will is a comprehensive vehicle, facilitating the disposition of all of the deceased's worldly goods (provided, of course, that it is properly drawn). Finally, there is a belief that the will facilitates an orderly and inexpensive disposition of assets upon death, and can prevent expensive and extended legal proceedings. Whether this final characteristic is valid today is open to question, particularly in light of the recent and dramatic increases in probate filing fees,\textsuperscript{23} not to mention the potential for proceedings under the Wills Variation Act. However, as with any human activity, perceived benefits are often more important than proven benefits.

There are three traditional alternative vehicles to the will for the disposition of property upon death generally referred to in the textbooks on the subject. These are intestacies, joint tenancies, and trusts. A combination of two or more is, of course, a fourth option, and designations under pension and insurances schemes is a more recent, fifth, option.

Intestacies result in the distribution of the
deceased's estate according to standards set by the legislature. In British Columbia, these standards are set out in Part 7 of the Estate Administration Act. The overall scheme, based on philosophical considerations similar to those for the Wills Variation Act, is designed to protect the family. As the Law Reform Commission points out:

These provisions are intended to distribute the deceased's property in the same manner as he would probably have directed had he considered making a will.

Thus, the failure to execute a will still results in the distribution of the estate amongst family members. However, there is no control over that distribution, and an intestacy is thus unlikely to be an attractive alternate to the individual who wishes to guide his or her estate from beyond the grave. There is also the matter of expense in an intestacy; both time and money are expended because of the requirement for court supervision in administering the provisions of the Estate Administration Act.

The second option for the settlement of one's affairs is the simple principle of joint tenancy with its right of survivorship. Provided that the testator wishes to leave his or her entire estate to one or two people, affairs can be structured such that all assets are held jointly by the donor and donees. This method works particularly well for spouses.
However, when third parties are considered, or where there is a marriage breakdown, complications can arise. Unlike a gift in a will, a transfer of property to joint tenancy results in an immediate gift. Creditors of the donee may take execution proceedings against the property. Moreover, there is nothing to prevent the donee from exercising his or her rights as a joint tenant, particularly the severing of the joint tenancy with the resulting loss to the donor. Either action may deprive the donor of the property before death instead of at death, as intended. Nor is it easy to alter one's wishes once the joint tenancy has been created.

Neither joint tenancies nor designations under pension or insurance schemes are a comprehensive solution to testamentary dispositions. Some assets do not lend themselves to ownership by joint tenancies, and only the pension or insurance fund itself can pass under a designation.

The final option to be discussed, and the focus of this thesis, is that of the trust. Although the concept of a trust is simple enough, the legal configurations of a trust are staggering. It would therefore seem appropriate to provide an overview and clarify terms before embarking upon a study of the one particular type of trust which is the subject of this thesis.
Footnotes to Chapter 1

1. R.S.B.C. 1979, c. 435 and amendments thereto.


3. S.B.C. 1920, c. 94.


5. The first Wills Act was passed in 1540, and was enacted to mollify English landowners who had lost the right to pass land to descendants as a result of the Statute of Uses, 1535: Sir William Holdsworth, A History of English Law, (London: Meuthuen & Co. Ltd., 1937), Vol. IV at 455.

6. Supra, footnote 1, s. 2 as amended by S.B.C. 1985 c. 68.


10. Ibid., at 153.


15. Supra, footnote 9, at 88-89.
16. Ibid., at 83-84.
17. Ibid., at 84.
18. Ibid., at 78.
19. Ibid., at 46.
20. Ibid., at 75.
22. Ibid., Wills Act, s. 20, 21(2).
23. Schedule 1, #12, Appendix 1 to the British Columbia Supreme Court Rules as amended.
24. Supra, footnote 23.
25. Supra, footnote 9 at 5.
1. THE ORIGIN OF THE TRUST

The concept of the trust is one which has existed for centuries. It describes, at its most basic, a relationship between at least two parties, one of whom holds property for the benefit of the others. The earliest example of this kind of relationship is found in Anglo-Saxon England, and in particular in the custom of the Roman Catholic Church known as the giving of alms. These gifts to the Church during one's lifetime were recommended to assist in the salvations of one's soul. The larger the gift, particularly while the donor was in good health, the greater the probability of salvation. However, a large gift meant considerable sacrifice by the donor, and a practice developed as early as the seventh century whereby the property was given during life to the Church, but the donor retained its use until death. The Church held the property, at least implicitly, in trust for the donor during his lifetime.

The Latin phrase "ad opus" was used to describe the relationship between donor and donee in these bequests, and
eventually this customary relationship developed into the legal institution known as "the use". The "ad opus" relationship grew in popularity in England from the tenth century on. The Franciscan friars, who were bound by vows of poverty, were able to enjoy the income and use of land held by others on their behalf. Landholders taking part in the Crusades or other hazardous journeys conveyed their lands to friends for the use of their wives or infant children, until their return. Landholders also avoided certain feudal obligations by employing the use. Under feudal "incidents of tenure", the death of a landholder benefitted his feudal superior in several ways. The lord was entitled to a relief (the payment of monies) if the succeeding heir was of age, or to act as guardian and take the profits and rents of the land if the heir was under age; the marriage of the heir could be sold by the lord; and if there was no heir at all, the land escheated to the lord. The landholder, by transferring land to several others in joint tenancy, to the use of himself, ensured that there would be no death which could trigger these incidents of tenure. By including heirs of his choice as beneficiaries of the use, the landholder was also able to devise property otherwise indevisable under existing laws. Professor Holmes suggested that this was, in fact, the most common reason for a use in its earlier development. Later, the use was employed unsuccessfully by politically active landholders who wished to
protect their lands from forfeiture when opposing their King.\(^4\)

It is impossible to know just how widespread the employment of this "use" was in England under early Norman rule. Certainly, the use was a convenient and flexible tool, for it gave the beneficiary all the advantages of property while avoiding the many legal liabilities that flowed from it. However, it must be remembered that as late as the fifteen century the use was still simply a device employed by landholders for a variety of purposes, and not a legally sanctioned institution. In fact, the common law courts refused to recognize the use at all; as far as it was concerned, the legal owner was the sole owner, and had all the rights and duties which flowed from such legal ownership. It was not until those affected by the abuses of the use sought protection from the equitable authority of the King's Chancellor, who later became the Court of Chancery, that the use began to gain legitimacy as a legal tool.\(^5\)

In a period of approximately one hundred years, the Court of Chancery enunciated legal rights and duties of the parties to the use, and effectively created the legal institution of the use. As a result, the use gained widespread popularity.\(^6\) Unincorporated organizations such as parishes,
lawyers' inns, charitable groups and for a time, guilds and fraternities, were able to enjoy the benefits of landholding notwithstanding their inability at common law to be legal owners. But perhaps the most popular application was the family settlement, which permitted landholders to provide in an innovative fashion for wives, children, relatives and friends, in the event of marriage or death. It is not surprising that the use became popular, for the common law permitted only limited interests in land: the estate in fee simple, life interests and fee tails with reversion or remainder interests. The variety of "future" interests which could be bestowed by a use were practically limitless; "springing" and "shifting" uses became common. These facilitated the use of land by one or more beneficiaries for a period of time or until the happening of a certain event, and the use would then pass to another beneficiary, again for a period of time or until the happening of a certain event, and so on theoretically in perpetuity.

The Court of Chancery's decisions effectively separated and created the equitable interest in land from the legal interest. It granted certain rights and powers to the beneficiary, known as the "cestui que use" and imposed corresponding liabilities and obligations on the person holding legal title, known as the "feoffee to uses". By the turn of the sixteenth century, uses were so widespread that the Crown
introduced legislation to stem the tide. Henry VIII's main concern and opposition to the use stemmed from the loss of the Crown's revenue from incidents of tenure and right of forfeiture. Henry desperately required revenue for his royal coffers, and his campaign against uses was largely prompted by an attempt to revive the incidents of tenure which had been severely undermined by the use. His solution, after unsuccessful attempts in 1529, 1532, was the Statute of Uses in 1535. The key provision in the Act was simple: it vested the legal interest of the estate in the cestui que use, thus reuniting the legal interest of the estate in land with the equitable interest which the Court of Chancery had created. This process was called "executing the use".

The Statute satisfied the needs of the Crown, whose purpose was to revive the revenue-producing "incidents of tenure". By "executing" the use, the statute ensured that the death of the cestui que use would trigger the profitable incidents of tenure for the Crown. Conversely, it triggered liabilities for the landlord who had relied upon the use. As a result, there was a reduction in the frequency with which uses were employed for a time, until lawyers and the Court of Chancery were able to find methods of interpretation and alternate means to effect the same result which the use had produced. This was achieved within one hundred years by the
creation of a "double" use. Lawyers drafted a "use upon a use", and eventually the Court of Chancery enforced it. The methodology was simple. As the phrase suggests, two uses were created, and only the first was considered by the Court of Chancery to be executed by the Statute of Uses. The enforcement of this "use upon a use" opened the door to the Court to once again actively enforce the trust relationship, and to develop what is today the modern law of trusts. In fact, the "use upon a use" soon became known as a trust.

Like the mediaeval use, trusts soon became very popular with landholders. Although there were no longer incidents of tenure to avoid, landholders still desired to arrange and control the family estate. The restricted rights of succession as provided by the law of promigenture (or, if no male heirs, by the law of coparceny) were not abolished until 1926. If the landholder failed to make proper testamentary arrangements, wives, younger sons, daughters with brothers, and illegitimate children could be left with nothing at his death. The legal requirements of dower alleviated the hardship of the wife to some degree, and generally speaking, the exercise of the freedom of testamentary disposition avoided the operation of primogeniture. However, landholders wanted to do more than transfer the family estate upon death. They wanted to ensure that the estate would remain in the family, for land meant po-
political, economic and social power until well into the nineteenth century. At the same time, they wished to provide for each member of the family. In order to protect both family members and the family estate, landholders (or perhaps, more accurately, their lawyers) created the "strict settlement".  

These strict settlement were firmly established by the end of the seventeenth century. Some were structured without the benefit of a trust, so that the eldest son became a life tenant of the property, with limited remainders to each of his children in succession. When a trust was utilized, it was often to preserve remainders and provide annuities to the widow and younger children. In either event, it was necessary to re-settle in each subsequent generation. During the seventeenth and eighteenth centuries, the strict settlement satisfied the needs of most affluent landholders concerned with maintaining their power and family estates. However, by the nineteenth century, changing economic and social factors resulted in new needs and concerns which the older settlements could not satisfy. The industrial revolution changed England from an agricultural nation to a trading nation; land became a source of minerals and factory sites rather than of simple food and clothing. Moreover, the growth of stocks and bonds as profitable investment eclipsed
the importance of land as an investment. Land became less valuable in its own right and more valuable in terms of what could be done with it: selling it, leasing it, or otherwise using it in an advantageous and profitable manner. However, the old strict settlement did not generally permit a life interest holder to either sell or lease lands. Even raising the funds to improve the existing estate could be difficult. Sometimes, too, the burden of annuities to other beneficiaries produced greater debts than the estate could manage.\textsuperscript{15}

There were several methods developed in the nineteenth century to remedy these defects which developed in strict settlements. First, when a new settlement was created, lawyers inserted a wide range of powers into the new instrument. They were called "powers of administration", and included the power to lease for long periods, and the power to sell lands with the consent of the trustee.\textsuperscript{16} Secondly, if no re-settlement was forthcoming or the drafter of the new settlement had not adequately provided for these powers, it was possible to obtain a private act of Parliament to permit "variation" of the settlement.\textsuperscript{17} Eventually, Parliament took positive action in a series of legislation designed to reform land law generally. The most important of this legislation was the Settled Land Act of 1882 - 90.\textsuperscript{18} It granted the necessary powers to the life tenant to exploit the land, but
did not otherwise interfere with the structure of the settlement. However, the complex interests created by the settlement became less popular with the advent of the trust for sale. This trust left property, and the power to sell it, in the hands of a trustee rather than the life tenant.

While lawyers and landholders were utilizing the trust in the family settlement and the trust for sale, the Court of Chancery was also applying the concept of the trust in other creative ways. Thus, between the late sixteenth century and the late nineteenth century, the court greatly enhanced and expanded the rights of married women with the help of the trust device. In our own times, the Canadian courts have developed the trust in a similar direction, in the enforcement of the constructive trust. Although applied initially to the protection of common law spouses, the concept of the constructive trust has been extended to become a general principal of Canadian law.

This brief history of the trust demonstrates the versatility and flexibility of the institution. Legislation has been unsuccessful in its efforts to confine the trust, and in fact, such legislation has often had the effect of expanding trust law. The trust would therefore appear to be eminently suitable, in theory at least, as a replacement for the will.
2. DEFINING TERMS

In examining this question, it is important to understand the essential character of the trust. It creates a fiduciary or "trusting" relationship which the courts will enforce notwithstanding laws to the contrary. Although the legal ownership of the property may be in the hands of the trustee, the courts recognize the special relationship between the trustee and the beneficiary, and protect the latter's rights in that relationship.

Perhaps because the trust has such a long history, "no definition of a trust appears to have been accepted as both comprehensive and exact". Sir Arthur Underhill's definition seems to be the most popularly quoted:

A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and anyone of whom may enforce the obligation.

The classification of trusts is another matter again. There are express trusts, resulting trusts, constructive trusts, pri-
vate and public trusts, sprinkling trusts, descretionary trusts, testamentary trusts, business trusts, and so on. For the purposes of this thesis, it is unnecessary to examine in detail the various classifications; moreover, it has been done with great diligence elsewhere.\textsuperscript{23} The focus here will be on the inter vivos trust containing a power of revocation. Insofar as the term "inter vivos" means simply "between the living", almost any trust created expressly by deed or verbally, and taking effect during the donor's lifetime, can be viewed as an "inter vivos" trusts. The only express trust which could not be so labelled is the trust created within the terms of a will -- that is, a testamentary trust, for it takes effect only upon death. The Americans often describe the inter vivos trust as a "living trust" to distinguish it from testamentary trusts.

Insofar as only a living person can create a trust, the term "inter vivos" is somewhat tautological. However, the description of a trust as inter vivos generally denotes that the trust is created "to take effect in the lifetime of the creator".\textsuperscript{24} Such trusts are common in estate planning, although they can also be found in the business and commerce field (as alternates to the corporate structure or to facilitate investments), in the political sphere (the "blind" trust), and in charitable affairs.
There are two types of inter vivos trusts used in estate planning today, distinguishable by the mere inclusion, or not, of a clause allowing the trust to be revoked. The inter vivos trust which contains no power of revocation is by far the most popular in Canada, for it attracts certain tax advantages unavailable through other testamentary instruments. In describing it as "popular", it must be understood that its use is not necessarily widespread, for it is a highly detailed and goal oriented instrument, designed to take the most advantage of particular provisions of the Income Tax Act. Implicit in such tax considerations is the enjoyment of sufficient income to generate a need for tax "breaks", and irrevocable inter vivos trusts are thus generally used only by the more wealthy strata of Canadian society. Moreover, because the trust must be irrevocable to attract these tax benefits, its use is judicious. This irrevocability makes such a trust a poor substitute for a will, for it will be recalled that part of a will's attraction lies in its changeability. In fact, the irrevocable inter vivos trust is generally accompanied by a will to comprehensively deal with testamentary wishes.

Although the insertion of a power to revoke in an inter vivos trust offers the flexibility found in a will, it has been largely neglected as a testamentary tool in British
Columbia. Indeed, not only does it have many of the characteristics of a will, but also some additional attributes. It must be emphasized, however, that a trust is a fundamentally different legal entity than a will, and these differences will be explored in greater detail in the pages which follow. For convenience, the inter vivos trust with a power to revoke will be referred to simply as a revocable trust.

3. THE WILL AND THE REVOCABLE TRUST: A COMPARISON

The advantages of the will as a testamentary instrument have already been mentioned. The advantages of a revocable trust will be discussed in due course. However, describing what a particular legal instrument offers, and understanding the legal principles and how the instrument operates, are very different matters. Only by a comparison of the legal characteristics of wills and trusts can one begin to assess whether the two are interchangeable. It is unnecessary and inappropriate to dwell on every nuance of the respective legal characteristics, as any such exercise would be only a poor imitation of the standard textbooks on wills and trusts respectively. Nevertheless, a brief review of the germane features of each is essential for the purposes of this study.
Although mediaeval wills in England had strong religious roots, and were structured in contractual terms, the will as we know it today is a creature of statute. The right to bequeath property by will was first granted in England in 1540, and today in British Columbia that right continues under the Wills Act. The Act sets forth the requirements of a valid will: legal capacity of the testator, in written form, properly executed by witnesses also with legal capacity. The Act limits the mode of altering a will, of revocation and revival. In addition to these matters of form, the Act also incorporates certain rules to be used in the interpretation of wills. What the Wills Act does not do is to provide a definition of the will itself. Section 1 states only that a will "includes" a "testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition".

Jarman on Wills is more specific, stating that a will "is the aggregate of a man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute". "Testamentary intentions" include: the appointment of an executor, a guardian, or a trustee; the disposition of property; and directions for burial. It is not necessary that all such intentions be manifest in a document in
order that it be a will. The essential characteristic (assuming that all formalities are satisfied pursuant to the Wills Act) is that the intentions are to take effect only after death. The will is thus "in its own nature ambulatory and revocable" during life.

The trust, on the other hand, is not a creature of statute but rather a concept developed over many years by numerous judges exercising the courts' equitable jurisdiction. That is not to say that it is not regulated by statute today; there is legislation which deals with various aspects of the trust, such as the duties of trustees. Nevertheless, the essential characteristics and formalities of the trust are found in the distillation of judgements rendered over hundreds of years.

Like a will, the creator of the trust must have legal capacity, as must the trustee if one is appointed. Also like a will, the trust will designate beneficiaries and identify property. However, insofar as the contents of the trust are concerned the requirements are more stringent than in a will. Any trust, whether revocable or not, must contain the "three certainties"; that is, an intention to create a trust, trust property, and beneficiaries. These certainties need not be reduced to writing, although clearly, a trust in writing is
easier to prove than an oral declaration. In addition, the trust property must vest in a trustee in order to create a valid trust; in other words,

the settlor must have done everything which according to the nature of the property comprised in the settlement was necessary to be done in order to render the settlement binding upon him.\(^{33}\)

The implications of this rule will be discussed in greater depth later. For now, the important point is that the trust takes effect upon the creation of the trust, and not, as with a will, upon death. Of course, the terms of a trust "may postpone the possession or enjoyment, or even the vesting, (of the property) until the death of the disposing party".\(^{34}\) But such postponement is caused by the intention of settlor in a trust, and is not a component of the very nature of the instrument, as it is in the will. This distinction may seem academic, given that the same result may ensue -- that is, the beneficiaries receive property only upon the death of the testator or settlor. However, the inter vivos creation of the trust distinguishes it from the will in a fundamental fashion, and has undeniable effects in the use of the revocable trust as a testamentary instrument. That these effects have not prevented the use of revocable trusts as substitutes for wills is apparent from the American experience to be discussed in the next chapter.
Footnotes to Chapter 2


8. Supra, footnote 5, Vol. IV at 455.


11. Ibid.


15. Ibid., at 27.
16. Supra, footnote 12, at 41.
17. Supra, footnote 14, at 28.
18. Supra, footnote 12, at 41.
22. H.C. Underhill, The Law of Wills, (Chicago: T.H. Flood & Co. 1970), at 3. The control exercised by the trustee is almost always such as to make him or her the legal owner of the property.
24. Ibid., at 431.
25. See Chapter 5 herein, Section 2, Income Taxes.
26. Supra, footnote 1, for a detailed analysis of the mediaeval will.
27. R.S.B.C. 1979 c. 434.
28. Ibid.
30. Supra, footnote 22 at 8, note 3.
31. Supra, footnote 29 at 8, note 4.
32. Supra, footnote 23 at 107.
34. Supra, footnote 29 at 8.
1. INTRODUCTION

The inter vivos trust, sometimes referred to as the living trust, enjoys considerable popularity in many jurisdictions of the United States of America. It is used in both its revocable and irrevocable forms to assist in estate planning. Like its Canadian counterpart, American federal tax law favours the use of the irrevocable trust, for the revocable trust "has almost no tax consequences, and is generally neutral as to taxes". Nevertheless, there is considerable literature focusing on the revocable trust, exhorting its application and offering practical advice on drafting suitable provisions for estate planning purposes. It has been described in the following terms:

A revocable trust is a legally recognized relationship where one person (the grantor) transfers money, securities, or other assets to one or more persons (the trustee or trustees) to be held in trust under the terms of a trust agreement. The trust agreement typically provides that: (1) the trust income is to be paid to the grantor during lifetime; (2) the trustee or trustees are authorized to pay trust principal to the trustor or to use it for his benefit, if necessary; (3) the grantor retains the power to change all or any of the terms of the trust agreement during lifetime; (4) the grantor keeps the right to end the trust at any time, and to receive back whatever is then in the trust; and (5) at the grantor's death the trust property is either paid out to, or kept in further trust for, beneficiaries.
Although the revocable trust in estate planning has been used since at least the 1920's, it is difficult to determine with any degree of accuracy when its specific use as a substitute for the will became acceptable or popular. This is partly due to the nature of the American states. Like our own provinces, each state has exclusive jurisdiction over property and estate matters, with the result that statutes, caselaw, and customs have not developed uniformly. Moreover, even within each state, the courts have not always been consistent in their approach to the enforceability of the revocable trust as a substitute for a testamentary device. Nevertheless, it is clear from a review of the articles and texts on the revocable trust which have originated from many different states that the revocable trust as a wills substitute has found general acceptance, at least in principal, particularly in the past twenty years. This was not always so; the judicial rulings of some states in the first half of the twentieth century found that revocable trusts were invalid, while others found them enforceable. The particular findings in these cases will be examined in subsequent chapters, when the problem of enforcing the revocable trust in British Columbia is examined. For the present, the focus will remain on a general overview of the American law.
2. A BRIEF HISTORY

The problem facing the American judiciary in accepting the revocable trust as a substitute for the will was its apparent testamentary nature. The early cases emphasized the degree of control which the settlor maintained over the trustee and the trust property and refused to uphold the trust, declaring the relationship a mere agency and the disposition testamentary. The 1935 Restatement of the Law of Trusts by the American Law Institute summarized the state of the law as follows:

Where the settlor transfers property in trust and reserves not only a beneficial life estate and a power to revoke and modify the trust but also such power to control the trustee as to details of the administration of the trust that the trustee is the agent of the settlor, the disposition so far as it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to wills are complied with.⁶

Under this doctrine, the revocable trust was found not to be a trust at all. As one commentator noted in 1946,

some courts simply will not tolerate a situation in which the purported trustee is no more than a feoffee to uses in the ancient sense.⁷

This intolerance seemed to have been the norm in the first half of the twentieth century in most American states,
although it was by no means universal. A particularly notable exception was the so-called "tentative trust", also known as the Totten trust, after the case which first permitted it. Courts were prepared to enforce a trust where money was deposited in a savings account by an individual in his own name as trustee for another, notwithstanding that the depositor could withdraw a portion or all of the deposit during his life. The trust was "tentative" and revocable until death, at which time "an absolute trust was created as to the balance on hand at the death of the depositor". The irony of the Totten trust is that it was first enforced, and is still enforced, in one of the few states, namely New York, in which there today remains some question as to the enforceability of the revocable trust as a substitute for the will.

The problem with the law as stated by the American Law Institute in 1935 was that it focused entirely upon the results of the revocable trust. Because the settlor maintained a large degree of control and property was not disposed of until death, the trust was found not to be a trust at all. Such a focus ignores the basic elements of trust law. As Professor Scott has pointed out,

It fails to take into consideration the formality or lack of formality evidencing the disposition of the property.
In time, the focus did shift to the formalities of the trust itself, particularly after 1944, when the Supreme Judicial Court of Massachusetts handed down its judgement in *National Shawmut Bank v. Joy.*12 The court thoroughly examined the case law on wills and revocable trusts in the State of Massachusetts and other jurisdictions, and made the following assessments:

The distinguishing feature of a testamentary disposition is that it remains ambulatory until the death of the one who makes it. Until he dies, his title remains unimpaired and unaffected. A testamentary disposition becomes operative only upon and by reason of the death of the owner who makes it. It operates only upon what he leaves at his death. If the interest in question passes from the owner presently, while he remains alive, the transfer is inter vivos and not testamentary.

The reservation by the settlor, in addition to an interest for life, of a power to revoke the trust, did not make incomplete or testamentary the gift...(T)he same is true, a fortiori, of a reservation of the lesser powers to alter or amend the trust, or to withdraw principal from it either with or without the consent of the trustee. A reservation by a settlor of the power to control investments does not impair the validity of a trust.13

Although the decision did not expressly criticize the "agency" reasoning of the 1935 Restatement, it did expressly overrule the widely accepted case which had advanced the agency proposition in Massachusetts prior to 1944.14 Nevertheless, *National Shawmut Bank v. Joy* was greeted with praise by the legal community, and has been credited as the main source for the revision in the Second Restatement of the Law of Trusts
dealing with revocable trusts. That revision, published in 1958, stated:

Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.

Following this Second Restatement, the use of the revocable trust as an alternative to the will gained legitimacy in the courts and statutes of many American states. By 1965, the American Bar Association found the revocable trust of sufficient importance to produce a movie on the subject, entitled "The Revocable Trust - An Essential Tool for the Practicing Lawyer". According to one source, it was viewed by over thirty thousand people—lawyers, students, and others, in its first four years of distribution. It is not unreasonable to conclude that such exposure resulted in the more widespread use of the revocable trust.

The form of revocable trust traditionally used by lawyers and trust institutions in the States at this time was the so called "two party trust". The "two parties" does not refer to the number of persons involved in the trust, but rather to the fact that the settlor (the first party) appoints as trustee another individual or institution (the second
party). However, in the same year that the American Bar Association produced its movie, a non-lawyer named Norman F. Dacey wrote a book on trusts and wills, entitled "How to Avoid Probate". Much to the legal profession's surprise and chagrin, the book became a best seller. Dacey was strongly opposed to the traditional probate system, which he considered to be corrupt and expensive. He advocated the use of a trust format which became known as the "one party", or sometimes the "Dacey", trust. Essentially, this is the personal declaration of trust, where the settlor himself is the trustee. While the personal declaration of trust is by no means revolutionary, it touched what one writer called a "sensitive nerve" in the public dissatisfied with the traditional probate system. The Dacey trust had the advantage of simplicity. The settlor was not required to transfer assets to a third party, and at least psychologically, maintained control over his assets. Although Dacey's book has been described as "an amalgam of simplistic tear out trust and will forms and diatribes against the legal profession", it has been credited with creating a heightened public awareness of the revocable trust generally, and more particularly, of the application of the revocable trust as a wills substitute.
3. PERCEIVED BENEFITS AND DISADVANTAGES

Today, there are legal proponents of the revocable trust in the American literature who find it superior in every way to the will, and urge its use as the main vehicle for testamentary dispositions. Even those who recommend the revocable trust be combined with a will agree that the use of the trust has many advantages and benefits. Indeed, as early as 1926, Gilbert Thomas Stephenson published a book intended as a practical guide for the man who is "undecided whether or not a living trust will best serve his purposes". Stephenson was an expert in the field of estate planning, and needless to say, he responded to this issue in the affirmative. He describes three general purposes for the living trust: as a vehicle to create or build up one's estate; to conserve and care for that estate once created; and to administer it during life and upon death. In this last category, which is of key interest here, Stephenson viewed the trust as a supplement and enhancement to the will. In particular, he suggested the living trust enables the settlor or testator to "see his will in operation". It offers the opportunity to study and evaluate not only the terms of the trust in action, but also to observe the trustee's ability to effectively carry out those terms. Moreover, if difficulties arise, the trustee has the opportunity to review the settlor's intentions with the settlor, and if necessary, the trust can be amended to more
accurately reflect those intentions, or to replace the trustee.

Modern American commentators cite this opportunity to view one's will in operation is only one of the many benefits of the revocable trust. By employing such a trust, an individual can insure against the disruptive results of a future mental or physical infirmity. While the settlor is capable, he or she can be involved in the administration of the estate, as either a trustee or by retaining managerial powers. If, however, a physical or mental infirmity intervenes, the trust can provide that other trustees assume these responsibilities. This provision not only permits "uninterrupted management" of the estate, but also avoids the expense, time, and publicity of an application to the court for the appointment of a guardian or conservator. In addition, as one source notes, the settlor retains the choice and control over whom will be appointed as guardian or conservator.

While an enduring power of attorney might appear a simpler alternative in British Columbia, it must be remembered that such a power terminates with the death of the donor. With the revocable trust, uninterrupted management continues after the death of the settlor. The American proponents of the revocable trust particularly emphasize this benefit when advancing the trust as an alternative to the will, for it avoids the disruptive effects of probate proceedings. As one
writer states, the revocable trust is:

a trust that is far better than a will as a way to transfer property to others in that it avoids the publicity, delay and expense of probate court proceedings that might be undertaken when property is transferred through a will.33

The three disadvantages of probate mentioned, namely publicity, delay, and expense, are the classic problems cited by most American commentators who advocate the replacement of the will with the revocable trust.34 With respect to the first, publicity, anyone can upon demand gain access to the entire financial information of the deceased's estate as set out in the required disclosure statements found in the probate documents. By employing the revocable trust, such information is largely, if not totally, kept from the public eye.

The probate system in most American states is also apparently very complicated, requiring considerable supervision of each step in the proceeding. For example, court approval is required in many states for purchases and sales of estate assets, as well as the passing of executor's accounts.35 The time for settling an estate is estimated by one Californian practitioner to be at least one and one half to two years, with three to four years "not unreasonable".36 According to this same practitioner, such delays have a direct correlation not only to the anxiety and stress experienced by the testator's family, but also the likelihood of challenges to the will it-
The avoidance of such conflict and challenges by using the revocable trust is clearly an advantage.

The delay inherent in probate proceedings is also said to inhibit the distribution of assets, both to creditors and to the beneficiaries of the estate, for until a grant of probate is obtained, probate assets are in a "suspended state". Although the practice varies from state to state, generally speaking there is personal liability on the part of the executor if he or she distributes estate assets to the detriment of creditors or tax authorities. On the other hand, the trustee of a revocable trust, while responsible for certain death taxes, does not apparently incur personal liability when, after the death of the settlor and in accordance with the terms of the trust, he makes distributions before the creditor has taken appropriate steps to reach the trust assets.

The generally accepted conclusion is therefore that "property in a revocable living trust may be more readily available to beneficiaries than probate assets".

It should be noted that the use of the revocable trust to avoid of the expense of probate is not universally accepted by the American commentators. Those advancing the argument point to the cost of executors' commissions and attorneys' fees in probating an estate. One author, using Estate Tax Sta-
tistics from the Internal Revenue Service concludes that these commissions and fees amount to approximately seven per cent of the gross value of an estate. Another estimates the percentage in a range from 3.9 to 12.8 per cent. Although the statistics relied upon to determine these figures were somewhat dated in both instances, there is no reason to believe that they are not accurate, and in fact, it is more likely that the figures have risen in recent years. However, the opponents of the argument point out that federal estate taxes and state inheritance or estate taxes must still be determined and paid whether a will or a revocable trust is employed. In addition, it is open to debate whether the percentages quoted above represent a substantial cost to the estate; it would depend largely upon the size and complexity of the estate.

Those commentators who question the cost factor of using the revocable trust as a substitute for the will also point out that there are no statistics available as to the cost of setting up and administering a revocable trust. These costs would vary quite substantially depending upon the length of time in which the trust will operate. Obviously, the total trustees fees would be much higher in a trust which operated for twenty years versus one which operated for only one or two. While the use of a "one party trust" would eliminate such fees, a realistic comparison of the costs of the revocable trust and a probate proceeding is clearly difficult.
In light of the difficulty in accurately assessing the comparative costs, some doubt can be and has been raised as to the efficacy of using a revocable trust, if its only purpose is to avoid the expense of probate. However, according to most American commentators, the benefits of the revocable trust are much more extensive than merely avoiding probate. Some of these have already been mentioned. In addition, it is said that the less stringent legal formalities of the trust instrument protect it from the fate of the will, which is automatically revoked by a subsequent marriage or divorce. For the same reason, it is less onerous to prove the formalities of a trust. Moreover, it is less likely than a will to be attacked on the grounds of mental incompetence or undue influence, as such grounds are difficult to prove when "a trust has been created, funded and in operation under the donor's surveillance during his lifetime". One writer even suggests that he found it easier to convince clients to execute a revocable trust than a will, for

(W)ills denoted death. A trust inter vivos symbolized life.

Advocates also note that the trust instrument permits the choice of jurisdictional matters, by the inclusion of a clause dealing with venue. While such choice must bear some connection with the trust parties or property, it is noted
that the will does not offer such a choice at all. Similarly, the use of a trust avoids ancillary probate proceedings in other jurisdictions if assets are located in more than one jurisdiction. It also permits the circumvention of the application of mortmain statutes in certain states. Some America commentators have also pointed to the possible control of marital property through the use of the revocable trust.

The American sources do not, of course, present the revocable trust as a perfect solution for all estate planning needs. Like any legal tool, there are disadvantages attached to the use of the revocable trust, and these are acknowledged by the writers. Whether a two party or one party trust is employed, there is some loss of control and discretion in the use of the settlor's property. Notwithstanding any savings in probate proceedings, there are costs incurred in setting up the trust — lawyer's fees, transfer fees, and trustee fees. (These would, of course, not apply to a Dacey form trust.) There is also the time and expense of keeping separate and accurate books for the trust. In addition, while a will is easily amended, amendments to a trust agreement do not "erase the record". This can be particularly embarrassing and potentially litigious if beneficiaries are changed. Although a revocable trust can be revoked in its entirety, this is a more complicated procedure than revoking a will. Again, the use of a Dacey trust would alleviate this problem somewhat. However,
the use of such a trust has its own difficulties, particularly with respect to the succeeding trustees. If there have been breaches of the fiduciary duties by the settlor/trustee, the succeeding trustee may be liable for such breaches, and at the very least, will be under a duty to review the acts of the predecessor.56

Another drawback to the revocable trust cited is its unsuitability for some assets.57 Some assets are more difficult to hold "in trust" than others, and "a trust is a fully effective testamentary substitute only if the settlor transfers all his property to the trust prior to his own death".58 However, the use of a "pour over will" is generally advised by the American sources, to be used in conjunction with the revocable trust. Assets not transferred to the trust "due to neglect, intent, or design"59 can be caught by a will containing provisions to transfer such assets to the existing revocable trust. A will is also necessary for the appointment of guardians where there are minor children involved.

The American sources also note that there are, inevitably, some tax problems in using the revocable trust.60 For example, a tax identification number is required for all trusts, notwithstanding that the income of a revocable trust is taxed in the hands of the settlor. In addition, if assets are
held in more than one jurisdiction, double taxing may result. There are also the local taxes for transferring property to the trust.

But perhaps one of the greatest overall disadvantages in using a revocable trust as opposed to a will is the fact that there is no "long standing body of law"\textsuperscript{61} to rely upon in considering the use of the revocable trust for this purpose. Drafting must be carefully reviewed, and formalities satisfied. Notwithstanding such concerns, it is clear that the revocable trust is accepted and employed as an alternative to the will in many American jurisdictions today. Whether it can be transplanted to the locale of British Columbia to assist in the circumventing of the application of the Wills Variation Act remains to be seen. However, it is interesting to note the comments of one American expert in this topic:

Various restrictions may be imposed by state law on O's freedom to decide who will be the beneficiaries of his bounty when he dies and in what manner the benefits will be conferred on his beneficiaries. To the extent that these restrictions are applicable only to probate assets, they can be avoided by avoiding probate. To the extent that they are not limited to probate, they may be avoided by placing the property under the more favourable law of another state.
Footnotes To Chapter 3


5. Ibid.


7. Supra, footnote 4, at 18.


10. See the discussion of Newman v. Dore at 154-157 herein.

11. Supra, footnote 9, at 485.


13. Ibid., at 122.


17. Supra, footnote 2, at ph. 71.1600.3.

18. "The Revocable Trust, An Essential Tool for the Practicing

19. Ibid., at 537.


21. Supra, footnote 18, at 538.


24. Supra, footnote 18, at 538.

25. Ibid.


27. Stephensen, supra, footnote 3, at viii.

28. Ibid., at 27.

29. Ibid., at 47.


31. Carr, supra, footnote 26, at 48.

32. Supra, footnote 1, at 224.

33. Carr, supra, footnote 26, at 5.

34. Ibid., at 38-50; see also Turner, supra, footnote 26, chapter 2, and Schwartz, supra, footnote 30, at ph. 4.8.

35. Supra, footnote 1, at 226.

37. Ibid., at 5.
38. Supra, footnote 18, at 110.
39. Ibid., at 120.
40. Ibid., at 121.
41. Supra, footnote 1, at 226.
42. Carr, supra, footnote 26, at 48.
43. Turner, supra, footnote 26, at 14.
44. Supra, footnote 1, at 225.
45. Supra, footnote 3, at ph. 71.203.
46. Edward C. King, "Trusts As Substitutes for Wills" (Dec. 1941), 14 Rocky Mt. L.R. 1, at 4.
47. Supra, footnote 1, at 227.
48. Supra, footnote 3, at ph. 71.201.
50. Ibid., at 134.
52. Ibid.; see also supra, footnote 26, at 36.
53. Supra, footnote 1, at 227.
54. Ibid., at 228; see also John Cohen and Geraldine S. Hemmerling, Inter Vivos Trusts: Planning, Drafting and Taxation, (McGraw Hill Book Company/Shepards, 1975), at 35.
55. Supra, footnote 3, at ph. 71.203.
57. Supra, footnote 1, at 232.
58. Supra, footnote 56, at 354.
59. Supra, footnote 226, at 63.
60. Supra, footnote 3, at ph. 71.203.
61. Supra, footnote 49, at 124.
1. INTRODUCTION

While the revocable trust may be established as an alternate to a will in the United States, the same cannot be said in Canada. It is certainly recognized as a useful tool in estate planning, but it is most often employed in retirement savings plans, blind trusts for politicians, and employee benefit plans.

Tax laws are partially to blame for the underuse of the revocable trust as a testamentary vehicle. The attribution rules in the Income Tax Act have the effect of taxing income in the hands of the settlor, an often undesirable result in estate planning. However, it is undoubtedly true that the lack of popularity of the revocable trust as an alternative to the will is also due to insufficient analysis of, and exposure to, the revocable trust generally. In fact, a superficial examination of the limited caselaw and commentary available in Canada might lead one to the conclusion that only an irrevocable trust is enforceable. While such a conclusion is obviously wrong (witness the well established uses of the revocable trust mentioned above), the state of Canadian law is
by no means clear when it addresses such trusts. To understand why this is so, and to erase any misapprehension that a revocable trust is a legally enforceable instrument, it is necessary to re-examine some basic principles of trust law.

2. THE COMPLETELY CONSTITUTED TRUST

It will be recalled that a trust must contain "the three certainties" — the intention to create a trust, trust property, and trust objects. However, in order for the trust to be legally enforceable, the "trust property must be vested in the trustee". Whether this is done by a transfer to a trustee or by an effective declaration of trust, only when it is done is there what is called a "completely constituted trust". If there is no satisfactory transfer of the trust property, the trust will not be enforced by the courts.

This question of what completely constitutes a trust was settled in Milroy v. Lord, a decision of the Lord Justices in 1862. In that case, the deceased had, during his lifetime, executed a trust document wherein he purported to assign certain bank shares to the Defendant, to be held in trust for the deceased's niece. The Defendant also held powers of attorney to transfer these shares and receive dividends from them. The shares, however, were never actually transferred to
the Defendant as trustee.

Lord Justice Turner concluded that "no perfect trust was ever created" because the shares "never legally vested in him". The principle of completely constituting a trust is set out in the following passage:

I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes . . . but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift.

This principle, so clear in the context of the facts in Milroy v. Lord, has created some difficulties when applied in subsequent cases. Indeed, its misapplication has resulted in the confusion surrounding revocable trusts. The difficulties arise in distinguishing the character of the transfer in question. The passage quoted above sets out the three possible methods of transferring property: from the settlor directly to the beneficiary; from the settlor to a trustee in trust for the beneficiary; or from the settlor by a
personal declaration of trust for the beneficiary. In many cases, the facts, or perhaps only the arguments, have disguised the true nature of the transfer. For example, if a direct transfer to a beneficiary is incomplete for some reason, the argument can (and has) been made that the court should find that the settlor was nevertheless declaring himself as a trustee of the property for the intended beneficiary. The same argument can be made, with somewhat less force, in an incomplete transfer to a trustee.

The strength of this argument is that there is never a verifiable transfer of property in a declaration of trust. There are only the donor's words and actions to be interpreted in deciding whether there has been a transfer of property. The courts must determine if such words and actions constitute a personal declaration of trust or merely an incomplete gift or transfer to a trustee. In their efforts to do so, the courts have focused upon the binding nature of the "transfer".

In *Warriner v. Rogers*, Bacon, V. C., interpreted *Milroy v. Lord* to mean that a donor or settlor could make a trust binding only by "absolutely" parting with his interest in the trust property. In that case, the deceased gave a box containing a deed and keys to her house to the Plaintiff. It also contained a memorandum stating "(T)he contents of this box is a deed of gift..." to the Plaintiff. However, the box was
not to be opened until the deceased's death. The Plaintiff pleaded that this amounted to a declaration of trust. The court disagreed, stating that the donor

should have absolutely parted with that interest which has been his up to the time of the declaration, should have effectively changed his right in that respect and put the property out of his power, at least in the way of interest.

This passage leaves open the possibility of retaining some other interest in the property, such as a life interest, or even a power to revoke. However, it is the phrase "absolutely parted" which has subsequently been emphasized in some cases, leading eventually to the use of the word "irrevocable" when discussing completely constituted trusts.

In Richards v. Delridge, an endorsement on a lease that "(T)his deed and all thereto belonging I give to [R] from this time forth" was held to be insufficient to constitute a trust. Jessel, M. R., states the principle in this way:

A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title may so deal with the property as to deprive himself of its beneficial ownership . . .
The suggestion that the donor or settlor "completely divest himself" of the legal ownership and "deprive" himself of the beneficial ownership was taken one step further in Re Cozens. The court suggested that, where a declaration of trust is relied upon, a present "irrevocable" declaration must be proved. The use of the word irrevocable is unfortunate, for it suggests that the donor cannot retain a power to revoke the declaration. The editors of the thirteenth edition of Underhill's Law of Trusts and Trustees counter that the term "irrevocable" should be taken to mean only that the "settlor must have made a final binding unequivocal decision" to assume the role of trustee. In other words, there must be a clear intention to declare coupled with the words or actions of a declaration. Regrettably, the distinction between an irrevocable intention to declare a trust and a trust that is irrevocable has not always been understood in the Canadian cases on the subject. While the cases which suggest the need for irrevocability in order to completely constitute a trust are by no means authoritative, the dicta does exist, and should be carefully reviewed.

One of the earliest reported Canadian cases dates from Ontario in 1892. In Kreh v. Moses, the deceased, during his lifetime, gave his fiancee a written document,
directed to his life insurance company, which stated "I give and bequeath" the proceeds of the policy to her. He told her at the time that it was "as good as a will". The court purported to follow the Milroy v. Lord and Richards v. Delridge decisions, in stating:

Assuming that enough appears to raise some trust — which, however, I do not say is so — I think the cases go to show that the trust intended must be irrevocable, before the court will enforce a pure act of volition against the donor or his representatives.\(^16\)

It is immediately apparent that the circumstances disclose no clear intention to create a trust, and indeed the court so found in the above passage. In addition, the court found the writing to be testamentary in nature, and not properly executed. It is thus fair to say that the court's interpretation of earlier cases as requiring irrevocability may be discounted.

Another case contemporary with Kreh v. Moses may be said to be even less authoritative on the subject. In Clattenburg v. Morine,\(^17\) the Plaintiff conveyed his homestead to the Defendant in trust as security for a debt owed to the Defendant, and further in trust for the Plaintiff's children. The Plaintiff sought to revoke the trust, as the debt had been paid and the children, all sui juris, consented. The Defendant refused to reconvey the homestead. The Nova Scotia court said:
...the grantor did not intend the deed to be irrevocable and, therefore, the transaction was not a final and fully completed one within the rule stated by Lord Justice Turner [in Milroy v Lord].

As such, the court refused to enforce the trust, and ordered the homestead reconveyed to the Plaintiff. The decision does not rest upon these grounds alone, however. The court also found that the parties had intended that the Plaintiff be entitled to revoke the trust, and that the Plaintiff had done so. It is not a particularly well reasoned or well grounded case, and the reference to the rule of Turner, L.J., rule may be superfluous at best (and at worst, it is submitted, a misinterpretation of that rule).

More difficult to explain is the decision of the Manitoba Court of Appeal in Re Pfrimmer. In that case, the deceased, during his lifetime, purported to create a trust over certain property by way of a Declaration of Trust. The wording of the declaration, however, made it clear that the trust was not to take effect until the donor's death; the settlor retained the right to dispose of the property, and only such property as remained at his death was to be disposed pursuant to the terms of the trust. Trueman, J.A., concluded that the Declaration was intended "to take the place of a testamentary disposition" and was therefore invalid for non-compliance with the Manitoba Wills Act. He went on to state that the
The deceased did not intend to "create an irrevocable trust by a binding transfer of the properties",21 and concluded:

The law is clear that to give validity to a declaration of trust property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectively put such interest beyond his reach.22

In using the term "irrevocable trust", was Trueman, J.A., stating that the trust had to be irrevocable per se, or merely that the method of transfer was to be irrevocable? Certainly, the second passage suggests the latter, and is, in fact, reminiscent of the words of Turner, L.J., in Milroy v. Lord. The settlor, by transferring his interest to a trustee, or to himself as trustee, is "absolutely" parting with his interest in the trust property. The intention to part must be irrevocable, as must be the parting, but that does not prevent the trust from itself being revocable, if it contains a power to revoke. This is surely the meaning attributable to the statement of Trueman, J.A. that the deceased did not intend to "create an irrevocable trust by a binding transfer of property".

The conclusion to be drawn from the foregoing review of cases is that there is very little substance to the suggestion that a trust must be irrevocable to be binding. If one steps back from the particulars of the cases, it is
immediately apparent that the need for irrevocability does not fit at all with other general principles or practicalities of trust law. Since trusts were first employed, as the medaeival use, their advantage lay in their flexibility. A knight could leave his estate in the hands of another while away on Crusade, to be passed on to his heirs if he did not return. If he did return, however, it was surely with the expectation of regaining his estate. In modern times, the creation of blind trusts for politicians, employee benefit trusts, R.R.S.P.'s and the myriad of other "temporary" trusts would be impossible without a power of revocation.

It is fair to conclude that any suggestion of irrevocability can only apply to the intention to create a trust, and the actual transfer of trust property. The Ontario Court of Appeal reached this conclusion in *Barnett and Wise v. Wise*23. The facts revealed that a husband had signed a document prepared by his dying wife, to the effect that one half of his property was, in fact, hers, and that he would hold it in trust for their children until the youngest reached twenty one years of age. Laidlaw, J.A., reviewed the English cases, and arrived at the following test to determine the creation of a trust:

Do the acts of the respondent amount to clear and definite proof of an intention and determination by him to part absolutely with the beneficial interest in one half of the assets held by him and to retain the legal ownership thereof as a trustee for his
wife?24

Any remaining doubt that a revocable trust is entirely enforceable may be dissipated by reference to two additional cases. In British Columbia, the Court of Appeal has recognized the concept of a revocable trust, albeit in obitur, in the decision of Re Mee:25

Also the law is clear that a settlor cannot revoke a completely constituted trust unless a power of revocation is reserved, unless of course, the settlement was obtained by fraud, undue influence, fundamental mistake or the like.26

In the second case, Anderson (Administratrix of Costello Estate) v. Patton et. al.,27 the deceased, shortly before his death, gave Five Thousand Dollars to the Defendant "to hold in trust" for the deceased. The document acknowledging receipt of the trust funds went on to provide that if anything happened to the deceased, the monies were to be paid out to two named persons. Finally, there was a provision that the monies were to be returned to the deceased upon demand. The Alberta Court of Appeal confirmed the trial judge's finding that there was a completed gift inter vivos by the creation of a trust. Ford, J.A., for the majority, stated:

The reservation of a power of revocation is not inconsistent with the creation of a valid trust and does not have the effect of making the document testamentary.28
This conclusion of the Alberta Court of Appeal introduces the next issue which must be addressed in this discussion of using a revocable trust as a substitute for the will. It is the very important issue of whether the trust will be treated by the courts as a testamentary disposition. If it is, then the trust will likely be unenforceable for non-compliance with the formalities of execution for a will. Moreover, even if such formalities were satisfied, the purpose of avoiding probate would be defeated.

3. THE TESTAMENTARY NATURE OF THE TRUST

In considering the use of a trust, whether it be revocable or irrevocable, as a replacement for a will, two apparently conflicting principles of law must be resolved. The first principle derives from the law of wills, and is stated in Theobald on Wills in the following terms:

A gift intended to be testamentary can only be effectually made by an instrument duly executed as a will.29

The second principle derives from the law of trusts, and can be described as follows: a settlor of a trust may designate a beneficiary who is to receive the trust property only upon the
happening of a certain event. The beneficiary's interest may be a vested interest or a contingent interest, depending upon the terms of the trust.

Where the trust provides that the beneficiary shall not receive the gift until the settlor's death, it is arguable that there is "gift intended to be testamentary". If so, the principle cited in Theobald should be followed, and the instrument "duly executed as a will". However, this argument fails to consider the nature and formalities of the trust instrument. It will be recalled from the earlier overview of the law of wills and trusts that there is a considerable difference in the nature of the two. The will does not have any force or effect until after death. The prospective beneficiary has no interest in the donor's property until the death of the donor. The gift is testamentary. A trust, on the other hand, is effective and enforceable immediately upon creation, and the beneficiary has an interest in the trust property, albeit subject to the conditions and limitations created by the trust. The gift, however conditional, is a present one, not one "intended to be testamentary".

While the distinction is certainly a fine one -- afterall, in both cases, the gift is not possessed until the death of the donor -- it is an entirely proper one based on legal principles. Unfortunately, it is one which has not
always been easy to find in the caselaw. This may stem, in part, from the fact that the case most often quoted on the testamentary nature of a trust did not deal with trusts at all.

The case, Cock v. Cooke,\textsuperscript{30} dates to 1866. The facts are simple: shortly before her death, the deceased executed a document which contained the following words: "I wish my sister to have my bankbook for her own use". The deceased's signature was attested to by two witnesses. The sister sought to have the document propounded as the deceased's last will and testament. The Court had to decide whether the document was testamentary or an out-and-out gift. It concluded that the deceased intended that the document "should only take effect in the event of her death",\textsuperscript{31} and was properly executed as a will. The court relied upon the following test to determine testamentary nature:

It is undoubtedly law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.\textsuperscript{32}

While the principle enunciated in this passage can be applied when the instrument in question is in the form of a trust, its application can overshadow the more important issue of whether the trust is properly created in the first instance. In other words, instead of focusing on the necessary
prerequisites for a valid trust, the court examines the intentions of the settlor, and the results of the instrument. This happened in Re Pfrimmer. It will be recalled that the Manitoba Court of Appeal was not satisfied on the facts of that case that there was a completely constituted trust. However, it also decided, following Cock v. Cooke, that no trust existed because the settlor intended that the trust document take effect only upon his death, and was therefore testamentary in nature. It should be noted that such a decision was unnecessary in light of the former finding.

Another case which concluded that a testamentary intent and result vitiated a trust is Re Beardsmore Trusts. There, a husband and wife entered into a separation agreement which provided, inter alia, for a transfer to a trustee, in trust for the wife and their two children, of three-fifths of the husband's net estate upon death, the transfer to be effected only upon the husband's death. The wife predeceased the husband, who subsequently brought an application to be relieved of his trust obligations under the agreement. (The two adult children supported the application.) The Ontario High Court found that the provision in the separation agreement creating the trust "was designed to have effect only after the death of the settlor", and was void for failure to comply with the Ontario Wills Act. However, the Court also examined the terms of the trust provision, and found that no trust
existed because the subject matter was uncertain ("three-fifths of the net estate"), and the purpose had lapsed in any event (the wife having died). It is submitted that these findings, which deal with the formalities of the trust, were all that were required in this case. It was unnecessary for the Court to have also declared the trust provision void because of its testamentary nature.

The argument that an inter vivos trust is a testamentary disposition and void if not properly executed as a will has met with less success in other cases. For example, in Corlet v. Isle of Man Bank Ltd.,36 the deceased executed a trust document during his lifetime, appointing the Defendant bank as trustee. The trust property consisted of certain life insurance policies which were to be collected upon the settlor's death, the proceeds to be invested and held in trust for members of the settlor's family. The settlor reserved the right to discontinue payment of the life insurance premiums, in which event the trust would, of course, terminate. The Alberta Court of Appeal rejected the argument that the document was a testamentary disposition in the following passage:

The fallacy in the argument based on the "oft-quoted" words of Sir J.P. Wilde in Cock v. Cooke [citation deleted] lies in a misunderstanding of what the words "vigour and effect" are applicable to. They are clearly applicable not to the result obtained by, or to the performance of, the terms of the instrument, but to the instrument itself. The question is whether the instrument has vigour to effect, and does effect, or is "consummate on execution" to effect, a
gift or create a trust. If the document is "consummate" to create a trust in praesenti, though to be performed after the death of donor, it is not dependent upon his death for its vigour and effect.\(^37\)

Ford, J.A., goes on to identify three ways in which a "testamentary intention" may be effected notwithstanding the non-compliance with the Wills Act: a donatio mortis causa, a deed promising that one's executor will pay money to named persons after one's death, and a "conveyance of property to trustees to hold for the benefit of the grantor for life, and after his death for the benefit of other persons".\(^38\) All three may effect a testamentary intention without actually being testamentary because the forms of the transactions do not depend upon death for their "vigour and effect".

Other cases recognizing that a trust may contain testamentary intentions without itself being testamentary include Re Woodman,\(^39\) Anderson v. Patton et.al.,\(^40\) Re Evans,\(^41\) Hicks v. Rothermel et.al.,\(^42\) and Goodman (Estate) v. Geffen.\(^43\) There are also a number of cases dealing with the disposition of bank accounts which do not require compliance with the Statute of Wills. These cases will be more closely examined below in another context. However, it is interesting to note that Anderson v. Patton was also a decision of the Alberta Court of Appeal, with Ford, J.A., again speaking for the majority. It is worth quoting two sentences from his
judgment, for they summarize nicely the appropriate test in this area:

If the document is not intended to have any operation until the settlor's death it is testamentary.
If the document is intended to have, and does have, the effect of transferring the property or of setting up a trust thereof in praesenti, though to be performed after the settlor's death, it is not testamentary.

This test better reflects both the laws of wills and trusts, and the reconciliation of the two where the testamentary nature of a trust is in question. The cases suggesting that a trust instrument having testamentary intentions and effect cannot be valid are distinguishable on a number of grounds. In both Re Pfrimmer and Re Beardsmore Trusts, the documents were so worded that, to use the words of Ford, J.A., in Anderson v. Patton, they were not to have any operation until the settlor's death. In addition, both of these cases had alternate grounds for the finding that no trust existed.

Although trusts containing testamentary intentions will not necessarily be testamentary per se, caution must still be exercised in drafting and constituting any trust, to ensure that it cannot be construed as having no "vigour and effect" until the death of the settlor. For the purposes of this study, it is necessary to ask whether the proposed revocable
trust could be considered testamentary. In particular, does the retention by the settlor of such powers as a power to revoke, a power to modify, a life interest, a power to control the administration of a trust, or a combination of these powers, reflect an intention that the trust is to have no "vigour and effect" until the settlor's death? Canadian courts have rarely had an opportunity to review and analyze an express trust containing all of these powers. It is therefore necessary to rely upon American decisions where the few Canadian cases do not provide answers. The caselaw will be examined in three separate categories: where a power to revoke or modify has been found to be reserved to the settlor; where the settlor retains a life interest in the trust property; and where power to control the trust property or trustee is found to exist.

4. THE EFFECTS OF A POWER TO REVOKE OR MODIFY

Generally speaking, the Canadian cases which have examined trusts containing both testamentary intentions and a power to revoke follow the modern American approach. That is, they find that a reservation by the settlor of a power to revoke the trust does not result in the trust being testamentary in nature, and therefore invalid for non-compliance with the Statute of Wills. This was the conclusion
in Anderson v. Patton, where, as previously mentioned, the Alberta Court of Appeal stated:

The reservation of a power of revocation is not inconsistent with the creation of a valid trust and does not have the effect of making the document creating it testamentary.\(^{45}\)

The Supreme Court of British Columbia has also found that neither powers of modification nor revocation result in making the trust testamentary. In Re Evans,\(^{46}\) Evans had set up a trust for his wife and daughter, retaining the power to substitute the trust property, which were securities. The court allowed this power to modify, and although it found that there was no power of revocation, it nevertheless concluded:

Even had the settlor retained a power to withdraw the securities, such a right of withdrawal would not have rendered the trust document invalid.\(^{47}\)

Dealing with a direct gift rather than a trust, the Ontario Court of Appeal has also, in obitur, approved the view that a power to revoke does not necessarily make the gift testamentary in nature. In Campbell v. Fenwick,\(^{48}\) the court found that a cheque given to the Defendant three days prior to, and cashed one day prior to, the payor’s death, was an absolute gift. It continued:

It may have been and probably was subject to a power of revocation at any time before the death of the do-
nor, or it may be that it was subject to a trust in favour of the donor, but terminating upon her death. Neither would make the gift testamentary in its character.49

There are virtually no cases in Canada or England which take the opposing view, that is, that a power to revoke or modify will render a trust testamentary in nature. A few seem to imply this result, but are capable of alternate interpretations. For example, in *Fletcher v. Fletcher*,50 an English decision from 1841, the court found that the trust in question contained no power of revocation. Sir James Wigram thus concluded that "the party was clearly bound, and there is, therefore, no ground for the argument that the interest is testamentary".51 If Sir Wigram meant by this that the trust was fully constituted, and therefore not testamentary, one can not argue with his conclusion. But if he meant to imply that irrevocability was a prerequisite to a finding that the trust was not testamentary, it is submitted that he was in error.

The other decision which seems to support the view that revocability equates to testamentary is that of *Re Woodman*,52 a British Columbia Supreme Court decision of Chief Justice Farris. In that case, the testator executed a separation agreement with his wife which provided, inter alia, a trust of one third of his estate in favour of his wife. The court was able to conclude, on the wording of the trust provision, that it created a present irrevocable trust in
favour of his wife, and that it was not therefore a testamentary disposition. Again, if Ferris, C.J., in using the term "irrevocable", was referring to the creation of the trust rather than its nature, there can be no argument with him. On the other hand, if his finding was that the trust was not testamentary only because it was irrevocable, it must be seriously questioned. As Sir C. Pepys said in Tompson v. Browne over one hundred and fifty years ago:

The decision in The Attorney General v. Jones seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that, if this were law, a great number of transactions of which the validity has never been doubted would be liable to be impeached.

5. THE EFFECT OF A LIFE INTEREST

It is not, of course, only a power to revoke or modify which is of importance in employing a trust as a testamentary instrument. In order to "imitate" a will, the settlor will also clearly want to retain a beneficial interest in the trust property until his or her death -- in other words,
a life interest. The American judiciary has, overall, permitted such an interest in a revocable trust.\(^{55}\) A large number of cases are cited by Professor Scott in support of such a combination of life interests and powers to revoke, including one from the Supreme Court of Canada, Raynor v. Read.\(^{56}\) In fact, that case did not deal with a trust at all, but rather with a direct gift of securities. The issue determined by the court was whether the gift was complete, in light of the donor's continuing possession of the subject property. The decision of the Prince Edward Island Supreme Court, affirmed by the Supreme Court of Canada, was that the gift was complete. The fact that the donee returned the gift to the donor for "safekeeping" did not vitiate the completed gift, as the donor became "a custodian and no more".\(^{57}\)

A more recent decision of the Alberta Queen's Bench does address the validity of an inter vivos trust containing a life interest in favour of the settlor but no power of revocation. In Goodman (Estate) v. Geffen,\(^{58}\) the executor of the deceased's will sought to set aside a trust created by the deceased in her lifetime. One of the arguments advanced was that the trust was testamentary because no cestui que trust held an interest in the trust property during the settlor's lifetime: she held the entire beneficial interest as a life tenant. The court rejected this argument, finding that the intention of the settlor was not to create a testamentary trust
but a binding inter vivos trust; the trust property had vested in the trustee, and "the trust agreement was a valid inter vivos trust". 59

No other Canadian cases were found for this study which dealt directly with both life interests and powers to revoke in a trust. There are, however, a number of cases which deal with the subject of a life interest in connection with the outright gift of a joint bank account. Generally, the fact pattern which emerges in these cases is that one individual opens a joint account entirely with his or her funds, and a second individual is named as the joint tenant. The latter is either unaware of the account, or understands or agrees that it is not be used by him or her until the death of the individual who opened the account. That individual usually has sole use of the account until his or her death. As such, he or she has both a life interest in and a power to revoke the gift.

These cases can be broken down into two general categories: those which premise judgment on a finding of either a gift or a presumption of resulting trust; 60 and those which, having found a valid gift, take the matter one step further, by examining the possible testamentary nature of the gift. 61

The cases in the first category have little bearing
on the discussion at hand, dealing as they do with the following principles of law, as described by Crockett, J. of the Supreme Court of Canada, in Re Mailman:

That both law and equity interpose such a presumption against an intention to create a joint tenancy, except where a father makes an investment or bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife, is now too firmly settled to admit of any controversy. This presumption, of course, is a rebuttable presumption, which may always be overborn by the owner's previous or contemporaneous oral statements or other relevant facts or circumstances...62

The second category of cases, although they do not deal with trusts in any form, are of some limited assistance in examining how a Canadian court might approach the question of the effect of a life interest in a revocable trust. While some of the earlier cases found that a gift of a bank account by way of joint tenancy was testamentary, the more modern view is that it is a present gift.

The cases finding the gift testamentary start with the Ontario High Court decision of Hill v. Hill, 63. In that case, a father deposited certain monies at a bank and received a deposit receipt in the following terms: "payable to William Hill, Sr. and John R. Hill, his son, or either, or the survivor". It was understood by the son that the monies would remain in the father's control and subject to his disposition
until his death. The father advised the bank manager that the arrangement was to enable his son to receive the money when "he was done with". Anglin, J., found himself driven to the conclusion that the purpose of William Hill, deceased, was by this means to make a gift to his son, the plaintiff, in its nature testamentary. As such, it could only be made effectually by an instrument duly executed as a will. The father retained the exclusive control and disposing power...the rights of the son were intended to arise only upon and after his father's death.64

This case was followed by the New Brunswick Court of Appeal, in Shortill v. Grannon (1920)65 and McKnight v. Titus (1930).66 However, in 1921 the Ontario Court of Appeal, in Re Reid,67 had an opportunity to examine the same issue, and reached an opposite conclusion (while not expressly overruling Hill v. Hill). In that case, a son opened a joint account with his father, solely with the son's funds. He did this only after he had been told by legal counsel that an earlier attempt to leave his father the same monies by signing a blank cheque to his father, to be negotiated after the son's death, would be unsuccessful. It was understood between the father and son that the father would not draw any funds during his son's lifetime. Although Hodgins, J.A., in dissent, approved the reasoning in Hill v. Hill,68 the majority found that the gift as evidenced by the opening of the joint account was "complete and perfect", and that the right of the donor to draw the money was only a "right and power to defeat" the gift, and did not
have the effect of making the gift testamentary.

Re Reid was followed in the English decision of Young v. Sealey, as authority for the proposition that the right of a survivor to a joint account could not be defeated as an attempted testamentary disposition, as it was a completed gift. The Supreme Court of Canada has also cited Re Reid and Young v. Sealey with approval in Edwards v. Bradley, although in that case there was insufficient evidence to find a present gift.

While not conclusive for the purposes of this study, it is encouraging that some Canadian courts have accepted that a present gift may result from the creation of a joint tenancy, even when the donor retains what amounts to a power to revoke and a life interest in the gifted property. Of course, in these cases, the successful donee received a legal, as well as a beneficial, interest in the gift, whereas in a trust, only the beneficial interest would vest. Nevertheless, it is suggested here that it is the fact that the interest is a present, vested interest which is crucial, and the more recent cases dealing with joint bank accounts clearly recognize that such an interest cannot be defeated because of its testamentary qualities. It should make no difference that the interest passes by way of a trust instead of an outright gift. If that is so, it follows that the reservation of a life interest in a
revocable trust should cause no difficulties.

Certainly, the American courts have had no difficulty in allowing trusts which contain both a power to revoke and a life interest reserved to the settlor. While there are large numbers of cases which support this proposition, the 1938 decision of the Ohio Supreme Court in Cleveland Trust Company v White,\textsuperscript{72} is one of the more popularly cited decisions. In that case, White executed a trust agreement in which a life interest in the trust property was reserved, as well as the power to revoke and a degree of control over the trust property. The court stated:

By the weight of authority, a trust, otherwise effective, is not rendered nugatory because the settlor reserves to himself the following rights and powers: (1) the use of the property and the income therefrom for life; (2) the supervision and direction of investments and reinvestments; (3) the amendment or modification of the trust agreement; (4) the revocation of the trust in whole or in part; (5) the consumption of principal....These reserved powers are generally regarded as conditions subsequent, with no more than curtailing or divesting significance.\textsuperscript{73}

The inclusion in this list of powers of "the supervision and direction of investments and income" is interesting, particularly in light of the date of the decision (1938). This was a time when the First Restatement of the Law of Trusts still governed, and the law was that control over administrative matters usually resulted in a finding of agency,
not trust. This is the subject of the following discussion, but the comment of the Ohio Supreme Court in Cleveland Trust Co. v. White is worth keeping in mind in that discussion: "It is evident that cases of the type now under consideration must be decided on their particular facts".74

6. THE EFFECT OF A POWER TO CONTROL

The reservation by the settlor of such powers as control of investments, management and administration, the right to appoint or remove trustees, the right to withdraw all or part of the principal of the trust property, the right to mortgage trust property and appropriate the proceeds, and the right to appoint remaindermen, all fall under the category of "powers to control". The extent to which such powers may properly be reserved to the settlor is obviously of vital importance in determining the usefulness of the revocable trust as a substitute for the will. A will, after all, does not dispose of any property until death, and until then, the testator has complete dominion over the property. If a settlor of a revocable trust does not have similar freedom to deal with his or her property, it is not likely to be his or her choice as a testamentary vehicle.

Of course, in suggesting that a settlor has similar
freedom to a testator in dealing with the devised or trust property, it must be understood that the expression "similar" is in no way to be equated to "same". Whatever the practical results of retaining powers of control within a trust, the settlor must understand that the property is no longer absolutely his or hers, but rather is trust property in which he or she has an interest as a beneficiary (and possibly as a trustee). Failure to make this distinction, in the trust deed itself or in the day to day administration of the trust, is the very matter with which the courts are concerned in examining powers of control. If such powers are very extensive, the courts may question whether the trust exists at all.

The Second Restatement of the Law of Trusts,75 and the accumulated cases found in Scott on Trusts and other American authorities76 reveal that the modern trend of the American courts is to permit quite extensive powers of control. This is a liberating move, away from the trend in the early part of this century (as reflected in the Restatement of the Law of Trusts of 1935), when a trustee was reduced to a mere agent of the settlor, if the degree of control reserved to the settlor was too extensive.

Although the agency approach has fallen into disfavour, failing as it does to assess the fundamental requirements of a trust, it has not been entirely discounted in
some American jurisdictions. Moreover, some American courts have disallowed trusts containing extensive powers to control on other grounds. While these cases remain in the minority overall, they are of sufficient number and quality to be seriously considered by, and possibly persuasive to, the Canadian judiciary, should the question arise in Canada. A review of them is therefore in order.

The preliminary point which must be made vis a vis the review of these cases is that they are representative only. It would be virtually impossible to locate every American case on this topic, much less review each one. The cases discussed are those more popularly mentioned in the American references, discounting some older pronouncements in jurisdictions where more recent case authority adopts the modern trend.

The second fact which must be noted in reviewing these cases is that they are by no means consistent with each other. This is not surprising, when one considers the diversity of jurisdictions and judicial minds from whence they originate. Nevertheless, certain categories do emerge upon a careful reading. First, there are those decisions which basically follow the Restatement of the Law of Trusts of 1935, finding that the trust is merely an agency when the settlor retains too much control over the trust. Second, there are a number of decisions which hold no trust was created in the
first instance because one of the key elements of a trust is missing -- one of the certainties, or the vesting of the trust property in the trustee. Third, there are those decisions which find the trust "illusionary" as against the surviving spouse who is entitled to a share of the communal property. These categories are by no means insulated: cases in which an agency is found may be based on the failure of the settlor to properly transfer the property to the trustee. When a trust has one of its certainties missing, or is a mere agency, it may be called "illusionary" by a court. (The term illusionary was first coined in New York in a case involving spousal claims, but has often since been used in New York and elsewhere even when no spousal claims are made.)

Insofar as the cases finding a revocable trust illusionary are generally those in which a surviving spouse's rights are concerned, they will be dealt with in greater detail in Chapter 6. Of the remaining two categories, it is the first (dealing with the agency argument) which is of particular importance to this study. The cases in the second, where no trust was found, are only of marginal interest, as any trust is open to attack for lack of formalities. A revocable trust may be so poorly worded that it fails to pass a present interest, or define the trust property or beneficiary; it may fail because the trust property is not conveyed or transferred to the trustee. Such failures can be avoided by strict attention
to the formalities of creating a trust, and in drafting the contents of it. The Canadian case of Re Pfrimmer may be cited in this context. An example of an American case in this category is the 1948 decision of the Supreme Court of Missouri in Atlantic National Bank of Jacksonville et. al. v. St. Louis Trust Co. et. al. In that case, the trust instrument specified that "from and after" the settlor's decease, the trustees were to "forthwith take, hold, manage and control" the trust property. The court found that such words reflected an intention that the trust should operate in futuro, and that there was no delivery of the trust property. It is difficult to find fault with such a conclusion.

It is interesting to note that there are a number of cases in the "agency" category which do canvas the formalities of the trust instrument. These cases generally conclude that there is a mere agency only after finding that there is no trust. For example, in the 1944 decision of the New York Surrogate Court, Re Seeburg Estate, a mother "turned over" $3,000.00 to her son to distribute amongst all her children upon her death. The court found that no trust was created, the son being an agent only.

This decision was followed in another New York case, In Re Estate of Fontanella. Again, the court first determined that no trust had been created (in this instance,
because there was no express intention to create a trust, nor any designated beneficiary, and the donor retained complete control of the property). It then concluded that an agency only had been created.

Cases such as this do not really belong in the "agency" category, although they do make a finding that an agency exists, and are cited as such. They do not, however, blindly follow the 1935 Restatement and label a trust an "agency" merely because there are extensive powers of control retained by the settlor. Of those cases that do make such a causal connection, some can be distinguished on the basis that they were decided prior to the Second Restatement in 1958. It will be recalled that this Restatement abandoned the focus of an agency relationship and recognized instead that a settlor might retain powers to control a trustee in the administration of a trust without thereby invalidating the trust.

However, not all the cases following the agency principle were decided before the Second Restatement. And some decided before have continued to be cited as good authority notwithstanding the Second Restatement. For example, in the State of Pennsylvania, the decision of Re Shapley Trust, decided under the First Restatement, is still regarded as good law, and cited regularly. In that case, the Pennsylvania Supreme Court made the following statements:
...where the deed vests a present interest in the beneficiaries, it is a valid inter vivos trust. It is not rendered testamentary in character because the settlor reserves a beneficial life interest, and in addition, a power to revoke or modify in whole or in part. [citations omitted] Where, however, a settlor, in addition to the reservations above mentioned reserves the power to control the trustee as to details of the administration of the trust, and thus makes the trustee merely the agent of the settlor, the scheme becomes testamentary as to dispositions intended to take effect after death.82

This decision was followed in Re Pengally's Estate,83 where the Pennsylvania Supreme Court found that the trust agreement gave the settlor complete control over the composition of the trust fund. The agreement granted to the trustee the power to alter, vary, change or transfer investments "with the approval of the settlor" during his lifetime, as well as the right of the settlor to require payments from principle "as may in his opinion be necessary". The moral again would appear to be to exercise caution in drafting such clauses; it is suggested that the trustee's discretion to pay principle might have been more appropriate, as would have advising rather than approval of the investments. An added unfortunate factor in Re Pengally's Estate was that there had been a previously existing agency relationship between the settlor and trustee, leading the court to conclude that such a relationship continued, the trust agreement being merely an attempt to make a testamentary disposition without the benefit of a will. One distinguishing feature of the case should be men-
tioned: the applicant was the widow, who was not provided for in the will or the trust. Whether this fact influenced the court in any way is difficult to ascertain, but it is interesting to note that most of the Pennsylvania cases which follow Re Shapley Trust and Re Pengally's Estate have been ones in which spousal claims were make. The only Pennsylvania decision found where spousal claims were not involved allowed the trust, although acknowledging the principle that extensive controls result in an agency. The case is Re Estate of Mason, and the applicant seeking to set aside the trust was a creditor of the deceased. Nothwithstanding considerable control by the settlor (including prior authorization of any sale or mortgage of trust property, and the right to withdraw the principle) the court found that the trust was valid. The reasoning of the case is sound, for the trust was clearly fully constituted and complete, and the trustee had active duties to perform. But the same can be said for the cases in which spousal claims successfully defeated a revocable trust. This leads to the conclusion that the agency argument in Pennsylvania is more likely to succeed where spousal claims are made, and the cases may be distinguished on that basis.

The same conclusion applies to judicial pronouncements in the State of Texas, although the agency argument has less support than in Pennsylvania. The Supreme Court in Texas has disallowed trusts containing reservations by the settlor of
a large degree of control over the trust property. Such trusts are referred to as "illusionary", following the tradition of the New York judiciary; however, findings of illusionary trusts have been limited to situations where spouses claim a share of the community property. Earlier decisions applying the agency principal, such as Fleet v. Baldwin, have been "severly limited" by more recent decisions and statutory amendments.

The same cannot be said for the District of Columbia, where the Court of Appeal decision of Betker v. Nalley stands as good law. The settlor executed a trust deed which reserved a life interest to her and the power to encumber or sell the trust property. The court concluded that the trustees were "mere agents with very limited powers". Although the case was decided under the First Restatement, and is apparently an isolated one, it does not appear to have been overruled or distinguished. Nevertheless, it is interesting to note that the court relied on a number of decisions from other states, all of which were subsequently overruled or distinguished in those states. In particular, it followed the 1929 Ohio case of Union Trust Co. v. Hawkins which was overruled in the 1939 decision of Cleveland Trust Co. v. White; the decision of the Massachusetts court in 1909, McEvoy v. Boston Five Cents Savings Bank which was overruled by the 1944 case of National Shawmut Bank of Boston v. Joy, and finally, the
Wisconsin case of Warsco v. Oshkosh Savings and Trust Co. (1924) which was narrowly interpreted thirty three years later in Re Steck's Estate. Moreover, the reasoning in Warsco was not clear, for the court simultaneously found that there was no trust for failure to vest the trust property and because the trustee was a mere agent. The relevant passage reads as follows:

If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell, and collect income for him, and pay as he directs. The donor has parted with no dominion over his property nor any part thereof by the terms of the trust, and such an agreement is no valid trust agreement.

The Supreme Court of Wisconsin interpreted Warsco in the following manner, in the case of Re Steck's Estate:

In that case the agreement was held not to constitute a valid conveyance in trust because the donor had retained full dominion over the trust res, the trustee being a mere agent to hold the property.

It would be fair to conclude that, both in the District of Columbia and the State of Wisconsin, the use of the agency argument would face some considerable opposition, in light of the more recent cases. Moreover, it is submitted that the same conclusion can be made for any other jurisdiction in the States. An interesting twist on this conclusion is found in New York State, where a case which approved the agency
principle is regularly cited and followed for the proposition that reservation by the settlor of extensive powers of control does not make a trust invalid. In the 1951 decision of In Re Ford's Estate, the New York Supreme Court, Appellate Division, accepted in principle the reasoning of the First Restatement. However, it concluded on the facts of the case that the trustee was not a mere agent of the settlor as the settlor was a co-trustee, and was entitled in that capacity to approve investments or changes to them. Once again, the proper wording of the trust deed cannot be overemphasized.

The State of Florida is another jurisdiction where the agency argument has had some success. In the 1958 decision of Hanson v. Denckla, the settlor had executed a revocable trust, retaining a life interest, power to amend, change trustees, and appoint beneficiaries by will or deed. The settlor was also designated as "advisor" to the trustee. During his lifetime, the settlor exercised the power of appointment frequently. The Florida Supreme Court concluded that such activity demonstrated "that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills and codicils in their operation", and that only an agency was intended.

The case is not entirely authoritative for the agency principle, however, as the court found, in the alternative,
that no interest vested in any beneficiary, and that there was therefore no trust. The case can also be distinguished on its very unusual facts: the settlor, although residing in Florida at the date of his death, had chosen a Delaware situs and trustee for the trust. The Delaware trustee brought action in Delaware to enforce the trust after the executors in Florida had obtained their judgment that the trust was invalid. The Delaware courts came to the opposite conclusion,\textsuperscript{105} and the United States Supreme Court eventually affirmed the Delaware decision, finding that Florida had no jurisdiction in the matter. Its adherence to the agency principle was thus of little consequence.

It should be added that a Florida Statute passed in 1969 effectively overruled the decision in \textit{Hansen v. Denckla}.\textsuperscript{106} It provides that an otherwise valid inter vivos trust shall not be held invalid or an attempted testamentary disposition because of the inclusion of the following powers:

1. the power to revoke, amend, alter or modify the trust in whole or in part;
2. the power to appoint beneficiaries by deed or will;
3. the power to add to or withdraw from the principal;
4. the power to remove and appoint trustees;
5. the power to control trustees in the administration of the trust;
6. the right to receive all or part of the income of the trust.
The statute brings Florida law into line with the principles of the Second Restatement of the Law of Trusts, but it does contain one important exception. If the settlor is the sole trustee, the trust instrument must either be executed in accordance with the formalities for the execution of a will, or valid under the laws of the jurisdiction in which it is executed. Whether it would still be open to a Florida court to find a Declaration of Trust a mere agency where such formalities are not met is open to question. It would seem, however, that such a finding would be stretching the agency argument past breaking, for in effect the settlor would be appointing himself as the agent.

It should be emphasized that, notwithstanding the statutory provisions, Hanson v. Denckla has not been expressly overruled in Florida, and it is therefore open to courts in our own jurisdiction to follow it. It is true that the decision has been criticized by the Florida District Court of Appeal, in Lane v. Palmer First National Bank & Trust Company of Sarasota. In that case, some ten years after the Hanson decision, the court noted that it had been decided under the original Restatement, and that it had been criticized as a minority view. The court then went on:

It is the opinion of this court that a valid inter vivos trust may be created in Florida even though it contains a power to control the trustee, in addition to being revocable and retaining the life income to the settlor, in accordance with the provisions of
Nevertheless, the court in *Lane* merely distinguished *Hanson v. Denckla* on the basis that the frequent use of the power of appointment in the earlier case was not evident in *Lane*. The court went so far as to conclude that, had there been such day to day control, the settlor "would have divested himself of nothing", and the trust have been nothing but an agency agreement.109

The conclusion of one commentator of *Hanson v. Denckla* is that it represents not only a minority view in the United States, but is difficult to support.110 The commentator argues forcefully that there is no reason to disallow a revocable inter vivos trust on public policy grounds:

The formal requirements of the wills statutes are intended to prevent fraudulent claims against the estate of a decedent. It is well established that an inter vivos trust instrument need not be executed with the formalities required for a will even though the settlor reserves a life interest and a power to revoke or amend the trust. Fraudulent claims do not present any greater danger because the settlor also reserves powers of control over the trustee as to the administration of the trust and a power of appointment exercisable only by an instrument executed and signed by the settlor and delivered to the trustee.111

The reasoning that the danger of fraud does not increase by the
retention of extensive powers of control has considerable merit. It again emphasizes the importance of the formalities of the trust in determining its validity. If the trust is in the form of an express and detailed agreement, the chances of fraud are minimal. In fact, it could be argued that extensive powers of control diminish further the opportunity for fraud, certainly as against the settlor who exercises those powers. The modern approach is clearly to permit such extensive controls and there seems little reason why they should not be permitted.

The cases following the agency principle should not be entirely discounted, however, for they do contain a common message, valuable to anyone preparing or using the revocable trust as a wills substitute. This message is simply to use caution in the drafting and administration of such trusts. The trustee should have some active duties to perform; the trust property must clearly vest. If the settlor acts as sole trustee, he or she must clearly distinguish the role of the trustee from the role of the life tenant/beneficiary. The words of one Ohio judge in this context are particular apt:

With the increasing popularity of the revocable living or inter vivos trust in modern estate planning, it should be made clear that the phraseology used in the trust instrument is meaningless, if the so-called settlor or donor actually remains in virtual control and the so-called
trustee for fear of losing the business acquiesces in his every act and wish. Where the trustee continually yields and makes adjustments in an attempt to keep a semblance of a trust, a mere agency or custodianship is bound to result.
Footnotes To Chapter 4

1. See, for example, the list of uses in the Canadian Estate Planning and Administration Reports, "Trusts", by Mary Louise Dickson, at 7591-2.

2. Income Tax Act, R.S.C. 1952 c. 148 and amendments thereto, s. 75.

3. For example, Trusts, Continuing Legal Education, November 7 & 8, 1985, at 8.1.01, suggests that "a valid trust is irrevocable".


7. Ibid., at 1189.

8. (1873), L.R. 16 Eq. 11.

9. Ibid., at 348.

10. (1874), L.R. 18 Eq. 11.

11. Ibid., at 14.

12. [1913] 2 Ch. 478.

13. Ibid., at 486.


16. Ibid., at 310.

17. (1895), 40 N.S.L.R. 193.

18. Ibid., at 198.


21. Ibid.

22. Ibid.
24. Ibid., at 327.
26. Ibid.
28. Ibid., at 463.
30. (1866), L.R. 1 P. & D. 241.
31. Ibid., at 244.
32. Ibid., at 243.
33. Supra, footnote 19.
35. Ibid., [1952] 1 D.L.R. 41 at 47.
37. Ibid., at 165.
38. Ibid.
40. Supra, footnote 25.
44. Supra, footnote 40, at 463.
45. Ibid.
46. Supra, footnote 41.
47. Ibid., at 451.
48. [1934] 4 D.L.R. 787 (Ont. C.A.)
49. Ibid., at 763.
50. (1841) 4 Hare 69, 67 E.R. 564.
51. Ibid., at 569.
52. Supra, footnote 39.
54. Ibid., 40 E.R. 13 at 14.
57. Ibid., at 234.
58. Supra, footnote 43.
59. Ibid., at 234.
61. See, for example, the following cases: Hill v. Hill (1904), 6 M.P.R. 282 (N.B.C.A.); McKnight v. Titus (1933), 55 D.L.R. 416 (N.B.C.A.); Shortill v. Grannon (1920), 50 O.L.R. 595 (Ont. C.A.); Larondeau v. Larondeau, [1954] 4 D.L.R. 293; Re Fenton (1977), 26 N.S.R. (2d) 662 (N.S.S.C.).
62. Re Mailman, supra, footnote 60, at 454.
64. Ibid., at 711.
67. Re Reid, supra, footnote 61.
68. Ibid., at 604.
69. Ibid., per Ferguson, J.A., at 607.
70. [1949] L.R. Ch. D. 278.
72. (1938), 134 Ohio St 1, 15 N.E.2d 627.
73. Ibid., 629.
74. Ibid., 630.
79. Re Seeburg Estate, 46 N.Y.S.2d 412 (1944), Surrogate Ct, Erie County.
82. Ibid. at 48-49.
86. see Land v. Marshall, 426 S.W.2d 841 (1968), Texas.
87. Westerfield v Huckaby, 462 S.W.2d 324 (1971), Texas C.A..
89. see supra, footnote 86 and 87.


92. Ibid., at 173.


94. Cleveland Trust Co. v. White, 134 Ohio St 1, 15 N.E.2d 627 (1938).


99. Supra, footnote 97, at 830.

100. Supra, footnote 98, at 732.


104. Ibid.


107. Lane v. Palmer First National Bank and Trust Company of Sarasota, 213 So.2d 301 (1968), Florida District C.A.

108. Ibid., at 303.

109. Ibid., at 306.

110. James S. Roth, "Estate Planning in Florida: The Revocable
111. Ibid., at 48-49.

CHAPTER 5
PRACTICAL CONCERNS IN USING THE REVOCABLE TRUST

1. INTRODUCTION

Having determined that a revocable trust can, if carefully drafted and employed, be used in place of a will, there remains to be examined certain practical matters arising from such use in British Columbia. What assets can and should be transferred to the revocable trust? What will be the effect of such transfers? And what rights, if any, will residual beneficiaries have vis a vis the trust? These are some of the more important practical concerns of using a revocable trust. Of more philosophical or public policy concern is the question of whether individuals should be permitted to place assets beyond the reach of those who might otherwise be entitled to claim a portion of those assets. In this class of persons are spouses and children. The law in this area remains indeterminate in British Columbia. This chapter will examine the practical matters arising in using a revocable trust, and the next, the issues arising in claims advanced by a spouse or children.
2. WHAT ASSETS

In utilizing the revocable trust as a wills substitute, careful consideration must be given to which assets should be transferred to the trust. Clearly, some assets do not lend themselves easily to ownership by a trustee -- for example, personal and household possessions, earnings from employment, motor vehicles, and perhaps even the jointly held family residence. That is not to say that such assets could not be transferred to the revocable trust, but rather that it would be inconvenient to do so. The better plan may be to accept that some assets will pass through the settlor's estate upon death, and to arrange for disposition of those assets by will. This course of action is the one recommended by the American sources.\(^1\) The assets can either be left to named beneficiaries, or to the revocable trust itself. If the latter, the will is called by the American sources a "pour over will".\(^2\) If a pour over will is used, the doctrine of incorporation by reference must be noted, and the will and trust drafted in such a way as to ensure that the trust is not incorporated into the will, but rather vice versa. Moreover, if any changes are made to the trust, or it is revoked and reconstituted, then a new will should also be executed to avoid potential problems in the incorporation.

If the specific concern of the settlor is to avoid
claims under the Wills Variation Act, then only a minimum amount of assets should be left to be transmitted by way of a will. Beneficiary designations in pension plans, life insurance, employee profit sharing plans and similar plans should be the revocable trust, so as to avoid payment to the estate. (Designations to particular beneficiaries are, of course, an alternative.) Indeed, a revocable trust may be entirely unfunded until the settlor's death, if the bulk of assets consist of death benefits under such plans.

Generally speaking, assets such as land, savings, stocks and bonds, and other investments should be transferred to the revocable trust upon its creation. It may be necessary to deal with various public and private institutions in order to fulfill transfer requirements. Clearly, such requirements will depend upon the asset and the institution, and it is not possible to consider them in this context. However, the transfer of assets to a revocable trust may trigger tax consequences at the federal and provincial level, and a brief review of these consequences is in order.

3. INCOME TAXES

The subject of taxing a trust is an extensive one, deserving of study beyond the scope of this thesis. In fact, a
thesis was published on the subject in 1985, and there are also a number of other sources available. Only the briefest of overviews on taxing a trust will be dealt with here, with these sources recommended for any indepth review.

On a general note, the taxation of trusts is a difficult issue for taxing authorities, because of the very nature of the trust. It is not an individual or an entity of any kind. It is only a label used for identifying a legal relationship. However, it is a truism that income tax law is a creature of statute, and accordingly, can ignore the traditional view of a trust, imposing instead its own definition of a trust for income tax purposes. Oddly enough, there is no comprehensive definition of a trust in the Income Tax Act of Canada. The definition section in the subdivision of the Act dealing with trusts states only that a trust "includes an inter vivos trust and a testamentary trust". The former is defined as "a trust other than a testamentary trust". Notwithstanding the lack of definitions, the Act essentially treats trusts as individuals for the purposes of taxation (except for certain deductions).

More important than how a trust is defined or treated under the Act is the matter of when the trust is taxed. For clarity, the income tax consequences for a revocable trust will
be discussed with reference to a simple hypothetical fact situation as follows. The settlor transfers all his real and personal property to a trust, naming himself and his wife as co-trustees, and his brother as a replacement trustee upon their deaths. The settlor retains a power to revoke, some powers of administration, grants a life interest to himself and his wife jointly, and names his children as the beneficiaries following the death of both himself and his wife. The trustees have the power to encroach upon the capital of the trust for the benefit of the life tenants. Both spouses work and retain their employment income personally, and there is no business income generated by the trust. The trust will be referred to as the Family Trust.

For the purposes of this discussion, there are three possible "whens" which may trigger income tax for the Family Trust: upon its creation, during its operation, and upon winding up. With respect to the first event, the Income Tax Act includes in income the aggregate of taxable capital gains over allowable capital losses from the "disposition of property".9 (A capital gains exemption of up to $100,000.00 is, however, available under section 110.6(3).) Subsection 54(c) defines a disposition of property as including "any transfer of property to a trust, or any transfer of property of a trust to any beneficiary under the trust".10 Thus, when the settlor transfers his property to the Family Trust, a
disposition has occurred for the purposes of the Income Tax Act, and increased taxes may result. The fact that no consideration for the property may flow from the trust to the settlor is irrelevant because of section 69(1)(b). That section stipulates that the disposition of anything by a taxpayer, either by gift inter vivos, or to a person with whom he is not dealing at arm's length for no proceeds or less than fair market value proceeds, shall be deemed to reap proceeds equal to fair market value. The recipient (the Family Trust here) will be deemed to have received the property at fair market value. 11 Only if the fair market value of the property at the date of transfer is the same as the cost of the property to the settlor, or if the settlor can claim an exemption on any capital gain incurred, will be no income tax consequences for the settlor. This is not to say that there will be no consequences at all; if nothing else, the income tax return of the settlor of the Family Trust will be more complicated in the year that he transfers the property to the trust. In addition, a return for the trust will have to be prepared and filed.

Assuming that there is a potential taxable capital gain in transferring property to the Family Trust, it is arguable that the retention of a life interest by the settlor should exempt the transfer from such gains under the wording of subsection 54(c)(v). It stipulates an exclusion to the meaning
of "disposition" as follows:

any transfer of property by virtue of which there is a change in the legal ownership of the property without any change in the beneficial ownership thereof...12

Theoretically, this subsection can be applied to an ordinary revocable trust as contemplated in the Family Trust here. However, careful attention must be paid to the words "without any change in the beneficial ownership". One writer gives the bare trust as an example of a transfer where the beneficial ownership is unchanged.13 He describes such a trust as one in which the settlor is the sole beneficiary and the trustee has no active duties to perform, except to transfer the property as the beneficiary directs. Leaving aside the issue of whether the absence of active duties is an essential ingredient of a bare trust,14 does the Family Trust as hypothesized here fit Raphael's description of a bare trust? Clearly, the answer is no: the settlor is not the sole or residual beneficiary and has active duties to perform. Careful drafting might make the Family Trust appear to be a bare trust, particularly if the powers of administration granted to the settlor were extensive. However, caution must be used in such drafting, as the trust might be open to attack as a "mere agency". While the finding of an agency would be advantageous for tax purposes (the exemption in subsection 54(c)(v) would certainly apply), it could well destroy the usefulness of the
Family Trust as a wills substitute. It is probably better to admit that the typical revocable trust discussed here is simply not a bare trust.

Does that conclusion necessarily mean that a transfer to a revocable trust cannot fall within the exception described in subsection 54(c)(v)? It is certainly arguable that the beneficial ownership of the property is not altered in the Family Trust, and in a revocable trust generally, and that the subsection does apply. The power to revoke may constitute effective continued beneficial ownership and control over the property, notwithstanding the provision for life tenants and residual beneficiaries. The interpretation of the power to revoke is crucial in determining whether there has been a change of beneficial ownership. If it is viewed as giving the settlor constructive ownership of the property, there is no real change in the beneficial ownership. On the other hand, if the power to revoke is viewed only as a means to transfer the beneficial ownership back to the settlor, pending which the settlor has only a life interest, there would clearly be a change in the beneficial ownership.

Assuming that the latter interpretation is correct, one method which could be utilized to at least delay the disposition for the purposes of the Income Tax Act would be to grant to the settlor a power of appointment, instead of naming
residual beneficiaries when creating the Family Trust. In that case, a stronger argument could be made that there has been no change of beneficial ownership as required by subsection 54(c)(v), as the settlor holds not only the life interest but also the rights to the residue until such time as the power of appointment is exercised. (Although the wife's life interest may represent some change in the beneficial ownership.) It must be emphasized that this course of action would only delay the disposition and not avoid it altogether. Whether such a delay would be desirable would depend entirely on the particular circumstances at the time of drafting the trust.

It should be pointed out that there are no cases dealing with the application of subsection 54(c)(v) to a revocable trust. While not dealing specifically with a revocable trust, one commentator argues that the subsection does not apply to a transfer of property to a trust which provides the transferor with only a life interest, the remainder vesting in a specified living person. However, none of the three cases he cites in support of this statement deals with such a situation, and all are English cases dealing with a taxing provision which is concerned with "absolute ownership". One dealt with a gratuitous transfer which gave rise to a resulting trust, and another with payment of insurance monies. In the third case, shares of a family run company were transferred to a trustee, to be held
for fifteen years. The rights of the shareholders to dispose of the shares or deal with their beneficial interests were restricted under the terms of the trust agreement. Notwithstanding such restrictions, the shareholder was held to be absolutely entitled to the shares, and accordingly the transfer was not subject to capital gains tax. It is submitted that the right to a return of the shares after fifteen years in this case is analogous to a power to revoke in a trust, insofar as both result in the return of the property to the settlor. Admittedly, the return pursuant to the power to revoke is contingent only, but the case lends some support to the view that there is no change of beneficial ownership in a transfer to a revocable trust. Nevertheless, until the courts address this issue, it should be assumed that transfers to a revocable trust may be dispositions for the purposes of calculating capital gains.

The provisions of subsection 75(2) deal with the second possible "when" for taxing revocable trusts. That subsection stipulates that, in a trust where property is held on certain conditions, any loss or income, or capital gain or loss from that property shall be deemed to be that of the settlor. The conditions are as follows:

(1) the property (whether original or substituted) may revert to the settlor;  
(2) the property may pass to persons to be determined by the settlor subsequent to the creation of the trust; or
The settlor has, during his or her lifetime, control over disposition of the property either by requiring his consent or direction.20

The first condition clearly encompasses a revocable trust, and the other two would also often be found in such a trust, under a power of appointment or powers of administration. Certainly, the subsection applies to the Family Trust described above. As such, the settlor would be deemed to be in receipt of the income and capital gains, and could declare the losses, of the property held by the trust. It can thus be said that, at least during the existence of the Family Trust under discussion here, the tax position of the settlor is no different than his position prior to the creation of the trust.

The wording of subsection 75(2) provides only for attribution to the settlor during his lifetime. When the settlor of the Family Trust dies, his surviving wife, having only a life interest, will not be deemed to receive the income, capital gains, or losses of the trust property. In fact, the trust will no longer be revocable, the power to revoke having died with the settlor. The trust will, however, not qualify as a spousal trust because the surviving spouse was not the only person entitled to receive the income of the trust during her lifetime, as stipulated in section 73(1).21
A practical point to remember is that the reporting of the settlor's tax position will be more complicated when using the Family Trust. This is because the settlor is required to file not only annual personal income tax returns, but also annual returns for the trust, in his capacity as a trustee.

The third event in the life of the Family Trust, its winding up, will occur when both the settlor and his wife have died. The remaining trustee will then be required to distribute the trust property to the named beneficiaries. It will be recalled that subsection 54(c) includes in the definition of a disposition "any transfer of property of a trust to a beneficiary under the trust". However, under subsection 107(2), any property distributed by the trust to a beneficiary under the trust in satisfaction of all or any part of his or capital interest is deemed to be disposed of in an amount equal to the cost of the property to the trust. In other words, there is no capital gain or loss by the trust upon the transfer to the beneficiary. If the settlor had not used the trust, there would have been a deemed disposition of all his capital property upon death.

Assuming that the property has been increasing in value over the years, the creation of the trust can clearly be advantageous to the settlor's estate, for it "freezes" the
value of the capital property on the date that it is transferred to the trust. Subsequent increases in value will have no tax consequences for the settlor, provided that the capital property is retained. The beneficiary, of course, may suffer adverse tax consequences, for he or she acquires the property at less than fair market value and will be liable for a larger capital gain if a sale subsequently occurs.

It should be noted that settlor's potential tax savings in using the Family Trust may be at risk, because of the provisions for deemed dispositions upon death. Insofar as the settlor has certain interests in the trust property immediately prior to his death, to what extent can and should such interests be evaluated and the proceeds included in the terminal return?

In the Family Trust described, the settlor and his wife are entitled to a life interest in the trust property. To the extent that income has accrued but not been paid prior to death, it must be included as income in the terminal year pursuant to subsection 70(1). That section states

In computing the income of the taxpayer for the taxation year in which he died, an amount of interest, rent, royalty, annuity...remuneration from an office or employment, or other amount payable periodically, that was not paid before his death...shall be included in computing the taxpayer's income for the year in which he died.
While the income from the trust clearly falls within this provision, the inclusion of any capital payable under the power to encroach is more doubtful. Unless it could be established that the power was exercised so consistently so as to produce an "amount paid periodically", subsection 70(1) would not seem to apply. Even if it could be shown that there were periodic payments, there surely is no payment "owing" on the taxpayer's death, as such payments are solely in the trustee's discretion. Until that discretion is exercised, the settlor has no ascertainable interest in the capital. The same can be said for the power to revoke. However, while these interests may not be easily ascertainable, it is arguable that they do exist, and should be evaluated as property. This argument is based on the definition of a capital interest of a trust, in subsection 108(1)(c), as follows:

a right (whether immediate or future and whether absolute or contingent) of the taxpayer as a beneficiary under the trust to, or to receive, all or any part of the capital of the trust.

This definition may be sufficiently broad to encompass a power to encroach or a power to revoke. A technical argument might be made that the settlor holds the power to revoke qua settlor rather than as a beneficiary. This would still leave the power to encroach as a potential capital interest. Is this capital interest a property for the purposes of dispositions upon
death? The answer would appear to be yes, based on various provisions of the Income Tax Act. Subsection 70(5) specifies that "the taxpayer shall be deemed to have disposed, immediately before his death, of each property owned by him at that time that was a capital property". Subsection 54(b) defines capital property as depreciable property and any other property "any gain or loss from the disposition of which would, if the property were disposed of, be a capital gain or a capital loss, as the case may be, of the taxpayer". Subsection 107(1) provides for a taxable capital gain upon the disposition of a capital interest in a trust. These three subsections, read together with the definition of a capital interest in subsection 108(1)(c), form a strong presumption that a power to encroach or a power to revoke are capital property deemed to be disposed of upon death. Nevertheless, the fact remains that the value of such "property" would be difficult, if not impossible, to ascertain. The fair market value of a power to revoke may be the value of all the property held by the trust, provided that the power is exercised. But if it is not, what basis can be used to evaluate the fair market value? The fair market value of a power to encroach upon capital is even more tenuous, particularly if exercisable only in the discretion of the trustee. Would the value fluctuate depending upon the trustee's generosity? The valuation problems seem insurmountable, and it is unlikely that the problem is a realistic one. In fact, no cases were found where Revenue
Canada has attempted to value either a power to revoke or a power to encroach, leading to the bold conclusion that the matter has simply not arisen.

Returning from the tax problems of the deceased settlor's estate to those of the revocable trust, another matter which should be considered in a discussion of winding up the Family Trust is subsection 104(4). Under that subsection, every trust (other than a spousal trust for which special rules apply) shall be deemed to have disposed of all capital property every twenty one years, and have reacquired it immediately thereafter, at fair market value. Assuming that the property has increased sufficiently in value, taxable capital gains may result in additional taxes payable by the trust (and if the settlor is still alive, the settlor by attribution). Alternately, such capital gains may be allocated to beneficiaries under subsection 104(21).

The reason for this deemed disposition is clearly to prevent tax deferral indefinitely by the use of trusts. For the purposes of the Family Trust, the settlor might consider exercising the power to revoke prior to the twenty one year deadline, in which case subsection 107(2) would apply and no taxable capital gains would result. However, any resettlement to a revocable trust would probably be caught by the definition of disposition of property, as discussed earlier, and no real
tax advantage would ensue. The most that can be said about the twenty one year rule is that its possible application must be considered when drafting or contemplating the revocable trust.

Another matter which should be mentioned in connection with the winding up of the Family Trust is a consideration of transferring trust property to the residual beneficiaries before the death of the settlor. Because of a recent amendment to the Income Tax Act,24 this course of action may have adverse tax consequences. It will be recalled that subsection 107(2) permits a rollover from a trust to a beneficiary in satisfaction of all or any part of his or her capital interest in the trust. Subsection 107(4) exempts such a rollover when the trust concerned is a spousal trust as defined by the Act. The amendment, subsection 107(4.1), extends this exemption to trusts to which subsection 75(2) applies, when distribution to beneficiaries is made during the settlor's lifetime. In other words, where the terms of a trust cause the attribution rules in subsection 75(2) to apply, any distribution of a capital interest to a beneficiary during the settlor's lifetime will result in a deemed disposition with tax consequences. Therefore, if income tax consequences are of concern, any such distribution should be approached with caution.

In conclusion, there are inevitable income tax
consequences in the use of a revocable trust. These consequences may work in favour of the settlor-taxpayer, and may make the revocable trust a more attractive vehicle for estate planning in British Columbia. Conversely, the tax consequences may be negative, and other methods of avoiding claims under the Wills Variation Act will need to be explored. Unavoidable in either circumstance is the increased complexity of the taxpayer's financial affairs. While such complexities may encourage a taxpayer to keep better records, or employ an institutional trustee to do so, they are just as likely to discourage the use of the revocable trust by many individuals.

4. PROVINCIAL TAXES

There are at least two forms of taxes at the provincial level which must be considered when setting up a revocable trust. The first is a sales or transfer tax on personal property, detailed in the Social Services Tax Act\(^2\)\(^5\) and the second is the tax imposed upon the transfer of real property pursuant to the Purchase Property Tax Act.\(^2\)\(^6\) (The provisions of the provincial Income Tax Act are not included in this discussion, as they are to a large extent ancilliary to the provisions of the federal Act.)

The imposition of a sales tax upon the revocable
trust as the recipient of personal property is unlikely, given the wording of the Social Services Tax Act. Tax is imposed upon a purchaser who is defined in section 1 as

a person who acquires tangible personal property at a sale in the Province for his own consumption or use...\textsuperscript{27}

It is unlikely that a trust would be considered a "person" under the Act, as it does not include a trust within the definition of person, and at common law a trust is not a person. Moreover, while it is arguable that the trustee might be the recipient, he or she is not acquiring the property for his or her "own consumption or use". Finally, provided that the transfer to the revocable trust is made without consideration, the definition of "sale" in the Act clearly does not cover the transaction. It stipulates that a sale

includes a conditional sale and a transfer of title or possession, conditional or otherwise, including a sale on credit or where the price is payable by instalments, an exchange, barter, lease or rental or any other contract whereby at a price or other consideration a personal delivers to another tangible personal property...(underline added)\textsuperscript{28}

It is also arguable that, as a beneficial interest in the property remains in the transferor, the transfer is not one which properly falls within the provisions of the Act. Caution must nevertheless be exercised in drafting and constituting the
trust to ensure that the transfers are indeed made for no valuable consideration.

The application of the Purchase Property Tax Act cannot be so easily dismissed. That Act provides that, subject to certain exemptions, a tax is imposed upon "taxable transactions at the Land Title Office". A taxable transaction is defined, in part, as any transaction purporting to transfer by any method including a disposition, an order of a court, including an order absolute of foreclosure, or by the operation of any enactment or law, an estate in fee simple referred to in section 23(1) of the Land Title Act, a life interest in land...

The tax imposed upon such transactions is one percent of the first $200,000.00 of the fair market value of the interest to be transferred, and two percent of the remaining fair market value. It is not necessary that the transfer be registered, or even registrable, to attract the liability of the tax. A transferee must file a return and pay taxes within a prescribed period in either event.

Certainly, the definition of a taxable transaction is broad enough to encompass a transfer to the trustee of a revocable trust, and even a personal declaration of trust. There are exemptions from payment of the tax set out in section 5 of the Act. Some twenty three transactions are exempt, but
only a few of these could possibly apply to a revocable trust. Much depends upon how the revocable trust is structured. For example, if the settlor transfers the property to a trustee who concurrently transfers back to the settlor a life interest, the transaction may be exempt under subsection 5(2)(i). It provides an exemption of a transfer

of a life estate where the transfereee of that life estate transferred the fee simple estate in the same land to the transferor of the life estate in a concurrent transaction.\textsuperscript{34}

No mention is made of the remainder, but the provision clearly suggests that it passes to the "transferor" (in this case, the trustee) upon the life tenant's (settlor's) death. Whether the taxing authorities would permit the exemption to be claimed where the transferor holds the fee simple in trust for other remaindermen is open to question.

A second possible exemption may arise if the settlor and the trustee are related individuals, and the land transferred is a family farm, principle residence, or recreational residence. A related individual is defined as a spouse, parent, child, grandparent, grandchild, great grandparent, great grandchild or the spouse of any of them, provided that he or she is a citizen or permanent resident of Canada.\textsuperscript{35} If the trustee in the revocable trust is such a person, it is arguable that he or she can claim an exemption.
The argument is based upon the assumption that the trustee is the transferee in the taxable transaction and not the trust itself. As the description of a transferee in section 1 of the Act "means a person to whom land is transferred under a taxable transaction", this argument has some merit. It is moot, however, if the property transferred is not a principle or recreation residence or family farm.

A third possible exemption which might apply to a revocable trust is a transfer to the Public Trustee or a trustee registered under the Trust Company Act, R.S.B.C. 1979 c. 412, where the administration of the trust estate is for the sole benefit of the settlor and on the termination of the trust the land reverts to the settlor or his estate or from the trustee back to the settlor.

Leaving aside the question of whether an institutional trustee is recommended or desired, the difficulty with this provision is the specified conditions of the trust. Is the revocable trust envisaged here for the "sole benefit of the settlor"? Although it may be from a practical viewpoint, in light of the life interest and power to revoke, it is unlikely that the taxing authorities will accept it as such, particularly if residual beneficiaries are named in the trust instrument. If a power of appointment is utilized, the argument is slightly stronger, but still marginal. Another problem is that, while the land may revert to the settlor upon termination if the
power of revocation is exercised, it will not necessarily revert to the settlor. It will certainly not revert to his estate, if by estate is meant that property which a legal representative is entitled to administer upon the settlor's death. (The term estate is not defined in the Act.) Nevertheless, the exemption may be of some value where the terms of the revocable trust are appropriately drafted.

The only exemption which specifically refers to an inter vivos trust deals only with a transfer from a trustee to a beneficiary. The exemption is limited to situations where the settlor and the beneficiary are related individuals and the land transferred is a family farm, principle residence or recreational residence. This exemption may be of some assistance to the trustee who is obliged to transfer the trust property upon the settlor's death, but it is of little assistance in the initial transfer of the property from the settlor to the trustee.

It is not difficult to conclude that the draftsman of the Purchase Property Tax Act did not address their minds to whether transfers to revocable trusts should or should not be exempt. Until this is done, and amendments made to the Act, the possible imposition of purchase property tax must be carefully reviewed in drafting the revocable trust.
5. BENEFICIARIES CLAIMS

Where a trustee is appointed in a revocable trust, the trust instrument will generally set out the duties of that trustee. The law of trusts also imposes upon the trustee of any trust certain duties and obligations. These include the duty to preserve the trust property, and not to gain personal advantage from it without proper authority, to maintain an even hand between the life tenants and residual beneficiaries, and to keep proper accounts. A detailed analysis of such duties can be found in any text on trusts and trustees, and it is not the intention to review them here. For the present purposes, it is the breach of those duties, and the consequences of such breaches, which are of interest. In particular, what will be the effect of a breach of trust by the settlor/trustee of a revocable trust? For the purposes of this discussion, it will be assumed that the settlor only has retained the power to revoke. In addition, the term "beneficiaries" will refer only to the remaindermen of the revocable trust.

The rights of a beneficiary of a revocable trust are no different from the rights of a beneficiary under any trust. These broadly include: the right to compel the trustees to perform their duties in a proper manner, and to bring action to recover trust property wrongfully transferred. However,
the application of those rights in a revocable trust situation may be difficult in light of the nature of the beneficiary's interest. The interest is a remainder following a life estate, and may be classified as a present vested interest. However, while a usual remainder interest may not vest in possession because of the premature death of the beneficiary, a remainder interest in a revocable trust may additionally not vest in possession because the power of revocation is exercised. The existence of such a power essentially places the beneficiary at the mercy of the settlor/trustee, at least during the settlor/trustee's lifetime. Notwithstanding any rights the beneficiary may have under law, he or she

is not likely to invite the revocation of the trust by making a complaint about the settlor-trustee's management of the trust property, even though that management may vary from accepted trust practices.40

Practically speaking, the beneficiary is far more likely to eventually receive the trust property by acquiescing to any breaches of trust on the part of the settlor/trustee, than if complaints are registered. This assumes, of course, that the beneficiary is aware of the terms of the trust, and has some knowledge of breaches. In fact, in using a revocable trust as a substitute for a will, it is more likely that the beneficiaries will have no knowledge of its terms or even its existence.
However, if the beneficiary does have such knowledge, and complains of a breach of trust on the part of the settlor/trustee, what remedy does the beneficiary have? The better view would seem to be that there is only a right to have the trust properly administered. As Professor Waters explains,

(T)he beneficiary's principal right is to require that the trustees, who have caused loss to the trust through their breach of trust, shall out of their own pockets indemnify the trust for its loss.

This right is based on the loss to the trust. A beneficiary not yet entitled to possession of the trust property can do no more than insist that compensation be paid to the trust for any losses suffered. No damages can be awarded personally to the beneficiary until he or she realizes an actual loss from the trustee's breach, by receiving trust property less valuable, or no trust property at all. In addition to ordering compensation payable to the trust, the court might also order that an accounting, or even appoint a receiver, to prevent further breaches of trust. On the other hand, the court might refuse to grant any relief, on the theory that it would be pointless in light of the power of revocation.

It may safely be said that it is only after the settlor's death that the beneficiaries have any real remedy for
breaches of trust committed by the settlor as trustee. This is because of the well established principal that trustees can be held responsible for breaches of trust occurring before they assumed their duties. The beneficiaries may sue not only the succeeding trustee, but also the estate of the settlor/trustee. As the purpose of the revocable trust may well have been to minimize the value of the estate for probate purposes, the succeeding trustee is well advised to review the settlor/trustee's accounts carefully before assuming trusteeship. Indeed, some American sources recommend that the succeeding trustee be appointed as joint trustee during the settlor's lifetime, in order to ensure that the trust is properly administered.

It may well be that the succeeding trustee may obtain some relief from the courts under section 98 of the Trustee Act, which provides

If it appears to the court that a trustee, however, appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust...then the court may relieve the trustee either wholly or partly from that personal liability.

While only the circumstances can determine the applicability of this section, it may offer some assistance for innocent or inadvertent breaches of trust by the settlor/trustee. The
moral, however, is that the settlor must be carefully instructed as to his or her obligations as a trustee in the administration of the trust.
Footnotes to Chapter 5


2. Ibid.


6. Ibid., s. 108(1)(j).

7. Ibid., subsection f.

8. Ibid., s. 104(2).

9. Ibid., s. 38, and generally, Subdivision (c) of Division B.

10. Ibid., s. 54(c)(iii).

11. Ibid., s. 69(1)(b).

12. Ibid., s. 54(c)(v) - the subsection goes on to make certain exceptions to the exclusion, where the transfer is by a trust resident in Canada to a trust not resident in Canada, or a transfer to an R.R.S.P., defined profit sharing plan, employees profit sharing plan, or registered retirement income fund by a beneficiary.

13. Supra, footnote 4, at 70.


15. Supra, footnote 4, at 69.
16. Ibid., note 97.
20. Supra, footnote 6, s. 70(5).
21. Ibid., s. 73(1).
22. Supra, footnote 11.
23. Supra, footnote 6, s. 70(5).
24. Subsection 107(4.1).
27. Supra, footnote 25, s. 1.
28. Ibid.
29. Supra, footnote 26, s. 2(1).
30. Ibid., s. 1(1).
31. Ibid., s. 3.
32. Ibid., s. 2(4).
33. Ibid., s. 2(5).
34. Ibid., s. 5(2)(i).
35. Ibid., s. 5(1).
36. Ibid., s. 1(1).
37. Ibid., s. 5(2)(t).
38. Ibid., s. 5(2)(a)(iii).
39. Supra, footnote 15, chapters 18 and 19.
40. Supra, footnote 1, Carr, at 172.
41. D.W.M. Waters, "The Nature of the Trust Beneficiary's

42. Supra, footnote 15, at 984.

43. Ibid., at 991.

44. Supra, footnote 1, Turner at ch. 9.

45. R.S.B.C. 1979 c. 414 and amendments.
1. INTRODUCTION

There are three circumstances where a spouse might assert a claim to the property held in a revocable trust: where the settlor spouse dies intestate; where the settlor spouse dies testate but the estate is minimal or non-existence because the trust holds the bulk of the deceased's assets; and where there is a marriage breakdown. In the first two circumstances, the children of the settlor may also have a claim against the trust property. Insofar as such claims have a common basis, the discussion will refer mainly to spousal claims. In the third situation, the claim is clearly governed in British Columbia by legislation, and will therefore be reviewed first.

2. MARRIAGE BREAKDOWN

When parties to a marriage separate, and division of property is an issue, the Family Relations Act of British Columbia is the governing legislation. The Act provides for an equal division of "family assets" upon certain triggering
events: namely, a separation agreement, a declaratory order, an order for dissolution of marriage or judicial separation, or an order declaring the marriage null and void. Family assets are defined in section 45 of the Act as assets owned by one or both spouses which are used for a family purpose, and include both an "interest in a trust" owned by a spouse, and

...where property would be a family asset if owned by a spouse, property
(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or
(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property.

If the definition of a family asset had been limited to "an interest in a trust", some interesting issues could have arisen in interpreting the terms of a revocable trust. For example, if the spouse owned a life interest only, how would such a life interest be valued for the purposes of division? If the spouse as settlor had also retained a power to encroach upon capital, would this be included as "an interest", and if so, again, how would it be valued?

However, these questions become moot with the included definition of family assets as set out in the passage above. This definition is clearly broad enough to capture any family asset transferred to a revocable trust. While there
have been no reported cases dealing directly with this section as it applies to a revocable trust, there is no reason to believe that a judicial division of assets held in such a trust could be avoided, provided of course that the assets were used for a family purpose. At least one decision of the Supreme Court of British Columbia has indicated a willingness to review property held in trust for a spouse. In *Graham v. Graham*, the Respondent husband made an application pursuant to Section 45 and the B.C. Supreme Court Rules, to examine the wife’s father concerning, amongst other things, trusts created for the benefit of the wife. The court allowed the application. Oppal, L.J.S.C., found that "evidence relating to the existence or non-existence of secret or blind trusts in favour of the wife is material" to the determination of property under section 45. The decision was affirmed on appeal. Although there is no report as to the final outcome in the *Graham* case, another decision of the Supreme Court of British Columbia reveals no hesitation on the court’s part in setting aside gratuitous inter vivos dispositions of family assets if made to avoid spousal claims. In *Oscroft v. Oscroft*, the wife gratuitously transferred the family residence to her daughter and a third party months before commencing a divorce petition. The husband counterpetitioned for division of family assets under the Family Relations Act, and also commenced an action alleging a fraudulent transfer of the family residence, seeking rectification of title and/or a trust. The court found
that the "object behind the transfer...was to defeat or attempt to defeat the interest" of the husband, and accordingly set aside the transfer. The decision was based upon a finding of fraud, and its applicability to a revocable trust would depend largely upon the intentions of the settlor in creating the trust. But caution should certainly be exercised in using a revocable trust only to avoid a spousal claim under the Family Relations Act.

This is not to say that a revocable trust might not be useful in matrimonial situations. For example, a trust might be created prior to the marriage to protect a wealthy spouse from future claims under the Family Relations Act by the spouse who comes into the marriage with no assets. The trust agreement would have to be carefully worded, and the trust property itself insulated from use for a family purpose. (It seems that income from such trust property may be used for a family purpose. It has been held that such use does not change the character of the asset itself into a family asset.) Currently, pre-nuptial agreements are commonly used to protect such spouses, but a revocable trust could not only protect the estate of the wealthy spouse during marriage but also potentially upon death. It is the ability of the revocable trust to fulfill the latter need which will be discussed next. The point to remember here, however, is that a revocable trust created at or near the breakdown of a marriage, with the
intention of defrauding a spouse of his or her rights under the Family Relations Act is unlikely to withstand challenges.

3. TESTACIES AND INTESTACIES

A. Current Legislation

When a revocable trust is used in conjunction with, or as a replacement for, a will, the questions arise whether a surviving spouse or child is, or should be, entitled to a share of the trust res by virtue of the statutory scheme for distribution of the deceased's estate. In British Columbia, if there is a will, the statutory authority derives from the Wills Variation Act; if there is no will, the authority is found under Part 7 of the Estate Administration Act.

On a strict reading, the provisions of either Act would not appear to apply to claims against property held in a revocable trust. Section 2 of the Wills Variation Act provides that the court may order "provision for the proper maintenance and support" of a surviving spouse or children from the estate of the testator, where the will fails to do so. Section 96 of the Estate Administration Act distributes an intestate's estate amongst next of kin, beginning with the surviving spouse and children. (Protection is also provided for common law
spouses and illegitimate children.) In either event, if the deceased has transferred some or all of his or her worldly goods to a revocable trust prior to death, it is no longer part of the deceased's estate. This restriction could, of course, be remedied by extending the definition of an estate to include property transferred to an inter vivos trust, as has been done in the Ontario legislation. But until such legislation is demanded and enacted, the surviving spouse and children must look to the courts for relief against complete or partial disinheriance through the medium of a revocable trust.

Before examining the courts' options for applying succession rights to property held in a revocable trust, it would be wise to examine the reasons and purpose underlying the existing statutory relief. Such an understanding is important in assessing whether claims by a surviving spouse or child should be extended by the courts in the absence of a statutory mandate. Moreover, while the courts may not clearly express a concern for the reasons and purposes behind such relief, it is suggested that such considerations will certainly influence judicial decision making.

B. The Justification for Statutory Succession Rights

Historically, a widow has always had some measure of
protection from the husband's freedom of alienation and testation of real property in the form of dower rights. These rights entitled a widow, upon her husband's death, to a life interest in one third of the land owned by the husband during the marriage. Although the interest did not vest until the husband's death, it could not be defeated by an inter vivos disposition without consent by the wife. Curtesy offered a similar life interest to the husband, although it attached to all of the wife's lands, provided that issue resulted from the marriage. Dower and curtesy ceased to be applicable in England when land ceased to be of importance, but was not abolished until 1925.

For landless families, there were succession rules of a sort enforced first by the Church and later by Parliament. These rules gave a part of the deceased's personal property to the widow and children. However, the rules lost much of their potency by the seventeenth century with the advent of freedom of testation. While the succession rules continued to apply upon an intestacy, it was not until the twentieth century that legislation provided for relief to a widow and children where there was a will. Today, protection is provided by the legislation previously described: the Estate Administration Act ensures that an intestate's estate goes first to the surviving spouse and children and the Wills Variation Act permits redistribution of a testate's estate if
adequate provision has not been made for the surviving spouse and children. This legislation has counterparts in England, Australia and New Zealand.

The generally accepted raison d'etre of dower and succession rights is that they protected the widow from being impecunious, and gave a measure of security to the family unit. While its effectiveness in accomplishing these ends has been questioned, there is no doubt that the modern rights as provided in the Wills Variation Act are concerned with the same goals of protection and security.

Those who champion the need for protecting the financial position of the widow generally perceive her as an unsophisticated and undereducated homemaker who has left all the financial management of the family unit to the husband. She therefore requires assistance from the state in ensuring that her husband does not leave her and her children stranded, financially. Implicit in the suggestion that this stereotypical widow needs protection is a strong belief in the traditional family unit. The following statement of Professor MacDonald, who wrote the standard text on the subject, *Fraud on the Widow's Share*, demonstrates this emphasis:

> The need for protection is obvious. By the marital vows the wife assumes her natural role of homemaking and the husband undertakes to 'provide' for the home.
While these words were written in 1960, before the "women's liberation" movement took hold, they undeniably reflect the historical rationale for statutory widow's rights. They do not, however, seem to justify the extension of such rights to widowers in modern times (or, for that matter, the custom of curtesy in former days). If men are the "providers", it cannot be argued that they need financial support and maintenance from their wives' estate. The extension of statutory succession rights to husbands seems to be an attempt to update an old concept with society's modern concerns of non-discrimination and equality of the sexes. The husband should be no less entitled to a share of the wife's estate than vice versa. It is, however, ironic that this modern concern with equality between the sexes should be applied to rights founded in the traditional unequal positions of the spouses. In fact, one critic of the forced share legislation found in many American states suggests that it perpetuates the subservient role of women, by "reinforcing the very system for which it is compensating".22

Although it may be argued that statutory protection of a spouse upon disinheritance under a will or an intestacy is based upon a dated view of the family unit and the roles of the sexes, the issues are somewhat more complex. The modern concern for equality within a marriage has produced legal
innovations which are more substantive than the cosmetic changing of "wife" to "spouse" in legislation. Perhaps most important is the idea, found in most family legislation in Canada today, of an equal sharing of the family assets upon dissolution of a marriage. This sharing is based upon a belief that marriage is a partnership, and that each spouse should be compensated for his or her respective roles in that partnership. It is not unreasonable to assert that such compensation should be available whenever a marriage ends -- whether it be by divorce or death. This element of compensation can be seen as a modern justification for the statutory succession rights as found in the Estate Administration Act. Moreover, although the Wills Variation Act speaks only of maintenance and support, it is asserted that the aspect of compensation is considered by the courts in British Columbia when applying the Wills Variation Act.

The Law Reform Commission takes a slightly different approach to the justification for statutory succession rights. It bases the entitlement of the deceased's family to the assets of his estate upon a moral claim. It distinguishes inter vivos obligations from obligations at death as follows:

A deceased's moral obligation to provide adequately for his family differ from inter vivos obligations he may have owed them. Principles which determine inter vivos obligations are primarily founded upon concepts of maintenance and support. In some cases members of the deceased's family have a moral claim to share the assets of his estate which is not necessarily limited
to support... Obligations arising after the deceased's demise should be determined with reference to the fact that the deceased no longer has any needs.23

The emphasis upon moral claims may create major difficulties, particularly where the deceased is survived by more than one family. Moreover, in order to adjudicate such claims, the court has little choice but to impose its own morality upon the situation. However, the moral approach is comprehensive, in that it justifies children's as well as spouses' statutory succession rights, particularly when those children are no longer dependent upon the deceased as at the date of death.

Whether the rationale for statutory succession rights be protection and security, compensation, a moral obligation, or a combination thereof, the legislators in British Columbia have made a public policy decision in enacting such rights. It is a decision that prefers the rights of surviving spouses and children over the freedom of the testator to bequeath his worldly goods or not, as he chooses. This public policy decision has yet to be considered, or determined, where the testator transfers his worldly goods to a revocable trust. As previously mentioned, until the legislators concern themselves with the question, it will be up to the courts in British Columbia to answer it. If their interpretation of the Wills Variation Act is any indication, our courts apparently have a predilection for the rights of family members as opposed to the
principal of freedom of testation. However, whether this predilection will be strong enough to result in the reallocation to a surviving spouse or child of property transferred to a revocable trust is the subject which must now be examined.

Our courts have but two options in this matter: they can adopt a legalistic, technical approach and deny the claim, or they can apply a more creative and equitable approach, and allow the claim. Both options can be supported by caselaw. The former is favoured in some jurisdictions in the United States, and arguably, in New Zealand, Australia, Ontario and Alberta. The term arguably is used because there is no extensive caselaw in those jurisdictions, and certainly not dealing with revocable trusts per se. The creative, equitable approach can be found in a variety of forms in some American jurisdictions. Both approaches will be examined in the following discussion.

As a preface, it should be noted that in reviewing American caselaw, the discussion will be limited to the caselaw in the common law states, as the cases in community property states have substantially different considerations. (Chief among them is the fact that the surviving spouse has a vested interest in the community property during the marriage, whereas in common law states, the interest does not vest until the
death of the spouse.) It should also be noted that statutory rights considered in the caselaw discussed vary from state to state and country to country, and no attempt is made here to review such rights in depth. Reference to particular statutory provisions will, however, be made where necessary.

C. Options: The Legal Approach

The cases in which the judiciary have not allowed the surviving spouse to claim a share of the deceased's property transferred inter vivos focuses exclusively upon the completeness of the transaction or instrument in question. In the case of a revocable trust, the issue is whether the formal requirements for a trust have been satisfied. If they have, and a completely constituted trust exists the court will refuse to impeach that trust in favour of the surviving spouse. This view has been described by American scholars as the "liberal legal view", in light of its emphasis upon legal formalities and its implicit belief in freedom of alienation of property.

This view has also been called the "Massachusetts theory", acknowledging the state from whence the better known American cases for the principle have emerged. It will be recalled that the classic case dealing with the effect of
powers of control in a revocable inter vivos trust, National Shawmut Bank of Boston v. Joy,27 hails from Massachusetts. That decision, although not dealing with the claim of a surviving spouse, is an early example of the "liberal legal view". It enunciated the rule that a revocable trust containing powers of control could not be considered testamentary, provided the trust created a present interest in the trustee and beneficiary. Moreover, the decision discounted as immaterial the settlor's motive of evading or circumventing the statutory requirements for a will. The court said:

If an owner of property can find a means of disposing of it inter vivos that will render a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it. The fact that the motive of a transfer is to obtain the practical advantages of a will without making one is immaterial.28

The views of the court in National Shawmut were applied to the surviving spouse who claimed against property held in a revocable trust, in the later Massachusetts case of Kerwin v. Donaghy.29 Although the facts in that case revealed that the relations between the surviving wife and the husband-settlor were good, there was the occasional disagreement. It was during one of those disagreements that the settlor created two revocable trusts in favour of his daughter from a previous marriage. The trusts comprised substantially all of the settlor's property, and provided for a
life interest to the settlor. The court found that the trusts were validly created and binding as against the parties to them. The court went on to suggest that, as the surviving spouse could only claim against the settlor's estate at death for her statutory forced share, her attack on the trusts could be no more successful than one instituted by the settlor. In addition, following National Shawmut, the court found that motive for creating the trust was irrelevant.

The Massachusetts theory is unquestionably grounded in a belief in the sanctity of free alienability of one's property, as can be seen from the following passages from Kerwin v. Donaghy:

He could not 'cheat' her in any legal sense by means of those agreements unless she had rights that were paramount to his right to do what he pleased in his lifetime with his own personal property....In this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions [citations omitted], under his will, or by virtue of a waiver of his will.30

Courts in other American jurisdictions (although not always uniformly) have also applied this preference for freedom of alienation.31 For example, in Ohio, in the 1961 decision of Smyth v. Cleveland Trust Co.,32 where the court opined:

If a valid trust inter vivos was created, valid title
in the corpus passed to the trustee, and nothing remained in the settlor except the right to revoke, alter, or amend the agreement. At the time of the settlor's death, if the agreement has not been revoked, altered, or amended, the title to the trust property was still in the trustee, subject to distribution under the trust instrument, and it is difficult to see how a part of the trust property could pass to the settlor's administrator or executor.33

The emphasis of the Ohio court in this passage is clearly upon the legal formalities of the transaction. Concern for the surviving spouse is not readily apparent in this or other American decisions applying the Massachusetts theory. The same can be said for decisions originating in New Zealand, Australia, Ontario and Alberta. These cases are few in number, and must be cited with caution, as only two deal with trusts, and it is uncertain whether one of those deals with a revocable trust. Nevertheless, they are valuable insofar as they reveal the general leanings of other commonwealth courts.

The one case which deals with revocable trusts, In Re Paulin,34 hails from New Zealand. The trusts in question were of the variety known in America as Totten trusts. Mr. Paulin Senior deposited monies in two separate bank accounts, designating himself as trustee, with the beneficiary on one being his daughter, Lavinia Margaret, and on the other, his son, William Bruce. Upon his death, his widow made application for provision for her maintenance from his estate, as she had been omitted from his will. In discussing what that estate
was, the court held that the monies did not form part of his estate, and that:

In New Zealand it has been held that the Court cannot deal with property settled by the testator in his lifetime—Parish v. Parish [1923] N.Z.G.R. 72—and in South Australia it was said in Re Richardson [1920] S.A.L.R. 24 at p. 40 that the Court could not touch property disposed of by the testator in his lifetime, even though dependents are thereby left without adequate provision...

The courts in New Zealand apparently take the same approach with wills-variation type legislation. In Thomson v. Thomson, an inter vivos transfer of the family farm from the deceased to one of his sons was attacked by the other children. The court found that

...the right to relief arises only if any person dies leaving a will without making therein adequate provision for the proper maintenance and support of the testator's wife, husband or children. The statute in no way attempts to regulate dispositions in life.

Closer to home, the Alberta Supreme Court, Appellate Division, reviewed the provisions of the Alberta Family Relief Act, R.S.A. 1955, to determine its applicability to property transferred to an inter vivos trust, in Collier v. Yonkers et. al. It is not clear from the case report whether the trust contained a power to revoke, but it did provide that income be paid to the settlor for life, with a gift over to her
children upon her death. The court concluded that the trust fund did not form part of the estate for the purposes of the Family Relief Act, notwithstanding apparently liberal definitions for "will" and "testator" in the Act, as follows:

"will" means any deed, will, codicil, instrument or other act by which a testator so disposes of real or personal property that the same will pass at his death to some other person;
"testator" means a person who by deed or will or by any other instrument or act so disposes of real or personal property or any interest therein that the same will pass at his death to some other person.

The court found a complete gift upon the execution of the trust deed and transfer of the funds to the trust, following Corlet v. Isle of Man Bank.39 There was thus no property or interest passing at death.

The court in Collier v. Yonkers et. al. did not review in any detail the broad definitions for will and testator in the Act, except to reject the argument that they applied to the trust gift. The court simply followed a Supreme Court of Canada decision which reviewed identical definitions in the Ontario Dependent's Relief Act, R.S.O. 1950. In that case, Kerslake v. Grey40 the question was whether proceeds from a life insurance policy, payable not to the estate but to a third party, were part of the estate of the testator for the purposes of the Dependant's Relief Act. A majority of the Supreme Court of Canada said no; notwithstanding the extended
meaning of "will" and "testator" in the Act, "a dependant is entitled to look only to the estate which the personal representatives of the deceased are entitled to administer".\textsuperscript{41} The personal representative had no claim against the insurance proceeds unless, the court opined, there were some grounds to set aside the designation in the insurance policy. This, of course, is a classic example of the Massachusetts theory—the inter vivos transaction can be attacked only on legal formalities.

As in the American cases, concern for, or consideration of, the needs of the dependants was ignored in both Kerslake and Collier. In another Alberta case, Dower v. Public Trustee et. al.\textsuperscript{42} (to be discussed in detail below), the court alluded to the problems of the surviving family, but suggested that the solution lay with the legislature, not the courts. But if the following paragraph is any indication, the court in Dower had little real sympathy for the rights of the surviving family:

If the right to avoid gifts and other inter vivos dispositions of his property is given after his death to a man's wife and other dependents on the ground that they hinder, delay or defeat their claims under the Family Relief Act, they would have a similar right of action during his lifetime on the ground that they tend to or will necessarily have such effect upon his death. Any disgruntled dependent could use this right of action before or after his death to prevent or set aside a man's benefactions and gifts and circumvent the object of his charity.\textsuperscript{43}
In a contest between rights of the surviving spouse or children, and the right to freely alienate one's property during one's lifetime, the latter is clearly the preferred choice of the cases using the legal liberal approach. However, caution must be exercised in over-emphasizing the policy preferences in these cases. Notwithstanding the comments of the court in Dower, the lack of concern for the surviving spouse or children is not necessarily a conscious or considered decision by the judiciary. This is clearly illustrated in a recent Massachusetts case, where the issue of public policy was brought to the attention of the courts.

In Sullivan v. Burkin, the Supreme Judicial Court of Massachusetts considered the modern roles and rights of spouses in the following passage:

There have been significant changes since 1945 in public policy considerations bearing on the right of one spouse to treat his or her property as he or she wishes during marriage. The interests of one spouse in the property of the other have been substantially increased upon the dissolution of a marriage by divorce. We believe that, when a marriage is terminated by the death of one spouse, the rights of the surviving spouse should not be so restricted as they are by the rule in Kerwin v. Donaghy. It is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remained married until the death of his or her spouse.
It is interesting to note that this reasoning, which was previously described as a possible justification for modern day statutory succession rights, has been so readily adopted by the court for justifying the attachment of those rights to property transferred inter vivos. Moreover, the focus on modern spousal rights is one which might successfully distinguish the Canadian cases cited above, all of which were decided before the advent of modern family legislation.

Parenthetically, although the court in Sullivan v. Burkin followed its earlier decision of Kerwin v. Donaghy, it warned that it would no longer do so for trusts created or amended after the date of its judgment. It would seem that the Massachusetts theory may no longer be an appropriate label for the liberal legal approach.

D. Options: The Equitable Creative Approach

The concern for more equitable results in the distribution of a deceased's estate, as demonstrated in Sullivan v. Burkin, has been found in other American jurisdictions. The cases which allow the surviving spouse to claim property transferred inter vivos fall into two general categories. The cases in the first category traditionally obscures the public policy question with ingenuous legal
reasoning. This reasoning is commonly referred to as the "illusionary transfer doctrine". That term is used here with some hesitation, for the cases which purport to follow the doctrine defy any easy interpretation or classification. Generally, however, as its name implies, the doctrine examines not only the formalities of the inter vivos transaction but also the substance of it.

The cases in the second category also examine the substance of the inter vivos transaction, but generally readily admit that this is done for public policy reasons. The issue is described as one of fraud upon the marital rights, but as will be seen, "fraud" as more of a label than a considered legal principle. It is suggested here that, of the two, the doctrine of fraud on the marital rights is a much neater one to argue than the illusionary transfer doctrine, and hence may be better received by our own courts. However, the illusionary transfer doctrine has a loyal following in the American judiciary and cannot be altogether discounted.

The term "illusionary transfer" was popularized by the 1937 New York decision of Newman v. Dore. In that case, the husband executed a revocable trust, retaining the right to income and substantive control over the trustees during his lifetime. He died three days later. The court's reasoning is not entirely without ambiguity, and has been
variously interpreted over the years by both academicians and the courts of various jurisdictions. Although the court at one point assumes the trust to be valid, it also states that "the settlor never intended to divest himself of his property". This has lead one commentator to conclude that there never was a trust in fact. However, the more popular view would appear to be that

...the case was accepted as holding that there was a real trust but that it could not defeat the statutory marital right of the surviving spouse despite its reality because a retention of control in the settlor brought the inter vivos transfer, insofar as the surviving spouse was concerned, too close to a testamentary transfer, which the statute made ineffective to defeat the surviving spouse.

This view is supported by a careful reading of the case. The test used by the court in Newman v. Dore is the degree of control retained by the deceased over the trust property. This test, it will be recalled, was also used in the early American cases in determining whether a trust was really an attempted testamentary device. However, there is a crucial difference in the use of this test in the illusionary transfer doctrine: in the earlier cases of attempted testamentary dispositions, the trust was set aside altogether, if it was found to be a testamentary disposition which did not comply with the statute of wills; in the case of an illusionary transfer, the court will set the trust aside only to the extent of satisfying the claim of the surviving spouse.
the latter result seems to contradict the principles of trust law (either a trust is valid or it is not), it can be understand in light of public policy considerations. The court, without admitting the fact, is "legislating a preferred status for the spouse".\textsuperscript{51} As Robert C. Bensing points out, the concept of a valid trust except as against the surviving spouse is

simply a recognition of the fact that the policy underlying the election statutes is stronger in regard to the degree of divestment of control necessary for validity of an inter vivos transfer than is the policy underlying the Statute of Wills.\textsuperscript{52}

Another aspect of the reasoning in \textit{Newman v. Dore} which demonstrates not only this preference but also the obscure legal reasoning used to justify it, is the matter of motive or intent. The court found that the deceased had a clear intention to deprive his wife of her statutory rights upon his death, but concluded that he was entitled to alienate his property during his lifetime. It stated bluntly that "motive or intent is an unsatisfactory test of the validity of a transfer of property".\textsuperscript{53} That this statement was mere lip service to the concept of free alienability is clear, however, in the subsequent finding of the court that any alienation of property had to proceed "in good faith". This good faith, the court emphasized, was not related to the intention to deprive the wife, but rather referred to the
intention to "divest himself of ownership of his property".

Now, although "good faith is an intangible and abstract quality with no technical meaning or statutory definition",\(^54\) most legal scholars would accept the suggested definition in *Black's Law Dictionary* that

it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage... (I)n common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.\(^55\)

In other words, good faith is very much interwoven with motive. To describe it as an intention to divest oneself of property is surely only disguising that motive with an accepted legal concept, that is, the certainty of intention to create a trust. However, using such an accepted legal concept would result in a finding that no trust exists, and as already noted, the trust in *Newman v. Dore* was found to be invalid only to the extent necessary to satisfy a claim by the surviving spouse.

The difficulties created by the contorted reasoning and results in *Newman v. Dore* become readily apparent in the New York courts' application of the decision to Totten trusts, also known as tentative trusts. It will be recalled that the
nature of the tentative trust is that it is not absolute until death. As such, it is logical that a claim by a surviving spouse might succeed against such a trust. This was in fact the outcome in the 1941 decision of *Krause v. Krause*.56 However, the New York Court of Appeals reached this outcome not by applying such logic, but by following *Newman v. Dore*, and finding that the tentative trust was illusionary. Subsequent to this decision, lower courts and commentators categorized Totten trusts as illusionary per se.57 However, ten years later, in the decision of *Re Halpern's Estate*,58 the same court concluded that "(T)here is nothing illusionary about a Totten trust as such."59 It denied the applicant surviving spouse any right to the monies held in a Totten trust, and distinguished the cases following the *Newman* line of reasoning in the following fashion:

In each of those cases the finding of illusoriness was made on a factual showing of unreality, and not solely because the transfers operated to, and were intended to, defeat the widow's expectancy.60

A comparison of the facts in two of the cases under discussion suggest otherwise, and demonstrate the difficulty in relying (or even understanding) the illusionary transfer doctrine. In *Krause v. Krause*, part of the settlor's property was left in a tentative trust for a daughter whom the settlor had not seen in years, and who resided in a foreign country. The trust was set up three years after marriage to a second
wife (the applicant) and three years before his death. It was found to be illusionary. In Re Halpern's Estate, the facts revealed that the decedent had separated from his wife two years before his death, and that the tentative trusts were in favour of his infant granddaughter. These trusts were found to be valid. It is submitted that, whatever the terminology, the judicial mind in these decisions considered the equities of the facts, whether admitting it or not. In Krause, equity favoured the surviving spouse over a geographically and emotionally distant daughter; in Halpern, an infant granddaughter was favoured over a separated spouse.

This consideration is more apparent in decisions from other jurisdictions where the illusionary transfer doctrine is used, particularly when motive is discussed. For example, in the Colorado case of Richard v. James, the surviving wife argued that an inter vivos transfer of property to an irrevocable trust was "illusionary, colourable and not in good faith", because of the settlor's direction to pay his debts at death from the trust res (thus enabling him to effectively control the trust property). However, the court found that:

(T)here is absolutely no evidence in the record...that the grantor and trustor had any evil intention whatsoever, or make and executed said documents with the purpose in mind of defeating them by contracting indebtedness in a haphazard and willful manner. Such it would seem to us would be required before it could be reasonably contended that the documents attacked were in any way colourable or bear the earmark of pretense or sham.
Elsewhere, the court intimates that the issue is one of fraud. While the use of words such as colourable, pretense, sham, and fraud, do nothing to simplify the reasoning, the court is clearly concerned with good faith and motive. It is, at least implicitly, willing to impose a certain standard of behavior upon the deceased. Unfortunately, identifying the concern does not resolve the difficulties inherent in the illusionary transfer doctrine.

Recently, the Appellate Court of Illinois has attempted to rationalize and clarify the illusionary transfer doctrine, in the decision of Toman v. Svoboda. The case does not deal with a trust, but rather with property held in joint tenancy with the deceased's mother and sister. The surviving spouse asserted her statutory marital right against the property. The court, in addressing the issue of illusionary transfers, stated:

Under Illinois law, which is in accord with the weight of American authority, a real inter vivos gift to another is thus effective, even thought the said real inter vivos gift is made for the precise purpose of minimizing or defeating what would otherwise have been the statutory marital right....The confusing factor is that Illinois and the majority of American states also examine the gift looking for what they unfortunately call fraudulent circumstances, but by which they mean circumstances indicating that the gift was not a real gift because there was no present donative intent (that is, no donative intent of any kind or, at most, a mere testamentary, as distinguished from a present, donative intent), for
lack of which the alleged gift was simply a sham or a mere colourable transfer of legal title.\footnote{66}

It seems that the court here is suggesting that a transfer is illusionary if it lacks certainty of intention, which would certainly rationalize the doctrine with accepted trust law. However, the court fails to address how such a transfer can be void only as against the surviving spouse. Indeed, it confuses matters further by suggesting that even a "real" gift may be voidable to satisfy the claim of a surviving spouse, if the donor lawfully retains "such a degree of control" over the property that "the transfer of title to the donee must be regarded as quasi-testamentary".\footnote{67} In other words, the transfer is valid enough to avoid operation of the Statute of Wills, but remains somehow testamentary vis a vis the surviving spouse. It seems that the most that can be said definitely about the illusionary transfer doctrine is that it can be used to effect redistribution of property transferred inter vivos, to provide for a surviving spouse, without offering a sound legal basis as to why such redistribution is proper.

While it may be argued that the doctrine of fraud upon marital rights has no better legal basis for redistributing property transferred to an inter vivos trust, it is certainly easier to understand than the illusionary transfer doctrine. While the same terminology often surfaces in both
doctrines--transactions are called illusionary, colourable, fraudulent or shams--the fraud doctrine avoids using the terminology to produce a complicated legal principle. Instead, a pragmatic approach is taken in searching for certain factors, the existence of which will justify infringing upon the right to freely alienate property. In applying the doctrine, the American courts openly acknowledge that they are concerned with public policy. As the Maryland Court of Appeal stated in 1952,

(T)he doctrine of fraud on marital rights represent an effort to balance the social and practical undesirability of restricting the free alienation of personal property against the desire to protect the legal share of a spouse.68

Although the American cases which follow this doctrine of fraud upon marital rights are not overly concerned with precise definitions, it is suggested that the fraud contemplated is an equitable or constructive fraud, as opposed to a legal fraud. While the distinction between legal and equitable fraud has fallen into disfavour in the United States in recent years,69 it is still good law in British Columbia.70 The principle of equitable fraud is therefore of assistance in understanding the American fraud on marital rights cases, and their potential applicability in our own jurisdiction. The principle was described by Viscount Haldane, L.C., in the 1914 case of Nocton v. Lord Ashburton.71

My Lords, it is known that in cases of actual fraud
the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times....But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolum malus. ...A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence....What it really means in this connection is, not moral fraud in the ordinary sense but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.72

The approach of the American judiciary in cases of marital fraud is substantially the same as that taken by Viscount Haldane in the passage above. Depriving a surviving spouse of a share in the deceased’s estate by transferring property to a revocable trust is condemned as behavior that is unconscionable, whether or not there was an intention to defraud.

Like any principle substantially equitable in nature, the fraud on marital rights doctrine would seem to result in a highly subjective, and hence unpredictable, series of cases. However, the American decisions are quite particular in identifying the indicia of behavior it considers unconscionable. For example, in Maryland, the Court of Appeals has specified that the following factors will all be considered
material in determining whether a transaction is fraudulent as against the surviving spouse: the completeness of the transfer; the extent of control retained by the transferor; the motive of the transferor; participation by the transferee in the alleged fraud; and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent spouse.73 Other factors which may also be considered include: the relative moral claims of the surviving spouse and the transferee; other provisions made for the surviving spouse; whether the surviving spouse has independent means; and the interval between the transfer and the death of the transferor.74 These factors have been adopted in toto by the courts in the District of Columbia.75 If marital fraud is found in these two states, the entire transaction is set aside.

The courts of other states have attempted to stipulate similar standards, but with less success from the point of view of clarity. For example, in Tennessee, the Court of Appeal in Sherrill v. Mallicote76 recognized that each case must be determined on its own facts, with particular consideration to: the lack of consideration, the size of the transfer vis a vis the settlors' total assets, the time between the transfer and date of death, the relations between the spouses at the time of the transfer, and the source from which the property came. However, the court also suggested that even
if there was no fraud

(G)enerally a gift or transfer inter vivos by a husband of his property, if absolute and bona fide and not made with a fraudulent intent, is not a fraud on the right of the wife to share in his estate at his death. However, the courts have voided such transfers when they have found them to be merely colourable— a device by which the husband is able to use and enjoy the property during his lifetime and at the same time deprive his wife of her rights in the property at his death...77

This reference to colourable transactions raises the spectre of the illusionary transfer doctrine: the transferor retains such a degree of control over the property that there is no "real" transfer at all. At least one commentator suggests that, in Tennessee, the two doctrines of fraud upon the marital rights and illusionary transfers, co-exist.78 However, in Sherrill v. Mallicote, the entire transaction (an inter vivos trust) was set aside, and it is therefore perhaps more accurate to say that some variation of the illusionary transfer doctrine exists in Tennessee.

Another form of the fraud on marital rights doctrine is found in Missouri. There, the courts are also willing to "consider all facts and circumstances in evidence".79 However, such considerations are only relevant to establish the intentions of the deceased in the inter vivos transaction. In Potter v. Winter, the Supreme Court of Missouri made this clear in the following passage:
...the voluntary conveyance which the widow may set aside as fraudulent is one executed with the intent and purpose to defeat his wife's marital rights.80

This emphasis upon motive places marital fraud in Missouri much closer to what Lord Haldane in Nocton v. Ashburton called "legal fraud", that is "fraud as descriptive of the dishonest mind of a person who knowingly deceives".81 Even courts which generally follow the "Massachusetts theory" have allowed that proof of such fraud may result in a finding that the transaction is invalid.82 The courts broadcast a clear message that certain behavior, predicated on specified factors, will not be tolerated.

In its purest form, as found in Maryland and the District of Columbia, there is an attractive simplicity to the doctrine of fraud on the marital rights. It is a practical doctrine: while fraud is the term used to label the solution, it is more of a catchall for unacceptable behavior than a strict legal principle. Nevertheless, the kinship to equitable fraud should not be ignored, for tying the American doctrine of fraud upon the marital rights to the English concept of equitable fraud may make the doctrine more acceptable to our own courts. The principle of equitable fraud is applied where one party is considered to be obligated to another in good conscience—that is, in equity. In Canada, this has included
relationships between employees and employers, agents and their principals, and creditors and debtors. Whether it would apply to family relationship is uncertain. The English authorities would suggest it should. In reviewing equitable fraud, Halsbury's indicates that

(R)elief will be granted in equity against a transaction which involves injury to third parties who stand in such a relation to the principal parties as to be affected by it, a rule which has been established on grounds of public policy.

Cases cited include one in which "a woman about to marry made a disposition of her property in fraud of her husband's marital rights". However, that decision dates to 1789, a time when men had considerable rights over his wife's property, arising upon marriage as opposed to death. As will be seen, the nature of these rights may be crucial. For the present, an argument can be made that there is an obligation flowing from the deceased to the surviving spouse or children, an obligation which today is to provide financial security or compensation, or to satisfy moral claims, from the deceased's estate. The fact that this obligation is to some extent codified buttresses the argument: the courts would merely be extending the legislation to a situation not contemplated by it but clearly within its intent. Equity was created for situations such as this, and equitable fraud might well be the remedy that the surviving spouse or child needs.
The equitable principle of unjust enrichment is another remedy which deserves mention in making the argument that a revocable trust should be set aside in favour of the surviving spouse or children. The now classic definition was enunciated by Dickson, J. in *Pettkus v. Becker*,88 as follows:

There are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment.89

The surviving spouse or children can certainly show that the beneficiaries under the revocable trust have been enriched. If (once again) the court accepts that the deceased is under a general obligation to provide for his or her surviving spouse or children, then there is a corresponding deprivation. It would then be a matter of fact to determine if there was any juristic reason for the enrichment.

The obstacle to be hurtled in arguing either a variation of equitable fraud/fraud on the marital rights, or unjust enrichment is convincing the courts that succession rights as they presently exist give rise to an equitable obligation on the part of the deceased to provide for the surviving spouse or children. While this obstacle seems formidable in light of the Canadian cases discussed above, it may well be that counsel in those cases did not argue, or argue
forcefully, the equities. Collier v. Yonkers\textsuperscript{90} and Kerslake v. Gray\textsuperscript{91} both focused on an interpretation of legislation rather than the rights of the surviving spouse or children. The case of Dower v. Public Trustee\textsuperscript{92} is the only case in which the equities were argued, if the Statement of Claim is any indication. It is therefore worth reviewing in some detail.

The Plaintiff was the wife of one John Dower, and the Defendants included the Public Trustee as Committee of the said John Dower, and apparently all of Mr. Dower's business associates and other relatives. The Plaintiff alleged that her husband had made gifts to the Defendants, other than the Public Trustee, for the purpose of defeating her claims for maintenance, support, and a fair share of his estate upon his death. She also alleged that the gifts were incomplete, illusionary, unconscionable, improvident, made under mistake, undue influence or while mentally incompetent. She specifically argued the provisions of 13 Elizabeth Ch. 5, dealing with fraudulent conveyances.

Mr. Dower died during the course of the proceedings, and the Defendants, again other than the Public Trustee, brought an application to strike out certain paragraphs in the Statement of Claim as disclosing no cause of action, particularly those dealing with maintenance and the fraudulent
conveyances statute. The court declined to strike out those dealing with maintenance, notwithstanding that such a claim ceased to exist when Mr. Dower died, because the claim was made against the Public Trustee as committee, and he was not the applicant.

The balance of the judgment dealt with the issue of whether an action lies under 13 Elizabeth Ch. 5 by the surviving spouse, to set aside transfers or gifts of property made during the deceased's estate. The statute declared void all conveyances or deeds made with the intention "to delay, hinder or defraud creditors or others". The court referred to May on Fraudulent and Voluntary Dispositions of Property, in finding that the words "creditors and others" included any persons with legal or equitable claims against the grantor or settlor. The question then arose as to whether a surviving spouse had any legal or equitable claim to share in property disposed of during the lifetime of the deceased spouse. The court found no such claim at common law, and then turned to a review of the provisions of the Family Relief Act, R.S.A. 1955, c. 109. The Australian and New Zealand cases were reviewed, and the court followed their reasoning in finding that provision could be made only out of the estate of the deceased. The court stated:

The Court, therefore, has no jurisdiction to grant a dependent a share of any property which was not owned by the deceased at the date of his death and is not
comprised in his estate.. 93

Nor could 13 Elizabeth Ch. 5 assist the surviving spouse with respect to any inter vivos transfers, for

(A) wife has no absolute right to an order under this Statute [the Family Relief Act] and the Court is not here dealing with legal or equitable rights of the widow or other dependent but with his or her moral rights and the moral obligation which the Family Relief Act recognizes as resting upon a man to provide for his widow and other dependents after his death. 94

This distinction between moral and equitable or legal claims is an important one for the present discussion. If the surviving spouse or child has only a moral claim to share in the deceased's estate, is this an obligation which equity should enforce under the equitable fraud or constructive trust doctrines? While only the courts can answer that question, it is clear that an affirmative answer would be an innovation in the law as in currently stands in British Columbia.

E. Conclusion

The foregoing discussion examined different approaches open to our courts in determining the question of the rights of surviving spouses and children to property transferred by the deceased to a revocable trust. The
Massachusetts, or liberal legal, doctrine in certainly the most popular one in the United States. There are strong indications that it is the preferred approach in jurisdictions similar to our own: New Zealand, Australia, Ontario, and Alberta. It is a doctrine which is easy to adopt, coinciding as it does with traditionally acceptable principles of law.

Nevertheless, it is a doctrine which ignores and defeats certain rights which modern society considers important: the rights of surviving members of a deceased's family to have security, compensation or perhaps moral claims satisfied from the deceased's estate. When such rights are brought to the courts' attention, they may be less willing to apply the liberal legal approach, as was the case in the Massachusetts case of Sullivan v. Burkin. The court there effectively made a judicial amendment to the Massachusetts succession statute because, while acknowledging that such a change is "best handled by legislation...until it is, the answers to these problems will be determined in the usual way through the judicial process". If our courts can be convinced that this is the appropriate approach, they have several alternate justifications for it: the doctrines of illusionary transfers and fraud on the marital right, or the equitable remedies of equitable fraud or the constructive trust. It is suggested here, however, that it will not be easy to convince a court in British Columbia that it should adopt an
approach which might "open the floodgates" of a new cause of action. The equitable approach is notoriously unpredictable, insofar as it is essentially a subjective judgment of facts, as opposed to applying established rules to facts. It is suggested here that the practice of transferring property inter vivos to defeat spousal and children's rights would have to be very widespread before the courts in British Columbia contemplated taking the initiative over the Legislature.
Footnotes to Chapter 6

1. Family Relations Act, R.S.B.C. 1979 c 121, section 43.
2. Ibid., section 45.
4. Ibid., at 137.
5. 59 B.C.L.R. 27.
7. Ibid., at 248.
11. Supra, footnote 9, section 2.
12. Supra, footnote 10, section 96 and 85-86.
15. Kulzer, Ibid., at 201.
18. see MacDonald, supra, footnote 14 at 24 - 29.
20. MacDonald, supra, footnote 14.
21. Ibid., at 24.

23. *Supra*, footnote 16 at 75.

24. For a detailed review, albeit dated, of such rights in the United States, see Oval A. Phipps, "Marital Property Rights" (1955), 27 Rocky Mtn L.R. 180; and more recently, concerning New York, and Pennsylvania only, Elias Clark, "The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms" (1970), 2 Conn. L.R. 513.


28. Ibid., at 122.


30. Ibid., at 306.


33. Ibid., at 67.


35. Ibid., at 464.


37. Ibid., at s. 62.


41. **Ibid.** at 519.


43. **Ibid.** at 141-2.


45. **Ibid.** at 577.


47. **Ibid.** at 970.


49. John Cornelius Hayes, "Illinois Dower and the 'Illusionary' Trust: The New York Influence" (1952), 2 *dePaul Review* 1, at 16; MacDonald has referred to these transfers as "quasi testamentary", supra, footnote 14 at 87.

50. In **Newman v. Dore,** supra, footnote 46 at 969, the court found the trust was valid "except for the provisions of" of the statute granting a forced share; see also **Merz v. Tower Grove Bank & Trust Co.,** 344 Mo. 1150, 130 S.W. 2d 611 at 616 (1939 S.C. of Mo.).

51. **Clark,** supra, footnote 24, at 519.


53. **Newman v. Dore,** supra, footnote 46 at 969


55. **Ibid.** at 623-4.


57. MacDonald, supra, footnote 14 at 123; Hayes, supra, footnote 49 at 79-20.
58. Re Halpern's Estate, 100 N.E. 2d 120 (1951)

59. Ibid., at 122.


63. Ibid.

64. see MacDonald, supra, footnote 14, at 135-7, for a review of what the Colorado courts have meant by the term "colourable".


66. Ibid., at 673.

67. Ibid., at 677.


70. see C.E.D. (Western) 15 (3rd), Title 67: Fraud and Misrepresentation.


72. Ibid., at 951-2,954.


74. Ibid.

76. Supra, footnote 61.
77. Ibid.
78. Casenote, 36 Tenn. L.R. 604 at 608.
79. Supra, footnote 50.
81. Supra, footnote 71 at 955.
82. See, for example, Dunnett v. Shields and Conant, 97 Ve. 419, 123 A. 626 (1924).
87. Ibid., note 3.
89. Ibid., at 180.
90. Supra, footnote 38.
91. Supra, footnote 40.
92. Supra, footnote 42.
93. Ibid., at 39.
94. Ibid., at 35.
95. Supra, footnote 44 at 578.
The purpose of this thesis has been to study the revocable trust, that is, an inter vivos trust containing a power of revocation. The particular interest has been to determine its suitability as an alternative to the will in the jurisdiction of British Columbia. The genesis of this study was a concern about the effectiveness of the will to freely dispose of property upon death, in light of the judiciary's interpretation and application of the Wills Variation Act of British Columbia. The recent imposition of hefty probate fees in this province creates a subsidiary reason to consider alternatives to the traditional will.

There are numerous methods of disposing property upon death outside the ambit of a will. Depending upon the nature of the property and the beneficiaries, an individual can consider an intestacy, joint tenancies, and designations under pension plans, insurance plans or employee benefit plans. However, none of these methods separately or collectively can provide a comprehensive control over disposition of all of one's property upon death. Nor do they provide the benefits perceived to derive from using a will. These benefits include the ongoing personal control of the property during life, the
ability to choose and change beneficiaries at whim, and to impose conditions upon gifts, the ability to appoint and change guardians and executors, and the entirely private nature of the will.

The revocable trust, on the other hand, can not only comprehensively dispose of all of one's property upon death, but can also provide many of the perceived benefits of the will. Such a trust would generally include a life interest in the trust property in favour of the settlor, a power by the trustee to encroach upon capital for the benefit of the settlor, and some powers of administration and alteration granted to the settlor. With careful drafting, the settlor can maintain control over the trust property, can impose conditions upon gifts, and can change beneficiaries or trustees with ease. The trust can be as private as a will, and with the power of revocation, the settlor has the ultimate freedom of changing his or her mind at any time.

The one feature of a will that a revocable trust cannot provide is its ambulatory nature. While a will has no force and effect until death, a trust is enforceable immediately upon its creation, that is, when the trust property has been transferred to the trustee and the three certainties are ascertainable.
This distinction is an extremely important one in studying the viability of the revocable trust as a substitute for the will. Indeed, the failure to recognize the distinction has resulted in substantial litigation in the United States over the years, in cases where the trust has been used as an alternate to the will. The issue raised is the testamentary nature of the trust. It is argued that the settlor, by retaining a large degree of control over the trust property, and providing for distribution to residual beneficiaries only upon the settlor's death, has effectively created only a testamentary instrument.

In the early part of this century, the American judiciary accepted this argument, and found that in such circumstances the trustee was merely an agent of the settlor. This was the established view until the 1940s, when the courts began to accept that a revocable trust, whatever its results, transferred an interest in property inter vivos, and was not testamentary. It was this recognition of the distinction between a revocable trust and a will that permitted the revocable trust to become popular as a wills substitute in the United States.

The Canadian experience with revocable trusts has been largely confined to employee benefit plans, pension plans, and blind trusts. There is a dearth of authority, academic or
judicial, dealing with revocable trusts as substitutes for wills. While this would appear to open the door to reliance upon the modern American authorities when considering the revocable trust as a wills substitute, the cautious should be aware of certain principles in Canadian caselaw which might affect such use. In particular, there is a line of cases which review the testamentary nature of gifts and trusts. The test enunciated is whether the instrument containing the gift or trust is "dependent upon death for its vigour and effect". Some cases have applied this test to the results or performance of the instrument, repeating the mistake made in the early American decisions which failed to distinguish the nature of the trust and the nature of the will. However, this approach has been criticized in other cases, and the better view is that the test should be applied to the instrument itself. For trusts, this means that if there is a transfer of property to a trustee inter vivos, the instrument creates a present interest and does not rely upon death for its vigour and effect. The fact that the instrument may contain testamentary intentions does not necessarily make it testamentary per se.

While the revocable trust may not be testamentary under this test, it may nevertheless be attacked on other grounds. There are virtually no Canadian cases which review a revocable trust drafted specifically for the purpose of replacing a will. There is some authority for the
permissibility of powers of revocation or modification combined with life interests in trusts which contain testamentary intentions. However, the detailed powers of control which would be required to imitate a will have not been examined by the Canadian judiciary, and it is necessary to rely upon the American cases which permit very broad powers of control. It should be kept in mind, however, that all powers of control are subsidiary to the power of revocation, which is the ultimate control of all. It can thus be argued, using the Canadian authorities approving powers of revocation, that powers of control are equally permissible.

The importance of the Canadian cases which discuss testamentary matters, and the American cases which find that there is merely an agency rather than a trust, lies in drafting considerations. No matter how many cases are cited in support of the validity of a power of revocation, powers of control, or life interests, the success of a particular revocable trust will always depend upon its own terms, and how they are used. Poor drafting or poor operation of the trust will expose it to attacks based on testamentary and agency considerations.

According to the American authorities, a properly drawn revocable trust can not only emulate a will but can provide additional benefits not available when using a will. For example, by using the revocable trust, it is possible to
see one's trustee in action, and to determine the effectiveness of trust terms. The revocable trust can also provide uninterrupted management of one's affairs not only during any physical or mental infirmity, but also upon one's death. The revocable trust is not revoked by marriage or divorce, and it is difficult to argue that the settlor was mentally incompetent or unduly influenced when it was created, if he or she was involved in its operation.

There are, of course, some disadvantages in using a revocable trust as a substitute for the will. Because it does entail a present transfer of trust property from the settlor to the trustee, the revocable trust may trigger tax consequences at both the federal and provincial level. Federal and provincial income taxes may result from any taxable capital gains, and a provincial purchase property tax may have to be paid. Income tax returns will have to be filed for the trust each year, notwithstanding that the income and taxable capital gains or losses of the trust are attributable to the settlor. While the income tax consequences may be beneficial in some circumstances, they must be examined carefully before committing assets to the revocable trust.

Problems may also arise during the operation of the revocable trust, if the settlor acts as the sole trustee. It may be difficult to maintain the standard of care required by a
trustee in dealing with property which is still considered by the settlor to be his or her own. However, failure to do so may result in allegations of breach of trust by beneficiaries against not only subsequent trustees but also the settlor's estate. It may be wise to appoint the succeeding trustee to a position of co-trustee during the settlor's lifetime, or even consider an institution as a co-trustee, to maintain proper records and practices. In any event, it is crucial that the settlor understand his or her role as trustee as opposed to trust beneficiary.

Another area of concern will be when the revocable trust is used specifically to avoid claims by surviving spouses or children under the Wills Variation Act. Although the provisions of that Act ostensibly apply only to the estate of the testator, it is possible that the courts will extend its application to property held in a revocable trust. A strong argument can be marshalled that it would be contrary to public policy to deprive a surviving spouse or children of a share in the testator's assets, whether held in a revocable trust or an estate. In support of the argument can be cited a number of American cases which set aside inter vivos trusts in whole or in part to satisfy succession claims of the surviving spouse. These cases fall into two broad categories described as the "illusionary transfer" doctrine and the "fraud on marital rights" doctrine. The first is a hybrid of the older theory
that a revocable trust was testamentary in nature. The courts find that the trust is testamentary and ineffective, but only insofar as the surviving spouse is concerned. The doctrine is not easily reconcilable with traditional trust principles, but is nevertheless popular in some American jurisdictions.

The fraud on marital rights doctrine is similar to the principle of equitable or constructive fraud found in British Columbia jurisprudence. It is unnecessary to find an actual fraudulent intent, the focus being rather upon the inequitable results which may occur when moral obligations are ignored. The American doctrine takes a pragmatic approach to the rights of the surviving spouse, and reviews the facts of each case to determine whether it would be equitable to set aside the trust. The difficulty with this approach is that it is somewhat subjective, and makes the law unpredictable.

There is no evidence that either doctrines would be adopted by the courts in British Columbia. Indeed, the trend here and in other Canadian jurisdictions is more akin to another American doctrine known as the "liberal legal" or "Massachusetts" theory. The focus is upon whether the legal requirements of a trust have been fulfilled. If so, the courts will not set it aside notwithstanding possible inequitable results for the surviving spouse or children. This view favours the free alienability of property over moral claims.
upon that property.

Although the indication is that our own courts prefer the liberal legal doctrine, the more equitable approach found in the marital fraud and illusionary transfer doctrines should not be ignored when drafting a revocable trust which is intended to defeat claims under the Wills Variation Act. A small bequest for the potential claimant in a will, coupled with a declaration under the Act, should be considered.

Notwithstanding the possible drawbacks to using the revocable trust as a substitute for the will, it has considerable potential in the right circumstances. It behooves practitioners to consider innovative methods of satisfying a client's needs. In the case of the revocable trust, there is little reason to ignore its application in estate planning as developed by our American colleagues.