

## Title

Only the trust, as opposed to the will, can facilitate the inter vivos bestowal on others of vested yet retrievable property rights in one's property

## Text

Consider the following hypothetical: Testator executes a will (signs, has witnessed, etc.) that specifically devises (bequeaths pre-UPC) his Rolls-Royce to X, a named individual. Period. Testator's intention is that if X predeceases testator, testator's Rolls-Royce shall become an asset of X's probate estate upon testator's death.

*The will's limitations.* Under classic wills doctrine, however, should X predecease the testator the devise upon the testator's death will instead lapse (fail), with the subject property either passing via the will's residue clause, or, in the absence of such a clause, via intestate succession to the testator's heirs at law. This is because during the testator's lifetime X's interest in the Rolls-Royce was a mere expectancy, which is not a property interest. An expectancy is not even a future interest in property. Recall that a will is ambulatory/revocable. And being testamentary, it speaks only at the testator's death. Since X possesses no property interest (vested, contingent, or otherwise) in the Rolls-Royce while the testator is alive, no property rights in the Rolls-Royce can accrue to X's executor (personal representative), *qua* executor (personal representative), at X's death should X predecease the testator. For that reason, a devise to "X or [into] X's probate estate should X predecease me" also will not fly.

Now the devise could have been expanded at the drafting stage to specify alternate direct takers of the Rolls-Royce upon the testator's death should X predecease the testator. Or should X predecease testator, upon the testator's death some antilapse statute might kick in and supply alternate direct takers, possibly X's issue should he have any at the time of the testator's death. But our testator is not interested in supplying, or having the state supply, alternate direct takers in the event X predeceases. The testator wants the Rolls-Royce eventually to become an actual asset of X's probate estate.

*The revocable inter vivos trust to the rescue.* The revocable inter vivos trust is tailor-made for getting vested property rights in the Rolls-Royce into the hands of X while X is alive, while at the same time allowing the testator (hereinafter settlor) to retrieve those rights while the settlor is alive. The process is simple.

Settlor establishes a revocable inter vivos trust and transfers legal title to the Rolls-Royce to the trustee. The trust’s terms provide that upon the death of the settlor title to the Rolls-Royce shall pass outright and free of trust from the trustee to X *free of any survivorship preconditions*. Period. That X is a named individual alive when the trustee takes title is critical. See appendix below. Any trust related UPC antilapse provisions that might otherwise be applicable are expressly negated. See UPC §2-707; *Loring and Rounds: A Trustee’s Handbook* (2023) §8.15.55. In other words, grant to X *ab initio* via the trust’s terms a “vested (transmissible) contingent equitable remainder” or a “vested equitable remainder subject to divestment.” As to the former property interest, the primary condition precedent is the non-exercise of the settlor’s right of revocation. As to the latter property interest, the primary condition subsequent is that the right is exercised. These two vested equitable *property* interests are explained and compared in §8.30 of *Loring and Rounds: A Trustee’s Handbook* (2023), which section is reproduced in the appendix below. See especially footnote 26 in the appendix. The Handbook is available for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-roundstrustees-hanbook-2023e/01t4R00000Ojr97QAB>.

### Appendix

## §8.30 The Difference Between a Vested Equitable Remainder Subject to Divestment and a Vested (Transmissible) Contingent Equitable Remainder [from *Loring and Rounds: A Trustee’s Handbook* (2023), available for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-roundstrustees-hanbook-2023e/01t4R00000Ojr97QAB>].

*I am quite aware that this is all largely matter of words, but so is much of the law of property; and unless we treat such formal distinctions as real, that law will melt away and leave not a rack behind.—Learned Hand<sup>1</sup>*

A *legal* future interest requires a previous estate to support it.<sup>2</sup> Because no *equitable* future interest incident to a trust relationship requires a previous supporting estate, legal title being in the trustee, there is technically no such thing as an equitable remainder.<sup>3</sup> Thus, Prof. John Chipman Gray, exhibiting his characteristic scholarly precision, has labeled the equitable equivalent of a legal remainder a quasi remainder.<sup>4</sup> The UPC employs the term “remainder in corpus.”<sup>5</sup> Better still. The Restatement (Third) of Property (Wills and Other Donative Transfers) has no patience with such scholarly precision as evidenced in its coverage of remainder doctrine. We explain in *Old Doctrine Misunderstood, New Doctrine*

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<sup>1</sup>Comm’r v. City Bank Farmers’ Tr. Co., 74 F.2d 242, 247 (2d Cir. 1934).

<sup>2</sup>See generally §8.27 of this handbook (the difference between a legal estate and an equitable one).

<sup>3</sup>See John Chipman Gray, *The Rule Against Perpetuities* §324 (4th ed. 1942).

<sup>4</sup>See John Chipman Gray, *The Rule Against Perpetuities* §324 (4th ed. 1942).

<sup>5</sup>See, e.g., UPC §2-707 cmt. (specifically *Examples* 1, 3, 4, 5, 6, 7, 8 & 10).

*Misconceived: Deconstructing the Newly-Minted Restatement (Third) of Property's Power of Appointment Sections.*<sup>6</sup>

**The vested equitable remainder subject to divestment.** A *vested equitable remainder subject to complete divestment*<sup>7</sup> would look something like this: A (settlor) transfers property to B (trustee) for C (life beneficiary) for life, remainder to D, an ascertained individual (remainderman); but if Susan marries Tom during C's lifetime (condition subsequent), then the trust property passes outright and free of trust to X (alternate remainderman). At the time the property is transferred from A to B, D receives a vested equitable remainder subject to complete divestment during the period that C, Susan and Tom are all alive and Susan and Tom are unmarried to one another. Should D die during that period, D's equitable remainder interest passes to his estate.

If the condition subsequent, *i.e.*, the marriage of Susan to Tom, is still unfulfilled at C's death, the underlying trust property passes to the executor of D's estate at C's death. If, on the other hand, Susan and Tom end up marrying during C's lifetime, D's equitable remainder extinguishes at the time of the marriage because the condition subsequent has been fulfilled. The practical consequence is that the underlying trust property passes to X upon the death of C. Unlike a remainder which is a successive interest, an executory interest is a divesting interest.<sup>8</sup> X's interest is an example of an equitable shifting executory interest. Springing and shifting executory property interests, both of the legal and the equitable varieties, are covered generally in §8.15.80 of this handbook.

One court has found the equitable interest of a remainderman vested subject to divestment where the trust was revocable and the remainderman was named and alive at the trust's inception.<sup>9</sup> In this case, the condition subsequent was the settlor exercising her right of revocation. The remainderman having predeceased the settlor, the property subject to the unrevoked trust passed to the estate of the remainderman upon the settlor's death. Other courts, however, see such arrangements very differently, as do the authors of this handbook: "... [T]rusts in which the settlor retains the right to amend or revoke the instrument [sic] do not convey 'presently vested rights' to beneficiaries because their interests are contingent upon the settlor not amending or revoking the trust."<sup>10</sup>

If enforcement of a condition subsequent is illegal or violates public policy,<sup>11</sup> there are at least two possibilities: The interest subject to the condition becomes absolute<sup>12</sup> or the condition is deemed not to have been imposed, not to have been satisfied actually.<sup>13</sup> The Restatement (Third) of Trusts generally favors the second approach so as to accommodate provisions in default of the condition's fulfillment.<sup>14</sup>

We would note here that vested equitable *reversionary* interests also can be rendered subject to a divestment. In response to "concerns about the clogging of title and other administrative problems caused

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<sup>6</sup>Charles E. Rounds, Jr, *Old Doctrine Misunderstood, New Doctrine Misconceived: Deconstructing the Newly-Minted Restatement (Third) of Property's Power of Appointment Sections*, 26 *Quinnipiac Prob. L.J.* 240, 247–248 (2013).

<sup>7</sup>See generally John Chipman Gray, *The Rule Against Perpetuities* §108 (4th ed. 1942).

<sup>8</sup>Cornelius J. Moynihan, *Introduction to the Law of Real Property* 191–192 (2d ed. 1988).

<sup>9</sup>*First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956).

<sup>10</sup>*Patterson v. Patterson*, 266 P.3d 828, 836 (Utah 2011). See also *Pennington v. Vonier*, 589 S.W.3d 734 (Mo. 2019).

<sup>11</sup>See generally §9.24 of this handbook (the incentive trust (and the public policy considerations); marriage restraints).

<sup>12</sup>1 Scott & Ascher §9.6.2.

<sup>13</sup>1 Scott & Ascher §9.6.2. See also 1 Scott & Ascher §§9.7 (When Performance Is Impossible) and 9.8 (When the Terms of the Trust Are Indefinite).

<sup>14</sup>Restatement (Third) of Trusts §29 cmt. i(1).

by remote default provisions upon failure of a charitable purpose,”<sup>15</sup> for example, the UTC would sharply curtail the ability of a settlor to create a charitable trust whose property would revert to the settlor’s personal representative, *i.e.*, the settlor’s probate estate, upon the accomplishment of that purpose (or upon the impossibility of its fulfillment), even when the purpose is a limited one.<sup>16</sup> This is a topic we cover in some detail in §9.4.3 of this handbook as part of our discussion of the *cy pres* doctrine. In England, on the other hand, a reversion upon the happening of a condition subsequent now implicates the Rule against Perpetuities.<sup>17</sup> The Rule is also implicated when the duration of an English charitable trust is subject to a contingency-based limitation, such as so long as a certain state of affairs continues.<sup>18</sup> Thus, an equitable reversion upon the failure of an English charitable trust would be unenforceable if the interest were to become possessory beyond the period of the rule.<sup>19</sup> *Cy pres* would then have to be applied.

**The vested (transmissible) contingent equitable remainder.** A *vested (transmissible) contingent equitable remainder*,<sup>20</sup> on the other hand, would look something like this: A (settlor) transfers property to B (trustee) for C (beneficiary) for life, remainder to D, an ascertained individual (remainderman), if Susan marries Tom during C’s lifetime; if Susan is not married to Tom at the death of C, then to X (alternate remainderman). At the time the property is transferred from A to B, D takes a vested (in the sense of transmissible) contingent equitable remainder.<sup>21</sup>

Why transmissible? Because D, at the trust’s inception, is an ascertained individual whose interest is not conditioned upon his surviving C.

Why contingent? Because D’s interest is subject to a condition precedent, namely Susan’s marrying Tom by the time C dies. As an aside, if the condition precedent were illegal or violated public policy, *e.g.*, if the interest instead were subject to the precondition of D divorcing his own wife,<sup>22</sup> then a court might well deem the interest to be fully vested in *ab initio*, with enjoyment to await the expiration of C’s prior estate.<sup>23</sup>

And what are the practical consequences of D’s possessing what is sometimes called a vested contingent remainder? If D dies after the trust’s inception but before C dies and if Susan marries Tom during that period as well, then the trust property passes to D’s estate upon the death of C.<sup>24</sup> If Susan and Tom are not married at C’s death, the property passes to X. That having been said, for rule against perpetuities analysis purposes, D’s interest is deemed to be fully contingent.<sup>25</sup>

How can one tell the difference between a *vested equitable remainder subject to complete divestment* and a *vested (transmissible) contingent remainder*? Ultimately it hinges on the words used, as Professor Gray has explained: “If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is

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<sup>15</sup>UTC §413 cmt.

<sup>16</sup>UTC §413. *See generally* 6 Scott & Ascher §39.5.2.

<sup>17</sup>*See generally* 6 Scott & Ascher §39.7.2.

<sup>18</sup>6 Scott & Ascher §39.7.3 (Limitations).

<sup>19</sup>*See generally* 6 Scott & Ascher §39.7.2.

<sup>20</sup>*See generally* John Chipman Gray, *The Rule Against Perpetuities* §118 (4th ed. 1942).

<sup>21</sup>*See also* §8.15.65 of this handbook (destructibility of contingent remainders rule [the trust exemption]).

<sup>22</sup>*See generally* §9.24 of this handbook (the incentive trust (and the public policy considerations); marriage restraints).

<sup>23</sup>2 Scott & Ascher §9.6.3. *See also* 2 Scott & Ascher §§9.7 (When Performance Is Impossible) and 9.8 (When the Terms of the Trust Are Indefinite).

<sup>24</sup>*See, e.g.*, *Hills v. Barnard*, 152 Mass. 67, 25 N.E. 96 (1890).

<sup>25</sup>*See* John Chipman Gray, *The Rule Against Perpetuities* §118 (4th ed. 1942).

added divesting it, the remainder is vested.”<sup>26</sup> Professor Moynihan has found the test to be helpful, but not always that easy to apply in a given situation, noting that “it may be difficult to determine in some cases whether the conditional element is ‘incorporated into the gift to the remainderman.’”<sup>27</sup> He suggests that “[i]t may first be necessary to resort to rules of construction to determine the meaning of the language.”<sup>28</sup> He elaborates with some examples in his *Introduction to the Law of Real Property*.<sup>29</sup>

**The Restatement (Third) of Property intentionally conflates the two types of future interest.** The Restatement (Third) of Property further complicates matters by pretzeling the traditional vested equitable future interest that is subject to a condition subsequent into an interest that is subject to a condition precedent.<sup>30</sup> “A condition subsequent is a condition that is expressed as a condition that, if satisfied on or before the distribution date, extinguishes the possibility that the future interest will take effect in possession or enjoyment.”<sup>31</sup> This intentional conflation is unfortunate as the transmissibility of the vested remainder subject to divestment is easier to grasp conceptually than the transmissibility of the contingent remainder. Moreover, while all such vested remainders are transmissible, the same cannot be said for all versions of the contingent remainder.<sup>32</sup>

**The holder of a legal right of entry for condition broken is not a trust beneficiary.** This is a topic we take up in §9.9.24 of this handbook. For a discussion of the differences between a legal property interest and an equitable one, the reader is referred to §8.27 of this handbook.

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<sup>26</sup>John Chipman Gray, *The Rule Against Perpetuities* 95 (4th ed. 1942). Some courts have found a reserved right of revocation to be a condition precedent, others to be a condition subsequent. *See, e.g.*, *Baldwin v. Branch*, 888 So. 2d 482 (Ala. 2004) (involving a vested interest subject to divestment upon the settlor’s exercising his right of revocation); *First Nat’l Bank of Bar Harbor v. Anthony*, 557 A.2d. 957 (Me. 1989) (involving a vested contingent/transmissible equitable remainder that was conditioned on the settlor not exercising his right to revoke). It should be noted that a transmissible equitable remainder whether vested or contingent is an interest in property which itself may be the subject of a trust. *See generally* §2.1.1 of this handbook (the inter vivos trust).

<sup>27</sup>Cornelius J. Moynihan, *Introduction to the Law of Real Property* 128 (2d ed. 1988).

<sup>28</sup>Cornelius J. Moynihan, *Introduction to the Law of Real Property* 128 (2d ed. 1988).

<sup>29</sup>Cornelius J. Moynihan, *Introduction to the Law of Real Property* 128 (2d ed. 1988).

<sup>30</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §26.2 cmt. c (“This Restatement declines to perpetuate a difference in classification between a condition precedent and a condition subsequent.”).

<sup>31</sup>Restatement (Third) of Property (Wills and Other Donative Transfers) §26.2 cmt. b.

<sup>32</sup>*See generally* §8.30 of this handbook.