

The Worthier Title Doctrine: Does *Draft Restatement III of Property* Write a Premature Obituary?

Joseph W. Morris*

I.

Fifty-seven years ago, I submitted to the Editors of the *Oklahoma Law Review* for their consideration a portion of my dissertation. As a young lawyer hoping to be published, I was elated when advised that my submission would be published as the lead article in the May issue of the *Review*.¹ I was also elated some years later when I was advised that the second part of my dissertation would be published as the lead article in the February issue of the *Michigan Law Review*.²

In doing my research on the Inter Vivos Branch, I had the good fortune to have as my mentor Professor Lewis M. Simes, legendary Professor of Law at the University of Michigan. It was his practice to meet once each week with me for one hour, one-on-one, at which time I reported to him the progress I was making on my research project. Having already completed the course in Future Interests before I arrived at Michigan, I was not permitted to take his course in Future Interests but was permitted to audit his class. I inquired of him early on in our weekly meetings whether we could talk about anything embraced within the law of Future Interests after I had completed my weekly report to him. He said, “The field is wide open for discussion.”

For me, this was a once-in-a-lifetime opportunity to “sit at the feet of the master” and discuss an area of the law that fascinated me to no end. Professor Simes was a gracious, humble, unassuming man, a giant scholar, and a superb writer. He had completed his three-volume treatise, *The Law of Future Interests*,³ was working on the first edition of the *Handbook on the Law of Future Interests* for West’s Hornbook Series,⁴ and was one of those who worked on the *Restatement (First) of Property* (1940), referred to herein as *Restatement I*.

* A.B. 1943, LL.B. 1947, Washburn University; LL.M. 1948, S.J.D. 1955, University of Michigan; admitted to practice law in Kansas, Oklahoma and Texas; member of the Board of Directors of Gable & Gotwals, Tulsa, Oklahoma; former Chief Judge of the United States District Court for the Eastern District of Oklahoma; life member, The American Law Institute.

1. See Joseph W. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949).

2. See Joseph W. Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451 (1956).

3. LEWIS M. SIMES, *THE LAW OF FUTURE INTERESTS* (1936).

4. LEWIS M. SIMES, *HANDBOOK ON THE LAW OF FUTURE INTERESTS* (1951).

II.

I write today on the Inter Vivos Branch of the Worthier Title Doctrine because *Restatement (Third) of Property: Wills and Other Donative Transfers* (Tentative Draft No. 4, 2004), referred to herein as *Restatement III*, diametrically reverses the position of *Restatement I* and *Restatement (Second) of Property: Donative Transfers* (1987), referred to herein as *Restatement II*. It does so (1) without acknowledging the reversal; (2) without acknowledging that its new position is contrary to the work and thinking of generations of legal scholars; and (3) without acknowledging that the new draft sets forth the writers' view, not of what the law "is" but, rather, of what the law "ought to be." More importantly, it continues a shift in the role of the Restatements of Property,⁵ which in my view, substantially lessens its value.

III.

The Inter Vivos Branch of the Worthier Title Doctrine may be stated as follows: If a person makes an inter vivos conveyance with an ultimate end limitation to his own heirs or next of kin, the end limitation is void in the sense that it designates purchasers, and the grantor retains a reversionary interest. The legal consequences flowing from the application of the Inter Vivos Branch are wide in scope and are significant.⁶ In my research on the Inter Vivos Branch, I attempted to develop the history and the breadth and depth of that doctrine as reflected in English and American law. I attempted to state what the law was and also inquired into what the law ought to be. I thought it was important to ascertain the state of the law as it existed and also to examine whether this doctrine, having had its ancient origins in England, was a justifiable principle in modern U.S. law.

I knew that *Restatement I* had concluded that, as a rule of construction, the rule was justified because it furthered the likely intention of the grantor. *Restatement I* put it this way:

The continuance of the rule stated in Subsection (1) as a rule of construction is justified on the basis that it represents the probable intention of the average conveyor. Where a person makes a gift in remainder to his own heirs (particularly where he also gives himself an estate for life) he seldom intends to create an indestructible interest in those persons who take his property by intestacy, but intends the same thing as if he had given the remainder "to my estate"

5. See A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 100 (1981); W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 25 (1985).

6. See *Dunnett v. First Nat'l Bank & Trust Co.*, 85 P.2d 281 (Okla. 1938); *Conrad v. Funnell*, 232 P. 950 (Okla. 1924); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2 cmt. h (1988); Morris, *supra* note 1, at 160.

The increased alienability of the subject matter of the conveyance which results from the application of the rule stated in Subsection (1) is also a justification for the continuance of this rule.⁷

In struggling with the issue of whether the Inter Vivos doctrine had any justifiable place in U.S. law, and before I had read all of the cases and done all of the research, I had initially been of the view that it was a principle no longer justified in our law and that it should be abolished legislatively or by court decision.⁸ The more research I did, the less certain I became as to whether my initial premise was correct. At the end, I concluded:

Suffice it to say that the term “rule of construction” has been used in this article to indicate that when a grantor makes an ultimate limitation to his own heirs or next of kin, there arises a rebuttable presumption to the effect that he has retained a reversionary interest. This presumption may be overcome by provisions in the instrument which seem to indicate that he had a contrary intent.

. . . .
. . . The position taken in the *Restatement of Property* is that the rule is justifiable on the basis that it “represents the probable intention of the average conveyer.”

This position seems sound. It is consistent with the idea that the average person prefers to enjoy and retain ownership of the property which he has accumulated during his life, and that unless he manifests an intention to create indestructible interests in his prospective heirs or next of kin, he probably intends to retain a reversionary interest.⁹

IV.

Restatement II, published nearly fifty years after *Restatement I*, again addresses the Inter Vivos Branch. The black-letter law is stated as follows:

§ 30.2 Transfer to the Heirs or Next of Kin of the Transferor

(1) If a person purports to make an intervivos transfer of an interest in real property, or of an interest in personal property, to his or her own heirs or next of kin, such purported transfer is a nullity in the sense that it designates neither a transferee nor the type of interest of a transferee, unless additional language or circumstances indicate the heirs or next of kin are to take as purchasers or indicate that they are to take as purchasers unless such person revokes the transfer to them.¹⁰

7. RESTATEMENT OF PROP. § 314 cmt. a (1940).

8. Justice Oliver Wendall Holmes of the Supreme Judicial Court of Massachusetts stated the following:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

9. Morris, *supra* note 1, at 174.

10. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2(1) (1988).

In Comment a on subsection (1) above, the continued justification of the Inter Vivos Branch is stated as follows:

The continuance of the rule stated in subsection (1) as a rule of construction may be justified on the basis that it represents the probable intention of the average transferor. However, additional language or circumstances may establish that the transferor intends the heirs or next of kin to take as purchasers under all circumstances, or that they take as purchasers only if the transferor does not revoke their interests.

The increased alienability of the subject matter of the transfer which results from the application of the rule stated in subsection (1) is also a justification for it.¹¹

Professor A. James Casner of Harvard, the Reporter of this volume of *Restatement II*, in his note to section 30.2, stated the following: "Comparison with present state of the law—The rules of this section are supported by judicial authority. Also, there is limited judicial authority abolishing the Doctrine of Worthier Title."¹² Comment e to subsection (1) of section 30.2 states as follows: "The rule stated in subsection (1) is a rule of construction based on the inference that the average grantor does not intend by a limitation to his or her own heirs to create in them an interest that is indestructible by the grantor during the grantor's own lifetime."¹³ The statutory note to section 30.2 directs attention to the fact that eleven states have abolished by statute the Doctrine of Worthier Title and that the Joint Editorial Board of the Uniform Probate Code approved, in principle, the abolition of the Doctrine of Worthier Title.

There is nothing that appears in the language used in the black-letter law or in the comments that follow or in the notes by Professor Casner that explicitly states or infers that section 30.2 does not represent a restatement of the law as it then existed.¹⁴ Indeed, Professor Casner stated that the rule in this section is "supported by judicial authority," pointing out, of course, that there is "limited judicial authority abolishing the Doctrine of Worthier Title."¹⁵

There is clearly nothing in the language used that suggests the Inter Vivos Branch *ought not to be the law*. I make this comment for the reason that there have been rather strong expressions by some writers that certain portions of *Restatement II* constitute an important

11. *Id.* § 30.2(1) cmt. a.

12. *Id.* § 30.2 n.1.

13. *Id.* § 30.2(1) cmt. e.

14. I know, based upon my numerous conversations with Professor Simes, that the Reporters and Advisers who worked on *Restatement I* took great care to state the law as it existed and did not state what they thought the law ought to be.

15. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2 n.1 (1988).

philosophical change in the property restatements from that of restating the law in *Restatement I* to reforming the law in *Restatement II*.¹⁶

V.

*Restatement III*¹⁷ again addresses the Inter Vivos Branch. The black-letter law is stated as follows:

§ 16.3 Doctrine of Worthier Title Repudiated

The doctrine of worthier title is repudiated, both as a rule of law and as a rule of construction. An inter vivos transfer purporting to create a future interest in the transferor's heirs or next of kin creates a future interest in the transferor's heirs or next of kin, not a reversionary interest in the transferor.¹⁸

The Comment following the black-letter law tersely reviews the history of the Worthier Title Doctrine. Attention is next directed to then Judge Benjamin N. Cardozo's decision in *Doctor v. Hughes*.¹⁹ This decision, without doubt, is the leading case on the Inter Vivos Branch and is widely cited. Judge Cardozo, writing for a unanimous court of appeals, stated that

the rule persists today, at least as a rule of construction. . . . We do not say that the ancient rule survives as an absolute prohibition But at least the ancient rule survives to this extent: That, to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed.²⁰

Softly, but clearly criticizing Judge Cardozo's rationale, *Restatement III* then provides the following: "But shifting a mandatory rule of law to a rule of construction is not a natural evolutionary step in legal development."²¹ Continuing, *Restatement III* provides:

Rules of construction, on the other hand, operate in areas in which society as a whole is indifferent to the result. The only public policy goal that rules of construction vindicate is giving effect to private intention in areas of societal indifference. Rules of construction seek to facilitate this intent-effecting goal by providing a presumptive meaning—one designed to accord with common intention—to words that have failed to express the actual intention of the parties clearly.

. . . Shifting the worthier-title doctrine from a rule of law to one of construction is not a normal step in the evolutionary process of law, and it has done more harm than good.

. . . This supposed rule of construction disregards the core principle of construction: [I]nstead of taking unclear language and pre-

16. David A. Thomas, *Restatements Relating to Property: Why Lawyers Don't Really Care*, 38 REAL PROP. PROB. & TR. J. 655, 675 (2004).

17. It is my understanding that Tentative Draft No. 4 has not received final approval.

18. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 (Tentative Draft No. 4, 2004).

19. 122 N.E. 221 (N.Y. 1919).

20. *Id.* at 222.

21. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 cmt. a (Tentative Draft No. 4, 2004).

sumptively attributing common meaning to it (the normal function of a rule of construction), it takes clear language and presumptively attributes abnormal meaning to it.²²

Restatement III continues further as follows:

b. Repudiation of the doctrine of worthier title. This Restatement repudiates the doctrine of worthier title, both as a rule of law and as a rule of construction. The original rationale for the worthier-title doctrine has long since disappeared, the doctrine is intent-defeating, it can produce unexpected adverse tax consequences, and it has no justification in public policy. A transferor who actually wants to retain a reversionary interest can do so by simple language to that effect.²³

VI.

Restatement III represents a remarkable 180-degree reversal of position from *Restatement I* and *Restatement II*. Inferentially, if not directly, it demeans the rationale of Judge Cardozo. More significantly, it does not so much as even hint that *Restatement I* and *Restatement II* take absolutely contrary positions to *Restatement III*.

Restatement III reasonably and properly admits that a rule of construction seeks “to facilitate . . . this intent-effecting goal by providing a presumptive meaning—one designed to accord with common intention—to words that have failed to express the actual intention of the parties clearly.”²⁴ This, after all, is simply another way of expressing the justification announced on two occasions by *Restatement I* and *Restatement II*, to-wit: The Inter Vivos Branch is justifiable because “it represents the probable intention of the average conveyor” who “seldom intends to create an indestructible interest in those persons who take his property by intestacy.”²⁵

Surely it would be important to give recognition to those giant scholars of earlier days to point out that *Restatement I* and *Restatement II* arrive at a diametrically opposite position to that taken in *Restatement III*. It would be quite appropriate for *Restatement III* to say that, after due consideration, the writers had reached the judgment that the law ought to be different than that stated in *Restatement I* and *Restatement II* and that they disagree with the rationale previously set forth.

Legislatures and courts are granted the authority to make policies by legislative enactments and by judicial pronouncements. I recognize that in some states, since *Restatement I* and *Restatement II*, the Wor-

22. *Id.*

23. *Id.* § 16.3 cmt. b.

24. *Id.* § 16.3 cmt. a.

25. RESTATEMENT OF PROP. § 314 cmt. a (1940); see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2(1) cmt. a (1988) (“[I]t represents the probable intention of the average transferor.”).

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thier Title Doctrine has been abolished, either by specific statutes or by judicial pronouncements. For legislatures and courts to have changed the law is quite proper; it is their function. But it is likely that many lawyers and judges will read *Restatement III*—if it is approved as now written—as a statement that represents the law. Yet many states have not repudiated the Inter Vivos Branch either legislatively or by judicial pronouncements.

The Inter Vivos Branch, as announced by Judge Cardozo, represents the common law in many states. It would be honorable and appropriate if *Restatement III* recognized that its position on this question constitutes a view that is not the law in many jurisdictions and represents what the writers of *Restatement III* believe the law ought to be.

