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THE INTER VIVOS BRANCH OF THE WORTHIER TITLE DOCTRINE

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Change for good reason is most appropriate. Sometimes it is superb, but change for the sake of change is usually wrong. It is regrettable and unjustifiable that an old and beneficial principle of law has been challenged as no longer a part of American law. Not many will know and few will care, but some of those who have a keen interest in the Law of Future Interests will be concerned.

The *Restatement of the Law of Property*, Vol. III, is about future interests, and it was published in 1940.¹ The second *Restatement of the Law of Property 2nd*, Vol. III, is also about future interests, and it was published in 1987.² The *Restatement of the Law of Property 3rd*, Vol. III, is also about future interests, and it was published in 2011.³

Each of the Restatements has a section on the Inter Vivos Branch of the Worthier Title Doctrine. Restatements I and II both find, in unequivocal language, that the Inter Vivos Branch of the Worthier Title Doctrine is a sound and worthwhile principle of law because it furthers the probable intention of the donor.⁴ Restatement III completely reverses those findings and states that the Inter Vivos Branch of the Worthier Title Doctrine is (a) not a part of American law and (b) is intent-defeating.⁵ The purpose of this essay is to suggest that neither of the conclusions of Restatement III is persuasive and to urge courts and legislatures to retain the findings of Restatement I and II.

The Inter Vivos Branch of the Worthier Title Doctrine has substantial consequences in 2016. It is not a doctrine in the category referred to by Justice Holmes when he said, "It is revolting to have no better reason for a

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1. RESTATEMENT (FIRST) OF PROPERTY (AM. LAW INST. 1940).

2. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS (AM. LAW INST. 1987).

3. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (AM. LAW INST. 2001).

4. RESTATEMENT (FIRST) OF PROPERTY § 314; RESTATEMENT (SECOND) OF PROPERTY § 30.2.

5. RESTATEMENT (THIRD) OF PROPERTY § 16.3.

rule of law than that so it was laid down in the time of Henry IV.”⁶ For example: If Isaac conveys land or personal property to his wife Janet for life and at her death, to “my heirs at law,” it is not likely that he intends to invest his prospective heirs or next of kin (whomever they may be) with an indestructible interest during his lifetime. It seems more probable that he intends to retain the reversion during his life so that he might dispose of it while he is alive or by his Will. Application of Restatements I and II achieve that intent by making the end limitation to Isaac’s “heirs at law” void and leaving the reversion in him. Application of Restatement III, however, defeats that intent.

The Inter Vivos Branch of the Worthier Title Doctrine in Restatement II is framed as follows:

If a person purports to make an inter vivos 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.⁷

Restatement II states that this principle of law may be illustrated as follows:

O transfers Blackacre by deed “to O’s son S for life, then to the heirs of O.” The rule stated in subsection (1) applies. S has an estate for life in possession and O has a reversion in fee simple in the absence of additional language or circumstances that indicate otherwise.⁸

Restatement II states that the above principle of law “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.”⁹ In other words, the above principle of law is a rule of construction that furthers the likely intention of the average conveyer.

6. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

7. RESTATEMENT (SECOND) OF PROPERTY § 30.2(1).

8. *Id.* § 30.2 cmt. d, illus. 3.

9. *Id.* § 30.2 cmt. e.

I respectfully submit that the purpose of this rule is justified by a worthwhile intention and ought to be preserved and given effect. I respectfully disagree with Restatement III, which states that this “doctrine is intent-defeating” and “has no justification in public policy.”¹⁰

Furthermore, I respectfully submit that the giant academic scholars on Future Interests for the last seventy years also believed the rule to be justified. Those giants were the Reporter and members of the Committee of Advisors that addressed the Inter Vivos Branch of the Worthier Title Doctrine in Restatements I and II. Restatement I states “[w]here a person makes a gift in remainder to his own heirs . . . 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.’”¹¹

Consider the identity of some of those giants:

Richard R. Powell, Columbia University, Reporter

W. Barton Leach, Harvard University

A. James Casner, Harvard University, Reporter

Lewis M. Simes, University of Michigan

Charles E. Clark, New Haven, CT

Stanley M. Johanson, University of Texas

Richard V. Wellman, University of Georgia¹²

Restatement II, in its Forward, states that

[t]he exposition reflects the skill and sensitivity of the Reporter, Professor A. James Casner. As in earlier volumes of Donative Transfers, Professor Casner brings to bear both the highest technical legal skill and thoughtful awareness of contemporary social relationships. The Institute acknowledges its continuing debt to him in the completion of this important work. We also express our thanks to the members of his Advisory Committee

10. RESTATEMENT (THIRD) OF PROPERTY § 16.3 cmt. b.

11. RESTATEMENT (FIRST) OF PROPERTY § 314 cmt. a.

12. RESTATEMENT (FIRST) OF PROPERTY ALI Committee on Property; RESTATEMENT (SECOND) OF PROPERTY ALI Officers and Council.

for their able and conscientious contributions in the drafting process.¹³

I had the good fortune as a graduate student to sit across the table from Professor Lewis M. Simes and attempt to respond to his piercing and probing questions. I have also done a bit of work myself on the Worthier Title Doctrine.¹⁴ I have provided my views to the drafters of Restatement III.¹⁵ I attempted, before the change was made, to direct my attention to others of my concerns. I wrote a short essay before the final draft was approved with the hope that my concerns might be addressed.¹⁶

I believe it is fair to say that Restatement III does not address the reasoning of Restatement I or Restatement II. It does point to the history and to Justice Cardozo's decision in *Doctor v. Hughes*.¹⁷ This decision is well-known as the leading case on the Inter Vivos Branch of the Worthier Title Doctrine. Restatement II points out that "*Doctor v. Hughes* has been widely followed by courts in jurisdictions other than New York."¹⁸ Rather than addressing the rationale of Restatement II or *Doctor v. Hughes*, Restatement III simply criticizes Justice Cardozo for finding the doctrine applicable as a rule of construction, saying that "[s]hifting 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."¹⁹ Thus, Restatement III simply does not address the substantive reasoning of Restatements I and II. It also fails to establish that the Worthier Title Doctrine is no longer recognized as a part of American law.²⁰

13. RESTATEMENT (SECOND) OF PROPERTY Foreword (emphasis added).

14. Joseph W. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949); Joseph W. Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451 (1956). The Reporter's note to Restatement II cites both of these articles. RESTATEMENT (SECOND) OF PROPERTY § 30.2, reporter's nn.3(b), 6(b).

15. When Restatement III was being worked on, I wrote several letters to Professor Lawrence W. Waggoner, Reporter, University of Michigan Law School and attempted to bring his attention to my concern about the direction that was being taken by the early drafts. I did not receive a response until after the decision was made on Restatement III.

16. Joseph W. Morris, *The Worthier Title Doctrine: Does Draft Restatement III of Property Write a Premature Obituary?* 45 WASHBURN L.J. 387 (2006).

17. 122 N.E. 221 (N.Y. 1919).

18. RESTATEMENT (SECOND) OF PROPERTY § 30.2, reporter's n.3(a).

19. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 cmt. a (AM. LAW INST. 2001).

20. The Reporter's Note to Restatement III identifies eleven states that have abolished the Doctrine in connection with adopting the Uniform Probate Code and thirteen states that have done so via non-uniform statutes (i.e., twenty-four states altogether). *Id.* reporter's n.2.

I acknowledge that some state legislatures and some appellate courts have abolished the Inter Vivos Branch of the Worthier Title Doctrine. Such a step is appropriate when a judgment is reached by such a body, but there are many appellate courts and legislatures that have not disavowed or repudiated the Doctrine. There are many courts that have not yet spoken on whether the rationale of Restatement I and II is, in fact, more persuasive than the purported reasons advanced in Restatement III.

In short, I believe it is not justifiable when Restatement III states that “[t]he doctrine of worthier title is not recognized as a part of American law, neither as a rule of law, nor as a rule of construction.”²¹ Accordingly, I invite those jurisdictions, which have not legislated or ruled on the viability of the Worthier Title Doctrine, to look at the twenty-eight pages of discussion of the Inter Vivos Branch of the Worthier Title Doctrine in Restatement II and compare that discussion to the six-and-a-half pages of discussion in Restatement III.²² Some jurisdictions have embraced the Doctrine, and some have not. I respectfully urge those jurisdictions that have not spoken to make the comparison before they decide.

It further identifies two jurisdictions, Connecticut (1947) and the District of Columbia (1966), where courts have abolished it. *Id.* But the Note also acknowledges that in the last fifty years, courts in three states—Mississippi (1980), New Jersey (1964) and Virginia (1954)—have applied the Doctrine or stated that the rule is still in effect. *Id.* It further states that two state legislatures—Kansas and Nebraska—and the courts of three jurisdictions—Alabama (1978), Iowa (1982) and Kentucky (1940)—have abolished only the testamentary branch of the Doctrine. *Id.*

21. RESTATEMENT (THIRD) OF PROPERTY § 16.3 cmt. b.

22. RESTATEMENT (SECOND) OF PROPERTY § 30.2; RESTATEMENT (THIRD) OF PROPERTY § 16.3.

