# Notes

## THE ISSUE OF DELIVERY RAISED BY "DISPOSITIVE" CONVEYANCES

A common desire and purpose among many men is to settle their estates[1] and to distribute their property during their lifetime by using a deed as a substitute for a will.[2] The reasons for this method of distribution include avoidance of estate taxes, avoidance of the uncertainties, expenses and delay of probate[3] and the assurance of the desired devolution of property.[4] These motives are often counterbalanced by a feeling that some leverage should be retained over the behavior of their children or by a fear that future economic needs cannot be met. As a result, the grantor is placed upon the horns of a dilemma—to dispose of his property without losing the security of ownership[5] —and accordingly may respond with a "dispositive" conveyance whereby he purports to transfer his land while attempting to retain some degree of control over it.[6]

This dilemma is not new. At early common law the convenant to stand seized, in the equity courts,[7] and the creation of future interests in the form of reversions and remainders, in the law courts,[8] were employed as a means to

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1 Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); Dolph v. Wortman, 191 Iowa 1364, 183 N.W. 814 (1921); Denzler v. Rieckhoff, 97 Iowa 75, 66 N.W. 147 (1896); Ewing v. Buckner, 76 Iowa 467, 41 N.W. 164 (1889).

2 Witt v. Witt, 174 Iowa 173, 156 N.W. 321 (1916); Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886).

3 Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947); Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938).

4 Klosterboer v. Englekes, 255 Iowa 1076, 125 N.W.2d 115 (1963); Dyson v. Dyson, 237 Iowa 1285, 23 N.W.2d 259 (1946); Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914).

5 Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926); Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute* (pts. 2-3), 16 CATHOLIC U.L. REV. 119, 256 (1966-1967).

6 The term "dispositive" was coined, for purposes of this Note to describe a particular type of intent—an intent that has been the underlying motherlode of many contested transfers of realty. Typically, the transfers arose from a setting which resembled both gifts inter vivos and gifts made in contemplation of death. The transfers were like gifts inter vivos in that the grantor made completed gifts of his property during his own lifetime and were like gifts made in contemplation of death in that the transfers were prompted by the inevitability of death. Yet, unlike gifts made in contemplation of death, death probably was not so eminent that the "dispositive" transfers were brought within the meaning of contemplation of death; but like gifts made in contemplation of death and unlike the usual facts found with the problems of gifts inter vivos, the grantors were generally deceased by the time a court was called upon to decide if legal effect could be given the alleged conveyances. Unable to sustain a transfer, the court on one occasion commented that: "The result is regrettable because it defeats the wishes of the grantor and vests title in her heirs whom she did not desire to have it. . . . It is another of many instances in which an aged owner of property does not execute his wishes in the manner required by law." Brandt v. Schucha, 250 Iowa 679, 690-91, 96 N.W.2d 179, 186 (1959). *See* 25 IOWA L. REV. 161 (1939).

7 C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 190-91 (1962); L. SIMES & A. SMITH, FUTURE INTERESTS § 28 (2d ed. 1956); T. TIFFANY, REAL PROPERTY ch. 7 (3d ed. 1939).

8 C. MOYNIHAN, *supra* note 7, at ch. 5; R SWENSON, POSSESSORY ESTATE AND FUTURE INTERESTS IN IOWA, 36 IOWA CODE ANN. 73 (1950).

transfer property while reserving to the grantor certain rights of ownership. Today, the same purpose may be fulfilled by the creation of revocable trusts,[9] joint tenancies[10] or future interests.[11] In contrast to these proprietary arrangements, a "dispositive" conveyance is generally the culmination of improper estate planning without the advice of counsel. Consequently, the burden falls upon the court to decide if a conveyance was completed during the grantor's lifetime. The approach to this problem is usually phrased in terms of whether the deed was effectively delivered. Yet, delivery is a somewhat nebulous term as its effectiveness is measured by figuratively weighing the facts on a scale and requiring that they point towards an intent to make a transfer before death,[12] except that a mere intent to transfer, no matter how strong, will not alone require legal effect to be given an instrument of conveyance.[13] Through the term delivery, the courts actually seem to be looking for certain operative facts upon which a transfer can be sustained.

The purpose of this Note is to focus upon delivery within the context of a "dispositive" conveyance and the problems peculiar to such a transfer by providing an analysis of the influential facts to which the court has frequently referred as manifestations of an intent to transfer property before death.[14] Discussion will center upon the concept of delivery, the forms of "dispositive" conveyances from which problems most frequently arise and, finally, the factors of intent the court has in the past considered relevant to establish the legal powers and privileges of ownership with respect to certain realty.[15]

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9 The advantage of a revocable trust is to allow the grantor to accomplish during his lifetime what he could otherwise only do by will, but as one author stated: "The trust, however, is a somewhat expensive and complex institution. Its operation and use are beyond the knowledge of the average layman. Moreover, it is not readily adaptable to all types of property nor to the peculiar circumstances of all cases." Garvey, *Revocable Gifts of Legal Interests in Land*, 54 KY. L.J. 920-21 (1965). In criticizing revocable trusts, the above mentioned author suggested that the solution lies with recognition of the revocable deed. He argued that a donor who finds the need to reclaim the property could do so at any time before death "merely by exercising his power of revocation. . . . Yet if the power is not exercised, the donee's estate becomes absolute and indefeasible at the moment of the donor's death without the need of any further act of formality." *Id.* at 49.

In this connection reference should be made to the Totten Trust. Through the medium of a savings account this device enables the donor to make a gift of money during his lifetime which becomes absolute upon his death as to the amount remaining in the account at that time. Anytime prior to death the donor may revoke the gift by simply withdrawing the balance of the account. G. BOGERT, TRUSTS & TRUSTEES § 47 (2d ed. 1965).

10 Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966); Riecker, *Joint Tenancy: The Estate Lawyer's Continuing Burden*, 64 MICH. L. REV. 801 (1966).

11 Contrary to the rule at early common-law, IOWA CODE § 557.6 (1966) permits an estate to begin in the future without using a straw man or a trust. *See* R. SWENSON, *supra* note 8.

12 Discussed in more detail at text accompanying notes 75-77 *infra.*

13 Discussed generally at pt. I, § *B*, *infra.*

14 *See* text accompanying notes 26, 27 & 46 *infra.*

15 The scope of this Note does not extend to an analysis of revocable trusts, Toten Trusts, joint tenancies, creation of future interests or other similar devices sometimes employed for transferring property without a will. For discussion of these points see authorities cited at notes 9, 10, & 11 *supra.* Consideration of third-party rights in transferred realty also is outside the subject matter of this Note. Finally, no attempt has been made herein to analyze the law of other jurisdictions "[a]s transfers of real estate their validity must be

## I. Concept of Delivery

### A. *Historical Background*

The legal term "delivery" had its historic origin in the concept of livery of seisin: the means by which a landowner would enfeoff his property to another. The land was symbolically transferred to the feoffee by a physical ceremony wherein the feoffor-grantor would hand the feoffee-grantee a twig or piece of turf. This act vested the feoffee with seisin—the equivalent of ownership.[16] Gradually, an instrument of conveyance replaced the twig and turf. In fact, after the thirteenth century the custom was for the feoffor to deliver a deed or charter of feoffment to the feoffee. The charter, in lieu of the twig, served as evidence of the livery of seisin in addition to setting forth the nature of the estate granted and certain covenants of warranty. The operative act of the transfer was not the exchanging possession of the instrument, but rather livery of seisin. Later, the requirements for transferring property were reversed; livery of seisin became obsolete, and the deed was considered the essential factor.[17] From this background emerged the "manual tradition"—the idea that physical delivery of a written instrument was essential to the transfer of real property.[18]

The concept of a manual transfer has also undergone some modification since "[t]he deed is but a symbol of the transfer of the land." A physical receipt of the instrument only provides evidence of intent to pass "title."[19] Thus, the common law formalities of conveyancing have been largely rejected in favor of an inquiry based upon the intent of the grantor.[20] "[T]he intention of the grantor is the polar star by which courts must be guided in determining the question [of delivery]."[21]

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determined by *lex loci rei sitae*"—the law of the place where the realty is situated. Loving v. Pairo, 10 Iowa 282, 287 (1860). *See also* Harrison v. City Nat'l Bank, 210 F. Supp. 362 (S.D. Iowa 1962); Note, *Use of Deeds to Effectuate Transfer at Death of Grantor*, 32 Notre Dame L. Rev. 300 (1957).

16 C. Moynihan, *supra* note 7, at 163; T. Tiffany, *supra* note 7, at § 1033.

17 C. Moynihan, *supra* note 7, at 164. *See also* Bordwell, *To Have and to Give*, 37 Iowa L. Rev. 1, 10-12 (1937).

18 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); T. Tiffany, *supra* note 7, at § 1033.

19 McKemey v. Ketchum, 188 Iowa 1081, 1082, 175 N.W. 325, 326 (1919).

20 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923). *See* Thornton v. Mulquinne, 12 Iowa 549 (1861), in which the court discussed the proposition that the intent of the grantor should prevail over the technical requirements of common-law conveyances.

21 Trask v. Trask, 90 Iowa 318, 322, 57 N.W. 841, 843 (1894). *See* Ransom v. Pottawattamie County, 168 Iowa 570, 150 N.W. 657 (1915); Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898). After acknowledging intention as the controlling factor of delivery (Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949)) the court has often stated that the intent to make a transfer would be protected (Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960)) and that it would attempt to give effect to such intent (Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918)). *Cf.* The comment has been made that the law will presume that the grantor intended to create a valid instrument. *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959). The attitude of the court in that case further emphasizes the important role which the grantor's intent plays in determining whether a conveyance can be upheld. *See also* T. Tiffany, *supra* note 7, at § 1034; 24 Iowa L. Rev. 167 (1938).

### B. *Elements of Delivery*

Although delivery is essential for a deed to be effective, the facts which in the legal sense constitute delivery remain undefined.[22] Certainly, a deed must be delivered during the grantor's life[23] and by the grantor, or at his direction;[24] otherwise, a transfer of land is ineffective and incomplete.[25] However, delivery does not need to be in a special form. The question in each case is whether the facts have the "legal effect" of transferring an interest in the land[26] and whether the facts (particularly acts or words or both) of each case have such a "legal effect" depends upon the intent of the grantor.[27] As long as the grantor expressed an intent to transfer an interest in his land before death, the instrument of conveyance may be effective without particular words.[28] Still, mere intent to deliver will not satisfy the requirement of a legal delivery.[29] However, neither manual delivery of the instrument[30] nor a specific act is necessary.[31] In short, the requirement of delivery may be satisfied by acts or words or both, whether actual or symbolic.[32]

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[22] Kyle v. Kyle, 175 Iowa 734, 157 N.W. 248 (1916). In this connection the use of a contract should not be overlooked as a means to obviate the requirement that a deed must be delivered—a requirement which is otherwise necessary to complete the transfer of an interest in land. *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959).

Acceptance is also essential to complete a transfer of realty but it is presumed as long as the conveyance is beneficial in character and imposes no conditions or burdens. Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); Matheson v. Matheson, 139 Iowa 511, 117 N.W. 755 (1908). Beyond this presumption the matter of acceptance involves problems which are peculiar to it and apart from the question of delivery. Therefore, no further consideration will be given to this aspect of land transfer.

[23] Klosterboer v. Englekes, 255 Iowa 1076, 125 N.W.2d 115 (1963); Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963); Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959); Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Dolph v. Wortman, 185 Iowa 630, 168 N.W. 252 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 14 (1921).

[24] Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899).

[25] Shelter v. Stewart, 133 Iowa 320, 107 N.W. 310 (1906). A deed remains ineffective when taken from grantor without his knowledge (Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916)) or when given to the grantee by an administrator acting without previous instruction from the grantor (Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932)).

[26] Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923).

[27] Jeager v. Elliott, 257 Iowa 897, 134 N.W.2d 560 (1965); Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946); Boone Biblical College v. Forrest, 223 Iowa 1260, 275 N.W. 132 (1937); *rev'd*, Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938); Goodman v. Andrews, 203 Iowa 979, 213 N.W. 713 (1927); Wilson v. Carter, 132 Iowa 442, 109 N.W. 886 (1906); Saunders v. Saunders, 115 Iowa 275, 88 N.W. 329 (1901); Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898).

[28] Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914). In fact, an instrument of conveyance has, on at least one occasion, been held unnecessary to transfer ownership of land. "[A]n oral transfer of real estate followed by the taking, possession and occupancy, constitutes a valid conveyance." Lynch v. Lynch, 239 Iowa 1245, 1253, 34 N.W.2d 485, 489 (1948).

[29] Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926); Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899). *See* discussion of agency at notes 66-69 & accompanying text *infra*.

[30] *See* text accompanying note 19 *infra*.

[31] Kyle v. Kyle, 175 Iowa 734, 157 N.W. 248 (1916).

[32] Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926).

Whatever the form,[33] an operative delivery[34] requires not only an intent to transfer certain rights of ownership but also an intent to do so *in praesenti*.[35] Thus, during the lifetime of the grantor[36] a present estate must be created in the grantee and certain rights thereto must pass immediately upon delivery.[37] The intrinsic purpose of the delivery is to divest the grantor of an estate and vest that estate in the grantee instanter.[38] If such divestment and resulting investment occur, possession and enjoyment of the property may be postponed until sometime in the future,[39] even after the grantor's death, without making the transfer testamentary in nature.[40] If the grantor did not intend to pass

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33 *Id.* at 623, 210 N.W. at 766 ("In whatever form delivery is accomplished, there must be the intention of the grantor to transfer title, and without any reservation of control thereover.").

34 Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949). The court discussed the requirements necessary to make a delivery effective—in other words, the requirements which would make the instrument of conveyance operative.

35 Klosterboer v. Englekes, 255 Iowa 1076, 125 N.W.2d 115 (1963); Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963); Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951); Lawson v. Boo, 227 Iowa 100, 287 N.W. 282 (1939); Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938); Collins v. Smith, 144 Iowa 200, 122 N.W. 839 (1909). *See also* Dolph v. Wortman, 191 Iowa 1364, 183 N.W. 814 (1921). Once a present transfer of ownership is made the conveyance is complete (*In re* Champion's Estate, 206 Iowa 6, 218 N.W. 37 (1928)) and irrevocable (Kane v. Campisano, *supra*; Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951)) from the time of the transfer forward and cannot be defeated by subsequent declarations (Mathers v. Sewell, 193 Iowa 35, 186 N.W. 636 (1922)) or acts (Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); Ewing v. Buckner, 76 Iowa 467, 41 N.W. 164 (1889)). *See also* IOWA CODE § 558.1 (1966); discussion of grantor's words and acts at pt. III, § *B*, *infra*. For that reason, the grantor may not thereafter add any conditions altering the terms of the instrument or transfer. McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895). Thus, a deed which was validly delivered during the life of the grantor has been treated as having the force and effect of a probated will. Witt v. Witt, 174 Iowa 173, 156 N.W. 321 (1916). The following language used in that case illustrates the "dispositive" character of such a transfer:

> Many careful men prefer to distribute their bounty to their beneficiaries by deeds in their lifetime or by depositing the instruments with a third person for delivery upon the grantor's death, thereby avoiding the necessity and expense of probate, to say nothing of the possibility of dissension and litigation over the validity, construction, or effect of a mere devise. What he did may be said to have all the effect of a will which has been admitted to probate and placed beyond dispute or contest.

*Id.* at 176-77, 156 N.W. at 322.

Perhaps the irrevocable nature of a completed transfer explains the often repeated comment that land may not be the subject of a gift causa mortis. *See* Dolph v. Wortman, 185 Iowa 630, 168 N.W. 252 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 814 (1921). However, if recognition were to be given to revocable transfers, reason could not object to a gift causa mortis of land. The transfer would still be legally complete, but subject to defeasance at the option of the grantor. *See* Garvey, *supra* note 9.

36 *See In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911) (held that the grantee's interest had vested during the grantor's lifetime).

37 Shaull v. Shaull, 160 N.W. 36 (Iowa 1916), *rev'd on rehearing*, 182 Iowa 770, 166 N.W. 301 (1918).

38 Keck v. McKinstry, 206 Iowa 1121, 221 N.W. 851 (1928); Shaull v. Shaull, 160 N.W. 36 (Iowa 1916), *rev'd on rehearing*, 182 Iowa 770, 166 N.W. 301 (1918).

39 Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914).

40 Keck v. McKinstry, 206 Iowa 1121, 221 N.W. 851 (1928). A conveyance will be considered valid even though the estate commences at a future time. In that event, the grantor typically retains a life estate while the grantee has a present vested interest with the right of possession and enjoyment postponed until a later time or occurrence. Ransom v. Pottawattamie County, 168 Iowa 570, 150 N.W. 657 (1915); Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914). *See* IOWA CODE § 557.6 (1966); R. SWENSON, *supra* note 8. An estate of this type arises, for example, when a deed has been given to a third person to be delivered to the grantee after the grantor's death, provided the grantor intended to convey a present

a present interest but to delay doing so until his death, the conveyance is ineffectual as an inter vivos transfer.[41] Instead, it must be considered as a testamentary[42] disposition which fails unless it complies with the requirements for executing a will.[43]

An inter vivos instrument is distinguished from the testamentary instrument in that the latter "operates only upon and by reason of the maker's death" and remains ambulatory during the maker's lifetime. When a testamentary instrument is executed, the maker does not divest himself of any right or interest in his estate and, axiomatically, no interest or right in his estate becomes vested in any other person. Rather, "[t]he maker's death establishes the character of the instrument. It then ceases to be ambulatory, acquires a fixed status and operates as a transfer of title."[44]

For purposes of delivery, courts distinguish between an inter vivos and a testamentary disposition by construing the instrument as a whole and in a manner which will give effect to all its parts if unambiguous.[45] The decisions are not merely confined to considerations of language which is purportedly peculiar to inter vivos or testamentary instruments or the maker's belief about the effect of his instrument. The courts also weigh "the facts and circumstances . . . attending the execution of the instrument," and attempt to sustain "the manifest intention of the maker and the parties to it."[46] In determining in-

interest at the time he gave the deed to the third person. Collins v. Smith, 144 Iowa 200, 122 N.W. 839 (1909); Matheson v. Matheson, 139 Iowa 511, 117 N.W. 755 (1908). *See* discussion of the various forms of dispositive conveyances at pt. II *infra*. Similarly, a present enforceable interest may be created by a contract wherein the obligation to pay and the right of possession follow the grantor's death. In the interim the grantee has the equitable title and the grantor has the legal title as security for payment to his estate by the grantee. *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959). *See also* 30 IOWA L. REV. 108 (1944).

41 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Wilson v. Carter, 132 Iowa 442, 109 N.W. 886 (1906). The nature of the grantor's intent is the same whether he intended to make an inter vivos or testamentary transfer. Clearly, he intended to vest another with the rights of ownership. The question, then, is when did he intend those rights to vest? The cases cited at note 40 *supra*, and others, answer the question of "when" in terms of the grantor's intent to convey or not to convey a "present interest" before his death. This analysis of the grantor's intent has been criticized for failing to adequately define the "present interest" concept and, consequently, for only adding to the confusion of determining if a conveyance was completed during the grantor's lifetime. Garvey, *supra* note 9.

42 Ransom v. Pottawattamie County, 168 Iowa 570, 150 N.W. 657 (1915).

43 Tuttle v. Raish, 116 Iowa 331, 90 N.W. 66 (1902). *See* IOWA CODE § 633.279 (1966).

44 *In re* Estate of Lundgren, 250 Iowa 1233, 1237, 98 N.W.2d 839, 841 (1959). As stated above, an inter vivos transfer requires an intent to vest the grantee with a present right of ownership. Notes 35-41 and accompanying text *supra*. The corollary of this rule is that a testamentary disposition requires an intent, on the part of the testator, to " 'pass no interest in the property until his death . . . .' " Harrison v. City Nat'l Bank, 210 F. Supp. 362, 368 (S.D. Iowa 1962), quoting from 1 PAGE, WILLS § 5.6 at 174 (Bowe-Parker Revision 1960). *See also* Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959), wherein the court distinguished a contract from a will.

45 Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Bardsley v. Spencer, 215 Iowa 616, 244 N.W. 275 (1932); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918); Ransom v. Pottawattamie County, 168 Iowa 570, 150 N.W. 657 (1915); Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914); Saunders v. Saunders, 115 Iowa 275, 88 N.W. 329 (1901).

46 Burlington Univ. v. Barrett, 22 Iowa 60, 74 (1867). The court not only attempts to give effect to the manifest intention of the grantor but, in addition, presumes that the

tent, the Iowa Supreme Court has often stated that an equivocal instrument will not be defeated by the application of technical rules of construction.[47] The fundamental goal is to determine if the grantor sufficiently manifested an intent, in terms of delivery, to transfer an interest in his land prior to death or, stated differently, if he incontestably divested himself of certain rights of ownership.[48] Therefore, the issue of intent is ultimately reduced to a factual question which requires an examination of all the facts and circumstances of each case.[49]

The foregoing approach presents certain difficulties.[50] Measuring the success of a transfer by the grantor's intent has been appropriately criticized as illusory and subjective. It can, in this view, only be "presumed from the language and conduct of the party." Since a court must base its decision upon this presumption, the factors of intent have not been clearly identified or isolated to "any particular factor that of itself will swing the scale one way or the other." "[T]he gravest difficulty with the criterion [measuring the success of a transfer by the grantor's intent] is that the intent requisite for an inter vivos transfer is not specified with clarity."[51]

The "dispositive" features of the transfers considered herein further complicates the courts' problem of reconstructing the grantor's intent. Typically, the grantor waits "until the last days of his life to undertake the important task of disposing of his property,"[52] and consequently the shadow of time obscures those circumstances of the transactions which might have explained the nature of the grantor's intent.[53]

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parties to an instrument intended for it to be valid and that the legal requirements therefore were known to them. *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918). In the *Lundgren* case the question was whether the grantor meant to create a contract to convey, which would have been performed upon the grantor's death, or meant only to create a testamentary instrument which, in this instance, failed to comply with the formalities for executing a will and therefore could not have been sustained. The court held that the grantor intended to create a contract, not a will, because the parties to the transaction must have known that the statutory requirements for a will would have defeated the instrument as a testamentary disposition. *See* IOWA CODE § 633.279 (1966). Thus, if all other factors are equal, the courts are inclined to favor a decision that the grantor intended to convey a present interest over a decision that his intent was only testamentary.

47 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); Thornton v. Mulquinne, 12 Iowa 549 (1861).

48 Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946). On one occasion the court commented that a preference of "shadow to substance" would be shown by construing an instrument according to technical rules, rather than according to the manifest intention of the grantor. Newton v. Bealer, 41 Iowa 334, 340 (1875).

49 Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Bardsley v. Spencer, 215 Iowa 616, 244 N.W. 275 (1932); Gilmore v. Griffith, 187 Iowa 327, 174 N.W. 273 (1919).

50 Trask v. Trask, 90 Iowa 318, 57 N.W. 841 (1894).

51 Garvey, *supra* note 9, at 52.

52 Keune v. McCauley, 228 Iowa 607, 608, 293 N.W. 25 (1940).

53 Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963). For other cases wherein the alleged conveyance was dispositive in nature *see* Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Keune v. McCauley, 228 Iowa 607, 293 N.W. 25 (1940); Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929); Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Criswell v. Criswell, 138 Iowa 607, 116 N.W. 713 (1908); White v. Watts, 118 Iowa 549, 92 N.W. 660 (1902).

## II. Forms of "Dispositive" Conveyances

### A. *Delivery to a Third Person To Be Delivered to Grantee Upon Grantor's Death*

A "dispositive" conveyance may be attempted by depositing the deed with a third person for delivery to the grantee upon the grantor's death.[54] The third person, with whom the deed is left, functions similarly to an escrow agent.[55] Frequently, the depositee of the deed has been a friend,[56] a notary public,[57] a justice of the peace,[58] a banker,[59] a scrivener,[60] a housekeeper,[61] an attorney,[62] the wife of the grantor[63] and even the grantee's wife.[64] When deposited with such persons, such deposit has been regarded as the equivalent of a delivery to the grantee.[65] However, the third person must act as the agent of the grantee.[66] If the depositee is employed to hold the deed for safekeeping or to carry the deed to the grantee, in contrast to receiving it for the

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[54] The principle that a conveyance may be accomplished by leaving the deed with a third-party has been constantly reaffirmed. Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898). Delivery in this manner makes the transfer irrevocable as long as the third person is not the agent of the grantor. (The grantee, of course, can never be an escrowee for himself. McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895)). *See* note 35 & accompanying text *supra*; notes 66-69 & accompanying text *infra*. While the deed remains with the third person, the grantee has a present vested interest with possession and enjoyment postponed. *See* notes 39-40 & accompanying text *supra*; text accompanying notes 196-97 *infra*. However, a transfer by means of a third person is the same as any other form of inter vivos transfer; a certain element of intent on the part of the grantor must be present to give it legal effect. *See* discussion of intent pt. I, § *B*, *infra*.

In a more liberal moment the court applied the above principal to a mere verbal expression indicating an intent to make an inter vivos transfer:

> What is the essential difference between telling a third person to hand a paper, whose contents he does not know, to a named person after the grantor dies, and stating that certain property had been "deeded" to a named person, declining for that reason to dispose of the property by will, and writing upon the paper that it was the deed of a named grantee to described property? Why do not both amount to a declaration of at least an intention to convey which is the essential thing on the question of the delivery of deeds, although mere intention is ineffective in the gift of a chattel?

McKemey v. Ketchum, 188 Iowa 1081, 1088-89, 175 N.W. 325, 328 (1919). The decision therein was that although delivery to a third person never occurred, the intention to part with title was as strong "as a direction that a third person should keep a paper until after grantor died;" therefore, the conveyance would not be defeated merely because the grantor had retained the deed in his own box. *Id.* at 1088, 175 N.W. at 327. However, the strength which can be accorded this holding has been greatly weakened by later decisions. *See* notes 84-86 & accompanying text *supra*.

[55] Oehler v. Hoffman, 253 Iowa 631, 113 N.W.2d 254 (1962).

[56] Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899).

[57] White v. Watts, 118 Iowa 549, 92 N.W. 660 (1902).

[58] Hinson v. Bailey, 73 Iowa 544, 35 N.W. 626 (1887).

[59] Lippold v. Lippold, 112 Iowa 134, 83 N.W. 809 (1900).

[60] Johnson v. Moore, 184 Iowa 648, 169 N.W. 47 (1918).

[61] Criswell v. Criswell, 138 Iowa 607, 116 N.W. 713 (1908).

[62] Keating v. Augustine, 213 Iowa 1336, 241 N.W. 429 (1932).

[63] Gilmore v. Griffith, 187 Iowa 327, 174 N.W. 273 (1919) (The court found that the grantor's wife held certain deeds for the benefit of their children.).

[64] Craven v. Winter, 38 Iowa 471 (1874) (The deposit of the deed with the grantee's wife was held to be the same as a delivery to her husband, the grantee.).

[65] Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926). *Cf.* Webb v. Webb, 130 Iowa 457, 104 N.W. 438 (1905), wherein a valid delivery to one grantee was viewed as a valid delivery to all the other joint grantees; the receiving grantee served as agent for all.

[66] Keating v. Augustine, 213 Iowa 1336, 241 N.W. 429 (1932).

benefit of the grantee, said third person acts as the grantor's agent. This agency relationship terminates upon the death of the grantor, and rights of ownership pass to his estate.[67] Conversely, receipt of a deed to be delivered after the grantor's death is for the benefit of the grantee and creates an agency between the third person and grantee.[68] This relationship and the validity of the instrument as a transfer of ownership are unaffected by the grantor's death since delivery in law has already been completed. Therefore, delivery in fact "may be incomplete in life to become absolute after death."[69]

### B. *Other "Dispositive" Conveyances: Symbolic and Direct Delivery*

"Dispositive" conveyances may be formed by delivery described as symbolic. The basis of delivery in this manner is some statement or act of the grantor.[70] If sustained, the conveyance is treated as though the instrument was delivered to the grantee during the grantor's lifetime. Apart from the success of the transfer, the location of the deed upon the grantor's death has provided a factual distinction for this conveyance. The deed in these circumstances has been found among the grantor's other papers,[71] in the grantor's lock box at home,[72] at the bank[73] or even in the grantee's own lock box without her knowledge.[74]

Those situations in which the grantee receives the instrument directly

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67 Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899).

68 Kyle v. Kyle, 175 Iowa 734, 157 N.W. 248 (1916). The court's language in that case helps to draw into sharper focus the distinction between the depositee of a deed acting as the agent of the grantor and the depositee of a deed acting as agent for the grantee:

> It seems hardly necessary to say that the universal holdings of all the courts are that the deposit of a deed with a third person to be delivered to the grantee upon the death of the grantor has effect to make the depositary the agent or trustee of the grantee, and the delivery to such agent or trustee is effectual to vest the grantee with a present interest from the date when the instrument is so deposited by the grantor. Of course, the deposit of the deed by the grantor in the hands of his own agent for safekeeping, or to be held for the grantor, or such deposit made without instructions, would not be a delivery to the grantee; but, when the grantor deposits the deed with a third person, directing him to deliver it upon the happening of the grantor's death, no authority or control over the instrument being reserved, the possession of the custodian is for the use of the grantee alone . . . .

*Id.* at 744, 157 N.W. at 251. *See also In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911).

69 Dettmer v. Behrens, 106 Iowa 585, 588, 76 N.W. 853, 854 (1898).

70 *See* generally discussion of grantor's words and acts at pt. III, § *B*, *infra*.

71 Forrest v. Otis, 224 Iowa 63, 276 N.W. 102 (1937); Shelter v. Stewart, 133 Iowa 320, 107 N.W. 310 (1906); Miller v. Murfield, 79 Iowa 64, 44 N.W. 540 (1890); Ewing v. Buckner, 76 Iowa 467, 41 N.W. 164 (1889). *But see* notes 84-86 & accompanying text *infra*.

72 Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); McKemey v. Ketchum, 188 Iowa 1081, 175 N.W. 325 (1919); Reichart v. Wilhelm, 83 Iowa 510, 50 N.W. 19 (1891); Newton v. Bealer, 41 Iowa 334 (1875); *cf.* Foreman v. Archer, 150 Iowa 49, 106 N.W. 372 (1906). Although the deed in that case was initially left with an attorney, the grantor later persuaded the attorney to relinquish possession of the instrument. The grantor then placed the deed in his satchel at home. Nevertheless, the court upheld the transfer upon additional facts which accompanied the original deposit, and treated the act of repossession as an expression of his desire to only change custody of the instrument, not to cancel it.

73 Gilmer v. Neuenswander, 238 Iowa 502, 28 N.W.2d 43 (1947); Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938); Robertson v. Renshaw, 220 Iowa 572, 261 N.W. 645 (1935), *rev'd*, Orris v. Whipple, *supra*; Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926).

74 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923).

from the grantor may be grouped as a third type of "dispositive" conveyance. Although the grantee may have had possession of the deed when the grantor died, the basic issue remains the same—was the deed legally delivered during the grantor's lifetime?[75]

These broad classifications (given to "dispositive" conveyances and the motivational background discussed earlier) help to arrange the factual setting for the stage on which a court must perform the difficult task of deciding whether the asserted conveyance can be upheld. Any further categorical distinction between these transfers and the means to complete them ceases to be useful;[76] the various factors considered as "manifesting an intent" to presently transfer "title" have not been peculiar to any one situation and, as previously discussed, any one factor cannot be said to have been determinative. Instead, the so-called "factors of intent" have cut across attempts to pigeonhole questions of delivery according to particular facts. The same factors have often reappeared in the course of court opinions without regard for the mode of delivery employed. Therefore, each case must be separated and each factual manifestation of intent must be balanced and weighed with others to determine whether the "scales" have been sufficiently tilted to indicate that a valid delivery was made during the lifetime of the grantor.[77] The crux of the question is whether the facts taken as a whole establish an intent by which a court can give legal effect to an attempted conveyance.

## III. Factors of Intent

### A. *Circumstances Surrounding the Instrument*

#### 1. *Manner of Reservation of Control Over the Instrument*

No single factor appears to have been decisive on the issue of delivery, but certain factors are entitled to more weight than others. One such factor is the instrument and the circumstances surrounding it. For instance, the grantor's intent may be reflected by the steps taken to regain control over the deed. If he reserved the right to recall the deed, the evident purpose is "not to make

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[75] *See* Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947); Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941); *cf.* pt. III, § *A*, 3, *infra* for a consideration of the significance accorded possession of the instrument.

[76] For example, in Orris v. Whipple, 224 Iowa 1157, 1168, 280 N.W. 617, 622 (1938), the court considered cases involving delivery more nearly according to certain factual classifications than according to the mode of delivery (including delivery accomplished directly, through an intermediary or symbolically):

> First, there is the usual and ordinary manual delivery cases. Second, there are the cases of delivery in escrow with instructions to deliver to the grantee upon the happening of some specified conditions. Third, there are the cases of symbolic delivery such as placing the deed in a chest or other receptacle and surrendering the key to the grantee or to another with instructions regarding actual delivery. Fourth, there are the cases of delivery by placing the deed in escrow with instruction to deliver unless recalled, where the power to recall is never exercised; and fifth, the line of cases where the grantor has placed the deed in his safety deposit box, retains the key thereto and continues to exercise full dominion over the property, and dies.

[77] *See generally* discussion of delivery and intent therefore at pt. I, § *B*, *supra*.

it presently effective as a conveyance."[78] The same is true of a deed left tentatively with a third person. It transfers no ownership[79] because the divestment necessary for delivery, and in turn for a conveyance, cannot occur where control has been retained over the deed.[80]

For some time, however, the Iowa Supreme Court held that even though the grantor had reserved the right to recall a deed from the bank[81] or could have withdrawn the deed from his deposit box,[82] delivery was complete upon death as long as that right or power remained unexercised.[83] An opposite position was subsequently taken in *Orris v. Whipple*,[84] which overruled the above proposition; thereafter, the grantor must have demonstrated an intent to part with an interest in the land during his lifetime more clearly than to simply deposit the instrument somewhere and leave it untouched for the remainder of his life. The *Orris* opinion reveals the stark contrast between its holding and the reasoning of the earlier cases:

> [The] evidence proves nothing as to delivery unless we want to conclude that delivery is proven by evidence of the making of a deed. All there is to show delivery in this case is that the deed was prepared and executed by Miss Aken: that she told others that she wanted the plaintiffs to have the property, and that she

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78 Albrecht v. Albrecht, 121 Iowa 521, 525, 96 N.W. 1087, 1088 (1903). The grantor's mere access to the instrument following the purported delivery has been held insufficient to prove that the grantor never intended to surrender his control. Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941); Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); Newton v. Bealer, 41 Iowa 334 (1875).

When faced with the problem of the grantor's continued access to the instrument, the court has taken cognizance of the grantor's physical infirmities which made repossession or control of the instrument unlikely. *See* discussion of extrinsic circumstances note 240 & accompanying text *infra*.

79 Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963); Kyle v. Kyle, 175 Iowa 734, 157 N.W. 248 (1916); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906); White v. Watts, 118 Iowa 549, 92 N.W. 660 (1902).

80 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967). *See also* Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946), which held that the grantor did not intend to part with control over the deed. Conversely, see the following cases for a consideration of the factual situation wherein the grantor was found to have parted with the instrument without intending to retain control over it: Oehler v. Hoffman, 253 Iowa 631, 113 N.W.2d 254 (1962); Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938); Keating v. Augustine, 213 Iowa 1336, 241 N.W. 429 (1932); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918); Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899).

81 Boone Biblical College v. Forrest, 223 Iowa 1260, 275 N.W. 132 (1937); Davis v. John E. Brown College, 208 Iowa 480, 222 N.W. 858 (1929). These cases were subsequently overruled by Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

82 Robertson v. Renshaw, 220 Iowa 572, 261 N.W. 645 (1935), *rev'd*, Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

83 *See* Lippold v. Lippold, 112 Iowa 134, 83 N.W. 809 (1900). The crux of the court's reasoning in these earlier cases was as follows:

> [By] the delivery of the deed to the depositary, with intent that it shall be delivered by the depositary to the grantee named, unless recalled by the grantor, and where the grantor failed to exercise such power of recall or to revoke the power vested in the depositary, and did not evidence an intent contrary to the original one under which the deed was deposited with the custodian, and where the latter, upon the death of the grantor, delivered the deed to the grantee, there was a valid delivery of the instrument.

Davis v. John E. Brown College, 208 Iowa 480, 489-90, 222 N.W. 858, 862 (1929), *rev'd*, Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

84 Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

> had prepared papers so providing. She put the deeds in her safety deposit box and retained the key. We do not think these admitted facts show a legal delivery of the deed in question.[85]

Thus, the legal requirement of delivery cannot be satisfied by mere failure to exercise a power of recall.[86]

### 2. *Recordation of the Instrument*

In addition to the manner by which control is reserved over the instrument, recordation of the deed has been a valuable tool for assistance in uncovering the grantor's intent at the time he allegedly made the transfer.[87] To pass "title" between the parties, recording is not essential,[88] but failure to do so may disclose that the grantor did not intend the transfer to have become presently operative.[89] However, recordation by the grantor[90] or at his direction[91] raises a presumption of delivery (a presumption that the transfer was

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[85] *Id.* at 1170, 280 N.W. at 623. *See* 24 IOWA L. REV. 167 (1938).

[86] As explained above (text accompanying notes 84-85 *supra*) the proposition that an unexercised right of withdrawal or recall constituted a valid delivery was overruled, but whether it was, in fact, overruled appeared questionable in the light of a later case, Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943), wherein the court sought to distinguish the facts of that case from those of Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938). In the *Ferrell* case the grantor had placed the deed in a box in her home where it remained until after her death. The court found an intent for the deed to be effective. This finding was based largely upon the purpose of the deed to serve as a voluntary settlement. (*See* 29 IOWA L. REV. 500 (1944) for a criticism of the *Ferrell* case.) The question now seems to have been affirmatively settled that the *Orris* case is the law of Iowa. (A possible exception to this rule may be found where the grantee is an infant child of the grantor. *See* notes 226-37 & accompanying text *infra*.) Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959). Worth noting is the unequivocal language in the *Brandt* case in reaffirming the view adopted in the *Orris* case:

> Plaintiff argues the case last named [Davis v. John E. Brown College, 208 Iowa 480, 222 N.W. 858 (1929)] and the two later decisions, supra [Boone Biblical College v. Forrest, 223 Iowa 1260, 275 N.W. 132 (1937); Robertson v. Renshaw, 220 Iowa 572, 261 N.W. 645 (1935)] largely based thereon, were not overruled by Orris v. Whipple because the deed there was not placed with a third party but in the grantor's safety-deposit box, Notwithstanding this factual distinction between the John E. Brown College and Boone Biblical College cases on the one hand, and Orris v. Whipple, the argument cannot be accepted. . . .
>
> We have construed the Orris opinion several times as overruling these two "College" cases as well as Robertson v. Renshaw, supra, and they cannot now be recognized as expressing the law of this state.

Brandt v. Schucha, *supra* at 688, 96 N.W.2d at 184.

In connection with the problems caused by a grantor's attempt to retain control over the instrument, even though the power of control is never exercised, consideration should also be givn the possibility of reserving a power to revoke the transfer. The retention of this power would not mean a return to the rule of the Brown decision because in that case the grantor could not be said to have reached the point in delivery at which an estate was created in the grantee. Whereas, if a power of revocation were to be retained, a present estate would be created in the grantee, but the estate would be subject to defeasance upon exercise of the power of revocation. Garvey, *supra* note 5; 43 CALIF. L. REV. 124 (1955); 22 U. KAN. CITY L. REV. 171 (1954).

[87] Potter v. Potter, 185 Iowa 559, 170 N.W. 773 (1919); *In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911).

[88] Reichert v. Wilhelm, 83 Iowa 510, 50 N.W. 19 (1891). *See* IOWA CODE § 558.41 (1966).

[89] Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938); Forrest v. Otis, 224 Iowa 63, 276 N.W. 102 (1937); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926).

[90] Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 93 (1951); Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Palmer v. Palmer, 62 Iowa 204, 17 N.W. 463 (1883).

[91] Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); *In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911); Collins v. Smith, 144 Iowa 200, 122 N.W. 839 (1909).

to have been complete before death).[92] The evidence required to overcome this presumption must be "clear, satisfactory and convincing,"[93] but the interrelationship of recording with the other circumstances of the transfer has a tendency to rebut this presumption. For instance, recordation of the instrument after the grantor's death greatly weakens any presumption of delivery which arises from recording[94] and may suggest that he intended for the transfer to have no effect during his lifetime.[95] On the other hand, a deed recorded after the grantor's death may be perfectly consistent with an intent to be divested of an interest during his lifetime if the deed was irrevocably given to a third person to record after the grantor's death.[96]

*3. Possession of the Instrument*

Functioning similarly to recordation, possession of the deed is looked upon as an integral part of the overall picture of intent.[97] The presumption arising from possession of the instrument parallels those strengths and weaknesses arising from recordation; for instance, the presumption of delivery is weakened if possession was not obtained until after the grantor's death, yet this fact does not entirely overcome a presumption of delivery "because the manual possession of the deed by the grantee is not necessarily essential to an effective delivery."[98]

A grantee without possession of the instrument has the burden to prove a completed delivery.[99] A grantee with possession of the instrument[100] is presumed to have obtained it rightfully,[101] via proper delivery, thereby establishing a prima facie conveyance.[102] The burden is then shifted to the party asserting nondelivery to show the same by clear, convincing and satisfactory proof.[103]

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92 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); Heavner v. Kading, 209 Iowa 1275, 228 N.W. 313 (1929).

93 Jeppesen v. Jeppesen, 249 Iowa 702, 709, 88 N.W.2d 633, 637 (1958).

94 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); *cf.* Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946), wherein the court was faced with the problem of deciding whether a deed had been delivered prior to the grantor's marriage. In deciding it had not been so delivered, the court applied to the time of recording in relation to the marriage the same principle applied to the time of recording in relation to death—namely, recordation after the grantor's death tends to overcome any presumption of delivery arising from recording.

95 Reichert v. Wilhelm, 83 Iowa 510, 50 N.W. 19 (1891); Ewing v. Buckner, 76 Iowa 467, 41 N.W. 164 (1889).

96 Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); *In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911). *See* notes 35, 65-66 & accompanying text *supra*.

97 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

98 Heavner v. Kading, 209 Iowa 1275, 1276, 228 N.W. 313 (1929). *See also* Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Schaeffer v. Anchor Mut. Fire Ins. Co., 113 Iowa 652, 85 N.W. 985 (1901), *rehearing*, 133 Iowa 205, 100 N.W. 857 (1907), wherein the court affirmed its prior decision but reversed the trial court a second time *on other grounds*.

99 Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

100 Proferring the instrument has been regarded as evidence of possession sufficient to create a presumption of delivery. Steenhoek v. Schoonover Trust Co., 205 Iowa 1379, 219 N.W. 492 (1928).

101 Mathers v. Sewell, 193 Iowa 35, 186 N.W. 636 (1922).

102 Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899).

103 Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895).

This analysis does not stop with the bare fact of possession but also encompasses the means by which the grantee acquired the instrument. For example, the contention of delivery has been rejected where possession of the deed was obtained without authority while the grantor was ill.[104] Likewise, a deed found among the grantor's papers, in and of itself, has been regarded as only "so much waste paper," and a subsequent acquisition of the instrument by the grantees would have given them no additional rights.[105] The deed was treated in this manner since the facts were "strong circumstance[s] against the theory of there having been a previous delivery."[106] Stated more succinctly, the previous facts did not reveal an intent to pass an interest *in praesenti*. The conclusion which follows is that a deed which had been in the grantor's possession at death and was later obtained by the grantee creates no presumption of delivery unless facts are found to support an allegation of intention to vest the grantee with an interest in the land before death.[107] If more facts are found, an otherwise sound delivery will not be defeated by the grantor's possession of the deed at his death.[108] Where additional facts attested to a completed conveyance, the cases were decided largely on the basis of some prior act of the grantor,[109] which the court labeled as symbolic,[110] or on the basis of the identity of the grantee who was often either an infant[111] or a natural object of the grantor's bounty.[112] A physical delivery in these cases would have only put "frosting on the cake" which again emphasizes the

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104 Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916). *See* note 25 & accompanying text *supra*. The above textual reference to unauthorized possession once again serves to illustrate the cumulative nature of the various factors upon which the court is forced to base its conclusion in the matter of whether the grantor intended to transfer an interest in his property before death. Each fact must be weighed against and with each other; for that reason no further attention will be given the problem of overcoming the presumption arising from recording and possession of a deed. The question in determining if these presumptions have been rebutted is not unique; rather, it is answered by the interrelationship of recording and possession with other facts which may indicate to the court the nature of the grantor's intent. For cases which held that such a presumption of delivery was not overcome, *see* Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Lawson v. Boo, 227 Iowa 100, 287 N.W. 282 (1939); Heavner v. Kading, 209 Iowa 1275, 228 N.W. 313 (1929); Mathers v. Sewell, 193 Iowa 35, 186 N.W. 636 (1922); Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886). Conversely, for cases which held that such a presumption of delivery was overcome, *see* Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961); Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960); Schaefer v. Anchor Mut. Fire Ins. Co., 133 Iowa 205, 100 N.W. 857 (1907).

105 Shetler v. Stewart, 133 Iowa 320, 324, 107 N.W. 310, 312 (1906).

106 Dolph v. Wortman, 185 Iowa 630, 645, 168 N.W. 252, 256 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 814 (1921). *See also* Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926). In the *Orris* case the deed remained in the grantor's box until after his death. *See* discussion at notes 84-86 & accompanying text *supra*.

107 Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932).

108 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

109 *See* Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941).

110 A symbolic delivery may be found, for example, in the prior act of the grantor placing the deed in his safety deposit box and handing the key to the grantee. Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929).

111 Palmer v. Palmer, 62 Iowa 204, 17 N.W. 463 (1883).

112 Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946); Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); *cf.* Note, *The Question of a Valid Delivery Where the Grantor Retains the Deed*, 19 NOTRE DAME LAW. 170 (1943).

weight that the grantor's probable intent places upon the outcome of a contested transfer.[113]

4. *Characteristics of the Instrument*

In addition to control, recordation and possession, the characteristics of an instrument may help form the foundation of a decision to accept or reject an alleged transfer. The court initially looks to the face of the instrument for the grantor's intent if its terms are clear and unambiguous.[114] Specifically, the court has considered whether the language of the instrument[115] suggests that it was not to have taken effect during the lifetime of the grantor.[116] However, the court weighs not only the content of the instrument but also its physical appearance. For example, if the instrument is in ink or pencil[117] or

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113 Jeager v. Elliott, 257 Iowa 897, 134 N.W.2d 560 (1965). Although establishing a prima facie case of delivery (Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961); Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895)), a manual change of the instrument is not indispensable to the transfer of an interest in the land (Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); text accompanying notes 19 & 30 *supra*). In fact, a manual transfer of the instrument is not conclusive of a valid conveyance. Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946). The "legal effect" of the transfer remains a matter of intent (Gilmer v. Neuenswander, 238 Iowa 502, 28 N.W.2d 43 (1947); Collins v. Smith, 144 Iowa 200, 122 N.W. 839 (1909))—an intent to pass a present interest (*id.*; *see* pt. I, § *B*, *supra*)—with the parties treating the manual delivery as such a transfer (Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); *see also* Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); Dolph v. Wortman, 185 Iowa 630, 168 N.W. 252 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 814 (1921); Witt v. Witt, 174 Iowa 173, 156 N.W. 321 (1916)). Authority for the proposition that the grantor's intent reigns supreme over physical control of an instrument has often been found in the following language from Newton v. Bealer, 41 Iowa 334, 339 (1875):

> Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because during life he might have done that which he did not do.

*See also* McKemey v. Ketchum, 188 Iowa 1081, 175 N.W. 325 (1919). Davis v. John E. Brown College, 208 Iowa 480, 222 N.W. 858 (1929), *rev'd*, Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938), extended this principle to include actual reservation of a right to recall a deed from a depository and as long as that right had not been exercised, delivery was considered complete upon the grantor's death. Subsequently, recognition of delivery via an unexercised right of recall was overruled by Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938), wherein the grantor had retained possession of the deed in his strongbox. Discussed at notes 81-86 & accompanying text *supra*. However, the initial proposition that the grantor's continued possession of the instrument will not defeat the transfer would still seem to be valid provided additional facts are sufficient to sustain the contested transfer. Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932); discussion of grantor's words and acts, and extrinsic circumstances at pt. III, §§ *B* & *D*, *infra*.

114 Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918); Stewart v. Wills, 137 Iowa 16, 114 N.W. 548 (1908); Wilson v. Carter, 132 Iowa 442, 109 N.W. 886 (1906); *cf.* construction given a deed discussed at notes 45-48 & accompanying text *supra*. *See generally* IOWA CODE ch. 558 (1966).

115 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919).

116 Potter v. Potter, 185 Iowa 559, 170 N.W. 773 (1919); *cf.* Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947). In the latter case the contestant tried unsuccessfully to impeach an instrument containing unambiguous terms; he contended the instrument was testamentary because the grantor had remarked that the transfer was to avoid probate. The court rejected this contention and held that an unequivocal deed, once effectively delivered, could not be rendered null by mere evidence that the grantor intended to achieve a testamentary purpose of affecting distribution of his estate.

117 Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926). The court in that case gave special attention to the method used to write the grantee's name on the deed—namely, lead pencil. By so doing, the grantor left open the possibility of later substituting another grantee.

if the writing has been altered,[118] the balance may be swung towards a finding that delivery was not complete.

An instrument in the form of a warranty deed contains a built-in signal that governs the directional flow of other facts; "the fact that the instrument is in form a warranty deed, containing the usual words of conveyance and covenance [sic] and covenants of warranty, should be given weight in ascertaining the intention of the grantor" to pass an interest during his lifetime, in contrast to an intent for the transfer to have been testamentary.[119] Thus, a warranty deed which is not deposited with a third person and does not reserve a life estate requires the grantor to divest himself of all rights of ownership before death if it is to be enforceable. When such an absolute instrument is read in the light of a failure to record and continued possession, the conclusion becomes apparent that the grantor did not have an intent to "presently" vest the grantee with an interest in the realty.[120]

A distinction between a present intent and a testamentary intent may become more pronounced by consideration of whether the grantor reserved a life estate.[121] If a life estate was omitted, the assumption has been made that the grantor did not intend to complete the transfer before death,[122] whereas reservation of a life estate was a strong indication of a contrary intent[123] since he no longer would have had cause to retain control over the instrument.[124] In some instances reservation of a life estate has been said to create a presumption of delivery.[125] Moreover, it has reconciled certain acts of the grantor which otherwise were inconsistent with an intent for the instrument to operate immediately. These inconsistent acts included leaving the deed with the scrivener,[126] an agreement between the grantor and grantee—husband and

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This fact, among others, indicated to the court that the grantor had intended to retain control over the instrument and therefore the transfer failed.

118 McKemey v. Ketchum, 188 Iowa 1081, 175 N.W. 325 (1919). The court noted that the absence of any change on the face of the instrument (when considered with the other facts and circumstances surrounding the alleged transfer) constituted "a most solemn admission that the deed was delievered; that by it the grantors had parted with the property." *Id.* at 1091, 175 N.W. 328.

119 Shaull v. Shaull, 182 Iowa 770, 780, 166 N.W. 301, 304 (1918). *See* Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951). Other decisions have at least taken cognizance that the form of the instrument was a warranty deed. Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963); *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959); Matheson v. Matheson, 139 Iowa 511, 117 N.W. 755 (1908).

120 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961); Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932).

121 Graven v. Winter, 38 Iowa 471 (1874).

122 Shaull v. Shaull, 160 N.W. 36 (1916), *rev'd on rehearing*, 182 Iowa 770, 166 N.W. 301 (1918).

123 Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); McKemey v. Ketchum, 188 Iowa 1081, 175 N.W. 325 (1919); Collins v. Smith, 144 Iowa 200, 122 N.W. 839 (1909); Saunders v. Saunders, 115 Iowa 275, 88 N.W. 329 (1901).

124 Webb v. Webb, 130 Iowa 457, 104 N.W. 488 (1905). By the same token, a reservation of the income from the property for the remainder of the grantor's life would have been unnecessary unless his intent was to have presently transferred an interest in the property. Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949).

125 Dyson v. Dyson, 237 Iowa 1265, 25 N.W.2d 259 (1946).

126 Johnson v. Moore, 184 Iowa 648, 169 N.W. 47 (1918).

wife—to use a succession of transfers as a means to distribute the husband's realty after their death to the children and at the same time avoid probate[127] and various acts in the nature of ownership, such as possession[128] and offers to sell.[129]

Determining if the grantor actually intended to reserve a life estate or to limit the passing of any interest until after his death presents one of the more puzzling aspects of intent and its relation to the question of a legal delivery. This dilemma arises where the instrument contains added conditions purportedly affecting passage of any interest to the grantee. Examples of these conditions are: " '[t]o commence after the death of both of the said grantors' "; " '[i]t is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the said grantors, or either of them, shall live' ";[130] "in effect . . . that it shall not pass title to the land until its delivery to the grantee after her [grantor's] death";[131] "the provision of the instrument itself is that it shall not become effective as a conveyance until after her death, and then only on the condition that the county pay her debts and funeral expenses";[132] " '[t]his deed to take effect immediately upon the death of both the grantors herein.' "[133] The foregoing provisos were construed as limitations by which the grantors intended to delay the transfers until death. A case involving the last quoted clause was subsequently reversed upon rehearing and held to simply postpone possession and enjoyment—these rights passing upon the grantor's death.[134] Thus, the latter clause and the following clauses have been inter-

127 Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938).

128 Albrecht v. Albrecht, 121 Iowa 521, 96 N.W. 1087 (1903).

129 Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886). *See* notes 205, 208 & accompanying text *infra*.

130 Leaver v. Gauss, 62 Iowa 314, 315, 17 N.W. 522 (1883). The court's reasoning in that case is helpful to sharpen the contrast between merely reserving a life estate and passing no interest to the grantee:

> [A]ny language employed by the grantor, which would be sufficient to create an estate to commence at a future day, [and at the same time reserve a life estate in the grantee] would, in the nature of the case, give a present interest in the property. The estate would stand created, and the enjoyment postponed. A declaration that the grantee takes no interest during the life of the grantor is equivalent, we think, to a declaration that no estate is created. The instrument, it is true, evidences an intention favorable to the grantee, but that intention is, in substance, only testamentary, and is, of course, subject to revocation, if indeed a revocation is needed to prevent it from becoming operative.

*Id.* at 316, 17 N.W. at 522-23.

131 Wilson v. Carter, 132 Iowa 442, 444, 109 N.W. 886, 887 (1906). The provision, mentioned in the above text, arose from an escrow agreement.

132 Ransom v. Pottawattamie County, 168 Iowa 570, 576, 150 N.W. 657, 658 (1915). In the course of deciding that the grantor did not intend to make a present transfer, the court greatly emphasized that the grantor's funeral expenses, and other debts, could not have been determined before death, and that, in all likelihood, the county would not have accepted the transfer subject to an indefinite amount of consideration—payment of the grantor's outstanding debts after death.

133 Shaull v. Shaull, 160 N.W. 36 (Iowa 1916), *rev'd on rehearing*, 182 Iowa 770, 166 N.W. 301 (1918).

134 Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918), *rev'g* 160 N.W. 36 (Iowa 1916). At rehearing the court was able to hang its hat on the instrument's form which was in all respects, with the exception of the proviso noted above (text accompanying note 133 *supra*), a warranty deed that had been delivered to a third person with a direction to record and

preted to only re-emphasize that the grantor intended to reserve a life estate: " '[t]he intention being that this deed shall not be in force or take effect until after the death of the grantor herein' ";[135] " '[t]he title to this land is not to pass while I live' ";[136] " '[t]he fee simple title to said land to vest in the grantee herein at the death of the grantor, and not until his death.' "[137] The above reversal and the close similarity of these provisos underscore that such phraseology is no longer the mainstay of a successful transfer.[138] Greater atten-

deliver the instrument to the grantee. *See also* Lonard v. Wren, 184 Iowa 1339, 169 N.W. 621 (1918). In the latter case the manner in which reference was made to Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918), implied that the first hearing, Shaull v. Shaull, 160 N.W. 56 (Iowa 1916), stood as a high water mark of the court's hesitancy to recognize a restrictive clause as merely reserving a life estate to the grantor. Prior to the time of the rehearing the court had held that the effect of such a clause was to prevent the passing of any interest in the grantor's land until his death and that the grantee received nothing by the deed since the grantor failed to comply with the requirements for a will. *See also* IOWA CODE § 633.279 (1966).

135 Saunders v. Saunders, 115 Iowa 275, 276, 88 N.W. 329, 330 (1901).

136 Bradley v. Bradley, 185 Iowa 1272, 1280, 171 N.W. 729, 732 (1919). After conceding that the prior rule (interpreting provisos similar to those discussed above at notes 130-34 & accompanying text *supra*) had undergone some modification, the court proceeded to distinguish the terms of the instrument in issue from the terms of those instruments (such as in Leaver v. Gauss, 62 Iowa 314, 17 N.W. 522 (1883)) which purported to pass no interest in the land during the grantor's lifetime:

> [I]t will be seen that, by the express terms of the deeds there being considered, or by necessary implication from such terms, the grantees were to have "no interest" in the property until the grantor's death. There is no such provision in the deed now under consideration. It does provide that the "title shall not pass" until the death of the grantor, but this is by no means the equivalent of a declaration that the grantee shall have "no interest" in the property during the lifetime of grantor.

*Id.* at 1282, 171 N.W. at 732.

137 Schenck v. Schenck, 242 Iowa 1289, 1290, 50 N.W.2d 33, 34 (1951); *cf.* Stewart v. Wills, 137 Iowa 16, 114 N.W. 548 (1908).

138 Criticism has been made that no logical distinction exists between provisos similar to those analyzed above (notes 130-37 & accompanying text *supra*). The only reason the provisos were not held as testamentary was because the courts "have been insistent that the grantor's intent be carried out." Note, *Use of Deeds To Effectuate Transfer at Death of Grantor*, 32 NOTRE DAME LAW. 300, 302-03 (1957). The crux of this criticism is that in most cases the grantor intended for a certain person to receive the property and, at the same time, desired to provide a measure of security for himself by retaining control over the property until death. Thus, the above provisos appear to be the product of a "dispositive" intent. *See* notes 1-6 & accompanying text *supra* for some of the reasons behind a "dispositive" intent.

To alleviate some of the problems which commonly spring from a "dispositive" intent, such as the above provisos, one author has urged judicial recognition be given the concept of a revocable transfer. The revocable feature of the transfer would permit the grantor to convey his property before death with the assurance that ownership could be recovered if the need should arise. Until exercising the power of revocation, the transfer would be legally complete but subject to defeasance, in constrast to a transfer which was never completed. The difference between these transfers has been explained as follows by the proponent of the revocable transfer:

> It is probable that the makers of some deeds providing that they were not to be effective until death were desirous of making revocable gifts. No objection can be taken to decisions holding these instruments ineffective. The intent required to make a valid revocable deed is complex; it requires the intention that the instrument shall always be effective as a conveyance, though the economic effect of the transaction can be defeated in a very limited and specified manner—the exercise of the reserved power that determines the grantee's estate . . . . This conclusion results from the wisdom of the requirement of delivery in Anglo-American law. It would be wrong for a court to give effect to an act that was not definitely intended to have legal significance. As indicated above the mere signing of the instrument is not a sufficient safeguard in this respect; but when the maker evidences his intention that

tion is now directed toward additional factors which may be outside the body of the instrument.[139]

The above conditions, which may have affected the passing of a present interest, should not be confused with other conditions that merely limit the nature of the estate granted,[140] attempt to place a restraint upon alienation,[141] form a part of a contractual agreement to sell the property[142] or relate to consideration.[143]

### 5. *Consideration*

Actual consideration has consistently been held unnecessary to a transfer made as a gift,[144] advancement or family settlement.[145] Love and affection are

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> the instrument is final, that it creates present legal rights that are binding on him, then the instrument can and should be given effect according to its terms.

Garvey, *supra* note 9, at 62.

139 *See* Leonard v. Wren, 184 Iowa 1339, 169 N.W. 621 (1918); Ransom v. Pottawattamie County, 168 Iowa 570, 150 N.W. 657 (1915). Beyond the instrument proper the court may look to outside related factors which include recording, possession and statements by the grantor at the time the instrument was allegedly delivered to an intermediary. Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951); Shaull v. Shaull, 182 Iowa 770, 166 N.W. 301 (1918). These additional factors, in the opinion of one author, should be applied to the issue of delivery in the following manner:

> The most that we can do is look at all the circumstances of the transaction and impute a fictitious intent to the donor. It is submitted that when imputing such an intent, we should impute a valid one—one that will sustain the transaction and give effect to the manifested desires of the donor—unless there is something in the transaction that affirmatively manifests an invalid one.

Garvey, *supra* note 5, at 156.

140 Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940). The deed had been placed in an envelope bearing a notation which indicated "George" was to have received the property if "Charlie" died first; a third person had been directed to deliver the deed. The court found that the notation only related to the nature of the estate granted (that is to say, whether the grantee received a vested or contingent remainder) and that it in no way affected the central issue of delivery.

141 Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927). The terms of the deed attempted to prevent the grantee from disposing of the property for a period of twenty years. Although void as a restraint upon alienation, the provision was held to have no effect upon passage of an estate to the grantee.

142 Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898). In *In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959), the grantor had contracted to sell his property with delivery of the deed, in the physical sense, to follow his death. The court held, in essence, that postponement of delivery of the deed did not change the quality of the estate which vested in the grantee at the conclusion of the contract.

143 In Kyle v. Kyle, 175 Iowa 734, 745, 157 N.W. 248, 252 (1916), the following distinction was made between elements of consideration which were conditions subsequent and those which were conditions precedent and the respective effect of each upon the alleged transfer:

> [T]he so-called "conditions" therein [relating to assumption of a mortgage and providing the grantor with support for life] are merely statements of consideration for the conveyance, or at most, conditions subsequent. . . . Had the deed been conditioned to take effect only when the agreed consideration had been furnished or performed, a very different problem would arise.

*Cf.* In Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916), the deed contained a provision that the grantee was to care for the grantor; however, the provision was essentially unfulfilled. As a result equitable considerations of the grantee's disregard for the grantor were largely responsible for the court's finding that the grantor did not intend to deliver the deed before death or, in other words, until the conditions of care had been performed.

144 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); *cf.* Keune v. McCauley, 228 Iowa 607, 293 N.W. 25 (1940).

145 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967).

sufficient as long as the rights of third parties have not intervened.[146] Even in cases where the instrument recited consideration, lack of actual consideration did not defeat the transfer, convert it to a trust or make it testamentary (which would have subjected it to the requirements for executing a will).[147] Thus, as the court on one occasion stated: "An executed, delivered deed is not invalid merely because it is without consideration. Want of consideration is a ground for avoidance of an executory contract but not, as between the parties thereto, of an executed conveyance."[148]

However, consideration does bear upon the issue of delivery in at least two respects. First, the court has made special mention that a transfer may stand upon the additional footing of a recital of consideration such as a promise by the grantee to have cared for the grantor.[149] This agreement demonstrated that the grantor intended to create a present interest in the grantee.[150] Second, receipt of consideration by the grantor would have given the grantee a present contractual right enforceable after the grantor's death. Without consideration the transfer must have been consummated before his death or else the instrument would have no more significance than an incomplete gift.[151]

### B. *Words and Acts*

#### 1. *Statements by the Grantor*

Thus far, delivery has been discussed from the reference point of circumstances surrounding the instrument, yet delivery has also been "determined by his [the grantor's] acts or words or both."[152] Therefore, the focus of discussion will now center upon those factors which are apart from the instrument but nevertheless play a supporting, if not leading, role in the quest for the grantor's intent.

As a general rule, statements by the grantor at the time the instrument was executed, or subsequent thereto, are competent evidence of his intent[153] to part with "title."[154] On one occasion the court remarked that the grantor's

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146 Craven v. Winter, 38 Iowa 471 (1874).

147 Tucker v. Glew, 158 Iowa 231, 139 N.W. 565 (1913).

148 Oehler v. Hoffman, 253 Iowa 631, 637-38, 113 N.W.2d 254, 258 (1962).

149 Graham v. Johnston, 243 Iowa 112, 49 N.W.2d 540 (1951); Saunders v. Saunders, 115 Iowa 275, 88 N.W. 329 (1901); *cf. In re* Estate of Lundgren, 250 Iowa 1233, 98 N.W.2d 839 (1959); Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898). In the latter cases the court found that the grantee was entitled to have the grantor's executor deliver the deed as per the purchase agreement executed during the grantor's lifetime if he had accepted part of the consideration before death.

150 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919).

151 Furenes v. Eide, 109 Iowa 511, 80 N.W. 539 (1899); *cf.* Keune v. McCauley, 228 Iowa 607, 293 N.W. 25 (1940).

152 Ferrell v. Stinson, 233 Iowa 1331, 1336, 11 N.W.2d 701, 704 (1943); *accord*, Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958). *See generally* discussion of what constitutes delivery at pt. I, § *B*, *supra*.

153 The court has stated "[i]t is elementary that subsequent declarations in harmony with the deed are of great weight." McKemey v. Ketchum, 188 Iowa 1081, 1086, 175 N.W. 325, 327 (1919).

154 Albrecht v. Albrecht, 121 Iowa 521, 96 N.W. 1087 (1903).

statements were " 'considered a potent factor' " in the matter of delivery.[155] A statement made in writing, in addition to the instrument and coinciding in time with the asserted delivery was treated as such a factor.[156] Similarly, a previous comment by the grantor that he was "not quite ready" strengthened the credibility of an allegation that delivery occurred subsequent thereto,[157] whereas a grantor's reply that he would retain possession of the deed has been interpreted as disproof of his intent to transfer ownership of the property before death.[158]

Statements by the grantor which follow an unequivocal delivery logically will not, as noted, defeat the transfer,[159] but such statements may be a reflection of an intent that the instrument was to have become operative only upon the grantor's death, if the transfer is questionable in the first instance.[160] Nevertheless, the grantor affirmatively removed much doubt surrounding a prior delivery when he later informed the grantee that the land had been "deeded" to him[161] or when he directed the grantee to "get" his (the grantor's) papers.[162]

Comparably, a request to record the instrument after giving it to a third person,[163] the lack of a statement reserving the power or right to recall the deed[164] or the declaration that "I don't want it" after the third person offered to return the deed have corroborated the assertion that the grantor intended to divest himself of an interest in the property.[165] An opposite

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155 Ferrell v. Stinson, 233 Iowa 1331, 1339, 11 N.W.2d 701, 705 (1943). *See* Stewart v. Wills, 137 Iowa 16, 114 N.W. 548 (1908).

156 In Kane v. Campisano, 255 Iowa 745, 755, 124 N.W.2d 172, 178 (1963), the grantor had written over her signature on the deed the following: " 'I herewith *hand you the deed which I have* this day *executed and delivered* . . . . I therefore request that you *hold it for the grantee*, recording it after my death.' (Emphasis supplied.)" The statement was held to have affirmatively shown that the grantor intended to part with all control over the deed.

157 Criswell v. Criswell, 138 Iowa 607, 610, 116 N.W. 713, 714 (1908).

158 Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916).

159 Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947); Mathers v. Sewell, 193 Iowa 35, 186 N.W. 636 (1922). *See* discussion of indefeasibility of a completed transfer at note 35 *supra*.

160 Gilmer v. Neuenswander, 238 Iowa 502, 28 N.W.2d 43 (1947). *Cf.* Brandt v. Schucha, 250 Iowa 679, 690, 96 N.W.2d 179, 185 (1959) (wherein a deed had been deposited with a third person subject to a right of recall). At trial a letter to the grantee was introduced which allegedly waived the right of recall, but the court held the letter failed to show by "requisite clear, satisfactory and convincing proof" that the grantor had made such a waiver.

161 Hinson v. Bailey, 73 Iowa 544, 545, 35 N.W. 626, 627 (1887); *accord*, Johnson v. Moore, 184 Iowa 648, 169 N.W. 47 (1918).

162 Mathers v. Sewell, 193 Iowa 35, 37, 186 N.W. 636, 638 (1922).

163 Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); *In re* Estate of Bell, 150 Iowa 725, 130 N.W. 798 (1911); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906). In Johnson v. Moore, 184 Iowa 648, 656, 169 N.W. 47, 50 (1918), the scrivener, with whom the deeds were left, testified that the grantor wanted the deeds recorded so "it might appear to the public that he had conveyed his real estate." This evidence clearly influenced the court's conclusion that the grantor intended to complete the transfer at the time the deed was executed. *Cf.* Webb v. Webb, 130 Iowa 457, 104 N.W. 438 (1905) (wherein some importance was attached to the grantor's request for a notary to draw the deeds).

164 Potter v. Potter, 185 Iowa 559, 170 N.W. 773 (1919); Schaefer v. Anchor Mut. Fire Ins. Co., 133 Iowa 205, 100 N.W. 857 (1907).

165 Hinson v. Bailey, 73 Iowa 544, 545, 35 N.W. 626, 627 (1887).

intent was exhibited by the grantor's conditioned instruction to deliver "if anything happened,"[166] and to get the deed if "he did not return."[167]

The grantor's statements may take the form of a delivery via an intermediary if he placed the deed in his lockbox or chest and prior to death informed another that it would be found there or asked the other person to get the deed after death and give it to the grantee. From these statements the court has deduced that the grantor intended to make a present transfer which was to have become complete upon his death. The conveyance became complete upon the grantor's death in the sense that the grantee then had the right to possession and enjoyment of the property.[168]

Statements to other persons, *not directly* involved with the transaction, have also been viewed as having some probative value of the grantor's intent at the time of the prior act asserted to be delivery. For the most part, these statements are of the following tenor: that the grantor wanted a certain person to have the property,[169] that the property had been given to a certain person,[170] that the grantor "deeded" the land[171] or that he had prepared the papers.[172] Similarly, the manner in which the grantor spoke to disinterested parties about the transaction may operate as further proof of his intent.[173] Such comments have taken these forms: a discussion of the legal validity of the deed and the grantor's preference for it over the use of a testamentary transfer,[174] an explanation that an unconditional transfer had been made[175] or a refusal to include certain property in a will because that land had already been "deeded" to another.[176]

The grantor's intent to make or not to make a completed transfer may

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166 Trask v. Trask, 90 Iowa 318, 323, 57 N.W. 841, 843 (1894).

167 Dolph v. Wortman, 185 Iowa 630, 643, 168 N.W. 252, 256 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 814 (1921).

168 Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906); Newton v. Bealer, 41 Iowa 334 (1875). *See* Mathers v. Sewell, 193 Iowa 35, 186 N.W. 636 (1922).

169 Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947); Trask v. Trask, 90 Iowa 318, 57 N.W. 814 (1894).

170 Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947); Denzler v. Rieckhoff, 97 Iowa 75, 66 N.W. 147 (1896).

171 McKemey v. Ketchum, 188 Iowa 1081, 1090, 175 N.W. 325, 328 (1919); *accord*, Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943). *Contra*, Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958), which illustrates the relative effect given the grantor's remarks about disposition of his property. A comment that the property had been "deeded" to the children was found consistent with an intent (more strongly expressed in other acts and statements) for the deed to become operative only at death.

172 Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

173 Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941); Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929); Webb v. Webb, 130 Iowa 457, 104 N.W. 438 (1905).

174 White v. Watts, 118 Iowa 549, 92 N.W. 660 (1902).

175 Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Denzler v. Rieckhoff, 97 Iowa 75, 66 N.W. 147 (1896); *cf.* In Dettmer v. Behrens, 106 Iowa 585, 589, 76 N.W. 853, 854 (1898), the grantor had "repeatedly remarked" that the deed would be delivered upon payment of the outstanding consideration. These statements were reiterations of a prior contractual agreement and helped to demonstrate, to the court's satisfaction, that the grantor never intended to recall the deed from the depository. Therefore, upon receipt of the unpaid balance, the grantor's executor was obligated to give the grantee possession of the instrument.

176 McKemey v. Ketchum, 188 Iowa 1081, 1091, 175 N.W. 325, 329 (1919); *accord*, Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943).

be inferred from his silence on certain matters.[177] For instance, the absence of any assertion or claim of right to repossess the papers after the contested delivery has been held additional evidence of an intent to part with all control over the instrument.[178] The negative of this intent has been drawn from the grantor's failure to comment on the following aspects of the transaction: generally, any statement which would indicate that he intended for the grantee to receive a present interest, instructions to deliver the deed after death, or any claim, such as reserving a right to use the property, which would explain continued occupancy by the grantor.[179]

2. *Acts of the Grantor*

The grantor's acts may also provide a manifestation of intent to complete a transfer during his lifetime and thereby satisfy the judicial requirement of delivery.[180] In this respect the court has noted: " 'That the grantor acts as if the title had or had not passed to the named grantee would certainly appear to be strong evidence of his intention that the instrument should or should not operate to pass the title.' "[181] Direct acts which physically transfer the instrument to the grantee come within the concept of a manual delivery of the instrument,[182] cause little difficulty and create a prima facie case for a valid transfer.[183] Less direct acts in the form of handing a safety box key to the grantee[184] or placing the deed in the grantee's private box,[185] for example, have enabled the court to sustain a transfer on the strength of a symbolic delivery,[186] but the court has refused to accept the argument that delivery was symbolic[187] if the key was given for the limited purpose of obtaining some

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177 *See* discussion accompanying note 164 *supra*.

178 Potter v. Potter, 185 Iowa 559, 170 N.W. 773 (1919).

179 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932). *See* discussion of reserving or failing to reserve a life estate at notes 121-29 & accompanying text *supra*.

180 Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); text accompanying note 152 *supra*.

181 Jeppesen v. Jeppesen, 249 Iowa 702, 710, 88 N.W.2d 633, 638 (1958), quoting from T. TIFFANY, REAL PROPERTY § 1045, at 222 (3d ed. 1939). Unfortunately, determining what acts of the grantor will be sufficient to constitute delivery remains an elusive process and defies any attempt to reduce such a process to a simple rule. In Orris v. Whipple, 224 Iowa 1157, 1170, 280 N.W. 617, 623 (1938), discussed at notes 84-86 & accompanying text *supra*, the court held that the grantor's act of merely executing a deed, placing it in a safety box and telling another that the named grantee was to have the property was not enough to establish a "legal delivery." The thrust of the *Orris* decision was that to satisfy the requirement of delivery (in the legal meaning of the word) the grantor's acts must have been more positive and definitive in nature than those just described.

182 Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); *see* Gruber v. Palmer, 230 Iowa 587, 298 N.W. 926 (1941).

183 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

184 Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929). *See also* Robertson v. Renshaw, 220 Iowa 572, 261 N.W. 645 (1935), *rev'd*, Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

185 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923). The court commented that the grantor's continued access to the grantee's box would not defeat the transfer.

186 *See* Kane v. Campisano, 255 Iowa 745, 124 N.W.2d 172 (1963).

187 In the cases cited at notes 188-90 *infra*, the grantor, in each instance, was held to have failed to make an operative delivery; in other words, the grantor did not complete a transfer of ownership before death. These failures are significant to emphasize the

papers from a deposit box[188] or with the stipulation to open the box if the grantor did not return[189] or if the deed was handed to a notary and then returned to the grantor who retained possession thereof.[190]

Whether delivery was manual or symbolic, an event so claimed has received additional impetus from certain nonactions, including failures to change a deed for thirty-five years,[191] subsequently reclaim it (a proposition now overruled)[192] or set it aside.[193]

Positive acts of ownership in the nature of continued possession and control of the property have tended to negate an allegation that the grantor had delivered the instrument,[194] and relinquishing possession of the property has accordingly meant that the grantor never intended to recall the deed.[195] Still, the consequence of these acts to the transfer has depended upon what rights of ownership were asserted with respect to the property. Indeed, continued possession was acknowledged as perfectly consistent with an intent to make an inter vivos transfer where the grantor had reserved a life estate.[196] The same results were produced by depositing the deed with a third person—an arrangement which preserves a life estate for the grantor.[197] Notwithstanding the omission of a life estate, the "legal efficacy of the instrument" is unaffected by the grantor's possession following a physical delivery if no claim of ownership had been asserted over the property.[198] Moreover, continued control and management of property transferred to the grantor's wife was dismissed, without challenge to the conveyance, as partial fulfillment of the husband's family responsibilities.[199] A different intent has been shown when a warranty deed was

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cumulative nature of the various facts which indicate the time the grantor intended the grantee to have been vested with rights of ownership. One fact, considered apart from the others, probably will not be decisive of the next case. *Cf.* Heavner v. Kading, 209 Iowa 1271, 228 N.W. 311 (1929). The court recognized that although a belief about the validity of the transfer is not determinative of its legal success, the grantor's certainty that he has successfully transferred his property reinforces other evidence supporting the conveyance.

188 Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938).

189 Lathrop v. Knoop, 202 Iowa 621, 623, 210 N.W. 764, 765 (1926).

190 Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932).

191 Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951).

192 Potter v. Potter, 185 Iowa 559, 170 N.W. 773 (1919). Failure to exercise a power of recall over the instrument was once considered indicative of an intent to convey the property; consequently, delivery was adequate and the conveyance became complete upon the grantor's death. Today, an unexercised right of recall will not suffice for the legal requirement of delivery. Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959); Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938); notes 84-86 & accompanying text supra.

193 Bardsley v. Spencer, 215 Iowa 616, 244 N.W. 275 (1932).

194 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

195 Dettmer v. Behrens, 106 Iowa 585, 76 N.W. 853 (1898). *See* manner of reservation of control over the instrument at pt. III, § *A*, 1, *supra.*

196 Webb v. Webb, 130 Iowa 457, 104 N.W. 438 (1905); Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886); *see* discussion reserving or failing to reserve a life estate at notes 121-29 & accompanying text *supra.*

197 Oehler v. Hoffman, 253 Iowa 631, 113 N.W.2d 254 (1962); Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959); Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938); Albrecht v. Albrecht, 121 Iowa 521, 96 N.W. 1087 (1903). *See also* discussion of delivery to a third person to be delivered upon the grantor's death at pt. II, § *A*, *supra.*

198 Potter v. Potter, 185 Iowa 559, 567, 170 N.W. 773, 776 (1919); *see* McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895).

199 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923); *see* Gruber v. Palmer, 230

analyzed in conjunction with a claim of ownership to obtain income or in conjunction with continued possession under a claim of right.[200] These acts lead to the conclusion that the grantor did not intend to make an inter vivos transfer[201] since the terms of the instrument required possession and control to vest before death.[202]

Various other acts in relation to the property have proven useful to reconstruct the grantor's intent from the facts. An intent to transfer no interest until death has been partly deduced from the grantor's continued payment of taxes,[203] but contra if the grantor reserved a life estate since he was then expected to pay property taxes.[204] Offers to sell[205] and payments of insurance premiums[206] had the same effect. In each case these acts revealed more clearly an intent that the instrument was to have remained unenforceable, yet payments of insurance[207] or offers to sell or lease drew little attention from the court where a life estate had been reserved[208] or the grantor had intentionally released all dominion over the deed through a valid delivery.[209]

An act by the grantor after a completed transfer—for example destroying the deed—will not change the validity of that transfer[210] unless the grantee joined by consenting to the destruction; then, the grantee would be treated as holding the record title in trust for the benefit of the grantor. The significance attached to destruction of the deed has been limited to an obliteration of the written evidence of the transfer, but aside from the possibilities arising from the grantee's consent, this act was without legal or equitable effect.[211]

### 3. *Acts of the Grantee*

Acts of the grantee, as well as those of the grantor, have been appraised by the court in reaching a decision on the issue of delivery.[212] Consideration

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Iowa 587, 298 N.W. 926 (1941); *cf.* effect of family relationship upon success of a transfer discussed at notes 229-37 & accompanying text *infra*.

200 Avery v. Lillie, 148 N.W.2d 474 (Iowa 1967); Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961); Lathrop v. Knoop, 202 Iowa 621, 210 N.W. 764 (1926).

201 Dolph v. Wortman, 185 Iowa 630, 168 N.W. 252 (1918), *aff'd on rehearing*, 191 Iowa 1364, 183 N.W. 814 (1921); Reichert v. Wilhelm, 83 Iowa 510, 50 N.W. 19 (1891); *see* Orris v. Whipple, 224 Iowa 1157, 280 N.W. 617 (1938). *See also* discussion of an instrument in the nature of a warranty deed at notes 119-20 & accompanying text *supra*.

202 Dolph v. Wortman, 191 Iowa 1364, 183 N.W. 814 (1921).

203 Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961); Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

204 Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886).

205 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958).

206 Robinson v. Loyd, 252 Iowa 1086, 109 N.W.2d 619 (1961).

207 Webb v. Webb, 130 Iowa 457, 104 N.W. 438 (1905).

208 Blair v. Howell, 68 Iowa 619, 28 N.W. 199 (1886). The court noted the grantor was a necessary party to any sale of the land which followed the contested transfer; since he had retained a life estate, the entire fee could not have been sold without his participation and consent.

209 Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 53 (1951); Smith v. Fay, 228 Iowa 868, 293 N.W. 497 (1940); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906).

210 *See* discussion of irrevocability of a completed transfer at note 35 *supra*.

211 Matheson v. Matheson, 139 Iowa 511, 117 N.W. 755 (1908); *see* Albrecht v. Albrecht, 121 Iowa 521, 96 N.W. 1087 (1903).

212 Jeppesen v. Jeppesen, 249 Iowa 702, 88 N.W.2d 633 (1958); Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946).

of the grantee's acts in the formation of a court's decision is possibly justified by the basic proposition that the question of delivery hinges on intent, and if an instrument was "intended to pass title, and all parties so treated it, the delivery was sufficient."[213] Expectedly, only passing reference has been given to those acts which were in accord with a present transfer. Instead, the court has focused its attention upon those acts which demonstrated that the transaction was never understood as a present transfer of title. Some of these acts have been continued rent payments,[214] an expression of desire to have the deed quickly recorded upon its discovery after the grantor's death[215] and failure of the grantee to claim either the deed[216] or ownership and possession of the property.[217] On the last point, some irregularities have appeared. An earlier case interpreted the grantee's acquiescence in continued possession and payment of taxes and repairs by the grantor as consistent with the transfer since the grantor's wife was the grantee's sister.[218] In a more recent case the court reached an opposite conclusion under similar circumstances. Therein, the grantor was the grantee's mother and a life estate had not been reserved, but the grantee had performed none of the acts associated with ownership (for instance, paying taxes or claiming a right to the income). The person acting as owner, in that sense, was the mother, not the grantee-daughter. Perhaps the distinction between the two cases is equitable. The grantee in the latter case managed the "whole affair" and when asked about the matter denied having any knowledge of the transaction.[219]

In connection with the evidence of delivery to be gathered by reference to the grantee, mention should be made of the relationship which the grantee's knowledge has to the legal success of a transfer. His knowledge of the "delivery" is immaterial if the deed was given to a third person to be handed to him after the grantor's death[220] or if delivery was accomplished in some other manner during the grantor's life.[221] However, the grantee's lack of knowledge

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213 Collins v. Smith, 144 Iowa 200, 203, 122 N.W. 839, 840 (1909). The grantee's acts would seem to have little value as a means of determining whether the grantor intended to convey a present interest in the land, unless justified by the general proposition that all the parties to the instrument must treat it as a transfer of ownership if it is to stand.

214 Miller v. Murfield, 79 Iowa 64, 44 N.W. 540 (1890).

215 Hinson v. Bailey, 73 Iowa 544, 35 N.W. 626 (1887). As mentioned (note 143 *supra*) the court in Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916), was equitably influenced to reject the alleged transfer. First, the grantee had failed to provide proper care for his father, the grantor, in accordance with the terms of the deed, and second, the grantee had obtained possession of the deed without his father's consent.

216 Brandt v. Schucha, 250 Iowa 679, 96 N.W.2d 179 (1959); Hintz v. Hintz, 176 Iowa 392, 157 N.W. 878 (1916).

217 Gilmer v. Neuenswander, 238 Iowa 502, 28 N.W.2d 43 (1947).

218 McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895); *cf.* influence of family relationships upon the legal effect of an attempted transfer, discussed at notes 229-37 & accompanying text *infra*.

219 Avery v. Lillie, 148 N.W.2d 474, 477 (Iowa 1967).

220 Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914); Criswell v. Criswell, 138 Iowa 607, 116 N.W. 713 (1908); *cf.* Matheson v. Matheson, 139 Iowa 511, 117 N.W. 755 (1908).

221 Heavner v. Kading, 209 Iowa 1275, 228 N.W. 313 (1929). In Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951), an action was brought, after both the grantor and grantee were dead, contending that the deed was never delivered to the grantee-wife. Al-

becomes important where he did not receive possession of the deed until after the grantor's death[222] and at the time of death it remained among grantor's papers.[223] The court reasoned from such facts that the grantor failed to adequately manifest an intent for the instrument to be operative during his lifetime.[224]

### C. *Extrinsic Circumstances*

Extrinsic evidence[225] has been admitted to allow the court to place itself in the position of the parties[226] in search for an inducement[227] or motive[228] behind the execution of the instrument which, in turn, would help uncover the nature of the grantor's intent.

The position of the parties has frequently been used to refer to any familial factors.[229] Where the grantee was a natural object of the grantor's bounty, the comment has been made that "courts of equity are strongly inclined to uphold the deed and will do so unless impelled to the opposite conclusion by strong and convincing evidence."[230] Prompted by this attitude the court has taken special notice of the equities which favored the grantee who, as the grantor's brother, was the natural object of his bounty[231] and of the

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though the wife had no knowledge of the instrument, the conveyance was sustained because the grantor reserved a life estate and then recorded the deed. Knowledge of the instrument was likewise unnecessary in Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923), wherein the grantor had deposited the deed in his wife's (the grantee's) private box. The court regarded placing the deed in the grantee's box to be the same as an actual manual delivery to the grantee.

222 Schaeffer v. Anchor Mut. Fire Ins. Co., 113 Iowa 652, 85 N.W. 985 (1901), *rehearing*, 133 Iowa 205, 100 N.W. 857 (1907). The court affirmed its prior decision but reversed the trial court a second time *on other grounds*.

223 Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932); Miller v. Murfield, 79 Iowa 64, 44 N.W. 540 (1890).

224 Miller v. Murfield, 79 Iowa 64, 44 N.W. 540 (1890).

225 Hilliard v. Hilliard, 240 Iowa 1394, 39 N.W.2d 624 (1949); Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Criswell v. Criswell, 138 Iowa 607, 116 N.W. 713 (1908); Stewart v. Wills, 137 Iowa 16, 114 N.W. 548 (1908); Craven v. Winter, 38 Iowa 471 (1874).

226 Tuttle v. Raish, 116 Iowa 331, 90 N.W. 66 (1902); Craven v. Winter, 38 Iowa 471 (1874).

227 Craven v. Winter, 38 Iowa 471 (1874).

228 Blain v. Blain, 215 Iowa 69, 244 N.W. 827 (1932). The court determined that the grantor's only motive for the alleged conveyance was to prevent his divorced wife from obtaining his property. Consequently, ownership rights in the land were never intended to have been transferred.

229 McKemey v. Ketchum, 188 Iowa 1081, 175 N.W. 325 (1919); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906).

230 Ferrell v. Stinson, 233 Iowa 1331, 1338, 11 N.W.2d 701, 705 (1943). One reason for attaching a great amount of importance to familial factors has been advanced by the court as follows:

> There is in such a case a high degree of mutual confidence between the parties. In this class of cases courts of equity do not put so much importance in the mere manual possession of the deed as in the intent of the grantor. If his intent to pass title presently to the grantee is satisfactorily shown, equity usually sustains such a conveyance, even where the grantor retained manual possession of the deed.

231 Klosterboer v. Engelkes, 255 Iowa 1076, 125 N.W.2d 115 (1963); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906) (discussed at length that the grantees were orphaned grandchildren of the grantor).

grantor's purpose to vest his wife with a remainder interest in the property.[232] If the grantee was an infant child of the grantor, the requirement of delivery has been fulfilled by recordation of the deed at the grantor's instance[233] or by placing the deed with a third person to be recorded after the grantor's death.[234] Certainly, a transfer to an infant could not be accomplished through a manual process.[235] Familial relationships have justified retention of the deed by the grantor-father-husband[236] and continued possession of the farm when the grantor's wife was the grantee's sister.[237] These acts otherwise would not have been consistent with an intent to transfer a present interest.

Familial factors have also defeated a conveyance through the objection that a confidential relationship has been abused. From the "presence of a dominant influence under which the act is presumed to have been done" a presumption arises that the "deed was procured by fraud or undue influence."[238] The purpose in applying this doctrine has been to defeat a conveyance obtained by unfair advantage and pressure which the grantee was able to assert since he was once closely associated with the grantor.[239]

Extrinsic circumstances not involving a relationship of the parties have included the health of the grantor,[240] the grantor's belief about how long he had to live[241] and, as an outgrowth of that belief, his "dispositive" intent[242] or some benevolent reason which caused the grantor to attempt the transfer.[243]

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232 Schenck v. Schenck, 242 Iowa 1289, 50 N.W.2d 33 (1951).

233 Goodman v. Andrews, 203 Iowa 979, 213 N.W. 605 (1927); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906); Palmer v. Palmer, 62 Iowa 204, 17 N.W. 463 (1883); *see* recordation of the instrument at pt. III, § *A*, 2, *supra*.

234 Schurz v. Schurz, 153 Iowa 187, 128 N.W. 944 (1910); *see* delivery to a third person to be delivered upon the grantor's death at pt. II, § *A*, *supra*.

235 Newton v. Bealer, 41 Iowa 334 (1875).

236 Leighton v. Leighton, 196 Iowa 1191, 194 N.W. 276 (1923).

237 McGee v. Allison, 94 Iowa 527, 63 N.W. 322 (1895); *see* acts of the grantee at pt. III, § *C*, *supra*.

238 Oehler v. Hoffman, 253 Iowa 631, 634, 113 N.W.2d 254, 256 (1962). *See also* Nowlen v. Nowlen, 122 Iowa 541, 98 N.W. 383 (1904).

239 Oehler v. Hoffman, 253 Iowa 631, 113 N.W.2d 254 (1962). A satisfactory rule has not been formalized to define the existence of a confidential relationship except to say that each case must be considered on its own facts. Arndt v. Lapel, 214 Iowa 594, 243 N.W. 605 (1932); Steenhoek v. Schoonover Trust Co., 205 Iowa 1379, 219 N.W. 492 (1928). Further consideration of the problems which may develop from a confidential relation remain beyond the scope of this paper. *See* 43 IOWA L. REV. 425 (1958).

240 Kyle v. Kyle, 175 Iowa 734, 157 N.W. 248 (1916). The court in Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943), confirmed its decision to sustain the transfer by noting that the grantor was physically unable to regain possession of the deed after she directed a servant to place it in her (the grantor's) box. *Cf.* Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960). The issue of delivery in the *Adler* case arose while the grantor remained alive. In refusing to uphold the alleged transfer, the court made reference to the grantor's age, poor memory and frequent confusion; the court further stated that protection must be given the grantor for choosing the wrong way to reward a friend who was deceased at the time of trial. The court was clearly influenced by the equities of the situation; the grantor was alive and was contesting the validity of the transfer. However, the degree of importance placed upon the above circumstances was not indicated.

241 Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Foreman v. Archer, 130 Iowa 49, 106 N.W. 372 (1906).

242 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919); *see* "delivery" problems created by a "dispositive" intent at text accompanying notes 52-53 *supra*.

243 Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919). The close relationship of the grantor with his brother, the grantee, provided the court with additional evidence of an

The court also has recognized as extrinsic evidence the diverse circumstances of an early delivery of a deed by the intermediary,[244] efforts to prove delivery as occurring on too many different occasions,[245] concurrence of the grantor's wife in the transaction[246] and the location of the deed and the will in the same place after the grantor's death.[247] The weight of these extrinsic factors upon the issue of delivery cannot be measured with any degree of precision because the court often was merely "varnishing" its decision; yet as shown, these factors have been part and parcel of the court's reasoning process and therefore should not be left unturned for whatever force they may have in shaping the outcome of the central issue of delivery.

## V. Conclusion

To complete a transfer of land by deed, it must be delivered during the grantor's lifetime. The reasoning behind this requirement is to establish, with certainty, that the grantor intended to part with an interest in the land and that he intended to do so before his death. Through the requirement of delivery, this intent is given expression and the grantor is made cognizant of the finality of his act. Consequently, a certain degree of proof will be available in order to protect the grantor and the conveyance, after his death, against the "slings and arrows" of outrageous heirs.[248] The application of this criteria

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intent to complete an inter vivos transfer. The court observed that the grantor probably felt obligated to make the transfer as "a fit recognition of the help he had received at the hands of" the grantee. *Id.* at 1281, 171 N.W. at 732.

244 White v. Watts, 118 Iowa 549, 92 N.W. 660 (1902). The plaintiffs in that case were challenging several transfers claimed to have been completed when the instruments were deposited with a notary public. Later, however, the grantor gave instructions for the notary to deliver one of the deeds to a grantee-son without waiting until his (the grantor's) death as initially intended. The position of the plaintiffs was that the remaining deeds were undelivered because the grantor, when the deeds were deposited with the notary, did not intend to pass an interest in the land before death. Answering the contention, the court stated:

> [A]s the son to [for] whom the order was given was a grantee, the delivery to him is entirely consistent with the idea that the grantor intended the making and deposit of the deeds to operate as valid conveyances, and adds to, rather than detracts from, the strength of defendant's position.

*Id.* at 553, 92 N.W. at 661-62.

245 Dolph v. Wortman, 191 Iowa 1364, 183 N.W. 814 (1921).

246 Denzler v. Rieckhoff, 97 Iowa 75, 66 N.W. 147 (1896). The wife's consent to the transfer became significant when she unsuccessfully contested the conveyance after the grantor-husband's death.

247 The degree of importance which can be attached to finding a deed with the grantor's will remains uncertain. In an earlier case, Trask v. Trask, 90 Iowa 318, 57 N.W. 841 (1894), the court remarked that such an occurrence was not in accord with an intent to complete a transfer before death. Ultimately, the court held that other evidence, namely, the grantor's acts, statements and familial relationship, overcame any negative effect resulting from finding the deed and will together. Whereas the court in more recent and other decisions (Ferrell v. Stinson, 233 Iowa 1331, 11 N.W.2d 701 (1943); Denzler v. Rieckhoff, 97 Iowa 75, 66 N.W. 147 (1896)) has done no more than to state, as part of the facts, that the deed was found with the will and then proceed to a consideration of other circumstances upon which the holdings were primarily based. *See* words and acts of the grantor at pt. III, § *B*, *supra*. *See also* 25 Iowa L. Rev. 161 (1939).

248 One author has explained the function of delivery as follows:

> [Delivery] is to caution donors of the seriousness of the transaction they are contemplating and to deter them from making ill-considered dispositions . . . . "The

(intent manifested through delivery) to the formidable undertaking of determining the validity of an alleged conveyance is hindered by at least three characteristics inherent within the rule. First, it is subjective and "[f]rom the nature of things, such intent can seldom be known with certainty; it can only be presumed from the language and conduct of the party."[249] Second, since the criteria is subjective, each case must be decided on the basis of its own facts—each fact weighed against and with the others to see which way the balance will point with the extreme disadvantage that a similar fact in a second case may have a dissimilar result if additional facts are present. Therefore, a reliable yardstick cannot be found which will measure the grantor's intent from one case to the next. Third, using the term delivery has clouded the real question where a conveyance was at issue.[250] The point of the search is whether a conveyance has been completed: that is, a transfer of certain rights, powers and privileges, from one person to another, with respect to a particular *res*.[251] The route of this search has been mapped in terms of deeds and delivery. However, the deficiency of this terminology becomes apparent when the deed is viewed in the light of its primary function of serving as written evidence of the conveyance. In the event of an oral gift, a deed is not necessary to transfer ownership of land—the Statute of Frauds to the contrary notwithstanding.[252] The misleading nature of the term delivery stems from

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*wrench* of delivery, if the expression be understood and permissible, the little mental twinge at seeing his property pass from his hands into those of another, is an important element to the protection of the donor."

Garvey, *supra* note 5, at 278.

The ramifications of requiring delivery to complete a conveyance and the basis of that requirement—to provide a safety check in the form of the grantor's intent against fraudulent transfers—have produced a rule of law which is easily stated and about which there is little controversy. A successful transfer requires a valid delivery which in turn rests upon whether the grantor intended to divest himself of an interest in the land during his lifetime. Caveat, when the courts must apply the rule—determining the validity of a delivery in accordance with the grantor's intent as gathered from all the facts—the results may not be as easily stated or predicted. *See* discussion what constitutes delivery at pt. I, § *B*, *supra*; delivery requires an intent to make a present transfer at pt. I, § *C*, *supra*.

249 Garvey, *supra* note 9, at 52. *See* text accompanying notes 51-53 *supra*.

250 The misleading nature of certain terms unfortunately has been further complicated by the court meaning something other than what it literally said. For example, the court has stated that a conveyance would be valid without the use of any particular words, when actually it intended to say that a deed would be valid without using particular words. Yeager v. Farnsworth, 163 Iowa 537, 145 N.W. 87 (1914). Visa versa, the court was referring to a completed conveyance (not a deed) when it stated that "[w]ithout delivery there is no deed." Shelter v. Stewart, 133 Iowa 320, 324, 107 N.W. 310, 312 (1906).

251 *See* T. TIFFANY, *supra* note 7, at § 1, for a discussion of the various aspects of ownership.

252 Lynch v. Lynch, 239 Iowa 1245, 34 N.W.2d 485 (1948). The grantee was in possession of the land when the grantor orally made a gift of the property to her son, the grantee. The court upheld the oral transfer as follows:

> There can be no question that an oral transfer of real estate followed by the taking, possession and occupancy, constitutes a valid conveyance. Oral gifts have frequently been recognized in this state as valid. The proof of such gift should be clear, convincing and satisfactory, and when so established is upheld. . . .
>
> Nor is it necessary that there be any actual change of possession where the donee is in possession at the time of gift, the change in the character of possession being sufficient. . . . Such gifts may be established provided the facts and circumstances fairly tend to show the alleged gift. . . . We agree with the district court in holding

early common-law which considered a physical act essential to give an instrument of conveyance legal effect. Today, delivery in the physical sense is no longer required to complete a transfer, for it may be indirect or symbolic[253] or even eliminated where the transfer is oral and without a deed.[254] In short, delivery describes the *sine qua non* of a valid conveyance—the legal effect of transferring from the grantor to the grantee certain rights of ownership. Since the requirement of delivery is, in all likelihood, here to stay, a more meaningful approach to the question of the validity of a conveyance would be to ask whether the grantor can be said to have incontestably divested himself of a fee interest which was transferred to, or vested in, another person.

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that the ownership of the south farm was acquired by oral gift; that he is the absolute owner thereof.

*Id.* at 1253-54, 34 N.W.2d at 489-90. *See* IOWA CODE § 622.32 (1966).

253 *See* forms of "dispositive" conveyances at pt. II, *supra*.

254 Lynch v. Lynch, 239 Iowa 1245, 34 N.W.2d 485 (1948).

# THE NEED FOR AN IOWA POST-CONVICTION HEARING STATUTE

## INTRODUCTION

Post-conviction procedure has long been one of the weak spots in criminal law administration.[1] During the past few years post-conviction procedures[2] to correct erroneous convictions have been enacted on federal[3] and state[4] levels and have become an established part of the criminal law.[5] This development is the result of United States Supreme Court decisions indicating that states should provide adequate post-conviction remedies for the protection of constitutional rights.[6] Furthermore, post-conviction remedies have become increasingly significant as a result of the Supreme Court's changing concept of due process of law under the fourteenth amendment.[7] These changes have radically affected the minimum standards dealing with procedures considered constitutionally permissable in state administration of criminal law with the result that many convictions which were valid at the time entered would be unconstitutional by today's standards.[8] Several of these changes in constitutional requirements have been found to apply retroactively,[9] resulting in new rights

1 HANDBOOK OF THE NAT'L CONF. OF COMM. ON UNIF. STATE LAWS, UNIFORM POST-CONVICTION PROCEDURE ACT—PREFATORY STATEMENT 202 (1955) [hereinafter cited as 1955 HANDBOOK ON UNIF. STATE LAWS].

2 Post-conviction procedures could include procedures such as appeal, motion for new trial and motion in arrest of judgment. However, for purposes of this Note the term is used to refer to only those extraordinary remedies which continue to be available after the time limit for appeal and the other above-mentioned procedures has expired.

3 28 U.S.C. § 2255 (1964), first enacted by Congress in 1948, states in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

4 ILL. STAT. ANN. ch. 38 §§ 122-1 to -7 (Smith-West 1964); MD. ANN. CODE art. 27 § 645A (1967); N.C. GEN. STAT. §§ 15-217 to -222 (Supp. 1967); ORE. REV. STAT. §§ 138.510-.680 (1967). Several states have incorporated the post-conviction remedy into the rules of criminal procedure. FLA. R. CRIM. P. 1.850 (1968). *See also* ABA INSTITUTE ON JUDICIAL ADMINISTRATION, POST-CONVICTION REMEDIES 112 (Tent. Draft Jan., 1967).

5 ABA INSTITUTE ON JUDICIAL ADMINISTRATION, POST-CONVICTION REMEDIES 1 (Tent. Draft Jan., 1967) [hereinafter cited as ABA POST-CONVICTION REMEDIES].

6 Young v. Ragen, 337 U.S. 235 (1949); Marino v. Ragen, 332 U.S. 561 (1947) (concurring opinion).

7 Merrill, *Federal Habeas Corpus and Maryland Post-Conviction Remedies*, 24 MD. L. REV. 46 (1964).

8 *See* Mapp v. Ohio, 367 U.S. 643 (1961), *rehearing denied*, 368 U.S. 871 (1961) (previously valid state convictions based on illegally seized evidence are now unconstitutional); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendants have a right to counsel in all serious criminal cases).

9 In discussing retrospective application of decisions, the Court in Linkletter v. Walker, 381 U.S. 618, 629 (1964), stated: "[W]e must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *See also* Johnson v. New Jersey, 384 U.S. 719 (1965); Tehan v. United States *ex rel.* Scott, 382 U.S. 406 (1965); Johnson v. Bennett, 386 F.2d 677 (8th Cir. 1967).

Some examples of retrospective application are Johnson v. Denno, 378 U.S. 368 (1964)