THE ONE-PARTY TRUST FOR NEBRASKANS

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There are a number of situations in which a special kind of funded, revocable inter vivos trust, namely one in which the settlor is also originally the sole trustee and the primary income and principal beneficiary, may serve a useful purpose. Nebraska attorneys, however, may hesitate to use this type of trust either because they are not familiar with it or because they may have doubts about its validity. If, however, an attorney is reasonably convinced that a one-party trust is valid, and especially if he has such a trust form available in either semi-automated or partly pre-printed form, he will soon find that the trust is both a sound estate planning device as well as an economically feasible one.[1] Moreover, if an attorney has reservations about the validity of a one-party trust in Nebraska (or in any other jurisdiction) he can use the one-party trust in conjunction with a standard, properly executed will which incorporates the one-party trust by reference; and then, if the trust is later found to be invalid, nothing substantial will have been lost by its attempted use. In other words, the proper use of a one-party trust offers substantial advantages; any disadvantages will be discussed shortly.

In addition to briefly pointing out some of the positive and negative features of the one-party trust, this article will also suggest in what situations the trust might be useful, evaluate its validity in Nebraska, and provide for the reader's consideration several "special" clauses which may be used when drafting such an instrument.[2]

The term "one-party trust" is somewhat of a misnomer because it is basic trust law that no trust comes into being if an owner purports to convey property to himself as sole trustee for his own ex-

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1. On automation generally, *see* B. STERNIN, THE PRACTICAL LAWYER'S MANUAL FOR AUTOMATIC LAW-OFFICE TYPING (1st ed. 1971). On the use of preprinted pages, *see* Pasquesi, *A First Step in the "Automated" Drafting of Wills — The Preprinted Page*, 60 ILL. B. J. 958 (1972); and, Pasquesi, *A First Step in the "Automated" Drafting of Wills — A Second Application of the "Preprinted Page System"*, 61 ILL. B. J. 40 (1972).

2. NORTHERN TRUST CO., WILL AND TRUST FORMS (2d ed. 1972), contains complete forms for declarations of trust at 159-201. For other one-party trust forms see J. CORCORAN, ALTERNATIVES TO PROBATE, Ch. 23 (1971); G. BOGERT, TRUST AND TRUSTEES, § 1071 (2d ed. 1969). Some of these authorities suggest having the one-party trust witnessed; if two or more credible witnesses sign the instrument, it could of course be admitted to probate in most jurisdictions, if necessary.

clusive benefit, as to all income and all principal.[3] However, the one-party trust discussed in this article is one in which some person other than the original settlor-trustee-beneficiary has some *present* beneficial interest in the trust,

> even though the enjoyment of that interest may be postponed until the settlor's death and even though the interest is subject to revocation or alteration in the interim.[4]

In other words, the one-party trust we are discussing is one in which the settlor, trustee and income (as well as corpus) beneficiary are originally the same person (hence the term "one-party trust") but in which there is also presently at least an ultimate corpus beneficiary who is different from the original settlor-trustee-beneficiary and to whom the settlor-trustee owes fiduciary duties.[5]

THEORY

Conceptually one may think of three focal points in every trust:

(1) the transferor of assets or rights (often called the settlor or grantor);
(2) he who holds the assets or rights for the benefit of one or more persons or groups (the trustee); and,
(3) the beneficiary or beneficiaries of the trust.

Historically, trusts have been either two-party or three-party instruments, assuming the three focal points identified above.[6] A three-party trust would be involved, for example, in each of the following:

(1) A son may transfer assets to a corporate trustee and direct the trustee to pay the trust income (and principal if necessary) to his mother for her lifetime, and at his mother's death to distribute the trust principal, if any remains, to the settlor's then living descendants *per stirpes*; or,

(2) A husband who owns substantial assets may transfer those assets by will to a corporate trustee and direct the trustee to pay the net income of the trust (and also the principal under a proper standard) to the husband's widow for her lifetime. The trust instrument

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3. A. SCOTT, 2 SCOTT ON TRUSTS, 818 (3d ed. 1967), where it is stated:

> A trust is not created, however, where the settlor declares himself trustee for his own sole benefit. In such a case the intended trust fails, not because the settlor is trustee but because the trustee is the sole beneficiary.

4. A. Fleming, *One-Party Trusts*, U. MIAMI 2ND INST. ON EST. PLAN. Ch. 68-3 (1968), at ¶ 68.301. Mr. Fleming's article appears in condensed form in 14 PRAC. LAW. 73 (Dec. 1968). Mr. Fleming's article contains an excellent discussion of this type of trust. *See also* Edmonds, *Self-Declarations of Trust*, 57 ILL. B. J. 398 (1969).

5. Jones v. Bodley, 26 Del. 218, ___, 27 A.2d 84, 86 (1942), *rev'd on other grounds, sub nom* Bodley v. Jones, 27 Del. 273, 32 A.2d 436 (1942), states:

> The question is always whether the declarant manifested an intent to impose upon himself equitable duties to deal with the property for the benefit of another person.

6. Fleming uses the term "two-party" trust for the trust forms which this article has divided into three-party and two-party trusts. Fleming, *supra* note 4, at ¶ 68.300.

will further provide that any corpus which remains at the widow's death is to be distributed as the widow directs by a special power of appointment, and in default of the exercise of such power, the trust corpus will go to the husband's descendants *per stirpes*, living at the widow's death. Of course, attorneys will recognize this latter type of three-party trust, with elaborations, as the familiar non-marital or family trust (sometimes also called Trust B) used in marital deduction planning.

A typical two-party trust under our terminology would be a transfer by S (single and aged) to T in trust, income and principal to be used for S during his lifetime, with the balance of the principal, if any, remaining at S's death to pass to Creighton Law School.

THE ONE-PARTY TRUST

A typical fact situation which would be suitable for a one-party trust would be something like the following: Mary is a widow who has a heart disease and a family history of incapacitating strokes. She presently lives alone in a house worth $30,000, having no mortgage. She also owns stocks, bonds, and savings accounts worth $10,000-$15,000, a small checking account and miscellaneous assets worth perhaps $5,000-$10,000. She may or may not also have a small amount of life insurance. She now comes to her attorney and asks him if she can:

(1) plan in advance to avoid a guardianship in case of her possible physical incompetence;[7]

(2) retain control of all of her assets during her lifetime or until her incompetency, yet avoid a trustee's fee while she is both alive and competent; and,

(3) avoid the expense and delay of a probate administration after her death.

The answer to Mary's inquiries is that she can accomplish all three of her objectives if her attorney draws a one-party trust for her, since:

(1) the existence of the trust, with provisions for a successor trustee, eliminates the need for any guardianship or conservatorship should she become incompetent because, at the moment she becomes incompetent, the successor trustee takes over the administration of the trust;

(2) the trust will be wholly revocable until Mary's death; and,

(3) the arrangement leaves no assets in Mary's name individually (if it is carefully set up and periodically reviewed) other than a small

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7. A guardian of this type is sometimes also called a "conservator." *See, e.g.*, ILL. ANN. STAT., Ch. 3, § 113 (Smith-Hurd 1961).

checking account for her current expenses. At Mary's death, her successor trustee will distribute the remaining trust assets as Mary has set out in her one-party trust and then terminate the trust. Her checking account can be easily transferred by the use of a small estate's affidavit.[8]

While Professor Scott unequivocally states that, so far as *personal* property is concerned,

> (t)he rule is now well settled both in England and in the United States that where the owner of property gratuitously declares himself trustee for another, a valid trust is created[9]

he goes on to say that,

> (i)t is not quite so clear whether a trust of land can be created by a gratuitous declaration by the owner of the land that he holds it in trust.[10]

Professor Scott's second comment would lead one to believe that, in our example, there would be some question about whether or not Mary can declare herself trustee of her own residence. The problem which Professor Scott raises, however, appears to be more a matter of conveyancing and terminology rather than trust law, because while the one-party trust is sometimes referred to as a declaration or self-declaration of trust, it is really more than that if the attorney properly sets it up. There will be not only a written trust instrument in which Mary unequivocally expresses her intention to create a trust, which instrument Mary will sign as settlor and also will accept (sign again) as trustee, but in addition, there will be a transfer by a proper instrument from Mary individually to Mary as trustee of every asset which is to go into the trust.[11] Thus, if one takes into account the fact that there is a trust agreement to which assets are transferred, as well as the actual transfers of the assets themselves, he will not easily be misled into thinking of the one-party trust as a "mere" self-declaration of trust; that is, a situation in which Mary simply declares in writing that she now holds all of her assets as trustee for herself. A "mere" declaration, without a transfer by deed of Mary's real estate, might raise a question whether the declaration itself acts as a conveyance of the real estate from herself individually to herself as a trustee. Presumably, it is that problem which worries Professor Scott.[12]

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8. NEB. REV. STAT. § 30-341 (Cum. Supp. 1972). The limit in Nebraska for the use of a wholly non-court supervised administration is relatively small ($3,000.00). There is in Nebraska, however, a shortened form of judicial administration, called the Small Estates Act. NEB. REV. STAT. §§ 30-334 to 30-336.02 (Reissue of 1964).

9. A. SCOTT, 1 SCOTT ON TRUSTS, 237 (3d ed. 1967).

10. *Id.* at 238.

11. Some authorities recommend that the one-party trust also have several witnesses. Corcoran, *supra* note 2, at § 23.5.

12. SCOTT, *supra* note 9, at 238-239:

> It might be argued that in jurisdictions in which the Statute of

The revocable, funded, inter vivos one-party trust serves at least four other purposes:

(1) *It avoids a legal life estate.* Assume a widower wishes to leave the family farm to one or more of his children without probate. It would be more flexible if the attorney, instead of creating a legal life estate in the parent with a remainder in the farm to the child, set up a one-party trust with the parent acting as the settlor, sole trustee and sole income beneficiary, and with the trust providing that at the parent's death, one child shall become successor trustee, the trust shall terminate, and the successor trustee shall distribute the farm according to the trust terms.

(2) *It decreases litigation risks by avoiding survivorship accounts.* For example, a mother may enter a hospital. She may be thinking of setting up one or more survivorship checking or savings and loan accounts with some of her several sons or daughters, "as a matter of convenience." If she dies while in the hospital and the survivor named by the mother attempts to retain such account balances, recent cases permit the takers of her estate to bring an action against each account survivor, in order to force such survivor to return the account balances to the estate so that these assets may then be distributed among all of the mother's testate or intestate takers. The litigation over these so-called joint accounts becomes awesome once a court permits an attack on the right of survivorship.[13] A one-party trust would be a better vehicle than a so-called

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> Uses still operates the owner of land might declare that he holds it for the use of another, and that if such a declaration of use is valid although not under seal and though there is no consideration or recital of consideration, the statute would execute the use. This would mean that land could be conveyed without a deed and without the formalities necessary for a bargain and sale. Undoubtedly the legal title to land cannot be thus conveyed. It would seem, however, that the reason is not a gratuitous declaration of trust of land is invalid, but that the trust or use thus raised will not be executed by the statute.

Perhaps the distinction sought to be made is one without a difference. For example, note the following in A. SCOTT, 2 SCOTT ON TRUSTS 817 (3d ed. 1967):

> It sometimes happens that the owner of property executes a conveyance of the property to himself as trustee. In such a case he is of course both settlor and trustee. Technically, however, there is no transfer of the legal title to the property, since the settlor-trustee holds the legal title both before and after the creation of the trust. He is not in reality transferring property from himself individually to himself as trustee, but is merely evidencing his intention to hold in trust the property which he previously held free of trust. At any rate, the trust is effectively created, whether in form the owner of the property declares himself trustee or purports to convey the property to himself as trustee.

13. *In re* Schneider's Estate, 6 Ill.2d 180, 127 N.E. 2d 445 (1955), and the cases still bobbing in its wake. For an unsuccessful attack on a true joint tenancy under similar theories, *see* Miller v. Riegler, 243 Ark. 251, 419 S.W.2d 99 (1967). *See also* Hunt, *What About that Joint Bank Account?*, 52 ILL. B. J. 30 (1963); Kepner, *The Joint and Survivorship Bank Account — A Concept Without a Name*, 41 CALIF. L. REV.

joint account for the family in the above-described situation, since it would avoid posthumous litigation concerning whether or not the mother really intended survivorship; that is to say, avoid litigation about her intention to make a "gift" of the balance remaining in the so-called joint account to the named survivor, thus disinheriting her other children in this asset.[14]

(3) *It avoids ancillary administration.* A Nebraska resident who has a summer or winter home in Iowa, Florida or Colorado, or an oil or gas interest in Texas, may wish to avoid ancillary probate administration of this asset without using a joint tenancy and he can do so by placing the item in a one-party trust.[15]

(4) *It avoids the prudent man rule.* Finally, let us suppose a Nebraska resident wishes to manage his own investments, rather than have a bank do so, perhaps because the individual wants to invest in highly speculative securities. While such an arrangement may be possible with a bank or trust company acting as trustee (by the institution's taking back indemnifications from the settlor), both the bank and the individual would probably be more content if the individual set up a one-party trust as his investment vehicle rather than a two-party trust with the bank. Indeed, the one-party trust may have a particular attraction for all of those individuals who do in fact intend to have their assets in a revocable inter vivos trust, but who also somehow feel that they lose control of their assets if they transfer them to an independent trustee, even though the transfer to the independent trustee is merely into a revocable trust.[16]

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596 (1953); and, Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959).

14. There are various theories which are used to sustain survivorship accounts, none of them really satisfactory. For instance, it is difficult to say that in the example given the decedent (mother) intended to make an inter vivos gift, because she retains until her death the power to withdraw the entire account balance of any so-called joint account (assuming there are no problems with the possession of the passbook). In Eden v. Eden, 182 Neb. 768, 157 N.W.2d 543 (1968), a so-called joint account was successfully attacked on a trust theory.

15. O, by a trust instrument, declares himself to be trustee of his Colorado summer home, for O's use during his lifetime. At his death, the trust is to terminate and S (O's son) is to have O's Colorado home. The trust also names S as successor trustee. O executes and records a deed from himself individually to himself as trustee under the above described trust. After O's death, S executes and records a trustee's deed to himself individually and the transfer from O to S is complete, without Colorado ancillary administration (subject to applicable death transfer taxes, if any). The same device can be used to transfer, without probate, a stamp, coin, or art collection. Fleming, *supra* note 4, at ¶ 68.303. Of course, the attorney must be certain that the successor corporate fiduciary will accept out-of-state realty. Martin & Nicholson, *The New Phenomenon: Settlor as Trustee of a Funded Living Trust*, 110 TRUST AND ESTATES 164, 166 (1971).

16. Marks, *The Revocable Declaration of Trust*, 105 TRUSTS AND ESTATES 1141, 1142 (1966):

> [P]robably the most important advantage of the declaration of trust would be psychological. The settlor would not have to convey his property to another; therefore little or no affirmative

VALIDITY IN GENERAL

The difficulty with the one-party trust is that, as Austin Fleming puts it:

> On first impression, such a trust strikes a lawyer as a questionable device. There is no conveyance or delivery of the property to any outside person . . . . The controls which the declarant retains seem very close indeed to outright ownership. What is the standing of a one-party trust legally? Is it anything more than a "testamentary disposition"?[17]

In answering his own question in the affirmative, Fleming goes on to point out, first of all, that the one-party trust, although made popular by Norman F. Dacey's recent book,[18] is a device dating back at least a hundred and fifty years;[19] and that:

> Such a declaration, though gratuitous, is valid. There need be no delivery of the subject matter to the beneficiary or other third person. The use of formal or technical words is not essential. The only question in each case is whether the declarant has sufficiently manifested an intention to create a present trust and to impose on himself equitable duties to deal with the property for the eventual benefit of another person.[20]

Such a manifestation of intent ought to be easy to establish if, among other things:

(1) the settlor, or his attorney, is meticulous about segregating a trust corpus; and,

(2) the settlor treats the trust assets as true trust assets and no longer treats them as if they were simply assets of the settlor still owned individually but in a slightly different form. In other words, it is very important that the settlor or his attorney be careful about form, a point which all of the commentators stress.[21]

> action is necessary, and the settlor would feel that the trust assets were more readily available to meet his personal needs than if they were held by another, albeit under a trust document giving the settlor almost unlimited power to recall assets from the trust.

This idea should in no way be interpreted as sanctioning carelessness regarding form.

17. Fleming, *supra* note 4, at ¶ 68.304.

18. N. DACEY, HOW TO AVOID PROBATE (1965). A collection of law review articles discussing Mr. Dacey's book can be found in J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 419 (1st ed. 1972). A good critique can be found in Johanson, *Revocable Trusts and Community Property: The Substantive Problems*, 47 TEXAS L. REV. 537, 548 (1969).

19. *Ex Parte* Pye, 18 Ves. 140, 34 Eng. Rep. 271 (1811).

20. Fleming, *supra* note 4, at ¶ 68.304.

21. Sheard, *Avoiding Probate of Decedents' Estates*, 36 U. CIN. L. REV. 70, 90 (1967).

> To safely establish the validity of a declaration of trust, the settlor-trustee should closely follow the applicable suggestions made earlier for establishing a trust with an individual trustee. He should also place all the trust securities in a separate safe deposit box. All of these formal precautions may not be necessary, but, since their cost is small, it is wise to follow them since they will bring

Assuming, however, that there is attention to good form, the main argument for the validity of the one-party trust is, in this writer's judgment, that the one-party trust is merely a proper extension of the revocable inter vivos trust and that the device is not something new, since the one-party trust already exists as a valid legal arrangement in limited form in the bank account or Totten trust situation, and in the one-party trust of mutual fund shares.[22]

In other words, it is this writer's judgment that the critical issue for a particular jurisdiction is simply whether or not the jurisdiction recognizes, or will recognize, as a present trust one which is wholly revocable; conceptually and practically the chief difficulty which a court might have with upholding the validity of a one-party trust may be the problem of control, since it is easy to think of a settlor-trustee as having no real limits at all on his control over the purported trust assets. In other words, the one-party trust may look to a court very similar to an agency relationship, which means, in effect, that the purported settlor has never ceased owning his assets in his own name individually. The matter of control, however, should not be an obstacle to finding a one-party trust valid, for as Sheard says:

> A declaration of trust of securities eliminates the possibility that the trust will fail because the settlor has kept too much control over the trustee. "Since it is clearly permissible for the settlor to act as trustee, in the very nature of the situation the settlor-trustee must retain a greater degree of control than may be thought desirable when there is a separate trustee."[23]

In addition, the *Restatement (Second) of Trusts* takes the same view on this matter of control:

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the trust within the scope of modern decisions upholding these trusts.

It is very hard to distinguish the practical effect of a revocable declaration of trust from a will, but some courts are able to do so as are the commentators. However, it may be that the approval of a declaration of trust is only appropriate when sufficient formalities surround the transaction, and that this is the real basis for decision. Marks, *supra* note 16, at 1145.

One important point made in the first edition of the *Restatement* is the impact of form on the question of intention; form is relevant to the distinction of agency from trust. This might indicate that an instrument prepared with the advice and assistance of counsel would succeed where an arrangement embracing similar economic consequences to the settlor undertaken by himself would fail. Lowe, *Some Remarks Concerning the Revocable Self-Declaration of Trust*, 32 MO. L. REV. 199, 203 (1967).

22. The Totten trust cases are collected in Fleming, *supra* note 4, at ¶ 68.310, n. 46-47; mutual fund cases in Marks, *supra* note 16, at 1145, n. 34. Not every jurisdiction recognizes the Totten trust, *see, e.g.*, Blais v. Colebrook Guaranty Savings Bank, 107 N.H. 300, 220 A.2d 763 (1966).

23. Sheard, *supra* note 21, at 89, citing United Building and Loan v. Garrett, 64 F. Supp. 460, 464-65 (W.D. Ark. 1946).

> Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, *and a power to control the trustee as to the administration of the trust* (emphasis added).[24]
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> The rule stated in this Section is applicable not only where the owner of property transfers it to another as trustee, but also where he declares himself trustee of the property. The disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor-trustee reserves a beneficial life interest and power to revoke and modify the trust. *The fact that as trustee he controls the administration of the trust does not invalidate it* (emphasis added).[25]

To repeat, if a jurisdiction already sustains or can be expected to sustain a revocable inter vivos trust as a valid trust, then it would not seem crucial whether or not the settlor of the revocable inter vivos trust is also the sole original trustee, since the settlor's acting as trustee does not give the settlor-trustee any greater control over his own trust than a settlor has over a revocable inter vivos trust with an independent trustee. This is true because:

(1) the settlor of any revocable trust, by revoking the trust and setting up a new trust with a new trustee can always rid himself of any undesirable trustee; but more importantly,

(2) so long as a trust exists, whoever the trustee is (whether the settlor or not), the trustee is a fiduciary and is subject to all of the duties of a trustee, assuming, as we do, that there is ultimately at least one beneficiary other than the original settlor-trustee-beneficiary to whom such duties are owed.[26] Furthermore, if a jurisdic-

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24. RESTATEMENT (SECOND) OF TRUSTS § 57 (1959).
25. *Id.* at comment *h. See* Lowe, *supra* note 21, at 202.
26. Where property is transferred under a formal living trust agreement to a third-party trustee, and the settlor retains various powers of control, the issue is framed in terms of whether the third party is in substance a trustee or a mere agent. However, the basic considerations and arguments are similar to those where the settlor makes himself trustee. While the text writers state that the determining factor is the "degree" of control, the overwhelming modern trend is to sustain the trust as nontestamentary . . . .
J. RITCHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 449 (4th ed. 1971):
But considering the terms of these instruments we believe Farkas did intend to presently give Williams an interest in the property referred to. For it may be said, at the very least, that upon his executing one of these instruments, he showed an intention to

tion permits a revocable inter vivos trust, the fact that the settlor is also currently a beneficiary is certainly an incidental matter because the settlor of any revocable trust can at any time, by revoking the trust in whole or in part, obtain full control of all of the trust assets — certainly a greater degree of control over trust assets than a beneficiary has. Finally, so long as there is some beneficiary other than the settlor, there should be no problem about the interest of the trustee and the beneficiary merging and the purported trust then disappearing.[27]

The inquiry about whether or not the revocable inter vivos one-party trust is "testamentary," that is to say, whether or not its apparent inter vivos nature is actually illusory so that it must fail because it lacks Wills Act form, also appears to this writer to be an inquiry without a great deal of merit. To put the matter another way, the classification of certain essentially testamentary legal events as valid or invalid is largely arbitrary, and the labels "testamentary" and "nontestamentary" merely represent conclusions not policy questions. The life insurance contract is a testamentary event without Wills Act form but the payment of large death benefit sums under life insurance contracts is unequivocally accepted. The same can be said about payments from pension and profit-sharing trusts. Moreover, any survivorship arrangement is essentially a testamentary event, yet large sums of money and a great deal of corporate securities are routinely transferred by survivorship designations in instruments which do not have Wills Act form, most particularly by the use of joint tenancies.[28]

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presently part with some of the incidents of ownership in the stock. Immediately after the execution of each of these instruments, he could not deal with the stock therein referred to the same as if he owned the property absolutely, but only in accordance with the terms of the instrument. He purported to set himself up as trustee of the stock for the benefit of Williams, and the stock was registered in his name as trustee for Williams. Thus assuming to act as trustee, he is held to have intended to take on those obligations which are expressly set out in the instrument, as well as those fiduciary obligations implied by law. In addition, he manifested an intention to bind himself to having this property pass upon his death to Williams, unless he changed the beneficiary or revoked the trust, and then such change of beneficiary or revocation was not to be effective as to Investors Mutual, Inc., unless and until written notice thereof in such form as the company prescribed was delivered to them at Minneapolis, Minnesota. An absolute owner can dispose of his property, either in his lifetime or by will, in any way he sees fit without notifying or securing approval from anyone and without being held to the duties of a fiduciary in so doing. Farkas v. Williams, 5 Ill.2d 417, 125 N.E.2d 600, 603 (1955).

27. Martin & Nicholson, *The New Phenomenon: Settlor as Trustee of a Funded Living Trust*, 110 TRUST AND ESTATES 164, 165 (1971).

28. For a slightly different perspective *see* McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 Nw. U. L. REV. 7 (1972).

It would be conceivable, of course, for a jurisdiction to treat all revocable inter vivos trusts, including one-party and Totten trusts, as testamentary and therefore invalid since lacking Wills Act form.[29] The effort, of course, would be relatively futile, since one would then merely execute all revocable inter vivos trusts with Wills Act form, thereby adding at the most a few words and signatures to such trusts.[30] But even though a jurisdiction could thus readily classify all existing one-party and Totten trusts as "testamentary" and invalid, the real question is not the making of such a classification judgment, but whether or not as a matter of policy a jurisdiction wants to permit its attorneys to have available to them these kinds of will substitutes.

Of course, it is true that form and concepts do have legal significance (a deed, for example, must be "delivered"), and while it may be true that a one-party trust (like a one-man corporation) rests on slender conceptual threads, there does not appear to be sufficient reason, in order to prevent wrongdoing or to preserve the integrity of Wills Act form, to frustrate an individual's obvious and formal expression of intention and to treat a written one-party trust as illusory.[31] A one-party trust need not be any more, nor any less, subject to the rules of fraud on marital rights or on creditors, undue influence, lack of capacity and all other modes of attack on trusts and wills than any other instrument. What should not exist is a carte blanche rejection of the possibility of a one-party trust on the basis of a weak notion about form.[32] Perhaps one should remember that, in the end, as a practical matter, both wills and will substitutes (particularly so-called joint accounts) are attacked, not because the instruments violate some public policy (although that argument is used), but because disappointed spouses, heirs, or other hopeful takers believe that a decedent's assets are being distributed by means of these instruments in a manner which the attacker thinks violates the attacker's sense of what should have been the decedent's "natural" pattern of distribution, namely, a distribution to

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29. After all, the Internal Revenue Service places the value of the corpus of revocable trusts into the settlor's estate. INT. REV. CODE OF 1954, §§ 2036 & 2038.

30. After chancery recognized a use on a use, Lord Hardwicke remarked that the Statute of Uses "has had no other effect than to add at most three words to a conveyance." C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY, 210, n. 7 (1962).

31. Referring to self-declarations of trust, Professor Scott says:

> Slender as is the reed upon which it thus rests . . . [t]he rule is now well settled both in England and in the United States that where the owner of [personal] property gratuitously declares himself trustee for another, a valid trust is created. Scott, *supra* note 9, at 237.

32. The Internal Revenue Service for many years fought unsuccessfuly to prevent the recognition of the validity of the professional service corporation, partly because the concept seemingly did not fit into the existing "form" or pattern of the historic business corporation.

the attacker. Wouldn't it be wiser if a jurisdiction would uphold a one-party trust as another valid estate planning device and then let the law of fraud on marital and creditors' rights, undue influence, incapacity and the like settle these disputes?[33] It is submitted, therefore, that a properly executed and carefully operated one-party trust ought to be treated in straightforward fashion as another proper will substitute and as another appropriate estate planning device.

I should also add that perhaps the chief practical obstacle with the one-party trust will be the refusal or extreme reluctance of corporate fiduciaries to accept the office of successor trustee. As one trust officer, writing with an attorney, has said:

> (T)he successor trustee arrangement has evoked a number of strong and conflicting reactions from corporate fiduciaries. Some institutions are almost completely reluctant to accept a successor trustee appointment while others demonstrate complete passivity in accepting such an appointment.[34]

THE EXPERTS' OPINIONS

There should no longer be any doubt about the validity of a funded revocable inter vivos trust with an independent trustee, even though the settlor is also the primary income beneficiary of the trust and has substantial access to principal.[35] Likewise, there should not be much doubt in an attorney's mind about the validity of a revocable inter vivos trust in which the settlor also acts as the trustee, and is the primary income and principal beneficiary, so long as someone other than the settlor-trustee is an ultimate beneficiary.[36] The validity of such a one-party trust for bank account deposits is well established and numerous jurisdictions have, as indicated, also upheld revocable one-party trusts of mutual fund

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33. The Internal Revenue Service will also be interested in whether or not a true trust exists, since a trust is a separate tax paying entity.

34. Martin & Nicholson, *supra* note 27, at 458.

> Deep and substantial differences of opinion divide trustmen concerning the advisability of accepting appointments as successor trustee. Arguments rage pro and con about responsibilities, liabilities, fees, acceptance and non-acceptance of the arrangement. *Id.* at 460.

Parts two and three of this article are good discussions of the title and succession problems of the one-party trust. A settlor-trustee's succession problems are lessened if the corporate successor trustee signs the *original* trust agreement.

35. *See, e.g.*, National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Whalen v. Swircin, 141 Neb. 650, 4 N.W.2d 737 (1942). *See also* Casner, *Estate Planning — Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960). Some jurisdictions have validated revocable trusts by statute. *See, e.g.*, WIS. STAT. ANN. § 231.205 (1957).

36. CORCORAN, *supra* note 2, § 23.3. The following is also of interest in this regard:

> Even as to the revocable unfunded trust where the donor himself is sole trustee, the trust today generally is considered valid, pro-

shares. While it is true that a Totten trust (bank account "trust") involves only cash in a checking or savings account, and that a jurisdiction might have a statute which the bank thinks will protect it upon its payment of the account balance to the named beneficiary,[37] and while it may be further true that after the death of the settlor-depositor the bank is not a true trustee,[38] nevertheless, if a jurisdiction has judicially sanctioned a one-party bank account trust, it ought to uphold the validity of a one-party trust funded with other assets because the Totten trust hangs by a more slender thread of validity than the general type of one-party trust.[39]

One is not surprised, of course, to find many commentators equivocating about the validity of the one-party trust. Thus Professor Lowe says:

> Decisions on the validity of the revocable self-declaration of trust are few in number. A survey of the reported cases indicates that the courts have not been uniform in their disposition of the cases, although a clear majority do sustain the trust.
>
> Some courts have refused to uphold the revocable self-declaration of trust, and even within a particular state the decisions have not been uniform.[40]

Sheard states that:

> The gratuitous declaration of trust has long been established in legal theory, but, with the exception of cases involving bank accounts, there are few cases actually holding these trusts to be valid. The cases invalidating gratuitous declarations of trust seem to fall into two categories: those reflecting

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vided there are beneficial interests other than the donor's and provided appropriate trust formalities are observed. While the donor may not be sole beneficiary the fact that remainder interests in others than the donor are subject to the donor's power to revoke or to invade principal does not preclude validity. A. CASNER, THE REVOCABLE TRUST — AN ESSENTIAL TOOL FOR THE PRACTICING LAWYER 234 (1965).

37. *See, e.g.*, Eden v. Eden, 182 Neb. 768, 157 N.W.2d 543 (1968).

38. For example, does the bank now have a duty to invest the account balance; and does a savings and loan association have a duty to turn its Totten trust account balances over to a trustee, if the association does not have the capacity to act as a trustee?

39. Fleming, *supra* note 4, at § 68.311:

> In view of the complete dominion and unlimited power of withdrawal which the depositor retains over the account, one might reasonably conclude — to quote Professor Scott — that the trust is very thin indeed and "could easily be held to be testamentary."

Mr. Fleming concludes:

> One-party savings account trusts have been widely upheld and approved and have acquired considerable judicial patina by way of interpretation and legal effect. In a sense, however, they represent a "poor man's" estate arrangement and their significance may be somewhat qualified for that reason. *Id.* at ¶ 68.316.

40. Lowe, *supra* note 21, at 200-01.

> the now disappearing hostility of the courts to revocable declarations of trust in general, and those in which the declaration of trust was poorly drafted or was so ambiguous as to leave the settlor's intention in question.[41]

And Marks cautions that:

> The major difficulty in giving conclusive answers in this problem area is that the general theories of law which are apparently applicable are often followed in name only. In order to understand the problems surrounding the validity of declarations of trusts, one must look into a few cherished traditions of the law of trusts. The same hurdles must be cleared with the conventional revocable trust where the settlor retains many powers. However, the declaration of trust presents, at least at first glance, an even more flagrant disregard of time honored principles. Therefore, we must be concerned lest a difference in quantity makes for a difference in quality of treatment.
>
> There are several major legal questions which must be researched and analyzed before an informed conclusion can be reached on the validity of the declaration of trust:
>
> (1) Is the trust created really an attempted "testamentary" disposition?
>
> (2) Did the settlor intend to create a trust?
>
> (O)ne important warning is in order — the conclusions as to the validity of a given declaration of trust may vary from state to state. Therefore, it is important to investigate the local law of the jurisdiction wherein the trust will be established.[42]

Austin Fleming, however, is quite straightforward about such trusts, properly created and properly administered:

> (U)nder the guidance of a competent advisor, the settlor of a well drafted, revocable one-party trust which has clearly identified assets and which is administered in accordance with established fiduciary standards, should attain the same results as under a conventional two-party revocable trust. Such is the effect of the recent cases.[43]

The *Restatement (Second) of Trusts* also takes the position that the one-party trust is valid, as previously indicated.[44] And at least one jurisdiction, Florida, has settled the matter by a statute which validates the one-party trust providing such a trust is legal where created or is executed with Wills Act form.[45]

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41. Sheard, *supra* note 21, at 90.
42. Marks, *supra* note 16, at 1142-43.
43. Fleming, *supra* note 4, at ¶ 68.309.
44. RESTAURANT (SECOND) OF TRUSTS § 57, comment *h* (1959).
45. FLA. STAT. ANN. § 689.075 (Cum. Supp. 1973). The Totten trust is still valid in Florida despite its lack of Wills Act form. Litsey v. First Federal Savings and Loan Ass'n of Tampa, 243 So.2d 239 (Fla. 1971). Louisiana apparently forbids a one-

Finally the *Wills and Trust Form Book* of the Northern Trust Company of Chicago includes a section on self-declarations of trust, which is a good indication of this trust company's judgment regarding the safety of these trusts.[46] Bogert and several Continuing Legal Education Publications also contain such forms.[47]

A general one-party trust, therefore, ought to have a reasonably good chance for recognition of validity if the arrangement is truly intended to be a present trust and if an attorney is careful about form. Assets should be meticulously transferred from the settlor, individually, to himself as trustee by recorded deed, bill of sale, execution of new signature cards and the re-registration of securities, although Austin Fleming suggests that, so far as listed securities are concerned, it should be a sufficient identification of those trust assets if they are left with a bank or trust company in a custody account, even though the custodian bank or trust company in turn holds the listed securities in nominee form.[48]

The attorney should *not* leave securities merely in the settlor's name as if he held them as nominee, nor should the attorney simply attach stock powers executed in blank to stock certificates, notwithstanding Sections 8-401 and 8-308 (6) of the Uniform Commercial Code, which appear only to protect the corporation in registering the transfer and do not appear to be determinative of the property law rights as between heirs and the successor trustee.[49]

In addition, someone should:

(1) obtain an identification number for the trust;

(2) open a checking account for the trust, which account should receive all of the trust receipts and from which account one should make all of the trust's disbursements;

(3) maintain separate books of account for the trust and regularly file state and federal tax returns; and,

(4) place all securities and other documents of the trust in a separate safety deposit box, in the name of the trust.

Finally, in the operation of the trust, the settlor-trustee-beneficiary should avoid excessive activity, such as frequent additions to and revocations from it, since such activity indicates that the settlor-trustee considers the trust more as a personal or agency device rather than a true trust. In other words, the settlor must

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party trust by statute. LA. REV. STAT. ANN. § 9.1784 (Reissue of 1965).

46. NORTHERN TRUST CO., *supra* note 2. It is perhaps no coincidence that Austin Fleming is an attorney for the Northern Trust Co.

47. BOGERT, *supra* note 2.

48. Fleming, *supra* note 4, at ¶ 68.308.

49. *Id.* One of Mr. Dacey's forms permits such nominee registration. It is reproduced in DUKEMINIER, *supra* note 18, at 67.

really treat the transferred assets as trust assets and not merely his individual assets in some slightly altered form.[50]

VALIDITY IN NEBRASKA

There is no Nebraska statute which makes valid the funded revocable inter vivos one-party trust. There is also no Nebraska statute or reported court decision which has ruled upon and upheld the validity of a Totten trust, although there is an unreported 1972 decision in the District Court of Dodge County, Nebraska, *Voss v. Spear's Free Clinic*,[51] which upheld the validity of numerous Totten trust accounts. Furthermore at least one bank in Omaha[52] accepts deposits designated "John Smith in trust for Harry Jones" and upon John's death, the bank will pay the then existing account balance to Harry Jones, even though the original signature card does not bear Harry's signature. Since the bank does not have Harry's signature on its account card and since the bank does not pay the account balance to John's personal representative, the bank apparently makes payment to Harry on the bank's judgment that the creation of the account established a valid inter vivos trust of which Harry Jones is the beneficiary. Such is the holding in the *Voss* case.[53] There is also no Nebraska decision upholding a self-declaration of trust over mutual fund shares or other listed securities.

There are, in addition to the *Voss* case, several reasons for assuming that in a proper case, Nebraska would uphold a one-party

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50. Marks, *supra* note 16, at 1146:

> No case has been located upholding a declaration of trust where the settlor-trustee had treated the trust assets as if they were his own or even where the trust assets were the subject of a substantial amount of activity.

Fleming says that of six essential elements which he isolates as critical in supporting trust declarations, "the most important as respects one-party trusts are an *isolation of the subject matter* of the trust and an *independent handling of its affairs*." Fleming, *supra* note 4, at § 68.305.

51. No. 21180 (Dodge Co. 1972). The case was a petition for a declaratory judgment to determine the disposition of various accounts for which the passbooks were held by the executor of the estate of Emma Rebbe Voss.

52. One suspects that all institutions would do the same.

53. The Voss case was heard on motions for a judgment on the pleadings, and the relevant part of the order is as follows:

> The Court hereby finds that the pleadings established as a matter of law that the trust accounts listed in the plaintiff's petition are valid trusts; that such trusts were not revoked by Emma Voss; that the beneficial interest in each account is in the beneficiary named in each such account: that the funds of each trust is [sic] to be held, paid and distributed in accordance with the terms of such trust; and that evidence of ownership of each such account now in the hands of the Executor should be delivered to such parties as may effectuate the above findings of this Court. Voss v. Spear's Free Clinic, No. 21180 (Dodge Co. 1972).

trust. First of all, there are at least two Nebraska cases which appear to sustain, as non-testamentary, deeds which were deposited in escrow but were not to be delivered until the grantor-depositor's death.[54] These cases are some indication that Nebraska courts are flexible about what is and what is not "testamentary." Secondly, and most significantly, Nebraska has a 1942 case, *Whalen v. Swircin*,[55] which upheld as non-testamentary an oral inter vivos funded trust of which the settlor was also the income beneficiary with a power of withdrawal, although the settlor was not the sole income and principal beneficiary.[56] The deceased settlor had also retained the right to draw down the entire trust corpus, which was in effect a power of revocation.[57]

If, as this article suggests, it is *revocability* which is critical (that is to say, if the "slender thread" between a present inter vivos trust and an illusory one is to be tested by whether or not a jurisdiction sustains as a valid present trust one which is wholly revocable by the settlor), then one could predict that in a proper case a Nebraska court will sustain a carefully created and properly operated one-party trust. In other words, if one asks, if the settlor in the *Whalen* case had also been the sole original trustee and primary income and principal beneficiary, would the court have still found that a present trust had been created, one can conjecture that the answer would be a qualified "yes." One's answer would be qualified because before one can make a reasonably accurate surmise in such a situation:

> Some care must be exercised to determine if the local courts are particularly sensitive about attempted testamentary dispositions and are prone to follow older cases.[58]

My colleague, Professor Volkmer, in his recent *Nebraska Annotations* to the *Restatement (Second) of Trusts* says, however, that "(t)he *Whalen* decision is totally consistent with § 57 as it now stands."[59] Section 57 in turn states that:

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54. Brunson v. Kahler, 176 Neb. 735, 127 N.W.2d 281 (1964); Milligan v. Milligan, 161 Neb. 449, 74 N.W.2d 74 (1955), "although the legal theory [in the two cases] is somewhat cloudy." RESTATEMENT OF TRUSTS, NEBR. ANN. § 56 Comment *f* (1971).

55. 141 Neb. 650, 4 N.W.2d 737 (1942).

56. "[The corpus] was held subject to her [the settlor's] use as she desired during her lifetime and that if any of the [corpus] beneficiaries [after the settlor's death] were in immediate need the trustee was to advance money to them from the trust fund." *Id.* at 652, 4 N.W.2d 739. In fact the trust did not earn any income because the settlor gave Swircin, the trustee, cash "with instructions for him to place them [the cash funds] in a safety deposit box in his own name . . . . The trustee did not reinvest the funds, but kept them in currency in the safety deposit box as directed." *Id.*

57. "The reservation of the principal of the trust fund, if needed, is nothing more than a reserved power of revocation." *Id.* at 655-656, 4 N.W.2d 740.

58. Marks, *supra* note 16, at 1146.

59. RESTATEMENT (SECOND) OF TRUSTS, NEB. ANN., § 57 (1971).

> Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.[60]

Comment h of Section 57 adds:

> The rule stated in this Section is applicable not only where the owner of property transfers it to another as trustee, but also where he declares himself trustee of the property. The disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor-trustee reserves a beneficial life interest and power to revoke and modify the trust. The fact that as trustee he controls the administration of the trust does not invalidate it.[61]

Moreover, the *Whalen* decision specifically cites with approval the old *Restatement of Trusts* Section 57, comment d:

> A trust in which the settlor reserves the beneficial life estate and a power to revoke and modify the trust is not invalid for failure to comply with the requirements of the Statute of Wills merely because the purpose of the settlor in creating the trust was to avoid the requirements of the Statute of Wills or to avoid the necessity of probate administration.[62]

More significantly, the *Whalen* decision makes an approving reference to the original *Restatement of Trusts* Section 58, the section which approves the Totten trust, which is, as we have seen, merely one particular form of the one-party trust and a form which has now been sustained in Nebraska at the District Court level in the *Voss* case.[63]

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60. RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959).
61. *Id.* at 155.
62. RESTATEMENT OF TRUSTS, § 57 at comment *d* (1935).
63. Voss v. Spear's Free Clinic, No. 21180 (Dodge Co. 1972). The Whalen reference is as follows:

> The fact that withdrawals of principal may be made by the settlor does not mean that the trustee has no title to the fund and the trust no effective existence, but that the trust is to continue and exist at the will of the settlor. But if the fund, or any part thereof, is permitted by the settlor to remain in existence, it does not work a denial of the right of the beneficiaries to enforce the trust as against the trustee. 141 Neb. 650, 656, 4 N.W.2d 737, 740 (1942).

Old § 58 of the Restatement pointed out:

> Where a person makes a deposit in a savings account in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit

There is also a sometimes cited and somewhat well-known Nebraska tax case in the Eighth Circuit, *Morsman v. Commissioner*,[64] which dealt with a self-declaration of trust and held that the self-declaration was not a true trust; therefore, the "trust's" income tax gains were really Morsman's gains. The *Morsman* case, however, does not cast doubt upon the validity in Nebraska of a properly created and independently handled one-party trust because:

(1) at least one leading authority says:

> It is submitted that, insofar as the majority opinion in *Morsman v. Commissioner of Internal Revenue* purports to declare the law of trusts, it is unsound and ought not to be followed. The settlor of a private trust can be the sole trustee and the only presently ascertainable beneficiary so long as the other beneficiaries will be ascertainable within the period of the rule against perpetuities. John Stiles, while unmarried, can declare himself trustee of South Sea shares for the benefit of himself during his lifetime and of his unascertained widow and unborn children after his death.[65]

(2) the case does not rely on (or even cite) Nebraska law;

(3) it is a tax case, which makes it distinguishable for that reason alone; and finally,

(4) there was not the kind of attention to form in the *Morsman* situation which one ought to exercise, and the case can otherwise be distinguished on its facts from the kind of carefully established one-party trust this article discusses.

WHAT IS LOST BY POSSIBLE INVALIDITY

Is anything lost if a one-party trust is held to be invalid? Let us assume that the attorney for our widow Mary has created a one-party trust and that at her death, a Nebraska court holds that the trust never came into existence and that Mary's purported one-party trust assets are therefore probate assets. What, if anything, would be lost by such a decision? If the trust scheme had never been attempted, Mary's assets would have been probate assets anyway, subject to the costs and fees of administration. There is no income, estate or gift tax loss to anyone by the failure of the one-party trust because no income, estate or gift tax advantages were possible or

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> at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust. RESTATEMENT OF TRUSTS, § 58 (1935).

64. 90 F.2d 18 (8th Cir. 1937).

65. Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 MICH L. REV. 907, 934 (1949).

expected as a result of creating the one-party, funded, revocable trust in the first place.[66] Finally, even after establishing a one-party trust, Mary should have a will, and if her will properly incorporates by reference the one-party trust, then the dispositive provisions of that trust will become the dispositive provisions of Mary's will for the purported trust assets; which assets, while requiring probate administration, will pass as part of Mary's testate scheme and not by an unwanted intestacy.[67] Hence it would seem that the one-party trust, where appropriate and where properly incorporated into the settlor's will, offers several potential advantages and no serious disadvantages. There are, however, some minor negative features.

First, for each one-party trust that an attorney draws, he will probably suffer some economic detriment, because his fee for setting up and terminating a one-party trust will likely be less than a probate fee would have been over those same assets. Secondly, the settlor-trustee may do a bad bookkeeping and investment job, to such an extent that no successor-trustee will want to accept the trust, at least without a court proceeding, although in a typical case such action ought not to be necessary since the trust beneficiaries and the now-deceased-settlor's beneficiaries will often be identical, and their claim for trust mismanagement would be against themselves insofar as they took all of the decedent's assets in one way or another.

There is also some potential disadvantage (or extra cost) to the settlor-trustee who does not do his own bookkeeping and tax work because of the need for separate individual and trust accounts, and the preparation of state and federal fiduciary income tax returns every year for the one-party trust in addition to the preparation of the settlor's individual income tax returns. One could also raise the question of whether or not an owner, who transfers his residence to a one-party trust, will thereby lose his real estate homestead tax exemption even though the former owner continues to reside in the property. As a practical matter, the answer is probably that the exemption will not be lost.[68]

Finally, the successor-trustee may charge a fee for terminating the trust. On balance, however, the advantages in a particular case may outweigh the disadvantages and Nebraska attorneys might

66. The income from a revocable trust is taxable to the settlor, INT. REV. CODE of 1954 § 676; its corpus falls into the settlor's federal gross estate, *Id.* at §§ 2036 and 2038; and no gift is made upon its creation. *Treas. Reg.* § 25.2511-2 (b) (1973).

67. Martin & Nicholson, *supra* note 27, at 165-166; Sheard, *supra* note 21, at 96-97.

68. NEB. REV. STAT. § 77.202 (Cum. Supp. 1972). *See* Comment, *The Revocable Living Trust as an Estate Planning Tool*, 7 REAL PROP., PROB. AND TRUST J. 233, 228 (1972).

well wish to consider the one-party trust in appropriate situations as an additional and useful estate planning tool.[69]

APPENDIX A

THE ANN R. DOE TRUST

This is a trust agreement dated February 5, 1973, between Ann R. Doe as settlor ("settlor") and Ann R. Doe as original trustee ("trustee") and may be referred to as the Ann R. Doe Trust.

ONE

1.1 Settlor has transferred to the trustee the settlor's residence and the furnishings therein, particularly some antiques and items of sentimental value as well as certain accounts in the Stateville Federal Savings & Loan Association. Settlor, as insured, has also designated this trust as beneficiary of certain insurance policies on her life. The trustee shall hold all such property and all investments and reinvestments thereof and any additions thereto (hereafter referred to as "the trust estate") upon the following trust or trusts.

1.2 During the lifetime of Ann R. Doe ("Ann") the trustee shall pay all of the net income from the trust estate in convenient installments at least quarter-annually to Ann or otherwise as she may from time to time direct, and the trustee shall also pay such sums from the principal of the trust to Ann, upon her request or as she may otherwise direct, from time to time and at any time. At any time that a successor-trustee to Ann is acting hereunder, such requests and directions shall be in writing.

1.3 If at any time or times Ann shall be under a legal disability or by reason of illness or mental or physical disability be, in the opinion of her family physician or another board-certified physician as stated in writing to the successor-trustee, unable properly to manage her affairs, the trustee may use such sums from the income and principal of the trust estate as the trustee deems necessary or advisable for the medical care, support, companionship and comfort of Ann and of any person dependent upon her, or for any other purpose the trustee considers to be for Ann's best interests, adding to principal any income not so used.

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69. The writer would also like his friends in the practicing bar to know that he is aware of Tom Shaffer's comment that "[a]cademic lawyers full of advice on how to practice law invite the sort of observation E. B. White made about home economists. He said that those he had met had only one thing in common — 'none of them was at home.'" T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 59 (1972).

(Here follow customary trust provisons)

4.3 In addition to the foregoing provisions, the following terms shall apply to this trust:

(a) Ann may resign as trustee at any time by written notice to Local State Bank, Local, Nebraska, which, upon receipt of such notice of resignation, or upon Ann's death, disability, refusal or inability to act shall become trustee hereunder.

(b) In order to begin to act as trustee hereunder Local State Bank or any trustee other than Ann, may rely upon the written statement of a physician, as set out in section 1.3, that Ann is unable properly to manage her affairs because of illness or mental or physical disability.

(c) During Ann's lifetime she shall have the right to occupy and use her former residence which she has transferred to this trust, rent free, but so long as Ann occupies her home she shall pay all of the expenses and taxes incurred in connection with living in such residence.

(d) Notwithstanding any foregoing provision of this trust or of any contrary rule of law, Ann as trustee (or any successor-trustee) may hold indefinitely certain non-income producing property in this trust such as her residence and household goods.

(e) If any trustee accepts the office of trustee from Ann for any reason, such trustee may accept without examination or review Ann's accounts and the property received from her as a full and complete discharge of Ann without incurring any liability for so doing for any acts or omissions of Ann.

FIVE

5.1 Ann or any other person may transfer, devise or bequeath additional property to the trustee to be held under this declaration. If the addition is made by will, the trustee may accept the statement of the legal representative that the assets delivered to the trustee constitute all of the property to which the trustee is entitled, without any duty to inquire into the representative's administration or accounting.

5.2 Ann may at any time or times during her lifetime by instrument in writing delivered to the trustee amend or revoke this declaration in whole or in part. The trust property to which any revocation relates shall be conveyed to Ann individually, or otherwise as she directs. This power is personal to Ann and may not be exercised by her legal representative or others.

I HAVE EXECUTED this declaration 1973.

Ann R. Doe, Settlor

Accepted

By:
Ann R. Doe, Trustee

APPENDIX B

WILL CLAUSE

5.1 On 1973, I created a trust naming myself trustee and life beneficiary, and as remaindermen, my descendants living at my death, *per stirpes* (or Creighton Law School). From time to time I have deposited assets in that trust, as evidenced by schedules thereto. If for some reason that trust should be invalid so that the assets I have placed therein become a part of my estate passing under this will, I hereby devise and bequeath all the property remaining in that purported trust as follows: I give and devise all such property, free of trust, to my descendants living at my death *per stirpes* (or to Creighton Law School).

This clause is substantially the one suggested by Sheard, "Avoiding Probate of Decedents' Estates," 36 *U. Cin. L. Rev.* 70, 96 (1967).