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Releasing the Expectancy

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RELEASING THE EXPECTANCY

Katheleen R. Guzman*

I. INTRODUCTION

The truism that owners of property may generally transfer it as desired does not change merely because they execute a will or fall within a specific intestacy scheme. The property remains that of the testator/intestate, subject to voluntary or involuntary conveyance as circumstances permit. Conversely, beneficiaries and heirs as yet hold no property—merely the evanescent "expectancy," hovering somewhere between hope and high chance.[1] But notwithstanding the orthodoxy that such putative takers may not convey that expectancy at law,[2] they do enjoy limited, linked

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1. Rightly or not, the proposition is almost so entrenched as to need no citation. *E.g.*, 1 WILLIAM H. PAGE, ON THE LAW OF WILLS § 1.2, at 3–4 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp., Jeffrey A. Schoenblum ed., 2001) ("[T]he will is not meant to create rights in others or to pass any interest in the property covered by the will prior to maker's death. . . . [T]o revoke a will is not to recall or reclaim an interest in another."); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 86.1 (4th ed. 1989); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1083 (1996) ("[T]he interests [a will] creates are mere expectancies, in no wise encumbering the properties it bequeaths."); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

One could quarrel with the entire expectancy/property dichotomy. Some expectancies might be more tangible or likely to vest than many contingent property interests, such as equitable remainders under self-settled revocable trusts. Recognizing their quasi-property status (or at least eliminating some of the legal distinctions the expectancy category engenders) would increase the range and scope of enforceable expectancy transactions, such as their donative transfer, condemnation, or insurability. *See, e.g.*, WILLIAM M. MCGOVERN, JR., & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 196 (2d ed. 2001) ("The line between 'expectancies' and 'property' is . . . wavering . . . and arbitrary.").

2. Professor Alexander succinctly notes: "[A]ttempts to assign or sell [the expectancy] are not recognized at law because, the usual expression goes, the putative grantor has nothing to assign or transfer." Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1573 (1982). Relatedly, a creditor of the taker may not levy upon the expectancy, nor will an interest therein transfer to a taker's trustee in bankruptcy. 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1681A (Walter H.E. Jaeger, ed., 3d ed. 1972). *See*

transactional rights even before any specific interest vests at the relevant decedent's death.[3]

An expectant heir or hopeful beneficiary can "transfer" an inchoate interest in an ancestor's estate either by release or by assignment.[4] Although sources might offhandedly mention ostensibly slight, tangential differences between these two transfer methods, they are commonly presented as indistinguishable in theory and effect save for the identity of the transferee. Thus, the casual observer will find quasi-syllogistic statements such as "for fair consideration, presumptive takers may *release* an expectancy interest to the decedent or *assign* an expectancy interest to a third person." That case law also tends to endorse or reject the doctrines conjunctively reinforces the notion that release and assignment are two quite similar sides of a single coin.[5]

True, similarities exist, which makes for simplicity and a pleasing parity when confronting the expectancy, which stands at the margins of property law. As here discussed, both release and assignment concern equitable transfers by expectant beneficiaries in property owned by an as-yet living person, and both are relative legal fixtures with a long history of discussion and enforcement.[6] Yet, while one could state that facile similarities there

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generally Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284, 288 (Ark. 1948); 1 LEWIS M. SIMES & ALLEN F. SMITH, THE LAW OF FUTURE INTERESTS § 395 (John A. Barron, Jr., ed., 2d ed. 1956 & Supp. 2001).

3. Vested, the expectancy is voluntarily and involuntarily alienable, descendible, and devisable in like manner as any other property interest. 23 AM. JUR. 2D *Descent and Distribution* § 148 (1983); 1 PAGE, *supra* note 1, §§ 16.17, 59.2, 59.19.

4. But an expectant heir may not effect such a "transfer" by descent or devise. 23 AM. JUR. 2D *Descent and Distribution* § 148 (1983); 1 PAGE, *supra* note 1, § 16.17. Note that the term "transfer" is technically inappropriate to equitable assignment or expectancy release. *See* BLACK'S LAW DICTIONARY 1503, 334, 115 (7th ed. 1999) (defining "transfer," "conveyance," and "assignment," respectively, to highlight the need for a "property interest" as prerequisite to property transfer).

5. For examples of such textual treatment, see *infra* Part II.A.

6. Consider the early case of *Quarles v. Quarles*, 4 Mass. (3 Tyng) 679 (1808). Son and father executed cross-deeds, the son's stating that in consideration of his father's, he was "fully satisfied and contented as [to any] share of his father's estate," and relinquished all rights as heir. *Id.* at 682. Both the majority and dissenting opinions explicitly rejected technical release theory as release can only affect a right held by the transferor on its date. *Id.* at 687–89. The dissent similarly rejected collateral satisfaction and takers' acknowledgment theories as inapplicable at law, observed as "remarkable" that the question had never arisen under its (and perhaps, any) succession scheme, and mused that the dearth of case law owed to the problem's resolution in estate distribution. *Id.* at 692 (citing LEX TESTAMENTARIA 426). Nevertheless, the majority noted the honesty, competence, fairness, and clarity of the parties and the agreement to enforce it as functionally equivalent to release under an "advancement in full" theory grounded in an 18th century Massachusetts statute and earlier English precedent. *Id.* at 683–88. Within three years, *Quarles* was employed to support the theory of release. *See* Kenney v. Tucker, 8 Mass. (7 Tyng) 142, 145 (1811). This approach remained in force as both binding and

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end and that meaningful ones never arise, release and assignment remain exhibited and understood as functionally equivalent. As a result, concepts best applied to only one or the other instead flow freely between them, masking fundamental distinctions to spawn confusion in the transfer methods' conception, application, and effect. Ironically, the very thing that superficially twins release and assignment—that they are identical save to whom the expectancy goes—is precisely what should uncouple them as well.

Abstractly, the separation of release from assignment is important. How lawyers and laity view the transfer of the expectancy shapes how it is perceived in terms of ownership rights. For example, requiring consideration for the release of the expectancy back to the source from which it emanates suggests that the expectancy is the hopeful beneficiary's to give—i.e., that the expectancy is "property." Viewing inheritance rights as property would be a radical suggestion indeed, and would speak volumes about the way in which current generations claim entitlement to their ancestors' wealth. More pragmatically, revisiting the nature of release and assignment is timely, given the nation's changing demographic and economic complexion. As age expectancies increase, tri- and quad-generational families are created and mature, blended families expand, health costs rise, and intra-family wealth becomes more concentrated at the child or even grandchild generation,[7] releases might be attractive vehicles through which to assure ancestors that their wealth will be preserved for those who need it most. Although releases do not seem to figure prominently in modern estate planning, they might be more serviceable if unnecessary transaction and information costs were mitigated through reform.

Finally, the accepted doctrine supporting release contains theoretical and actual errors that have gone unchecked and unabated for most of the last two hundred years. Whether revamping release doctrine will result in its increased usage or a better general understanding of the expectancy,

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persuasive authority for another century. *E.g.*, Chase v. Dickey, 99 N.E. 410, 412 (Mass. 1912); Pritchard v. Pritchard, 85 S.E. 29, 29–30 (W. Va. 1915).

For examples of early recognition of assignment doctrine, see *Lewis v. Madisons*, 15 Va. (2 Munf.) 120 (1810) (holding that the conveyance of expectancy in real property is not against public policy and can be upheld under covenant or specific performance theories); Annotation, *Validity and Effect of Transfer of Expectancy by Prospective Heir*, 17 A.L.R. 597, 597 (1922) (discussing English common law precedent permitting equitable assignment of the expectancy).

7. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 3–7 (3d ed. 2002). According to a 2001 Census Bureau report, the world's "elderly" population (defined as age 65 or over) has tripled in the past half century alone. Lisa McLaughlin, *Personal Time/Your Family: In Brief*, TIME, Jan. 7, 2002, at 152.

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venerable legal errors are as mischievous as modern ones, and perhaps even more so. There is little justification for ever perpetuating mistakes, if for no other reason than that law is most potent and respected when the doctrines upon which it relies are true.

Part I of this article contextualizes the release and the assignment within traditional succession doctrine, while Part II explores their symbiotic development and presentation and the difficulties thereby caused. As Parts III and IV develop, release and assignment differ in much more than name. While the evolved law of assignment may well fit assignment, it is ill suited to the release given these critical and substantive distinctions—most notably, whether the recipient of the transferred expectancy is third party or source. Part IV continues by proposing a liberalizing reform in release law doctrine, providing a theoretical framework for that change discussed in Part V.

A. Assignment and Release: Doctrine in Context

1. Assignment

An assignment is the transfer by an heir as beneficiary of a potential claim to a decedent's estate.[8] The term is properly used only when the expectancy holder transfers that interest to a third party, and is only enforceable where supported by fair or adequate consideration.[9] Equity will enforce the assignment if and when the *expectant* beneficiary actually acquires the subject property.[10]

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8. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 note j (1998); 6 AM. JUR. 2D *Assignments* §§ 88–89 (1999); THOMAS E. ATKINSON, THE LAW OF WILLS § 131 (2d ed. 1953); 6A C.J.S. *Assignments* §§ 17–18 (1975); SIMES & SMITH, *supra* note 2, § 395; Annotation, *Validity and Effect of Transfer of Expectancy by Prospective Heir*, 121 A.L.R. 450 (1939); Annotation, *Validity and Effect of Transfer of Expectancy by Prospective Heir*, 44 A.L.R. 1465 (1926); Annotation, *Validity and Effect of Transfer of Expectancy by Prospective Heir*, 17 A.L.R. 597 (1922).

9. 9 ALOYSIUS A. LEOPOLD & GERRY W. BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 11.7 (2d ed. 1992).

10. *See id.*; *see also* 1 PAGE, *supra* note 1, § 16.17; WILLISTON, *supra* note 2, § 1681A nn.12–16 and accompanying text. For case law examples, consider *Hinkle v. Wanzer*, 58 U.S. (17 How.) 353, 368 (1854); *Sgambelluri v. Nelson*, 480 F.2d 619, 620 (9th Cir. 1973); *Bradley Lumber Co. v. Burbridge*, 210 S.W.2d 284, 288 (Ark. 1948); *Grimm v. Grimm*, 157 P.2d 841, 843 (Cal. 1945); In re *Wickersham's Estate*, 70 P. 1076, 1077–78 (Cal. 1902); *Dyblie v. Dyblie*, 59 N.E.2d 657, 659 (Ill. 1945); *Brown v. Cunningham*, 25 N.E.2d 113, 114 (Ill. App. Ct. 1940); *Humble Oil & Ref. Co. v. Luckel*, 171 S.W.2d 902, 905 (Tex. Civ. App. 1943).

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2. Release

By contrast to assignment, release occurs where the holder of an expectancy relinquishes it to the person from whom the intestate or testate transfer was anticipated (the "source").[11] As noted, the stated rules governing release track those of assignment: the transfer is only enforceable in equity and must be accompanied by consideration.[12] One may view the transaction as either enforceable upon the releasor's acquisition of the property, or (more strictly and technically) as preventing him from ever succeeding to it.[13]

B. *Advancement, Satisfaction, and Disclaimer Compared*

Both transfer methods differ from the related doctrines of advancement, satisfaction, and disclaimer in timing and in effect. A true release foregoes all claims to the source's estate, barring the releasor's call for any portion thereof, irrespective of whether the consideration received matches what he would have taken in intestacy. Release is, therefore, unconcerned with subsequent fluctuation in the decedent's estate. Increase will not inure to the releasor's benefit; depletion will not harm the releasor in any way.

Contrast the traditional advance. As an *inter vivos* gift intended merely to reduce the advancee's ultimate intestate share, it might (but need not) preclude the advancee from the donor's estate. In part, the advance does heed dip and surge in estate valuation. As its sufficient increase will ensure that the amount advanced will not exceed, and thus bar the advancee from a distributive share of the decedent's estate, many advancees enjoy two bites of the estate apple. Like the releasor, however, an advancee remains

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The assignment might be enforceable at law if the expectancy is coupled with a present interest. *See, e.g.*, Martin v. Smith, 404 So. 2d 341, 343 (Ala. 1981); Avon State Bank v. Commercial & Sav. Bank, 207 N.W. 654, 656 (S.D. 1926).

11. Although the term "release" was traditionally limited to a putative heir's relinquishment of an *intestate* share to the ancestor, it now encompasses similar action by a putative beneficiary of a *testate* estate. *See, e.g.*, Ware v. Crowell, 465 S.E.2d 809, 811 (Va. 1996) (noting that, ironically, Virginia permits the release of a testate share but not an intestate share).

12. RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 (1940); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. j (1998); 23 AM. JUR. 2D *Descent and Distribution* §§ 174–175 (1983); ATKINSON, *supra* note 8, § 130; SIMES & SMITH, *supra* note 2, § 394. For the most recent case law, see *Martin*, 404 So. 2d at 343, 345; *Leggett v. Martin*, 156 S.W.2d 71, 74 (Ark. 1941); *Stewart v. McDade*, 124 S.E.2d 822, 826 (N.C. 1962); *Price v. Davis*, 93 S.E.2d 93, 97 (N.C. 1956); In re *McGillick's Estate*, 293 N.W. 185, 186 (S.D. 1940); *Ware*, 465 S.E.2d at 811.

13. *See, e.g.*, SIMES & SMITH, *supra* note 2, § 394.

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immune to estate depletion to the extent that he need never "purge the advance," or return its value to a decedent donor's estate.[14]

The testate analog to the advance, ademption by satisfaction, works similarly. An interest will adeem by satisfaction, in whole or in part, provided that there is sufficiently expressed intent that an *inter vivos* gift be charged against a beneficiary's testate share.[15]

Assignment, release, advance, and satisfaction all occur before the testate or intestate decedent dies, and thus before the expectancy actually vests. A beneficiary/heir's initial rejection of estate property after the relevant death is a disclaimer,[16] while a beneficiary/heir's receipt and subsequent transfer of that property after the relevant death is an ordinary conveyance.

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14. For example, suppose that single Owner has four children: *A*, *B*, *C*, and *D*. Owner transfers $10,000 to *A* in 1992 and dies in 2002 with a net estate of $90,000. If Owner dies intestate, and if the transfer to *A* was a gift and no more, each child would take $22,500. If the transfer to *A* was an advance, *A* would take $15,000, and *B*, *C*, and *D* would take $25,000 apiece. If the transfer to *A* was consideration for a release, *A* would take nothing, and *B*, *C*, and *D* would take $30,000 apiece.

Although the effects of gift, advance, and release clearly differ, semantic difficulties remain as some older cases refer to what is modernly called a release as "advancement in full" and what is modernly called an advance as "advancement in part." *See, e.g.*, Quarles v. Quarles, 4 Mass. (3 Tyng) 680 (1808).

15. Most jurisdictions codify the assumption that *inter vivos* gifts are not implicit reductions of testate shares by requiring that such intent be expressed in writing. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.4 (1998); UNIF. PROBATE CODE § 2-109(a) (1998) (requiring either donor's contemporaneous writing or any writing by donee). Occasionally, a state will allow oral evidence of that intent, or even presume that post-execution gifts to a child are intended as satisfactions. *See* MCGOVERN & KURTZ, *supra* note 1, at 67 and *infra* notes 35–36.

Ademption by satisfaction technically only applies to the general bequest or devise. An *inter vivos* transfer of a specific bequest or devise, whether to the intended will beneficiary or a stranger, results in ademption by extinction—the name accorded the situation where the subject property no longer exists in the decedent's estate at death. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.2f (1998).

16. Common law employed the term "renunciation" to describe an heir's refusal to accept an *intestate* share, which did not technically work at common law. As the taker was thought to instantaneously acquire title upon the intestate's death, renunciation actually generated two taxable transfers: one from the estate to the heir and another from the heir to the next qualified taker. 1 PAGE, *supra* note 1, § 49.1. Most modern statutes use the terms "disclaimer" and "renunciation" interchangeably, and the I.R.C. § 2518 treats them identically for tax purposes. MARK REUTLINGER, WILLS, TRUSTS, AND ESTATES: ESSENTIAL TERMS AND CONCEPTS 78 (1993). *See also* C.P. Jhong, Annotation, *What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest*, 93 A.L.R.2d 8 (1964). *Compare* Bostian v. Milens, 193 S.W.2d 797, 801–02 (Mo. Ct. App. 1946) (discussing the distinction between right to renounce interest transferred under will versus intestacy), *with In re* Brajkovic, 151 B.R. 402, 408 n.11 (Bankr. W.D. Tex. 1993) (noting absurdity of barring renunciation of intestate share). *But see* J.R. Kemper, Annotation, *Devolution of Legacy or Devise Renounced During Life of Testator*, 47 A.L.R.3d 1277 (1973) (applying term to what would normally be called "release").

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II. FUSING RELEASE TO ASSIGNMENT: CAUSES, EFFECTS

A. *Textual and Historical Melding*

Perhaps because the exterior similarity between release and assignment makes them easy to organize and present simultaneously, most modern textual sources, particularly casebooks and hornbooks, relate their requirements in abbreviated counterpoint:[17]

> A presumptive heir (or devisee) can *release* an expectancy interest to the decedent or *assign* an expectancy interest to a third person. A contract to release or assign an expectancy interest is only enforceable in equity and only if the heir (or devisee) receives fair consideration.[18]

> [A] parallel doctrine [to assignments of expectancies] recognizes transfers of a child's expectancy back to the parent, again if supported by fair consideration. These transfers are called "releases[.]"[19]

> Presumptive heirs (or devisees) can *release* their expectancy interest to the decedent. Presumptive heirs (or devisees) can also *assign* their expectancy interests to third persons. Contracts to release or assign expectancy interests are only enforceable in equity and only if the heir (or devisee) receives fair consideration.[20]

Where still used, the term "relinquishment" probably refers to a release rather than a renunciation or disclaimer. *See, e.g.*, *In re* Will of Edgerton, 223 S.E.2d 524, 526 (N.C. Ct. App. 1976) (referring to expectant taker's instrument as "release and renunciation"); RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 cmts. f–i, (1940); 76 C.J.S. *Release* § 3 (1994).

17. Older texts spend more time discussing and separating the issues. *See, e.g.*, ATKINSON, *supra* note 8, §§ 130 (discussing release of expectancy), 131 (discussing transfer of expectancy); SIMES & SMITH, *supra* note 2, §§ 394 (discussing release), 395 (discussing assignment).

18. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. j (1998).

19. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 163 (2d ed. 1999).

20. WAGGONER ET. AL., *supra* note 7, at 75–76. For additional examples, see REUTLINGER, *supra* note 16, at 31 ("Because the expectancy may never come to fruition and is not technically a property right, a release [] can be enforced only in equity and only if fair consideration is given for it[,]" "[b]ecause technically the heir has no property interest to transfer, the assignment can be enforced only in equity and if there is a fair consideration . . ."); EUGENE F. SCOLES, ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 73 (6th ed. 2000) ("The general rule is that, when one who subsequently turns out to be an heir

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To be fair, release and assignment are indeed similar, and presenting them together offers advantages of clarity and economy given the many pressing issues competing for textual space. Nevertheless, the presentation creates and then reinforces a perception in student and practitioner alike that release and assignment are interchangeable forms. Whether in cause, effect, or both, case law reinforces this misguided symmetry by intimating that one form of expectancy transfer is necessarily permitted (or barred) wherever the other is, often by gratuitously discussing both transfer methods where but one is at hand.[21]

Far less benign than either parallel presentation or unnecessary dicta is careless use, such as employing the terms "release" and "assignment" interchangeably, referring to a release as an "equitable assignment," or applying one term where the other is warranted. Consider the circular treatment given to the issue in a popular reference source. The author distinguishes the release of a vested interest from "the release of the expectancy of an heir apparent, either to his ancestor *or to another potential heir or distributee*."[22] Given the breadth of potential recipients stated, the term "release" is inappropriately used. Although an accompanying footnote refers the reader to materials on assignment, the footnote text then states that the referenced material covers "the assignment of the expectancy of an heir apparent, *including assignments and releases* of such an expectancy *between heirs*."[23] For the same reason, the term "assignment" is

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has released an expectant interest to the source (the intestate) before the latter's death, the release is binding on the heir if supported by a 'fair and adequate consideration.' It is also generally held that a purported *assignment* of an expectancy (to someone other than the source) for a fair and adequate consideration is binding on an heir or a beneficiary under a will.").

21. *See, e.g.*, Donough v. Garland, 109 N.E. 1015, 1016 (Ill. 1915) (noting that an expectancy could be released to an ancestor or assigned to a stranger); Simpson v. Simpson, 16 Ill. App. 170, 174 (1885) (noting that while release and assignment of expectancy differ, either is enforceable in equity where made in good faith for adequate consideration); Hart v. Gregg, 32 Ohio St. 502, 511 (1877) (holding that at common law a mere expectancy of an heir apparent cannot be released or assigned); Gilpin v. Williams, 25 Ohio St. 283, 300 (1874); Needles v. Needles, 7 Ohio St. 432, 443 (1857) (holding that a mere expectancy of an heir apparent cannot be released or assigned at common law).

22. 23 AM. JUR. 2D *Descent and Distribution* § 173 (1983) (emphasis added).

23. *Id.* § 173 & note 14 (emphasis added); *see also, e.g.*, J.R. Kemper, Annotation, *Devolution of Legacy or Devise Renounced During Life of Testator*, 47 A.L.R. 3d 1277, 1277 n.1 (1973). After confusingly treating renunciation as equivalent to release, the annotation distinguishes it from "a beneficiary's release, relinquishment, or assignment of his rights or interest to be acquired under a will in favor of another. . . ." *Id.* The discussion of releases and assignments was recently updated. While the current text is more straightforward in its treatment of the transfer methods, it states that "[h]eirs or distributees who have the legal capacity *may release or relinquish* their existing interests *among one another*." 23 AM. JUR. 2d § 151 (2002). While the author presumably intended to set forth the rule for existing (i.e., already vested) interests, the terminology used is confusing and imprecise.

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inappropriately used. While the text might well have been intended to highlight pre- versus post-vested property transfers, that thrust is lost on the casual reader who could mistakenly process the term "release" as applicable to a transfer of an expectancy to a third person, and the term "assignment" to a transfer of an expectancy to an ancestor source.

Confusion in actual precedent can cause even more mischief. For example, the 1841 case of *Trull v. Eastman* detailed a brother's deed of all interest in his living father's estate to a sibling.[24] After characterizing the agreement as a release, the state supreme court tested whether it was made fairly, with the ancestor/father's consent, and for sufficient consideration.[25] The remarkable aspect of the case is not that the court found that the three elements existed, but that it required them at all. By erroneously labeling the assignment a release, but invoking the elements of assignment, the court may have inadvertently imported additional and arguably absurd requirements into its jurisdiction's and others' release doctrine.[26] The conflation sporadically appears in subsequent cases where *Trull* is invoked for all sorts of cross-purposes: to require an ancestor's consent to what is mistakenly termed a release from one heir apparent to another,[27] or to support the validity or prerequisite of consent to either release[28] or assignment,[29] properly so termed.

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24. Trull v. Eastman, 44 Mass. (3 Met.) 121 (1841).

25. *Id.* at 123–24 (requiring ancestor consent for an assignment from one brother to his siblings) (citing Fitch v. Fitch, 25 Mass. (8 Pick.) 480, 483 (1829)).

26. The case clearly seems to apply the law of assignment, as the invoked *Fitch* case clearly reviewed the agreement under assignment doctrine and because the requirement of ancestor consent was commonly discussed for assignment, but never release, in the mid-19th century. 25 Mass. (8 Pick.) 480 (1829). For additional discussion of the consent requirement, see *infra* note 65 and accompanying text.

27. Curtis v. Curtis, 40 Me. 24, 27 (1855).

28. Boyer v. Boyer, 111 N.E. 952, 954 (Ind. Ct. App. 1916) (discussing the validity of release); Daniel v. Lewis, 13 Ky. L. Rptr. 827, 828 (1892) (noting that "[t]he whole current of authority, both in this country and in England, is, that a release by an heir apparent of his estate in expectancy, with a covenant of non-claim, is, if made fairly and with the express consent of the ancestor, or *a fortiori* if made with the ancestor, a bar to the releasor's claim thereto by descent or devise") (emphasis added). Note that the quoted language implicitly dispenses with the requirement that there be express consent for a release.

29. McAdams v. Bailey, 80 N.E. 171, 173 (Ind. Ct. App. 1907) (discussing consent); Newburyport Soc'y for Relief of Aged Women v. Noyes, 192 N.E. 54, 56 (Mass. 1934) (discussing consent); Gadsby v. Gadsby, 175 N.E. 495, 497–98 (Mass. 1931) (discussing consent); Sec. Bank of N.Y. v. Callahan, 107 N.E. 385, 386 (Mass. 1915) (discussing validity); Wallace v. Quick, 153 S.E. 168, 180–81 (S.C. 1930) (discussing validity); Blackwell v. Harrelson, 84 S.E. 233, 234 (S.C. 1914) (discussing validity).

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B. *Linkage Effects*

The effect of carelessness or historical accident is negligible where opportunities for correction arise through ongoing doctrinal refinement. That is not the case here, where the venerability and outwardly deft integration of the law of release and assignment tempts those who present or apply it to receive stated doctrine rather than challenge the precedent upon which artless statements rest.[30] Although release is recognized as an alternative to assignment, differences are presented as formal only. The transfer itself is keyed as the significant act, its parties merely peripheral and fungible actors. Hence the occasional erroneous usage or syllogistic application of the terms: cases supporting one method of transfer cited to support the other; elements required for "the other" transfer method incorporated into the first. Most critically, the practitioner learns that consideration is required for release as well as assignment, which is a development that probably owes far more to fortuity or outright mistake than design.

The preeminent treatise on future interests, written by Professors Simes and Smith of the University of Michigan, notes that "[f]rom the days of Littleton to the present time, it has been clear that a mere deed of release *without consideration given by the heir apparent* does not operate as a conveyance to extinguish the bare expectancy."[31] The quoted portion of Littleton's text on tenures, however, describes an assignment rather than a release—an expectant heir's attempted transfer of an interest in his living father's estate to a third party, and not to the father.[32] Within historical context, then, the rule would have made sense, as the "release" was considered a form of conveyance,[33] then thought to require consideration.[34]

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30. Tellingly, of roughly ninety cases bearing headnotes directly relating to Westlaw's Key number 124k70 (Descent & Distribution, Release of Expectant Share to Ancestor), only fifteen, or roughly 16%, have arisen within the last half-century. The dearth of case law might stem from either non-use of the transfer methods or their unchallenged use. Either way, there is less opportunity for change.

31. SIMES & SMITH, *supra* note 2, § 394 at 413 (emphasis added).

32. *Id.* at 412. "For if there be father and son, and the father be disseized, and the son (living with his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warranty . . . the son may lawfully enter upon the possession of the disseisor." *Id.* (quoting THOMAS LITTLETON, TENURES § 446 (T.E. Tomlins ed., 1841)). Writing in 1955, Professor Bailey of the University of Texas noted that a covenant of warranty in the deed from the assignor to the assignee would have supplied the requisite consideration. Edward W. Bailey, *Release of the Heir's Expectancy*, 33 TEX. L. REV. 423, 430 (1955). *See also* Dart v. Dart, 7 Conn. 250, 257 (1828) (citing Littleton to hold that an estoppel would arise against the expectancy holder had there been a warranty but not without one).

33. Bailey, *supra* note 32, at 430 (citation omitted).

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"[Like decisionmakers], [l]awmakers have a natural proclivity to free-ride on the intellectual travails of others."[35] This phenomenon seems even more likely when the initial "travailers" are no less than Professors Simes and Smith, or even Littleton and Coke. Thus, when equity courts later confronted the transfer of an expectant taker's interest to ancestor or testator, they faced what appeared to be a hard, fast, and applicable rule demanding consideration, notwithstanding the "unlikely kinship" between release and assignment.[36] Professors Stoebuck and Whitman note that "the common law's technicality is no longer with us, but much of its phraseology remains."[37] Within the release/assignment context it appears that the phraseology is much more than benignly superfluous. The "common law's technicality" has instead infiltrated the doctrine, and in a particularly substantive and inappropriate way.

Such flawed "doctrinal/functional" equality manifests at the theoretical level as well. "An assignment is the expressed intent of one party to pass rights owned to another."[38] The very term evokes its theoretical basis. Indeed, as an agreement between assignor and assignee, the assignment is subject to the same validity prerequisites and basic interpretive rules as other contracts.[39] While a legal assignment transfers something *in esse* whereas an equitable assignment transfers contingency, potential, or

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34. The "bargain and sale" deed made possible and popular under the Statute of Uses, 27 Hen. VIII, Ch. 10 (1536), required the recitation of paid consideration; related doctrines demanded that absent such consideration, relation by blood or marriage could suffice. *See, e.g.*, Chase Fed. Sav. & Loan Ass'n v. Schreiber, 479 So. 2d 90, 100 (Fla. 1985); *see generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 812 & n.44 (3d ed. 2000).

35. Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 180 (2001) (describing the tendency to adopt uniform acts, and identifying the phenomenon within cognitive psychology circles as "information cascade").

36. Bailey, *supra* note 32, at 430. *See also* LEOPOLD & BEYER, *supra* note 9, § 11.1 & n.8 (citing Professor Bailey to observe that "[c]onfusion of the release cases with the assignment cases has resulted in a hard-and-fast rule that the release must be supported by consideration").

37. STOEBUCK & WHITMAN, *supra* note 34, at 809–10 (discussing why modern deeds often state consideration even where it is not required).

38. *In re* Kaufman, 37 P.3d 845, 850 (Okla. 2001) (citing Johnson *ex rel.* Lackey v. Schick, 882 P.2d 1059 (Okla. 1994)).

39. *See generally* 6 AM. JUR. 2D *Assignments* § 1 (1999); 6A C.J.S. *Assignments* § 4 (1975) (discussing proper parties, mutual assent, consideration, and legal subject matter).

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expectancy,[40] both are ordinarily conceived as transferring intangible rights (such as rights *in* property) rather than the actual property itself.[41]

These principles sensibly apply to the transfer of an expectancy. Because an expectancy is "non-property," its holder can neither claim ownership of the underlying interest nor convey it through such title transfer methods as deed or will. But assignments do not actually convey property, and equitable assignments permit the transfer of unripened interests. Thus, expectancy transfers can fit within the equitable assignment rubric, requiring the disappointed assignee to meet the unique demands of justice and fairness contextually imposed.[42] Numerous sources agree.[43] While

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40. Johnson *ex rel.* Lackey v. Schick, 882 P.2d 1059, 1061 (Okla. 1994) (enforcing debtor's assignment of inheritance interest). Equitable assignments are "in the nature of a declaration of trust," and are based on principles of fairness irrespective of form. 6A C.J.S. *Assignments* § 2(b) (1975); *see also* 6 AM. JUR. 2D *Assignments* §§ 5, 15 (1999).

41. 6 AM. JUR. 2D *Assignments* § 1 (1999); *see, e.g.*, Burk v. Morain, 272 N.W. 441, 442–43 (Iowa 1937) (holding that assignment of expectancy did not transfer existing property, but was merely a contract to assign sustained and enforced as assignor's executory promise).

42. Equitable principles control equitable assignments, which must be fair, supported by adequate consideration, and within public policy to be enforced. *See, e.g.*, Martin v. Smith, 404 So. 2d 341, 343 (Ala. 1981) (validating an equitable assignment "made in good faith and free from circumstances of fraud or oppression"); Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 730 (Iowa 1942) (validating an equitable assignment "if fairly made and free from any unconscionable advantage"); *In re* Estate of Wettig, 138 N.W.2d 206, 208 (Wis. 1965) (holding that equitable principles control the enforcement of equitable assignments); Hofmeister v. Hunter, 283 N.W. 330, 333 (Wis. 1939) (enforcing an equitable assignment if free from "vitiating elements" and no imposition on a "necessitous heir").

43. Most texts explain the assignment of the expectancy (or note that the majority of cases do) in contractual, equitable assignment terms. The explanation is normally that the attempted (but legally ineffectual) conveyance is equivalent to the assignor's executory contract to convey to the assignee when the source of the anticipated expectancy dies. For authority to that effect, see SIMES & SMITH, *supra* note 2, § 396 (providing alternate explanation for specific performance applied to non-unique chattels); RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 cmts. c, d, & i (1940); 1 PAGE, *supra* note 1, § 16.17; Annotation, *Validity and Effect of Transfer of Expectancy by Prospective Heir*, 121 A.L.R. 450, 452 (1939); 44 A.L.R. 1465, 1466 (1926); 17 A.L.R. 597, 601 (1922); *see generally* 6 AM. JUR. 2D *Assignments* § 89 (1999); 6A C.J.S. *Assignments* § 18 (1975). Of course, contract law sources similarly explain the assignment of the expectancy. *See e.g.*, ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 874, 908 (Joseph M. Perillo ed., 1993); WILLISTON, *supra* note 2, § 1681A. Texts on equity do as well. *See e.g.*, 3 JOSEPH STORY COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1395 (14th ed. 1918); 3 POMEROY, EQUITY JURISPRUDENCE §§ 1236, 1270, 1290 (3d ed.). For case law illustrating the creation of the assignee's cause of action for specific performance if and when the interest vests, see for example, *Dyblie v. Dyblie*, 59 N.E.2d 657, 659 (Ill. 1945); In re *Estate of Davis*, 467 N.E.2d 402, 403–04 (Ill. App. Ct. 1984); *Brown v. Cunningham*, 25 N.E.2d 113, 114 (Ill. App. Ct. 1940).

An alternate and less common theory for enforcing an expectancy transfer is estoppel by deed where the expectancy was "conveyed" via warranty deed. This approach would not theoretically work under a quitclaim conveyance. *See e.g.*, SIMES & SMITH, *supra* note 2, § 395; 6 AM. JUR. 2D *Assignments* § 90 (1999); 6A C.J.S. *Assignments* § 18 (1975); Annotation,

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neither deeds nor wills require consideration,[44] that contracts still do explains why the donative assignment of the expectancy is invalid.[45]

Perhaps because of its wholesale but unthinking adoption of assignment doctrine, the expectancy release suffers theoretical opacity.[46] The generic observation that releases are usually enforceable is seldom coherently supported. Instead, results are presented as *fait accompli*, with supporting statements sounding far more like conclusion than rationale.[47] The spare and hand-wringing rationales offered, ranging from conveyance to contract with many points in between, often overtly or latently conflict to heighten doctrinal and theoretical confusion and disarray between and within jurisdictions.

Unlike "assignment," the term "release" volunteers no endemic clues to its doctrinal origin. While it might be used contractually to describe "[t]he relinquishment, concession, or giving up of a right, claim or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced,"[48] it also applies to property transactions, such as a re-letting of leased premises or a release

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Validity and Effect of Transfer of Expectancy by Prospective Heir, 121 A.L.R. 450, 459 (1939); 44 A.L.R. 1465, 1469 (1926); 17 A.L.R. 597, 616 (1922) (all noting the estoppel basis for passing after-acquired property through to the grantee). For case law examples, see e.g., *Dart v. Dart*, 7 Conn. 250 (1828); *Blackwell v. Harrelson*, 84 S.E. 233 (S.C. 1914); *Birk v. First Wichita Nat'l Bank*, 352 S.W.2d 781 (Tex. Civ. App. 1961). Note that the estoppel approach does not confer any extra status to the expectancy, as one who holds absolutely no interest or even expectancy in certain property is still bound to convey it should he subsequently acquire title after executing a warranty deed.

44. 3 AMERICAN LAW OF PROPERTY § 12.43 (1952) (citation omitted). Because a will is a donative transfer deferred until death, the will requires no consideration by definition.

45. In this regard, "transfer" of an expectancy is more like an unenforceable promise (here, of future transfer if and when the expectancy vests) or purported transfer of a right anticipated under an as-yet nonexistent contract. Both scenarios require consideration to be enforceable. MCGOVERN & KURTZ, *supra* note 1, at 195.

46. Textual sources might observe divergent explanatory bases for the release, but present the assignment as understandable under equitable assignment, and occasionally, estoppel theories. *Compare* ATKINSON, *supra* note 8, § 130 at 726–28 (discussing four possible theoretical bases for the release after noting that "it is not clear upon what legal theory [release] is reached") *and* LEOPOLD & BEYER, *supra* note 9, §§ 11.1–11.4 (noting at least seven possible theories and fully discussing four) *with* ATKINSON, *supra* note 8, § 131 at 729 (presenting the single equitable rule for assignment) *and* LEOPOLD & BEYER, *supra* note 9, § 11.7 ("the accepted rule . . . is that the expectancy of the [putative taker] is assignable in equity").

47. *See, e.g.*, Mires v. Laubenheimer, 111 N.E. 106, 107 (Ill. 1915) ("A release to the ancestor . . . operates not as a contract or as a transfer or a conveyance either to the ancestor or to the other heirs, but as an extinguishment of his right to take any estate by descent.").

48. BLACK'S LAW DICTIONARY 1453 (4th ed. 1968). For a similar definition, see, for example, *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1454 (N.D. Ind. 1990). When so viewed, the release is either a "contract or subspecies of a contract." 76 C.J.S. *Release* § 2 (1994).

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deed of a future interest to the holder of the present supporting estate. Notwithstanding such differentiable usage, initial attempts to impose order on the theory of expectancy release thrust it into the same contract box that shelters the assignment.

First (tautologically, and due to its flawed coupling with assignment), the release of an expectancy requires consideration in a way that even similar property transfers do not. For example, future interest owner *A* may release a very contingent remainder to alternate contingent remainderman and life tenant *B*. Irrespective of consideration, *A* ends up with nothing, and *B* with the full fee through merger.[49] It does not matter whether *B* pays *A* a single dime. Second, property conveyances usually demand present interests, a category within which the expectancy finds no traditional home. "The expectancy that one will inherit by intestacy or under a will from a person now living is not property; it is not land, chattel or chose in action, but rather the hope of owning such in the future."[50] Although exclusion from property theory does not necessitate inclusion in contract theory, the latter might initially seem to provide the most logical fit given legitimate comparisons between *what is transferred* in both assignment and release.[51]

Even a loose contractual overlay atop the release presupposes attendant applications of enforceability, validity, and form that may or may not be warranted. For example, assuming a valid release contract, the parties in privity—releasor and source—are directly benefited and burdened, thus seemingly able to enforce the arrangement against the other. But while a source should be able to prevent a releasor from *claiming* a distributive share, it is questionable whether the releasor should be able to prevent the source from *giving* it or whether other takers from the source (as ostensible third-party beneficiaries) should be able to enforce the release over the objection of releasor, source, or both. The issues do not arise so acutely in the assignment: in its most common form, there is no intent to benefit others beyond immediate parties. Additionally, neither the assignee nor any

49. *See* SIMES & SMITH, *supra* note 2, §§ 1853, 1855 (discussing rule under English common law and noting that today it is "well settled" that a future interest may be conveyed by release). This is so even if the contingent remainder is less likely to vest than the expectancy, as where an insane deathbed intestate with a single and healthy heir apparent (*A*) lacks the testamentary capacity to divert that interest from *A*'s ultimate acquisition.

50. PAUL HASKELL, PREFACE TO WILLS, TRUSTS, AND ADMINISTRATION 80 (1987). No interest vests until the putative taker survives the decedent's death. Even then, the decedent might have "created" a more direct heir, written or changed a will, or otherwise disposed of the anticipated *res*. *See also supra* note 1 and accompanying text.

51. For cases accepting the contract theory, see ATKINSON, *supra* note 8, § 130 n.9.

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third party acquires any rights against the source since the assignor held none to give.[52]

Issues of form are similar. Viewing the release as a deed or will would require a writing,[53] but as a species of contract, perhaps not. Although an expectancy is not real property, the Statute of Frauds requires a writing for a contract *involving* the sale of an *interest in* real property;[54] although an expectancy is not a good, the Uniform Commercial Code requires a writing for a contract *involving* personal property exceeding five thousand dollars in amount or remedy value.[55] Both standards leave unanswered whether expectancies fall within their provisions, with the requirement hinging on the level of "involvement" demanded between the expectancy and the estate, the type of property within the estate, and the propriety of naming an expectancy in real property an "interest" therein.[56] Case law has yet to definitively fill the void. The issue is less likely to arise with the assignment given that most assignees would presumably demand a writing.

As a contract, release would require offer, acceptance, and consideration. Offer and acceptance could be assumed by the parties' entry into the arrangement, particularly as expectancy releases must be evident from the relevant instrument or surrounding facts. But once more, the sticking point is consideration: "[a]ll of the authorities seem to agree that a gratuitous assignment is unenforceable, because there is no contract to enforce."[57] Is consideration required for release because it is required for assignment? Is it required for the release because the release is viewed as contract, or is the release viewed as contract because it is required? And is the release viewed as contract because the assignment is as well? The questions posed spin into a circularity caused and continued by the relentless, wrongheaded

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52. Casady v. Scott, 237 P. 415, 420 (Idaho 1924) (holding that assignee had no right against estate of source, which at the time of assignment was subject to a will contract that was later released in favor of the assignor); CORBIN, *supra* note 43, § 908.

53. 6A POWELL, REAL PROPERTY ¶ 881 (1980) (deeds); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 3.1 cmt.f (attested wills), 3.2 (unattested wills) (1998). The oral or nuncupative will, permitted in twenty states, is so rare and closely circumscribed as to pose no real exception to the rule. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 statutory note 3.

54. *See* STOEBUCK & WHITMAN, *supra* note 34, § 10.1.

55. U.C.C. § 1-206 (1989 & Supp. 2002).

56. To the extent that an "interest in" real property is usually one that is presently protectable, the answer might be no. For example, an unexercised option is usually not yet considered an "interest in" real property, and might not fall within coverage of the Statute of Frauds. STOEBUCK & WHITMAN, *supra* note 34, at 800–02. *See, e.g.*, Bank of Cal. v. Connolly, 36 Cal. App. 3d 350, 364–65 (1973) (holding that a contract for the assignment of a share in the profits of land speculation is not a contract for the sale of an interest in land).

57. Scott v. First Nat'l Bank, 168 A.2d 349, 352 (Md. 1961).

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fusion of release and assignment. Assignment poses no similar theoretical problem, as the expectancy does not derive from the assignee.

Approaching the release as a contract works well enough if the jurisdiction accepts these subsidiary contract-based premises, which might seem innocuous anyway as most releases are in writing and consideration is already required.[58] But it may well be a desire to avoid some or all such spillover effects that leads some courts to ground the release in alternate theory such as secret trust, estoppel, or fraud. A more direct approach would recognize the critical distinctions between release and assignment and evaluate independently whether and to what extent the traditional requirements should remain for each.

III. UNCOUPLING RELEASE FROM ASSIGNMENT

A. *Similarity and Difference*

1. Expectancy Transfer: Motivation

Valid reasons exist for the expectancy holder to effect its pre-acquisition assignment. The primary motivation is presumably economic: a need or desire for the certainty, liquidity, or cost avoidance offered by an agreement that capitalizes the ether of potential. That type of assignor must find either a purchaser willing to wager that the expectancy will ultimately yield an amount exceeding (or at least equal to) the value of consideration paid,[59] or

58. For fuller discussion, see *infra* Parts IV.B., V.A. (discussing the propriety of each requirement to the release and possible attempts to avoid some or all of these requirements).

59. The chancy, aleatory nature of the assignment can not be overstated. While it may end in great profit to the assignee, the savvy assignee will also of course realize the potential for zero economic gain, and zero recourse, should the assignor ultimately inherit nothing. Sgambelluri v. Nelson, 480 F.2d 619, 620 (9th Cir. 1973) (holding an assignment complete when expectancy occurs, and failure to occur leaves assignee without rights). One court, discussing an assignment whereby a charitable institution agreed to support an elderly pauper, colorfully described this fact:

> For [taking care of an impoverished resident, the Home] received initially a mere pittance, and the promise of the possibility, and was content. Vulgarly speaking, the Home and the inmate each took a chance, and in this instance the Home won. But suggestion of the spirit of gamble is unfair and offends good taste, for the Home is a pure charity for the aged homeless, supported by public contributions, and unselfishly served by kindly and generous men and women.

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less likely, one who holds a donative perspective, not caring whether the expectancy ripens into a consideration-equivalent amount. The first type of assignee would include creditors seeking to secure debt;[60] the latter would presumably be a family member or close friend. Secondarily, the assignor might seek less pecuniary fulfillment: to influence or control others' behavior, to smooth familial relationships, or to assure another of future provision (thus present flexibility). Such motivations essentially track those impelling any promise of future largesse. Although the diminished emphasis on economic gain might increase the set of willing assignees, the intent at play suggests that the assignor has a particular assignee or two in mind.

Similar stimulants exist for the releasor, who seeks either the certainty of an early payout or the satisfaction/consequences of assuring the source of a relinquished claim. But rather than ordering economic above altruistic incentive, as is possible with assignment, the releasor's motivation is probably more evenly distributed between the two. Moreover, the dynamic is also altered in that it is far more likely that a source will initiate a release than that an assignee will initiate an assignment.

2. Expectancy Transfer: Perspective

Although release and assignment may share roughly similar motivations, their cross-pollination inhibits a more piercing examination of dissimilarity. Pivotal differences are ignored or presented as quirky anomalies when they should be reinforced. Only four distinctions—sometimes noted, less often explained, and rarely justified—find expression in main text or case: (1) to whom the expectancy flows;[61] (2) whether the descendants of the transferor are bound;[62] (3) the amount of the consideration demanded;[63] and (4) the requirement of ancestor consent.[64] It is an ironic paradox that the most commonly stated distinction of the four—to whom the expectancy flows—

Fid. Union Trust Co. v. Reeves, 125 A. 582, 584 (N.J. Ch. 1924). *See generally* RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 cmt. a (1940). For a more detailed discussion of the risk allocation inherent in assignment and release, see *infra* Part IV.B.2.

60. *E.g.*, Kaylor v. Kaylor, 45 P.2d 743, 744 (Okla. 1935); Hofmeister v. Hunter, 283 N.W. 330, 333–34 (Wis. 1939).

61. This distinction is always noted, sometimes to the exclusion of all others.

62. This distinction is commonly noted. *E.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. j, reporter's note 2 (1998) (discussing difference); REUTLINGER, *supra* note 16, at 31 (noting jurisdictional variance); SCOLES ET AL., *supra* note 20, at 73–74; WAGGONER ET AL., *supra* note 7, at 75; WILLISTON *supra* note 2, at 703 n.19.

63. Fewer sources note this distinction. *See, e.g.*, ATKINSON, *supra* note 8, § 131; LEOPOLD & BEYER, *supra* note 9, § 11.7; SCOLES ET AL., *supra* note 20, at 73.

64. This distinction is rarely noted overtly.

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is simultaneously the most visible and superficial yet obscure and significant, with the capacity to explain and extend both the few existing stated differences and others that should apply.

Viewing assignment as a "transfer" to a third party and release as a "transfer" to the source assumes that in each it is the expectancy that transfers and the expectant taker who transfers it. It is admittedly alluring to so preserve a pat syllogism of form by highlighting the distinction as one of alternate *recipients*. However, a more apt description might be that release is a transfer not from releasor to source, but from source to releasor. This alternate construction inverts rather than parallels assignment, and highlights the distinction as one of alternate *transferors*. In other words, there is a justifiable difference between promising "whatever I will get from *X*, I give to you" and "whatever I will get from you, I give to you." In neither example does the promise transform "whatever I will get" into a present property interest in speaker or recipient, and in neither example does "whatever I will get" necessarily hold any value greater than zero. In the first example, however, the expectancy exists independently of the transferee, inhering instead in the speaker—*X* relationship which the assignee can not control. In the second example, the expectancy never really exists objectively at all without transferee *X*. The expectancy is *X*'s to give. Stated otherwise, the source creates the expectancy. The assignor and assignee do not.

A byproduct of rearranging the conception of the release suggests a second foundational difference: that what actually transfers is the "consideration" to sustain it from source to taker, rather than the expectancy itself from taker to source. If so, that consideration is actually but a gift, since no expectant taker holds any right to an estate in any event. Notwithstanding its apparent similarity to the assignment, release thus hews more closely to the two other well-established "prepayments" of expected shares to expectant takers—advance and satisfaction. Perhaps release law should borrow more liberally from those doctrines than from its false twin.

B. Explaining Stated Differences

Reconceptualizing the release can resolve stated tensions with assignment. The distinction between the identity of the interest recipient is superficially semantic, categorical, and straightforward. But altering the functional identity of both transferor *and* transferee in release explains other distinctions commonly or less often noted. For example, first consider the occasionally expressed requirement that ancestor consent is prerequisite to

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assignment alone.[65] That element is immediately recognized as superfluous precisely because the source would certainly "consent" to any transfer that he functionally initiates.[66] The focus shifts to source intent, precisely where it rests in related advancement theory.

Second, release binds a predeceasing transferor's descendants, whereas assignment leaves their interest untouched. For example, *T* dies leaving a $60,000 net estate and three descendants: Son *A* and two grandchildren of predeceased Son *B*. Had *B* released to *T*, Son *A* would inherit the entire estate, the grandchildren's "interest" extinguished by virtue of *B*'s action. Had *B* instead assigned to *A*, Son *A* would inherit $30,000, the grandchildren $15,000 apiece, free of the consequences of the assignment. The rule is inveterate, perhaps more so regarding the effects of assignment than release.[67] Well-established or not, however, it is rarely well explained.

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65. The twofold rationale supports avoiding an ancestor's effectively "leaving" his property to a stranger and the potential loss of parental authority occasioned by assignment, which removes the fear of disinheritance. *E.g.*, McClure v. Raben, 33 N.E. 275, 277 (Ind. 1893) (noting that assignment is essentially fraud on the ancestor); Farmers' Loan & Trust Co. v. Wood, 134 N.E. 899, 900 (Ind. Ct. App. 1922) (holding that failure to object to transfer insufficient to establish affirmative consent); Curtis v. Curtis, 40 Me. 24, 26–28 (1855); Boynton v. Hubbard, 7 Mass. 111, 121 (1810) ("let loose from [the ancestor's] salutary control, [assignors] may indulge in prodigality, idleness, and vice; and . . . may go on trafficking with [the ancestor's] expected bounty, making it a fund to supply the wastes of dissipation and extravagance"); Stevens v. Stevens, 148 N.W. 225, 228 (Mich. 1914). In other jurisdictions, consent is immaterial. Gannon v. Graham, 231 N.W. 675, 676 (Iowa 1930); Scott v. First Nat'l Bank, 168 A.2d 349, 352–53 (Md. 1961). By 1940, the requirement was sufficiently on the wane to fall out of the stated elements for a valid assignment. *E.g.*, RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 cmt. j (1940) (power to bind the expectancy not dependent on source's knowledge of or consent to transaction). See note 26, *supra*, and accompanying text, for a discussion showing how the consent requirement, probably inadvertently, occasionally infiltrates release doctrine.

66. Of course, the absence of the consent requirement for release can also be explained under the traditional view, where the source would have to agree to the transaction as recipient.

67. *E.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. j (1998) ("[i]f a releasor or assignor predeceases the decedent, the right of the descendants of a releasor but not of an assignor are cut off by the ancestor's action"); WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS AND ESTATES 29 (1988). Some commentary limits this preclusive effect to circumstances where other children of the source survive, presumably theorizing that the source would prefer the otherwise estopped child or grandchild to take over more attenuated collateral relatives or share in the estate with other descendants of equal degree. *E.g.*, Pylant v. Burns, 112 S.E. 455, 458 (Ga. 1922); ATKINSON, *supra* note 8, § 130 at 728; REUTLINGER, *supra* note 16, at 31; Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 251–52 & nn.125–27 (1981). *Contra* RESTATEMENT OF PROP.: FUTURE INTERESTS § 316, cmt. f, illus. 6 (1940) (stating that the collateral relatives would take).

For case law examples of the result in assignment, see *Casady v. Scott*, 237 P. 415, 420 (Idaho 1924); *Johnson v. Breeding*, 190 S.W. 545, 545–46 (Tenn. 1916). For case law examples of the result in release, see *Simpson v. Simpson*, 2 N.E. 258, 262 (Ill. 1885) (blending

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The distinction is routinely supported by invoking *Donough v. Garland*,[68] where an adult child assigned her expectancy in her mother's estate to two siblings, then predeceased her mother. When the mother died, the assignor's seven children sued for partition, claiming that they were not precluded from a share in their grandmother's estate.[69] The court agreed. After reciting a series of peripheral cases, the last paragraph of the opinion differentiates release from assignment by remarking that the former "extinguish[es] . . . the right of inheritance, cutting it off at its source"[70] whereas the latter preserves the right of inheritance and specifically enforces the agreement once, if ever, the expectancy vests in the assignor.[71] Aside from conclusory statements, where is the articulated rationale? The "release bars descendants" dogma is thus stated for very indistinct reasons in the arguably seminal case. The rule bears appreciable merit from the perspective of assignment. While the intent of the decedent from which the expectancy derives is tangential to its transfer, most such decedents would probably prefer to minimize its effect, particularly as applied to that assignor's descendants.

Indeed, if the transferor is the expectant taker in both assignment and release, one might question the very validity of any distinction. It would seem that the expectant taker's contract with another should either bind or not bind that taker's non-party descendants, regardless of with whom the contract was made.

The distinction, however, makes sense when the release is viewed as a transfer from source to releasor, rather than from releasor to source. The focus shifts from which burdens descend from that releasor to the source's intent. An assignee might well recognize the attendant and non-manageable risks of purchasing an expectancy, including that it may end up valueless. By controlling the existence and value of the expectancy, however, a source would view that risk as minimal, and might well anticipate, or even intend, that the consideration the source paid represented all that either the releasor or his descendants would take.[72] This is particularly so if jurisprudence

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the theories of release and advance); *Crum v. O'Rear*, 24 N.E. 956, 961 (Ill. 1890); *Anderson v. Forbes*, 84 S.W.2d 104, 105–06 (Tenn 1935); *Liesse v. Fontaine*, 195 N.W. 393, 396 (Wis. 1923) (noting that the weight of authority is that agreement binds the children). *But see, e.g.*, Mow v. Baker, 24 S.W.2d 1, 3–4 (Tex. Comm'n App. 1930) (holding that children of predeceasing releasor take from grandparent's estate).

68. 109 N.E. 1015 (Ill. 1915). *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSERS § 2.6 reporter's note 2 (1998).

69. *Donough*, 109 N.E. at 1015–16.

70. *Id.* at 1017.

71. *Id.*

72. *E.g.*, Simpson v. Simpson, 4 N.E. 137, 138–40 (Ill. 1886). *But see* WAGGONER ET AL., *supra* note 7, at 52 n.29 (noting survey results that show public support for horizontal equality,

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retains the established view that most decedents favor generational equality at the child level.

Advancement theory complements the analogy. While the Uniform Probate Code and some state statutes do not charge an advance against children of the predeceasing advancee,[73] the traditional rule accounts for the advance when computing representative takers' shares[74] given the assumed pass-through benefit from that advancee/ancestor's estate or the presumed intent of the intestate to preserve vertical distributional equality. But oddly enough, the Uniform Probate Code does charge the value of a satisfaction, the testate analog to advance, against the descendants of a predeceasing donee who are substituted as recipients under anti-lapse.[75]

While there is a certain convenience in bundling release and assignment, that they differ (at times, critically) in theory and policy demands that the law of each should differ as well. Reconceptualizing the release can be potent to the reformation task. Coupled with a more careful dissection of the stimulus for and policy underpinnings of assignment and release, such theoretical redesign supports liberalizing reform in release law to encourage its expansion and adaptation to modern sociological conditions.

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per-capita at each generation). It is not clear whether intestate decedents appreciate the ramifications of competing representational schemes (pure *per stirpes*, modified *per stirpes*, horizontal equality) or endorse one over the other. It is nevertheless fair to assume that many might view representational distribution with disfavor, particularly after a release by a predeceasing descendant/ancestor. Moreover, a testate source with contrary beliefs could always designate the releasor's descendants as direct will beneficiaries anyway, thus sidestepping the lapse issues raised when releasor predeceases source.

73. UNIF. PROBATE CODE § 2-109(c) (1998); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. h (1998). The theory implicitly opposes presuming that the descendants benefited by receiving either the advanced share or its value from the advancee or his estate. The advance is of course charged against the donee's descendants if the decedent's contemporaneous writing so provided or if the grandchild was the specific advancee him or herself.

74. *See, e.g.*, ATKINSON, *supra* note 8, § 129 at 722; SIMES & SMITH, *supra* note 2, § 394 at 416–17 (noting English and American common law). For legislative examples see 755 ILL. COMP. STAT. § 5/2-5 ("if [the advancee] die[s] before the decedent, [the advancement is applied] on the share of the descendants of the person to whom the advancement was made"); MD. CODE ANN. EST. & TRUSTS § 3-106(c) (2001) ("If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the share of the issue of the recipient."); OKLA. STAT. ANN. tit. 84 § 227 (West 1990) ("if any [qualified advancee] dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them").

75. UNIF. PROBATE CODE § 2-109(c) (1998) (unless there is a contrary contemporaneous writing by the testator). *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.4 cmt. h (1998) (unless testator's contemporaneous writing provides otherwise).

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IV. EXTENDING STATED DIFFERENCE: REFORM

For the most part, assignment doctrine makes sense. Presuming the weakened financial/bargaining position of the assignor of the expectancy renders the potential for detrimental transfers significant. As such transferors may undervalue and thus too deeply discount the expectancy's worth,[76] the orthodox enforcement strictures of fair consideration and transactional equity are reasonable and welcome in deterring improvident expectancy transfers at the vulnerable beneficiary's expense.[77] Remove both the presumption and its premises, however, and assignment rules appear less ideal. What if an assignor is not the storied necessitous heir, but rather one who merely wishes to accomplish early what he could do later by disclaiming? Someone comfortable believing that most assignors are driven by need rather than by altruism, and familiar with the pre-acquisition freedom to disclaim/post-acquisition freedom to donate property or confirm an earlier assignment,[78] would be willing to retain the requirement of consideration as a check against the type of overreaching that precipitated assignment rules in the first place.

However, return to the assignor who does need quick liquidation and who would trade potentially huge gain for a drastically reduced sum certain, and the reasoning is by turns sensible and counter-intuitive. Frustrating that assignor's informed intent by requiring fair consideration might be more paternalistic than prudent, at least to the extent that the transaction participants appreciate the legal prerequisites to assignment enforceability. Perversely, it is difficult to undervalue that which, by its very evanescence, the law deems unworthy of property status. The upshot of demanding consideration that is "fair" (not required of other contracts) in exchange for an interest that is not even property is a smaller universe of assignees willing to rescue economically straitened heirs. This suggests that assignment doctrine is driven less by assignor protection than by

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76. *E.g.*, SIMES & SMITH, *supra* note 2, § 395 at 420–21 (continuing by noting the consequences of permitting forced transfers, which would wipe out potentially large expectancies but bring little debt reduction in return).

77. *Cf. In re* Estate of Vought, 250 N.E.2d 343 (N.Y. 1969). The assignor, aptly named "Chance," held a remainder in the corpus of a spendthrift trust. *Id.* at 344. While the equitable interest holder remained alive, he transferred his interest to assorted assignees for roughly $100,000, approximately ten percent of its estimated worth. *Id.* Given that Chance's interest was already vested and merely deferred in possession at the time of transfer, expectancy assignment rules did not apply. *Id.* at 349. Nevertheless, the facts instruct. How much less consideration would Chance have received had his interest been subject to revocation by the settlor? How much more would Chance have received had he waited for distribution of the *res*!

78. An otherwise unenforceable agreement might be made valid where an informed assignor, under no fraud or surprise, makes a deliberate act confirming it. *E.g.*, Dunham v. Bentley, 72 N.W. 437, 438 (Iowa 1897); Hofmeister v. Hunter, 283 N.W. 330, 334 (Wis. 1939).

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assignment inhibition, which preserves the conventional wisdom that assignment of an expectancy, and perhaps even the expectancy itself, is not a legal favorite.[79]

One way for assignors to reduce risk, and thus increase the likelihood of a willing assignee, as well as the value of the expectancy and the amount of consideration paid, would be to secure a will contract with the relevant property owner, and perhaps the assignee as well.[80] For example, an owner could promise to preserve the amount then allocated by will to the assignor. Although the agreement would only be as enforceable as other will contracts, it would help value the expectancy and add an extra measure of protection against its subsequent loss. Interestingly, it might also facilitate the assignment in an unanticipated way: if the will contract with the property owner is created first, and the contract right (and not the expectancy) is assigned to the assignee, no consideration at all might be required. While required for the creation of a contract, consideration is not normally required for the assignment of a pre-existing contract right.

Such an arrangement would not, however, alleviate every difficulty of disincentive and valuation. First, it would not reduce *all* risk, but merely some within the property owner's control. For example, the assignor could still fail to survive. Although the owner could name the assignee as a substitute taker in the event of the assignor's predecease, that action might invite a will contest, particularly if the assignee is a "stranger" to the family and other related beneficiaries exist. Second, it would not ensure the assignee's right to contest the will should the property owner later disinherit the assignor. A mere assignment, whether standing alone, or presumably, coupled with a will contract, does not necessarily confer standing on the assignee.[81]

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79. This view of assignments is manifest in the many judicial statements that assignments of expectancies "are not favored" and are subject to very close judicial scrutiny. *E.g.*, Burton v. Campbell, 195 S.W. 1091, 1093 (Ky. 1917) (declaring that assignments of expectancies should be inhibited "for the protection of the weak, the youthful, and inexperienced"); Swan v. Pople, 190 S.E. 902, 904 (W. Va. 1937) (holding that the instrument must be "clear and unambiguous, and the intent[] must be manifest"); Graef v. Kanouse, 238 N.W. 377, 379 (Wis. 1931) (stating that such agreements "have the highly speculative and some other vicious features of [wagering] contracts").

80. I do not advocate return to the requirement of ancestor consent. The decision to assign an expectancy should rest with the expectant taker alone, irrespective of what the ancestor would prefer. After all, heirs and beneficiaries have always been free to alienate their interests post-acquisition. Moreover, consent was never intended to protect the assignee anyway, and never barred the ancestor from changing the distribution. Seeking the owner's agreement might even reduce the instances of assignment, in that the owner might decide to gift, advance, or secure release for the anticipated sum instead.

81. *E.g.*, *In re* Estate of Davis, 467 N.E.2d 402, 403 (Ill. App. 1984) (assignor left with no property interest in estate except for contest right, which was not assignable; assignee not

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At bottom, the law of assignment is essentially fair in providing some measure of protection against the sale of a fortune for the proverbial mess of pottage.[82] Change should focus less on legal reform than on practical suggestions for removing some of the impediments to assignment use and validity. Nevertheless, however well matched the policy, theory, and doctrine of assignment law, the fit of that "fairness/consideration" model is neither as neat nor serendipitous when applied to the release.

The release is not as disparaged as the assignment, nor should it be. The context does not breed similar suspicion, probably because its parties will never be strangers. Always related, expectant heirs of an intestate source are usually spouse or descendant. Although not necessarily related, expectant takers from a testate source are usually either relatives or their functional equivalent. While the very existence and incidence of will challenges such as undue influence illustrate that neither heir nor beneficiary is necessarily innocent of overreaching, it is far less likely that the overreaching would operate in reverse, considering that a source could always disinherit heir or beneficiary at will.

Even where considered inalienable to third parties, well-established exceptions permit the release of analogous future interests (such as the contingent remainder and executory interest) to the person holding the supporting estate.[83] While not a cloud on title, the transfer of an expectancy to the source should be similarly encouraged even where its third-party alienation is suppressed. Freeing the release from assignment-driven doctrine demands two specific reforms: liberalizing its enforcement and discarding the absolute requirement of consideration.

A. Release Should be Enforceable at Law or at Equity

Relative unanimity exists in the stated requirement that the release of an expectancy is only enforceable at equity and not at law.[84] That the release

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"interested party" entitled to challenge will); Burk v. Morain, 272 N.W. 441, 442–43 (Iowa 1937) (assignment gave assignee no interest in estate); Casady v. Scott, 237 P. 415, 420 (Idaho 1924) (holding that contract to make provision in the will does not vest promisee with an interest that he may assign to a third person not in privity).

82. *Genesis* 25:29–34 (Esau's sale of his birthright to Jacob).

83. STOEBUCK & WHITMAN, *supra* note 34, at 138–43.

84. Under New York law, a testamentary expectancy is recognized as a legal property interest, the conveyance of which is presumably subject to legal as well as equitable enforcement. *E.g.*, Barnett v. Jaspan, 124 F.2d 1005, 1007–08 (2d Cir. 1942); von Bulow *ex rel.* Auersperg v. von Bulow, 634 F. Supp. 1284, 1308 (S.D.N.Y. 1986); Cohalan v. Parker, 123 N.Y.S. 343, 343 (App. Div. 1910) (using term "expectancy" loosely, and possibly to describe any contingent future interest).

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must satisfy the equitable sensibilities of the reviewing court is either overtly stated or expressed through the demand that it be freely and "fairly made," "in good faith and free from circumstances of fraud or oppression."[85] This context raises three subsidiary points: the court within which relief may be sought, the remedy the aggrieved party may seek, and the degree of fairness required of the original transaction.

Traditionally, courts of law awarded money damages, whereas courts of equity mandated specific performance or injunction. Originally, monetary recovery was not conveniently available for breach of the assignment agreement,[86] and disappointed parties turned to chancery courts exercising equitable jurisdiction for specific performance, where the requirement of fair consideration was carefully cultivated and nurtured. The importance of the distinction is lessened today where the administration of law and equity is usually united in a single court.[87] Little problem should exist in applying equitable remedies to the assignment, even in a court of law. The personal representative could either be enjoined from distributing a non-distributed share to the releasor, or the releasor could be compelled to transfer a distributed share to the non-releasing heirs or beneficiaries.[88] Nevertheless, a theoretical problem remains if the estate is not considered unique enough to support a demand for its completed transfer. Loosening the strictures of equity might ensure that the relief sought is not rebuffed merely because the estate (particularly personal property, certain legacies, or general and demonstrative bequests) is considered too "fungible" to warrant it. Breach of the agreement by the releasor should entitle the estate to equivalent money damages irrespective of that characterization.

More generally, the release should not invite the same searching scrutiny that equity provides for assignment, given the latter's assumptions that (1)

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85. *E.g.*, Martin v. Smith, 404 So. 2d 341, 343 (Ala. 1981) (validating an equitable assignment "made in good faith and free from . . . fraud or oppression"); *In re* Wickersham's Estate, 96 P. 311, 312 (Cal. 1908) ("view to substantial justice") (citations omitted); Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 730 (Iowa 1942) (holding "valid, if fairly made and free from any unconscionable advantage"); Scott v. First Nat'l Bank, 168 A.2d 349, 351 (Md. 1961) ("fair and equitable"); Stevens v. Stevens, 148 N.W. 225, 228 (Mich. 1914) (invalidating an assignment as "fraud on the ancestor"); Latimer v. Holladay, 134 P.2d 183, 186 (Utah 1943) ("fairly made [and] supported by a fair consideration"); *In re* Estate of Wettig, 138 N.W.2d 206, 209 (Wis. 1965) ("the controlling principles are equitable"); Hofmeister v. Hunter, 283 N.W. 330, 333 (Wis. 1939) ("enforceable . . . [if] free from vitiating elements" and "no imposition on a necessitous heir").

86. RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 cmt. c (1940).

87. *E.g.*, Bank of Cal. v. Connolly, 36 Cal. App. 3d 350, 367–68 (1973) (disregarding the "esoteric refinements of equitable assignments" by noting that the distinction between enforcement at law versus equity "has largely been reduced to a matter of historical interest" by modern rules of practice and procedure) (citations omitted).

88. *See* SIMES & SMITH, *supra* note 2, § 394 at 418.

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"one party is defenseless and exposed to the demands of the other, under the pressure of necessity,"[89] (2) "there is a direct or implied fraud upon the parent or other ancestor,"[90] and (3) the strict rules are needed to "prevent dispersal of family estates through improvident sales" and "to preserve for a dominant class the economic resources on which its prestige and power depend[]."[91] Those premises are inapposite to the release. Sources are presumably far less willing or even able to outmaneuver a defenseless releasor, in part because as with advance, the source can value the expectancy as wished, and may always disinherit any releasor anyway. To that extent, all those who hold expectancies are defenseless to the wishes of the relevant ancestor. With release, there is no "duped" source to speak of, whose property passes to "some unscrupulous loan shark" rather than to heir or devisee as supposed.[92] The source knows of the release by necessity, and can accordingly adjust his affairs. Notably, even the suspect assignment is usually upheld (and vastly more likely to be countenanced as "fair") if "made with the knowledge and assent of the ancestor"[93] or effected as part of a family arrangement. Release fits both criteria.

Even if flagrant unfairness permeates the release (as where the source induces the release on a promise he does not intend to keep), other defenses to enforcement exist, such as fraud, undue influence, mistake, or other grounds of equitable cognizance.[94] And should the release remain grounded in contract, the releasor would benefit from protections applicable to any transacting party (such as undue influence and mistake) presumably adequate to ensure, from a societal perspective, that wholly inappropriate or unconscionable transactions are not enforced. In short, an independent evaluation of fairness, especially regarding consideration, should hold no real role within the source/releasor context, and equity stands alone in commanding it.[95] The difficulty is particularly acute where the release is

89. 6A C.J.S. *Assignments* § 18 (1975).

90. *Id.*

91. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 268 (1947) (explaining Chancery decisions during the formative period of the equitable assignment).

92. SIMES & SMITH, *supra* note 2, § 395 at 420 (noting one policy reason against assignment).

93. 6A C.J.S. *Assignments* § 18(b) (1975). *E.g.*, Hooker v. Hooker, 32 A.2d 68, 73–74 (Conn. 1943).

94. 23 AM. JUR. 2D *Descent and Distribution* § 172 (1983).

95. Alexander, *supra* note 2, at 1573 nn.73–74 (noting that equity courts accorded very close scrutiny to the transaction, and effectively "reserved the right to do what the classical bargain theory of contracts forbade—to review the substantive fairness of the exchange").

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viewed as an equitable assignment, the very validity of which hinges on the assignee's purchaser-for-value status.[96]

The presumed power disparity attributed to parties to an expectancy assignment is thus highly protective of its assignor, explaining the requirement that the party seeking its enforcement (usually the assignee) bear the burden of proving its fairness.[97] If identical requirements that the release be "freely and fairly made" are retained, the preceding points counsel that the law should presume that the standard was met and shift the burden of establishing non-equitable conditions to the party seeking avoidance.[98]

B. Release Should Not Require Consideration

The requirement of consideration for the release is steadfast;[99] only the level fluctuates depending upon the jurisdiction.[100] One benefit to consideration is that to some extent, it proves up the transaction. It also impresses the parties with the seriousness of their acts, ensures a purchaser for value, supports a contract, and creates an estoppel—all key ingredients if the goal is to fit the release under traditional doctrines. Although the requirement of consideration initially seems reasonable when played off the law of assignment, a second glance reads like a double take.

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96. 6A C.J.S. *Assignments* § 53 (1975) (stating that purchaser-for-value theory is sole basis for recognizing equitable assignment).

97. *In re* Edelman's Estate, 82 P. 962, 963 (Cal. 1905); *see also* Bank of Cal. v. Connolly, 36 Cal. App. 3d 350, 366 (1973) (noting that the burden of proof is on one setting up equitable estoppel); McClure v. Raben, 25 N.E. 179, 181–82 (Ind. 1890) (noting Pomeroy's assertion that in contracts with expectant takers, a "presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract to show affirmatively its perfect fairness").

98. Stewart v. McDade, 124 S.E.2d 822, 826 (N.C. 1962) (shifting the burden where the releasor was otherwise a "stranger" to the decedent's estate).

99. LEOPOLD & BEYER, *supra* note 9, § 11.1.

100. Courts state different standards of consideration when enumerating the requirements for release, including "valuable consideration," "not grossly inadequate," and "not procured by fraud or undue influence." For examples using the "valuable consideration" standard, see *Martin v. Smith*, 404 So. 2d 341, 343 (Ala. 1981); *Stewart*, 124 S.E.2d at 826; In re *Will of Edgerton*, 223 S.E.2d 524, 526 (N.C. Ct. App. 1976); *Hamilton v. McKinney*, 357 S.W.2d 348, 361 (Tenn. Ct. App. 1961); *Ware v. Crowell*, 465 S.E.2d 809, 811 (Va. 1996). For examples applying the not "grossly inadequate" standard, see *Price v. Davis*, 93 S.E.2d 93, 97 (N.C. 1956); In re *Edgerton*, 223 S.E.2d at 526. For an example of the not "procured by fraud or undue influence" standard, see In re *Edgerton*, 223 S.E.2d at 526.

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1. Transfer Perspective: Release as Transfer from Source

The requirement at any grade that a source pay for a release intuitively seems absurd, as the source need not pay a dime (much less anything fair) were he merely to execute or modify a will to the detriment of any would-be taker. The consideration paid for the release might then very well be called a gift, unless there is implicit benefit to the source beyond "permission" to exclude the releasor from his largesse.

Consideration is contrary to a gift. Donors need not pay for the right to donate to donees, who need not pay for the right to receive gifts from donors. As early payments on a later gift, advances are early gifts. Thus, if a release is more like a transfer from the source (or liquidated advance) than a transfer from the expectancy holder (or assignment), similar observations should apply. The consideration is actually a gift, and neither the donor/source nor the donee/releasor need sacrifice anything to effect it.

The disclaimer provides analogy for those more comfortable with retaining the view of release as a transfer from, rather than to, the releasor. Recall that the disclaimer is a post-death renunciation of an interest in the relevant decedent's death. Like the release, it may be motivated by either selfless or financial concerns, usually cost- or creditor-avoidance.[101] Aside from the obvious timing aspect,[102] however, the transactions are not identical. The disclaimant, knowing the precise amount disclaimed and to whom the disclaimed property will pass, is better equipped for the cost/benefit analysis that disclaiming usually entails. By acting before the

101. Disclaimers are primarily tax-motivated. By avoiding the acquisition of the property and causing its transfer to other(s) (usually, the disclaimant's descendants), the disclaimant can redistribute wealth without incurring gift tax consequences. An economically motivated disclaimant is cost-averse, whereas an economically motivated releasor is pro-acquisition.

Disclaiming in the face of creditors is normally not considered a fraudulent transfer because the disclaimant theoretically never receives anything to convey. Similarly, there is usually no prohibition on disclaimers by insolvent beneficiaries unless they have already filed for bankruptcy. *See* Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 183 n.25 (1994); Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 154–63 (2001); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 627–31 (1989). The same ostensibly holds true, and even more so, for release or assignment, where the interest is even more amorphous and immune from attachment by creditors. For a unique interpretation of the interplay between assignment and disclaimer, see *Badouh v. Hale*, 22 S.W.3d 392, 396–97 (Tex. 2000) (holding that an expectant taker's assignment of her expectancy interest constituted sufficient dominion and control *as beneficiary* to preclude her from validly disclaiming the interest upon the decedent's death).

102. *See In re* Estate of Baird, 933 P.2d 1031, 1035 (Wash. 1997) (no disclaimer by taker under living ancestor's estate where statute only permitted disclaimer of an "interest," which expectancy was not).

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decedent's death, the releasor holds no similar predictive abilities, and, to some extent, acts on faith.

A disclaimer requires no consideration; in fact, payment of consideration will invalidate it.[103] That the releasor blindly effects the transfer before the decedent dies, whereas the disclaimant more knowingly does so thereafter, still fails to explain why consideration is required for one but not the other, unless the overarching design remains that of protecting the penurious from himself. Moreover, the difference should not be shunted by invoking the property/non-property distinction, for in neither case is the expectancy vested in its transferor. At release, the interest has not yet vested due to failure of death and delivery. At disclaimer, the interest is retroactively "de-vested" due to failure of acceptance to begin with.

Even if the release does not fit perfectly within either the advance or disclaimer model, that it sits somewhere between them yet stands alone in requiring consideration is illogical if not awry.

The peculiarity of requiring consideration of the release at all is heightened when modifiers purport to limit it in obscure and meaningless ways. For example, how much consideration is "fair"? If Owner has $10,000,000 and pays $100,000 for a release, does a 1 to 100 ratio suffice? What if Owner has $10,000 and pays $100? Depending on perspective, that consideration represents either a 99% reduction from the amount then owned by the source, or an increase of more than 100% over what an expectant taker could ultimately acquire, including nothing, given circumstances too numerous to list. Factor in the vagaries of fluctuating net and time values, and meaningful review becomes even more elusive. Like charges can be levied against a requirement that the consideration be "valuable" or "not inadequate."

2. Transfer Motivation: Normative Aspects of Party and Purpose

Difficulty accepting that consideration ought not be required for the release might partly emanate from a failure to examine the competing normative aspects between release and assignment. Analogous motivations admittedly exist. As with assignors, some releasors must be inspired by the opportunity to accelerate and capture the otherwise deferred and frangible inheritance. Yet, as presently discussed, there are probably fewer economically-driven releasors than assignors; for the others, consideration is a particularly inappropriate demand. Releasors should not be forced to

103. Treas. Reg. § 25.2518-2(d)(1) (1997).

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sell what they would rather donate, and sources should not have to subsidize the generosity of releasors by paying for that which is theirs alone to give.

Given the option, an informed expectancy holder who seeks its capitalization would subordinate release to assignment. As the following chart suggests, the doctrinal structure of assignment renders it quite difficult for any assignor to suffer significant harm upon transferring the expectancy early rather than waiting for it to vest.

Expectancy/ Consideration Differential	Effect on Assignor	Effect on Releasor
1. Expectancy < Consideration	Positive. As assignor need not pay difference to assignee, gets something for nothing (particularly where expectancy holds zero value).	Same, but note that this result is likely for testate succession as the source may have adjusted his estate post-release.
2. Expectancy = Consideration	Not negative; probably positive given time/dollar value of early acquisition + avoidance of probate costs.	Same, with caveats above.
3. Expectancy > Consideration	Negative, although consider time/dollar value of property + fact that expectancy converted to value at assignor's need.	Same, with caveats above if source factored in time/dollar value of consideration.

Cursory review of the chart misleads by suggesting too much parity between the effects of assignment and release, and even seeking same, on the expectant taker. First, the source's knowledge of a release is a given, but his knowledge of an assignment is not. Thus, the needy expectant taker who desires "his inheritance" now risks incurring the source's disfavor by requesting payment for something to which he is not entitled. That the releasor must locate a source willing to pay for the privilege of excluding him from the source's estate,[104] and in amounts high enough to make a difference, places the desirous releasor in a tricky position. Moreover, if a necessitous expectant taker's assessment of the size and value of the decedent's estate matches the reality of its valuation, and if the source has concern for the economic well-being of the taker anyway, the source might

104. Value might exist for the source if the consideration paid parallels the anticipated cost of an existent or anticipated property settlement or pre/post-death litigation costs.

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eliminate the need for either assignment or release of the expectancy through a gift to that taker, whether tempered with a subsequent adjustment in the estate or not.

The third scenario, where the value of the expectancy exceeds that paid in its anticipation, is the most critical. Doctrine rescues the negatively impacted assignor from the effects of such shortsightedness by invalidating the assignment upon sufficient disparity between the consideration paid and the value of the expectancy foregone.[105] Upon invalidation, the assignor may usually keep the (in)/testate share, subject only to interest-free restitution to the assignee for the consideration paid. At that point, the assignor does not care. He has more than he bargained for, and could view the restitution due as a small price to pay for what amounted to insurance that the expectancy's worth would at least meet the value of the earlier consideration obtained.

This third scenario is far less likely for the releasing testate source. One would presume that a source's payment for a release would be quickly followed by significant adjustment to the source's will. It is only with the intestate release that sufficient disparity is even detectable. Again, the transfer is invalidated, with the consideration paid treated as an advance instead of a bar. Again, the releasor benefits, particularly as advances are valued when given, rather than at the decedent's death.

The truth of the foregoing suppositions depends heavily on ascertaining the triggering disparity. Stated otherwise, how much deviance is permitted from rough correlation? The more equivalence required, the more likely the expectant taker will emerge ahead, the lower the risk to that holder, the higher the risk to the transferee. Conversely, the less equivalence required, the less likely the expectant taker will emerge ahead, the higher the risk to that holder, the lower the risk to the transferee. While the doctrines ensure that both assignors and releasors avoid the most inopportune effects of their decisions, the degree of equivalence required seems less stringent for

105. For case law discussion of the necessary connection between the consideration for the release and/or assignment, their value, and that of the expectancy, see *McClure v. Raben*, 25 N.E. 179 (Ind. 1890) (requiring, for "perfectly fair" transaction, payment of actual, full, and fair market value for property); *Price v. Davis*, 93 S.E.2d 93 (N.C. 1956); In re *Fritz's Estate*, 28 A. 642 (Pa. 1894) (holding sum of $625 sufficient consideration for the assignment of expectant interest amounting to $771); and In re *McGillick's Estate*, 293 N.W. 185 (S.D. 1940) (both noting that the scenario whereby the sum received by the releasor is of lesser value than that which he would have received as an heir/beneficiary will not necessarily defeat the release). Note that the concurrence in *McClure* highlights a distinction between the purchaser's payment of the value of the property conveyed *as an expectancy* versus without reference to the chance that the estate will never vest, and opts for the latter, more stringent, requirement. Under this view, the specific property expected to be inherited must be assigned a present value at the time of conveyance.

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release than assignment.[106] Release invalidation is thus rare indeed, and no matter the amount of consideration paid, the source in any event can always assure that it will favorably compare through appropriate testamentary disposition. This is how it should be. Risks should be high for an assignee but low (perhaps non-existent) for a source. Reprocessing the release as capable of donative transfer, or at least relaxing the fairness and consideration requirements, ensures this result and protects testamentary freedom by avoiding post-death reordering of presumed testamentary intent.

Just as release differs from assignment in motivation, so too does it differ in terms of who initiates it. One would think that assignments are initiated by the assignor and rarely the assignee. They can occur between the expectancy holder and anyone else—relative, friend, or stranger—and directly affect their parties with little repercussion on others. But by necessity, release binds family members—usually parent and child.[107] As well as suggesting greater likelihood of gratuitous motivation, this intra-familial dynamic triangulates relationships by affecting relatives of both parties. Moreover, a release is not always initiated by the releasor. It is more likely that a source would approach the expectancy holder to request interest relinquishment than that an assignee would make the same request.

For example, imagine that *O*, well-off and remarried, has adult children from a first marriage for whom she has already provided. Although her will leaves all to her spouse, *O* fears he will suffer future economic distress should her estate be bound in lengthy litigation. Instead of rolling the dice, *O* might choose to provide for her children in her will, include an *in terrorem* clause to discourage a post-death strike suit, and/or enter a will contract whereby she promises not to alter her will and her children promise not to contest it. Alternatively, *O* might offer her children a liquidated sum representing their "share" in the estate and request their release to ensure against the very effects she attempts to forestall. *O*'s cost/benefit analysis might include consideration of the value saved by her estate (thus her spouse) in defending expensive, protracted will litigation; other differently situated intestate sources might instead (or as well) assess the direct and indirect costs of will preparation, execution, and defense from challenge.

In this instance, the release is actually initiated and motivated by the needs of the source in a way that assignments rarely would be. In addition to their expectancy, the releasing children relinquish rights to contest the will, standing for which would have been conferred by their heirship status

106. ATKINSON, *supra* note 8, § 51 at 240–41; SCOLES ET AL., *supra* note 20, at 73.

107. Bailey, *supra* note 32, at 423. It is of course possible that a close friend named in another's will could "release" her interest to that testator, but because the friend would not take in intestacy anyway, it is far more likely that the will would simply be changed.

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(now lost) should it have failed. *O* therefore acquires both substantive and procedural protection to the will challenge.[108] Perhaps this scenario warrants consideration and transactional equity, given that the putative heirs are releasing a legal right as well as an equitable expectancy, and since the source holds the releasors dead to rights given her ability to dangle disinheritance above them. Nevertheless, the children could always reject the offer, gambling that either their mother would provide for them anyway or that they would prevail in a post-death will contest. After all, the "right" to challenge a will is tenuous where the basis rests solely on disgruntlement with its terms or is already compromised by a valid *in terrorem* clause, the inclusion of which demands no consideration.

Compare the preceding discussion with other situations in which the source might initiate the transaction: (1) an inter-spousal release; (2) a release from a descendant entitled to a forced share (legitime); or (3) a release from one who holds a will contract-based claim in the estate. In these situations, contract, marital property, or related theories seem to elevate the status of the "mere expectancy" into something more approaching actual property. Thus, perhaps consideration should be strictly observed. While considerable, these concerns should not control all of release law given that (1) legitime only exists, in restricted form, in Louisiana; (2) the inter-spousal arrangement might be invalid anyway as a post-nuptial contract violating public policy; and (3) the usual releasor's status as issue or ancestor rather than spouse or collateral relative of the source. Release differs from assignment in ways more significant than a cursory comparison will reveal. Recognizing the distinction assists in reconciling occasionally inexplicable existent differences. Moreover, it permits reconsideration of traditional release doctrine by freeing it from the tethers of assignment-driven demands.

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108. This result could be affected by the release theory employed. If release extinguishes inheritance rights, the releasor lacks standing to even enter probate court and dispute the will or perhaps challenge the release. The probate court would then have jurisdiction to enforce it, just as it would were the release treated like an advancement and within state succession schemes. If instead the release stands on contract or constructive trust theory, the probate court would lack the power to bar the releasor from acquiring the share. The estate would need to turn to a court of equity for specific performance requiring the property to be conveyed to its proper recipients. LEOPOLD & BEYER, *supra* note 9, § 11.1.

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V. GROUNDING THE RELEASE

A. *Requirements*

Removing the heightened scrutiny and consideration requirements from the release encourages its enforcement and positions it more squarely within the source's hands. The effect is desirable if the goal is to view the release more as a donative transfer from source to releasor than a compensable one from releasor to source. Nevertheless, such reform compels attention to pragmatic loss.

To some extent, the release generates the same cautionary, evidentiary, and channeling concerns thought indispensable to the requirement that wills be written, and perhaps witnessed. As with the will, the release could cut off an heir and benefit those who are not traditional heirs—important consequences, particularly when remembering that the release ultimately affects the affairs of one who has already died, and is thus unable to testify as to intent. So significant are these concerns in some jurisdictions that the release is invalid at both law and equity as an impermissible circumvention of state succession schemes without complementary compliance with the Statute of Wills.[109]

For example, New York law demands that the "conveyance, assignment, *or other transfer of . . . [a person's interest] in the estate of a decedent . . .* shall be in writing and acknowledged or proved" in the manner required to entitle conveyances of realty to be recorded and requires recording to protect against a subsequent bona fide purchaser or mortgagee.[110] Although it would seem that an expectancy would fit within these provisions, it is possible that the legislature meant to cover post-death interests in estates only. Either way, it would seem that similar requirements for the release are even more advisable from an estates perspective. In assignment, the right to inherit is never really extinguished, but instead preserved. The presumptive taker acquires the now-vested expectancy, and must thereafter ensure its transfer to the designated assignee. This route does not impede expeditious estate distribution because the probate court need not delve into the proper recipient of the relevant share. In release, however, the release directly controls to whom the property will initially pass. Since the source

109. *See, e.g.*, Prater v. Hicks, 220 S.W.2d 1011 (Ky. 1949) (contract of assignment void in Kentucky); Wedington v. Adkins, 54 S.W.2d 331 (Ky. 1932) (same for contract of release). Note that the cited cases turn on an alternate rationale. *See generally* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws*, 82 KY.L.J. 29 (1993–1994).

110. N.Y. EST. POWERS & TRUSTS LAW § 13-2.2 (Mckinney 2002) (emphasis added).

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is now dead, there is no one besides the self-interested releasor to ensure that the release is effected, heightening the value of a recorded writing.

Like the older requirement of consent to assignment, one could see the requirement of consideration for the release as meeting some will-like functions by ensuring that both releasor and source considered and intended its effects and providing evidence to assist a third party seeking to enforce it. If so, negating its necessity could lessen the ability to establish the release in existence and terms. At the least, jurisdictions should counter that loss by statutorily requiring that the release be in writing irrespective of the real or personal property nature of the underlying estate.[111] Statutes could go further by requiring that the release comply with will formalities (although in that event, it ceases being anything but a will itself) or be physically attached to, or incorporated by reference into, the will. Moreover, jurisdictions might require that the release be recorded, or that other notice be given to minimize the unlikely situation where a creditor relies on a debtor's prospective inheritance, or the more common one where a releasor is tempted toward disavowal of its terms after the source's death.

B. Effect

Many cases discuss the release as though it creates not only a contract between releasor and source, but also enforceable rights to the amount released held by the source's other takers via increase in the value of their respective shares. Support for the principle is either imprecise or non-existent, although it presumably rests on the belief that those others occupy some sort of immediate third-party beneficiary status to the release itself. For example, in *Ware v. Crowell*,[112] the court stated that "[a]s a contract, the release effectively conveys the expectancy interest to the other beneficiaries when the interest becomes vested at the . . . ancestor's death."[113] Admittedly, the *Ware* court tempers its assertion by bridling the contract interest until the source's death.[114] Nevertheless, the implication of the

111. Authority is currently split. Some jurisdictions permit oral releases. *E.g.*, Mires v. Laubenheimer, 111 N.E. 106, 108 (Ill. 1915); Galbraith v. McLain, 84 Ill. 379, 382 (1877); McDowell v. McDowell, 119 N.W. 702, 703 (Iowa 1909); Douglass v. Hammel, 285 S.W. 433, 435 (Mo. 1926); Patterson v. Volmar, 1 N.E.2d 323, 323 (Ohio 1936). In others, the statute of frauds demands a writing where the release affects real property. *E.g.*, Leggett v. Martin, 156 S.W.2d 71, 74 (Ark. 1941); Riddell v. Riddell, 97 N.W. 609, 611–12 (Neb. 1903); Brands v. De Witt, 14 A. 894, 896 (N.J. 1888). *See generally* 23 AM. JUR. 2D *Descent and Distribution* § 176 (1983).

112. 465 S.E.2d 809 (Va. 1996).

113. *Id.* at 811.

114. *Id.*

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suggestion remains extraordinary, and *Ware* does not stand alone in making it. A statement by one commentator captures the view: "the acceptance of a release is an incomprehensible act from the viewpoint of the source, unless he intends the release as a device by which he may benefit others."[115]

That view might not embody the motivations of all releasors all of the time. The source might accept the release simply because that is what the releasor wants. Alternatively, the source might accept the release because he wants to benefit himself and no one else. That is, the source acquires something in return for the arrangement beyond the right to exclude the releasor from further bounty, perhaps peace of mind, freedom from the threat of guardianship proceedings, or the control-minded satisfaction of preventing another from upending his estate plan post-death. Neither motivation spins on the source's direct intent to use the release as an other-benefiting device, and certainly not to the extent that would support creation of third-party rights in them.

To say that other motivations are possible, however, should not suggest that an intent to benefit others is not equally possible, or even more likely. Unlike the conventional contract, a release will usually occur between family members and will often be effected to benefit, at least indirectly, parties other than source or releasor. However, who those parties are, and in what amount the source intends to benefit them, remains too speculative to support creation of third-party rights in their interest. The release still operates within a donative context, both in terms of what legal responsibilities the source held vis-à-vis the releasor and the other takers. Thus, a reversal of the source's intent—that the donor source will in fact leave property to the releasor after all—should not concern others at all, given that they formerly held naught but an expectancy themselves. After all, a source could pay a child one dime for the release of that child's presumptive share, and then write a will leaving all to the Salvation Army to the chagrin of the four other children expecting a larger slice of the decedent's estate.

The situation changes once the release is imbued with characteristics of assignment. For example, in the *Ware* case, the release contract was enforced even though the source executed a subsequent will leaving property to the releasor.[116] Key to that determination, however, was the sense that as the release was agreed to by the source, the releasor, and the other ultimate will beneficiary (pursuant to a real property settlement agreement), it was perceivable as a simultaneous release to the ancestor *and*

115. Alvin Evans, *Certain Evasive and Protective Devices Affecting Succession to Decedents' Estates*, 32 MICH. L. REV. 478, 497 (1934).

116. *Ware*, 465 S.E.2d at 812.

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assignment to the other expectant taker.[117] The court's offhanded statement—that the release transfers rights to the other heirs[118]—should not apply too broadly, nor should the same outcome occur, where the other beneficiary or heir is not similarly implicated in the primary agreement itself.[119] Note that similarly, a releasor's consent should not be required before a source "breaches" by leaving that releasor property under the will. An attempt by the source to do so should be treated like any other deathtime gift, thus subject to disclaimer or rejection by the releasor who for whatever reason wishes to uphold the original agreement.[120]

C. *Theory*

Part II explained how theoretical justification for the release varies, with some jurisdictions avoiding a contract-based doctrine by invoking estoppel,[121] tort,[122] or some other theory.[123] While those "solutions" might

117. *Id.* at 811–12.

118. *Id.* at 811.

119. *See also* Stewart v. McDade, 124 S.E.2d 822, 827 (N.C. 1962) (demonstrating simultaneous release and assignment).

120. One peculiar possibility to note: what if the earlier release were viewed as enough "dominion and control" over the interest to render its subsequent, post-death disclaimer inoperative? Although it seems unlikely, *Badouh v. Hale*, 22 S.W.3d 392, 396 (Tex. 2000), reached just this result. That case may be distinguished, however, in that the interest in *Badouh* was assigned rather than released, and the assignor/disclaimant was attempting an end-run around both the very assignee to whom she had pledged her expectancy and another creditor who held a judgment lien against her, which he had re-filed after the relevant decedent's estate. *Id.* at 394.

121. Estoppel theory would prevent the releasor from avoiding the release by presuming that his representation induced the relevant property owner to refrain from making a will. A true estoppel would require neither writing nor consideration. *E.g.*, Smith v. Hood, 103 So. 574, 575 (Ala. 1925); *In re* Edelman's Estate, 82 P. 962, 963–64 (Cal. 1905); Pylant v. Burns, 112 S.E. 455, 457 (Ga. 1922); McDowell v. McDowell, 119 N.W. 702, 703 (Iowa 1909); Arntson v. First Nat'l Bank, 167 N.W. 760, 763–64 (N.D. 1918); Holley v. Mucher, 165 S.W.2d 1015, 1018 (Tex. App. 1942). *See generally* ATKINSON, *supra* note 8, § 130; 23 AM. JUR. 2D *Descent and Distribution* § 175 (1983).

122. Fraud theory would prevent the releasor from avoiding the release upon establishing that he made a promise (to forego his share) that he never intended to keep. Fraud requires neither writing nor consideration, and would be enforced by way of constructive trust.

123. Generally, a trust must be written if it is testamentary (under the Statute of Wills) or is funded with real property (under the Statute of Frauds). Nevertheless, a totally secret trust may be enforced without a writing if proven by clear and convincing evidence, and there is no requirement for consideration to sustain any trust. Like fraud, or other wrongdoing preventing the making or revocation of a will, the secret trust is enforced through a constructive trust remedy. Crossman v. Keister, 79 N.E. 58, 62 (Ill. 1906). Note the distinction from a partially secret trust, where it is clear that the transferee holds legal title only, but no beneficiary is revealed: usually, the entire trust will fail, returning what would have been the trust *res* to the settlor under a resulting trust theory.

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maneuver the need for a writing, consideration, or both, they are riddled by other problems when applied to release. For example, a true estoppel normally requires a representation of fact, which will not exist unless the releasor states or implies that he will neither contest a will excluding him nor seek an intestate share of the decedent's estate.[124] True fraud only exists where the tortfeasor makes a statement that he does not then intend to uphold. If the releasor can show that at the time of the promise, he meant to abide by its terms, but later changed his mind, the release may not be enforced. And a true trust requires intent—that the legal and equitable title to the property be stratified, with one party or entity holding title for the benefit of the other(s). Instead of finessing old requirements obliquely and creating new difficulties in the process, the release should be positioned squarely within the jurisdiction's succession laws through specific, release-targeted legislation incorporating the suggestions and reform noted above.

Barring release-targeted legislation, advance theory can accommodate these changes and suggestions. An advance is not a contract and requires no consideration. It falls wholly within the intent and control of its maker in both existence and value, and cannot be enforced by third parties over his or her objection. It is not scrutinized for fairness or equity, given the recognition that it is, after all, but a gift; it often binds the descendants of the advancee whether the advance so states or not. Advances must be written.[125] Advance law mirrors the desired traits for the release.

Treating the release *like* an advance does not equal treating it identically to one. Specifically, an advance at creation is intended to reduce the share that the expectant taker acquires by way of succession, not entirely eliminate it. Share abrogation only occurs by happenstance where the amount advanced exceeds the taker's otherwise share. Conversely, a release when created is intended to do just that—wipe out the releasor's future share; its mere surcharge is what the parties seek to avoid. Not only that, a purported releasor should not be able to subvert that intent by attempting a post-hoc conversion of the release into an advance after assessing the amount "lost" at the decedent's death. Conjoining the theories requires that the release be treated as a liquidated advance, whereby the

124. LEOPOLD & BEYER, *supra* note 9, § 11.7.

125. Most jurisdictions, along with the Uniform Probate Code, require that an intent to treat a gift as an advance be expressed in writing. UNIF. PROBATE CODE § 2-109(a) (1998) (requiring that a donor's writing be contemporaneous, but imposing no similar restriction on the donee); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. c (1998). States that do not require written evidence of intent establish a presumption pro or contra that all gifts are advancements. *See* MCGOVERN & KURTZ, *supra* note 1, at 64 & nn.11–12.

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releasor and the source assign a value to the anticipated estate and the role of the current exchange (even if zero) in extinguishing it.

VI. CONCLUSION

The expectancy remains an odd little beast. Neither fish nor fowl, its curious existence is grudgingly acceded in the quasi-rights that holding one confers. Given the fluidity between its characteristics and some types of property, perhaps it is the discomfort that expectancies evoke that has caused failure or even refusal to realize warranted difference between its assignment versus its release. It is almost as if no one wants to peer too closely beneath the turned stone lest what is revealed prove too messy for neat and formalist compartmentalization.

The conflation of the requirements for release and assignment probably owes most to the calcification of past accident, ambiguity, and confusion. Already unfortunate, that symbiosis is reinforced today, where it might be fashionable in lay terms to equate expectancies with entitlements. So viewed, of course, consideration would be expected and required, irrespective of when or to whom that "right" was transferred. Nevertheless, the release of an expectancy does differ from the assignment of one, and the legal gist of each should too. One could hardly imagine arguing that any other donor should have to pay his or her donee before title will exchange through gift. Less imaginable would be the requirement, in any other context, that one may give away that to which one holds title, but must be paid for that to which one does not.

Regardless of the future of the property/expectancy distinction or the retention of contract-based rules for valid assignments of the expectancy, release should be easier to effect and enforce than it currently is. Whether or not most releases sport them, release should require neither consideration nor equitable imprimatur for validity. Any other requirement places too much restriction on the rights of sources and releasors alike, and inhibits the utility of a doctrine that might find renewed application in the world much-changed from the days of Lord Coke.

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