Erasing the Lines Between Contracts, Gifts, and Wills

Author : Sarah Waldeck

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Adam J. Hirsch, Formalizing Gratuitous and Contractual Transfers: A Situational Theory, 91 **Wash. U.L. Rev.** 797 (2014).

Imagine that I asked your opinion about a dispute concerning the purchase of a new car; or whether I was entitled to a necklace my friend promised to give me; or about the devise of land by my father. You would likely analyze each transaction against the rules of contracts, gifts, and estates and trusts, respectively. Was there a signed contract for the purchase of the car? Was the necklace delivered? How many witnesses signed the will? As Adam Hirsch's *Formalizing Gratuitous and Contractual Transfers: A Situational Theory* points out, however, the laws of contracts, gifts, and estates and trusts are all fundamentally about transfers. And perhaps we could considerably simplify the law if we abolished doctrinal categories and instead focused on the circumstances under which transfers occur.

At present, each doctrinal category has its own set of requirements for a valid transfer. Broadly speaking, contracts must comply with the statute of frauds; gifts must be delivered, and wills must be written, signed, and witnessed. But each of these formal requirements has exceptions. Lots and lots of exceptions, as well as inconsistencies, and Hirsch details most of them. These exceptions have sprung up over time, as legislatures and judges try to account for the varying circumstances under which transfers occur.

Hirsh argues that the situational context of the transfer—and not doctrinal category—should dictate the optimal level of formality that is required for a valid transfer. He identifies three different situational contexts. First, there are "spot transfers," where the exchange or handing over occurs right on the heels of making the decision to transfer. Examples of spot transfers include short-term contracts and inter vivos gifts. Second are "anticipatory transfers," where an interval of time elapses between the decision to make the transfer and the transfer itself, as with wills and relational contracts. Last, there are "eleventh hour" transfers, where the decision to make a transfer occurs very close to death. Examples include gifts causa mortis and deathbed wills. Hirsh suggests that each of these situational contexts necessitates a different level of formal requirements. Critically, however, these formalities could be the same across all doctrinal categories. For example, lawmakers could allow gifts to be promised in the present but given (i.e., delivered) in the future, provided that donors formalized the gift the same way they would formalize a will.

Hirsch suggests that applying rules across doctrinal lines will simplify existing doctrines. As he reviews the labyrinth of exceptions to existing rules (such as all the instances in which the statute of frauds does not apply, holographic wills, harmless error rules, and so forth), he makes the case for the necessity of reform. Still, I'm not entirely certain that we will eliminate exceptions and inconsistencies by focusing on situational context. Hirsch's article is focused exclusively on the timing of the transfer, but timing is only one element of a transaction's overall context. Unless we confine "situational context" to timing alone, there are plenty of ways to distinguish one transfer from another, which means there are ample opportunities to create exceptions and create apparent inconsistencies.

For me, however, the hallmark of a good article is when I continue to play with the ideas the article presents even when I'm done reading it. As law students, we learned by doctrinal category and as

professors we often teach by doctrinal category. But Hirsch's article encourages us to think outside the box and across doctrinal lines. In doing so, Hirsch suggests reforms that may make it easier for people to engage in legally valid transfers.

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