Michigan Law Review

Volume 41 | Issue 1

1942

TRUSTS - INTER VIVOS TRUST AS A SUBSTITUTE FOR A WILL - EFFECT OF SETTLOR'S RETENTION OF CONTROL

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TRUSTS — INTER VIVOS TRUST AS A SUBSTITUTE FOR A WILL — EFFECT OF SETTLOR'S RETENTION OF CONTROL — *A* executed an instrument without the formalities of a will, transferring securities to *B*. It was provided therein that *B* should hold, manage, sell, and invest according to *A's* written directions, and should retransfer to *A* if *A* so directed. *A* further reserved the right to alter the "ultimate beneficiary" and also to terminate the trust on notice to *B*, in which event *B* should retransfer to him securities and investments as well as net income otherwise payable to *A* at fixed intervals during *A's* life. On *A's* death, the trust was to become absolute and *B* thereupon had duties of investment and payment to beneficiaries. After the death of *A's* wife, the trust was to terminate and *B* was to make payment to the ultimate beneficiary. *A* made only a few alterations in his life. *Held*, one justice dissenting, that the reservation of powers by *A* did not prevent the creation of a valid inter vivos trust. *Central Trust Co. v. Watt*, 139 Ohio St. 50, 38 N. E. (2d) 185 (1941).

Recent years have seen increasingly widespread use of the inter vivos trust as a substitute for a will.[1] Not only can the trust accomplish most of the purposes of the will, but it has decided advantages and only a few disadvantages as compared to the latter instrument.[2] Courts recognize this substitute use, and

[1] Leaphart, "The Trust as a Substitute for a Will," 78 UNIV. PA. L. REV. 626 (1930); King, "Trusts as Substitutes for Wills, 14 ROCKY MT. L. REV. 1 (1941); Leaphart, "The Use in Montana of the Trust as a Substitute for a Will," MONT. L. REV. 19 (Spring, 1941).

[2] Among the advantages discussed by King, "Trusts as Substitutes for Wills," 14 ROCKY MT. L. REV. 1 (1941) are (1) less costly, (2) less administrative delay, (3) less publicity, (4) less difficulty in proof, and (5) possibilitity of avoiding certain statutory restrictions and burdens.

This last advantage is almost nonexistent as to taxes, [Goodrich v. City Nat. Bk. & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935), and Leaphart, "The Use in Montana of the Trust as a Substitute for a Will," MONT. L. REV. 19 (Spring, 1941)] and defeating creditors, [Rose v. Union Guardian Trust Co., 300 Mich. 73,

the majority expressly find no fault with such a purpose.[3] The theoretical differences between the two methods are clear. A will, being ambulatory, conveys no interest until the testator's death and is freely alterable until that time.[4] A trust, on the other hand, passes immediate legal title to the trustee and an immediate equitable interest to the beneficiaries.[5] These distinctions break down, however, and the inter vivos trust takes on a decidedly testamentary appearance when courts permit it to be revocable [6] and alterable [7] at the settlor's election, and allow the settlor to reserve income,[8] profits,[9] and even possession [10] of the trust res to himself. Add to this the control which the settlor may exercise over

1 N. W. (2d) 458 (1942)], but courts are still more favorable in some jurisdictions to the defeating of spouses' interests [Windolph v. Girard Trust Co., 245 Pa. 349, 91 A. 634 (1914), and Patterson v. McClenathan, 296 Ill. 475, 129 N. E. 767 (1921)] and the making of gifts to charities shortly before death [Ohio Gen. Code (Page, 1938), § 10504-5, and Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938)], by trust rather than by will.

Probably the most important disadvantage of the trust is that a court may find it invalid as a testamentary instrument not executed in accordance with the statute of wills.

[3] See 1 BOGERT, TRUSTS AND TRUSTEES 332 (1935) and 1 SCOTT, TRUSTS 338-339 (1939). The opposite view is taken in the dissenting opinion of Kelly v. Parker, 181 Ill. 49, 54 N. E. 615 (1899).

[4] Roth v. Michalis, 125 Ill. 325, 17 N. E. 809 (1888); Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1895); Niccolls v. Niccolls, 168 Cal. 444, 143 P. 712 (1914); Routson v. Hovis, 60 Ohio App. 536, 22 N. E. (2d) 209 (1938); 1 TRUSTS RESTATEMENT, § 56 (1935).

[5] Id.

[6] Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1895); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Goodrich v. City Nat. Bk. & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935); Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938); Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N. E. (2d) 119 (1939); Rock v. Rock, 309 Mass. 44, 33 N. E. (2d) 973 (1941); Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N. W. (2d) 458 (1942). See Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 at 526 (1930); 38 YALE L. J. 1135 at 1137 (1929); 1 TRUSTS RESTATEMENT, § 57 (1935).

[7] Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938); Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N. W. (2d) 458 (1942). See 1 BOGERT, TRUSTS AND TRUSTEES 337 (1935); 1 SCOTT, TRUSTS 225 (1939) and 1 TRUSTS RESTATEMENT, § 57 (1935).

[8] Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1895); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Davis v. Rossi, 326 Mo. 911, 34 S. W. (2d) 8 (1930); Goodrich v. City Nat. Bk. & Trust Co., 270 Mich. 222, 258 N. W. 253 (1935); Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937); Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N. E. (2d) 119 (1939). See 1 SCOTT, TRUSTS 336 (1939).

[9] Id.

[10] Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1895); Kelly v. Parker, 181 Ill. 49, 54 N. E. 615 (1899); Patterson v. McClenathan, 296 Ill. 475, 129 N. E. 767 (1921); Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N. E. (2d) 119 (1939). See 26 R. C. L. 1205 (1920) and 1 SCOTT, TRUSTS 332 (1939).

the trustee in the performance of the trustee's duties, and the distinction is even more tenuous. It is in the settlor's retention of control over the trustee, rather than over the trust res, that courts are most apt to find that the settlor has gone too far and has actually made a testamentary disposition.[11] In many of the cases, however, they are probably influenced by the cumulative effect of the entire transaction.[12] In any event, unless some discretion is left in the trustee, especially as to the details of administration, the courts are likely to hold the arrangement ineffectual.[13] Possibly they consider such trusts analogous to the "dry trust," [14] though there are few examples extreme enough to be so classified. That the decision in the instant case strains the ordinary conception of an inter vivos transfer cannot be denied, for there are revocation, alteration, income, and investment direction rights reserved to the settlor. There is, moreover, a provision for duties in the trustee after the termination of the trust, which has been held a serious defect.[15] At the same time it can hardly be called more extreme than

[11] 4 Ohio St. L. J. 137 (1937).

[12] The dissenting opinion in the principal case expressly takes a cumulative view of the reservations made by the settlor, thereby following Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938).

[13] In McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50, 87 N. E. 465 (1909), the trustee was completely subject to the demands of the settlor and was obliged only to make payments to the beneficiaries. The combination of duties to account and to submit all investments to the settlor for approval was held fatal in Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N. E. 389 (1928). Due, however, to statute [Ohio Gen. Code (Page, 1937), § 8617] and subsequent decisions [Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938); Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N. E. (2d) 119 (1939), and the instant case] this is no longer good law. For a detailed discussion of the Hawkins case, see Rowley, "Living Testamentary Dispositions and the Hawkins Case," 3 UNIV. CIN. L. REV. 361 (1929), and 73 A. L. R. 209 (1931).

In the following cases, good inter vivos trusts were held to have been created: Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925) (where the trust instrument gave the trustee powers of management and investment in its sole discretion); Keck v. McKinstry, 206 Iowa 1121, 221 N. W. 851 (1928), in which, although the settlor reserved the actual management of the property during his life, on his death the trustee's active duties began; and Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938) [see 118 A. L. R. 481 (1939)]. See also Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N. W. (2d) 458 (1942). Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 at 526 (1930) and 1 TRUSTS RESTATEMENT, § 57 (1935).

[14] The Statute of Uses executed the dry or passive trust. Something similar to this statute has been adopted in most of the states and in some, though not in all, it has been extended by analogy to personalty as well as realty. 1 BOGERT, TRUSTS AND TRUSTEES 588-600 (1935). Where the dry trust of personalty is not held to be executed, the trust would be valid of course. It is to be noted that in Ohio, where the principal case was decided, there is no statute analogous to the Statute of Uses and, therefore, the dry trust analogy would not be applicable there.

[15] Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N. E. 389 (1928). Contra: Miles v. Miles, 78 Kan. 382, 96 P. 481 (1908) and Wilcox v. Hubbell, 197 Mich. 21, 163 N. W. 497 (1917). "The intention of the settlor is exactly the same whether he provides that upon his death the trustee should convey the property and

other recent cases,[16] and under present conditions the result does appear desirable from a practical standpoint.[17] Nevertheless, the court has contributed nothing towards clearing up the artificial distinctions customarily employed in determining the validity of such trusts.[18]

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that the trust should then terminate, or that the trust should terminate and the trustee then convey the property." Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 at 529 (1930).

[16] See cases cited in the second paragraph of note 13, supra.

[17] See note 2, supra.

[18] Realistically, the power to revoke would seem to include powers of alteration and powers over the trustee, since the way is open to the settlor to revoke and recreate in part or to revoke and find a trustee compliant with his wishes. Yet the courts continue to distinguish these. It is not easy to see why, when a power of revocation is allowed, the provision that the trust applies only to property owned by the settlor upon his death should be bad. But this line of reasoning is not followed. Neither can any actual difference be perceived between a provision that payment on demand be made by the trustee and one that the settlor should be able to revoke, though some courts have been impressed by such a difference. The "termination of trusts" argument and its artificiality have already been alluded to. See note 15, supra.

For recognition of the extent to which judges are influenced by words, see Leaphart, "The Trust as a Substitute for a Will," 78 UNIV. PA. L. REV. 626 at 638 (1930) and "The Use in Montana of the Trust as a Substitute for a Will," MONT. L. REV. 19 at 25 (Spring, 1941). It must be admitted, nevertheless, that the effective administration of the statute of wills is dependent upon these distinctions, artificial though they may be.

The Ohio cases, including the principal one, are discussed by Goldman and De Camp, "When is a Trust not a Trust?" 16 UNIV. CIN. L. REV. 191 (1942).