Michigan Law Review

Volume 40 | Issue 1

1941

WILLS - VALIDITY OF CLAUSE RESTRICTING ALIENATION OF A LEGACY DURING ADMINISTRATION

Herbert R. Whiting
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons

Recommended Citation
Herbert R. Whiting, *WILLS - VALIDITY OF CLAUSE RESTRICTING ALIENATION OF A LEGACY DURING ADMINISTRATION*, 40 MICH. L. REV. 97 (1941).
Available at: https://repository.law.umich.edu/mlr/vol40/iss1/8

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WILLS — VALIDITY OF CLAUSE RESTRICTING ALIENATION OF A LEGACY DURING ADMINISTRATION — A Pennsylvania court in *Horton's Estate*[1] held that legacies are subject to garnishment by a creditor of the legatee while the property is in the hands of the deceased's executor. The case also intimated that had the testator so provided in his will this process would not lie and the creditor would have to stand by until possession of the property passed to the legatee. This last bit of dictum has since been established as the law of Pennsylvania by *Holmesburg Building Association v. Badger.*[2]

Of recent years clauses providing that the creditors of a legatee cannot reach any interest in the decedent's estate and that the legatee's interest therein shall be inalienable until the property passing from that estate has actually been handed over to the legatee have been appearing in some of the will forms. Though a Pennsylvania statute expressly made such interests subject to garnishment in favor of the legatee's creditors[3] the *Badger* case held one of these provisions valid and enforceable. Apparently the only precedents on this point to be found are two earlier Pennsylvania decisions and an Ohio report,[4] all of which take the view of the *Badger* case.

[1] 38 Pa. Dist. & Co. 183 (1940).

[2] (Pa. Super. 1941) 18 A. (2d) 529.

[3] Act of April 13, 1843; Pa. Laws (1843), No. 113, § 10; 12 Pa. Stat. (Purdon, 1931), § 2269.

[4] Beck's Estate, 133 Pa. 51, 19 A. 302 (1890); Goe's Estate, 146 Pa. 431, 23 A. 383 (1892); Skillman v. Symmes, 7 Ohio Cir. Dec. 39, 14 Ohio Cir. Ct. 547 (1896). The Pennsylvania cases are more or less dictum and the Ohio case gave no opinion, contenting itself with citing the two Pennsylvania cases and misusing a section from Redfield. See 2 REDFIELD, WILLS, 3d ed., 310 (1876).

It cannot be denied that no man should have an interest in property that is not subject to the payment of his debts. On the other hand, that it shall be alienable by the beneficial owner and subject to his debts is not an essential element of any estate in the sense that it is a logical impossibility for such an estate to exist without these incidents. In the final analysis, wherever it is held that such provisions are invalid it will be found that the true reason for the holding is not that the provisions are repugnant to or inconsistent with the estate granted but that it is deemed to be against public policy, as it is declared by the statutes or the common law, to permit them to be attached to the particular estate in question.[5]

> "Legal doctrines are the product of the constant struggle of conflicting ideas. In few parts of the law does this appear more clearly than in that relating to restraints on alienation. On the one hand are many factors which favor or at least condone the validity of restraints on the power of the owner of property to alienate his interests; on the other hand are an impressive group of reasons in favor of a requirement that the power of alienation be left unfettered."

In general it may be said that the law will permit an owner or testator to do with his property as he sees fit.[7] Where, however, there is some affirmative reason for restricting this right the courts are not slow to do so. Thus have arisen the rule against perpetuities, the rule against accumulations, the doctrine prohibiting direct restraints on alienation, the statute of frauds and numerous other restraints imposed by the courts curtailing one's ability to do as he wishes with his own property.

A direct analogy can be drawn between the type of restraint here under consideration and the spendthrift trust. An outright legacy cannot, of course, constitute a spendthrift trust in any true sense of the word. Professor Griswold, in his work on spendthrift trusts, goes on to say, "Accordingly an attempt to restrain the alienation of such a legacy is ineffective. . . ."[8] It is submitted that this conclusion does not follow. The question is purely one of policy—should we permit a restraint of this kind—and the fact that a legacy is not a spendthrift trust does not bear on this issue. Nevertheless a court's attitude toward the spendthrift trust would indicate its probable decision on the validity of the restraint here under consideration. In this connection it is to be noted

[5] GRAY, RESTRAINTS ON ALIENATION, 2d ed., 11, 214 (1895); 1 PERRY, TRUSTS, 7th ed., § 386a (1929).

[6] GRISWOLD, SPENDTHRIFT TRUSTS, § 9 (1936).

[7] In re Morgan's Estate, 223 Pa. 228, 72 A. 498 (1909).

[8] GRISWOLD, SPENDTHRIFT TRUSTS, § 258 (1936).

that the spendthrift trust of principal, rather than that of income, forms the closest analogy. In effect the situations are exactly the same—creditors of the individual entitled to an absolute interest in the property cannot, under the terms of the instrument setting up the estate, reach the property until it is handed over to that person. Probably all states except Pennsylvania hold that where a beneficiary has an immediate right to the principal of a trust no restraint on the voluntary or involuntary alienation of his right thereto is valid.[9] Subsequent to the decree of distribution a legatee has a present right to receive property held for him by the executor.[10] Thus it would seem that in most states a testamentary provision against alienation of that interest would be of no effect. In regard to the right of creditors to attach this interest before the court has ordered distribution, where such is allowed in absence of a clause like this,[11] the problem is more difficult. The courts are definitely not in accord as to the validity of spendthrift provisions restraining alienation of trust principal payable at some future date[12] though the writers agree that such provisions should be held void.[13] Courts taking the view that these are invalid would also, if they are consistent, hold invalid the testamentary provision as applied where no distribution of the estate has been ordered. Apparently such courts as hold to the contrary fail to distinguish between a restraint on income and one on principal.[14] Where a court does not so distinguish, the question arises whether the policy reasons for holding valid spendthrift

[9] GRISWOLD, SPENDTHRIFT TRUSTS, § 258 (1936); 1 SCOTT, TRUSTS, § 153.1 (1939); 1 TRUSTS RESTATEMENT, § 151 (1935). But see 29 MICH. L. REV. 493 (1931) for possible extension of a peculiar Iowa doctrine.

[10] Reed v. Hendee, 100 Vt. 351, 137 A. 329 (1927); 1 WOERNER, ADMINISTRATION, 3d ed., 600 (1923). That most courts allow garnishment of an executor after the order for distribution has been made, see Orlopp v. Schueller, 72 Ohio St. 41, 73 N. E. 1012 (1905).

[11] Stratton v. Ham, 8 Ind. 84 (1856), is about the only case permitting garnishment of an executor before the distribution decree in the absence of statute expressly providing for same. A number of states do, however, have statutes to this effect.

Furthermore, the creditor can proceed in equity to reach the legatee's interest before distribution has been ordered. Freemont Farmers Union Cooperative Assn. v. Markussen, 136 Neb. 567, 286 N. W. 784 (1939).

[12] *Valid*: Snyder v. O'Conner, 102 Colo. 567, 81 P. (2d) 773 (1938); Cowles v. Matthews, 197 Wash. 652, 86 P. (2d) 273 (1939). *Invalid*: Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922); Vellacott v. Murphy, (C. C. A. 5th, 1927) 16 F. (2d) 700. However, note that in the trusts held valid (as well as those held invalid) the beneficiary is to receive income of the trust during the life of said trust. If this feature were not present it may be that these courts would hold such trusts invalid. See 1 TRUSTS RESTATEMENT, § 151 (1935).

[13] GRISWOLD, SPENDTHRIFT TRUSTS, §§ 105-106 (1936); 1 SCOTT, TRUSTS, §§ 153.2-153.3 (1939); 1 TRUSTS RESTATEMENT, §§ 151, 153 (1935).

[14] GRISWOLD, SPENDTHRIFT TRUSTS, § 102 (1936); 1 SCOTT, TRUSTS, § 153.2 (1939).

provisions regarding trust income apply to the present problem and also whether there are any further policy arguments unique to this particular problem. In short, does the law, for reasons of public policy, prohibit the making of these provisions an element of the estate given?

On investigation it is apparent that the specific policy arguments for and against the spendthrift trust of income furnish no aid here as they do not apply to the situation. The argument in favor of such trusts is that it is desirable that the settlor be able to provide protection for his friends and relatives who may, for one reason or another, be unable to earn a living or preserve and keep such property as they may obtain. It is obvious that a clause of the kind involved in the *Badger* case offers no such protection. On the other hand, the arguments set forth against the validity of the spendthrift trust of income, that the apparent wealth of the beneficiary misleads creditors and that the security of the beneficiary has a bad effect upon his character, have no application.[15] The only reasons a testator could have for inserting in his will a provision restraining alienation during administration are (a) to enable the legatee, with the cooperation of the executor, to evade his creditors by a judicious timing of the administration of the estate, (b) to postpone for a time the inevitable rush of creditors, and (c) to protect the administration of the estate against interference by the creditors of one or more of the legatees. The courts cannot be made a sanctuary for property of the dishonest or elusive debtor. Thus the first two of the above reasons, together with the general doctrine that one should not be permitted to hold an interest in property that is not subject to the claims of his creditors, definitely militate against the validity of the restraint. The third is of no weight, since the courts will protect property in custodia legis, as this is, from such interference regardless of the provisions in the will.[16] Thus in support of the validity of the clause there is only the general principle that one should be allowed to dispose of his own property with such restrictions as he deems fit. As already indicated, this principle will not stand up in the face of policy arguments against such restrictions, and as a consequence it seems the provision should be declared ineffective as against attaching creditors or assignees of the legatee.[17]

[15] Obviously if the beneficiary receives all of the principal and income at the same time there will be no apparent wealth as to the beneficiary before that time; thus no creditors can be misled into extending credit on the basis of capital the beneficiary appears to have but in fact does not have.

[16] Bankers' Mortgage Co. of Topeka, Kansas v. McComb, (C. C. A. 10th, 1932) 60 F. (2d) 218; Williams v. Smith, 117 Wis. 142, 93 N. W. 464 (1903).

[17] Though the same policy arguments do not apply, nevertheless the court's general attitude toward the spendthrift trust may furnish an indication as to its probable decision on the validity of the restraint in question.

An examination of the statutes tends to bear out this conclusion. In a number of states the legislature has expressly made the interest of a legatee in the decedent's estate attachable or garnishable.[18] Though at the time of the *Badger* case Pennsylvania had such a statute[19] the court held the intent of the testator would nonetheless be given effect. It can well be argued that if the legislature has said these interests shall be garnishable then it is beyond the power of an individual to say they shall not. This reasoning has been used by several courts in invalidating restraints on legal[20] and equitable[21] interests. Furthermore some states have passed statutes restricting the creation of spendthrift trusts[22] or expressly making equitable interests liable for debts the same as legal interests.[23] These would seem to declare a local policy against the type of restraint here under consideration as well as against the ordinary spendthrift trust.

Another statute that raises a problem, though of a slightly different nature, is that prohibiting the suspension of alienation or absolute ownership for a period longer than two lives, a statute that has been passed in some form or other in a number of states.[24] During the period of administration there are no persons living who can alienate an absolute interest in the property of the estate—as in the indestructible trust the property is tied up until it passes to the beneficiary under the terms of the will.[25] Since this may be longer than the statute permits, or since the period is not measured by lives in being, the restraint may be declared invalid. It cannot be anticipated, however, that the whole will would be declared invalid as would a trust under similar circumstances,[26] it being clear the testator would want the will to stand regardless of the effectiveness of the restraining clause. The considera-

[18] Minn. Stat. (Mason, 1927), § 9360; 62 Ill. Ann. Stat. (Smith-Hurd, 1935), § 1.

[19] Act of April 13, 1843; Pa. Laws (1843), No. 113, § 10; 12 Pa. Stat. (Purdon, 1931), § 2269.

[20] Swan v. Gunderson, 51 S. D. 588, 215 N. W. 884 (1927).

[21] Brahmey v. Rollins, 87 N. H. 290, 179 A. 186 (1935).

[22] Sheridan v. Krause, 161 Va. 873, 172 S. E. 508 (1934). Statutes like this generally cannot be said to "restrict" spendthrift trusts as they are, in reality, usually passed to permit them (in restricted form) where the case law of the state has declared them invalid.

[23] Ky. Stat. Ann. (Carroll, 1930), § 2355; Miss. Code Ann. (1930), § 2128; 9 Ohio Gen. Code (Page, 1934), § 11760.

[24] E.g., 40 N. Y. Consol. Laws (McKinney, 1938), "Personal Property Law," § 11.

[25] In re Perkins' Estate, 245 N. Y. 478, 157 N. E. 750 (1927). The mere fact that the trustee has power to sell an absolute interest in the subject matter did not make the trust valid. Haynes v. Sherman, 117 N. Y. 433, 22 N. E. 938 (1889).

[26] 1 BOGERT, TRUSTS 700 (1935).

tion of these statutes naturally brings to mind the rule against perpetuities. It may be, though the cases are few and indefinite on the matter, that an indestructible trust to last longer than the period permitted by the rule against perpetuities is thereby destructible.[27] Taking this view and applying the rule that an indestructible trust to last until the executor handed over the property in the estate to the legatee would violate the rule against perpetuities,[28] the trust would be destructible. If the rule against perpetuities is applied to trusts in this manner it would seem that it should also apply to property held by an executor where the testator has provided that the beneficial interest shall be inalienable.

Herbert R. Whiting

[27] 2 SIMES, FUTURE INTERESTS, §§ 557-558 (1936).

[28] If vesting is contingent on the probate of the testator's estate, the limitations are too remote. GRAY, RULE AGAINST PERPETUITIES, 3d. ed., §§ 214b-214e (1915); Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920). The reasoning behind this is that it is possible the probate might be delayed beyond the period allowed by the rule.