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INTER VIVOS TRUSTS—Potential Beneficiary's Right To Compel Trustee To Render a Formal Accounting and Disclose Information

In recent years the inter vivos or living trust¹ has become a popular method of disposing of property² and in the future its use is likely to be even more widespread.³ Consequently, it has become increasingly important that the law governing such dispositions be both unequivocal and just. Unfortunately, in at least one situation this is not the case: When a person, believing himself to be a potential beneficiary of an inter vivos trust, seeks to compel the trustee to render a formal accounting⁴ or disclose information concerning the extent of his interest,⁵ he will find the law ambiguous and often inequitable.⁶

The recent case of *Davidson v. Blaustein*⁷ is illustrative of the difficulties which may arise in such a situation. The plaintiffs in that action were minors who had reason to believe that they were contingent beneficiaries of four inter vivos trusts established by their grandparents and great-grandparents. Although at least one

1. An inter vivos trust is one created during the life of the settlor and may take effect without judicial action. It is thus to be distinguished from a testamentary trust which is settled by will and has no legal effect until probated by a court. A testamentary trust becomes a matter of public record along with the will which creates it. In addition, most states require the trustee of such a disposition to render intermediate and final accounts to the court having jurisdiction over the decedent-settlor's estate. For an examination of the relevant statutes in each state, see BOGERT, TRUSTS & TRUSTEES §§ 965-68 (2d ed. 1962). On the other hand, in all but six states, see note 22 *infra*, the trustee of an inter vivos trust is not required to file the instrument in court or render a formal accounting unless requested to do so by the holder of a present possessory interest or a contingent beneficiary alleging mismanagement of the trust. See notes 13 & 14 *infra* and accompanying text.

2. See FARR, AN ESTATE PLANNER'S HANDBOOK 91 (3d ed. 1966).

3. A recent bestselling book advocates the use of inter vivos trusts as a means of escaping the expenses of the probate procedure. DACEY, HOW TO AVOID PROBATE (1966). In addition, the American Bar Association's Committee on Continuing Education of the Bar has recently produced and sponsored a movie "starring" Professor A. James Casner entitled *The Revocable Trust—An Essential Tool for the Practicing Lawyer*. Most of the ideas contained therein may be found in Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960).

4. In the rendition of formal accounts (also known as "affirmative relief by accounting"), the trustee must justify each transaction in which trust funds were used and produce all relevant records, vouchers, and receipts. See RESTATEMENT, TRUSTS (SECOND) § 172 (1959).

5. In the disclosure of information (also known as "discovery"), the trustee must make available the trust instrument and the records of his administration. See RESTATEMENT, TRUSTS (SECOND) § 173 (1959).

6. One commentator has denied the existence of any law on the subject: If the law is uncertain and variegated in the individual states of the United States with relation to accounting of fiduciaries serving under testamentary instruments it may be said to be practically nonexistent with relation to accountings under inter vivos trusts.

FARR, *op. cit. supra* note 2, at 217.

7. 247 F. Supp. 225 (D. Md. 1965) [hereinafter referred to as principal case].

of these trusts was created before 1938,⁸ the trustee never accounted to any of the beneficiaries and, while admitting that plaintiffs were contingent remaindermen,⁹ refused their request that they be provided with information concerning the scope, assets, and duration of the trusts. Plaintiffs brought suit in the Federal District Court of Maryland¹⁰ to compel the trustee (1) to render a formal accounting of his administration and (2) to disclose information as to the existence and terms of the trusts. On defendant's motion, the court dismissed both claims. It ruled that a person wishing to compel a formal accounting must allege either a present possessory interest or misconduct on the part of the trustee. Plaintiffs' failure to plead either of these rendered their suit for a formal accounting patently deficient, despite the fact that plaintiffs were unable to state a claim upon which relief could be granted only because they had no knowledge of the precise terms of the trust instrument.¹¹ As to plaintiffs' claim for disclosure of information, the court ruled that it did not provide an "amount in controversy" that would satisfy federal jurisdictional standards.¹² Thus, plaintiffs failed to obtain any information concerning trusts of which they were admittedly beneficiaries solely because they were unable to allege the very facts which it was the purpose of their suit to discover. As a result, they remained uninformed as to the existence of any conditions precedent to the vesting of their interests and therefore incapable of intelligently making their own estate plans. Of equal, if not greater, importance, is the fact that they were deprived of information without which they could not effectively protect the corpus of the trusts from mismanagement or unlawful conversion by the trustee.

8. Principal case at 226.

9. Defendant's motion to dismiss, p. 8.

10. There was diversity of citizenship, plaintiffs being citizens of Texas and defendant residing in Maryland. Principal case at 226.

11. FED. R. CIV. P. 12(b)(6).

12. Federal district courts have no jurisdiction in diversity of citizenship cases unless the matter in controversy exceeds the sum or value of \$10,000. 28 U.S.C. § 1332(a) (1964). The court noted that plaintiffs had not alleged that the information they sought had any present monetary value to them. Principal case at 228. Had plaintiffs stated a valid cause of action for a formal accounting, however, it is clear that their claim for disclosure of information could also have been heard under the doctrine of pendant jurisdiction: "If the court has jurisdiction of the principal action, it also has cognizance of any ancillary proceeding therein, regardless of the citizenship of the parties, *the amount in controversy*, or any other factor that would ordinarily determine jurisdiction." 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 23 (Wright ed. 1960) (Emphasis added); *accord*, 1 MOORE, FEDERAL PRACTICE ¶ 0.90(3) (2d ed. 1964). However, if the claim supporting jurisdiction is so insubstantial as to fail to survive a motion to dismiss, the pendant claim will usually not be heard. *Bell v. Hood*, 71 F. Supp. 813, 819-20 (S.D. Cal. 1947). *But see* *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1950) (declaring that a district court should have discretion to hear the non-federal claim if this will serve the interests of judicial economy); Note, *Discretionary Federal Jurisdiction Over the Pendant Cause*, 46 ILL. L. REV. 646 (1951). See generally WRIGHT, FEDERAL COURTS § 19 (1963).

Although the result in *Davidson* is unfortunate, the federal district court appears to have interpreted Maryland law correctly. In virtually all states, one who is presently entitled to payment of either income or corpus under a trust instrument may compel the trustee to render an account.¹³ It is also generally accepted that a contingent beneficiary may succeed in such an action when he alleges a wrongful dissipation of trust assets.¹⁴ However, no Maryland court has permitted a potential beneficiary to compel either a formal accounting or a disclosure of information without alleging that the trustee has been guilty of misconduct.¹⁵ Moreover, it appears that, absent legislation to the contrary,¹⁶ the courts of every other state have taken a similar position.¹⁷

Despite this seeming unanimity of judicial opinion, the leading commentators on the law of trusts have rejected the existing rule. Both Professors Bogert and Scott have stated that a potential beneficiary has a right to force the trustee to render a formal accounting and to disclose information at reasonable times.¹⁸ The *Restatement*

13. See BOGERT, *op. cit. supra* note 1, § 970. Apparently this right has rarely been contested in Maryland and thus there are few cases which expressly so hold. However, *Ehlen v. Ehlen*, 63 Md. 267 (1885), does appear to stand for this proposition. Moreover, the negative implication of the cases cited in note 14 *infra* is clearly that if the persons suing in those instances had been present, rather than merely contingent beneficiaries, no allegation of misconduct on the part of the trustee would have been required. It is worthy of note that *Ehlen* as well as almost all the authorities cited in note 14 involve testamentary trusts. As was suggested in note 6 *supra*, there is very little case authority dealing with actions for either formal accountings or disclosure of information with respect to inter vivos trusts. However, no court has made a distinction on this basis.

14. *E.g.*, *Badham v. Johnston*, 239 Ala. 48, 193 So. 420 (1940); *Kollock v. Webb*, 113 Ga. 762, 39 S.E. 339 (1901); *Burrows v. Palmer*, 5 Ill. 2d 434, 125 N.E.2d 484 (1955); *Blackett v. Ziegler*, 147 Iowa 167, 125 N.W. 874 (1910); *In re Clarke's Will*, 198 Md. 266, 81 A.2d 640 (1951); *Roberts v. Michigan Trust Co.*, 273 Mich. 91, 262 N.W. 744 (1935); *Northwestern Nat'l Bank & Trust Co. v. Pirich*, 215 Minn. 313, 9 N.W.2d 773 (1943); *Canada v. Daniel*, 175 Mo. App. 55, 157 S.W. 1032 (1913); *Presbyterian Church v. Plainfield Trust Co.*, 139 N.J. Eq. 501, 52 A.2d 400 (Ch. 1947); *In re Lowerre*, 104 Misc. 570, 172 N.Y. Supp. 171 (Surr. Ct. 1918); *Spence v. Commonwealth Trust Co.*, 79 Pa. D. & C. 307 (C.P. 1951); *White v. White*, 25 S.W.2d 826 (Tex. Comm'n App. 1930).

15. *E.g.*, *Harlan v. Gleason*, 180 Md. 24, 28-29, 22 A.2d 579, 581-82 (1941) (where there is no allegation of mismanagement and the time for distribution of corpus to beneficiaries is not at hand, an action for a formal accounting is demurrable).

16. See notes 21-24 *infra*.

17. See notes 13 & 14 *supra*.

18. Regarding actions for formal accountings: "In order to succeed in such a suit for accounting, it is not necessary that the beneficiary allege that there is any sum immediately due him under the trust, or that the trustee is in default." BOGERT, *op. cit. supra* note 1, § 963. "The fact that a beneficiary has only a future interest and that his interest is contingent does not preclude him from compelling the trustee to account." SCOTT, TRUSTS § 172 (1956).

Regarding actions for disclosure of information: "[T]he cestui is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use." BOGERT, *op. cit. supra* § 961.

The trustee is under a duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information as to the administration

of *Trusts* has also espoused this view.¹⁹ All three have declared that the trustee has a duty to honor the beneficiary's request for information concerning his interest in the trust and the manner in which it is being managed. A refusal to comply with the request is a breach of his duty and thus there is no need for the beneficiary to allege any additional misconduct in a suit to compel compliance.²⁰

A minority of the states have, by statute, also rejected the existing rule. In six states, the potential beneficiary is simply given an express right to compel a formal accounting or disclosure of information by the trustee.²¹ Legislation in another six states requires the trustee to render accounts in court periodically.²² Under such provisions, the trust instrument and accounts as rendered become matters of public record and thus no beneficiary can claim to be uninformed. In three additional states, statutes impose a similar requirement but their scope is expressly limited to court-appointed trustees.²³ Finally, three states, of which Maryland is one, have statutes which permit the courts to take jurisdiction over inter vivos trusts at the request of "any interested party."²⁴ Under these

of the trust . . . [A] beneficiary who has a future interest . . . is entitled to such information whether his interest is vested or contingent.
SCOTT, TRUSTS § 173 (1956).

It is significant that in this area neither *Bogert* and *Scott* nor the Restatement, see note 19 *infra*, make any distinction between the rules applicable to inter vivos and those applicable to testamentary trusts. As has been suggested, such uniform treatment is also characteristic of court decisions, see note 13 *supra*.

19. Regarding actions for formal accountings:

The trustee may be compelled to account not only by a beneficiary presently entitled to the payment of income or principal, but also by a beneficiary who will be or may be entitled to receive income or principal in the future.

RESTATEMENT, TRUSTS (SECOND) § 172, comment c (1959).

Regarding actions for disclosure of information:

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him . . . to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Id. § 173.

20. Although only *Bogert* expressly adopts the last part of this rationale, it appears to be the underlying premise of the broad rules set forth in *Scott* and the *Restatement*.

21. IND. ANN. STAT. § 31-703 (Supp. 1966); LA. REV. STAT. tit. 9, § 2089 (1964) (disclosure of information only); WASH. REV. CODE § 30.30.040 (1957); W. VA. CODE § 44-4-10 (1966); WIS. STAT. § 231.36 (Supp. 1967); N.J. SUPER. CT. R. 4:105-4 (1965).

22. The UNIFORM TRUSTEES' ACCOUNTING ACT §§ 12, 13 (1936), imposes such a requirement. However, these sections are only in force in Kansas, KAN. GEN. STAT. ANN. § 59-1606 (1964), Nevada, NEV. REV. STAT. §§ 165.130, 140 (1956), and New Mexico, N.M. STAT. ANN. §§ 33-2-12, -13 (1953). Other states have independently enacted similar provisions: IOWA CODE ANN. § 633.700 (1964); KY. REV. STAT § 25.175 (1962); W. VA. CODE § 44-4-1 (1966).

23. ME. REV. STAT. ANN. tit. 18, §§ 4051-52 (1964); MINN. STAT. § 501.34 (1947); S.C. CODE ANN. § 67-57.2 (1962).

24. N.D. CENT. CODE § 59-04-02 (1960); PA. STAT. tit. 20, § 2833; tit. 17, § 284 (Orphan's Court jurisdiction); tit. 20, § 2741 (Common Pleas Court jurisdiction) (1964); MD. RULES V71, V74 (1963).

statutes, once jurisdiction is acquired, the court has discretion to order the trustee either to render a formal accounting or to disclose all relevant information.²⁵

In the remaining thirty-two states, the potential beneficiary is foreclosed from any relief if he is unable to allege that the trust has been mismanaged. Under such conditions, the temptation to plead falsely is considerable, especially since the more modern procedural rules do not provide effective sanctions against tactics of this kind.²⁶ But, although such false allegations would carry the plaintiff past a motion to dismiss or a demurrer, the defendant could probably avoid the plaintiff's attempt to acquire desired information through the use of discovery procedures and plaintiff would thus fall victim to defendant's motion for summary judgment.²⁷ Therefore, if the potential beneficiary is to be afforded relief in the majority of states, a change in the substantive law is necessary.

Three major considerations favor such a change. First, the potential beneficiary may fail to fulfill a condition precedent to the vesting of his interest merely because he is unaware of its existence. This might occur, for example, where the vesting of his remainder was contingent upon his marrying, entering the clergy, or graduating from college. Second, the potential beneficiary and his relatives may have difficulty in intelligently making their own estate plans. For instance, assume that the father of the beneficiary is considering various alternative means of distributing his estate. In determining the amount he must provide for his child's maintenance and education, he will necessarily want to know both the extent of his child's potential interest and the conditions precedent to its vesting. Third, even a contingent beneficiary may be concerned with preventing

25. According to the principal case, however, such relief is not available in a federal court, which has no power to assume "jurisdiction" over a trust in the sense that the term is used in these statutes. Principal case at 229.

26. Under the Federal Rules of Civil Procedure, for example, the only sanction which can be imposed for false pleading is provided in rule 11. This provision warns the attorney who knowingly signs a false pleading that he may be subjected to disciplinary action. However, no penalty is imposed on the party and lawyers have been punished in only the most extreme cases. *la BARRON & HOLTZOFF, op. cit. supra* note 12, § 332.1.

27. Under the Federal Rules the events occurring after such a pleading would probably take the following course: Defendant would answer, FED. R. CIV. P. 8(b), generally denying that plaintiff had any present interest in the trust property or that there had been any mismanagement on his part, and would then move for summary judgment, FED. R. CIV. P. 56. Meanwhile plaintiff would attempt to take defendant's oral deposition, hoping to obtain thereby the information which the trustee had previously refused to disclose, FED. R. CIV. P. 30(a). However, defendant would no doubt seek a protective order, FED. R. CIV. P. 30(b), on the grounds that plaintiff was trying to obtain on discovery the very information for which he had brought suit. Since this would clearly be a fair appraisal of the situation, it is quite likely that the judge would issue the order defendant sought. Once this occurred, plaintiff would be doomed to failure. The falsity of his pleading would be demonstrated at the summary judgment hearing and a decree would be entered against him.

the mismanagement or unlawful conversion of the trust corpus in which he may someday have a present possessory interest. In most cases, the holders of the possessory rights would, by protecting their own interest, protect the interests of the contingent beneficiaries. However, if these persons are closely related to the trustee, they may prefer to refrain from bringing suit against him.²⁸ Moreover, there is always the possibility of disinterest on the part of the holders of present interests or of collusion between them and the trustee.

On the other hand, there are significant countervailing considerations which favor the present policy of non-disclosure. First, if the law permits an accounting action to be brought by anyone who claims on information and belief to be a potential beneficiary, the specter of the "nuisance suit" arises. Certainly the trustee ought not to be forced to undertake the time-consuming task of rendering accounts to any stranger who may be curious about the exact financial condition of his friend, business associate, or even prospective spouse; indeed, perhaps even the terms of the trust instrument should not be made available to such a person. However, as a practical matter, the threat of a flood of "nuisance suits" is not very grave. In most cases, the expense entailed in initiating a legal action will serve as an adequate deterrent to the more frivolous claims. In the rare situation in which the expense might appear to be justifiable (as, for example, in the marriage hypothetical), the public nature of such a suit will almost always operate as an additional deterrent. Second, where the settlor is still alive, it may be in his interest to maintain the secrecy of the terms of his disposition. A desire for such secrecy would appear to be particularly appropriate if the trust is revocable, for forced disclosures may subject the settlor to constant harassment by relatives and close friends who, for one reason or another, were not among the objects of his bounty. Third, the trust instrument itself may expressly provide that the terms of the trust remain undisclosed. The statutes that require the trustee to render formal accounts and disclose relevant information are divided as to the extent to which such a clause should be given effect.²⁹ Where a testamentary trust

28. In this regard, it is noteworthy that in the principal case the trustee was the son of two of the settlors and the grandson of the other two. Moreover, he was plaintiffs' grand-uncle. From these facts, it would appear likely that the life beneficiaries were also closely related to the trustee and this may explain why he had not been compelled to account for almost thirty years. Principal case at 226.

29. IND. ANN. STAT. § 31-711 (Supp. 1966) (settlor may waive statutory provisions relating to annual accountings to adult income beneficiaries but, by negative implication, he may not eliminate the right of "any beneficiary" to compel an accounting); WASH. REV. CODE § 30.30.20 (1957) (settlor may waive obligation of trustee to account annually but, by negative implication, he may not eliminate the right of "any beneficiary" to compel an accounting); IOWA CODE ANN. § 633.700 (1964) (settlor may waive obligation of trustee to render annual accounts); MD. RULES V71(c)(3) (1963) (settlor may bar court from assuming jurisdiction over the trust by appropriate language in the instrument); UNIFORM TRUSTEES' ACCOUNTING ACT § 15 (1936) (settlor may relieve trustee of his duties under the Act by appropriate language in the instrument).

is involved, the vast majority of courts refuse to enforce such a clause.³⁰ Nevertheless, since an inter vivos trust is not generally a matter of public record, it would seem that here the intention of the settlor should be effectuated.³¹

Strong arguments can thus be made for refusing to compel disclosure in certain situations. However, there is no justification for categorically denying a potential beneficiary the right to compel both a formal accounting and the disclosure of information simply because he is unable to allege mismanagement on the part of the trustee. A new rule of law is definitely required and the proper formulation of such a rule can probably best be accomplished by legislative action. Ideally, such legislation should provide that "any interested party" can compel the rendition of formal accounts and disclosure of information at reasonable times subject to the following qualifications: The equity court must have discretion to deny relief (1) where the settlor is alive and has expressed a desire that the terms of the trust remain secret; (2) where the trust instrument clearly manifests a similar intention; and (3) where justice and fairness so require. Moreover, the court should be permitted to order the disclosure of relevant information but deny a request for a formal accounting in appropriate circumstances.³² Under a statute of this nature, unfortunate results like the one in *Davidson* could be avoided.

30. *E.g.*, *Wood v. Honeyman*, 178 Ore. 484, 169 P.2d 131 (1946). For a discussion of other relevant cases see Annot., 171 A.L.R. 631 (1947).

31. This was the approach adopted in *Application of Cent. Hanover Bank & Trust Co.*, 176 Misc. 193, 26 N.Y.S.2d 924 (Sup. Ct.), *aff'd mem. sub nom. Central Hanover Bank & Trust Co. v. Momand*, 263 App. Div. 801, 32 N.Y.S.2d 128 (1941), *aff'd mem.* 288 N.Y. 608, 42 N.E.2d 610 (1942). In this case, a woman created an inter vivos trust for herself for life and then for her issue. She provided that the trustee should render accounts to her semi-annually but that the remaindermen should not be permitted to compel an accounting during her life. The clause was enforced, the court ruling that it was not against public policy. Although there was a statute invalidating exculpatory conditions, it was deemed applicable only to testamentary trusts.

32. For example, if the beneficiary's interest is minimal, it might seem inequitable to make the trustee render a formal accounting of a multi-million dollar trust.