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THE RACE FOR THE RES: COMPETITION FOR
THE CORPUS OF INTER VIVOS TRUSTS
IN PENNSYLVANIA

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THE TRUST INTER VIVOS is an inviting target, and various groups of claimants besiege its corpus. Against these onslaughts, the trustees fight the good fight. But their battle may have been lost the very day the trust was born for the attackers' most powerful artillery is concentrated on the rights retained by the settlor.

Yet—sympathize with the settlor. The *res*, after all, comes from him and if tax considerations are not paramount, he may be reluctant to yield control completely. He would probably like to receive income during his lifetime. He may want to postpone a final decision as to beneficiaries or allow for change by retaining power to appoint, revoke or amend the trust. Further, the settlor sometimes desires to retain a degree of control or power of approval over the trustees' management.

It is therefore up to the estate planner to explain to the settlor how the retention of these various rights will affect the trust's validity and inviolability. The difficulty is that the estate planner may not be sure himself, for we are dealing with a foggy patch of ocean. This article will consider two misty areas where judicial decisions invite—and perhaps defy—analysis. The problems are first, when can the settlor's creditors, present or future, satisfy their claims from trust corpus; and second, under what circumstances will an inter vivos trust be deemed "testamentary"?

THE SETTLOR'S CREDITORS AND TRUST CORPUS

While the right of a settlor's creditors to satisfy their claims from a trust fund is dependent upon the settlor's rights in such funds, the rights are not congruent.¹ Neither the settlor nor his creditor can reach the corpus of a trust if third parties have indefeasibly vested remainders in it; and both can reach corpus if settlor is a life tenant

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1. We are here dealing with rights in valid trusts. Creditors have also attempted to reach trust funds on the ground that the trust was invalid, ineffective or non-existent. See text and notes at page 599, *infra*.

and has the remainder or reversion.² But differences seem to appear as to the right to reach principal in comparing two similar types of trusts. There are, or seem to be differences between the rights of creditors and their settlor-debtors in each trust and differences between the creditors' rights to reach the corpus of the two types of trusts. In both, settlor retains income for life, but in one type of trust he retains a general power of appointment over the remainder, with named remaindermen in default of appointment, and in the other trust he grants the remainder to named persons or classes, but reserves a power of revocation. In both situations, obviously, a creditor can reach income since the settlor has the sole interest in it.³ The fact that a trust may be "spendthrift" is irrelevant; a settlor cannot create a spendthrift trust for himself.⁴

The right of creditors to reach the corpus lack such symmetry. When a settlor retains income for life and a general power of appointment, Pennsylvania cases hold uniformly that the settlor's creditors can satisfy their claims out of trust principal.⁵ This is so even if the appointment trust is *irrevocable*, and even if there are gifts over in default of appointment to named persons or classes. In this situation, the creditors' right to "invade" principal transcends that of the settlor, who can appoint beneficiaries of the remainder but generally cannot appropriate it for his own use.⁶ On the other hand, when a settlor retains income for life, names specific remainder beneficiaries, and retains a power of revocation, it is considered to be law in Pennsylvania that his creditors

2. Egberg v. DeSolms, 218 Pa. 207, 67 Atl. 212 (1907). Settlor had the right to apportion corpus among their children, but the gift of corpus to the children was vested and beyond the reach of settlor's creditors. But *cf.*, Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135 (1891), where income satisfied creditor's claim but the decision implied that he could have reached the corpus. As to settlor's rights, where he is also remainderman see text at page 612 *infra*.

3. Ghormley v. Smith, *supra* note 2. See also, Benedict v. Benedict, 261 Pa. 117, 104 Atl. 581 (1918); Rienzi v. Goodin, 249 Pa. 546, 95 Atl. 259 (1915); Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52 (1907); Mackason's Appeal, 42 Pa. 330 (1862).

4. Morton v. Morton, 394 Pa. 402, 147 A.2d 150 (1959); Schellentrager v. Tradesmen's Nat'l Bank & Trust Co., 370 Pa. 501, 88 A.2d 773 (1952); Bowers Trust Estate, 346 Pa. 85, 29 A.2d 519 (1943). *Cf.*, Chase Trust, 7 Pa. D.&C.2d 519 (Orphans' Ct. Phila. 1956); Goodell's Estate, 53 Pa. D. & C. 13, (Orphans' Ct. Phila. 1945).

5. Whether the settlor was solvent when the trust was created and whether the claimants were creditors before or after the transfer are irrelevant. The rule is not grounded on ordinary fraudulent conveyance principles, but on public policy against a settlor having the enjoyment of a *res* and yet protecting it from his creditors. See cases cited in note 3, *supra*; RESTATEMENT, TRUSTS § 156 (1935); GRISWOLD, SPENDTHRIFT TRUST § 478, 480 (2d ed. 1947).

6. McCreary Trust, 354 Pa. 347, 47 A.2d 235 (1946), where a gift in default of appointment was to a named class—children—and settlor could not terminate the trust because other present property interests were created which termination would prejudice.

cannot satisfy their claims from the corpus of the trust.⁷ If this is the correct interpretation of Pennsylvania law, then the settlor's creditors must go unpaid from the corpus even though the settlor can help himself to it by exercising his power of revocation.

It is submitted that the anomalous and undesirable results described above do not necessarily follow from the Pennsylvania decisions and the principles they enunciate. It is further submitted that there are no considerations of policy, logic, or even precedent which require that these two similar situations receive dissimilar treatment. On the contrary, all analytical approaches indicate that in both trust situations creditors should be able to reach trust principal.

The basic policy underlying the power of appointment cases is simply that you cannot have your cake and eat it too. You can put your property beyond your creditors by giving it away, or you can keep it, but not both. Time and again, when a settlor has had income for life, and the power to name the remainder beneficiaries, courts have held that *in reality* he still had enjoyment of the property—the equivalent of a fee—and that his creditors could obtain what the settlor enjoyed.⁸ Applying this same test to a trust where the settlor has retained income for life and a power of revocation, any realistic appraisal makes it clear that the settlor has more control (enjoyment) over the corpus than he has in a power of appointment trust. First, the settlor's right of revocation gives him a power to change the remainder beneficiaries equivalent to that of the settlor with a power of appointment.⁹ Moreover, the settlor with a power to revoke can actually regain some or all of the trust corpus, something the appointing settlor may never be able to do. Thus, if a life income settlor with a power of appointment has the equivalent of a fee, *a fortiori*, the life income settlor who can revoke possesses at least as much.

There is another policy reason why creditors should be able to reach the corpus of a trust revocable by the settlor; that is that one should be able to do directly what can be done indirectly. Under the Federal Bankruptcy Act, Sec. 70a (3), a trustee in bankruptcy is

7. *Murphey v. C.I.T. Corp.*, 347 Pa. 591, 33 A.2d 16 (1943); *Reimold v. Potter Bank and Trust Co.*, 17 Pa. D.&C.2d 530, 541 (C.P. Alleg. 1958); *McKee, The Validity of Inter Vivos Trusts*, 36 PA. B.A.Q. 33, 39-40 (1959).

8. See note 5 *supra*. It is this writer's position that this rule is eminently sound as between the settlor and his creditors. But the application of the rule has no bearing upon the validity of the trust. See pp. 599 to 601, *infra*.

9. A power to revoke encompasses a power to amend. *Schultz' Trust*, 395 Pa. 605, 151 A.2d 457 (1959); *Yost's Estate*, 87 Pa. D. & C. 40, 42 (Orphans' Ct. Phila. 1953); RESTATEMENT (SECOND), TRUSTS § 331, comment g (1959); 3 SCOTT, TRUSTS § 331.1 (2d ed. 1956). In any event, the settlor could revoke and republish the trust with substituted beneficiaries. *Schultz' Trust*, 8 Fiduc. Rep. 677 (Orphans' Ct. Lack. 1958), *aff'd on other grounds*, 395 Pa. 605, 151 A.2d 457 (1959).

vested with all rights which the bankrupt could have exercised for his own benefit, and under Sec. 70a (5), with all property which the bankrupt "could by any means have transferred".¹⁰ A right of revocation clearly falls within these descriptions.¹¹ Thus a creditor who could not have reached the corpus of a revocable trust in a state court could obtain the same result through an involuntary petition in bankruptcy.

An analysis of the property rights created under the two types of trusts provides no basis for dissimilar treatment of creditors. When a settlor creates a trust, retaining a life estate and power of revocation, and naming a remainderman, a vested remainder has been created.¹² This is a palpable property right with immediate value capable of being sold or assigned. It is no less vested because of the power of revocation although the remainder is, of course, subject to divestment if the power of revocation is exercised.¹³ Similarly, when the settlor reserves a life estate and general power of appointment and names a remainder beneficiary in default of appointment, a vested remainder has been created to the same extent and of the same type as in the revocable trust.¹⁴ The settlor cannot terminate a trust where such a vested remainder exists¹⁵ though the remainder can be divested if the power of appointment is exercised. In short, both trust dispositions create identical property rights, and both rights can be nullified by the settlors' acts. The vital fact is that each right, at creation, was subject to the control of the settlor. If the settlor's creditors can satisfy claims from the corpus in one type of trust because of the rights which the settlor retained, they should equally be allowed to do so in the other.¹⁶

Against these considerations arguing for similar treatment in both trust situations, there are no countervailing reasons for diverse

10. 30 STAT. 565 (1898) as amended, 11 U.S.C. §§ 110(a)(3), 110(a)(5).

11. 4 COLLIER, BANKRUPTCY ¶ 70.13 (14th ed. 1942); RESTATEMENT (SECOND), TRUSTS § 331, comment *o* (1959). It is not so clear that the bankruptcy trustee can reach the corpus where the settlor has a life income and a power of appointment, especially if the power is exercisable only by will. 5 AMERICAN LAW OF PROPERTY § 23.19 (Casner ed. 1952).

12. *Murphey v. C.I.T. Corp.*, 347 Pa. 591, 595, 33 A.2d 16, 18 (1943); *McKean's Trust*, 1 Fiduc. Rep. 26, 31 (Orphans' Ct. Phila. 1950); *Cf. Schellentragher v. Trademen's Nat'l Bank & Trust Co.*, 370 Pa. 501, 504-5, 88 A.2d 773, 774-75 (1952); *Shapley's Trust*, 353 Pa. 499, 46 A.2d 227 (1946).

13. See cases cited *supra* note 12.

14. *McCreary's Trust*, 354 Pa. 347, 47 A.2d 235 (1946); *DeCarlo v. Licini*, 156 Pa. Super. 363, 40 A.2d 127 (1944); *Reimold v. Potter Bank & Trust Co.*, 17 Pa. D.&C.2d 530, 537 (C.P. Alleg. 1958); RESTATEMENT, PROPERTY § 157(c), comments *o, p, r*, illust. 13 (1936).

15. *McCreary's Trust*, 354 Pa. 347, 47 A.2d 235 (1946); *Collins v. Provident Trust Co.* 83 Pa. D. & C. 459, 464 (C.P. Mtgy. 1952).

16. Section 11 of the Estates Act of 1947, PA. STAT. tit. 20 § 301.11 (1947), recognizes this identity, allowing a surviving spouse to treat as testamentary a conveyance reserving a power of appointment or a power of revocation.

treatment. One argument put forth as justification for barring creditors from the corpus of a revocable trust is that a settlor cannot be forced to exercise the power of revocation in favor of his creditors. In this view, a power of revocation is something personal to the settlor; an undetachable right that is buried alongside him.¹⁷ It is also suggested that the result is justified by a solicitude for the cestuis que trust.¹⁸ These arguments miss the point. When a settlor retains a power of appointment he is not "forced" to exercise the power in favor of his creditors, yet they can collect their debts from the corpus. The settlor may never exercise the power and the corpus may pass to the remaindermen in default of appointment, yet the settlor's creditors can reach the corpus because he has retained its enjoyment and control. In the same way, a settlor need not be "forced" to revoke the trust, but his creditors should be able to reach the corpus because of the substantial enjoyment and control the settlor has retained. No settlor's writing arm need be twisted.

Similarly, it is equally difficult to see how a power of revocation is any more personal than a power of appointment, or why beneficiaries of one trust are entitled to protection from creditors denied beneficiaries of the other. It is true that allowing creditors to satisfy claims from the corpus of a revocable trust lessens the value of the remainder interests but this is equally so in appointment trusts as to remainder interests in default of appointment. On any analysis, creditors' rights to the corpus should be the same as to both trusts.

That is what Pennsylvania law should be, but is it? The answer seems to be that creditors of settlors of both types of trust can reach the corpus, but creditors in revocable trust situations will have to clear some decisional hurdles to do so. It is crystal clear that creditors of a life estate settlor with a power of appointment can reach the corpus. Since *Mackason's Appeal* was decided in 1862,¹⁹ courts have held consistently that such a settlor has the equivalent of a fee and that to bar his creditors (even on post-trust debts) from the corpus would be

17. See cases and authorities cited *supra* note 7. See also, *Trusts—Inter Vivos or Testamentary? For What Purposes?*, 99 U. PA. L. REV. 879 (1951). Cf., *Dolan's Estate*, 279 Pa. 582, 589, 124 Atl. 176, 180 (1924) ("the right to revoke, unexercised, is a dead thing").

18. *Trusts—Inter Vivos or Testamentary? For What Purposes?*, 99 U. PA. L. REV. 879, 884 (1951), cites but disapproves cases containing this justification and the principle it supports. The cases cited as indicating such paternalism for the trust's beneficiaries all involve insurance policies where there is statutory authority for favoring beneficiaries. See *e.g.*, *Stutzman v. Fidelity Mut. Life Ins. Co.*, 315 Pa. 47, 172 Atl. 302 (1934); *Fidelity Trust Co. v. Union Nat'l Bank*, 313 Pa. 467, 169 Atl. 209 (1934).

19. 42 Pa. 330 (1862).

a fraud and against public policy. In *Mackason's Appeal*, the gift in default of appointment was to the settlor's heirs, but the case has since been followed without exception, even where the gift over was to named persons or classes and the trust was irrevocable.²⁰

The rights of creditors of a life estate settlor with power to revoke were not specifically before a court until the past two decades. But as early as 1886, a decision equated creditors' rights in revocable and appointment trusts. In *Dickerson's Appeal*,²¹ a settlor created various trusts by declaration and in one trust, declared for his daughter, retained both a life estate and a right to revoke. At his death, the settlor's widow attacked the trusts as testamentary, but the court held them valid inter vivos. The lower court decision, in discussing the revocable trust for the daughter, stated that it was valid against the widow although the trust ". . . in view of *Mackason's Appeal*, . . . could not be sustained against creditors."²² The supreme court affirmed, approving the decision below, and observing that the trust, unrevoked, was clearly valid "against everybody except creditors."²³ Thus the *Dickerson* dictum promised creditors of a life tenant-settlor of a revocable trust access to corpus equal to creditors' rights in appointment trusts.

But when creditors went after the corpus of a revocable trust in *Murphey v. C.I.T. Corp.*, the court barred the way.²⁴ There a husband and wife transferred entireties property to a spendthrift trust, income to both or the survivor for life, remainder to named persons, the spouses or the survivor also reserving the right to revoke. The wife had died and the husband's creditor claimed the right to satisfaction from income and corpus. The court allowed creditors to attach income on the ground that a settlor could not create a spendthrift trust for himself. But the court held that the corpus was inviolate because the trust was not testamentary, and created present interests in remaindermen, and because the creditor could not "force" the settlor to revoke. The court never considered the analogy of the case to decisions involving such creditors' rights in appointment trusts although, ironically, it relied upon *Dickerson's Appeal*.

20. *Benedict v. Benedict*, 261 Pa. 117, 104 Atl. 581 (1918) (gift to widow and children irrevocable); *Rienzi v. Goodin*, 249 Pa. 546, 95 Atl. 259 (1915) (irrevocable); *Ghormley v. Smith*, 139 Pa. 584, 21 Atl. 135 (1891) (irrevocable).

21. 115 Pa. 198, 8 Atl. 64 (1886).

22. *Id.* at 198, 8 Atl. at 65. The lower court decision is printed directly before the supreme court decision.

23. *Id.* at 210, 8 Atl. at 69.

24. *Murphey v. C.I.T. Corp.*, *supra* note 12, is considered the leading case in Pennsylvania for the proposition that the settlor's creditors cannot reach the corpus of a revocable trust even where the settlor is a life tenant. See *e.g.*, *Reimold v. Potter Bank & Trust Co.*, 17 Pa. D.&C.2d 530, 541-2 (C.P. Alleg. 1958) (dictum); *McKee, The Validity of Inter Vivos Trusts*, 31 PA. B.A.Q. 33, 39-40 (1959).

It is possible to devise a reasonable basis for distinguishing the *Murphey* decision by reading it in light of an earlier case arising from the same trust, *C.I.T. Corp. v. Flint*.²⁵ In the *Flint* case, the husband's judgment creditor had attempted, but failed, to set aside the trust as a fraudulent conveyance. The court upheld the trust on the ground that the property transferred had never been owned by the husband or subject to his debts; rather it was owned by the entiresities and the entiresities, not the husband, was the settlor.²⁶ The court expressly stated that if the husband had owned the property individually and retained life income and a power of revocation, his creditors could have reached the corpus, citing the power of appointment cases.²⁷ But the court also reaffirmed a settlor's right to create such interests—life estate and power of disposition over remainder—in *other beneficiaries* and to protect such interests from their creditors.²⁸ Such a conveyance is not a fraud on the beneficiary's creditors for the trust property does not emanate from the debtor, and whatever property rights are conferred on the beneficiary do not diminish his creditors' protection. Actually, the only issue ripe for decision in *Flint* was whether the conveyance was fraudulent. The creditor had also argued that, since the wife's death, the husband "owned" the trust property and the remainders were only testamentary transfers. This was left undecided and was the question on which *Murphey* passed.

With this background, *Murphey* should make sense. All the court had to remember was that the entiresities was the settlor, and the husband was only a beneficiary: The husband's creditors could not reach entiresities property, so the creation of the trust was no fraud on them, even if the beneficiary-debtor had control over the corpus' ultimate disposition. The creditors could not force the beneficiary to revoke, and they had no other claim on the property since it did not emanate from their debtor. Unfortunately, *Murphey* does not quite conform to this analysis. There, the court allowed the creditors to attach the husband's interest in income. If the husband was deemed

25. 333 Pa. 350, 5 A.2d 126 (1939).

26. *Id.* at 353-4, 5 A.2d at 127-28. The lower court ignored the ". . . anomalous, indeed, unique, nature of tenancy by entiresities." "The vital feature . . . is that the property was not one in which Flint had an individualized interest. The title legal and equitable, was in . . . a distinct legal entity . . .," the entiresities.

27. *Id.* at 353, 5 A.2d at 127. "[I]f Flint had owned the property . . . individually . . . and had executed *such a deed of trust*, the conveyance would have been in fraud of both his existing and future creditors. One cannot create a spendthrift trust in property for his own benefit, nor . . . exclude creditors while retaining the beneficiary interests and the incidents of ownership and control, as, *for example*, by . . . [spendthrift trust, life estate to himself] . . . with remainder to the use of his appointees by will, and in default of appointment, to the use of his heirs: . . ." (citing power of appointment cases). [Emphasis supplied].

28. *Id.* at 354, 5 A.2d at 129.

to be a beneficiary, then the spendthrift provisions should have been effective as to this interest. The court circumvented this difficulty by holding that the life estate had been reserved to the entireties (the settlor) and that the spendthrift provisions could therefore not apply even when that estate vested in the husband on his wife's death. The court's treatment of the power of revocation is less clear. The holding that the husband's creditor could not reach the corpus does not seem to be based on the fact that the husband held that right as a beneficiary. If anything, it intimates that revocation was reserved to the entireties and passed to the surviving husband. The basis stated for that holding is that the creditor cannot "force" the husband to revoke, and the only authority cited is the *Restatement of Trusts*, Sec. 330, comment "o" which states that a power of revocation "reserved by the settlor" cannot be reached by his creditors.

Read together, *Flint* and *Murphey* blur. The statement in *Flint* that if the husband had been the settlor, his creditors could reach the trust corpus appears at odds with the *Restatement* "rule", as cited in *Murphey*, relative to settlors. It should be emphasized that the main issue argued in *Murphey* was whether the trust was valid inter vivos or merely testamentary. Obviously, the trust was valid but that does not necessarily decide whether creditors can reach the corpus. The analogy to creditors' rights in appointment trust cases was not clearly met in the *Murphey* decision. What is clear is that the creditor who tried to reach the corpus was not the creditor of the settlor (the entireties) but of the husband. Despite the ambivalent characterization of the husband's position (settlor or beneficiary) vis-à-vis his enjoyment and control over the trust in *Murphey*, it is submitted that in fact the *Murphey* decision should be interpreted under the *Flint* rationale. The *Restatement* rule, as interpreted, produces nonsensical results and *Murphey* need not and should not be read as adopting such a rule.²⁹ Moreover, Comment "o" to Sec. 330 of the *Restatement*

29. Unfortunately, the *Murphey* case and § 330, comment o of the *Restatement of Trusts* have been interpreted as promulgating the rule that creditors of a settlor with a life estate and power to revoke cannot reach the corpus; *Reimold v. Potter Bank & Trust Co.*, 17 Pa. D.&C.2d 530, 541-42 (C.P. Alleg. 1958); *McKee, The Validity of Inter Vivos Trusts*, 31 PA. B.A.Q. 33, (1959). *RESTATEMENT (SECOND), TRUSTS* § 330, comment o (1959), contains the same rules as the original edition. Other than *Murphey*, the cases cited in the Pennsylvania Annotations to § 330, comment o of the *RESTATEMENT OF TRUSTS* are inapposite. *Fidelity Trust Co. v. Union Nat'l Bank of Pittsburgh*, 313 Pa. 467, 169 Atl. 209 (1934) (insurance trust: after settlor's death, his creditors cannot reach proceeds even though settlor could have revoked during his life, a case turning largely on the statutory protections of insurance proceeds from creditors); *Fleming's Estate*, 217 Pa. 610, 66 Atl. 874 (1907) (creditors cannot compel debtor to take against his wife's will); *Potter v. Fidelity Ins. Trust & Safe-Deposit Co.* (No. 2), 100 Pa. 366, 49 Atl. 86 (1901). (a premarital trust is not a fraud on settlor's wife); *Mullihan's Estate*, 157 Pa. 98, 27 Atl. 398 (1893) (executor cannot be forced to claim commissions).

of *Trusts*—the only authority *Murphey* cites for its decision—was misinterpreted. Sec. 330 of both the First and Second Restatement of Trusts merely states that the settlor can revoke a trust to the extent he reserved that power. Comment “o” speaks only of a settlor *with power to revoke*. It does not cover the situation of a settlor with power to revoke and a life estate. This distinction is highlighted by reading Sec. 156, Comment “c” of the same Restatement which allows a settlor’s creditors to reach principal if the settlor reserves “not only a life interest but also a general power to appoint the remainder. . . .” Thus Comment “o” of Sec. 330 should be read as barring the settlor’s creditors where he has retained power to revoke but no life estate.³⁰ Perhaps in Pennsylvania a creditor cannot force a settlor to revoke where other persons are both income and remainder beneficiaries,³¹ but this does not and should not alter the rule that a settlor with a life estate and control over the disposition of corpus possesses the fee as far as the creditors are concerned. With the *Restatement* rule in proper perspective, there is no basis for the *Murphey* decision, and it must either be interpreted narrowly as turning on the entireties conveyance, or fall.

If there has been any doubt as to whether creditors of a settlor in revocable and appointment trusts are to be treated similarly in Pennsylvania, it should be dispelled by the recent supreme court decision in *Morton v. Morton*.³² In that case, the settlor created a trust with income to himself for life, and the remainder to named persons. The settlor further reserved the right to add or substitute beneficiaries, or to vary their shares, by his own act,³³ but he could not amend other trust provisions without trustee approval. The trust was expressly declared to be irrevocable and contained “spendthrift” provisions. Creditors of the settlor,³⁴ whose claims could not be completely satisfied

30. This same distinction is made in 3 SCOTT, TRUSTS § 330.12 (2d ed. 1956). Mr. Scott records the rule that the creditors can reach the corpus where settlor is a trust beneficiary with a power of appointment. He then discusses the situation where a settlor has reserved power to revoke but “has not reserved a beneficial interest. . . .” and states that, generally, settlor’s creditors are there barred from the corpus.

31. In several states, statutes allow settlor’s creditors to reach the corpus even if only a power to revoke is reserved. ALA. CODE ANN. tit. 47, § 75 (1940); FLA. STAT. § 726.08 (1957); IND. STAT. ANN. § 56-610 (Burns 1933); KAN. GEN. STAT. ANN. § 67-414 (1949); MICH. STAT. ANN. § 26.104 (1937); MINN. STAT. ANN. § 502.76 (1945); N.Y. REAL PROP. LAW § 45; N.D. REV. CODE § 59-5035 (1943); OHIO REV. CODE § 1335.01 (Baldwin 1958); OKLA. STAT. ANN. tit. 60, § 267 (1949); S.D. CODE § 59.0444 (1939); WIS. STAT. § 232-13 (1955).

32. 394 Pa. 402, 147 A.2d 150 (1959).

33. The settlor had actually exercised his right to change beneficiaries several times.

34. Settlor’s wife and her attorneys. While a wife is a favored creditor, Stewart’s Estate, 334 Pa. 356, 5 A.2d 910 (1939), the attorneys are not, and the court’s decision

from income, attempted to reach the corpus of the trust. The court held that the creditors could reach the corpus, citing as authority the power of appointment cases. In other words, the court held that a settlor retaining income for life and the power to change beneficiaries has sufficient enjoyment or control over the trust so that his creditors can reach the corpus.³⁵ The *Morton* rationale must of necessity govern the revocable trust cases. This is absolutely certain since the supreme court's decision in *Schantz Trust*³⁶ that a power of revocation includes a power of amendment. Thus, a settlor with a life estate and power of revocation has as much and more interest in and control over his trust than the settlor in the *Morton* case, and it must follow that his creditors can also reach the corpus.

With *Morton*, the supreme court has obliquely but definitively settled the question of whether revocable trusts should be treated differently from power of appointment trusts vis-à-vis the settlor's creditors.³⁷ In declaring similar treatment for both types of trusts, the court has clarified a clouded question of law in consonance with the realities of the situation and in accordance with the underlying considerations of policy.

CIRCUMVENTING THE INTER VIVOS TRUST

Despite the increasing use of the "living trust" there are many who wish it were dead. Various claimants attempt to insert their claims to trust corpus ahead or instead of beneficiaries, by denying that the trust ever existed or was operative inter vivos. These claimants include the surviving spouse,³⁸ the estate or heirs of the settlor,³⁹ creditors,⁴⁰

is not based on the wife's special situation, but applies to any creditors of the settlor.

35. This precise question has rarely been decided. An excellent discussion of the entire question, reaching the same conclusion as the *Morton* case, is found in *Cooke's Trust Co. v. Lord*, 41 Hawaii 198 (1955).

36. 395 Pa. 605, 151 A.2d 457 (1959).

37. The question of *Morton's* effect on *Murphey v. C.I.T. Corp.* must be left open. *Murphey* has either been overruled or must be limited to trusts created by the entireties. If the latter, a settlor might reach for insulation from his creditors by first conveying property to the entireties and having it create the trust. Such subterfuge can be minimized by judicial scrutiny. If the trust's creation had been preceded by a conveyance to the entireties, the entireties should be deemed an agent and the transferring spouse the settlor. Cf., *Sheasley's Trust*, 366 Pa. 316, 77 A.2d 448 (1951); *King v. York Trust Co.*, 278 Pa. 141, 122 Atl. 227 (1923).

38. See e.g., *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914); *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891); *Vederman Estate*, 78 Pa. D. & C. 207 (Orphans' Ct. Phila. 1951); *Hurley's Estate*, 17 Pa. D. & C. 637 (Orphans' Ct. Phila. 1932).

39. See e.g., *Beaumont's Estate*, 214 Pa. 445, 63 Atl. 1023 (1906); *Reese's Estate*, 317 Pa. 473, 177 Atl. 792 (1931); *Pengelly Estate*, 374 Pa. 358, 97 A.2d 844 (1953).

40. See e.g., *Kenin's Trust Estate*, 343 Pa. 549, 23 A.2d 837 (1942). Cf., *Reiniger's Estate*, 36 Pa. D. & C. 163 (Orphans' Ct. Berks 1939).

the Commonwealth,⁴¹ and, quite frequently, the disgruntled settlor himself.⁴² It is possible to distill four main contentions used to attack trusts inter vivos which have been in fashion over the years. First, the trust is "testamentary" because made for the settlor's convenience; second, the trust is "testamentary" because it is a mere agency controlled by the settlor; third, the trust is revocable because fraudulently made irrevocable; fourth, the trust is terminable or testamentary because it creates no new property interests.

Out of this unremitting legal battle has come a welter of decisional law concerning the validity of inter vivos trusts. While these cases have provided some illumination they have, to a large extent, commingled the principles underlying all four attacks on such trusts, thus injecting confusion into an already amorphous area. *Hurley's Estate*,⁴³ is an apt illustration. There, the settlor created a trust naming a bank as trustee, with income payable to him for life and, at his death, remainder to designated grandchildren. The settlor retained power to amend or revoke. On its face the trust appears perfectly valid creating a vested remainder in the grandchildren subject to divestment by revocation.⁴⁴ But the court held, without any evidence but the trust deed, that the conveyance was "testamentary" and for the settlor's personal convenience and that, therefore, no present interests were created relying on *Frederick's Appeal* and *Rick's Appeal*.⁴⁵ As to the power of revocation, the court remarked that if the document is "testamentary" it is revocable whether it contains the power or not, but the existence of the power, while it implies an intent to create a valid deed of trust, is not controlling. Yet later in the opinion, the court pointed to the power of revocation as one item indicating the testamentary nature of the conveyance! On rehearing, the court indicated another basis for its decision by emphasizing that the trust ended at the settlor's death and the *res* was then payable to the remainderman, just as under a will. *Hurley* typically utilizes most of the generalizations found in these

41. See *e.g.*, *Glosser Trust*, 355 Pa. 210, 49 A.2d 401 (1946); *Myers' Estate*, 309 Pa. 581, 164 Atl. 611 (1932).

42. See *e.g.*, *Schellentrager v. Tradesmen's Nat'l Bank & Trust Co.*, 379 Pa. 501, 88 A.2d 773 (1952); *Bowers' Trust Estate*, 346 Pa. 85, 29 A.2d 519 (1943); *Rehr v. Fidelity-Philadelphia Trust Co.*, 310 Pa. 301, 165 Atl. 380 (1933); *Sturgeon v. Stevens*, 186 Pa. 350, 40 Atl. 488 (1898); *Long v. Tradesmen's Nat'l Bank*, 108 Pa. Super. 363, 165 Atl. 56 (1938); *Chase's Estate*, 7 D.&C.2d 519 (Orphans' Ct. Phila. 1956).

43. 16 Pa. D. & C. 521 (Orphans' Ct. Phila. 1931), petition for review dismissed, 17 Pa. D. & C. 637 (Orphans' Ct. Phila. 1932).

44. *Shapley's Trust*, 353 Pa. 499, 46 A.2d 227 (1946); *Lyons' Trust*, 164 Pa. Super. 140, 63 A.2d 415 (1949); *Reimold v. Potter Bank & Trust Co.*, 17 Pa. D.&C.2d 530 (C.P. Alleg. 1958); *McKean's Trust*, 71 Pa. D. & C. 429 (Orphans' Ct. Phila. 1951).

45. *Frederick's Appeal*, 52 Pa. 338 (1886); *Rick's Appeal*, 105 Pa. 528 (1884).

cases, in rather circular fashion. Thus a purported trust inter vivos is nugatory if "testamentary"; it is "testamentary" if the deed is for the personal convenience of the settlor and creates no present interests in others; and it creates no present interests if it is intended to take place at death—in other words, if it is testamentary. None of these abstractions gives any meaningful decision-making content to the others, and judges must and do resort to more factual material. The mingling of these principles results from the jumbling together of decisions based upon all four attacks made on inter vivos trusts. In the process, principles intended to operate very narrowly have been converted into broad rules of law.

*When Is An Inter Vivos Trust Testamentary? The Saga
Of Frederick's Appeal.*

One of the warhorse cases in the battle against the inter vivos trust is *Frederick's Appeal*,⁴⁶ a decision whose treatment by the courts would gladden the heart of any reader of Lewis Carroll. The case has been distinguished, criticized, restricted to its facts, and even declared defunct, yet it has survived to be cited again and again with approval.⁴⁷ In *Frederick's Appeal*, the settlor created a trust in 1853 and later tried, but failed, to cancel it on the grounds of fraud and weakmindedness. In 1865, the settlor executed a paper "revoking" the trust and in his will treated the trust *res* as part of his estate. The deed of trust recited that the settlor had suffered losses and debts because of his old and feeble condition, that he was incapable of handling his estate, and that the trust would spare him "much care and trouble." The trustees were to support the settlor for life and divide the *res* among his children one year after his death. The court emphasized the voluntary nature of the deed and held that its manifest intent was to promote the settlor's convenience and protect his own interests. In other words,

46. *Supra*, note 45.

47. *Mason's Estate*, 395 Pa. 485, 150 A.2d 542 (1959) (approved); *Curry's Appeal*, 390 Pa. 105, 134 A.2d 497 (1957) (declared defunct); *Pengelly Estate*, 374 Pa. 358, 97 A.2d 844 (1953) (approved); *Damiani v. Lobasco*, 367 Pa. 1, 79 A.2d 268 (1951) (limited); *Shapley's Trust*, 353 Pa. 499, 46 A.2d 22 (1946) (approved); *Tunnell's Estate*, 325 Pa. 554, 190 Atl. 906 (1937) (approved); *Beaumont's Estate*, 214 Pa. 445, 63 Atl. 1023 (1906) (followed); *Kraft v. Neuffer*, 202 Pa. 558, 52 Atl. 100 (1902) (restricted); *Potter v. Fidelity Ins. Trust & Safe-Deposit Co.* (No. 1), 199 Pa. 360, 49 Atl. 85 (1901) (restricted); *Rynd v. Baker*, 193 Pa. 486, 44 Atl. 551 (1899) (restricted); *Wilson v. Anderson*, 186 Pa. 531, 40 Atl. 1096 (1898) (restricted); *Sturgeon v. Stevens*, 186 Pa. 350, 40 Atl. 488 (1898) (approved); *Chestnut St. Nat'l Bank v. Fidelity Ins. Trust & Safe-Deposit Co.*, 186 Pa. 333, 40 Atl. 486 (1898) (followed); *Rick's Appeal*, 105 Pa. 528 (1884) (followed); *Mack's Appeal*, 68 Pa. 231 (1871) (distinguished); *Hurley's Estate*, 16 Pa. D. & C. 521 (Orphans' Ct. Phila. 1931) (followed); *Hill's Estate*, 15 Pa. D. & C. 699 (Orphans' Ct. Phila. 1931) (approved).

it was not really a trust at all but simply an agency relationship and therefore no interests were created in the children "remaindermen". Any disposition of the corpus to them was intended to take place after their father's death. At most, it was a testamentary disposition or will, superseded by the later will. Even in its day, *Frederick's Appeal* was rather extraordinary, for cases both before and shortly after it sustained inter vivos trusts as valid, even when the settlor had retained a life estate,⁴⁸ and there was no element of fraud involved. Yet the case has fathered two lines of cases holding inter vivos trusts to be testamentary: (1) if the trust is for the settlor's personal convenience; (2) if the settlor has retained a life estate with control over management.

*Trusts Testamentary Because For Settlor's
Personal Convenience.*

The court in *Frederick's Appeal* laid heavy emphasis on the fact that the trust was a voluntary (non-contractual) conveyance and that it was for the settlor's personal convenience and thus a mere agency. Deeds of trust are generally voluntary conveyances and one may assume that if a trust did not suit a settlor's convenience he would not create it. Neither factor seems sufficient ground for ignoring trust conveyances. Yet this aspect of the case, what we shall call the personal convenience doctrine of *Frederick's Appeal*, has had considerable vogue. Thus, in *Rick's Appeal*,⁴⁹ where the court could have allowed revocation on the ground of fraudulent inducement, it instead chose to hold that the trust was for the settlor's personal convenience, thus a mere agency, testamentary and therefore revocable. *Sturgeon v. Stevens*,⁵⁰ involved a trust created by a mother because of her son's anxiety to see that he got the fund at her death. The mother retained a life interest and the court held the conveyance testamentary, citing *Frederick's Appeal*. Again, in *Chestnut Street National Bank & Fidelity Insurance Trust and Safe Deposit Co.*⁵¹ where the settlor retained a life estate, remainder to her sons, the court held that because of the retention of the life estate the trust must be deemed a mere agency for her personal convenience and thus testamentary, following *Frederick's Appeal*. In *Beaumont Estate*,⁵² the settlor put bonds in

48. *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64 (1887); *Ashurst's Appeal*, 77 Pa. 464 (1875); *Greenfield's Estate*, 14 Pa. 489 (1850); *Reese v. Ruth*, 13 S. & R. 435 (Pa. 1825).

49. 105 Pa. 528 (1884); see text at page 610, *infra*.

50. 186 Pa. 350, 40 Atl. 488 (1898).

51. 186 Pa. 333, 40 Atl. 486 (1898).

52. 214 Pa. 445, 63 Atl. 1023 (1906).

trust to use their income for payment of insurance premiums. The proceeds of the policies were to be paid to named persons, but not to his wife who claimed the property as administratrix. A right to revoke was retained but not exercised. The court held that the trust was for the settlor's personal convenience, citing *Frederick's Appeal*, and gave the proceeds to the estate. The personal convenience doctrine has obvious appeal to an advocate for when all else is lost he can attack the trust as one for the settlor's personal convenience and thus a mere agency. Nevertheless, this principle of *Frederick's Appeal* has been sharply criticized, restricted and left for dead.⁵³ Even so, the corpse was lively enough as late as 1932 to be the basis for the decision in *Hurley's Estate*, *supra*. But when the principle was recently relied upon in *Curry Appeal*,⁵⁴ the supreme court took the occasion to announce that: "There is no vitality remaining in this doctrine of *Frederick's Appeal* and its following; these cases do not declare the law in Pennsylvania."⁵⁵ *Requiescat in pace*—maybe.⁵⁶

Trusts Testamentary Because Of Settlor's Life Estate And Control Of Management; The Details Of Administration Rule.

Whether the personal convenience doctrine has been laid to rest or not *Frederick's Appeal* has also been cited by the courts as authority for another, more vexatious, principle; a recent doctrine sometimes called the "mere agency" rule. This doctrine concedes that a trust is not rendered invalid even if the settlor reserves a life estate and power to revoke. But if, in addition, the settlor reserves the power to control the trustee as to the details of the trust's administration, the trust is a mere agency and testamentary.⁵⁷ The authority most frequently cited for this proposition is dictum in *Shapley Trust*.⁵⁸ In *Shapley*, the court held that an inter vivos deed was not testamentary and that the

53. In *Wilson v. Anderson*, 186 Pa. 531, 538, 40 Atl. 1096, 1098 (1898), the court declared that *Frederick's Appeal* "stands by itself; it is not authority for the sweeping proposition that every voluntary trust [whose grantor has a life estate] . . . is a testamentary instrument. . . . We do not favor an extension of the doctrine of *Frederick's Appeal supra*, an exceptional case. . . ." Yet 186 Pa. also reports *Sturgeon v. Stevens*, at 350, and the *Chestnut St. Nat'l Bank* case at 333, which rely on *Frederick's Appeal*. See also, cases *supra* note 47.

54. 390 Pa. 105, 134 A.2d 497 (1957).

55. *Id.* at 111, 134 A.2d at 500.

56. *Shapley's Trust*, 353 Pa. 499, 501, 46 A.2d 227, 228 (1946) cites *Hurley's Estate* and *Frederick's Appeal*, with approval, and that portion of *Shapley* was quoted with approval in *Mason's Estate*, 395 Pa. 485, 491, 150 A.2d 542, 546 (1959). See *Bookstaver*, *Trusts*, 20 U. PITT. L. REV. 401, 407 (1958).

57. RESTATEMENT, TRUSTS, § 57 (1935). Section 57(2) states the details of administration rule. Section 57(3) deals with declaration of trusts, stating that where settlor reserves a life estate, power to revoke and the right to do as he pleases with the property, it is testamentary.

58. 353 Pa. 499, 46 A.2d 22 (1946).

reserved power to revoke had not been exercised. However, the court went on to enunciate the "details of administration" rule citing *Frederick's Appeal* and other cases as support for the rule, although the cases are not really in point. In *Frederick's Appeal*, the settlor retained no control over trust management; he created the trust precisely because he was incompetent to manage his own affairs and the court held that for that reason the trust was a mere agency created for the settlor's convenience. The other cases cited by *Shapley* also are based on the "personal convenience" doctrine and are similarly not in point.⁵⁹ This confusion of precedent stems from the fact that the *Frederick's Appeal* case and the *Shapley Trust* dictum both operate to reduce a trust to a "mere agency". There is no other similarity and the "personal convenience" cases cannot be deemed authority for *Shapley's* "details of administration" doctrine. This doctrine is of relatively recent vintage in Pennsylvania and emanates from Section 57 (2) of the *Restatement of Trusts*. It is undesirable both in theory and in practice.

The theory underlying the rule against allowing the settlor to control the management of an inter vivos trust is that he has retained all the indices of a fee. It is conceded that a settlor can retain a life estate and also a power of revocation. If he can also control the management and investment of the trust *res*, the argument runs, he has parted with nothing⁶⁰ and the trustee only carries out the settlor's orders. Although the "details of administration" cases habitually cite *Frederick's Appeal* and its progeny,⁶¹ they gain no strength from these inapposite holdings. Thus the theory must defend itself without benefit of such hoary precedent.

Let us test the theory against an example. *A* creates a trust naming *B* bank as trustee, directing income to be paid to him for life, and to *C* for life after *A's* death with remainder payable at the death of *C* to *D*. *A* retains a power to revoke the trust but this in no way affects the inter vivos validity of the trust.⁶² The trust is equally un-

59. The *Shapley* dictum also cited *Turner v. Scott*, 51 Pa. 126 (1866) (where settlor's deed specifically disclaimed creation of present interests); *Beaumont's Estate*, 214 Pa. 445, 63 Atl. 1023 (1906) (a life insurance trust held to be for settlor's personal convenience) and *Hurley's Estate*, 16 Pa. D. & C. 521 (Orphans' Ct. Phila. 1931) (which followed *Frederick's Appeal* to invalidate a trust reserving no power of control to settlor).

60. *Trusts, Inter Vivos or Testamentary? For What Purposes?* 99 U. PA. L. REV. 870, 880-81 (1951).

61. See *e.g.*, *Pengelly Estate*, 374 Pa. 358, 364, 97 A.2d 844, 847 (1953).

62. *Mason's Estate*, 395 Pa. 485, 150 A.2d 542 (1959); *Shapley's Trust*, 353 Pa. 499, 46 A.2d 22 (1946); *Reese's Estate*, 317 Pa. 473, 177 Atl. 792 (1931); *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914); *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891); *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64 (1886); *Lyon's Trust*, 164 Pa. Super. 140, 63 A.2d 415 (1949).

affected if *A* authorizes the trustee to invest the corpus as it considers best without restriction to legal investments. The trustee will manage the trust as best it can and pay net income and the remainder as directed by the terms of the trust. Now suppose that *A* instructs *B* bank to invest the corpus pursuant to his directions. Since the trustee could be given the broadest powers of investment, *A*'s control does not necessarily alter investment policy. The returns from such investment are still governed by the trust's dispositive terms and the protections embodied in trust law generally. Why then is the validity of the trust destroyed by *A*'s control of its management? If *A* wanted control over the trust management, he could have named himself a co-trustee and the trust's existence would not be thereby impaired.⁶³ He could go one step further and name himself as sole trustee. Obviously, a settlor under a declaration of trust retains complete control over management. A declaration can even allow the settlor-trustee to make unrestricted types of investment. No one at this point would question that declarations of trust are valid in Pennsylvania.⁶⁴ But the authorities have suggested that when a settlor makes a declaration of trust he has only a limited control over the *res* even with a life estate and power of revocation. This is so, they say, because the settlor-trustee's management and control is governed and regulated by the trust's terms and the law enunciating his fiduciary duties—he cannot deal as he likes with the property.⁶⁵ This contention overlooks the fact that any time the settlor desires to deal with the property as he likes, he can revoke the trust. At any rate, the settlor-trustee retains as much or more control over the administration and management of the trust as the settlor who names a third party trustee but retains control over trust management. In both situations disposition of income and corpus are equally subject to the trust's terms. To hold the former valid *inter vivos* and the latter testamentary is to fly in the face of reason.

In practice, the "details of administration" rule has resulted in utterly inconsistent decisions. In *Tunnell Estate*,⁶⁶ the settlor regis-

63. *E.g.*, *Glosser's Trust*, 355 Pa. 210, 49 A.2d 401 (1946) where settlor was co-trustee.

64. *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64 (1886); *RESTATEMENT, TRUSTS*, § 57 comment *b* (1935). *Cf.*, *Tunnell's Estate*, 325 Pa. 554, 190 Atl. 906 (1937). However, the *RESTATEMENT OF TRUSTS*, § 57, states that if the settlor declares himself trustee and reserves a life estate, power of revocation and the right to deal with the property as he likes, it is testamentary.

65. *RESTATEMENT, TRUSTS*, § 57, comment *b* (1935); *SCOTT, TRUSTS*, § 57.6 (2d ed. 1956).

66. 325 Pa. 554, 190 Atl. 906 (1937). *Tunnell* is the first direct holding based on settlor's control over the *res*. In *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914), the court found no evidence that the settlor continued to exercise his

tered certain bonds in his name as trustee for designated persons. He also wrote letters declaring himself trustee but conditioning the trust on his retaining full power to receive interest and to sell the bonds; however, he reaffirmed the obligations of his personal representative to transfer the bonds to the beneficiaries when he died. As to one bond, the settlor wrote on the back of an envelope that it would become the property of a named person at his death. The bonds were kept in the settlor's deposit box until his death. The contest was between the *cestuis que trust* and the settlor's widow who took against his will. The supreme court held that the evidence was too uncertain and indefinite to show that the settlor intended to create personal trusts.⁶⁷ The court also said that the settlor's letters showed that he retained such dominion over the bonds that no rights vested in the beneficiaries, citing Section 57 of the first *Restatement of Trusts*. Declarations of trust, even where the settlor retained a life estate and power to revoke, were expressly approved, but the court felt that the settlor here had retained the power to deal with the property as he liked.

Vederman Estate,⁶⁸ decided in Philadelphia's orphans' court by Judge Mark Lefever, is a similar holding. There the settlor who died in 1949, stated in his will that he had made no provision for his wife or daughter therein because he had provided for them from other sources. The evidence indicated that no such provision had been made. In 1945, the settlor had transferred property in trust. Income was payable to him for life, remainder to seven charities, and he had retained a power to revoke the trust. The powers given the trustees were exercisable by them only if and when the settlor so directed and the trustees' duty was to follow his directions. The court held that the wife, taking against the will, could also take against the "testamentary" trust. The trust was testamentary because under the "details of administration" rule, the trustees were mere agents of the settlor, who also had an unlimited right to revoke, to amend and to speculate with the property. Significantly the court also emphasized that it would "not lightly" exclude his widow from the trust *res*, and that her claim ". . . will be viewed . . . in a benign spirit, intent upon protection of her rights."

right as owner, but intimated that if such evidence were present the trust would be voided as testamentary. See *Bullock's Estate*, 79 Pa. D. & C. 389 (Orphans' Ct. Dauph. 1951), following *Tunnell*.

67. The court distinguished *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64 (1886) and *Smith's Estate*, 144 Pa. 428, 22 Atl. 916 (1891) as cases where settlor's intention to create a trust clearly appeared, as opposed to the instant case.

68. 78 Pa. D. & C. 207 (Orphans' Ct. Phila. 1951).

However, in the same year that the orphans' court decided *Vederman*, the supreme court upheld an inter vivos trust giving the settlor broad power in *Sheasley Trust*.⁶⁹ There a father had transferred real and personal property to his sons who immediately executed a declaration of trust, but the court treated the father as a settlor. Income was payable to him during his life and after his death to his children or their issue. He had also retained the right to "manage, lease, sell or otherwise dispose of any or all of [the *res*] . . . and receive the entire income or proceeds." One of the settlor's sons and one of his grandsons had assigned their claims under his will (but not his trust) to the Federal Deposit Insurance Corporation, so that if the trust were testamentary, the FDIC took their interests. The court held that the trust was valid and created immediate rights in the beneficiaries, although enjoyment was postponed until the settlor's death. The court construed the settlor's power to sell the trust property and retain the funds as the equivalent of a power to revoke and reaffirmed the principle that a life estate, plus a power to revoke, does not invalidate a trust. But the settlor had also reserved a power to "manage" and this would seem to bring *Sheasley* within the holding of *Tunnell's Estate*, *supra*. The court distinguished *Tunnell* on the fact that there the trusts were created by informal letter and by registering the bonds in the settlor's name as trustee. In *Sheasley*, the court emphasized the "formality of the transaction", saying that with a formal deed of trust it was less likely that the trustee was the settlor's agent.

It was hoped that, with *Sheasley Trust* and its emphasis on formality, the supreme court was moving toward renunciation of the "details of administration" doctrine.⁷⁰ But these hopes were dashed when the supreme court considered and struck down an inter vivos trust in *Pengelly Estate*,⁷¹ which on its face was, if anything, less offensive than the trust which the court had upheld in *Sheasley*. In *Pengelly*, the settlor had executed a formal deed of trust and transferred securities to a trustee. Income was payable to the settlor for life and remainder was payable to a "housekeeper". The settlor also reserved the right to invade the corpus, and the trustee was to manage and invest the property with the approval of the settlor during his lifetime. At the settlor's death his wife took against his will and attacked the trust as testamentary. The court agreed, basing its decision on the "details of administration" doctrine, citing the *Shapley Trust*

69. 366 Pa. 316, 77 A.2d 448 (1951).

70. *Trusts Inter Vivos or Testamentary? For What Purpose?*, 99 U. PA. L. REV. 879, 880-81 (1951).

71. 374 Pa. 358, 97 A.2d 844 (1953).

dictum. It found the settlor had retained not only a life estate and power to revoke but also complete control over the trust's management, despite the language in the deed requiring the trustee to manage with the settlor's approval. The court relied heavily on the fact that prior to the trust's creation, the trustee had bought and sold securities for the settlor. The trustee testified that he had made investment recommendations to the settlor, who accepted or rejected them. After the trust's creation, the same procedure was followed as to investments, although the securities were transferred to the trustee's name. The court attempted to distinguish *Sheasley Trust*—where the settlor had a direct right of management—on the ground that there was no “agency relationship” in that case. Also emphasized was the status of the claimants; although the widow could not take against the trust under the Estates Act of 1947, the court held that act confirmatory of a “long existing public policy . . . to protect the rights of widows”.⁷² The court did not even mention the formality of the deed which it had found so important in *Sheasley*, and *Pengelly* and *Sheasley* must be viewed as irreconcilable on an analysis of their facts. The fact that there had been a prior agency relationship in *Pengelly* did not alter the powers retained by the settlor. That the settlor had gone to the trouble of preparing a formal deed creating interests in parties who had none theretofore and had conveyed to the trustee property previously held by him indicated that he intended to create something more than the prior “agency relationship.” In fact, the settlor in *Sheasley* retained stronger and more direct control over the trust management than in *Pengelly*, and both documents were of similar formality. The real distinction is that the upholding of the trust in *Sheasley* benefited the objects of the settlor's bounty at the expense of the FDIC, and nullifying the trust in *Pengelly* benefited the settlor's wife at the expense of the “housekeeper”.

It is also interesting to compare *Pengelly Estate* with the earlier case of *Windolph v. Girard Trust Co.*⁷³ There the settlor transferred assets in trust to her elderly mother as trustee, income to the settlor for life with annuities after her death and the remainder to her brothers' issue and charity. The settlor also reserved a right to revoke and the trustee could invest in non-legals only with the settlor's written consent. The evidence showed that the trustee was reluctant to act as trustee unless she could be relieved of the details of administration, and she

72. *Id.* at 369, 97 A. 2d at 849. The trust preceded the Estates Act of 1947, PA. STAT. tit. 20 § 301.11 (1947). The solicitude for the wife is diluted somewhat by the fact that she and settlor had been separated for 39 years preceding his death.

73. 245 Pa. 349, 91 Atl. 634 (1914).

consulted the settlor and her attorneys on investments. The referee further found that for ten years prior to the trust, the trustee had been in the habit of submitting mortgage investments to the settlor and had consulted her on mortgage investments⁷⁴ after the trust's creation. Despite this control over administration and evidence of investment consultation prior to the trust's creation, the court held the trust valid inter vivos. *Pengelly* distinguished *Windolph* on the ground that the trustee could invest in legals without consultation and ignored the evidence of prior relationships.

The supreme court's recent decision in *Mason Estate*,⁷⁵ does not particularly clear the air. In that case, a legatee contended, in behalf of himself and creditors, that a real estate trust was testamentary where the settlor reserved a life estate and power to revoke, and directed the remainder be paid after his death to income and then remainder beneficiaries. The trustee could mortgage or sell real estate but during the settlor's life, only with his consent. Actually, the settlor had mortgaged two properties by having the trustee reconvey executing the mortgage and then conveying again to the trustee. The legatee emphasized these activities plus the settlor's life estate and power to revoke, relying on *Pengelly* and *Shapely*. The court held the trust valid inter vivos, relying on *Windolph v. Girard Trust Co.*, *supra*, and *Shapley Trust*. The court quoted a long passage from *Shapley*, including the "details of administration" dictum, and the citation of *Frederick's Appeal*, but held the *Mason* trust not governed by that doctrine, *Pengelly Estate* was distinguished because it merely continued the previously existing agency.

As the precedents now stand, one never knows how the court will decide when an inter vivos trust is attacked as testamentary. It is possible to point to the factors that courts consider in deciding whether to uphold or to invalidate such trusts but it is not possible to predict which factors the courts will emphasize in any given case. Even the strongest case is not entirely free from doubt. Many decisions have held that the settlor's retention of a life estate and power to revoke does not render a trust testamentary. Yet in *Hurley's Estate*, *supra*, these factors were considered strong evidence of a testamentary intent. Of course, *Hurley* relies on *Frederick's Appeal*, and the "personal convenience" doctrine of that case was declared dead in *Curry Appeal*. Unfortunately, the court frequently quotes the passage in *Shapley Trust*

74. *Id.* at 355-57, 91 Atl. at 636. In the *Windolph* case the trustee could have invested in legals, but not non-legals without the settlor's consent. The referee indicated that the trustee made the final decision on mortgages, "but always after consultation with Mrs. Windolph" (the settlor). In the *Pengelly* case, the settlor had veto power under the document.

75. 395 Pa. 485, 150 A.2d 542 (1959).

which includes a citation of *Frederick's Appeal*. This was done in *Mason Estate*, which the supreme court decided after *Curry*, and thus *Mason* seems to cite *Frederick's Appeal* with approval, suggesting that the ghost of *Frederick's Appeal* still haunts the law.

Most of the other factors which the courts consider are inconsistently applied. Thus, one factor which courts apparently construe as indicating a testamentary intent is whether the trust corpus is payable to remaindermen at the settlor's death as in *Hurley's Estate* and *Tunnell Estate*. Yet in *Shapley's Trust*, that factor did not render the trust testamentary. Another element considered by the courts is the relationship of claimants involved. Frequently, as in *Pengelly*, *Hurley* and *Vederman*, the court will void a trust to enable the widow to share the *res*, or as in *Sheasley Estate*, will uphold a trust in favor of beneficiaries against assignees. A court may even attempt to intuit the actual intention of a settlor, as in *Hurley's Estate*, despite the apparent validity of the trust instrument. The fact that the settlor retained power to control management of administration of the trust was significant in invalidating trusts in *Tunnell Estate*, *Vederman Estate*, and *Pengelly Estate*, but was minimized in *Sheasley Estate*.

Another factor sometimes of importance is the formality with which the trust was created. Thus, in *Tunnell Estate*, trusts were ignored where they were created by letters or writing on the backs of envelopes. In *Sheasley Estate*, a trust was held valid because great emphasis was placed on the formality of its creation. Yet, in *Pengelly Estate*, similar formality was ignored in holding a trust testamentary. The hope that *Sheasley* presaged the demise of the "details of administration" rule has not been realized, since *Pengelly Estate* followed that rule and *Mason Estate* mentions it with approval. On the other hand, the decision in *Mason Estate* indicates that the supreme court is moving to restrict *Pengelly* to its facts, and the extent of the "details of administration" rule must therefore await further clarification. *Pengelly's Estate* may yet become the *Frederick's Appeal* of the twentieth century.

Trusts Revocable For Fraud Or Mistake.

There is another line of cases under whose authority valid inter vivos trusts which are expressly irrevocable can be revoked, usually by the settlor. Illustrative of these decisions is *Rick's Appeal*,⁷⁶ where a 75 year-old woman had executed a deed of trust, income to herself

76. 105 Pa. 528 (1884).

for life remainder to her children. There was no power of revocation and in fact the settlor had been expressly told that such a clause could not be included. Such a misrepresentation was a palpable fraud, sufficient in itself to render the trust voidable. When the settlor petitioned to revoke the trust, the fraud was given the short shrift it deserved, and the trust was revoked. The result is perfectly proper, but the rationale is untidy. The court held the case to be on all fours with *Frederick's Appeal*, thus a mere agency or will, revocable at any time, and *Rick's Appeal* has been cited as one of the "personal convenience" cases. During this earlier period, the existence of an inter vivos trust without a power of revocation was viewed with extreme suspicion. *Russel's Estate*,⁷⁷ created a virtual presumption of fraud in the absence of a power of revocation, and this presumption has had its vogue.⁷⁸ The doctrine has been outgrown, but its basis was fraud, and the intrusion of the "personal convenience" doctrine, with its "mere agency" and "no present interest" jargon has only muddied the waters.⁷⁹ The *Rick's Appeal* type cases cause no difficulty on their facts. But care must be used to see that the more generalized principles used as the basis for such decisions are not taken seriously.

The No Present Interests Rule.

It is Hornbook law that a will creates no present interests, while a trust inter vivos does. Thus, in every case where a court has struck down a trust as testamentary, it has additionally stated that the trust created no new interests. Such "holdings" are so obviously conclusions rather than bases for decision that they need not be considered further. The only decision which actually turned on the absence of present interests is *Turner v. Scott*,⁸⁰ where the settlor specifically stated that "this conveyance in no way to take effect . . . (until settlor's death)." The existence of present interests is of importance in decisions determining whether the settlor can terminate an inter vivos trust. It is

77. 75 Pa. 269 (1874).

78. See *e.g.*, *Sturgeon v. Stevens*, 186 Pa. 350, 40 Atl. 488 (1898); *Hood v. Leach*, 29 Pa. Dist. 517 (C.P. Phila. 1920).

79. Of course, any trust can be revoked when it is made irrevocable by mistake or fraud, but the burden of showing fraud is on the complainant. *Curry's Appeal*, 390 Pa. 105, 134 A.2d 497 (1957). An attempt was also made to apply a more generalized fraud doctrine to nullify inter vivos trusts. In *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914) and *Bierne v. Continental Equitable Title & Trust Co.*, 307 Pa. 570, 161 Atl. 721 (1932), it was claimed that such trusts were a fraud on the dower rights of settlors' wives. The contention was rejected, since Pennsylvania law specifically recognized the husband's right to make such transfers, despite the effect on dower rights. But see *Hill's Estate*, 15 Pa. D. & C. 699 (Orphans' Ct. Phila. 1931).

80. 51 Pa. 126 (1866).

settled that a trust cannot be terminated except with the consent of all persons with any interest in the trust.⁸¹ For a settlor to terminate a trust, he must either be the sole party in interest or have the consent of all such parties. His right to terminate thus often hinges on the nature of the remaindermen, even if he has a power to appoint. If the gift in default of appointment is to his estate (or heirs, prior to the abolition of the rule in Shelley's Case), then the settlor has been allowed to terminate.⁸² If the remainder gifts are to children, issue or other such named persons or classes, the settlor is not the sole party in interest.⁸³ Even where the settlor was sole beneficiary some cases, of which *Rehr v. Fidelity-Philadelphia Trust Co.*⁸⁴ is representative, have refused to permit termination or revocation when the trust had "spendthrift" provisions applicable to the settlor. Under these cases, the courts have construed the "spendthrift" provision as giving the trust a *raison d'être*, namely, keeping it out of the settlor's hands. The fatal flaw in this reasoning is that such "spendthrift" provisions had no effect on the settlor's creditors,⁸⁵ so he could deplete the trust corpus simply by incurring debts.

Although it has been suggested that these cases enunciate Pennsylvania's "peculiar rule of law" that an intemperate settlor cannot revoke or terminate a trust even if he is sole beneficiary,⁸⁶ the gravamen of almost all of these cases has been the presence of the "spendthrift" provision which gave the trust an unfulfilled purpose. This "peculiar rule" was wiped out by *Bowers' Trust Estate*,⁸⁷ where the settlor had a life estate and had acquired the vested remainder by assignment. The court held that the "spendthrift" provision was a nullity as to the settlor and allowed termination implicitly overruling the *Rehr* line of cases.⁸⁸ *Bowers* was followed and reinforced in *Schellentragher v. Tradesmen's National Bank & Trust Co.*,⁸⁹ in which the settlor had a life estate and the right to substitute and eliminate beneficiaries. He had eliminated all beneficiaries and named himself remainderman. The court held that

81. *McCreary's Trust*, 354 Pa. 347, 47 A.2d 235 (1946); *Potter v. Fidelity Ins. Trust & Safe-Deposit Co.* (No. 1), 199 Pa. 360, 49 Atl. 85 (1901); *Collins v. Provident Trust Co.*, 83 Pa. D. & C. 459 (C.P. Mtgy. 1952).

82. *Long v. Tradesmen's Nat'l Bank*, 108 Pa. Super. 363, 165 Atl. 56 (1933) (expressly irrevocable for ten years, held terminable); *Reiniger's Estate*, 36 Pa. D. & C. 163 (Orphans' Ct. Berks 1939); *Roberts' Estate*, 18 Pa. D. & C. 463 (Orphans' Ct. Phila. 1933); *Carson's Trust*, 31 Del. 311 (C.P. Pa. 1942).

83. See cases cited *supra* note 81.

84. 310 Pa. 301, 165 Atl. 380 (1933).

85. See cases cited *supra* notes 4-5.

86. *Trusts — Revocation and Termination of Pennsylvania Trusts*, 1 VILL. L. REV. 122, 123-24 (1956).

87. 346 Pa. 85, 29 A.2d 519 (1943).

88. *Id.* at 88-89, 29 A.2d at 520.

89. 370 Pa. 501, 88 A.2d 773 (1952).

he was now the sole beneficiary and could terminate despite "spendthrift" provisions. *Bowers* and *Schellentragher* are now law, and where the settlor has a life estate and the remainder is to his estate, or he has the power to name himself remainderman or to acquire the remainder interests, he should have no difficulty terminating the trust.⁹⁰

CONCLUSION

It has been suggested by one writer that a court's decision on whether an inter vivos trust is valid or not will vary with the claimants involved in the decision.⁹¹ This is no doubt true to some extent but it is of no help in drafting trusts or planning estates. No one can or should expect absolute predictability in the law, and especially in the field of estates and trusts which are concerned with interpreting and effectuating the intentions of settlors and testators. But courts must remember that they are not only rendering a decision on a particular fund but that they are also enunciating rules by which others will try to be guided. As matters now stand, a cautious draftsman would not dare give a settlor any powers beyond a life estate and power to revoke or appoint. And even those powers may go too far if *Frederick's Appeal* gets loose again.

It is submitted that courts can do a great deal in the area of inter vivos trusts to clarify the controlling principles in harmony with today's realities. The "personal convenience" test of *Frederick's Appeal*, which was declared dead in *Curry Appeal*, should be buried in silence, and it would be helpful if courts would stop citing it with seeming approval every time they quote from *Shapley Trust*. *Rick's Appeal* and its offspring should be restricted to their real rationale of fraud and mistake, and it should be recognized that there is no longer a presumption of fraud because a trust is irrevocable. The corpus of a settlor-life tenant's trust should be recognized as equally accessible to creditors, whether the settlor has retained a power to revoke or to appoint. But it should be remembered that creditors' rights transcend the rights of those who claim as beneficiaries, legatees or otherwise and that such trusts are valid despite the ability of creditors to reach the corpus.

90. See *e.g.*, *Chases' Trust*, 7 Pa. D.&C.2d 519 (Orphans' Ct. Phila. 1956); *Murdoch's Trust*, 5 Pa. D.&C.2d 287 (C.P. Phila. 1956); *Kelby's Estate*, 80 Pa. D. & C. 1 (Orphans' Ct. Phila. 1952). However, *Rehr v. Fidelity-Philadelphia Trust Co.*, 310 Pa. 301, 165 Atl. 380 (1933), was approvingly cited, in passing in *Morton v. Morton*, 394 Pa. 402, 406, 407 A.2d 150, 152 (1959).

91. *Trusts—Inter Vivos or Testamentary? For What Purposes?*, 99 U. PA. L. REV. 879 (1951). Compare, *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891) (trust not testamentary, widow cannot take against it) with *Lines Estate*, 155 Pa. 378, 26 Atl. 728 (1893) (same trust, inheritance tax payable).

Finally, and most important, the whole doctrine that a trust is "testamentary" because a settlor has retained power over the corpus should be discarded. If a settlor formally creates a trust, it should be held valid even if he can manage or administer the trust—as trustee, co-trustee or otherwise—and even if the trust terminates at his death. The "details of administration" rule is unrealistic in theory and unworkable in practice. It was probably originated to assist disinherited wives, but the Estates Act of 1947 affords them adequate protection, and its greatest use today is to afford a disgruntled legatee or beneficiary a colorable basis for a strike suit. In fact, recent thinking in the field has pointed toward a complete repudiation of this doctrine and two of the most respected extra-judicial authorities have recently come around to this viewpoint. The revised *Restatement of Trusts* has adopted a new Section 57 stating that a trust disposition is not testamentary even if the settlor retains a life estate, power of revocation "and a power to control the trustee as to the administration of the trust."⁹² Similarly, Austin W. Scott, in a recent article, states that:

"When the legal title to the trust property is vested in the trustee by a formal trust instrument, the trustee is not a mere agent of the settlor, even though the settlor reserves power to control the trustee as to the administration of the trust."⁹³

The adoption of this rule in Pennsylvania, accompanied by a clarification of the related but specialized principles discussed above, would go far toward strengthening the usefulness of the inter vivos trust and giving the estate planner peace.

92. RESTATEMENT (SECOND), TRUSTS, § 57 (1959).

93. Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 697 (1959).