Washington Law Review

Volume 32
Number 2 *Washington Case Law - 1956*

7-1-1957

Trusts

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Negligence: Signal-Controlled Intersections—Automobile Legally in Intersection Has Reasonable Time to Clear. In *Lanagan v. Crawford,* 149 Wash. Dec. 539, 304 P.2d 953 (1956), plaintiff sued for personal injures when his car was involved in a collision with defendant's car. The jury found that plaintiff had entered the intersection on a green light but had been held up while still in the intersection by traffic which was making a left hand turn. The jury further found that the defendant had entered the intersection when the light turned green in his favor and had struck the plaintiff's car while it was still there. Both cars were apparently legally in the intersection. A verdict was returned for the plaintiff which was vacated upon motion of the defendant and a judgment n.o.v. was granted in his favor. The judgment n.o.v. was granted on the basis of a holding in *Rockey v. Glacier Gravel Co.,* 34 Wn.2d 492, 209 P.2d 291 (1949), in which case a motorist, who made a left hand turn in front of the plaintiff who had entered with the green light in his favor, was found guilty of negligence. *Held,* reversed. The Court distinguished the *Glacier* case, *supra,* on its facts and, relying partially upon RCW 46.60.230, a "right of way" statute, held that vehicles legally in a light-controlled intersection have a reasonable opportunity to clear the intersection. Regardless of the fact that a motorist might enter the intersection under the protection of the green light, he is under a duty to observe traffic conditions and the failure to observe existing conditions and take necessary precautions is negligence. This case represents the first time this precise issue has been considered by the court. It curtails the concept that the motorist in whose favor the light is green has an absolute right to the intersection.

Negligence—Contributory Negligence—Presumption of Due Care. *Mills v. Pacific County,* 48 Wn.2d 211, 292 P.2d 362 (1956), was an action for the wrongful death of a motorist who was killed when his car went off a negligently maintained county bridge. There were no witnesses, but circumstantial evidence indicated contributory negligence upon the part of the decedent. The trial court gave judgment for the defendant. The appellant argued, *inter alia,* that circumstantial evidence may not be used to overcome the presumption that the decedent was exercising due care for his own safety; and that consequently the only reasonable conclusion to be drawn from the evidence was that the accident was caused by the defective condition of the bridge. *Held,* judgment affirmed. There is no presumption of due care on the part of the decedent, and circumstantial evidence adequately established his contributory negligence. The court relied upon the decision in *Hutton v. Martin,* 41 Wn.2d 780, 252 P.2d 581 (1953), which held that since the burden of proving contributory negligence is on the defendant, there is no need for a presumption of due care on the part of the decedent. That case expressly overruled the case of *Morris v. Chicago, M., St. P. & Pac. R. Co.,* 1 Wn.2d 587, 97 P.2d 119 (1939), insofar as it held that under certain circumstances, the presumption of due care should be submitted to the jury. See Comment, 29 WASH. L. REV. 79 (1954).

TRUSTS

Testamentary Trusts—Violation of the Rule Against Perpetuities —Effect of Saving Clause. The recent case of *In re Lee's Estate*[1] involved a testamentary trust which the Washington Court upheld solely by reason of a saving clause in the will creating the trust, when otherwise the trust would have failed since the limitations disposing

[1] 149 Wash. Dec. 247, 299 P.2d 1066 (1956).

of the corpus violated the rule against remoteness of vesting.

The plaintiff (*P*) was the son and the only heir at law of the testatrix (*T*). At *T*'s death *P* was fifty-four years old, and had two living children ages twenty-two and twenty-four years. When *T*'s will was probated, *P* objected that the trust created by the will should fail and result to him as *T*'s sole heir since the interests in the corpus created by the will could not be said to vest necessarily within the period allowed by the Rule Against Perpetuities.

The dispositive scheme of *T* was as follows: *T* devised her estate to the defendant in trust to pay twenty-five dollars per month to *P* for life; upon *P*'s death to pay to each of *P*'s children such sums from the income and/or principal as the defendant might deem necessary for the purpose of educating such child, until the child attained age twenty-five; then to pay to each such child twenty-five dollars per month until the youngest child of *P* attained the age of forty, at which time the corpus was to be distributed to *P*'s children then living. If no child of *P* reached age forty, then on the death of the survivor of *P*'s children prior to attaining age forty, the corpus was to be distributed to the grandchildren of *P*. But if all *P*'s children died prior to age forty without issue surviving, then the corpus was to be distributed to a named hospital. In a subsequent paragraph in the will there appeared a saving clause which provided that if any of the previous dispositions were void under the Rule Against Perpetuities or any other rule pertaining to trusts then the trust was to terminate one day prior to the end of the period allowable, and the corpus was to be distributed in such case to the persons "... herein named who would be entitled to take distribution ... upon termination of the trust."

The lower court conceded that the limitations disposing of the corpus violated the Rule Against Perpetuities and were void, but it sustained the trust by reason of the saving clause. The decree stated that the trust would terminate one day prior to the twenty-first anniversary of *P*'s death, or when the youngest of *P*'s children reached age forty, or upon the death of the survivor of *P*'s children prior to age forty, whichever event occurred first. From this decree *P* appealed contending that since the dispositions of the corpus were void, this caused the whole dispositive scheme to be frustrated; therefore, the trust should fail and result to him as *T*'s only heir. He maintained that the saving clause could not preserve the trust since it designated, as takers of the corpus, persons whose identities could be

ascertained only upon the occurrence of the same events designated in the void provision, which events need not occur within the allowable period.

The supreme court rejected these contentions and upheld the trust by reason of the saving clause which the court construed as an alternative disposition of the corpus to the general classes of persons indicated in the void provisions. The court stated that *T* was presumed to have intended a valid disposition by the saving clause and not a disposition to persons whose ability to take depended upon the same events which caused the prior disposition to fail. In clear language the court indicated that it was disposed to give effect to the testator's intentions if the language permitted a construction of the will whereby the trust could be upheld. The court concluded its opinion by modifying the decree of the lower court so that it provided that the trust would terminate only on the day prior to the twenty-first anniversary of *P*'s death, and that the corpus was to be distributed at that time to the then living children and grandchildren of *P*, and to the hospital if none of the persons in either group survived to that day. It remarked that the lower court had gone beyond the provisions of the saving clause by providing for an earlier termination.

The reason for the conclusion that the gifts of the corpus violated the Rule Against Perpetuities[2] is to be found in the holding of the English court in *Leake* v. *Robinson*[3] which has been followed by the Washington court.[4] According to the *Leake* case, a gift to a class is void under the Rule Against Perpetuities if the maximum and minimum membership in the class might not be ascertained within the period of the rule.[5] In the *Lee* case the maximum membership in the one class of *P*'s children would be fixed at *P*'s death. But the phrase "then living" was regarded as a condition precedent to the identification of the takers[6] (and necessarily in that case to the vesting of the interest) and, therefore, the minimum membership could be determined only at the time when *P*'s youngest child reached age forty. "Youngest child" was assumed to mean the youngest of the children which *P* could possibly have.[7] This assumption coupled with the conclusive

[2] A future interest is void unless it must vest, if at all, within lives in being at the creation of the interest, and twenty-one years thereafter. GRAY, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[3] 2 Mer. 363, 35 Eng. Rep. 979 (1817).

[4] Denny v. Hyland, 162 Wash. 68, 297 Pac. 1083 (1931); Betchard v. Iverson, 35 Wn.2d 344, 212 P.2d 783 (1949).

[5] SIMES AND SMITH, LAW OF FUTURE INTERESTS § 1265 (2d ed. 1956).

[6] *Ibid.* § 575-589, 649-654, 1269.

[7] If "youngest child" had meant the youngest of *P*'s children living at the death of

presumption of possibility of issue until *P*'s death[8], resulted in the conclusion that the youngest of *P*'s possible children might reach the age of forty at a time later than twenty-one years after *P*'s death. For this reason the gift to *P*'s children "then living" was void. Upon similar reasoning the alternative gifts over to *P*'s grandchildren or the hospital which were to take effect, if at all, upon the death of the survivor of *P*'s children (who could be an afterborn child) were also struck down.

The point of primary significance in the *Lee* case is that the trust was sustained solely on the basis of the saving clause. There is a paucity of authority with respect to the effect to be given to such clauses.[9] However, the Washington Court has indicated by the *Lee* case its willingness to give effect to such clauses at least in the case of testimentary trusts.

It should be noted that the clause in the *Lee* case was drawn to minimize the effect of a violation of both the rule against remoteness of vesting and the supposed rule against undue postponement of enjoyment (which some writers maintain limits the duration of trusts to the same period allowed by the rule against remoteness).[10] Such a saving clause directing that a trust *terminate* within the period allowed by the rule against remoteness of vesting, of necessity, would require all interests under the trust to vest, if at all, within that period. However, a saving clause could be drafted which would cause all interests to *vest* within the allowable period without limiting the duration of the trust to that period, or fixing immutably a day certain for termination.[11] Since the rule against remoteness of vesting is not directed at the duration of trusts,[12] it might be desirable to direct a saving clause primarily to the vesting of the interests under the trust,

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T, then the gift to *P*'s children would have been valid. For such an interpretation see Seitz v. Faversham, 205 N.Y. 197, 98 N.E. 385 (1912). See also SIMES AND SMITH, LAW OF FUTURE INTERESTS § 646 (2d ed. 1956); RESTATEMENT, PROPERTY § 295 comment *k* (1940).

[8] For the purpose of computing the period of the Rule Against Perpetuities, a person is presumed to be capable of issue until death. SIMES AND SMITH, LAW OF FUTURE INTERESTS § 1229 (2d ed. 1956).

[9] Only two cases seem to be somewhat in point, *In re* Friday's Estate, 313 Pa. 328, 170 Atl. 123 (1933); Tolman v. Reeve, 393 Ill. 272, 65 N.E.2d 815 (1946); Note, 42 ILL. L. REV. 125 (1947).

[10] BOGERT, TRUSTS AND TRUSTEES § 218 (1951); SIMES AND SMITH, LAW OF FUTURE INTERESTS § 1391 (2d ed. 1956).

[11] See SIMES AND SMITH, LAW OF FUTURE INTERESTS § 1295 (2d ed. 1956). For drafting suggestions see 6 AMERICAN LAW OF PROPERTY §§ 24.3-.8 (Casner ed. 1952); SHATTUCK AND FARR, ESTATE PLANNER'S HANDBOOK 289-92, 394 (2d ed. 1953).

[12] SCOTT, TRUSTS § 62.10 (2d ed. 1956); GRAY, RULE AGAINST PERPETUITIES § 412 (4th ed. 1942). *But see*, 4 RESTATEMENT, PROPERTY c. 261 topic 2 (1944); *cf.* SIMES AND SMITH, *op. cit. supra* § 1391.

which vesting will occur, in the case of class gifts, at the time the class closes (in the absence of additional conditions precedent to vesting). However, a draftsman should not fail to consider the possibility that his jurisdiction might thereafter recognize the rule against undue postponement of enjoyment, in which case the trust could not be made to last longer than the period allowed by the rule against remoteness.[13]

The *Lee* case also indicates the possible danger of defeating, to a certain extent, the real desires of a testator by using a saving clause which terminates the trust only at a fixed day. The saving clause in the *Lee* case terminated the trust one day prior to the expiration of the allowable period and thereby saved the trust; but by so fixing the time for termination, it precluded an earlier distribution of the corpus which might have occurred under the original dispositive scheme. As a result of the decree as modified by the court, *P*'s children, who were probably immediate objects of *T*'s beneficence, could in fact be excluded from participation in the corpus if they died prior to the day of termination which was twenty-one years after *P*'s death.[14] The decree of the lower court seemed to have been moulded with this possibility in mind. However, as the supreme court noted, the decree of the lower court went beyond the terms of the saving clause by incorporating the terms of those provisions which had been rendered void by violation of the rule against remoteness in vesting.

In summary, the *Lee* case indicates that the Washington Court will give effect to a saving clause, but only in accordance with its particular provisions. If the provisions of a given saving clause do not permit the termination of a trust prior to a fixed time, then the intended beneficiaries could be "skipped over," so to speak.

The practical impact of the decision in the *Lee* case could be severe since the saving clause there involved is of a type currently receiving extensive use in this jurisdiction. The possibility that such clauses may not procure the desired results seems apparent; consequently, a careful reexamination of previously drafted instruments in which such a clause has been used would be prudent counseling procedure.

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[13] It seems that at the present time Washington does not recognize the rule against undue postponement of enjoyment. See *In re* Lemon's Estate, 47 Wn.2d 23, 286 P.2d 691 (1955); Note, 31 WASH. L. REV. 162 (1956).

[14] The youngest child of *P* who was living at *T*'s death was twenty-two years old. If it is supposed that he would have reached age forty in eighteen years, then *P* at that time, if alive, would be seventy-two. If *P* then died, his children would have to live an additional twenty-two years if they were to share in the corpus according to the terms of the saving clause which permitted no earlier vesting or termination of the trust. Under the lower court's decree, *P*'s children, in the situation here supposed, could take distribution upon *P*'s death at age seventy-two.

Moreover, as an initial step, a draftsman should refer to the instant case and consider carefully the possible effect of any saving clause before inserting it in an instrument, lest it cause distribution to be made in a manner unexpected, and perhaps undesired by his client.

JOHN A. HAMILL

Bank Deposits as Tentative or "Totten" Trusts. In *In re Madsen's Estate*,[1] Washington recognized for the first time the tentative, or "Totten," trust.

In 1953, the decedent opened a savings account designated as "Madsen, Morris TR for Mamie" with a deposit of one thousand dollars. The signature card declared that the fund was a voluntary trust revocable in whole or in part by withdrawal, and that upon the signer's death any funds remaining were to become the property of his wife absolutely. The decedent subsequently made one withdrawal of fifty dollars. The passbook remained in his possession at all times. His will provided that all cash items includable in his estate were to go to his daughter. The probate court ordered his wife, as executrix, to inventory the balance in the account as part of his estate; and she appealed, claiming the funds as beneficiary under the trust.

The issue thus presented, one of first impression in this jurisdiction, was whether a valid trust was created by the deposit of funds in a savings account in the name of the depositor in trust for a designated beneficiary, the depositor reserving the right to revoke the trust or to withdraw all or any part of the deposit during his lifetime.

The court pointed out that a person making a deposit "A in trust for B" may have one of three intentions; (1) to create a revocable trust, (2) to create an irrevocable trust, and (3) to create no trust at all. The existence of a trust and its nature depend upon the intent of the depositor, limited only by policy considerations and presumptions raised by the law in the absence of evidence of the settlor's intent. Because of the clear statement signed by the decedent on the signature card, his intent was clear and unambiguous. Unless contrary to a principle of law based upon sound policy, that intent should be given effect.[2]

Concluding that no policy argument was sufficient to overcome this presumption of validity, the court upheld the trust. Citing the Restatement of Trusts[3] for the rule of decision, the court held the

[1] 48 Wn.2d 675, 296 P.2d 518 (1956).
[2] Millholland v. Whalen, 89 Md. 212, 43 Atl. 43 (1899).
[3] 1 RESTATEMENT, TRUSTS § 58 (1935).

trust enforceable by the beneficiary upon the death of the depositor as to any balance remaining provided he had not revoked the trust during his lifetime. This represents the majority view in the United States following the leading case of *In re Totten*,[4] although there is authority to the contrary.[5]

The major hurdle to recognition of the tentative trust is posed by the statute of wills. Where the trust property of the beneficiary cannot be ascertained prior to the depositor's death or where the settlor does not intend that a trust shall arise until his death, the trust is invalid as an attempted testamentary disposition violating the statue of wills. There is no difficulty in ascertaining the property or beneficiary of the trust in the instant case, but the problem of when the trust arises is not so easily solved. Where a settlor attempts to create a trust for a designated person and retains control of the administration of the trust, reserving a right to revoke and a life estate in the beneficial interest of the trust, the cases are conflicting. A court may well hold that no trust was ever created during the lifetime of the settlor.[6] It is hard to find any real distinction between these cases and the "Totten" trust in fact or effect.

Perhaps no logical distinction can be made. It nevertheless remains that the tentative trust of savings deposits is recognized where the *inter vivos* trust involving other types of property may not be. This result gives the practising lawyer a handy tool to use in the disposition of small amounts of cash without probate. The funds are available immediately to help the beneficiary through the trying period immediately following the death. The danger of fraud is minimized in the normal case if existent at all. The tentative trust is a practical and convenient means of disposing of small sums without the formality of a will and allows the depositor a maximum of control over the fund and its use in an emergency.

Washington has previously recognized some other means of disposing of small cash items. One is the third party beneficiary contract recognized in *Toulouse v. New York Life Ins. Co.*[7] The pattern there is limited to certain peculiar factual situations and is not convenient for general use. More widely applicable is joint tenancy in savings

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[4] 179 N.Y. 112, 71 N.E. 748, 70 L.R.A. 711 (1904).
[5] Nicklas v. Parker, 69 N.J. Eq. 743, 61 Atl. 267 (1905); Fleck v. Baldwin, 141 Tex.2d 340, 172 S.W.2d 975 (1943).
[6] 1 SCOTT, TRUSTS § 57 (1956) and cases cited.
[7] 40 Wn.2d 538, 245 P.2d 205 (1952).

bank deposits, recognized in Washington by statute.[8] This tenancy has been extended broadly by the court to the end that the survivor is not required to have knowledge of the tenancy prior to the depositor's death.[9] The tentative trust differs in effect in that the beneficiary cannot withdraw funds until the depositor's death.

Implied in the *Madsen* decision are several correlative results. The majority rule is that a deposit of funds in a savings account labeled a trust for a designated person creates only a revocable trust in the absence of further evidence.[10] The language used by the court implied that they regarded the deposit as a trust as of the time of deposit subject to a right of revocation rather than as an exception to the statute of wills. Where the beneficiary predeceases the depositor the trust is usually held to be automatically revoked and the successors to the beneficiary take nothing upon the depositor's death.[11]

The tentative trust is simple and reliable to use. The depositor's intent is a controlling factor, and the Washington lawyer making use of this tool would be well advised to follow the pattern of the instant case and have the settlor make a clear statement of intent upon the signature card, though that procedure is not necessary under the Totten doctrine. No better evidence of his intent could be secured. For clients with a small amount of cash to dispose of upon death who wish to retain it for security purposes and to avoid probate of the estate, no means seems more ideally suited than the revocable trust savings bank deposit.

WILLIAM FRASER

WORKMAN'S COMPENSATION

Substitution of a Personal Representative of Deceased Claimant. In *Curry v. Department of Labor and Industries*[1] the Washington Court refused to permit a deceased claimant's widow to be substituted in her own right, and as administratrix, in an action in which neither a verdict nor a judgment was returned in favor of the claimant prior to his death. It is questionable whether the entering of a verdict or a judgment should determine the survivorship of an action under the Workman's Compensation Act.

[8] RCW 33.20.030.
[9] *In re* Green's Estate, 46 Wn.2d 637, 283 P.2d 989 (1955).
[10] *In re* Totten, note 4, supra; 1 RESTATEMENT, TRUSTS § 58 (1935).
[11] Matter of United States Trust Co., 117 App. Div. 178, 102 N.Y. Supp. 271 (1907), *aff'd* 189 N.Y. 500, 81 N.E. 1177 (1907); Collopy's Estate, 33 D. & C. 169 (Pa. 1938).

[1] 149 Wash. Dec. 95, 198 P.2d 485 (1956).